Same sex marriages and occupational pension schemes

What do employers and trustees need to do?

We now know that the date from which same sex couples in England and Wales will be able to marry is 29 March 2014. It is time for trustees and employers to decide what to do.

Spouses of members in a same sex marriage will have the right to certain death benefits under occupational pension schemes. The rules of most schemes will need to be amended in order to ensure compliance. Trustees and employers will need to decide whether to pay just the minimum benefits required by law, or to treat same sex marriages in the same way as opposite sex marriages.

What are the options?

The Government has decided that pension schemes need not treat same sex marriages exactly the same as opposite sex marriages. Trustees and employers will need to decide whether they wish to pay just the minimum, or to treat same sex marriages in the same way as opposite sex marriages. They should discuss the potential cost implications with the scheme actuary. Many schemes chose to pay more than the minimum when civil partnerships were introduced: they agreed to treat civil partnerships in the same way as marriages. Those schemes should treat same sex marriages in the same way.

What are the minimum death benefits payable in respect of same sex marriages?

According to the legislation enacted by the Government, death benefits payable to a same sex marriage survivor can be based just on the pensionable service the member had completed from 5 December 2005 (rather than on his full pensionable service). The position is different for contracted-out schemes. Any contracted-out death benefits must be based on rights the member built up from 6 April 1988. These adjusted death benefits are the same as those that civil partners are currently entitled to. The adjustments only affect death benefits that are calculated according to length of pensionable service. Death benefits based just on a multiple of final salary are calculated in the same way as for opposite sex marriage survivors.

There is, however, a risk that the courts might take a sterner view of what constitutes the minimum. If so, this would lead to additional costs. We go into more detail below.

What do the employer and the trustees need to do to implement the changes?

The requirement to pay contracted-out death benefits to a same sex marriage survivor will not override scheme rules. The rules of most contracted-out schemes will, therefore, need to be amended. The requirement to pay other death benefits to a same sex survivor will override scheme rules – but only to the extent required to provide the minimum required by law.

Schemes that provide death benefits based only on multiples of salary (and not pensionable service) need do nothing, as the statutory override will ensure they comply and no restriction will apply to the amounts payable. Most pure defined contribution schemes will fall into this category. We recommend that all other schemes amend their rules so that it is clear what death benefits must be paid to same sex marriage survivors. The amendments should ideally be made before 29 March 2014, in time for the first same sex marriages. Trustees will need to tell members about the changes.
Uncertainty about the current requirements and possibility of change

There has been a good deal of controversy about the restriction on death benefits payable to the survivors of same sex marriages and civil partnerships. An employment tribunal decided in November 2012 that the restriction for civil partners breached European law prohibiting discrimination on the grounds of sexual orientation. Although the Employment Appeal Tribunal overthrew that decision in February 2014, the Government has undertaken to complete a review by 1 July 2014. As a result, the Government may decide that occupational pension schemes must treat same sex marriages on a par with opposite sex marriages. Schemes wishing to pay only the minimum benefits currently required by law should bear in mind that they may be forced to change their stance – at their own cost.