

Pensions and Employment: Pensions Bulletin

11th February 2016 / Issue 2

Legal and regulatory developments in pensions

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To access our Employment/Employee Benefits Bulletin visit the [Slaughter and May website](#).

Contents include:

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- From 6 April 2016, UK incorporated companies must hold and maintain a register showing individuals who have significant control over the company (PSC Register)
- National Living Wage (NLW) rate of £7.20 for workers aged 25 years and over will come into force on 1 April 2016 and the penalty for non-compliance has increased
- Can an employer monitor employees’ communications at work?

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Find out more about our pensions and employment practice [on the Slaughter and May website](#).

Details of our work in the pensions and employment field are [on the Slaughter and May website](#).

For more information, or if you have a query in relation to any of the above items, please contact the person with whom you normally deal at Slaughter and May or [Rebecca Hardy](#).

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Forthcoming Events

I. Watch list

The Watch List is a summary of some potentially important issues for pension schemes which we have identified and where time is running out (or has recently run out), with links to more detailed information. New or changed items are in **bold**.

No.	Topic	Deadline	Further information/action
1.	Abolition of refund of contributions for members of occupational schemes with at least 30 days' pensionable service who are just provided with money purchase benefits and who start pensionable service after 30th September, 2015	1st October, 2015	Pensions Bulletin 15/09 Action point: Scheme rules should have been amended where necessary to remove right to refund of contributions where member has at least 30 days' qualifying service but less than 2 years' qualifying service.
2.	Reduction in annual allowance for high income individuals Note: Up to £80,000 annual allowance for tax year ending 6th April, 2016	6th April, 2016	Summer Budget 2015 Supplement
3.	Reduction in Lifetime Allowance from £1.25 million to £1 million	6th April, 2016	Pensions Bulletin 15/19

No.	Topic	Deadline	Further information/action
4.	Members who intend to apply for Fixed Protection 2016 ("FP 2016") must stop accruing benefits	6th April, 2016	Pensions Bulletin 15/16 Think about communicating 6th April, 2016 reduction in LTA and possible protections highlighting necessity of ceasing accrual for FP 2016. Pensions Bulletin 15/20. As with FP 2012 and FP 2014, schemes may wish to add protective provisions to their trust deed and rules to prevent inadvertent loss of FP 2016. Please contact the person you usually deal with at Slaughter and May if you would like to add a protective provision to your scheme. The Deed of Amendment would need to be in place before 6th April, 2016.
5.	Abolition of DB contracting-out: managing additional costs	6th April, 2016	Pensions Bulletin 15/16 Checklist available to clients on request. Planning for this should be well developed by now.

No.	Topic	Deadline	Further information/action
6.	Abolition of DB contracting-out: practicalities	6th April, 2016	Pensions Bulletin 15/16 Checklist available to clients on request. Planning for this should be well developed by now. Employers to notify affected employees of change in contracted-out status "at the earliest opportunity" and in any event by 6th May, 2016. Schemes to notify affected members before, or as soon as possible after, 6th April, 2016 and in any event by 6th July, 2016. Change template contracts of employment for new joiners to remove references to contracted-out employment.
7.	EU/US Privacy Shield for transfers of personal data to US	May, 2016	To consider if transferring personal data to US. Also review transfers of data outside the EEA for compliance with the EU data protection directive. This Pensions Bulletin

No.	Topic	Deadline	Further information/ action
8.	Cyclical re-enrolment	Within 6 month window by reference to third anniversary of employer's staging date	For example employers with a March 2013 staging date must complete cyclical re-enrolment process between December 2015 and June 2016. Publication available to clients on request from usual pensions contact.
9.	First Chair's annual governance statement	Within 7 months of end of scheme year (for scheme years ending on or after 6th July, 2015)	For example, schemes with a 31st December year end must submit statement by 31st July, 2016. Client note dated June, 2015 available from Lynsey Richards
10.	Data protection: New Regulation	2018	Pensions Bulletin 16/01

New Law

II. Reducing regulatory burdens: Amendment to definition of “multi-employer scheme” for governance purposes

A. Overview

1. On 2nd February, 2016, the DWP published a partial response to its 12th November, 2015 consultation on reducing regulatory burdens¹.
2. The consultation included a proposed amendment to the definition of “relevant multi-employer scheme” to which additional governance requirements apply, including that the scheme has at least 3 trustees, the majority of which must be “non-affiliated”. The current wide definition has the potential to catch multi-employer group schemes, not just the commercially-promoted master trusts and industry-wide schemes they were aimed at.

