

# PENSIONS

## LEGAL

### Be ready for B Day

**5 April 2011**

**This is a key deadline for nearly all occupational pension schemes. If you are a trustee or an employer, please read this article.**

A key five year period of grace that began on 6 April 2006 (A Day) expires on 5 April 2011. You should check that you have taken advantage of it as far as you need to.

Special concessions making it easier to amend schemes in line with the new tax rules that came in on A Day run out next April. If you miss out on them, you might not be able to amend your scheme in ways you would like to. Some amendments might be impossible and others might have to be restricted to future accrual. We are calling the expiry date "B Day".

The transitional concessions help with three changes.

■ **Keeping pre-A Day HMRC benefit limits in place** in schemes that want some or all of them to apply indefinitely. For now, the transitional measures keep the old limits in place. But they will fall away on B Day unless they are expressly re-incorporated into the scheme rules.

Many schemes we advise have dealt with this already by doing an amending "A Day deed". You should check where your scheme stands.

■ **Removing restrictions on scheme alteration powers that require HMRC approval.**

Before A Day, amending a scheme without HMRC (i.e. Inland Revenue) approval put its tax exemptions at risk. Some schemes incorporated this requirement as a restriction on their alteration power. But, since A Day, approval is neither required nor possible. This led to a concern that a restriction that could no longer be satisfied would render all future amendments invalid. There is also a question whether an alteration power can be used to amend itself.

Recent regulations allow schemes to remove this restriction before B Day. You should check whether your amendment power has the restriction.

■ **Preserving an existing power to refund surplus** to the employer. A refund might seem a remote possibility today, but times can change. This is not about making a refund. The question is only whether a power to pay a refund in future should continue to exist.

To help schemes that might otherwise have lost their power to refund surplus, the Pensions Act 2004 included a transitional power of alteration. But the way it was drafted means that the trustees of nearly all schemes with power to make a refund now need to pass a carefully worded resolution if the power is to remain alive. This includes schemes that are winding up.

Since the issue is returning surplus, it is for the employer to take the initiative and make the case to the trustees for passing a resolution. The employer will often be able to argue that a resolution would benefit all parties by making points like these:

- a resolution does not mean there will be a refund, just that the existing possibility of one remains open;
- tough statutory conditions must be met before any surplus can be refunded (e.g. in an ongoing scheme, trustee consent is required and the scheme must be funded to buy-out level);
- without the possibility of a refund, the employer might take a tougher line in funding negotiations for fear of trapped surplus and might be less inclined to keep the scheme going in future; and
- the employer's ability to benefit from surplus can have an impact on its accounts.

The trustees should take an independent view whether to agree to the employer's proposal. They must be satisfied that a resolution would be in members' interests.

You should allow plenty of time. Trustees must give members 3 months' notice of their intention pass a resolution, so the employer should start the exercise well before the end of 2010.

The intention was that schemes with onerous conditions on their refund powers drawn from the pre-A Day legislation (e.g. HMRC's old definition of surplus) should be able to shed them now the legislation has been repealed. But the legislation has been drafted to catch more schemes than strictly necessary.

It is possible that B Day could be put back or that the requirement for a resolution over surplus could be restricted to a more limited category of schemes. But there is no sign of any such changes at the moment so you should plan around the legislation as it stands.

## 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.

## Green issue

In future we intend to distribute our publications by email to reduce our environmental impact. This also has the advantage of eliminating the delay in printing and posting.

For some of you this will be the first time that you have received one of our publications by email. If it is, we hope you agree with our policy.

If you have received this newsletter by post, please let us have an email address for future mailings.

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## To the rescue

In *ITS v Knell* the court rescued some rule changes that "lacked clarity of thought" (as the judge put it) by reading them as part of a wider set of alterations.

To equalise benefits for men and women, NRD was redefined as age 65 except "in relation to a female member before 1 July 1992", for whom it remained age 60. If this kept NRD at 60 for women who joined before July 1992, it failed to equalise retirement ages. But if it could be read to say that NRD remained age 60 "in relation to *the Pensionable Service* of a female member before 1 July 1992", there would be equality (with corresponding treatment for men's pensionable service in the Barber window).

The court was willing to read in the extra words. This was because of the standard rule of construction that if a provision is unclear, you can look at the context for clarification. The redefinition of NRD was part of a substantial set of amendments dealing with equalisation. Even though the other amendments were inconsistent about the special treatment for women in relation to the pre-July 1992 period, the court found that, taken as a whole, the amendments were more coherent if the extra words were read in. Ideally, documents should be drafted clearly to mean what they say. But context can sometimes come to the rescue.

## POLICY

### Coalition programme

The pensions headlines in the new government's programme are to:

- phase out the default retirement age of 65 (though no timetable has been given);
- simplify the regulation of pension schemes;
- look at allowing people early access to part of their pension fund;
- support auto enrolment (though a review is now under way into whether the system currently envisaged under NEST achieves the desired objective, particularly in relation to people on lower pay);
- restore the earnings link for the basic state pension from April 2011, with a guarantee that pensions are raised by the highest of earnings, prices and 2.5%;
- review the date at which state pension age starts to rise

to 66. At the earliest, it will be 2016 for men and 2020 for women. Under current law, the change to 66 is scheduled for 2024-26; and

- end compulsory annuitisation at age 75.

As it has been outlined in the Queen's Speech, the Pensions and Savings Bill will focus on state pension arrangements rather than occupational provision.

One of the main points not covered in the coalition agreement is tax relief on contributions. Before the election the Liberal Democrats proposed limiting it to the basic rate. The Conservatives planned to preserve higher rate relief but did not promise to reverse the restrictions already put in train by the Labour government. The budget on 22 June may clarify the position.

## REGULATORY

### TPR and DC

In the next couple of years the Pensions Regulator is looking to reduce members' risks in work-based defined contribution schemes. According to its Corporate Plan for 2010-13, TPR will focus on administration (including record keeping), the

choice and structure of default investment options, member communication, and practice around the drawdown of benefits, including the open market option. New regulatory initiatives will be phased in from 2011 to 2013.

### News in brief

If you receive our pensions publications by email, you will have had our briefings on:

- the Equality Act 2010 and what it means for pension schemes;
- the s.75 employer debt and the new exceptions for group restructuring;
- the Cemex case that raises new questions about when the s75 employer debt crystallises in multi-employer schemes; and
- an important Court of Appeal decision that means more schemes that have a mixture between DB and DC benefits will escape the DB funding requirements.

Go to: [http://www.burges-salmon.com/Practices/pensions\\_and\\_incentives/Publications/default.aspx](http://www.burges-salmon.com/Practices/pensions_and_incentives/Publications/default.aspx)

As we go to press, TPR has issued updated guidance on record keeping. It is substantially in line with the consultation draft.

Go to: <http://www.thepensionsregulator.gov.uk/guidance/guidance-record-keeping.aspx>. TPR has also issued new guidance on winding up.

The Department for Work and Pensions has published an introductory note that describes various forms of risk sharing. It is intended for employers but will also be useful to trustees faced with proposals for more risk sharing. It outlines some basic concepts and has case studies: <http://www.dwp.gov.uk/docs/risk-sharing-db-pension-schemes.pdf>.

## In the office



We are delighted to welcome **Claire Rankin** to the pensions team. An acknowledged leader in the pensions field, Claire joins us as a Senior Associate after practising with leading regional firms.

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