Trustee Knowledge Update

Welcome to the May 2015 edition of our Trustee Knowledge Update which summarises recent changes in the law. It is aimed at helping trustees (including trustee directors) comply with the legal requirement to have knowledge and understanding of the law relating to pensions and trusts. This edition focuses on the key legal developments over the last three months.

Legislation (http://www.legislation.gov.uk)

Pension Schemes Act 2015
In the last edition we summarised the content of this legislation as it neared the end of its passage through Parliament. The Bill has now received Royal Asset and many of its provisions came into force on 6 April.

Of most immediate relevance to trustees are the changes to the transfer regime. The main changes are:

- Members with defined contribution (DC) benefits will be allowed to transfer their DC benefits right up to the point when they come into payment (even if that is after the scheme's normal retirement age);
- All members have the right to transfer the whole of one particular type of benefit only (ie DB or DC); and
- Certain DB members are required to confirm they have received independent advice before a transfer is made to a DC arrangement.

Independent Advice Regulations 2015
These Regulations provide more detail on when DB members will need to demonstrate that they have received independent advice prior to making a transfer. The default is for trustees to assume that members are transferring to a DC arrangement unless the member confirms otherwise.

Trustees will need to notify members that they will need to provide independent advice confirmation and members will need to provide a statement from an adviser confirming that advice has been given within 3 months of a statement of entitlement. Generally, advice will need to be paid for by the member but there are circumstances in which the employer will need to meet the cost. The requirements will not apply where a member's transfer value (before any reduction for underfunding) is less than £30,000.

Members who do not comply with these requirements do not have a statutory right to a transfer.

Finance Act 2015
This Act contains provisions which allow annuity payments to be made on the death of a member to individuals nominated by the member or the trustees (not only dependants as previously) and to survivors of any dependant or nominee. These provisions will not apply to existing annuities.

Disclosure Regulations
New Disclosure Regulations have been issued. They replace the existing regime. Much is broadly similar but there are significant changes to the information that members with DC benefits need to be given as they approach retirement. This is to ensure that they have sufficient information to understand the new DC flexibility regime. Trustees need to ensure that they review the timing and content of member communications to ensure that they comply with the new requirements.

Miscellaneous Amendment Regulations
Among other things, these Regulations will allow trustees to amend their scheme by resolution (with the consent of the employers) to allow DC benefits to be taken under the new DC flexibility regime. This will be helpful where there are delays putting any deed of amendment in place or possibly restrictions on the scheme amendment power. However, in general, trustees wishing to offer any of the new flexible benefits should consider putting a deed of amendment in place.

Government (http://www.gov.uk)

Guidance on the charge cap
The Government has issued guidance on how to determine what a default fund is for the purposes of working out whether or not the new charge cap will apply from 6 April 2015. Some of the points to note are:

- Schemes where the only DC benefits are AVCs will not be caught by the charge cap provisions;
- Once a member is in a default fund, the charge cap will continue to apply to them even if they become a deferred member;
- The charge cap applies to all member funds in a default arrangement including those accumulated before the cap applied;
- The charge cap applies at a member level, not at the fund level;
- Schemes used by more than one employer will need to check the default funds for each employer. A default fund used by one employer will not necessarily be a default fund for another employer.

These provisions will apply to default funds in schemes used for auto-enrolment. Trustees with funds that might be affected should consider the position as soon as possible.

Tax (www.hmrc.gov.uk/pensionschemes/index.htm)

Brief on VAT on pension fund management costs
HMRC has issued a Brief on employers' ability to recover VAT in relation to fund management services provided to DB schemes. It had previously indicated that an employer may be able to recover VAT if it was a party to the contract with the trustees and the service provider. This Brief sets out the minimum terms required in such a tripartite contract for the employer to be able to recover VAT on fund management services. These include the following:

- the service provider must make its supplies to the employer (although the contract may recognise, to comply with legislation, that the provider is appointed by the trustees);
- the employer must pay directly for the services that are supplied and be issued with a valid VAT invoice;

- the service provider must pursue the employer for payment and only where the employer is unlikely to pay can it recover its fees from the scheme;
- the employer and trustees must both be entitled to bring legal action against the provider for breach of contract, although the provider's liability need not be greater than if the contract were only with the trustees; and
- the employer must be entitled to terminate the contract, although that can be subject to trustee consent.

If the employer tries to recharge the scheme for the fund management fees, that will be treated as a supply by the employer and so VAT would have to be added. However, HMRC accept that trustees can amend schedules of contributions to give credit to the employer for the fees which it pays direct to the fund manager.

