

Pensions law team – February 2019

Watch out, watch out – the Regulator's about

Future changes to pensions regulation affecting sponsors and trustees of defined benefit pension schemes

Sponsors must now, more than ever, ensure that they keep their defined benefit pension schemes at the forefront of their minds - particularly when embarking on corporate activity.

Protecting defined benefit pension schemes from sponsor failure or adverse restructuring is something the Government has been keen to prioritise. In its response to the Consultation on Protecting Defined Benefit Pension Schemes, the Government has set out proposals to increase pensions regulation and to improve the powers of the Pensions Regulator.

Criminal Offences

Two new criminal offences will be introduced. These will:

- target individuals who demonstrate "wilful or reckless behaviour" in relation to pension schemes. The Government has cited chronic business mismanagement, allowing huge pension deficits to build up and/or taking large investment risks as examples of such behaviour. The penalty will be **up to seven years' imprisonment or an unlimited fine**; and
- individuals who fail to comply with a contribution notice issued by the Pensions Regulator will be liable for an **unlimited fine**.

Notifiable Events

The notifiable events regime requires the employer or trustee of a pension scheme to give notice of certain events to the Pensions Regulator.

The Government's proposals include extending the current framework by requiring employers to notify the Pensions Regulator of:

- the sale of a material portion of the business or assets of a scheme employer who is responsible for funding at least 20% of the scheme's liabilities; and
- granting security on a debt to give it priority over any debt to the pension scheme.

Declaration of Intent

There will be a new requirement for a Declaration which will need to be shared with the scheme trustees and the Pensions Regulator when certain corporate transactions are being contemplated. The Declaration will need to explain the transaction, confirm that the trustee board has been consulted and explain how any detriment to the scheme is to be mitigated.

Powers of the Pensions Regulator

The Government intends to introduce a new power for the Pensions Regulator to issue civil penalties of **up to £1 million** in a number of cases. The table below sets out some of the actions that the Government has identified will be subject to the new fines.

| Action | Recipient of fine |
|--|--|
| Wilful or reckless behaviour in relation to a pension scheme (a civil penalty of up to £1 million may apply in addition to any criminal penalties) | Sponsoring employer and those connected or associated with a sponsoring employer |
| Failure to comply with a contribution notice or a financial support direction (civil penalty of up to £1 million may apply in addition to any criminal penalties where failure to comply relates to a contribution notice) | Sponsoring employer and those connected or associated with a sponsoring employer |
| Failure to comply with the notifiable events framework | Sponsoring employer or trustees |
| Failure to comply with the new requirement for a Declaration of Intent | Sponsoring employer and those connected or associated with a sponsoring employer |
| Knowingly or recklessly providing false information to trustees or the Pensions Regulator | Any person who is required to provide the information |

Changes have also been proposed to the Pensions Regulator's moral hazard powers. These include amending the reasonableness test for contribution notices and changing the tests for determining whether a financial support direction can be imposed.

Comment

The introduction of criminal liability as well as substantial fines shows a clear shift in the regulation of defined benefit pension schemes. The Government is clearly undertaking its policy that the failings in BHS and Carillion must not be allowed to happen again. We await the details of the Government's proposals – it almost goes without saying that this is an area that sponsors and trustees of defined benefit pension schemes need to watch closely.

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