

# Important Update for Clients Whose Pension Plans Have Provided Limited Benefits for Civil Partners and Same Sex Spouses

## Please Read – Action Required

July 2017

### Background

It has been possible to register civil partnerships in the UK since December 2005. Same sex marriage has been possible in England and Wales since March 2014. Generally speaking, civil partners and same sex spouses are accorded by law the right to receive the same benefits as opposite sex spouses. However, the Equality Act 2010 contains a limitation for benefits provided by an occupational pension plan: Benefits payable to surviving civil partners and same sex spouses earned by reference to their partner's length of pensionable service could be restricted to benefits accrued on and from 5 December 2005.

On 12 July 2017, the Supreme Court ruled that this limitation contained in the Equality Act 2010 is incompatible with EU law and must be disapplied.

### What Does This Mean?

The limitation allowing occupational pension plans to pay no more than what has previously been referred to as the "statutory minimum" was, according to the Supreme Court, never valid under EU law and cannot be used by occupational pension plans.

**This applies for all members and all occupational pension plans (including those that closed to accrual before 5 December 2005).**

Pension plans must now provide equal benefits for opposite sex spouses, same sex spouses and civil partners.

The test to ensure that equal benefits are provided arises at the point at which the benefit becomes payable, i.e. when a pension plan member dies. If the pension plan member leaves a surviving civil partner or same sex spouse, that survivor is entitled to receive the full benefit that an opposite sex spouse would have received at that point in time. For example, if an opposite sex spouse would have received a spouse's pension calculated by reference to pension accrued prior to 5 December 2005, then a civil partner or same sex spouse should also receive a spouse's pension calculated by reference to the same amount of pension accrued prior to 5 December 2005.

### What Action Should Pension Plans Take?

If a pension plan has always provided the same level of benefits for a same sex spouse or civil partner as it would for an opposite sex spouse, it is unlikely that any further action will be required.

If a pension plan has relied upon the government's limitation in the Equality Act 2010 then action will need to be taken:

- All pension plans are treated as containing a non-discrimination rule, but amendments may be necessary in order to ensure that the trustees have adequate powers in their rules to deliver benefits in accordance with the EU requirements. The law gives trustees power to do this, where necessary.
- Any spouse's pensions that have already come into payment in respect of surviving civil partners and same sex spouses will need to be reviewed, re-calculated and any appropriate back payments made.
- Any claim for a spouse's pension that has been rejected because a pension plan member had no pensionable service on or after 5 December 2005 will also need to be reviewed.

### GMP Proviso

Separate consideration will need to be given to GMPs, because the Supreme Court decision does not deal with that aspect of equal treatment and whether widows' or widowers' GMPs should be paid. GMPs are currently subject to their own line of case law in relation to equality.

### What Else?

The Supreme Court ruling dealt with a situation where the legislation introduced by the UK government has failed fully to implement the requirements of EU law. In a separate ruling made on the same day, the Supreme Court was unable to determine whether a part time worker was entitled to pension benefits in respect of the whole of his service, or just service from 7 April 2000, being the deadline for transposing an EU directive that prevented part time workers from being treated less favourably than full time workers. The Supreme Court has referred that question to the Court of Justice of the European Union and that decision is awaited.

Even that may not be the end of the story for occupational pension plans. The Supreme Court ruling throws into doubt other time limit cut-off periods in UK legislation, which are currently permitted in relation to the payment of equal pension benefits. For example, the courts may now be asked to reconsider the 1 December 2006 cut-off date in respect of age discrimination claims.

If you wish to discuss any of the above please get in touch with your usual Squire Patton Boggs contact.