Employment, incentives and pensions
February 2015

Work, rest and pay

As you have come to expect in the field of employment, incentives and pensions, the last few months have been extremely busy and the latest edition of "Work, rest and pay" brings you up to date with the main developments.

In the employment arena, I would like to draw your attention to our article on the latest position on holiday pay. As always, directors' remuneration reporting is in the spotlight and we cover the clarification provided by the GC100 and Investor Group in this area. With the introduction of the new pensions flexibilities just around the corner in April 2015, we cover responses to consultations, as well as further consultations issued. We also provide an automatic enrolment round-up and look at the latest proposals on the automatic transfer of pension pots.

To discuss any of the issues raised in this bulletin in more detail, please get in touch with your usual Ashurst contact or anyone whose details are listed on the final page.

Caroline Carter
Partner
Head of Employment, Europe

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Looking ahead: timetable for key areas of employment law reform for 2015

As campaigning for the May General Election continues to gain impetus, 2015 looks set to become an important year for determining the future and direction of employment law reform. Each of the main political parties have set out their proposals for change with, for example, reform of zero hours contracts featuring prominently in all three manifestos. Pending May's outcome, the table below outlines the current timetable of reform anticipated for 2015.

Timetable for key areas of employment law reform	
Early 2015	**Bonus clawback.** Rules on bonus clawback in relation to variable remuneration awarded by PRA-authorised firms came into force on 1 January 2015. Please click here for our briefing. **Ban of "overseas only" recruitment by employment agencies.** On 5 January 2015, legislation prohibiting "overseas only" recruitment by employment agencies came into force. According to the legislation, employment agencies and employment businesses are prohibited from advertising vacancies in another EEA country without also advertising in Great Britain. **Small Business, Enterprise and Employment Bill.** On 7 January 2015, the House of Lords' Committee stage of the Small Business, Enterprise and Employment Bill 2014–15 (the Bill) began. The Bill covers a number of areas, including restrictions on zero hours contracts (see below); new financial penalties for unpaid employment tribunal awards; a power to restrict the number of times an employment tribunal hearing can be postponed or adjourned; an extension to the financial penalty for failure to pay the national minimum wage; new reporting requirements for whistle-blowing "prescribed persons"; and a power to require repayment of public sector exit payments in certain circumstances. **Zero hours contracts.** Zero hours contracts have attracted substantial press comment. The Bill will insert a definition of zero hours contracts into the Employment Rights Act 1996 and make exclusivity clauses in zero hours contracts unenforceable. It will also give the Government wide-ranging powers to make further provisions in relation to zero hours contracts in the future. For more details on such contracts, please click here for our feature article from the November 2013 edition of Ashurst's World@Work "*Zero tolerance: are attitudes to alternative working patterns changing in the workplace?*" **Unlawful deductions from wages claims.** The new Deduction from Wages (Limitation) Regulations 2014 (the Regulations) are now in force, introducing a two-year limitation period on many unlawful deductions from wages claims presented on or after 1 July 2015 and providing that the Working Time Regulations 1998 do not confer a contractual right to paid leave (for more information on the Regulations, please see our report on holiday pay below).
April 2015 	**Shared parental leave.** A new shared parental leave scheme will apply to parents of babies due on or after 5 April 2015, or children placed for adoption on or after that date. Eligible employees will be entitled to a maximum of 52 weeks' leave and 39 weeks' statutory pay upon the birth or adoption of a child, which can be shared between the parents. Please click here for our briefing on the new regime. Employers need to review their maternity, paternity and adoption policies to bring them in line with the new legislation. In particular, they will need to consider what approach they want to take in relation to paternity pay, and whether this is to match any enhanced maternity pay offered. There has been recent case law in this area (*Shuter -v- Ford Motor Company Ltd* – click here for our report of this case in our last edition) and employers should take advice on potential risks and possible options.

