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pay, pensions and  
employment solutions

Local Government Pensions Committee  
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## LGPC Bulletin 65 – December 2009

This month's Bulletin contains a number of general items of information.

The consolidated LGPC guidance on transfers is still being worked on and will be issued as soon as possible.

Please contact Dave Friend with any comments you might have on the contents of this Bulletin or to suggest other items that you would wish to see included in future Bulletins.

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Local Government Employers is the business name of Employers Organisation for Local Government, a company limited by guarantee, registered in England and Wales, number 367661  
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## The Local Government Pension Scheme Regulations 2009 [SI 2009/3150]

The Local Government Pension Scheme (Miscellaneous) Regulations 2009 [SI 2009/3150] were laid before Parliament on 8 December 2009 and come into force on 31 December 2009. The Secretariat will be producing a Circular giving a detailed analysis of SI 2009/3150 but, in the meantime, a summary of the main amendments made by SI 2009/3150 is listed below.

Amendments to the LGPS (Early Termination of Employment) (Discretionary Compensation) (England and Wales) Regulations 2006 include:

- insertion of definitions for “the Benefit Regulations” and “the Administration Regulations”;
- amendment of the definitions of “employing authority” and “scheme member”;
- amendment to prevent the awarding of discretionary compensation for a member where the employing authority has granted the member augmented membership or additional pension (under regulations 12 or 13 respectively of the Benefits Regulations);
- amendment of the definition of a week’s pay for the purposes of calculating compensation under the 104 weeks provision so that it is now the same as used for the calculation of a redundancy payment (but ignoring the statutory weeks pay limit).

Amendments to the LGPS (Benefits, Membership and Contributions) Regulations 2007 include the following:

- in regulation 4, the addition of two further exclusions from the definition of pensionable pay. These are any payments by way of compensation for the purposes of achieving equal pay in relation to other employees; and the amount of any supplement paid by the Environment Agency in recognition of the difference in contribution rates between members of the Principle Civil Service Pension Scheme and the LGPS;
- regulation 10 (Final pay: reductions) is replaced with a new version which adds four further circumstances to those where regulation 10 will apply following a reduction or restriction in pay;
- the insertion of new regulations to permit
  - employing authorities to re-instate membership where a member who is subject to a reduction in accrued membership due to Enhanced Protection under the Finance Act 2004 subsequently loses or chooses not to have that Enhanced Protection applied (regulation 12A),
  - employing authorities to resolve, before 31 March 2012, to convert periods of Compensatory Added Years, annual compensation or annuities awarded under Discretionary Compensation Regulations into membership (regulations 12B and 13A),
  - members with nominated co-habiting partners to elect, before 1 April 2011, to pay additional survivor benefit contributions (ASBCs) so that pre 6 April 1988 membership can count in the calculation of the nominated co-habiting partner’s benefits (regulation 14A);
  - the payment of all or some of a children’s pension to someone other than the eligible child (regulation 27); and
- regulation 38 (pension increases under the Pensions (Increases) Acts) is replaced with an amended version.

Note: the amendments to the regulations 4, 10 and 27 of the Benefits Regulations have been backdated to 1 April 2008;

Amendments to the LGPS (Transitional Provisions) Regulations 2008 include:

- pre 6 April 1988 periods of membership are to be included on the calculation of a Civil Partner’s pension. This amendment is backdated to be effective from 1 April 2008 which will necessitate the recalculation of pensions awarded to civil partners on or after that date. It

also means that post leaving / post retirement civil partners will be placed in a more advantageous position than post leaving / post retirement spouses;

- for members who leave and defer their LGPS benefits after 31 March 2008, the death grant shall be their deferred pension multiplied by 5 (including that element of their deferred pension relating to any active membership before 1 April 2008);

Amendments to the LGPS (Administration) Regulations include:

- the insertion of new regulations 24A and 24B that relate to the payment of and discontinuance of ASBCs;
- the replacement of the current regulation 40 (employer's payment following resolution to increase membership or award additional pension) as a result of the insertion of new regulations 12B and 13A in the Benefits Regulations; and
- the insertion of new regulation 50A covering the payment of GMPs.

Note: the GAD guidance on ASBCs dated 23 December 2009 was e-mailed by CLG to Pension Managers on 23 December 2009 and is included in the December 2009 update of the Timeline Regulations website.

### **The LGPS (Management and Investment of Funds) Regulations 2009 [SI 2009/3093]**

The Local Government Pension Scheme (Management and Investment of Funds) Regulations 2009 [SI 2009/3093] were laid before Parliament on 1 December 2009 and come into force on 1 January 2010. The SI revokes the previous Management and Investment of Funds Regulations i.e. SI 1998/1831 and subsequent amendments.

The 2009 investment regulations require that from 1 April 2011, administering authorities must hold all monies for the purpose of the pension fund in a separate account with a deposit-taker. A deposit taker is defined as the Bank of England, the central bank of any other EEA state, the National Savings Bank, a person who has permission under Part 4 of the Financial Services and Markets Act 2000 to accept deposits or an EEA firm which can accept deposits by virtue of paragraphs 5(b), 12 and 15 of Schedule 3 to the Financial Services and Markets Act 2000.

