

GMP equalisation through conversion

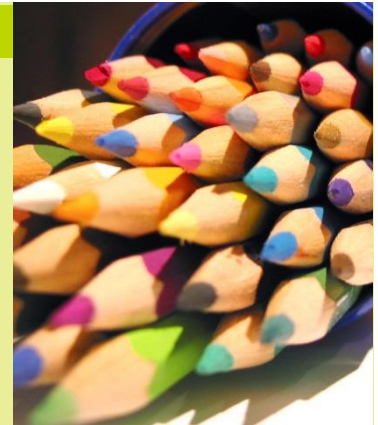
Briefing for pension schemes following publication of DWP guidance

June 2019

Pension briefing

HIGHLIGHTS

- Most defined benefit (DB) pension schemes in the UK are affected by the High Court decision in October last year that schemes must equalise for the unequal effect of guaranteed minimum pensions (GMPs) on men and women.
- The equalisation required is complex, and may be achieved by a number of different methods.
- One approach to equalisation is to equalise actuarial values of future benefits and to use existing legislation to convert GMPs into other scheme benefits. The converted benefits will be subject to the scheme rules and to legislation concerning "mainstream" (non-GMP) benefits.
- The DWP has recently issued guidance on how it envisages the conversion process working. The guidance follows extensive deliberation with industry participants, including Hogan Lovells.



This note sets out the DWP's approach to GMP conversion and highlights some of the issues trustees and employers should consider before undertaking a conversion exercise.

BACKGROUND

In a landmark decision given on 26 October 2018, the High Court held that occupational pension schemes must equalise for the effect of guaranteed minimum pensions (GMPs) providing different benefits for men and women.

The judgment made clear that:

- Trustees must amend their schemes to equalise for the effect of GMPs on male and female benefits earned between 17 May 1990 (the date of the *Barber* decision) and 5 April 1997 (when GMP accrual ceased).
- There is more than one possible method of equalisation.
- Arrears of underpaid pension must be made good, with simple interest at 1% over base rate.
- A scheme's forfeiture rule may provide that payments falling due more than six years previously are not payable. Where there is no such provision in the rules, there is no backstop on the arrears which must be paid.

For an explanation of why GMPs result in unequal benefits for men and women, please see Appendix I.

Further detail of the High Court decision, and explanations of the different methodologies for equalising GMPs, are set out in Appendix II.

GMP CONVERSION

What is GMP conversion?

Trustees have a statutory power to convert GMPs to regular scheme benefits which are not subject to the special GMP rules. Several safeguards apply, including that:

- GMPs must be replaced with actuarially equivalent benefits (or more valuable benefits);
- conversion of GMPs to money purchase benefits is not allowed;
- pensions in payment may not be reduced;
- survivors' benefits must be provided;
- the employer must consent to the conversion; and
- the affected members must be consulted.

Some commentators had doubted that the legislation permitted the conversion of survivors' benefits in payment at the conversion date. Helpfully, the judge ruled that the legislation is not defective in this way and that it allows survivors' benefits to be converted.

Why convert GMPs?

Trustees and employers should have a clear understanding of the purpose(s) of converting GMPs in their scheme:

- simply as a means to ensure equalisation of benefits accrued between 17 May 1990 and 5 April 1997?
- Or, additionally, to reset the benefit structure and, potentially, to simplify administration and ongoing member communications?

GMP conversion legislation permits trustees to include other amendments to the scheme which they think are "necessary or desirable as a consequence of, or to facilitate, the GMP conversion". For trustees and employers, conversion may provide a useful opportunity to rework, and potentially simplify, their benefit structure. Simplification and conversion may be especially helpful if a bulk annuity buy-in or buy-out is intended in future.

Preparation for conversion: action to take now

Accurate and comprehensive data will be key to a successful conversion. Different requirements apply to different tranches of benefits, such as:

- pre-1978 accrual (before GMP accrual started);
- 1978 – 1988 accrual (when rules for accrual of GMPs and increases to GMPs in payment changed);
- 1988 – 16 May 1990 accrual (the day before the *Barber* judgment);
- accrual from 17 May 1990 – the scheme equalisation date (the period in which men's normal retirement age (NRA) must be reduced to the women's NRA);
- accrual from the scheme equalisation date to 5 April 1997 (when GMP accrual ceased); and
- accrual from 6 April 1997 (when compulsory increases to pensions in payment were introduced).