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	We can provide you with training on the changes and the issues they raise. Please speak to your usual Ashurst contact or any of the contacts listed at the end of this newsletter.
	**Adoption leave changes.** On 5 April 2015, the following changes are expected to come into force: removal of the requirement for 26 weeks' service before employees become entitled to adoption leave; introduction of a new right for both single and joint adopters to attend adoption appointments, together with protection against suffering a detriment or being dismissed in relation to exercising that right; prevention of employees taking paternity leave if they have exercised a right to take paid time off to attend an adoption appointment in respect of that child; extension of the current rights to adoption leave to individuals fostering a child under the "Fostering for Adoption" scheme run by local authorities; and inclusion of couples who are adopting a child from outside the UK to the right to shared parental leave and pay. **Extension of unpaid parental leave.** On 5 April 2015, the existing unpaid parental leave regime will be extended to parents of children aged between five and 18. **False self-employment.** Amended record-keeping, returns and penalties provisions under the Finance Bill 2014 intended to combat false self-employment through service companies will apply from 6 April 2015 (with the first return due by 5 August 2015).
May 2015	**New Fit for Work Service.** A new Fit for Work Service will provide occupational health assessments and assist employees to return to work who have been absent for four weeks or more. It is expected to be fully up and running by May 2015. **General Election, 7 May 2015**
July 2015	**Two-year cap on many unlawful deductions from wages claims will apply to claims lodged on or after 1 July 2015** (see "Unlawful deductions from wages claims" above).
Autumn	**Caste discrimination.** The current definition of race in the Equality Act 2010 refers only to colour, nationality, and ethnic or national origins. Amendments to the Equality Act 2010, made by the Enterprise and Regulatory Reform Act, provide that caste must be covered as an aspect of race through further regulations. A draft order to outlaw caste discrimination is expected in Autumn 2015. **Introduction of a new tax-free childcare scheme.** Consultation on the proposed scheme (which will allow working families to reclaim 20 per cent of childcare costs with claims capped at £2,000 per child) closed in October 2013. The new scheme is currently due to be introduced in Autumn 2015 and will replace the existing employer-supported childcare (ESC) scheme.

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Holiday pay: latest developments

In November 2014, the Employment Appeal Tribunal (EAT) ruled in the high-profile joined cases *Bear Scotland Ltd & Others -v- Mr David Fulton and Others*; *Hertel UK Ltd -v- Mr K Woods and Others*; *Amec Group Ltd -v- Mr Law and Others* (*Fulton, Woods and Law*) concerning holiday pay and overtime. To date, the cases have not been appealed. Please see our detailed briefing here for more information.

Following on from these rulings, on 8 January 2015, the Deduction from Wages (Limitation) Regulations 2014 came into force. The Regulations are designed to limit the impact on businesses of the EAT's decision. However, it is worth noting that while they have been discussed with the Government taskforce set up to consider how to limit the impact of the decision on employers, they are not a direct result of the taskforce's work, which is still continuing.

The Regulations:

- introduce a two-year limitation period on any unlawful deductions from wages claims, including those for holiday pay, presented on or after 1 July 2015.
    - This cap, therefore, applies not only to claims for holiday pay, but extends to "wages" (as that term is defined in the Employment Rights Act 1996). This includes commission, bonuses, fees, holiday pay and other emoluments, whether payable under a worker's contract of employment or otherwise. It does not affect claims for deductions of other types of remuneration, such as statutory sick pay, statutory maternity pay (and other similar family leave payments), guarantee payments or protective awards.
    - As above, the new limitation period will apply to claims presented on or after 1 July 2015. This means that there is in effect a six-month transitional period where employees can still put in claims not subject to the cap; and
- provide that the Working Time Regulations 1998 do not confer a contractual right to paid leave. This is intended to ensure that, in most cases, workers will not be able to avoid the limitations on unlawful deductions from wages claims in the Tribunal by bringing a breach of contract claim in the civil courts. This amendment took effect on 8 January 2015 when the Regulations came into force. There have previously been questions over whether claims for holiday pay under the Working Time Regulations 1998 can be brought in the civil courts. The amendment aims to provide clarity on this issue and ensure that claims for underpayment of statutory holiday pay may only be brought as statutory claims, either under the Working Time Regulations 1998 themselves, or by way of a claim for unlawful deductions from wages.

Employers should review their holiday pay practices and their contracts of employment in light of these developments, to ensure that they are complying with their obligations, as well as not inadvertently creating unintended contractual rights.

Employment case law round-up

Collective redundancies

How should employers interpret the words "at one establishment" in the UK collective redundancy legislation?

In our March 2014 edition of "Work, rest and pay" (click here) we reported that, in the case of *USDAW and others -v- WW Realisation 1 Ltd (in Liquidation) and another*, the Court of Appeal had referred the issues relating to the interpretation of "at one establishment", for the purposes of collective redundancies, to the ECJ. The EAT had previously held that the words "at one establishment" should be disregarded from the UK legislation on the basis that

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they were incompatible with EU law, meaning that the obligation to collectively consult would be triggered where employers were making at least 20 dismissals over a period of 90 days, regardless of where those dismissals were taking place.