CLG have issued a letter to accompany the new investment regulations. The letter highlights that administering authorities should refer to the guidance published by CIPFA on 11 December 2009 when showing in their Statement of Investment Principles the extent to which they have complied with guidance or, to the extent the authority does not so comply, the reasons for not complying. The CIPFA guidance is entitled "Investment Decision-Making and Disclosure in the Local Government Pension Scheme: A Guide to the Application of the Myners Principles". [The new CIPFA guidance](#) supersedes the previous CIPFA guidance on the application of the original Myners principles issued in 2002. The cost of the new guidance is £50.

This month's update of [the Timeline Regulations](#) includes the addition of the new investment regulations and the accompanying letter from CLG.

As a result of the promulgation of the new Management and Investment of Funds Regulations there appear to be some consequential changes required to the LGPS (Administration) Regulations 2008 i.e.

- regulations 34(1)(i) and 35(2)(b)(ii) of the Administration Regulations should be amended to now refer to regulation 12 of the Local Government Pension Scheme (Management and Investment of Funds) Regulations 2009, and
- regulation 42(2)(b) of the Administration Regulations should be amended to now refer to regulation 4(5) of the Local Government Pension Scheme (Management and Investment of Funds) Regulations 2009.

Furthermore, it might have been appropriate for regulation 4(4) of the new Management and Investment of Funds Regulations to also refer to interest payable under regulation 16 of those Regulations.

### **LGPS 2008 – Admitted body status provisions guidance**

CLG have published guidance on “Admitted body status provisions in the Local Government Pension Scheme when services are transferred from a local authority or other scheme employer”. The guidance was accompanied by a covering letter from CLG, dated 17 December 2009. The main purpose of the guidance is to clarify the admission body status provisions within the LGPS and to encourage employers to address pension matters as early as possible in the outsourcing process.

CLG are only going to make the [Admitted body guidance available from their website](#). Administering and employing authorities can also download [a copy of the guidance from the Timeline Regulations website](#).

### **LGPS 2008 – the Rule of 85 (Technical Group meeting 8 December 2009)**

In [Bulletin 55](#) (and in its response to the draft version of the LGPS (Miscellaneous) Regulations 2009) the LGPC identified apparent problems with the current drafting of the rule of 85 protections that apply in England and Wales. In the absence of any definitive clarification from CLG, the topic of protection under the rule of 85 was discussed at the Technical Group meeting on 8 December 2009.

The meeting resolved that the LGPC should seek Counsel’s opinion on two questions. The first is whether or not the LGPC’s interpretation of the regulations (as currently drafted) is correct. If the answer to that question is, “Yes”, then does GAD guidance override it?

The LGPC will provide an update in the next available Bulletin after Counsel’s advice has been received.

### **LGPS 2008 – Interfund Adjustment Calculation (Technical Group meeting 8 December 2009)**

[Bulletin 60](#) included an article which demonstrated that there was a problem in calculating IFAs for members in England and Wales who **elected before 1 April 2009** but where the transfer is **completed on or after 1 April 2009**. The Technical Group at its meeting on 8 December 2009 agreed that interfund adjustment calculations for members who fall into this category should follow the calculation for an **outward Club** transfer value using the “**new**” factors as set out in Version 1.3 of the transfer factor suite dated 23 March 2009 and the associated guidance.

### **LGPS 2008 – Interfund Adjustment Procedure (Technical Group meeting 8 December 2009)**

The Technical Group was requested to consider again the correct procedure for the processing of interfund adjustments. The Group re-affirmed that the procedure should be as set out below which, in essence, follows the procedure for any other type of transfer in:

- (1) member joins the LGPS with his new employer and states an interest in transferring his benefits from his old LGPS fund to the new LGPS fund;
- (2) the new LGPS fund approaches the old LGPS fund for details of the IFA;
- (3) the old LGPS fund forwards details of membership in its fund to the new LGPS fund;
- (4) the new LGPS fund then processes a calculation based on membership with the old LGPS fund and the new fund and asks the member if he wishes to make an election to transfer;

- (5) the member makes an election to transfer and notifies the new fund. [Administration Regulation 16(4) requires the member to notify in writing the administering authorities for both the old and new funds of his election to aggregate membership. It is the notification of the election with the new authority which is deemed to trigger the interfund adjustment];
- (6) the new LGPS fund approaches the old LGPS fund to request payment of the interfund adjustment; and
- (7) the old LGPS fund pays the interfund (with interest calculated in accordance with the guidance with the rules using the date of election as at point (5) to determine whether or not interest is due).

### **LGPS 2008 – Benefits Regulation 19 (Early leavers: efficiency and redundancy) and Benefits Regulation 18 (Flexible retirement)**

The LGPC have received a number of enquiries seeking a definitive answer on whether or not employing authorities can rely on [CLG's letter of 7 October](#) to pay LGPS benefits to a member on the grounds of redundancy or business efficiency where the employee is under age 55 and the last day of employment is 31 March 2010.

