

Pensions law – the week in review

2 November 2009

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1 LEGISLATION

1.1 Employer-Financed Retirement Benefits (Excluded Benefits for Tax Purposes) (Amendment) Regulations 2009

Relevant benefits under an employer-financed retirement benefit scheme (EFRBS) count as employment income under the Income Tax (Earnings and Pensions) Act 2003 (ITEPA). However, certain benefits provided under an EFRBS do not count as relevant benefits because they are excluded benefits, as prescribed in regulations.

In the tax years before 2009/10, HM Revenue & Customs (HMRC) exercised a concessionary practice to exempt from tax the benefit of certain health-screening assessments and medical check-ups provided free by employers. This practice was formalised by the Finance Act 2009¹, and exempts current employees from tax on benefit consisting of one health screening assessment and/or one medical check-up in a tax year provided by their employer. This provision has effect from the 2009/10 tax year.

However, if an employer continues to provide former employees with free annual medical check-ups and health-screening after they retire, this is subject to a tax charge. But as this is contrary to the policy objective of aligning the taxation of non-cash benefits for retired employees as closely as possible with the taxation of benefits provided to current employees, the Employer-Financed Retirement Benefits (Excluded Benefits for Tax Purposes) Regulations 2007 are being amended in order to exclude these benefits from tax charges provided two conditions are met. These conditions are that:

- no liability to income tax would have arisen had the screening assessment / check-up been provided in the course of the employee's employment; and
- at least one screening or check-up had been provided to the employee during their employment.

¹ S.55 Finance Act 2009 introduced s.320B of ITEPA

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The regulations will come into force on 1 December 2009 and will have retrospective effect from the tax year 2006/07 onwards (the year from which the tax charge would otherwise have been applicable to former employees).

The regulations and accompanying explanatory memorandum can be accessed by clicking on the links below:

http://www.opsi.gov.uk/si/si2009/pdf/uksi_20092886_en.pdf

http://www.opsi.gov.uk/si/si2009/em/uksiem_20092886_en.pdf

2 ACTUARIAL PROFESSION

2.1 Consultation paper on actuarial information for accounts

The Board for Actuarial Standards (BAS) is consulting on proposals for a technical standard on actuarial information used for accounts and other financial documents, including the actuarial information used in the reporting of pension scheme costs.

One of the key consultation objectives is for those with responsibility for preparing accounts to have confidence in the actuarial information they receive, including information on risk and cash flows. Following the consultation, the BAS will issue an exposure draft of a principles based standard that will apply to this type of actuarial work.

The consultation will close on 8 January 2010.

The BAS press release and the consultation document can be accessed by clicking on the links below:

<http://www.frc.org.uk/bas/press/pub2150.html>

<http://www.frc.org.uk/images/uploaded/documents/Accounting%20CP%20FINAL.pdf>

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3 DEPARTMENT FOR WORK AND PENSIONS (DWP)

3.1 Ministers call for evidence on the default retirement age

The Employment Equality (Age) Regulations, which came into force on 1 October 2006², provide for a default retirement age (DRA) of 65. This is the age from which an employer can dismiss employees for reason of “retirement”.

Since the introduction of these regulations, the Government had always intended to review the DRA. And, as we reported on 20 July 2008, the Government has brought forward its promised review to 2010. This review will be conducted jointly by the DWP and the Department for Business, Innovation and Skills (BIS).

In an announcement calling on businesses and individuals to submit evidence on the DRA, the Government has asked for information on:

- the operation of the DRA in practice;
- the reasons that businesses use mandatory retirement ages;
- the impacts on businesses, individuals and the economy of raising or removing the DRA;
- the experiences of businesses operating without a DRA; and
- how any costs of raising or removing the DRA might be mitigated and benefits realised.

Evidence must be submitted by 1 February 2010.

The press releases of the DWP and BIS can be accessed by clicking on the links below:

<http://www.dwp.gov.uk/newsroom/press-releases/2009/october-2009/dwp054-09-281009.shtml>

<http://www.berr.gov.uk/whatwedo/employment/Default%20retirement%20age/index.html>

² 1 December 2006 for pensions purposes

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**3.2 Consultation on the Pension Protection Fund (Miscellaneous Amendments)
Regulations 2010**

The DWP is consulting on draft regulations which amend existing provisions governing the payment of pension compensation by the Board of the Pension Protection Fund (PPF) and the collection of the pension protection levy.