The new approach is not yet compulsory: HMRC say that until 31 December 2015, employers may continue to use the VAT treatment outlined in the existing VAT Notice, so long as the trustees agree.

HMRC has promised to issue further guidance later in the year on how tripartite contracts might work in relation to other services provided to pension schemes.

RPSM replaced with Pensions Tax Manual
For the future, HMRC guidance on pensions will be provided in the "Pensions Tax Manual". This is currently in draft form only "*but does reflect HMRC's current view*" and therefore schemes should be able to rely on it. It incorporates guidance on all of the new pension flexibility and replaces the multiple levels of guidance incorporated in the previous Registered Pension Schemes Manuals.

Provision of Information (Amendment) Regulations
If funds that can be paid tax free are transferred from one scheme to another, the receiving trustees need to know what the tax treatment of such funds should be. These Regulations contain requirements for transferring trustees to provide information to a receiving scheme so they can ensure the correct tax treatment is applied.

There are also changes to the information that must be provided to HMRC when a scheme changes its structure or range of number of members, to help HMRC combat pension liberation.

Trustees should check with their administrator that their processes comply with these new requirements.

Guidance on information to be given to members
When a member takes benefits under the new flexible DC provisions, the trustees must give them a flexible access statement (unless the member has already received such a statement from the scheme or told the scheme they have previously accessed their benefits flexibly). The statement must say:

- the member has flexibly accessed their pension savings and when;
- if in any tax year the member's total pension inputs into money purchase arrangements is more than £10,000: they will be liable to an annual allowance charge on the excess; their annual allowance for pension inputs under other types of arrangements will be reduced by £10,000 (to £30,000 currently); and
- the member has a duty to pass on information to other pension schemes together with what information they must provide and when.

The guidance also gives details of when trustees must provide a pension savings statement and a lifetime allowance statement and what they should contain.

Money Purchase annual allowance: split input periods
When the DC annual allowance is triggered, it applies for the tax year in which the flexible payment is made but not to DC savings made before it was triggered.

This guidance explains what needs to happen where the DC annual allowance is triggered part way through a pension input period. The pension input period will need to be split and amounts apportioned. Trustees will need to calculate the input amount up to and including the date of the trigger event, and the amount after the trigger event. Only the input amount after the trigger date is tested against the £10,000 money purchase annual allowance.

Transfer of Sums and Assets Amendment Regulations
The DC flexibilities included the removal of a number of restrictions for annuities issued on or after 6 April 2015 (eg. allowing payments under a lifetime annuity to be reduced).

These Regulations ensure that individuals with annuities issued before 6 April 2015 cannot take advantage of the new flexibilities by transferring their old annuity to a new one.

Regulator (www.pensionsregulator.gov.uk)

Guidance on communicating flexible benefits
The guidance is aimed at trustees and administrators and is intended to provide information on key changes to the disclosure regulations and good practice suggestions for communicating with members about retirement choices. In particular, the guidance:

- summarises the requirements to tell members about Pension Wise (the Government's new free and impartial advice site) at least 4 months prior to retirement. Trustees can use a standard "signpost" letter or provide the information in their own format;
- summarises the other information that members will need to be given, including the options available, the right to transfer and their estimated transfer value, together with a copy of guidance approved by the Regulator;
- encourages schemes to use a number of "generic risk warnings" at the point where members are required to make a decision about their benefits. The generic risk warnings set out issues and risks in relation to different kinds of benefit; and
- suggests asking members to sign a statement to confirm whether they have received the Pension Wise guidance or regulated advice, and that they have read the generic risk warnings.

Note: The Regulator has also finalised its guidance on DB to DC transfers (summarised in the last edition).

Scam-proof savings campaign
The Regulator has refreshed its pension scams campaign to deal with the introduction of DC flexibility.

The substance of the campaign remains much the same but the scorpion leaflets (both a basic leaflet and more detailed booklet) to members have been updated to refer to the new DC options.

The action pack for trustees has also been updated to reflect DC flexibility and the requirement for DB members to take independent financial advice on some transfers. It also refers to the code of practice on scams (although contains no detail about it – see last edition of TKU).

The Regulator says trustees should include the new scorpion leaflet in their member communications and members should receive regular information on how to spot pension scams (for instance provided with their annual pension statement). If trustees "*currently issue annual statements and transfer packs via third parties, [they] should consider if they should now be sent direct to members*". Finally it is suggested that trustees should "*encourage… members to understand their options by visiting Pension Wise*".