The Secretariat's view is that until regulation 19(2) is amended, then employing authorities who wish to be categorically assured that benefits will be payable to those who are under age 55 should ensure that the date of dismissal on the grounds of redundancy or business efficiency is 30 March 2010 (or earlier).

It should be noted, however, that in their letter to authorities dated 23 December 2009, CLG say in relation to Benefits Regulation 19:

*"It is proposed that this provision on early leavers is extended so that it covers those who are dismissed on or before 31 March 2010 rather than only before that date. This amendment will be backdated as appropriate."*

No mention has been made in any of the correspondence from CLG about Benefits Regulation 18 (flexible retirement). That regulation still states that the age 50 protection only applies if the request for flexible retirement (following a reduction in hours or grade) is made before 31 March 2010.

### **Age 50 protections**

[Bulletin 59](#) included an article which reported that the Secretariat had been in correspondence with CLG over the question of age 50 protections, as the Secretariat was of the view that the LGPS Regulations 1997 (and the LGPS (Scotland) Regulations 1998) needed to be amended to raise the minimum retirement age from 50 to 55 by 5 April 2010 for those employees who were not active members on 5 April 2006 and who left with a deferred benefit between 6 April 2006 and 31 March 2008 (6 April 2006 and 31 March 2009 in Scotland).

CLG had considered this and concluded that, for the LGPS in England and Wales:

1. Members who left with a deferred benefit prior to 6 April 2006 can retain age 50 ERD (forever) - which both the LGPS Regulations 1995 and the LGPS Regulations 1997 provide for;
2. Members who left with a deferred benefit on or after 6 April 2006 and before 1 April 2008 and who were active members of the scheme on 5 April 2006 can retain age 50 ERD (forever) - so these cases are alright under the wording of the LGPS Regulations 1997;

3. Members who left with a deferred benefit on or after 6 April 2006 and before 1 April 2008 and who were not active members of the scheme on 5 April 2006 can retain age 50 ERD until, at the latest, 5 April 2010, whereupon the age for ERD rises to 55 - which the LGPS Regulations 1997 do not currently provide for. The Secretariat understands that CLG are minded to make an appropriate amendment to the LGPS Regulations 1997 prior to 5 April 2010;

4. The LGPS, because it is a scheme which was in existence on 10 December 2003, can provide that members who left with a deferred benefit on or after 1 April 2008 and who were active members of the scheme on 5 April 2006 can retain an age 50 ERD (forever). However, in agreeing the terms of the new LGPS, a rise in the ERD to age 55 has been accepted. Thus, the protection in the Benefits Regulations at regulation 30(6) is actually more restrictive than what the Finance Act 2004 would permit, in that the protection only last to 31 March 2010 (rather than forever) for those who elect to draw their deferred benefits by then, and even then only for those who were active members of the scheme on 31 March 2008;

5. The LGPS can provide that members who left with a deferred benefit on or after 1 April 2008 and who were not active members of the scheme on 5 April 2006 can retain an age 50 ERD until, at the latest, 5 April 2010, whereupon the age for ERD rises to 55. The protection in the Benefits Regulations at regulation 30(6) is actually slightly more restrictive than what is permissible for schemes under the Finance Act 2004 in that the protection only last to 31 March 2010 (rather than to 5 April 2010) and only covers those who were active members of the Scheme on 31 March 2008 (rather than both pre April 2008 joiners and post April 2008 joiners who join prior to 6 April 2010);

6. Anyone who was retired on redundancy/efficiency grounds aged 50 or over prior to 1 April 2008 is alright (as the general Finance Act 2004 age 50 protection covers those who leave before 6 April 2010).

7. Under the Finance Act 2004, anyone who retires on redundancy/efficiency grounds aged 50 or over on or after 1 April 2008 and before 6 April 2010 is alright (as the general Finance Act age 50 protection covers those who leave before 6 April 2010). The protection in Benefits Regulation 19 is actually more restrictive than this in that is only covers those who were active members of the Scheme on 31 March 2008 and who leave on redundancy/efficiency grounds before 31 March 2010;

8. The Finance Act 2004 provides that, as the LGPS was in existence on 10 December 2003, anyone who retires on redundancy/efficiency grounds aged 50 or over on or after 6 April 2010 and who was an active member on 5 April 2006 could be provided, by the LGPS, with a protected age 50 ERD (forever). However, in agreeing to the terms of the new LGPS, a rise in the ERD to age 55 has been accepted. The protection in the Benefits Regulations at regulation 19(2) is actually tighter than the Finance Act 2004 permits, in that the protection only lasts to 30 March 2010 (rather than forever for those who were active members on 5 April 2006, or to 5 April 2010 for those who were not active members on 5 April 2006) and only covers those who were active members of the Scheme on 31 March 2008 and who leave on redundancy/efficiency grounds before 31 March 2010;

