

Pensions Team Bulletin

AUTUMN 2021

Welcome to the autumn bulletin. In this issue, we consider how the Regulator's powers have been strengthened by the Pension Schemes Act 2021, and the draft regulations making changes to the notifiable events regime. Trustees should also note the proposed increase to the normal minimum pension age and consider the potential impact on the retirement plans of their members. Finally, we provide a roundup of the latest GMP equalisation news, including new guidance and case law.

Please do get in touch with your usual contact in the Wrigleys' pensions team if you would like to discuss any of the legal developments raised in this bulletin.

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New Regulatory Powers effective from 1 October 2021

The provisions of the Pension Schemes Act 2021 creating new criminal offences and financial penalties came into force on 1 October 2021.

The existing anti-avoidance regime confers power on the Pensions Regulator to impose contribution notices on employers and connected / associated persons in prescribed circumstances. These powers have been strengthened by the Act with the creation of new criminal offences which are punishable by financial penalty (up to £1 million) and / or imprisonment (for a term not exceeding seven years).

The offences include:

- failure to comply with a contribution notice
- avoidance of an employer debt
- conduct risking accrued scheme benefits

The financial penalty may also be imposed in circumstances where a person “knowingly or recklessly” provides false or misleading information to the Regulator and / or trustees.

The new offences are committed by “persons” rather than “employers” or those who are “connected or associated” with employers, meaning the Regulator can cast the net more widely for the purposes of identifying those who may have committed an offence. This has caused some alarm in the industry as trustees and professional advisers fall within the category of persons who could commit an offence.

There is no clearance regime applicable in respect of the offences, meaning employers and trustees will need to assess carefully the impact of any proposals affecting the pension scheme (whether directly or indirectly).

From 1 October 2021, the Regulator will have the following two new grounds on which to impose a contribution notice:

- where the employer insolvency test is met

In summary, this requires an act or a deliberate failure to act which has the effect of reducing the amount of employer debt recoverable by an underfunded scheme.

- where the employer resources test is met

In summary, this requires an act or deliberate failure to act which has the effect of reducing the value of the resources of the employer and the reduction is material relative to the estimated value of the employer debt.

Sponsoring employers will need to consider these new tests (and the application of any statutory defences) in the context of corporate activity as they could bring it within the scope of the Regulator’s powers. Code of Practice 12 (Contribution Notices: Circumstances in relation to the material detriment test) has been updated to include the new tests and new Code Related Guidance will come into force on 1 October 2021. The Guidance provides illustrative examples of the types of transaction which are expected to meet the new tests as well as those that are not. Transactions which result in the removal or reduction of support by the sponsoring employer, weaken the scheme’s creditor position, or otherwise involve payments to creditors/ parties at the expense of the scheme, are potentially caught by the new tests.

Please do speak to your usual advisor in the pensions team if you are concerned about the Pension Regulator’s powers in the context of any planned corporate activity.

Changes to the Notifiable Events Regime

The Pensions Act 2004 requires trustees and employers to provide written notice to the Regulator of prescribed events affecting pension schemes and employers respectively. The government is consulting on draft regulations which vary and expand the list of employer notifiable events to include:

- a decision in principle by a controlling company to relinquish control of the sponsoring employer or an offer to acquire control of the employer,
- 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.

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.

With regards to the new statutory duty to give notices and statements to the Regulator, this would apply where “main terms have been proposed” concerning any of the following:

- the sale by the employer of a material proportion of its business or assets,
- the granting or extending of relevant security by the employer,
- the relinquishing of control by a controlling company of the employer.

The duty would also apply where a controlling company relinquishes control of the employer without a decision having been taken.

Where any of these events apply, the employer - but also anyone connected or associated with the employer - must notify the Regulator as soon as reasonably practicable. The notice must be accompanied by a statement which describes the 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.

Comment:

If the regulations come into force without material amendment, 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.

Consultation on the draft regulations runs until 27 October 2021; the regulations are expected to come into force next year.