The Attorney General has given his opinion on the issues, stating that "establishment", under EU law, means the unit to which the workers made redundant are assigned to carry out their duties. The Attorney General found that it would be contrary to the intention of the EU legislation to construe "establishment" as referring to an employer's entire undertaking. He placed importance on the "local employment unit", but left the interpretation of what that would mean in practice up to the courts of Member States.

We await the ECJ decision. However, if it follows the more restrictive interpretation of "establishment" put forward by the Attorney General, this will be very good news for employers.

Discrimination and obesity

In our last edition of "Work, rest and pay", we reported on the Advocate General's (AG) opinion in *FAO acting on behalf of Karsten Kaltoft -v- Kommuneres Landsforening acting on behalf of the Municipality of Billund*. Please click here for more details. The European Court of Justice (ECJ) has now delivered its judgment. Agreeing with the AG, the ECJ has ruled that there is no general principle of EU law prohibiting discrimination on the grounds of obesity in its own right. However, obesity may amount to a disability if it hinders a person's full and effective participation in professional life on an equal basis with other workers. The does not alter the UK position: EAT case law has previously taken a similar view.

Enforcing restrictive covenants

According to recent case law, employers should be careful about trying to enforce restrictive covenants against former employees where there has been no specific consideration. Where no real monetary or other specific benefit had been provided to the employee, the High Court in this case refused to enforce the covenant. Continued employment was held not to be sufficient (*Re-use Collections Limited -v- Sendall & May Glass*).

Consideration

Contract law is based on the principle that a promisee cannot enforce a promise unless he has given or promised something (i.e. "consideration") in exchange for it.

Notice periods: no work, no pay?

In an important case, the Court of Appeal (CA) has looked at "*the interesting and difficult issue of whether, when an employee leaves his employment without giving proper notice stating that he will never return, the employer can keep the contract of employment alive, so as to be able to enforce the employee's obligation not to work for anyone else, while simultaneously refusing to pay the employee any wages on the basis that the employee is no longer ready and willing to work for the employer*" (Mr Salter QC in the High Court).

In this case, the CA upheld an injunction to keep an employee's contract alive, so as to:

- bind him to his employer for six months of his notice period without pay; and
- prevent him from working for a competitor for an additional four months without pay.

In ruling on this question, the CA examined the principle that:

- the courts will not generally grant an injunction for specific performance of the employment contract where the effect is to compel the employee to continue to work for the employer; and
- in the same way, the courts will not generally grant an injunction to enforce a prohibition on an employee from working for anyone else if that will produce the same result indirectly. This is on the basis that if the employee cannot work for anyone else, he will be compelled to continue to work for the employer (i.e. he will be reduced to "idleness and starvation").

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A full analysis of this case is outside the scope of this briefing. However, in essence, the CA held that it should not be assumed that not paying the employee will mean that he is compelled to work. Whether that is the case will depend on the facts of the particular case. On the evidence in this case, in light of:

- the contractual start date the employee had agreed with the new employer;
- the fact he had agreed to six-month post-termination restraints (when there was no question of being paid); and
- the fact he had not submitted evidence that his skills would atrophy while not working,

the employee had not made out that he would be compelled to work if he was not paid.

In practice, this is a useful case for employers. Tactically, when appropriate, employers may now have another option open to them where the employee resigns with immediate effect, refusing to work their notice (*Sunrise Brokers LLP -v- Rodgers*).

More on holidays: two questions to consider

In a recent case (*The Sash Window Workshop Ltd and another -v- King*), the EAT considered these two questions:

- **Can workers carry forward holiday to the next leave year?** The usual rule is that holiday entitlement expires at the end of the leave year. Where a worker has not been able to take holiday due to sickness, case law (*NHS Leeds -v- Larner*) has stated that workers will be able to carry holiday over to the next leave year. The EAT suggested that this exception could extend beyond sickness absences and that workers could be entitled to carry over holiday to the next leave year where they are unable to take their holiday for reasons beyond their control. However, in order for the employee to have a meaningful remedy, it seems that the employee would need to have not been at work at the appropriate time; otherwise receiving holiday pay for the same period would amount to double recovery.
- **Can a worker bring an unlawful deduction from wages claim if they are not allowed to exercise their rights to take holiday?** No, said the EAT. Where the complaint is that a worker was not allowed to exercise their rights to take holiday, then the remedy is damages for the refusal to allow a right to be exercised and the worker cannot bring an unlawful deduction from wages claim.