9. Anyone who was retired on flexible retirement aged 50 or over prior to 1 April 2008 is alright (as the general Finance Act age 50 protection covers those who leave before 6 April 2010);

10. Under the Finance Act 2004, anyone who takes flexible retirement aged 50 or over on or after 1 April 2008 and before 6 April 2010 is alright (as the general Finance Act age 50

protection covers those who leave before 6 April 2010). Benefits Regulation 18 is actually more restrictive than this in that it only covers those who were active members of the Scheme on 31 March 2008 and who take flexible retirement before 31 March 2010; and

11. The Finance Act 2004 provides that, as the LGPS was in existence on 10 December 2003, anyone who takes flexible retirement aged 50 or over on or after 6 April 2010 and who was an active member on 5 April 2006 could be provided, by the LGPS, with a protected age 50 ERD (forever). However, in agreeing the terms of the new LGPS, a rise in the ERD to age 55 has been accepted. The protection in the Benefits Regulations at regulation 18(4) is actually far more restrictive than required under the Finance Act 2004 in that the protection only lasts to 30 March 2010 (rather than forever for those who were active members on 5 April 2006, or to 5 April 2010 for those who were not active members on 5 April 2006) and only cover those who were active members of the Scheme on 31 March 2008 and who take flexible retirement before 31 March 2010.

The information on the HMRC technical pages [RPSM03106020](#) and [RPSM03106025](#) (which suggests that protection only applies if there is an unqualified right to draw benefits from age 50 i.e. that no other party need consent to the individual's request before it becomes binding) has been considered but, in arriving at the views given above, it was felt necessary to have proper regard to the provisions of both the Finance Act 2004 and the Superannuation Act 1972.

The ERD position of those former NHS members who were covered by regulation 23 of the LGPS (Transitional Provisions) Regulations 1997 is being considered by CLG.

The age 50 reference in regulation 66(1)(d) of the LGPS Regulations 1997 (as protected by regulation 66(8) of the LGPS Regulations 1997) is not affected by the provisions of the Finance Act 2004. So, there is no change to regulation 66(1)(d) unless CLG decide, perhaps for consistency reasons, to consult on raising it from 50 to 55. Of course, there is equally an argument to leave it as age 50 on the grounds that members taking out an AVC may have been told they could cease paying AVC and convert the AVC pot to membership from age 50.

The Secretariat also reported that the position in Scotland was as follows:

1. Members who left with a deferred benefit prior to 6 April 2006 can retain age 50 ERD (forever) - which both the LGS (Scotland) Regulations 1987 and the LGPS (Scotland) Regulations 1998 provide for;
2. Members who left with a deferred benefit on or after 6 April 2006 and before 1 April 2009 and who were active members of the scheme on 5 April 2006 can retain age 50 ERD (forever) - so these cases are alright under the wording of the LGPS (Scotland) Regulations 1998;
3. Members who left with a deferred benefit on or after 6 April 2006 and before 1 April 2009 and who were not active members of the scheme on 5 April 2006 can retain age 50 ERD until, at the latest, 5 April 2010, whereupon the age for ERD rises to 55 - which the LGPS (Scotland) Regulations 1998 do not currently provide for. An appropriate amendment will need to be made to the LGPS (Scotland) Regulations 1998 prior to 5 April 2010;
4. The LGPS, because it is a scheme which was in existence on 10 December 2003, can provide that members who left with a deferred benefit on or after 1 April 2009 and who were active members of the scheme on 5 April 2006 can retain an age 50 ERD (forever). However, in agreeing the terms of the new LGPS, a rise in the ERD to age 55 has been accepted. Thus, the protection in the Benefits Regulations at regulation 30(6) is actually more

restrictive than what the Finance Act 2004 would permit, in that the protection only last to 31 March 2010 (rather than forever) for those who elect to draw their deferred benefits by then, and even then only for those who were active members of the scheme on 31 March 2009;

5. The LGPS can provide that members who left with a deferred benefit on or after 1 April 2009 and who were not active members of the scheme on 5 April 2006 can retain an age 50 ERD until, at the latest, 5 April 2010, whereupon the age for ERD rises to 55. The protection in the Benefits Regulations at regulation 30(6) is actually slightly more restrictive than what is permissible for schemes under the Finance Act 2004 in that the protection only last to 31 March 2010 (rather than to 5 April 2010) and only covers those who were active members of the Scheme on 31 March 2009 (rather than both pre April 2009 joiners and post April 2009 joiners who join prior to 6 April 2010);

6. Anyone who was retired on redundancy/efficiency grounds aged 50 or over prior to 1 April 2009 is alright (as the general Finance Act age 50 protection covers those who leave before 6 April 2010).