¹ “Better workplace pensions: reducing regulatory burdens, minor regulation changes, and response to consultation on investment regulations” ([Pensions Bulletin 15/19](#))

B. New definition

1. The draft regulations published in response to the consultation retain the existing wide definition (a scheme which is or has been promoted as a scheme where participating employers need not be connected employers); the DWP has decided not to define “promoted” but will consider whether the meaning should be dealt with in guidance. In its view it includes those schemes which actively undertake commercial advertising to unconnected employers and those industry-wide schemes which may not undertake commercial advertising but which offer themselves to employers within the same industry.
2. But a new definition of “connected” is included to allow corporate group schemes to be open to the employees of other non-associated employers which are connected to an employer within the group in one of 5 ways (relating to different types of corporate activity):

Comment: This a welcome change, on which we made representations to the DWP. It means that corporate group schemes can be open to employees of non-associated

employers that are connected to an employer in the group without triggering the additional governance requirements.

C. Other changes

1. Other changes in the draft regulations include:
 - 1.1 an amendment to allow a person or deputy chair appointed by the trustees to sign the chair's statement if there is no chair in place, and
 - 1.2 a statutory override to deal with provisions in trust deeds or rules that conflict with the key requirements for "relevant multi-employer schemes" to have a majority of trustees/directors that are non-affiliated and for there to be at least 3 trustees (or 3 directors of a sole corporate trustee).

Tax

III. Pension Schemes Newsletter 75

This was published on 28th January, 2016.

Points to note are:

- **Scottish rate of income tax:** HMRC notes that the Scottish rate for 2016/17 was announced by the Scottish Government on 16th December, 2015 as 10% i.e. the same as the rest of the UK.

But scheme administrators operating PAYE must still ensure the "S" tax codes are applied via RTI for Scottish taxpayers.

- **Lifetime Allowance reduction:** HMRC notes that scheme members cannot apply for Fixed Protection 2016 or Individual Protection 2016 before 6th April, 2016 and that it is unable to process any interim applications for protection that are received before then.

According to HMRC, any scheme member not planning to take benefits between 6th April, 2016 and July 2016, when the online digital service will be available, should wait and apply for protection using that. Full details

on the interim process, including how to contact HMRC, will be provided in HMRC's next Pension Schemes Newsletter.

Comment: Where a member is proposing to take benefits after 5th April, 2016 but before permanent reference numbers are available (likely to be July 2016), it will be safer for trustees to assume, when calculating whether any LTA charge arises, that the member **does not** have IP 2016 or FP 2016, even where the member has a temporary reference number. If a member wishes to rely on either protection, he may want to postpone taking benefits until he has a permanent reference number.

Action point: Trustees may wish to manage expectations appropriately in communications with affected members.

- **Annual allowance: Alignment of PIPs and the money purchase annual allowance:** the Newsletter sets out in detail how the rules for the money purchase annual allowance apply to the PIP alignment transitional rules for 2015/16.

The Newsletter is on the [gov.uk website](#).

IV. Tapered annual allowance: New requirement to provide pension savings statements: Draft regulations

On 28th January, 2016, HMRC published draft regulations² extending the requirement to provide a pension savings statement to any member whose “pensionable earnings” for a particular tax year exceed £110,000.

The requirement to provide a pension savings statement currently applies to any member whose pension input amounts for the relevant pension input period exceed the annual allowance for a particular tax year. Scheme administrators are also required to provide a pension savings statement to any other member who makes a written request. In all cases, the pension savings statement must be provided no later than 6th October following the relevant tax year.

The draft regulations define pensionable earnings as “*the member’s salary, wages or fee in respect of the employment to which the ... occupational pension scheme relates*”. HMRC says it is particularly interested in comments on this definition.

² The Registered Pension Schemes (Provision of Information) (Amendment) Regulations 2016

Comments on the draft regulations, due to take effect on 6th April, 2016, are invited by 17th February, 2016. The draft regulations are on the [gov.uk website](#).

Points in Practice

V. Incentive Exercises Code of Good Practice updated

A. Overview

1. An updated version of the Industry Code of Practice on incentive exercises for pensions (the “Code”) was published on 1st February, 2016.
2. Typically pensions incentive exercises entail:
 - 2.1 employers offering members incentives to transfer out of their DB pension scheme (usually by offering enhanced transfer values (“ETVs”) or, less commonly, a cash payment), or
 - 2.2 allowing members to take a higher initial pension on retirement in exchange for giving up their rights to non-statutory increases to their pension

in future (“pension increase exchange” or “PIE” exercises).