Managing sickness absence: employers beware

Managing ill-health continues to be one of the trickiest and most expensive issues for employers to manage. In a helpful judgment for employers (*Doran -v- DWP*), the EAT has recently held that an employer's duty to make reasonable adjustments was not triggered where an ill employee had not given any indication that she would be able to return to work (even if adjustments were made). This follows a line of recent cases where – favourably for employers – the EAT has restrictively construed the employer's duty to make reasonable adjustments. However, employers should not be complacent.

- In this case, the employer did in fact make suggestions for adjustments to the employee, but the employee failed to engage with her employer about them. In practice, it would be very risky for an employer to simply assume it had no duty to suggest or make reasonable adjustments. The legislation is clear that the duty to make adjustments falls on the employer and there is no obligation on a disabled person to make suggestions of adjustments. This is supported by the Equality and Human Rights Commission Code.
- Although employees may not succeed in a claim for reasonable adjustments, they may be successful in bringing the new "discrimination arising from disability" claim under the Equality Act 2010. From its comments in recent case law, it appears that the EAT is trying to encourage claimants to use the new "discrimination arising from disability" claim and rely less on claims of failure to make reasonable adjustments. Previously, claimants had to rely on reasonable adjustments because employers had greater scope to demonstrate justification under the other heads of claim. However, showing justification under the new "discrimination arising from disability" claim is much harder for employers, as no comparator is required. Employers need to bear this in mind when managing ill-health issues.

The duty to make reasonable adjustments

An employer is under a duty to make reasonable adjustments where it applies a provision, criterion or practice that puts a disabled person at a substantial disadvantage in comparison with persons who are not disabled. A failure to comply with this duty amounts to discrimination.

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Redundancy and maternity leave: at what point in time is the duty to offer a suitable alternative vacancy triggered?

Where a woman is on maternity leave and a redundancy situation arises, the woman has a right to be offered a suitable alternative vacancy (Maternity and Parental Leave Regulations 1999). The EAT has held that the employer's duty to offer a vacancy arises when the employer becomes aware that the employee's role is redundant or potentially redundant: it would undermine the purpose of the legislation if the employer was free to wait until after a restructure had been completed before offering the vacancy.

This raises issues for employers, similar to the questions that arise in collective redundancy situations. For example, how certain does the redundancy/restructure need to be in order for the duty to be triggered? Does it need to be a firm proposal? In practice, it will be prudent for employers to consider that the duty arises as soon as they first notify the employee that her role may be at risk.

Liability for psychiatric injury

In a helpful case for employers (*Yapp -v- Foreign and Commonwealth Office*), the CA has confirmed:

- "*an employer is usually entitled to assume that the employee can withstand the normal pressures of the job unless he knows of some particular problem or vulnerability*" (the principle in the landmark case *Hatton -v- Sutherland*);
- this applies not just to the "*normal pressures of the job*" (such as excessive workload) but also to one-off acts of unfair treatment; and
- these are not absolute rules but guidance. Each case must turn on its own facts. An employer's conduct might be so devastating that it is foreseeable that even a person of ordinary robustness might develop a depressive illness as a result.

In this case, in the absence of any prior awareness of a particular susceptibility to stress or other relevant vulnerability, it was not reasonably foreseeable that depression would result from the suspension and summary withdrawal of the employee (the High Commissioner of Belize) from his post, pending investigation into allegations of sexual misconduct and bullying.

Make sure you label negotiations "subject to contract"

The High Court recently held that parties in a negotiation had reached a binding settlement through an exchange of emails. Although the case concerned an email exchange between the parties' representatives, the case is a useful reminder of the dangers of not labelling settlement offers and negotiations "subject to contract": if you want a settlement offer to be subject to contract, make sure you expressly say that (*Bieber and others -v- Teathers Limited*).

Corporate governance

GC100 and Investor Group clarifies its guidance on directors' remuneration reporting

In September 2013, the GC100 and Investor Group (the Group) published best practice guidance for quoted companies when preparing their directors' remuneration report under the new statutory regime which took effect from October 2013 (the Guidance).

