



DEFINED BENEFIT SCHEMES: NEW ERA FOR PENSION REGULATOR'S ANTI-AVOIDANCE POWERS

OVERVIEW:

Under the Pension Schemes Act 2021, Royal Assent 11th February 2021, the Pensions Regulator is given extensive new powers affecting defined benefit schemes.

In the context of corporate activity impacting the employer covenant (eg restructuring, dividend and other distributions, transactions and security arrangements) the circumstances in which the Regulator can order extra amounts to be paid to schemes by Contribution Notices (“CNs”) are significantly widened; employers must pre-notify to the Regulator and to the trustees specified transactions; and certain acts become criminal offences. The net for the latter is potentially wide extending to any “person” involved including eg company directors, shareholders and scheme trustees and also those tangentially concerned with a corporate event such as lending banks.

Employers and trustees and relevant others have a breathing space to understand these new provisions before they come into force in Autumn 2021 as expected.

The notes below give a flavour of the changes and we look forward to discussing the new provisions in more detail with you.

NEW PROVISIONS – SUMMARY:

1. 2 new grounds for CNs:

In addition to the existing CN grounds in Pensions Act 2004, 2 new grounds are added namely:

- employer insolvency test; and
- employer resources test.

2. 3 new “notifiable events”:

Employers must give prior notice of certain types of event to the Regulator and to scheme trustees. The notice must include an “accompanying statement” explaining why in the employer’s view the proposed event is not detrimental to the employer covenant. For these purposes the relevant notifiable events are expected to be:

- sale of a controlling interest in a scheme employer; and/or
- sale of a business or assets of a sponsoring employer; and/or
- granting of security to third parties ahead of any (potential) debt to scheme trustees.

3. 3 new criminal offences (unlimited fine and/or imprisonment for up to 7 years):

- avoidance of employer debt;
- conduct risking accrued scheme benefits; and
- failure to comply with a CN notice.

4. Additional civil penalties:

The Regulator is empowered to issue penalties not exceeding £1 million in various circumstances including in cases of avoidance of employer debt and knowingly or recklessly giving false or misleading information to the Regulator.

CAUSE FOR CONCERN

The legislation contains defences to the new CN grounds and the criminal offences based around reasonableness. Also, within the next 6 months there are to be Regulations and Regulator Guidance explaining how the new provisions are intended to work.

The above may be of limited comfort. Reasonableness may be difficult to demonstrate in hindsight and, unlike for CNs, there is no advance clearance procedure enabling parties to be sure there will be no prosecution under the new criminal offences.

A piece of good news – the Pensions Minister announced on 11/1/2021 that the new CNs and the criminal offences will not apply to acts before these new provisions take effect later this year. Whilst welcome, the landscape going forward for acts after the new provisions have effect is more challenging as this note explains.

The Regulator’s powers to issue financial support directions (which are separate from CNs) continue unaltered.

CONCLUSION

The new provisions are challenging. We look forward to discussing them with employers, trustees and other interested parties over the coming months. Meanwhile, please contact us if you have any queries.

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