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pensions law group

Snapshot

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Overview

- ### New 'pensions nudge' requirements on trustees of defined contribution (**DC**) occupational pension schemes

  With effect from **1 June 2022**, trustees of occupational defined contribution pension schemes will need to offer to arrange a pensions guidance appointment with Pensions Wise when they receive an application or communication from a member or beneficiary to transfer any rights in order to take advantage of the pension freedoms or to start receiving benefits in a form which takes advantage of the pension freedoms. Unless an exemption applies, trustees will need to ensure the member or beneficiary either receives this advice or provides an opt out. Trustees should start to consider now what changes to their processes will be needed to ensure they are able to comply once these new requirements come into force.

- ### Pensions Regulator publishes new climate change guidance

  From **1 October 2022**, the requirement for certain occupational schemes to comply with governance and disclosure requirements in line with the recommendations set out by the Task Force on Climate-related Financial Disclosures (**TCFD**) will be extended to schemes with assets of £1 billion or more. The Pensions Regulator (**Regulator**) has published guidance setting out what it will consider when determining whether trustees have met the requirements of the climate regulations and taken account of the DWP's statutory guidance.

- ### Pensions Ombudsman – scams and the importance of acting on Regulator guidance early

  The Pensions Ombudsman (**PO**) has criticised a scheme for not implementing the Regulator's scam guidance in a timely manner. The decision is applicable not only to the requirement for trustees to ensure they have robust procedures in place to avoid transfers to scam arrangements, but it also highlights the expectation that trustees must comply with new Regulator guidance as soon as possible. One upcoming example of this would be the new Single Code of Practice requirements.

- ### New defined benefit funding code publication delayed

  The Regulator has confirmed that its publication of the new defined benefit (**DB**) funding code has been delayed until late Summer 2022, after the new draft regulations have been published and considered in Spring 2022. This delay could impact when the new DB scheme funding regime comes into force. It is possible that this will be before the end of the year, but it is more likely that the new regime will not apply until early 2023.

- ### Collective money purchase schemes

  The legislative framework providing for collective money purchase schemes has been published and will come into force on **1 August 2022**.

- ### De La Rue Ltd & Ors v De La Rue Pension Trustee Ltd & Anr

  In this case the court has provided some further useful insight into the construction of pension scheme documents.

More information

New 'pensions nudge' requirements on trustees of DC occupational pension schemes

In July 2021 the government consulted on proposals to implement a 'stronger nudge' to members to access appropriate pensions guidance from Penson Wise when they sought to receive benefits in a way that took advantage of the pension freedoms or transfer in order to take advantage of the pension freedoms. The intention is to ensure members are made aware of Pension Wise guidance when they seek to access defined contribution savings.

Following the consultation, the government made some changes to the proposals and have now published the Occupational and Personal Pension Schemes (Disclosure of Information) (Requirements to Refer Members to Guidance etc) (Amendment) Regulations 2022. These impose new obligations on **trustees of occupational defined contribution pension schemes.**

Under the regulations trustees must, where they receive an application or communication made in relation to an application to transfer any rights to take advantage of the pension freedoms or to start receiving benefits in a way that takes advantage of the pension freedoms, offer to book a pensions guidance appointment on behalf of the member or beneficiary.

The trustees must confirm to the applicant that they can only proceed with the application if the member or beneficiary has received appropriate guidance or has opted out of receiving guidance. The regulations provide how a member or beneficiary may opt out and also set out exemptions for certain members to whom these requirements will not apply. The trustees must repeat certain parts of the 'pensions nudge' requirements in subsequent communications with the members until advice or an opt-out request has been received.

The regulations also specify the record keeping that trustees must undertake in accordance with these new provisions.

The Regulator will issue its own guidance on these new requirements before they come into force.

These changes will require scheme processes to be updated, which is something trustees and administrators should start considering now. The new regulations come into force on **1 June 2022.**

Regulator publishes new climate change guidance

The Regulator has published its guidance for trustees on governance and reporting of climate-related risks and opportunities.

Starting from **1 October 2022**, the requirement for certain occupational schemes to comply with governance and disclosure requirements in line with the recommendations set out by the Task Force on Climate-related Financial Disclosures (**TCFD**) will be extended to schemes with assets of £1 billion or more. For more information, please see our briefing here.

The new Regulator guidance is intended to supplement the DWP statutory guidance. The guidance sets out what the Regulator will consider when determining whether trustees have met the requirements of the climate regulations and taken account of the DWP's statutory guidance. The guidance sets out what trustees need to do and report on in their annual TCFD report.

The guidance notes that it does not impose additional requirements on trustees but provides examples of how to apply the regulations and DWP statutory guidance. The guidance covers strategy and scenario analysis, risk management and publishing a climate change report and also discusses how the Regulator will approach imposing fines for any non-compliance.

Pensions Ombudsman – scams and the importance of acting on Regulator guidance early

Mr S was a deferred member of the Armed Forces Pension Scheme (the **AFPS**). He was cold-called and persuaded to transfer his benefits to the Capita Oak Scheme (the **Capita Scheme**), which was operated by Imperial Trustee Services Limited (**Imperial**).

In January 2013, Mr S asked the Ministry of Defence (**MoD**) to transfer his benefits from the AFPS to the Capita Scheme. The MoD checked that the Capita Scheme was registered with HMRC but did little else in terms of due diligence or warning Mr S of the risks of pension liberation scams.

After a delay from April to August 2013 caused by difficulty in obtaining acceptable ID from Mr S, the MoD gave final approval for the transfer on 3 September 2013. Mr S' benefits were transferred out of AFPS shortly thereafter. Imperial has since been forced into compulsory liquidation and Mr S believes his benefits have been lost.