Having reviewed how companies have dealt with the new regime over the 2014 AGM season, the Group felt that there was no need for a complete review of the Guidance but that there were a few issues which could helpfully be clarified in time for the 2015 AGM season. These were dealt with in a supplementary statement published in December 2014 (the 2014 Statement) which should be regarded as part of the Guidance. The main points to note are summarised in the table on the next page.

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Topic	Summary of 2014 Statement and comments
Malus and clawback provisions	As we reported in our last edition of "Work, rest and pay", available here, the revised 2014 UK Corporate Governance Code now states that listed companies "*should include*" malus and clawback provisions within their performance-related remuneration schemes for directors. If they choose not to do so, they must explain that decision to shareholders. Many quoted companies will have had a directors' remuneration policy approved in 2014 which does not include the possibility of malus and/or clawback. The 2014 Statement suggests that, if those companies now wish to include such provisions within their policy, they will need to obtain shareholders' approval, either in the short term by submitting a revised policy to a new shareholder vote, or in the long term by deferring the inclusion of malus and clawback provisions until the next scheduled policy renewal. It is our view, however, that in principle a company should be able to implement malus and clawback provisions without any new or additional shareholders' approval being required. This also avoids deferral which would, of course, mean companies having to explain to shareholders in the meantime why they have not complied with the UK Corporate Governance Code in this respect. Companies should, of course, discuss their proposed malus/clawback policy with their key shareholders to ensure they are fully informed and have an opportunity to discuss it.
Linking remuneration to company strategy	This remains an important area for investors who believe that companies should give this issue particular focus.
Discretion	To avoid companies having to give assurances after the annual report is published in order to narrow down the scope of discretions contained within the remuneration policy, companies are encouraged to read the section of the Guidance on discretion as a whole. Investors should be confident that a discretion will be used only if and as genuinely required and within an acceptable maximum.
Assurances	Any assurances given about the way the remuneration policy will be implemented should be published on the company's website. It should also be set out in the remuneration report in the following years of the policy's term as a disclosure regarding policy implementation in those years.
Publishing the approved policy in future years	It is not necessary to set out the full remuneration policy in every subsequent report, although sufficient information needs to be included to enable shareholders to assess implementation against the policy and at least the policy table should be included. The full policy should in any event be published on the company's website.
Performance targets and commercial sensitivity	Although the Group recognises that the *prospective* disclosure of performance targets and measures may cause difficulty, there should be *retrospective* disclosure once commercial sensitivity no longer applies.
Maximum remuneration payable	The remuneration policy must set out the maximum that may be paid for each component (in monetary terms or otherwise). The 2014 Statement clarifies that this maximum should be disclosed for each executive director on an individual basis.
Shareholding requirements	Where short- or long-term incentives are share settled, the company should disclose whether those shares are required to be retained after vesting as part of the director's shareholding requirement.
Clarity	Companies should continue to focus on clarity and conciseness, and listen to feedback from shareholders on how that could be achieved. Remuneration committees should also think about whether the report clearly explains the thinking and purpose behind the committee's decisions and choices.

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Are your directors and senior managers familiar with their obligations under the Model Code?

In January this year, the Financial Conduct Authority (FCA) fined Reckitt Benckiser Group Plc £539,800 for having inadequate systems and controls in place to monitor dealings in its own shares by persons discharging managerial responsibility (PDMRs). Please see here for our briefing which looks at the issues raised by the FCA and where the failings occurred.

One interesting point to note in the context of employee share plans is that the vast majority of share dealings by the PDMRs in this case related to the company's share plan and were dealt with through the share plan administrators, who had a list of those people who required clearance to deal. The administrators would notify the company secretary when a dealing took place (rather than the PDMRs doing it themselves) and the company secretary would then make the announcement to the market. One of the FCA's findings was that Reckitt Benckiser placed an over-reliance on the share plan administrator to notify the company when dealing had taken place. The warning for listed companies generally is that over-reliance on share plan administrators may lead PDMRs to fail to seek clearance for dealings which are unconnected to the share plan and which do not involve the plan administrators.

The FCA's findings in this case should concentrate the minds of listed company directors and senior executives on whether they fully understand their obligations under the Model Code and the Disclosure Rules, and also whether the company has appropriate systems in place. This is a topic on which we regularly offer bespoke training to clients. If you would be interested in receiving such training, please speak to your usual Ashurst contact or to anyone whose name is listed at the end of this bulletin.