The DWP conversion guidance points out that members' contracted-out dates and earnings history can be obtained through the GMP checker service.

Where data is incomplete, trustees may need to reconstruct member records or, if this is not feasible, agree a practical solution.

Third party administrators are likely to experience many calls for assistance with schemes' data cleansing and review. Discussion with the scheme administrator about capacity and timescales would be sensible.

GUIDANCE: THE DWP'S 10 STEP PLAN

The DWP working group has created a 10 Step Process to achieve equalisation for the effect of GMPs and conversion of individuals' GMPs to scheme benefits.

Stage 1: agree with employer

The trustees and the employer agree to proceed with GMP conversion, plus the basis on which replacement benefits will be provided in place of GMPs. The employer's consent is required in advance of the conversion, even where the trustees have power to amend the scheme under the scheme rules.

Stage 2: select members for conversion and "shape" of converted benefits

Not all members' benefits need be converted at the same time (or at all). However if a member is selected for conversion, all his/her GMP must be converted – not just the GMP accrued from 17 May 1990 to 5 April 1997.

Which members to convert?

The trustees and employer will need to decide whether to convert:

- all members with GMPs?
- only those members with pensionable service from 17 May 1990 to 5 April 1997?
- only members who are "disadvantaged" or "crossover" members (please see "Categories of member" below)?
- all members with pensionable service after 5 April 1988 (when GMP accrual changed; more schemes will have

records for post-88 service than for pre- and post-88 service)?

- survivors' pensions in payment following the death of a member?

Categories of member

A member with an unequalised benefit may be:

- at an advantage in relation to their opposite sex comparator at all times in retirement ("advantaged members");
- at a disadvantage in relation to their opposite sex comparator at all times in retirement ("disadvantaged members"); or
- a "crossover member", whose benefits are initially advantageous (or disadvantageous) compared to their opposite sex comparator but where those benefits switch at a time after retirement to become disadvantageous (or advantageous).

In general, women who left service a significant time before age 60, and whose schemes provide for fixed rate revaluation of GMPs, will often be advantaged throughout retirement when compared to an equivalent male pensioner.

No equalisation is needed in respect of advantaged members.

Crossover members will need some adjustment to achieve equalisation, but any increases will often be modest.

The greatest increase in benefit value is likely to be needed in respect of disadvantaged members.

Single conversion date, or several?

The timing of the conversion must also be decided.

- Should all selected members have their benefits converted at the same time?
- Alternatively, should benefits be converted in tranches, or at individual members' retirement dates?

Administratively, it may be more straightforward to convert GMPs in payment first, followed by deferred GMPs (possibly in tranches, with those closest to retirement being converted first).

What benefits to provide?

The employer and trustees should agree the shape of the converted benefits.

- The benefit structure could remain broadly the same, with converted members having a "notional GMP" and "notional excess over GMP" in respect of pre-1990 service, with the same rates of revaluation in deferment and increases in payment. This option would involve minimum interference with members' rights but would not result in any benefit simplification.
- Scheme rules (if any) on revaluation and increases in payment could be applied to the whole of the member's benefits, including the converted GMP.
- All pre-1997 benefits, both GMP and excess over GMP, could be converted to flat rate pensions (since legislation does not require pensions accrued before 6 April 1997 to

be increased). This would result in higher starting pensions.

- Male pensioners who retire before age 65 will receive an uplift when their GMP comes into payment at age 65. Post-conversion benefits could be structured to remove this step-up.

Reminder: increases to pensions in payment

GMPs

GMPs in payment must be increased as follows:

- GMPs accrued up to 5 April 1988: no increases from the scheme; members who reached state pension age before 6 April 2016 receive CPI increases on their GMPs, paid as a top up to their state pension.
- GMPs accrued from 6 April 1988 to 5 April 1997: schemes must increase GMPs by the lower of CPI or 3%; if CPI exceeds 3%, members who reached state pension age before 6 April 2016 receive a top up of the difference between 3% and CPI, paid as an increase to their state pension.

Excess over GMP

There is no legislative requirement for excess over GMP accrued before 6 April 1997 to be increased in payment.

