

What Does the Law Require?

In England and Wales, it has been possible to register for a same sex civil partnership since 5 December 2005, a same sex marriage since 13 March 2014 and an opposite sex civil partnership since 2 December 2019.

Broadly speaking, civil partners and same sex spouses should enjoy the same pension benefits as opposite sex married couples.

This means that a pension plan must provide the following benefits in respect of a same sex spouse or civil partner:

- Spouse's pension calculated by reference to the member's full period of pensionable service in the plan
- In respect of guaranteed minimum pensions (GMPs), the widower's GMP (regardless of the sex of the recipient)
- Any benefits payable to a spouse that are not calculated by reference to length of pensionable service, such as lump sum death benefits

What If the Rules Require the Survivor's Benefit to Be Paid to Someone Else?

Sometimes, where there is no opposite sex spouse, the deed and rules of a pension plan require payment of a survivor's benefit to be made to a dependant other than the same sex spouse or civil partner. Overriding law, however, requires the spouse's benefit to be paid to the same sex spouse or civil partner before any other dependants. Trustees have the power, however, under legislation, to pass a resolution amending the plan in a way that diverts a survivor's benefit away from such a dependant so that it may be paid, instead, to the civil partner or same sex spouse.

Are Earmarking and Pension Sharing Orders Available to Same Sex Spouses and Civil Partners?

The Pensions Act 1995 introduced the concept of "earmarking" of pensions on divorce and in December 2000, legislation came into effect that allowed the sharing of pensions on divorce. Although there is no obligation on the courts to order either pension sharing or earmarking, they are amongst several options available to couples including same sex couples who are divorcing and civil partners where a civil partnership is being dissolved.

What Else Should Trustees Be Aware Of?

In any legislation made after 13 March 2014, references to "marriage", "husband", "wife", "widower" and "widow" will all include references to parties from same sex marriages: i.e. "husband" will include a man married to another man and "widower" will include a man whose marriage to another man ended with the other man's death. The same will apply for a same sex female married couple where the terms "wife" and "widow" are used.

The law relating to the provision of GMPs for same sex spouses and civil partners on an equal treatment basis is currently uncertain. As noted above, UK legislation requires a same sex spouse or civil partner to be provided with a widower's GMP. Some commentators have suggested, however, that in the future, the courts might rule that the provision of a widower's GMP (regardless of their sex) to a same sex spouse or civil partner discriminates on the grounds of sexual orientation.

But Didn't There Used to Be an Option to Provide Limited Benefits?

Originally, the government provided an exemption for occupational pension plans so that it was only necessary to provide equal benefits for same sex spouses and civil partners in respect of pensionable service accrued on and from 5 December 2005. However, the courts have since ruled that this exemption did not correctly reflect EU law (which was overriding in this context). The UK government is incorporating this principle into UK legislation and it will take effect immediately before the end of 2023. The exemption, therefore, must be disregarded when determining the benefits payable to a same sex spouse or civil partner. Any plan rules that have ever taken advantage of the exemption will need to be amended to ensure compliance and previous benefit decisions will need to be revisited. Trustees could find themselves acting in breach of trust if they provide the higher equal benefit before amending their plan rules.

Some Practical Points

Do	Don't
Do consider whether the rules of the plan reflect the overriding law.	Don't forget to amend member literature (such as booklets) to ensure that the benefits provided to same sex spouses and civil partners are accurately described and communicated.
Do seek legal advice if plan rules do not provide, or have previously not provided, equal benefits for same and opposite sex spouses and civil partners for all service.	Don't forget to check insurance policies covering death benefits provided from the plan to confirm the correct level of cover is maintained.

What Are the Consequences of Failing to Comply?

Generally, the requirement to provide equal benefits is overriding, whether or not a plan's trust deed and rules have been updated accordingly. An affected person can, therefore, bring an action either before The Pensions Ombudsman or in the courts against the trustees of a plan to enforce their entitlement.

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