3. Both allow employers to reduce their exposure to the risks associated with providing DB pensions and, potentially, decrease their future pension liabilities.
4. The Code was first published on 8th June, 2012 ([Pensions Bulletin 12/10](#)) with the objectives of ensuring that all incentivised transfer and similar exercises are:
 - 4.1 done fairly and transparently,
 - 4.2 communicated in a balanced way and in terms that members can understand,
 - 4.3 available with appropriately regulated and qualified independent financial advice that is paid for by the employer,
 - 4.4 able to achieve high levels of member engagement, and
 - 4.5 provided with regulated access to the independent complaints and compensation process.

5. An incentive exercise will fall under the Code if it is “*an invitation or inducement... provided to a member to change the form of their accrued defined benefit rights...which meets both of the following tests:*”
- *one objective of providing the invitation or inducement is to reduce risk or cost for the pension scheme or sponsor(s); and*
 - *the invitation or inducement is not ordinarily available to members of the pension scheme”* (the “**business as usual**” exception).

Comment: Where the incentive or inducement is offered on an ongoing basis (for example it is included in pre-retirement packs) for active and deferred members it is likely to fall within the “business as usual” exception.

6. The Code is voluntary but has generally been followed since its inception. Although it is not statutory and so not considered by the Courts, the Pensions Ombudsman and the Financial Ombudsman Service have regard to it where appropriate. The party initiating the offer, typically the employer, is responsible for following the Code and seeking to ensure that other parties follow it.

B. New version

1. The updated version applies to all cases where an offer is made to a member after the date of its publication i.e. after 1st February, 2016. Where an offer has already been made to a member in writing, the exercise is subject to the old version of the Code.
2. Changes from the 2012 version largely relate to the introduction of pensions flexibility on 6th April, 2015. The Group has also included “boundary” and other examples where the Code would and would not apply. These replace the “practitioner notes” that accompanied the previous version. These are not being updated in future but “*remain available...and might be helpful in some circumstances*”.
3. Changes include:
 - 3.1 a “proportionality threshold” which, broadly, applies where a member is being offered a transfer value of £10,000 or less. Where the offer is below this there is no requirement to provide advice or guidance before an offer is accepted, but guidance should be made available that is “readily accessible” to members,

- 3.2 confirmation that the Code covers “full commutation exercises”.

Comment: This reflects the Industry Group’s announcement in December, 2014 that the Code applies to small and trivial pension commutation. The announcement went on to confirm that the Code would not generally apply to “business as usual” activity. So where an option to commute small lump sums is made available to all eligible members and communicated regularly in pre-retirement packs and to those in receipt of pensions, with no deadline for acceptance, the Code should not be relevant, and

- 3.3 a requirement that when giving advice, the adviser considers the implications of the offer for the member’s spouse and other beneficiaries and advises the member on these.
4. The Code states that it is not intended to apply generally in relation to exercises associated with winding up. In most cases wind-up lump sums can be expected to fall outside the scope of the Code but all parties should be “mindful” of the Code’s principles in such circumstances

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to ensure that members' interests are appropriately protected.

5. The Chairman's foreword foresees winding up lump sums being increasingly used as incentive exercises and says it will consult the industry during 2016 on whether the Code should extend to them.

The Code, mark-up and boundary examples are on the [Industry Group's website](#).

Comment: Where an employer is conducting an ETV exercise, the importance of making sure that the employee communications are fair, clear and not misleading cannot be over-emphasised. This an area where, if the process is not managed carefully, the legal risk will come back in due course and employers will be faced with claims to make good the loss suffered by the members based on misrepresentation should the ultimate retirement income provided by the ETV turn out to be lower than what the member would have received had he not transferred.

VI. PPF levy 2016/17: Group company guarantees: New publications

Following publication on 14th December, 2015 of its levy determination for 2016/17, the PPF has recently published on its website:

- its annual briefing note reflecting its experience of the contingent asset review process; and
- a sample form Type A (group company guarantee) contingent asset certificate.

The PPF says the note is substantially unchanged from the January 2015 note except in relation to references relative to the 2016/17 levy year. It looks in particular at:

- the factors that trustees should consider in assessing the impact of employer insolvency on the guarantor, and
- what the PPF looks at in testing guarantees.