The proposed amendments include changes which are necessary to:

- change the earliest age from which entitlement to payment of pension compensation can arise from age 50 to 55 (except in respect of individuals who have an earlier protected pension age), in line with the change under the Finance Act 2004 to normal minimum pension age, which will apply from 6 April 2010;
- enable individuals to apply for early payment of compensation at least two months (rather than the current six months) before the requested payment date, to remove that two month rule in limited cases, and to reduce the amount of information which needs to be provided with the application;
- modify the calculation of pension compensation for active members of career average revalued earnings (CARE) schemes to reflect the way in which pension benefits are calculated in those schemes;
- to introduce the provision allowed by the Pensions Act 2008 to enable the PPF Board to charge interest when the pension protection levy is paid late; and
- set the rate of interest and to provide for a waiver of the interest by the PPF Board in specific circumstances.

It is intended that the regulations relating to the payment of interest will come into force on 1 April 2010, to coincide with the start of the levy year, and that the amendments relating to pension compensation will come into force on 6 April 2010.

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The consultation will close on 15 January 2010.

The consultation document can be accessed by clicking on the link below:

<http://www.dwp.gov.uk/docs/ppf-misc-amend-regs-2010-consultation261009.pdf>

3.3 Research report 603: The Economic Basis for the Regulation of Pensions

The DWP has published research on the economic framework which underpins the regulation of occupational pensions.

As well as providing a broad overview, the report's authors identify three general areas of regulation which apply to workplace pension arrangements: information; prudential regulation; and product design.

The authors also developed a number of principles which they believe should form the basis of pension scheme regulation:

- any pension design should be simple enough so that it can be easily understood by employees;
- members must be informed in objective terms about the benefits and risks of the scheme when they enrol;
- joining an occupational pension scheme should be financially beneficial for almost all employees so they can be safely enrolled without financial advice;
- employers must have no direct commercial interest in the employee's participation; and
- the scheme must meet high solvency standards so that promised benefits can be paid with a high degree of probability, even if the sponsor fails and the scheme closes.

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The DWP's press release and research report 603 can be accessed by clicking on the links below:

<http://www.dwp.gov.uk/newsroom/press-releases/2009/october-2009/dwp056-09-291009.shtml>

<http://research.dwp.gov.uk/asd/asd5/rports2009-2010/rrep603.pdf>

3.4 Research report 608: Defined Contribution Pension Provision

The DWP has also published a research report in which it sets out a high level overview of private DC pension provision in the UK. Existing data and analysis is presented “in a systematic way” with judgments about the best sources to use where appropriate.

The report covers broad aspects of DC pension provision including data on membership (showing trends over time), member and employer contributions, the range of investment choice on offer as well as actual practice (most DC members are invested in default funds), the mechanisms used for turning accumulated pension pots into income streams on retirement (known as decumulation), and the financial capability, behaviour and attitudes of DC scheme members.

Research report 608 can be accessed by clicking on the link below:

<http://research.dwp.gov.uk/asd/asd5/rports2009-2010/rrep608.pdf>

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4 HM REVENUE & CUSTOMS

4.1 Registered Pension Schemes Manual (RPSM) updated

We reported on 21 September 2009 that HMRC had produced technical guidance on the Special Annual Allowance (which was first announced in this year's Budget³) for inclusion in the RPSM.

As of 27 October 2009, the manual has been updated to incorporate this information, together with guidance on the Registered Pension Schemes (Authorised Payments) Regulations 2009⁴, and a number of further general updates and clarifications.

The latest updates to the RPSM can be accessed by clicking on the link below:

<http://www.hmrc.gov.uk/manuals/rpsmmanual/updates/rpsmupdate271009.htm>

5 OFFICE FOR NATIONAL STATISTICS (ONS)

5.1 Occupational Pension Schemes Annual Report 2008

The latest ONS report sets out the results of the 2008 Occupational Pension Schemes Survey (OPSS). It compares the 2008 findings with the findings of earlier surveys carried out by the Government Actuary's Department from 1953 to 2005, and by the ONS in 2006 and 2007. The OPSS covers UK registered trust based schemes.

