

# PENSIONS

## Welcome

Welcome to **Pensions**, our bimonthly update keeping you informed of developments in pensions law.

To find out more about how we can help you with your occupational pension scheme, please email [tim.illston@burges-salmon.com](mailto:tim.illston@burges-salmon.com) or call him on 0117 939 2284.

## HOT TOPICS SEMINAR

We look forward to seeing the many of you who have booked to come to our Hot Topics in Pensions Law seminar in Bristol (on 17 March) and London (on 24 March).

We have had over 100 acceptances but a few places are still available. For the seminar programme and how to book online, please go to [www.burges-salmon.com/seminars](http://www.burges-salmon.com/seminars).

We will be reviewing recent case law and will be talking about our experience with the Pensions Regulator over the last year and about auto-enrolment.

## REGULATORY

### PPF levy 2011/12

You can still influence your 2011/12 risk-based levy by arranging contingent assets (like parent company guarantees and charges over company assets) and special contributions to reduce your deficit.

Existing contingent assets need to be re-certified if they are to be recognised for 2011/12.

The deadlines for making arrangements and filing information about them with the PPF are:

- **5pm on 31 March 2011** – certifying new contingent assets and re-certifying existing ones,
- **5pm on 7 April 2011** – certifying deficit reduction contributions and
- **5pm on 30 June 2011** – final certification of block transfers made before 1 April 2011.

As in the past, the deadlines for sending in other information (e.g. to improve D&B failure scores) were a year ago.



Depending on the type of contingent asset you use, the effect is either to improve the scheme's funding level for PPF purposes or to substitute the failure score of, say, a parent company for that of the scheme's sponsor.

You should act now if you are interested in arranging any form of contingent asset: there is a significant lead time for all of them. The PPF is strict about its deadlines.

*continued on page 2*

## Burges Salmon among industry giants

With 26 lawyers our pensions team ranks as 5th largest by size in the country.

This is the finding of a new survey by leading journal *Pensions Week*.

With almost 500 pensions clients we rank as 4th largest by number of clients.

Partner Richard Knight, Head of Pensions, says:

*"I'm delighted Pensions Week's survey has recognised our team. We're proud that we offer clients the best legal services and, with our Bristol cost base, excellent value for money. We've seen very strong growth over the last few years and believe we're well placed to continue that trend."*

continued from page 1

*“The new levy is intended to be more stable and to lead to individual bills that more accurately reflect a particular scheme’s risk of needing PPF protection.”*

## PPF levy next year: 2012/13

The PPF has confirmed that it is going ahead with a revamped levy beginning in April 2012. It is still working on the details and will announce them in the spring.

Meanwhile it has given advance notice of these deadlines for filing information for levy year 2012/13:

- **5pm on 31 March 2011** (sic) – providing information for D&B failure scores. The PPF says it will use this information if it decides to give transitional protection when it introduces the new levy;
- **5pm on 31 March 2011** (sic) – updating Exchange (the Pensions Regulator’s electronic information system) with levy-related scheme information. But if the new levy is introduced as planned, the PPF *will not use* this to calculate individual levy bills. The information will, however, go into the setting of the levy scaling factor for the first three years of the new levy;
- **31 March 2012** – updating Exchange with levy-related scheme information. This is the information the PPF *will use* to calculate individual levy bills and
- **dates after 31 March 2012** that have yet to be specified – certifying deficit reduction contributions and block transfers.

Over the coming year you should monitor the scheme sponsor’s D&B failure score regularly because one of the proposals for the new levy is that this will be taken as an average of twelve monthly assessments rather than a snapshot on one date. It is not yet clear which twelve months will count at the outset but it is prudent to assume it will be the coming dozen.

The new levy is intended to be more stable and to lead to individual bills that more accurately reflect a particular scheme’s risk of needing PPF protection.

The main new ideas in the proposals are:

- the levy formula to be fixed for three years at a time, including the levy cap and scaling factor;
- underfunding and insolvency risk to be measured over a period rather than on a single date;
- more weight to be given to a scheme’s funding position and less to the sponsor’s risk of insolvency and
- investment risk to be recognised.

We wait to see how far the new levy will reflect the original proposals.

## LEGAL

### GMPs resurrected

Around Easter the DWP will begin a consultation on draft legislation that will require schemes to equalise GMPs accrued after May 1990. It disclosed this in a brief note to the Occupational Pension Schemes Joint Working Group (an industry body). The note said nothing about what the amending legislation might say.

