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CURRENT LEGAL ISSUES IN PENSIONS: "TOP 10" LEGAL HOT TOPICS

1 DB TRANSFERS POST FREEDOM & CHOICE

The primary focus of the Budget reforms for many trustees of DB schemes has been whether they will see an increase in the number of members wishing to transfer-out to a DC arrangement from which they can access their benefits flexibly. Such transfers will continue to be permitted but, for transfers with a value above £30,000, members will need to demonstrate they have taken appropriate independent advice. There is a risk of selection against the scheme by members who, for example, are single or in poor health and some trustees may consider reviewing their transfer value basis. Trustees may take known facts about the member into account in calculating a transfer value and, where there is a statistical basis, to make appropriate assumptions as part of the actuarial calculation. TPR is revisiting its guidance on DB transfers and trustees should bear in mind that the industry code of practice on incentive exercises could also be applicable.

2 PENSIONS SCAMS

Estimates of the amount of pension savings that has been "liberated" in recent years run into hundreds of millions of pounds and there are fears that the incidence will increase dramatically after April 2015. Trustees need to balance their fiduciary duties to act in the member's best interest with their obligation to pay a transfer value. TPR has recently refreshed and re-issued its literature for trustees to send to members they consider at risk and a new industry code of practice on dealing with transfer requests is expected imminently. In the meantime, the Pensions Ombudsman has been dealing with several hundred complaints in respect of transfers that have proceeded and transfers that were blocked. The first judgement concerned a failure by a suspected scam arrangement to respond to the member's request to transfer his savings on elsewhere. The Ombudsman focused on whether the member had a statutory transfer right and concluded that was not the case – but there is a sense from the decision that if the member had a statutory transfer right, the trustees would have had to honour it. The Ombudsman has indicated a judgement concerning a transfer that went ahead will be published in the first half of 2015.

3 PPF CONTINGENT ASSETS

There are a number of changes to the contingent assets that the PPF will take into account for the 2015/16 levy, in particular to the certification needed by the trustees for a parent company guarantee. Asset backed contributions will also be considered, provided the PPF's detailed requirements are met. Trustees of "last man standing" schemes will need to take legal advice confirming that position by 29 May 2015.

4 NEW MONEY PURCHASE BENEFITS DEFINITION

In 2014 we finally got a new definition of money purchase benefits from the DWP (in response to the 2011 decision in the *Imperial Home Decor* case). The definition confirms the essential requirement that there cannot be a funding deficit with money purchase benefits, which is hard to argue with. Helpfully, the final version of the associated regulations contain extensive transitional protection which, broadly, mean that trustees need not revisit past administration unless the scheme is winding-up. They will, however, need to confirm that all benefits previously considered to be money purchase meet the new definition and make any necessary changes to future administration if they do not.

5 RECOVERING OVERPAYMENTS

Trustees have a primary obligation to pay the right benefits so, if they discover benefits have been overpaid, they have a duty to recover the overpaid sum. That's easy to say but can be difficult in practice. Trustees will need to consider their scheme rules and any tax consequences. There have been some interesting recent decisions from the Pensions Ombudsman and the High Court concerning when members can justifiably resist a request to repay sums paid to them in error.

6 MANAGING BENEFIT CHANGES

The decision in the *IBM* case in 2014 alarmed many employers looking to reduce future service benefits. Care is indeed needed, but changes are usually possible if the correct process is followed. Trustees will be familiar with exercising their scheme amendment power, but from April 2015 they will have a unilateral statutory power to amend their scheme to permit members to take their benefits flexibly. Care will be needed in practice when exercising that power.

7 END OF CONTRACTING-OUT

The prospect of increased National Insurance contributions from April 2016 is likely to be a driver of further benefit change (other than in the public sector and where statutory protection applies). Regulations are expected this side of the general election that will give employers a unilateral amendment power, provided they obtain actuarial certification that the benefit changes simply offset the additional NI costs.

8 DC GOVERNANCE

Trustees of schemes providing DC benefits (including DB schemes with legacy DC AVCs) have many more formal governance obligations to comply with from April 2015. Trustees will need to ascertain which requirements apply to their scheme and apply them in a proportionate manner.

9 SMALL POTS

The Budget changes included an increase in trivial commutation thresholds and, from April 2015, qualifying requirements, which could reduce the number of small pots requiring administration. The anticipated abolition of short service refunds from October 2015 and introduction of "pot follows member" (possibly from October 2016) will present trustees with new administration challenges and processes.

10 IORP UPDATE

The wheels of Brussels move slowly but will potentially have profound implications for UK DB schemes. Whilst the "fit and proper" person requirements in the latest draft Directive more closely match current TKU requirements, some of the administration requirements could be onerous. Of primary concern, however, is the seeming resurrection of the holistic balance sheet and need for "full" funding. In terms of timing, the December 2016 implementation deadline has certainly slipped. It is very much a question of "watch this space".

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