³ For more information on the SAA, 2009 Budget and Finance Act 2009, please see our Alerts: "Budget 2009 – Building Britain's future" (dated 23 April 2009); "Finance Bill 2009 - Limited relaxation of transitional provisions" (dated 10 July 2009); and "Finance Act 2009 - This time it's personal" (dated 24 July 2009), all of which are available from the client area of our website or from your usual Sackers contact

⁴ SI 2009/1171. For more information on these regulations, please see our Alert: "Trivial commutation regulations published!" (dated 18 May 2009)

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2008 statistics highlighted in the report include:

- there are an estimated 9 million active members of occupational pension schemes (made up of 3.6 million in the private sector and 5.4 million in the public sector);
- active membership of private sector defined benefit (DB) schemes fell to 2.6 million from 3 million in 2006 (active membership of defined contribution schemes remained constant, at around 1 million during the same period);
- only 42% of active members in private sector DB schemes were in open schemes, compared with 94% in DC schemes;
- 80% of active members of occupational pension schemes belonged to schemes with 10,000 or more members, while only 1% belonged to very small schemes (schemes with between 2 and 11 members); and
- the estimated total number of pensions in payment was 8.8 million (3.9 million in public sector schemes and 5 million in the private sector) and the estimated total number of deferred pension entitlements was 9.9 million.

The ONS report can be accessed by clicking on the link below:

http://www.statistics.gov.uk/downloads/theme_population/Occ-Pension-2008/OPSS_Annual_Report_2008.pdf

6 ORGANISATION FOR ECONOMIC CO-OPERATION AND DEVELOPMENT (OECD)

6.1 Pension Markets in Focus

The latest edition of the OECD's Pension Markets in Focus newsletter looks at the gradual recovery of funded pension arrangements from the financial crisis, and presents data on public pension reserve funds.

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The OECD notes that while the investment losses suffered in 2008 are far from being recouped, in respect of two of the key variables – investment returns and funding ratios in DB schemes – there has been a marked improvement in the first half of 2009.

However, it also notes that there are some structural challenges which have yet to be addressed, in particular the ongoing shift towards DC arrangements which it says “calls for an overhaul of regulatory approaches with default investment options that deliver risk mitigation as members approach retirement”.

Pension Markets in Focus can be accessed by clicking on the link below:

<http://www.oecd.org/dataoecd/30/40/43943964.pdf>

6.2 Survey on the investment regulation of pension funds

The OECD has also published a table in which it sets out the main quantitative investment regulations applied to pension funds in OECD and selected non-OECD countries as of December 2008.

The questionnaire covered a wide range of pension arrangements, including DB and DC, occupational and personal pensions. The collected information also concerns all forms of quantitative portfolio restrictions applied to pension funds at different legal levels (for example set out in statute, regulations or guidelines).

The OECD table can be accessed by clicking on the link below:

<http://www.oecd.org/dataoecd/30/6/43939773.pdf>

7 PENSIONS OMBUDSMAN (PO)

7.1 Framework document with the DWP

The PO (incorporating the Pension Protection Fund Ombudsman) has published a joint document with the DWP, setting out the broad framework within which the PO will operate.

Among other things, the framework document sets out:

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- the PO's overall aims, objectives and targets in support of the DWP's wider service aims and Public Service Agreement;
- the rules and guidelines relevant to the exercise of the PO's functions;
- the relationship between the DWP and the PO;
- the conditions under which any public funds are paid to the PO; and
- how the PO is to be held to account for its performance.

The document does not, however, convey any legal powers or responsibilities.

The framework document can be accessed by clicking on the links below:

<http://www.pensions-ombudsman.org.uk/publications/docs/FrameworkAgreement.pdf#zoom=100>

8 PENSION PROTECTION FUND

8.1 PPF solution to equalising benefits for GMPs approved

Back in April 2008, the PPF issued a consultation paper on “the requirement under section 171 of the Pensions Act 2004 to equalise compensation to allow for differences in the GMP formula”. The PPF's long awaited response was finally published on 29 October 2009.⁵

The decision document confirms that a PPF-specific solution will ensure that men and women who belong to pension schemes which are being assessed for entry into the PPF, or who are already PPF members, receive the same overall compensation. (Differences in entitlement arise in particular as a result of guaranteed minimum pensions (GMPs), primarily brought about by differences in the state retirement age.)

The PPF confirms that its proposal does not impose any new obligations on trustees of ongoing schemes.

⁵ Sackers' response to the consultation (dated 28 July 2008) can be accessed via the client area of our website, or from your usual Sackers contact

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The PPF will now address the calculation requirements for the different categories of members involved and will continue to liaise with external stakeholders and its own advisers on certain outstanding issues. Once these tasks have been completed, the PPF will decide how the equalisation of GMPs should be implemented. The PPF will provide further information to stakeholders at that time.

We will shortly be issuing an Alert on this topic.

The PPF's press release and the decision document can be accessed by clicking on the link below:

<http://www.pensionprotectionfund.org.uk/news/pages/details.aspx?itemID=135>

http://www.pensionprotectionfund.org.uk/DocumentLibrary/Documents/GMP_Oct2009.pdf

8.2 John Bevington appointed to PPF board

John Bevington has been appointed to the PPF board as a non-executive director.

