ALLEN & OVERY

Joint DB and DC trustee agenda update: current legal issues

For May 2018 meetings

Welcome to our monthly update on current legal issues for trustees of DB and hybrid pension schemes, designed to help you stay up-to-date with key developments between trustee meetings, and to support the legal update item on your next trustee agenda. We also have a separate DC-only briefing.

GDPR – new guidance: processing on the basis of legitimate interests NEW!

Under the General Data Protection Regulation (coming into force on 25 May 2018) trustees will have to establish which of six grounds can be relied on to process personal data. The Information Commissioner's Office (ICO) has published new guidance about relying on the 'legitimate interests' ground, detailing a three-part test to be met. Trustees seeking to rely on the ground must assess: what legitimate interest underlies each type of processing, whether the processing is necessary for that purpose; and whether the interest is overridden by the individual's interests, rights or freedoms. The ICO expects this assessment and its outcome to be recorded with an audit trail for the decisions made. Read more

ACTION: Where 'legitimate interests' is being relied on as a lawful basis for processing data ensure the appropriate assessment is undertaken and recorded.

TPR's annual funding statement NEW!

In its 2018 funding statement TPR focuses on appropriate trustee knowledge, skills and understanding and fair treatment for pension schemes, expecting employer affordability to be considered in the context of covenant leakage (e.g. dividends). The statement also expresses caution about assuming increasing transfer activity in valuation processes in case the expectation does not materialise and warns against trustees accepting inappropriate valuations and funding plans due to an imminent or lapsed valuation deadline.

The statement is relevant for all DB schemes and sponsors, particularly for those with an effective valuation date between 22 September 2017 and 21 September 2018 or where funding and risk strategies are under review due to wider scheme changes. TPR warns that it will intervene where trustees fail to meet its expectations. Read more

ACTION: Review the statement and ensure your valuation and funding strategies meet TPR's expectations.

TPR governance expectations UPDATED!

The Pensions Regulator (TPR) has recently published guidance in three key areas. The latest instalments of TPR's '21st Century Trusteeship Campaign' look at the trustee skills and experience necessary to run a scheme well and the selection and monitoring of advisers and service providers. The latter focuses on due diligence on appointment, on-going performance monitoring and oversight of delegated tasks and having a comprehensive business continuity plan.

TPR has also published guidance on building cyber resilience – the ability to assess and minimise risk of a breach and recover from a breach. This involves not only having controls, training and monitoring in place for the scheme but also ensuring that third party suppliers have sufficient controls in place. Read more

ACTION: Review the guidance and consider whether your scheme meets the Regulator's expectations in these areas.

Disclosure of DC costs and charges

New regulations require DC schemes to publish additional costs and charges information in the Chair's statement (applicable to the Chair's statement for the first scheme year ending on or after 6 April 2018) in respect of each default arrangement and each alternative fund option available and in which member assets are invested. The information must include an illustration of the compounding effect of costs and charges on members' pension savings.

This same information must also be published on the internet and members who receive an annual benefit statement must be given the web address. Read more

ACTION: Ensure that any processes required to enable this disclosure are put in place. Liaise with asset managers to gather cost information and update processes as required for the disclosure requirements.

Bulk transfers of DC rights simplified

New regulations simplify bulk transfers of 'pure' DC rights (i.e. no guarantees or promises) without member consent. Certain restrictions have been removed, such as the requirement to obtain an actuarial certificate. Instead, the decision maker may need to consider the advice of an 'appropriate adviser' who is 'independent' from the receiving scheme. If the default fund charge cap applies to transferring members, it must continue to apply to them in the receiving scheme. Statutory guidance is expected to be published shortly. Read more

ACTION: If a bulk transfer of 'pure' DC rights was previously considered but was not viable at the time, consider reassessing the position.

Bulk transfers of contracted out rights without member consent

New regulations allow the bulk transfer of contracted out rights, without member consent, to schemes that have never been contracted out. The transfer cannot adversely affect members' rights and the new scheme must provide the same protections. Read more

ACTION: If a bulk transfer of contracted out rights to a scheme that had never been contracted out was previously considered but unavailable, consider reassessing the position.

Employer debt: multi-employer schemes

A new way of dealing with statutory employer debt in multi-employer DB schemes, a 'deferred debt arrangement', allows employers to defer the requirement to pay the debt on ceasing to employ an active member, subject to trustee consent and meeting certain conditions. This arrangement is available to employers even if they have already used one of the other arrangements available for managing employer debt. Read more

ACTION: Employers considering how to deal with their employer debt obligations may wish to review whether this new arrangement is a helpful option.

Watch this space

- The government's White Paper on DB pensions reform proposes changes to trustee governance, new intervention and penalty powers for the Regulator and a new duty for companies to make a statement, before a sale or takeover of a DB scheme employer, that any detrimental impact to the scheme has been considered and mitigated. The intention is to phase in the proposed changes, beginning with those which do not require legislative change. Read more
- New standards for professional trustees are expected to be introduced shortly. These could particularly affect trustees who fall within the Regulator's professional trustee description without being part of a wider professional trustee organisation. Read more
- The government is proposing a number of changes to help combat pension scams, including changes to statutory transfer rights, banning cold-calling and requiring members to receive (or opt-out of receiving) guidance by a new body. Separately, TPAS has recently published a guide for members on how to spot and stop pension scams, which may be a useful resource for members. Read more

Valuing benefits for the advice requirement

When assessing if members with DB (safeguarded) or 'safeguarded flexible benefits' (such as benefits with a guaranteed annuity rate), who seek to transfer, convert or access their benefits flexibly, are required to take independent advice, schemes must now disregard any increase resulting from a 'higher than best estimate' calculation of the transfer value. Read more

Trustees of schemes offering safeguarded-flexible benefits must also provide a warning highlighting the guarantee and its value. The government has published guidance on the new duties and best practice. Read more

ACTION: Liaise with your scheme's actuary and administrator to ensure appropriate processes are in place for valuing benefits for the advice requirement and (if relevant) providing risk warnings.

Need help with a pensions dispute? Visit allenovery.com/pensionsindispute for practical help with pensions problems, including our case tracker.

Need help managing DB pension risk? Visit allenovery.com/pensionrisk

Looking for resources on a range of DC-related issues? Visit allenovery.com/DCHQ

Contact us at pensions.team@allenovery.com for more information or to be added to our mailing list.