Stage 3: set the conversion date

The employer and the trustees should agree the effective date for the conversion. It may be practical to combine conversion with the scheme year end date; the annual increase date for GMPs in payment (6 April each year); or the date on which annual increases are awarded on pensions in payment.

Where non-GMP benefits are increased on the anniversary of the individual member's retirement, trustees may decide to use the conversion process to move to a single annual increase date, for ease of administration.

Stage 4: consult members

The trustees must consult affected members before conversion takes place. The consultation may be high level but should include explanations that:

- GMPs will be converted into non-GMP form;
- benefits accrued alongside GMPs will also be adjusted;
- the unequal effect of GMPs on men and women will be addressed as part of the conversion process; and
- members may see changes to their benefits (including, for deferred members, a potential reduction in starting pension) but the overall value of an individual's benefits will not decrease.

Members should also be told that more personalised information will be available once conversion calculations, and any adjustment of benefits, have been carried out.

There is no specified minimum period for the consultation (in contrast to consultation on making a "listed change", which requires a consultation period of at least 60 days).

Stage 5: valuation

For each selected member, the scheme actuary will need to calculate as at the conversion date:

- "Amount A": the value of the member's benefits (GMP and excess over GMP) to be converted, including associated survivor's benefits; and
- "Amount B": the value of benefits (and associated survivor's benefits) for the same period of accrual, if the member were the opposite sex.

The trustees should decide the assumptions to be used in the valuation, having taken advice from the actuary. Decisions which may particularly impact the calculation results are:

- inflation assumptions, which affect pension increases, and revaluation in deferment;
- the member's assumed retirement date (which will impact the GMP revaluation rate used); and
- whether active members (or those with a final salary link) are treated as leaving at the conversion date or remaining in service.

According to the guidance, the scheme's CETV (transfer value) basis will often be acceptable for the conversion valuation, although the basis may need review where the CETV assumptions are tailored to groups of members more likely to transfer out. CETVs may be reduced to reflect underfunding in the scheme – but reduction is not permitted for the purposes of conversion.

Stage 6: equalisation

For each member, equalisation is achieved by using the higher of Amount A and Amount B as their "conversion value".

Stage 7: determining post-conversion benefits

Each member's conversion value needs to be converted into pension benefits in the revised form, using an actuarial basis consistent with the approach for the Stage 5 valuation.

Stage 8: certification

The scheme actuary must certify that the conversion calculations have been completed and that the post-conversion benefits have at least the same actuarial value as the benefits pre-conversion.

The certificate should be sent to the trustees within three months of the calculations being completed.

Stage 9: modification of scheme

A scheme may be modified to effect conversion in one of two ways:

- using the scheme amendment power; or
- by resolution of the trustees under a statutory power in s24G Pension Schemes Act 1993.

In either case, section 67 Pensions Act 1995 will not apply.

If a scheme's domestic amendment power is restrictive, amendment by resolution may be the only option.

When a scheme is amended to effect GMP conversion (by either method), the trustees may include other amendments which they consider "necessary or desirable as a consequence of, or to facilitate, the GMP conversion".

Where the trustees or employer wish to undertake a wider benefits restructure as part of conversion, legal advice may be needed as to whether those changes meet the "necessary or desirable" test above, or whether they can be implemented anyway without this test applying. If they do not (or can not),

the scheme amendment power will have to be relied on and section 67 will apply, meaning that either:

- individual members' consents will be needed; or
- an actuarial certificate must be obtained.

Stage 10: notify members and HMRC

Affected members and survivors must be notified before, or as soon as reasonably practicable after, the conversion date that:

- their benefits will be (or have been) converted from a specified date; and
- the amount and shape of the member's benefits going forward.

HMRC must be notified of the conversion on or before the conversion date and of the earners affected.

GMP CONVERSION: DIFFICULT ISSUES

The guidance recognises that several issues in relation to the conversion process remain unresolved. The following areas in particular will need further consideration.

Who is the employer?

The Guidance suggests that legal advice will be needed where the participating employers have changed over the years. For multi-employer schemes, seeking consent from the employer(s) responsible for scheme funding may be appropriate.

It is to be hoped that a new Pensions Bill will clarify the position.

Survivors' benefits

Survivors' GMPs need only be paid in circumstances set out in legislation, and are calculated by reference to the deceased member's GMP (disregarding any excess over GMP).

On a member's death in deferment, many schemes provide a survivor's benefit of just the survivor's GMP, with no benefit in respect of the member's excess over GMP.