PPF (www.ppf.gov.uk)

Last Man Standing Schemes
The PPF has summarised the requirements for schemes wishing to claim a last man standing discount. Schemes will only be a last man standing scheme if their rules do not contain a requirement or discretion (at either the option of the trustees or another party) to segregate the scheme if a participating employer leaves. Trustees need to obtain legal advice that the scheme rules do not contain such a provision. Schemes can rely on legal advice previously obtained, provided the scheme structure has not changed and the advice is "clear and unambiguous". The legal advice does not need to be sent to the PPF, although the PPF may require the trustees to provide it in the future.

If trustees are claiming a last man standing discount, they must submit an online form to the PPF by 29 May 2015.

Auto-enrolment

Response to consultation on auto-enrolment exemptions
There will be no exceptions from the auto-enrolment duty for members who flexibly access benefits under the new DC regime. However, the four originally proposed exceptions have been taken forward. These are:

- Employees in a notice period, or where notice of termination is given at any time up to 6 weeks after the duty has arisen (the Government will not extend the exemption to any other "end of employment" situations).
- An extended exception covering anyone who cancels membership of a qualifying scheme within 12 months of the automatic enrolment date, whether a worker, non-eligible jobholder or eligible jobholder at the time of cancellation. The provisions now provide that where a worker or jobholder cancels membership of a qualifying scheme within this exemption, the employer has a discretion to enrol or re-enrol the worker in the next 12 months after which the duty to enrol is lifted until the next automatic re-enrolment date.
- Where an employer has reasonable grounds to believe the individual has tax protected status, such as enhanced protection. The onus remains on the worker to notify the employer of their tax protected status.
- Members who receive a Winding-up Lump Sum but are re-employed within 12 months: HMRC and Regulator guidance will be updated.

The relevant Regulations implementing these changes came into force on 1 April.

Cases

Merchant Navy Ratings Pension Fund Trustees v Stena Line (High Court)
The scheme is an industry wide scheme for non-associated employers. The case concerned trustee proposals to introduce a contribution structure which would require historic employers to contribute in order to repair the scheme deficit. However, it also considered issues of general relevance about when section 75 debts are triggered.

By way of background, in 2001, the scheme closed to future accrual. Under the rules, members still in employment were defined as "active members" and had "enhanced revaluation" rights so that their benefits were revalued in line with national average earnings or the lesser of 7% or RPI (depending on which they had chosen). The "active member" category could include members who had left employment altogether for a period.

In a multi-employer scheme, broadly speaking, a section 75 debt will arise where an employer ceases to employ active members (or, as the legislation used to say, anyone in a category of employment to which the scheme relates) at a time when at least one other employer continues to do so. In this case, the judge considered that the enhanced revaluation did not satisfy the test and members entitled to enhanced revaluation were no longer active members (or in employment to which the scheme relates).

The consequence of this was that the scheme had been a "frozen scheme" for section 75 purposes since accrual ceased in 2001. This meant that when, in 2003, an employer ceased to employ any members entitled to the enhanced revaluation, no section 75 debt had been triggered. That employer therefore remained a statutory employer for section 75 purposes and was still liable to contribute to the scheme. This may have implications for other schemes that have closed to future accrual but still provide a salary link.

The judgment also contains useful clarification about trustees' duties, in particular the extent to which they may take into account employer interests when exercising their powers. When putting the new contribution structure in place the judge said "*as long as the primary purpose of securing the benefits due under the Rules is furthered and the employer covenant is sufficiently strong to fulfil that purpose, it is reasonable and proper should the Trustee consider it appropriate to do so, to take into account the Employers' interests*".

The decision is not being appealed.

Ombudsman (www.pensions-ombudsman.org.uk)

More pension liberation determinations
The Ombudsman has issued another two determinations illustrating its approach to pension liberation.

Harrison involved a complaint by a member who had not been allowed to transfer out of his personal pension scheme due to concerns about the proposed receiving scheme being a liberation scheme. The Ombudsman held that a member could not be deprived of a right to a transfer merely by regulatory or other guidance.

In this case, the Ombudsman held that although there was no statutory right to transfer, there was a contractual right, because the rules provided that a member could direct a transfer to another registered pension scheme. The receiving arrangement was a registered scheme. As such, the member had a right to transfer, and the Ombudsman ordered the provider to make the transfer out.