It goes on to give examples of issues that have arisen in previous cases: **Note** that these are unchanged from last year.

The sample certificate and note are on the [PPF website](#).

Comment: You need to look at both these documents if you are considering certifying, or re-certifying, a Type A contingent asset for this (2016/17) levy year. The deadline for submitting the certificate is midnight on 31st March, 2016.

VII. DWP factsheet on pension benefits with a guarantee and the advice requirement

A. Overview

1. This was published on 27th January, 2016. It summarises what the DWP sees as the principles for determining whether or not certain benefits with guarantees fall within the definition of "safeguarded benefits" to which the appropriate independent advice requirement applies.

Comment: The principles set out in the factsheet may be valid for benefits in personal pension schemes, but not for occupational pension schemes. In our experience, GARs in occupational pension schemes are invariably embedded in the asset representing the member's benefits. The benefits themselves are pure money purchase benefits, regardless of what the asset provides.

2. The factsheet notes that pension policies with guaranteed annuity rates (“GARs”) are the most common type of safeguarded benefit which is not a salary-related benefit under an occupational scheme; the benefits are safeguarded because the member has a right to convert the pot into an income in accordance with conversion factors which are known during the accumulation phase.
3. According to the factsheet, the benefits are safeguarded even if the promised GAR is below the rates currently being offered on the open market, because open market rates may fall below the GAR before the guarantee expires. A pension plan with a GAR that expires at a specific point in the future (for example when the member turns 60) is a safeguarded benefit until the GAR expires.

B. Contracted-out rights

1. Pension benefits which represent, or include, a GMP or Section 9(2B) rights are also safeguarded benefits.
2. But where liability for such contracted-out rights has been transferred under a buy-out policy and the member’s fund under the policy is greater than the amount needed

to provide the required minimum level of pension, if there are excess funds remaining after a pension at that level has been secured, the member’s remaining benefits under the policy will not be safeguarded benefits if there is no other income guarantee attached to them.

C. Benefits secured by insurance policy that includes a GAR

1. The factsheet refers to certain “exceptional” circumstances in which benefits including a GAR may not be safeguarded benefits because the presence of a third party promise results in the benefits being money purchase benefits.
2. The example given is where the trustees of an occupational pension scheme hold, as an asset of the scheme, an insurance policy which includes a GAR and the scheme rules provide that the member is entitled to the benefits that the policy will provide (but the scheme rules do not themselves promise the GAR).
3. Where a scheme is unsure where the particular benefits fall into this category, the DWP says it will need to consider the specific details of the scheme or policy under which

the benefits are provided and take legal advice if necessary.

Comment: The DWP’s statement that this situation is “exceptional” is nonsense. This is invariably the case in an occupational DC scheme where the GAR is provided through an asset (an insurance policy) secured with the member’s money purchase pot.

The factsheet is on the [gov.uk website](#).

VIII. Abolition of DB contracting-out: Practicalities

HMRC Countdown Bulletin 13: This was published on 2nd February, 2016 and notes:

- **time is running out** for schemes to register an interest in using the Scheme Reconciliation Service: registration is required before 5th April, 2016,
- topics discussed at the forums for scheme administrators that took place in November/ December, 2015, including in relation to HMRC processes, and
- that the Government is expecting many people receiving their state pension statements to consider state pension top

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up; administrators who get enquiries on this subject should read the Government's State Pension Top Up booklet for details.

Countdown Bulletin 13 is on the [gov.uk website](#).

Abolition of DB contracting-out: PASA guidance:

The PASA has published 3 helpful guidance notes and a GMP reconciliation process "map" for scheme administrators dealing with the abolition of DB contracting-out on 6th April, 2016.

The guidance is on the [PASA website](#).

Action point: The deadline for taking advantage of HMRC's GMP reconciliation processes is fast approaching. The national press is suggesting that inadequacies in GMP records will lead to incorrect state pensions being paid. So you need to be prepared to defend your data!

IX. EU/US agreement on "privacy shield"

On 2nd February, 2016, the European Commission ("EC") and the US agreed on a new framework for transatlantic data flows, the "EU-US Privacy Shield".

Agreement follows the CJEU decision in **Schrems** on 6th October, 2015 summarised in our [Client Alert](#) of the same date.

The EU Data Protection Directive (the "**Directive**") prohibits transfers of personal data to countries outside the EEA, unless an adequate level of protection of the data is provided. In 2000, the EC determined that the US Safe Harbour satisfied this requirement for transfers of personal data to US countries participating in the scheme (the "**Commission decision**").