As the conversion legislation currently stands, following conversion a scheme must provide:

- a widow's pension of at least 50% of the member's pension accrued from 6 April 1978 to 5 April 1997; or
- a widower's or surviving civil partner's pension of at least 50% of the member's pension accrued from 6 April 1988 to 5 April 1997.

Conversion therefore requires the provision of more generous survivors' pensions than the minimum required under the GMP rules. There has been speculation that the pre and post-conversion requirements may be aligned in future, but this would require primary legislation.

Actuarial assumptions for spouses' pensions

The actuary may be asked to value survivors' benefits using actual data about members' spouses (rather than making assumptions about the percentage of married members/civil partners and the assumed age of their spouses). Using actual data will provide more accurate valuations – but is only possible where the trustees hold spouses' data.

Unisex actuarial factors

Cash equivalent transfer values (CETVs) may be calculated using gender-specific actuarial factors. The conversion legislation does not prohibit use of male or female factors, but the guidance states that careful consideration should be given to any assumptions which are not unisex.

If unisex factors are used for GMP conversion, the post-conversion benefits for each member will be identical to the benefits of his/her opposite sex comparator. Gender-specific factors will result in different levels of benefits for men and women, even after equalisation, with the risk that a future court decision might find this unlawful.

Missing members

Trustees are expected to take "all reasonable steps" to consult members and survivors before converting GMPs and subsequently to notify them of the conversion. In practice, writing to the member's last known address is likely to be sufficient.

Tax issues

HMRC is working with industry bodies to consider the various tax implications of GMP equalisation. These include the following.

- **Income tax:** back payments of underpaid pensions in payment will be subject to income tax. A lump sum back payment will be treated as arising in the tax year in which it is paid, unless the member requests HMRC to spread the payment over the years in which the pension was underpaid. Providing information to allow the precise allocation of back payments to the tax years in which they should have been paid would cause considerable additional administration. However, where the amounts are small HMRC may be willing simply to spread the amounts equally over the years underpaid.
- **Annual allowance:** backpayments (or increasing a member's pension to take account of equalisation) ought not to give rise to annual allowance issues as this is not benefit accrual. However, HMRC has been asked to provide guidance.
- **Lifetime allowance:** there are concerns about how increases to pensions in payment should be treated for lifetime allowance purposes.

If treated as a benefit which should have come into payment at the time of retirement, calculation (and reporting) of the amount of the individual's lifetime allowance used up at retirement will be incorrect. For the majority of members, this will make no difference. However, higher earners may find themselves subject to a lifetime allowance charge in respect of the higher equalised pension. Legislation does not provide for reducing a pension in payment to reflect a previously underpaid lifetime allowance charge. If the pension increases in payment, the unpaid LTA could potentially be offset against future increases.

If, instead, the equalised pension is treated as an increase to an existing pension in payment, a further benefit crystallisation event (BCE 3) may occur. For this purpose, small increases not exceeding the higher of £250, 5%, and the increase in the retail prices index (RPI), are disregarded. Most members will fall within the small increases exemption, but some may be impacted.

- **De minimis:** many adjustments to benefits resulting from the equalisation and conversion process will be very

small. It would be helpful if HMRC could signal that adjustments below a certain level will be disregarded for lifetime and annual allowance purposes.

Transitional protections

Fixed and enhanced protection from the lifetime allowance charge is lost if a member has "relevant benefit accrual". Characterisation of an equalisation uplift as an increase to an existing pension in payment (BCE3) could cause members to lose protection if the increase exceeds a specified level.

Protection for pre-2006 rights to a normal minimum pension age of under 55, or to a lump sum of more than 25%, requires that the member becomes entitled to all his or her benefits from the arrangement on the same date. Such protection could be jeopardised by treating an equalisation uplift as a further benefit coming into payment.

Consequential questions from *Lloyds*

The *Lloyds* judgment last December left several unanswered questions, including:

- can trustees rely on a statutory discharge, or a discharge under the scheme rules, where a member has transferred out unequalised benefits?
- may very small (de minimis) differences between male and female benefits be disregarded? and
- must trustees revisit benefits in respect of members who have transferred out, taken full commutation, or died without leaving a spouse?