Mr Bevington has served internationally on boards in Europe, Asia-Pacific, Africa and the UK. He has worked for Shell and Unilever in operating company and head office strategic roles, in both consumer-branded and business to business sections, and has recently retired as CEO of Leatherhead Food Industrial – a global food and beverage technology driven business.

The PPF's press release can be accessed by clicking on the link below:

<http://www.pensionprotectionfund.org.uk/news/pages/details.aspx?itemID=134>

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9 THE PENSIONS REGULATOR (TPR)

9.1 TPR publishes review of retirement information for DC members

TPR has published a report of its findings following a review of pre-retirement literature in DC trust based schemes.

Ninety-seven schemes were assessed on adherence with legislative requirements, good practice in areas such as description and prominence of the Open Market Option (OMO), and the use of clear, plain English.

TPR's review indicates that levels of compliance and good practice vary widely. Of the ninety-seven schemes which submitted literature for the review:

- 98% offered the OMO, although the take up rate was considered low, at 23% of DC members retiring;
- 57% of schemes had some scope for improvement in the standards of the retirement information sent to members;
- 30% had alleged legislative breaches of retirement disclosure regulations; and
- 6% were referred to regulator casework teams to follow up the substantial changes required to their retirement literature or processes.

TPR will now write to 4,500 schemes, highlighting the findings of this investigation and encouraging trustees to review the pre-retirement literature that is sent out to their members.

TPR's report can be accessed by clicking on the link below:

<http://www.thepensionsregulator.gov.uk/whatsNew/5137.aspx>

<http://www.thepensionsregulator.gov.uk/pdf/RetirementInfoDCMembers.pdf>

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10 CASES

10.1 Mr S Hernandez v Standard Life (Pensions Ombudsman)

The PO has upheld a complaint against Standard Life (SL) for failing to take adequate steps to obtain material information about the potential recipients of a lump sum death benefit.

Background

Mrs Hernandez (Mrs H) died intestate in 2006. She had completed an expression of wish form in 2001, in which she nominated her husband, Mr Hernandez (Mr H) to receive 50% of her death benefits, and her two children (one of whom was a minor) 25% each. At the time of her death, Mr and Mrs H had separated but were still married and, although not living together, remained on good terms.

SL contacted solicitors purportedly acting for the estate of the deceased. During a telephone conversation with them, SL decided that the two children would receive 50% each of the lump sum. SL issued payment forms to the solicitors, together with a declaration to be signed by the younger child's parent or guardian. SL had, however, failed to ascertain that the solicitors were not properly instructed to act for Mrs H's estate. The form for the younger child was returned to SL signed by the child's aunt, who described herself on the form as her guardian.

On discovering what had happened, Mr H complained to SL on the basis that they should have contacted him prior to exercising their discretion to award the death benefit. SL should also have confirmed that the solicitors had authority from Mr H before accepting any information from them. He also claimed that as he was the younger child's parent, SL should not have sent the cheque for that child to its aunt.

SL argued that they had no reason to disbelieve the information provided by the solicitors and, even if they had contacted Mr H before making the decision, they would not have exercised their discretion in his favour because he had been separated from his wife at the time of her death.

The PO's Decision

The PO considered two distinct issues: whether the discretion had been properly exercised by SL; and whether it was proper for them to have made the payment to the aunt having received forms completed on the child's behalf.

In determining the first issue, the PO noted two relevant factors - the nomination form and the telephone discussion with the solicitors. He found that SL's decision had been made solely on the basis of the telephone call. Given that Mr H was a nominated beneficiary, SL should have done more, before reaching their decision, than hold a short, informal telephone call with a third party. Therefore, as the decision had not been made taking into account all material factors, the PO held that the decision could not stand.

In relation to the payment on behalf of the minor child to the aunt, the PO held that SL was able to rely on the signed declaration by the aunt. The declaration could be given extra weight as it had passed through the hands of a firm of solicitors who purported to know something about the situation.

SL was directed to take a fresh decision about the distribution of the death benefit. Before doing so they were ordered to obtain all material evidence relating to the circumstances of the potential beneficiaries as at the date of the member's death. SL was also directed to make a record of the material taken into account in reaching their new decision, and to give summary reasons to the affected persons.

Comment

This case highlights the risk that a decision maker runs when taking a decision based on anecdotal evidence rather than in the light of a proper investigation of the facts.

It also highlights the need, when taking information from a third party, to establish whether that third party has actual authority to make statements regarding the intentions or circumstances of a potential beneficiary, and if there is doubt to communicate directly with the person affected.