Pensions

Freedom and choice in pensions

As reported in our October 2014 edition of "Work, rest and pay" (click here), transfers out of funded public sector and private defined benefit (DB) schemes will continue to be permitted. It is anticipated, however, that the introduction of the pension flexibilities from April of this year for people with defined contribution (DC) benefits may increase the interest from members of DB arrangements who wish to transfer from their DB to a DC pension scheme.

The Pensions Regulator (TPR) has issued a consultation paper, "DB to DC transfers and conversions", which is the first part of a communications package aimed at helping trustees to prepare for the introduction of the new pension flexibilities and manage transfer requests and their impact. The consultation closes on 17 March 2015.

The consultation document considers issues such as:

- the position of the trustee in processing the potentially increased number of transfer requests and supporting members to make a fully informed decision. Trustees will need to consider the impact of the number and size of transfer requests on scheme funding and investment policy of the scheme. Additionally, they should also conduct proper due diligence on the receiving scheme to ensure that it is a legitimate arrangement;
- where appropriate, trustees must check that the member has taken appropriate independent advice from a Financial Conduct Authority (FCA) authorised adviser on the merits of the transfer. The adviser will need to provide the member with a written confirmation which the member will be required to submit to the trustees so that they can check that appropriate independent advice has been obtained. The consultation paper sets out the statements which must be included in the confirmation; and
- member communications should be reviewed and updated to explain the impact of the new pension flexibilities.

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Minimum governance standards and charges

In our October 2014 edition of "Work, rest and pay", we reported on the DWP's Command Paper "Better workplace pensions: Putting savers' interests first" and draft regulations (click here). The Government has now issued its response to that consultation and laid before Parliament updated draft Occupational Pension Schemes (Charges and Governance) Regulations 2015.

Governance
The regulations introduce new governance requirements from 6 April 2015 for certain occupational pension schemes which provide money purchase benefits by broadly requiring the trustees to ensure that:

- the design of default arrangements are in members' interests and kept under regular review;
- core financial transactions are processed promptly and accurately;
- the value of charges and transaction costs borne by scheme members are assessed; and
- a Chair is appointed, where the scheme does not already have a Chair in place, who will be responsible for signing off an annual Chair's statement on how the minimum governance standards have been met. Where the period from the first annual statement at 6 April 2015 to the end of the pension scheme year is less than three months, the statement can be moved into the following year's statement.

There are additional governance requirements to strengthen the independent oversight of master trust arrangements.

Charges
In "qualifying schemes" for automatic enrolment purposes, charges will broadly be capped from April 2015 in the default arrangements at 0.75 per cent annually of funds under management, or an equivalent combination charge unless members have agreed a more expensive option. The charge cap covers all costs and charges relating to general scheme documentation and investment administration. From April 2016, Active Member Discounts will also be banned from "qualifying schemes".

"Today is an excellent day for pension savers. It is vital that workplace pension schemes are run in the interests of their members and that their hard-earned savings are not eaten away by excessive charges."
Minister for Pensions, Steve Webb

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Compliance
TPR has enforcement powers. The annual scheme return notice will incorporate three additional questions which will be used to identify the Chair of the trustees, gather information on the completion of the Chair's statement, and confirm compliance with the charges and quality measures.

Remedies proposed following the FCA's retirement income market study

Click here for our insurance briefing on the FCA's provisional findings and proposed remedies following its retirement income market study.

FCA's additional protections for consumers

In January 2015, the FCA wrote to Chief Executive Officers of pension providers to introduce additional protections for those accessing their defined contribution pension pots. The rules will be introduced on a temporary basis from April 2015 without consultation.

Providers will be required to ask consumers about key features of the circumstances relating to the decision they are making about their pension pot, which include issues such as health and lifestyle choices or marital status.

Firms will also have to give relevant risk warnings on, for example, the tax implications of decisions in response to answers from the consumer. They must then highlight the availability of the Government's new Pension Wise scheme or regulated advice.

Governance gap in contract-based pension schemes

In our October 2014 edition of "Work, rest and pay", we also reported on FCA Consultation Paper CP14/16: Proposed rules for independent governance committees (click here). The Consultation Paper (which we responded to) proposed that the providers of workplace personal pension schemes would need to establish independent governance committees (IGCs), and these will be introduced on a compulsory footing by establishing them through FCA rules. Essentially, the proposals are intended to mirror the requirements for occupational schemes referred to above. The FCA issued its feedback and response to the consultation in February 2015.