The CJEU decided in **Schrems** that the Commission decision was invalid because the US authorities' wide-ranging powers of interference and surveillance and the absence of any administrative or judicial means of redress compromise individuals' fundamental rights to respect for private life and to effective judicial protections.

Subsequently the EU data protection authorities gave an ultimatum to politicians to resolve the situation by 31st January, 2016, failing which they would take co-ordinated legal action against non-compliant data controllers.

The EU-US Privacy Shield is expected to come into force in 3 months. According to an EC press release published on 2nd February, 2016, the new arrangement will provide stronger obligations on US companies to protect the personal data of Europeans, and stronger monitoring and enforcement by the US Department of Commerce and Federal Trade Commission, including

through increased co-operation with EU data protection authorities.

The new arrangement includes commitments by the US that possibilities under US law for public authorities to access personal data transferred under the new arrangement will be subject to clear conditions, limitation and oversight, preventing generalised access.

Europeans will have the possibility to raise any inquiry or complaint in this context with a dedicated new "Ombudsperson".

Comment: As yet, there is no guidance on what data controllers that were relying on the US Safe Harbour need to do to ensure they come under the umbrella of the Privacy Shield. The EU data protection authorities have confirmed that, for now, existing mechanisms such as binding corporate rules or EU standard model clauses can continue to be used for transfers of personal data to the US.

A client alert on the Privacy Shield is on our [website](#).

X. DWP response to consultation on banning member-borne commission

On 26th January, 2016, the DWP published its response to its 28th October, 2015 consultation on introducing a ban on member-borne commission payments in DC qualifying schemes (i.e. schemes used for automatic enrolment).

Commission payments typically relate to advice or services that have been agreed between a pension provider and an adviser; the provider pays the adviser and recoups the cost through member-borne charges.

The October, 2015 consultation paper explored whether the duty to ensure compliance with the ban should be imposed on trustees or service providers, noting the difficulty in making trustees responsible (in that they are one step removed from the negotiations and agreements in relation to commission payments between “service providers” and advisers).

The consultation response confirms that the duty will be placed on service providers not trustees. But trustees will be required to tell their service provider whether the scheme is being used as a qualifying scheme for auto-enrolment purposes.

By “service provider” is meant pension providers, bundled providers and third party administrators, but not asset managers. The ban will extend to “integrated service providers” i.e. those offering administration and/or investment services as well as advisory services.

Members will be able to opt in to advice and services, provided certain conditions are complied with. The ban will protect both active and deferred members.

The ban will be introduced via a staged approach as follows:

- from 6th April, 2016 duties on service providers and trustees will come into force in respect of **new** commission arrangements, and
- the DWP intends to consult later in 2016 on regulations in respect of **existing** commission arrangements.

The DWP consultation response is on the [gov.uk website](#).

XI. PPF updates its Guidance for restructuring and insolvency professionals

On 20th January, 2016, the PPF published “refreshed” general guidance for restructuring and insolvency professionals. The guidance was last updated in April, 2009 ([Pensions Bulletin 09/09](#)).

In order to ensure employers do not “dump” schemes in the PPF, the PPF works closely with the Pensions Regulator to ensure that any scheme entering the PPF is the subject of an actual or inevitable employer solvency.

The guide sets out the criteria that should be incorporated in any proposals made in respect of an insolvent employer. It notes that the PPF is not obliged to consider a restructuring proposal, and to do so, the criteria must be met.

The guide also provides information on the roles and responsibilities of insolvency practitioners throughout the PPF assessment process.

The “refreshed” guidance is on the [PPF website](#).

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XII. Pension Wise guidance “map”

We have updated our Pension Wise guidance map ([Pensions Bulletin 15/08](#)) to reflect changes made to the Pension Wise website as at 22nd January, 2016.

The “map” provides an “at a glance” summary of the contents of the various online guidance topics covered on the Pension Wise website and may be useful for schemes deciding how to comply with their “signposting” duties and how to cover particular topics in member communications.

Please email [Lynsey Richards](#) if you would like a copy.

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If you would like to find out more about our Pensions and Employment Group or require advice on a pensions, employment or employee benefits matters, please contact [Jonathan Fenn](mailto:jonathan.fenn@slaughterandmay.com) jonathan.fenn@slaughterandmay.com or your usual Slaughter and May adviser.

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