7. Under the Finance Act 2004, anyone who retires on redundancy/efficiency grounds aged 50 or over on or after 1 April 2009 and before 6 April 2010 is alright (as the general Finance Act age 50 protection covers those who leave before 6 April 2010). The protection in Benefits Regulation 19 is actually more restrictive than this in that, for those who were not active members of the scheme on 5 April 2006, it only covers those who were active members of the Scheme on 31 March 2009 and who leave on redundancy/efficiency grounds before 31 March 2010;

8. The Finance Act 2004 provides that, as the LGPS was in existence on 10 December 2003, anyone who retires on redundancy/efficiency grounds aged 50 or over on or after 6 April 2010 and who was an active member on 5 April 2006 could be provided, by the LGPS, with a protected age 50 ERD (forever). This protection has been replicated in Benefits Regulation 19(3). However, for those who were not active members on 5 April 2006, the protection in the Benefits Regulations at regulation 19(2) is actually tighter than the Finance Act 2004 permits, in that the protection only lasts to 30 March 2010 (rather than to 5 April 2010) and only covers those who were active members of the Scheme on 31 March 2009 and who leave on redundancy/efficiency grounds before 31 March 2010;

9. Anyone who was retired on flexible retirement aged 50 or over prior to 1 April 2009 is alright (as the general Finance Act age 50 protection covers those who leave before 6 April 2010);

10. Under the Finance Act 2004, anyone who takes flexible retirement aged 50 or over on or after 1 April 2009 and before 6 April 2010 is alright (as the general Finance Act age 50 protection covers those who leave before 6 April 2010). Benefits Regulation 18 is actually more restrictive than this in that it only covers those who were active members of the Scheme on 31 March 2009 and who take flexible retirement before 31 March 2010; and

11. The Finance Act 2004 provides that, as the LGPS was in existence on 10 December 2003, anyone who takes flexible retirement aged 50 or over on or after 6 April 2010 and who was an active member on 5 April 2006 could be provided, by the LGPS, with a protected age 50 ERD (forever). However, in agreeing the terms of the new LGPS, a rise in the ERD to age 55 has been accepted. The protection in the Benefits Regulations at regulation 18(5) is actually far more restrictive than required under the Finance Act 2004 in that the protection only lasts to 30 March 2010 (rather than forever for those who were active members on 5 April 2006, or to 5 April 2010 for those who were not active members on 5 April 2006) and



only cover those who were active members of the Scheme on 31 March 2009 and who take flexible retirement before 31 March 2010.

The age 50 reference in regulation 65(1)(d) of the LGPS (Scotland) Regulations 1998 (as protected by regulation 65(8) of the LGPS (Scotland) Regulations 1997) is not affected by the provisions of the Finance Act 2004. So, there is no change to regulation 65(1)(d) unless SPPA decide, perhaps for consistency reasons, to consult on raising it from 50 to 55. Of course, there is equally an argument to leave it as age 50 on the grounds that members taking out an AVC may have been told they could cease paying AVC and convert the AVC pot to membership from age 50.

In [Bulletin 64](#) the Secretariat covered the matter of age 50 protections where the employer's consent is required to draw benefits (e.g. retirement or early payment of deferred benefits before 60, and flexible retirement). In that Bulletin we said that where a member:

- will be under age 55 at 5 April 2010, and
- needs their employer's consent to retire / draw benefits (or to take flexible retirement), and
- whose BCE date occurs on or after 6 April 2010

the member will not have age 50 protection under Schedule 36 to the Finance Act 2006, so their normal minimum pension age under the Finance Act 2004 rises to age 55 with effect from 6 April 2010 - see page [RPSM03106020](#) from the HMRC Technical Manual for more details. If the employee retires (or takes flexible retirement) on a date before 6 April 2010, on 30 March 2010 for example, but the BCE date does not occur until on or after 6 April 2010, the payment of benefits be regarded as an unauthorised payment.

The Secretariat has been asked to clarify how the information in Bulletin 64 squares with categories 1 and 2 above, as reported in Bulletin 59. The Secretariat believes that the CLG lawyer felt that HMRC's interpretation of paragraph 22(4) of Part 3 of Schedule 36 to the Finance Act 2004 was debatable. That paragraph says:

"(a) on 5th April 2006 the member had an actual or prospective right under the pension scheme to any benefit from an age of less than 55,  
(b) the rules of the pension scheme on 10th December 2003 included provision conferring such a right on some or all of the persons who were then members of the pension scheme, and  
(c) such a right either was then conferred on the member or would have been had the member been a member of the scheme on that date."

and the CLG lawyer felt that "an actual or prospective right" did not necessarily mean an "unqualified right". Furthermore, section 12(4) of the Superannuation Act 1972 provides that:

"(4) No provision shall be made by any regulations by virtue of subsection (2) above unless any person who is placed in a worse position than he would have been in if the provision had not applied in relation to any pension which is being paid or may become payable to him is by the regulations given an opportunity to elect that the provision shall not so apply in relation to that pension ....."

So, as the right to request early payment from age 50 applied at the time the deferred members left the scheme (pre 6 April 2006) the member could opt out of any change to the LGPS Regulations that would change that right. So, CLG do not intend to amend the regulations for the first two categories mentioned in Bulletin 59. However, HMRC would view the payment of benefits to such

members as unauthorised payments if the BCE falls on or after 6 April 2010 and the benefit is paid on or after age 50 and before age 55 at the discretion of the former employer. Our advice, therefore, can only be that the LGPS Regulations permit an employer to pay such benefits at their discretion but, if they do so after 5 April 2010 before age 55 the payment may be an unauthorised payment attracting the relevant unauthorised payment tax charges. The scheme member, in deciding whether or not to apply for payment before age 55, would need to take this into account.