Amendments to the Conduct of Business Sourcebook (COBS)
The draft rules provided by the FCA (to be implemented by way of an update to COBS) are largely in expected form. In particular, the terms of reference and composition of IGCs are broadly unchanged from those proposed in the consultation paper (as summarised in the boxes below).

Composition of an IGC

- minimum of five members
- the majority of members should be "independent" of the relevant firm
- one of the independent members will be the Chair
- an IGC must have a majority of independent members present to be quorate

Terms of references for an IGC

- act solely in the interests of relevant policyholders
- assess the ongoing value for money of the firm's workplace personal pension schemes
- where it finds problems with value for money, to raise concerns (as it sees fit) with the firm's board
- escalate concerns to the FCA, alert relevant scheme members and employers
- when appropriate (and in consultation with the FCA), make its concerns public
- produce an annual report of its findings

(Source: Proposed amendment to the Conduct of Business Sourcebook (Rule 19.5.5))

Next steps
The FCA recently circulated a "Dear CEO" letter, inviting the Chairs of IGCs to a meeting on 30 March 2015 to discuss the requirements for IGCs. It is likely that more detailed discussions regarding the assessment of "value for money" will be discussed at the meeting.

The FCA intends to review the overall effectiveness of the new governance bodies in 2017. The review may be in the context of a broader FCA and DWP review of workplace pension reforms.

Automatic enrolment round-up

In December 2014, the DWP published "Technical Changes to Automatic Enrolment – a consultation on draft regulations", covering proposals to simplify the

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automatic enrolment process further. In particular, the areas under consideration are:

- the introduction of an alternative quality requirement for defined benefit (DB) schemes;
- streamlining the information requirements on employers; and
- in certain circumstances, creating exceptions to the employer duties.

Alternative quality requirement for DB schemes
Currently, to meet the minimum quality requirements, DB schemes must either be contracted out or satisfy the Test Scheme Standard (TSS) in relation to all relevant jobholders.

An alternative requirement is now proposed which will provide a simpler way of determining that a DB scheme meets the standards for automatic enrolment use than the existing TSS. The alternative test is based on the cost to the scheme of the future accrual of active members' benefits, and the prescribed level of this alternative test cannot be below the eight per cent total contribution required for a qualifying defined contribution scheme. It is intended that this alternative test will run parallel to the existing requirements in relation to scheme funding so that actuarial work required for scheme funding purposes can be relied upon for this test as well.

Information requirements for employers.
To streamline the current information requirements, it is proposed that the following minimum level of information should be given to employees:

- if they are being enrolled into a qualifying scheme and deductions taken, that they can opt out and how to do so, including knowing when the opt-out period is and confirming that any contributions will be refunded;

- if they meet the necessary requirements, that they can opt in or ask to join if they do not have qualifying earnings; and
- if enrolment is being postponed, that this is happening and that they will be enrolled on a deferred date, but that they can opt in or ask to join in the meantime.

By amending the detailed information requirements in the current regulations, the suggestion is that communications by an employer can be reduced to three pieces of information:

- one to all employees at staging date or individually when a new employee joins;
- one to all employees if the employer decides to postpone; and
- one to each employee when they are automatically enrolled, re-enrolled or enrolled following opting in or joining.

If appropriate, employers can combine these statements into one or two communications.

Exceptions to the employer duties

- **Jobholders leaving employment:** the draft regulations turn the duty to enrol into a power to enrol if someone is in a notice period or where a notice is given at any time up to six weeks after the duty has arisen. Effectively, the employer can choose whether or not to enrol the employee. The regulations do not distinguish between different reasons for notice being given and apply equally to resignation, dismissal or retirement.
- **Cancelling membership of a scheme before automatic enrolment:** some employers may enrol workers into a pension scheme when they start work. Presently, contractually joined employees who cancel their membership may still have to be automatically enrolled when they become eligible jobholders even if they have only just left the pension scheme. These draft regulations turn the enrolment duties into powers giving the employer the choice as to whether to enrol the employee. The regulations restrict the exception to individuals who left a qualifying scheme within 12 months before the automatic enrolment or re-enrolment date. The individual would be enrolled on the next re-enrolment date.
- **Individuals with tax-protected status:** for such individuals, it is proposed that the employer duty is turned into a power that the employer is able (but not required) to exercise when they have an employee who has a tax-protected status. The exception will apply to automatic enrolment and automatic re-enrolment. A wide exception is planned covering all current forms of tax protection.