For years it has been uncertain whether the *Barber* principle of sex equality requires schemes to iron out the sex differences in GMPs (and, if so, how they should go about it). In January 2010 the then government announced its view that, as a matter of law, schemes are obliged to do so. This was greeted with surprise but the DWP now says it has received further legal advice that confirms its view.

This is a difficult issue. There are important questions of principle for the government to consider at the outset, like how prescriptive the legislation should be. Prescription means certainty but also a straightjacket. Or would schemes prefer a broader, principles-based approach, allowing them to opt for pragmatic fairness rather than technical purity? Detailed and workable guidance on which schemes can rely will be needed alongside the amending legislation.



One thing is sure: the package of measures will take a long time to put together.

## Resolution resolved

Fewer trustees will need to pass a resolution to allow refunds to the employer if the Pensions Bill becomes law in its current form. Those who need to pass a resolution are offered a workable and flexible set of options, and plenty of time.

Concern that trustees needed to pass a resolution before 6 April 2011 to keep alive any existing power to refund surplus was allayed when the government said it would amend the legislation. The draft amendments now in the Bill mean that:

- schemes that are winding up need not pass a resolution and
- there will be no need for a resolution to preserve powers to make routine administrative payments to the employer.

If trustees pass a resolution before 6 April 2011 under the current legislation, they will be able to amend or

revoke it if they need to and pass a new one. Like the current legislation, the amended version will require trustees to give members three months' notice of their intention to pass a resolution.

The longstop date for passing a resolution will be 5 April 2016.

The underlying idea was a good one: to make sure that refund powers tied to the old (and now repealed) statutory concept of a surplus could survive. But the original legislation caught too wide a class of schemes and too many payments.

Unless they made a decision to go ahead under the current legislation by early January this year at the latest, trustees and employers should now wait until the Pensions Bill becomes law before they act.

## Box and cox



*"...APL is available to fathers who were eligible for statutory paternity leave. There is statutory pay, though not during any APL taken in what would have been the last three months of the mother's year of maternity leave."*

The mother of a child due on or after 3 April 2011 will be able to transfer some of the last six months of her maternity leave to the child's father so that she can return to work. The transferred leave is known as "additional paternity leave" (APL).

Briefly, APL is available to fathers who were eligible for statutory paternity leave. There is statutory pay, though not during any APL taken in what would have been the last three months of the mother's year of maternity leave.

APL is also available to the partners and civil partners of mothers and adopters.

Pension rights during APL follow the familiar pattern:

- for a member of a DB scheme who receives pay (statutory or contractual) while on leave, benefits

must accrue as if he was at work but his contributions must be based on the pay he actually receives;

- for a member of a DC scheme who receives pay (statutory or contractual) while on leave, the employer must continue to contribute as if he was at work but his own contributions must be based on the pay he actually receives;
- where APL is unpaid, there is, on a pragmatic view of the law, no requirement to provide pension accrual (DB) or contributions (DC).

## Agency workers



Agency workers acquire new rights from 1 October 2011 when the Agency Workers Regulations come into effect. But a right to be included in their hirer's pension scheme is not among them: there is a specific exemption for pensions.

This will change from 2012 when auto-enrolment will apply to agency workers. Depending on who pays the worker, the obligation to enrol an agency worker in a scheme can fall either to the hirer or the agency. Hirers and the agencies they use will need to have discussions about this.

## Sex back in court



In early March the European Court of Justice is expected to publish a decision that could restrict the use of sex-based actuarial factors by insurers.

If the court follows the advisory opinion in the *Test-Achats* case, it could decide that an exception under EU law that allows insurers to use sex-based factors is unlawful because it infringes the EU's fundamental principle of non-discrimination. Some UK law relies on

this exception. If it is withdrawn, there could be significant implications for the insurance industry and pension schemes. The advisory opinion recommends that the court's decision should not have retrospective effect and that there should be a transitional period of several years. The ECJ often follows the advisory opinion, but not always.

### News in brief

The contracted-out rebates for DB schemes are being reduced from April 2012. The combined employer and employee rebate will go down from 5.3% to 4.8%. The new rate splits 3.4% (previously 3.7%) for the employer and 1.4% (1.6%) for the

employee. The NAPF estimates this will cost schemes £500m a year. Contracting-out through protected rights is due to be abolished from April 2012.

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