For the sake of completeness, the item in [Bulletin 63](#) on age 50 protection for members not active at 5 April 2006 is reproduced below.

At its meeting on 6 October, the Technical Group discussed if there was age 50 protection for those employees who:

- were not active members of the LGPS or LGPS (Scotland) on 5 April 2006;
- will be under age 55 at 5 April 2010; and
- whose BCE date occurs on or after 6 April 2010.

Such members do not have age 50 protection under Schedule 36 to the Finance Act 2006 so their normal minimum pension age under that Act rises to age 55 with effect from 6 April 2010. If the employee retires on a date before 6 April 2010, on 30 March 2010 for example, but the BCE date does not occur until on or after 6 April 2010, will the payment of benefits be regarded as unauthorised payments?

The Secretariat contacted HMRC after the Technical Group meeting. HMRC has confirmed in an e-mail that an unauthorised payment will occur for employees falling into this category of members where the BCE is on or after 6 April 2010.

Example 1 from [RPSM 11102050](#) of HMRC's Technical Manual confirms that the payment of benefits is an authorised payment for these employees provided the BCE date is before 6 April 2010; i.e. the employee obtains an 'actual right' to receive benefits. As long as the employer and the member have, prior to 6 April 2010, provided all the information necessary to calculate benefits (such as the employer providing leaving details and final pay, and the member confirming his/her commutation option, bank details etc.), then the payment of benefits will be authorised even if the first payment of pension is on or after 6 April 2010.

So, to ensure that employees who were not active members of the LGPS or LGPS (Scotland) on 5 April 2006 and who are at least age 50 and less than age 55 at 5 April 2010 can receive payment of benefits without incurring an unauthorised payment tax charge, employers and administering authorities must ensure the member must have an 'actual right' to payment of benefits before 6 April 2010.

Employers and administering authorities in England and Wales will need to identify as soon as possible:

- a) those members who are taking flexible retirement before 31 March 2010 where the member:
  - was a member of the LGPS on 31 March 2008; but
  - was not a member of the LGPS on 5 April 2006; and
  - will be at least age 50 but younger than age 55 at the date of flexible retirement; and
  - has remained with the same employer since 31 March 2008

b) those members who are to be made redundant prior to 31 March 2010<sup>1</sup> where the member:

- was a member of the LGPS on 31 March 2008; but
- was not a member of the LGPS on 5 April 2006; and
- will be at least age 50 but younger than age 55 at the date of redundancy

c) those members where the employer agrees to an election made by the member before 1 April 2010 for early release of benefits (prior to age 60) and the member:

- was a member of the LGPS prior to 1 April 2008; but
- was not a member of the LGPS on 5 April 2006; and
- will be at least age 50 but younger than age 55 at the date of election

Employers and administering authorities in Scotland will need to identify as soon as possible

a) those members who are taking flexible retirement before 31 March 2010 where the member:

- was a member of the LGPS on 31 March 2009; but
- was not a member of the LGPS on 5 April 2006; and
- will be at least age 50 but younger than age 55 at the date of flexible retirement; and
- has remained with the same employer since 31 March 2009

b) those members who are to be made redundant prior to 31 March 2010 where the member:

- was a member of the LGPS on 31 March 2009; but
- was not a member of the LGPS on 5 April 2006; and
- will be at least age 50 but younger than age 55 at the date of redundancy

c) those members where the employer agrees to an election made by the member before 1 April 2010 for early release of benefits (prior to age 60) and the member:

- was a member of the LGPS prior to 1 April 2009; but
- was not a member of the LGPS on 5 April 2006; and
- will be at least age 50 but younger than age 55 at the date of election

It is imperative that the employer is aware, and it is also made clear to the employee, that in order to avoid paying a tax charge all the necessary forms, paperwork, and elections must have been completed and provided to the administering authority before 6 April 2010.

### **LGPS 2008 – Payment of death grants: member has no relatives or personal representatives**

Under regulations 23 (Death grants: active members), 32 (Death grants: deferred members) and 35 (Death grants: pensioner members) of the Benefit Regulations:

“The administering authority at their absolute discretion may make payments in respect of the death grant to or for the benefit of the member’s nominee or personal representatives, or any person appearing to the authority to have been his relative or dependant at any time.”

The Secretariat has been asked what happens if the member has no relatives nor any personal representatives at the date of death? Well, section 55 of the Administration of Estates Act 1925 defines a personal representative as follows:

‘(xi) “Personal representative” means the executor, original or by representation, or administrator for the time being of a deceased person, and as regards any liability for the payment of death duties includes any person who takes possession of or intermeddles with

<sup>1</sup> But see the next item in this Bulletin concerning the letter from CLG dated 7 October 2009.

the property of a deceased person without the authority of the personal representatives or the court, and “executor” includes a person deemed to be appointed executor as respects settled land.’