CONTACT US

We would be pleased to speak to employers or trustees who would like to discuss GMP conversion or any other aspect of equalising for the effect of GMPs. For further information, please contact one of the pension partners at the end of this note.

APPENDIX I: WHAT IS A GMP AND WHY ARE THEY UNEQUAL?

Defined benefit (DB) pension schemes that were contracted-out of the State Additional Pension (SERPS) in the period from April 1978 to April 1997 are required to provide members with a minimum level of pension (known as the Guaranteed Minimum Pension – GMP). The GMP replaces part or all of a member's SERPS entitlement.

GMPs, like SERPS at the time, were calculated differently between men and women in that:

- the age at which GMP becomes payable (GMP Age) is 60 for women but 65 for men; and
- women earned GMP at a faster rate than men.

Women's state pension age started to be equalised upwards from 1997. However, no changes were made to GMP Age, meaning that the inequalities between men and women entitled to GMPs remain hard-coded in legislation.

The Barber judgment

Following the European Court's May 1990 decision in the *Barber* case, most schemes took steps to equalise normal retirement ages (NRAs) between male and female members. Commonly, this meant increasing women's NRA to 65, to match the male NRA. This usually meant that overall benefits at the date of retirement, or leaving pensionable service, were equal for men and women (typically, a pension of 1/60th of final salary for each year of pensionable service, payable from age 65).

Unequal benefits and the "cross-over" point

The statutory GMP requirements, combined with the effect of the particular scheme's rules on any benefit in excess of the GMP, mean that a male is unlikely to receive exactly the same pension in payment as a female comparator.

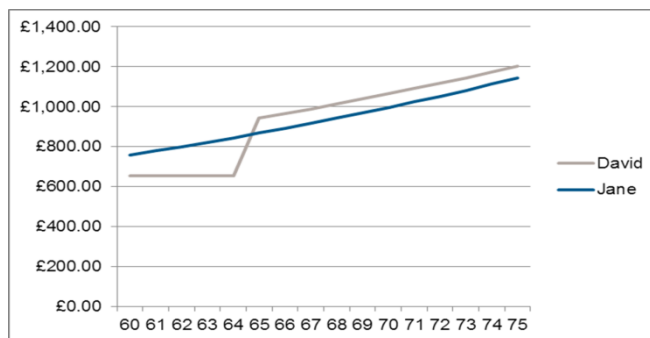
The chart below illustrates how benefits can differ between comparable male and female members – with the female receiving higher benefits between 60 and 65 and then being overtaken by the male at some point after he reaches GMP Age.

Differences can arise because:

- a man who leaves pensionable service before GMP Age will have his GMP revalued for a longer period of deferment than an equivalent woman who leaves pensionable service at the same age;
- a woman's GMP will be subject to statutory increases from age 60, while the GMP of her male comparator will only be increased from age 65;
- the notoriously complex "anti-franking" requirements of legislation (please see the box below), can result in differing treatment of male and female benefits.

The level and severity of the difference in treatment between men and women varies from scheme to scheme, depending on a number of factors – the most important being:

- how a scheme's rules increase pensions in payment;
- whether there is a period of deferment before the pension comes into payment (and, if so, what revaluation is applied in deferment); and
- the scheme's administration policy on anti-franking (please see the box below).



Anti-franking and GMPs

A member whose accrued right to pension is greater than the level of his/her GMP, will have rights to both the GMP and to the "excess over GMP". If the member leaves pensionable service before reaching GMP Age, the GMP must be revalued (protected against inflation) in line with statutory requirements.

"Anti-franking" legislation protects the member's deferred benefits – by ensuring that the growth in the GMP cannot simply be offset by making a corresponding reduction to the member's excess over GMP.

The anti-franking provisions are highly complex.

WHAT HAVE SCHEMES PREVIOUSLY DONE TO EQUALISE GMPs?

In practice, schemes have usually only sought to equalise for the effect of GMPs if the scheme was in winding up or was entering the Pension Protection Fund (PPF).

Otherwise, very few "ongoing" schemes have attempted to deal with inequalities caused by GMPs – most are aware of the issues but have been waiting for answers as to how to achieve equality (recognising that GMPs themselves cannot be equalised unless the legislation changes).

Schemes winding up needed to consider how to adjust benefits (both past and future) to reflect unequal GMPs and those that made any adjustment tended to adopt a rough and ready approach adjusting only future benefits. This was seen as a pragmatic approach to an insolvable problem.

