How to avoid criminal penalties following big pension changes

The Pension Schemes Act 2021 significantly increases the Pensions Regulator's powers and further adds to the obligations of companies that sponsor DB schemes and the trustees of those schemes.

The new powers will be enforceable once regulations are laid and this is expected to occur around the same time as the Pensions Regulator issues its guidance on how it will use these new powers (expected later in 2021).

The Pensions Minister has clarified that the new powers will not be retrospective. However, they illustrate the mood music from the Regulator and so should be considered in the context of current corporate activity, particularly in case of overlap with the new regime.

Directors and trustees will need to take legal and other specialist advice to ensure they don't fall foul of the new regime as the penalties can be severe, including £1m fines and up to seven years in jail.

How to keep safe from prosecution, fines and "Contribution Notices"

Consider and openly share with trustees information about relevant acts or events; take independent specialist advice; mitigate the event (aiming to protect the scheme's position); and keep clear records of this process. This will require **new governance processes** by both employers and trustees. **Explicitly and regularly considering the points below will be a useful start to this.**

Examples of corporate events potentially at risk

The main theme is events that weaken the covenant. This also includes a series of small actions/events that together add up to something more material.

The below is illustrative and not complete:

- Company transfers a material part of the balance sheet (via ownership transfer or internal loans or dividends) to another group entity, either UK or overseas
- Company pays a material special dividend to shareholders (or share buyback)
- Company pays more dividends than free cashflow, weakening the balance sheet
- Company sells part of its business and pays a special dividend
- Company restructures in a way that moves assets or business away from companies that support the pension scheme
- Company raises additional finance ranking ahead of the scheme
- Company undertakes programme of capital investment that includes significant risk, potentially reducing section 75 recovery
- Downgrade of credit rating/failure to make debt repayments/fall in share price/profit warning

Examples of trustee events potentially at risk

These include (again, not complete):

- Trustee failure to identify any of the above corporate events and to take appropriate action
- Trustee failure to use any contribution or investment powers appropriately

*What you **must** notify the Regulator of*

Currently, the law requires certain events to be notified to the Pensions Regulator. Regulations are expected to add two new events, with the full list for companies being as follows:

- Decision not to achieve full pension debt recovery
- Ceasing to trade in the UK
- Conviction of director or partner for an offence involving dishonesty
- Breach of banking covenant
- Sale of controlling interest*
- Sale of material proportion of business or assets (new)*
- Granting of security on debt ranking above DB scheme (new)*

*These three events are also likely to be subject to new "Statement of Intent" requirements. These will require the employer to provide early information to the trustees and the Pensions Regulator, in good time to enable them to consider the event and agree mitigation with the employer. More detail will emerge in 2021. In the meantime, it is good practice to follow the principles of the **Statement of Intent** requirements.

What if you get it wrong?

If the parties fail to identify an event, fail to then act, and/or fail to appropriately mitigate the pension scheme, the Pensions Regulator will have significantly increased powers to take action against the parties.

Contribution Notices

Previously, the Pensions Regulator had the power to issue two different types of Contribution Notice (CN) to an employer. The Pension Schemes Act adds a further two that are easier to impose.

CNs are a requirement for a related employer or director to contribute money to a pension scheme, because of an action they took, or deliberately failed to take, that worsened the position of the scheme.

It is possible for an employer to seek clearance from the Pensions Regulator in relation to any such event, which would then protect an employer and its directors from a CN. Guidance on the interpretation of the new law, and the new approach to clearance, is expected from the Pensions Regulator during 2021.

New penalties and offences

Failure to pay a CN by the due date without reasonable excuse will be a criminal offence (unlimited fine). Alternatively, the Regulator can impose a civil financial penalty of up to £1m.

The sanctions for the two existing CN triggers have been extended:

- Similar acts/inactions can result in civil financial penalties of **up to £1m**
- Similar acts/inactions can result in **criminal offences** risking **unlimited fines** and **imprisonment of up to seven years**

These sanctions can apply to **any party**, not just employers and directors, and can include trustees.

This note is an abbreviated summary of our current understanding of the Regulator's old and new powers and is not a complete treatment of the subject. Further clarity on the Regulator's use of its new powers should evolve with the publication of guidance in 2021. This note does not constitute advice, nor should it be taken as an authoritative statement of the law. For further help, please contact the partner who normally advises you.

January 2021

Want to find out more?

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