  Employers can, however, enrol all eligible employees, regardless of whether or not those employees have tax-protected status, if they find it easier.

  The employer must have reasonable grounds to believe the relevant individual has tax-protected status. It will be for the employee to make the fact known to the employer.

- **Winding-up lump sums:** if an employer's scheme is wound up and a purported lump sum is paid by the scheme to an employee, any subsequent contributions to any registered pension scheme by the employer in the following 12 months in respect of that employee will make the lump sum an unauthorised payment with consequent tax charges.

  Broadly, the regulations turn the employer duties into a power, and the employer can choose whether or not to enrol such employees. The duty to re-enrol remains the same.

Automatic enrolment earnings thresholds review and revision 2015/16

In December 2014, the Government issued its response to the consultation on revision proposals for the automatic enrolment earnings trigger and the qualifying earnings band. It confirms the Government's final proposal to freeze the earnings trigger for 2015/16 at £10,000, breaking the link between the earnings trigger and tax relief. The qualifying earnings band lower limit and upper limit will be aligned with the National Insurance Lower and Upper Earnings Limits in 2015/16 of £5,824 and £42,385.

Can all section 75 debts now be assigned?

Click here for our client briefing on the recent High Court judgment in *Trustee of the Singer & Friedlander Ltd Pension and Assurance Scheme -v- Corbett*, which decided that a section 75 debt can be assigned.

Automatic transfers

The DWP has published a paper "Automatic Transfers – A Framework for Consolidating Pension Saving", setting out how the Government anticipates implementing and operating a system of automatically transferring pension pots.

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The Pensions Act 2014 establishes the legislative framework to allow pension pots to follow members as they change employment and in particular:

- the system will be facilitated by pension schemes, rather than by employers; and
- eligible pots below the pot size limit built up in the money purchase default arrangement of workplace schemes will be automatically transferred.

Implementing the automatic transferring of pension pots will be on a phased basis. *"Phase 1 will limit the number of schemes making automatic transfers and will see the use of a member opt-in process for pension transfers to take place. Phase 2 will move towards full rollout in terms of scheme coverage and utilise an opt-out member communication where transfer will take place in the absence of member choice."*

Source: DWP's paper on automatic transfers

The federated model

The preferred approach for implementation is a "federated model", which is a network of interoperable registers – every register in the network is able to communicate information with all the other registers in the network – holding information about pension pots eligible to be automatically transferred. Pension schemes will be able to use these registers to match information about eligible pots which can be automatically transferred. Clearly, the success of this system will come down to the IT infrastructure which is put in place.

Key stages

Broadly, the paper identifies four key stages in the operation of automatically transferring a pension pot:

1. Pot flagging

Schemes will be required to assess pots against the criteria in the box below when the member has stopped contributing to the scheme.

Pots will be eligible for transfer where:

- the first contributions were received on or after July 2012, to coincide with the beginning of automatic enrolment;
- the pot is worth £10,000 or less at the point of valuation. The Secretary of State will review the pot size limit every five years; or
- the pot is invested in a charge-capped default arrangement at the point of valuation.

2. Pot matching

Where a new member joins a workplace pension scheme, that scheme will search for any eligible pots associated with the member. A match will be made if a pot is found on a register that accords with certain key pieces of information, such as the member's date of birth.

3. Contacting the member

Where there is a positive match, the scheme will contact the member to let them know that matched pots have been identified.

4. Pot transfer

Once pots have been matched and the member has had the opportunity to confirm the transfer, the receiving scheme will contact the other scheme(s) to request the transfer of the pot.

The aim is for the initial phase of automatic pot-matching to be in place by Autumn 2016.

2014 Autumn Statement

Please see our newsflash **here** for a summary of the key announcements on pensions, employment and incentives issues in the 2014 Autumn Statement.

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Contacts

Caroline Carter
Partner and head of employment, incentives and pensions
T: +44 (0)20 7859 1553
E: caroline.carter@ashurst.com

Paul Randall
Partner
T: +44 (0)20 7859 1298
E: paul.randall@ashurst.com

Marcus Fink
Partner
T: +44 (0)20 7859 1943
E: marcus.fink@ashurst.com

Elizabeth Bayliss
Senior Professional Development Lawyer
T: +44 (0)20 7859 1816
E: elizabeth.bayliss@ashurst.com

Sarah-Jane Gemmell
Counsel, Professional Development
T: +44 (0)20 7859 1914
E: sarah-jane.gemmell@ashurst.com