Where schemes of insolvent employers enter the PPF, adjustments are made to compensation according to the PPF's methodology and adjustments are made to correct past underpayments resulting from GMP inequality.

APPENDIX II: THE LLOYDS BANK CASE

In July 2018, the High Court heard an application brought by the trustee of some of Lloyds Bank's pension schemes seeking directions as to whether and, if so, how the schemes should adjust benefits to compensate for the inequalities of GMPs.

The judge was presented with the unenviable task of deciding whether there is a correct way to adjust benefits, or whether several different methods would be acceptable. He was also asked to consider what needed to be done regarding back-payments where members had been underpaid (including for those who had transferred out of the scheme).

Judgment was handed down on 26 October 2018.

EQUALISATION METHODS

In the *Lloyds Bank* case, four main methods of equalising GMPs (most with their own sub-variants) were presented to the Court. Methods A, B and C are based on the amount (quantum) of benefit paid. Method D, which is the method favoured by the DWP, looks at the actuarial value of male and female benefits.

Method A

Method A broadly speaking involved equalising different parts of the benefits. Method A3 involved equalising each "part" of the pension (GMP plus the pension which was the "excess over GMP") and levelling up each part. This would result in both male and female members receiving more in each year of payment than either would have had without equalisation. Method A is therefore a particularly expensive means of equalisation.

Method A was favoured by the representative beneficiaries.

Method B

Under Method B, each payment of pension (GMP combined with excess over GMP) is equalised, with the member receiving the higher of the benefit each year paid to a male or a female member in otherwise identical circumstances.

Under this method, in the early years of pension payment the female's pension would be higher – so the male pension would be topped up. After the "cross-over" point (please see Appendix I), the male pension would exceed the female, so a female pensioner would receive a top up.

Under Method B, both male and female pensioners would receive greater amounts over the course of their expected retirement than if the benefits had not been equalised.

In *Lloyds Bank*, no one argued that Method B was the right one to adopt.

Method C

Under Method C1, the male pension would be increased to the level of the female pension in the early years of payment but the increase would be treated (for the male) as a credit for early payment. After the "cross-over" point, the male pension would remain at the level of the female pension (by then lower than the male pension) until the accumulated credit had been used up – the second cross over point.

After the second cross-over point, both male and female pensioners would receive the amount of pension payable to a male.

For many schemes, there will be no cross-over members – in which case Method B and Method C will produce the same results.

Under a variation of Method C (Method "C2"), interest would be added to the credit for early payment, resulting in lower overall payments being made than under method C1.

Method C was favoured by the sponsoring employer.

Method D

Method D looks at the actuarial value of the projected income stream (of GMP and excess over GMP) for male and female members and would seek to equalise for the difference in treatment on a "once and for all" basis.

The DWP favoured a variation: Method "D2". Under this method, the actuarial value of benefits of an equivalent male and female member would be calculated, and the higher amount used for conversion into scheme benefits. The converted benefit would all be treated as non-GMP, with the result (in many cases) that the starting amounts of pension would be lower than before conversion. After a "cross-over" point, pension payments would be higher than pre-equalisation for both men and women.

Equalisation methods: what did the judge say?

When assessing the various suggested methods, the judge relied on the principle of "minimum interference" with parties' rights. He concluded as follows.

- Methods A, B, C1 and C2 were all permissible means of achieving equal treatment.
- The sponsoring employer could require the trustees to adopt method C2 as the method which would involve least cost (and therefore the minimum interference with the employer's rights). Similarly, method C2 is the method trustees could use without the employer's agreement to any other method.
- Method D1 was not permissible as it would infringe the rights of the beneficiaries (while other methods would not). Conversion under method D2 would also interfere with beneficiaries' rights, but this is permitted under the conversion legislation. In a second judgment given on 6 December 2018, the judge clarified that method D2 could be used for future benefit payments, while benefits already paid should be equalised using one of methods A, B or C.
- Trustees must make back-payments to make good arrears of underpaid pension, including interest at 1% simple over base rate.
- Scheme rules may limit back-payments to those falling due within the previous six years. Where the rules do not contain such a provision, there is no limitation on how far back arrears must be paid.

This note is written as a general guide only. It should not be relied upon as a substitute for specific legal advice.

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