

The key provisions of the Marriage (Same Sex Couples) Act 2013 (the "Act") are due to come into force on 13 March 2014 and the first same sex marriages can take place on 29 March 2014. This legislation affects survivors' benefits provided by occupational pension plans.

We recommend that trustees and employers consider the survivors' benefits to be provided to same sex spouses to ensure that their pension plans meet at least the minimum requirements. Where they have choices to make, they should consider what information or action is needed and ensure their intentions are reflected in their pension plan's rules.

Background

From 13 March 2014, as a minimum, occupational pension plans should provide the same level of survivors' benefits for same sex spouses as for civil partners. This means that same sex spouses must be treated the same as opposite sex spouses in respect of benefits accrued from 5 December 2005 (and for contracted out benefits in respect of service from 6 April 1988).

The Act provides that the extension of marriage to same sex couples will not alter the effect of any "private legal instrument" made before 13 March 2014. We consider that the deeds and rules of occupational pension plans can be treated as "private legal instruments". Accordingly, same and opposite sex spouses will not automatically be entitled to equal survivors' benefits and pension plans may restrict the survivors' benefits provided to same sex spouses but only in respect of service before 5 December 2005. Care will be needed to ensure that the minimum requirements of the legislation are met and any appropriate rule amendments are carried out effectively.

Is Any Action Needed?

- For survivors' benefits accrued or attributable to periods of service **after** 5 December 2005 (and for contracted-out benefits after 5 April 1988), employers and trustees should treat same sex spouses as if they were opposite sex spouses and ensure they administer their plans to comply with this.
- For survivors' benefits accrued or attributable to periods of service **before** 5 December 2005, employers and trustees should consider whether they wish to treat same sex spouses differently to opposite sex spouses.
 - If they do: we consider this is permissible under the legislation. However, as the legislation is not drafted as clearly as would be ideal, there is a potential risk that the provisions applying to "private legal instruments" referred to above could cease to apply to a pension plan in some circumstances where rule amendments are made on or after 13 March 2014. Accordingly, we recommend that legal advice should be sought in relation to rule amendments after this date and the continuing difference in treatment be specifically provided for within the governing rules of the pension plan by including appropriate wording in the first deed of amendment executed after 13 March 2014. Some commentators have suggested that a rule amendment is needed before 13 March 2014: we do not believe this is necessary but it could be considered if a highly risk-averse approach is preferred.
 - If they do not: for employers and trustees who wish to provide equal survivors' benefits for periods before 5 December 2005, we recommend that the plan rules are explicitly amended after 13 March 2014 as soon as the employers and trustees have clarified their intentions to do so. If done correctly, an amendment can be made without breach of the legislative and rules-based protections for past service benefits, but ideally should be made before a death of a same sex spouse occurs. Legal advice should be sought in relation to the amendment.
- In all cases, insurance policies covering death benefits provided from the plan should be checked to confirm the correct level of cover is maintained.
- Member explanatory literature should be amended and issued in due course to ensure that the benefits provided to same sex spouses are accurately described and communicated.



Possible Future Developments

The Act requires a government review to be published by 1 July 2014 on the differences in survivors' benefits provided by occupational pension plans for opposite and same sex spouses, civil partners, widows and widowers. This may lead to changes in legislation. Any differences in survivors' benefits for same sex spouses could also be subject to legal challenge.

Further Information

For further information please contact any of the partners listed below, or your usual contact in the Squire Sanders pensions team.

Catherine McKenna

Partner
T +44 113 284 7045
E catherine.mckenna@squiresanders.com

Anthea Whitton

Partner
T +44 113 284 7364
E anthea.whitton@squiresanders.com

Wendy Hunter

Partner
T +44 20 7655 1119
E wendy.hunter@squiresanders.com

Charmian Johnson

Partner
T +44 161 830 5047
E charmian.johnson@squiresanders.com

Matthew Giles

Partner
T +44 121 222 3296
E matthew.giles@squiresanders.com



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