Section 46(1) of the Act says:

“(vi) In default of any person taking an absolute interest under the foregoing provisions, the residuary estate of the intestate shall belong to the Crown or to the Duchy of Lancaster or to the Duke of Cornwall for the time being, as the case may be, as bona vacantia, and in lieu of any right to escheat. “

Section 30 of the Act makes it clear that it is the Treasury Solicitor who, in such cases, the administrator of the estate.

Therefore, where an administering authority is required to pay an amount within 2 years to the personal representative, the personal representative in bona vacantia cases is the Treasury Solicitor. There is more information available about [bona vacantia](#) and [referring estates to the Treasury Solicitor](#) on the Treasury Solicitor’s website.

### **The Pre-Budget Report 2009**

The LGPC has published a [brief commentary](#) on the Pre-Budget Report 2009. Administering authorities and employers should note that the LGPC has commissioned a report from KPMG on the effect of the Government’s new treatment for high-earners including the anti-forestalling measures. The Secretariat will issue this as soon as possible.

### **The Pensions Regulator: Code of Practice – Trustee Knowledge and Understanding**

The Pensions Regulator has published the second issue of its [Code of Practice No.7: Trustee Knowledge and Understanding](#). The effective date for the Code of Practice is 26 November 2009 as per The Pensions Act 2004 (Code of Practice) (Trustee Knowledge and Understanding) Appointed Day Order 2009 [SI 2009/3068].

## Equitable Life

In July 2008, the Parliamentary Ombudsman published [a report on Equitable Life](#) including GAD's role in the collapse of the institution. [Part 5 of the report](#) is a guide to the main report and provides a summary of the findings. The report found that there were 10 counts of maladministration and, in 6 of those, policyholders had suffered an injustice. As a result, the Parliamentary Ombudsman recommended that the government should establish a compensation scheme for the affected policyholders.

The government did accept 9 of the 10 counts of maladministration but only agreed that 3 of them had led to an injustice for policyholders. The government refused to accept the recommendation to establish a compensation for Equitable Life policyholders who had suffered an injustice. The government's alternative remedy was to establish an ex gratia payments scheme where:

- it accepts there had been maladministration; and
- only where it considered that the impact of the maladministration had had a disproportionate impact on the policy holder.

The Equitable Member's Action Group (EMAG) brought a claim for judicial review against HM Treasury [R (Equitable Members' Action Group) v HM Treasury [2009] EWHC 2495 (Admin)]. EMAG argued that the government had failed to give convincing reasons for rejecting some of the Parliamentary Ombudsman's findings and for refusing to establish the compensation scheme. EMAG had sought a judicial review because it regarded the government's response as unlawful.

The High Court partly upheld the challenge: in particular it rejected the government's response in relation to GAD's failure to ask and resolve issues which arose from Equitable Life's regulatory returns for 1990-93 and the return for 1995.

The court, however did not accept EMAG's argument that the government's reasoning for refusing to create a compensation scheme was irrational. The Court accepted that there was no legal requirement for the government to establish a compensation scheme. There will not be an appeal against the High Court's ruling.

The Chief Secretary to the Treasury (Liam Byrne) stated that the government accepted the High Court's ruling in a Parliamentary Statement given on 20 October 2009. The government had previously appointed Sir John Chadwick to advise on:

- the extent of relative losses suffered by policyholders;
- the proportion of those losses which can be attributed to maladministration accepted by the government;
- the classes of Equitable Life policyholders that have suffered the greatest loss; and
- the factors to be considered when determining whether a policy has suffered a disproportionate impact.

As a result of the High Court ruling, Liam Byrne has instructed Sir John Chadwick to include the additional findings of maladministration in his deliberations. His statement, Liam Byrne added that the government, "remain fully committed to introducing a fair ex gratia payment scheme as soon as possible . . . and having taken account of the public finances".

During a Parliamentary debate, held on 21 October 2009, the Chief Secretary to the Treasury advised that a possible 1 million policyholders may now be covered by the government's planned ex gratia scheme. He went on to add that the design of the ex gratia scheme would be completed by spring of 2010 but refused to give a commitment as to when payments from the scheme would start.

The government has also been silent on the total funds available to make payments to victims of the Equitable Life fiasco from the ex gratia scheme. It is possible that the inclusion of more policyholders in the ex gratia scheme will reduce the average payment to victims.

## Bits and Pieces

### Public Sector Pensions Commission

The Institute of Economic Affairs launched [The Public Sector Pensions Commission](#) on 17 December 2009 to examine the cost of public sector final-salary schemes.

### Flexible Retirement

In December 2008, the Department for Work and Pensions (DWP) consulted on alternative sets of draft regulations that would add a further exception to the non age-discrimination rule to facilitate the setting up of flexible retirement arrangements. The first set “**Option 1**” would except all pensions rules and practices linked to flexible retirement arrangements, the second “**Option 2**”, was more limited, allowing occupational pension schemes discretion to treat members in flexible retirement arrangements as pensioner members for the purposes of death benefits.