However, the Ombudsman said there will not have been maladministration by a body that makes a reasonable decision in an honest belief that it is acting correctly.

Winning involved a member complaint that a transfer to an alleged liberation arrangement should not have been made. The member had transferred over £50,000 from two personal pension plans to the "Capita Oak" pension scheme. However, he had since been unable to contact his new scheme. He complained to the Ombudsman, saying that the providers should not have allowed him to transfer in the first place.

The Ombudsman rejected the complaint. The transfer application had appeared to comply with all statutory requirements. A member could not be deprived of a statutory right to transfer and to the extent that each provider had a duty of care to the member, it was overridden by their legal obligation to make the transfer.

In considering whether there had been maladministration, the Ombudsman looked at whether the providers had acted consistently with good industry practice. The transfers took place in late 2012, before the Pensions Regulator had issued its detailed guidance about pension liberation which "*could be regarded as a point of change in what might be regarded as good industry practice*". Present standards of good practice could not be applied to past actions.

Transfers to Capita Oak: The Ombudsman has also issued an update aimed at members considering complaining either about the Capita Oak trustee not allowing them to transfer out of the new scheme, or about their previous pension scheme having made a transfer to Capita Oak.

In the latter case, the Ombudsman says that if a member's case is similar to the facts of Winning, the complaint is unlikely to be upheld. Potential complainants will need to explain why their case is significantly different. Before any complaint is brought, members should go through the transferring scheme's complaints procedures.

Bashford - *two-year time limit for death benefits*
The member had a retirement annuity contract that provided on his death, the proceeds would be payable on notification of death, together with such proof as the provider required. The member died in April 2005 and his widow informed the provider of the death. The provider asked for further documentation including the grant of probate, which she did not provide until January 2009.

The provider paid out the proceeds to the widow, informing her that the amount was an unauthorised payment under the Finance Act as more than two years had passed since it became aware of the member's death. She complained, saying that she had never been told about the two-year time limit: the provider acknowledged this and accepted that in principle it should pay compensation when the tax position was confirmed. Further delays by the window's accountant meant that she paid the unauthorised payment charges of 55% late and as a result, HMRC also levied late payment surcharges and interest totalling £5,900.

The widow complained to the Ombudsman, who partially upheld the complaint. The provider should have made the widow aware of the two-year time limit. Moreover, on the balance of probabilities, if the provider had advised her of the significant financial consequences of failing to provide information within the time limit, she would have ensured that it was provided. Therefore, the 55% unauthorised payments charges were directly attributable to the provider's failure to signpost the two-year limit. The provider should repay the amount of the unauthorised payments charges to the widow, together with simple interest at bank base rate from January 2012 (when HMRC received the tax) to the date of payment. However, the Ombudsman made no award in relation to the HMRC late payment surcharges, which were outside the provider's control.

Dates for diaries: Trustee training remains one of the most important ways of ensuring that trustees have the knowledge and understanding required to perform their duties. Our remaining 2015 trustee training courses are taking place on **9th June 2015** and **13th October 2015**. If you have any enquiries about any of these courses or would like to reserve a place, please contact **Karen Mumgaard – E:** karen.mumgaard@cms-cmck.com.

If you are interested in any additional trustee or employer training, please contact **Karen Mumgaard** who can provide you with a list of our current training topics or discuss any particular training needs you might have.

General: For further information on our pension services, please contact **Mark Grant – E:** mark.grant@cms-cmck.com, **T:** +44 (0)20 7367 2325 or your usual pension partner. Please also visit our website at **www.cms-cmck.com**.

The Pensions team is part of the CMS Cameron McKenna Human Capital group and advises employers and trustees of schemes varying in size, from a few million pounds to several billion pounds. Additionally, we act for some of the largest firms of administrators, actuaries, consultants, brokers and professional trustees. We provide a full range of services in connection with occupational pension schemes, including all aspects of employment and EU law. The team also works closely with our corporate lawyers, providing support on mergers and acquisitions, insolvency lawyers supporting us on employer covenant issues, and the financial services team which specialises in regulatory and fund management matters.

The information in this publication is for general purposes and guidance only and does not purport to constitute legal or professional advice. It is not an exhaustive review of recent developments and must not be relied upon as giving definitive advice. The Update is intended to simplify and summarise the issues which it covers. It represents the law as at 18 May 2015. *CMS Cameron McKenna LLP is a limited liability partnership registered in England and Wales with registration number OC310335.*