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Changes to the Notifiable Events Regime

March 2022

The Pensions Act 2004 requires trustees and employers to provide written notice to the Pensions Regulator of prescribed events affecting pension schemes and employers respectively. The new Pensions Schemes Act 2021 includes provisions which expand the notifiable events framework, and the Department for Work and Pensions has issued draft regulations providing further details of the changes.

Consultation on the draft regulations ended last year. The new regulations were expected to come into force this April but have been delayed.

The draft regulations introduce two new notifiable events, these are:

- a decision in principle by the employer to sell a material proportion of its business or assets,
- a decision in principle by the employer to grant or extend a relevant security over its assets, where that would result in the secured creditor ranking above the pension scheme in the order of recovery.

Further, one of the existing notifiable events has been amended so the underlying transaction is notifiable at an earlier stage:

- the Regulator must be notified when a controlling company makes a decision in principle to relinquish control of the sponsoring employer (or where there has been an offer to acquire control of the employer).

Notice requirements

Following the notification of the “decision in principle” to the Regulator, the “appropriate person” is required to provide a further notice and an accompanying statement to the Regulator as soon as “main terms have been proposed” in relation to the underlying transaction / reorganisation. The notice must be updated as soon as reasonably practicable following a material change in the transaction or its effects on the pension scheme.

The notice must be accompanied by a statement which describes the notifiable event, any adverse effects on the pension scheme, any adverse effects on the employer’s ability to support the scheme, any steps taken to mitigate those adverse effects and any communication with the trustees. A copy of the notice and the statement must be provided to the trustees at the same time.

New definitions:

A "decision in principle" is a decision prior to any negotiation or agreement being entered into with another party. This would require a relevant transaction to be notified at a very early stage.

A "material proportion of [the] business" is one that accounts for more than 25% of the employer's annual revenue. Similarly, a "material proportion of [the] assets" is one that accounts for more than 25% of the gross value of the employer's assets.

In both cases, the 25% threshold may be met by a single sale or a series of smaller sales over a 12 month period. "Relevant security" includes the grant or extension of security by subsidiaries where the security comprises more than 25% of the employer's consolidated revenue or its gross assets.

An "appropriate person" will generally be the employer, or a person connected or associated with it.

Comment:

If the regulations come into force as currently drafted, potentially sensitive transactions / reorganisations will require early notification to the Regulator with subsequent notices and accompanying statements being required as the transaction progresses. It is clear that the amendments will give the Regulator the opportunity to scrutinise transactions at a much earlier stage than currently. If they have not done so already, employers should consider putting in place confidentiality agreements with trustees to cover the sharing of any notices and statements required by the regulations.

Notifiers may find it difficult to identify when a decision in principle has been taken as this may not be clear in all circumstances. Further uncertainty arises in connection with the requirement to update the Regulator when there is a "material change". During the course of negotiations, there may be many changes which potentially meet this threshhold. Are parties expected to make multiple notifications in these circumstances? We hope these issues are considered in further guidance and / or amended regulations.

Finally, the new financial penalty under section 88A of the Pension Schemes Act 2021 applies to breaches of the notifiable events regime. In short, if a person fails to notify an event in accordance with the requirements of the legislation (or knowingly or recklessly provides the Regulator with false or misleading information), the Regulator can impose a fine of up to £1 million.

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