Mr S complained to the PO that the MoD did not exercise sufficient due diligence when allowing him to transfer his benefits. The PO upheld the complaint on the grounds that the MoD should not have processed the transfer as Mr S had no statutory right to transfer. However, the PO also considered the lack of due diligence/warnings given to Mr S by the MoD and criticised the MoD for failing to put additional due diligence checks regarding pension liberation scams in place earlier.

The Regulator issued its pension liberation scams guidance in February 2013 but the MoD only put additional due diligence checks in place in November 2013. The MoD claimed that it had not become aware of the new guidance until the end of October 2013. The PO did not accept that a reasonably competent pension provider could argue this and determined that it was the responsibility of the MoD to keep up-to-date with pensions standards and guidance.

It is worth noting that the PO did not accept the MoD's argument that there was no timescale within the Regulator's announcement for the guidance to be put into effect. The PO held that the guidance should have put the MoD on notice of the standards expected when considering future transfers. As the final decision on the transfer was only taken in September, the MoD had over six months from the announcement to ensure compliance with the new guidance.

The case is a useful reminder, not only of the importance of having stringent processes in place when members seek to transfer, but also of the expectation of early action in terms of complying with Regulator guidance. This is also likely to apply to compliance with upcoming developments, such as the Single Code of Practice.

Regulator delays publication of draft DB funding code and second consultation until late Summer 2022

The Regulator is keen for DB schemes to focus on long-term funding in order to ensure pension scheme members have the best chance of receiving the benefits they expect. It therefore issued a consultation on a revised funding code of practice for defined benefit pension schemes back in 2020. During this consultation the Regulator proposed a twin-track compliance approach to valuations under either a 'fast-track' or 'bespoke' approach to the valuation process.

It was expected that the second consultation on the new code would occur in Spring this year, at the same time as the DWP publishes its consultation on new funding regulations for DB schemes. The intention was that the revised code and the new regulations would neatly dovetail to form the new DB scheme funding regime (the legal framework of which was set out in the Pension Schemes Act 2021).

However, the Regulator has now confirmed that the second consultation on the draft code will occur after there has been a chance for responses to the DWP consultation. The second consultation is expected in late Summer 2022 and will include a draft of the code for consideration and comment.

This delay will impact when the new DB scheme funding regime comes into force. Whilst it is possible that this will be before the end of the year, it is more likely that the new regime will not apply until early 2023.

The existing funding regime remains in place until the new code and new regulations come into force.

Collective money purchase schemes

The DWP has published its response to regulations that will govern a new type of pension scheme in the UK, collective money purchase (**CMP**) schemes. CMP schemes provide benefits in the form of regular income for members, paid out of available assets of the scheme so there cannot be a deficit (unlike a DB scheme). For more detail on CMP schemes and the legal framework, see our briefing here.

The Occupational Pension Schemes (Collective Money Purchase Schemes) Regulations 2022 (the **CMP Regulations**) will be made under the Pension Schemes Act 2021. They set out the detail of how CMP schemes will be regulated. CMP schemes will be subject to the Regulator's authorisation and supervisory regime, similar to the supervision of master trusts. The DWP's consultation response proposes to set the application fee for authorisation of a new CMP scheme at £77,000 (compared to £23,000 for master trusts), reflecting the relative complexity of CMP schemes.

The CMP Regulations have been laid before Parliament and are expected to come into force on **1 August 2022**. A further set of regulations, the Occupational Pension Schemes (Collective Money

Purchase Schemes) (Modifications and Consequential and Miscellaneous Amendments) Regulations 2022, will make consequential changes to existing pensions regulations and are expected to be laid before Parliament in February 2022. The Regulator is expected to consult on a code of practice for CMP schemes in early 2022.

The driving force behind the legislation was a CMP scheme proposed by Royal Mail and the Communication Workers Union. This may become the first CMP scheme in the UK. Although wider demand for CMP schemes may be limited initially, with employers continuing to favour more traditional schemes and master trusts, their popularity may well start to grow following introduction of the relevant legislation.

De La Rue Ltd & Ors v De La Rue Pension Trustee Ltd & Anr

In this case the court provided some further useful insight into the construction of pension scheme documents.

The case concerned a single issue relating to the revaluation of deferred benefits for members of the Final Salary Section of the Scheme. The parties sought clarification from the court as to how one of the rules of the scheme should be construed. Subject to how the court determined the issue, the Scheme's liabilities could have been increased by more than £20 million.

A separate rule in the scheme provided for increases to pensions in payment (the **Increase Rule**).

The claimant argued that the court should determine the question before it by stating that revaluation of deferred pensions would be on the statutory basis. The defendant argued that it should be the better of the statutory basis and increases during deferment calculated by applying the Increase Rule.

The court found in favour of the claimants and provided some useful principles when considering the construction of pension scheme documents.

The rules of a pension scheme are a form of instrument in respect of which significant weight is to be given to textual analysis concentrating on the language that the drafter has chosen to use. That did not mean that "*literalism rules the day*" - a purposive construction may be appropriate, particularly where it is required to give reasonable practical effect to the scheme. If the defendant's argument were to hold true and there were other increases to be encapsulated by the rule in question then it would be much more natural for those other increases to be spelt out with an express provision (which was not what had actually occurred).

Although the issue of the archaeology of the Scheme's documentation had been raised by one the parties, the judge found that it provided limited assistance in the present case. He added that, if there had been an intention to change the nature of an entitlement, the drafter had chosen rather obscure language to achieve that result.

The Judge also felt that, if the terms of the rule had been ambiguous, it was permissible to consider consistency in the parties' course of conduct both before and after the instrument to demonstrate that no change was intended. However, the judge felt that this principle must be treated with some caution and it could only be engaged where the language was truly ambiguous.

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