The DWP has now [published its report](#) following the consultation and has concluded that given

- the evidence that flexible retirement arrangements have been successfully set up within the current framework, and
- the number of correspondents who doubted that “flexible retirement” in concept was discriminatory

the consultation has not provided sufficient robust evidence to proceed with either of the exceptions set out in the consultation.

The DWP recognises that this will disappoint those advocates of further legislative change, and say that it is clear from the wide range of responses that there remains significant uncertainty around the interaction between the Directive and the Age Regulations and flexible retirement practices. The DWP will therefore consider the prospects for further general guidance on occupational pension schemes and age discrimination. The development of such guidance would need to take into account ongoing work on equality in general – in particular the Equality Bill currently before Parliament - and take any opportunities for the sharing of best practice between stakeholders.

## Circulars

Since the publication of last month’s Bulletin, the LGPC has issued three circulars. [Circular 231](#) announced a series of “Understanding...” workshops on Transfer Values, the Employer Role and Guaranteed Minimum Pensions. [Circular 232](#) advertised a “Fundamentals Refresher Course” for trustees of LGPS funds. [Circular 233](#) is entitled “Workplace Pension Reforms” and sets out the LGPC’s current understanding of DWP’s draft auto-enrolment legislation.

## Timeline Regulations

The December 2009 update of the Timeline Regulations website includes:

### **in England and Wales:**

- the upload of the LGPS (Miscellaneous) Regulations 2009 and the commensurate amendments to the Benefits Regulations 2007, the Administration Regulations 2008, the Transitional Provisions Regulations 2008 and the Discretionary Compensation Regulations;
- the upload of the LGPS (Management and Investment of Funds) Regulations 2009 and the accompanying letter from CLG;
- upload of the Admitted body status provisions guidance and the CLG covering letter (dated 17 December 2009) to the Statutory Guidance / FAQs page;
- the upload to the GAD guidance page of:
  - (a) version 1.2 of the GAD guidance on the purchase of an additional pension under regulation 14 of the Benefit Regulations; and
  - (b) the GAD guidance for new Benefit Regulation 14A - Purchase of Additional Survivor's Benefits.

### **in Scotland**

- the upload of version 1.2 of the GAD guidance on the purchase of an additional pension under regulation 14 of the Benefit Regulations.
- the insertion of hyperlinks in the Benefit Regulations 2008 and the Administration Regulations 2008 to the Additional Pension guidance.

## The Civil Service Schemes

Sir Gus O'Donnell, the Cabinet Secretary, has announced that by April 2010 there will be no mandatory retirement ages for Civil Servants. In future, the Civil Service will assume that Civil Servants wish to continue working unless they inform their employer otherwise. The removal of the mandatory retirement age does not affect the Normal Pension Age for any of the Civil Service Schemes. These remain as age 65 for the Nuvos scheme (joiners after July 2007) and as age 60 for the Classic, Classic Plus and Premium schemes.

The removal of the mandatory retirement age has affected the upper age limit for the Civil Service Compensation Scheme which has also been removed. Payments to Civil Servants, who are older than their scheme's Normal Pension Age, may be reduced because the Civil Servant is entitled to an immediate payment of his or her pension. Furthermore, there will no longer be enhanced payment of benefits for early retirement under the Compensation scheme.

## Legislation

### United Kingdom

#### SI Reference Title

2009/3068	The Pensions Act 2004 (Code of Practice) (Trustee Knowledge and Understanding) Appointed Day Order 2009
2009/3093	The Local Government Pension Scheme (Management and Investment of Funds) Regulations 2009
2009/3094	The Pensions Act 2007 (Supplementary Provisions) (No.2) Order 2009
2009/3154	The Local Government Pension Scheme (Miscellaneous) Regulations 2009
2009/3229	The Social Security (Miscellaneous Amendments) (No.6) Regulations 2009
2009/3267	The Occupational Pensions (Revaluation) Order 2009

### Northern Ireland

#### SR Reference Title

2009/374	The Pensions (2005 Order) (Code of Practice) (Trustee Knowledge and Understanding) (Appointed Day) Order (Northern Ireland) 2009
2009/408	The Occupational Pensions (Revaluation Order (Northern Ireland) 2009
2009/409	The Social Security (Miscellaneous Amendments) (No.5) Regulations



## Useful Links

[The LGE Pensions page](#)

[The LGPS members' website](#)

[LGPS Discretions](#) lists all the potential discretions available within the LGPS in England and Wales, and Scotland.

[Qualifying Recognised Overseas Pension Schemes](#) approved by HMRC and who agreed to have their details published.

[Tax Guide \(Version 11\)](#)

[The Timeline Regulations](#)

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**Distribution sheet**

Pension managers (internal) of administering authorities  
Pension managers (outsourced) and administering authority client managers  
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Local Government Pensions Committee  
Trade unions  
CLG  
COSLA  
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