Increase to Normal Minimum Pension Age (NMPA)

NMPA is the minimum age from which a registered pension scheme can pay pension benefits without making an unauthorised payment. There are two exceptions: benefits may be paid before NMPA in circumstances where the member is suffering from ill health or has a protected pension age.

The government has confirmed that NMPA will increase from 55 to 57 with effect from 6 April 2028 and it has legislated for this change in the Finance Bill 2021-2022.

Where the rules of a pension scheme provide members with an unqualified right to draw their pension from age 55, those members will be treated as having a protected pension age of 55. This means they will continue to be able to draw their benefits from age 55 after 6 April 2028.

In order to benefit from a protected pension age, the scheme rules in force on 11 February 2021 must contain an unqualified right to draw pension from age 55, and a person must have been a member of that scheme immediately before 4 November 2021. “Unqualified” in this context means that the payment of benefits is not subject to consent, i.e. the member can request the payment of his benefits as of right.

Comment:

At this stage, trustees should consider the impact of the increase to the NMPA on their own scheme. For example, will members have a protected pension age of 55 under the rules of the scheme? If they will not, trustees may wish to communicate this change to members so they can discuss the impact on their retirement planning with an independent financial adviser. The increase in NMPA could have a material impact for those members intending to access benefits before age 57, particularly those who will be aged over 55 and under 57 on 6 April 2028.

GMP Equalisation Update

Following the Lloyds Bank case in 2018, the Regulator announced the formation of an industry working group to produce good practice industry guidance to support schemes with GMP equalisation. Since its formation, the GMP Equalisation Working Group has published a number of guidance notes including most recently Conversion Guidance (July 2021) and Transfers Guidance (August 2021).

The Conversion Guidance helpfully summarises the approach taken by three schemes that have undergone conversion exercises, including a detailed analysis of the tax position in each case. Looking at the approach in more detail, it would appear that the risk of tax charges being triggered on conversion can be managed but not eliminated in all cases. If a scheme has members with tax protected status, it may be necessary to consider one of the dual record keeping methods for these members.

With regards to the Transfers Guidance, this will be a useful reference point for trustees when they consider their legal obligations relating to historic transfer payments as part of the GMP equalisation project. The Guidance looks at common obstacles including inadequate data and missing contact details and contains useful commentary on establishing de minimis thresholds and settling the liability in those cases where there is no pension scheme to receive a top up.

Please do get in touch if you require any advice concerning GMP equalisation or the application of best practice guidance to your scheme.

Trustees should also note the recent decision in the Axminster Carpets case where the Court was asked to consider a scheme rule which required any unclaimed benefits to be forfeited after six years, but also reserved a discretion to the trustees to pay the unclaimed benefits notwithstanding the forfeiture. The trustees sought guidance on the factors to take into account when considering the exercise of the discretion.

The Judge made a number of helpful observations including the following:

“...the beneficiaries were not in a position to know that they were being underpaid over the years. Therefore, they were not in a position to make a claim to prevent time running under [the forfeiture provision]. It can therefore be said that the forfeiture of their benefits under [that provision] is wholly undeserved. It can then be said that the Trustee ought to exercise its discretion to restore those benefits under [the provision] unless there are other considerations which override that approach.”

This decision is relevant in the context of GMP equalisation where adjustments to benefits - to address the unequal effect of GMP - reveal that members have been underpaid. The Court ruled, in the Lloyds Bank case, that a forfeiture provision under a pension scheme’s rules could

restrict the award of back payments. Where a forfeiture provision also confers a discretion on trustees to pay the benefits notwithstanding the forfeiture, trustees will now need to consider the comments of the Judge in the Axminster case. Prior to the first Lloyds Bank judgment, members could not have known that they had a potential claim for benefits in respect of trustees' legal obligation to adjust benefits to take account of unequal GMPs. Any forfeiture of these "unclaimed" benefits would be undeserved and, following the comments of the Judge in the Axminster case, trustees ought to consider exercising their discretion to allow a full award of back payments.

Please do get in touch with your usual contact in the pensions team to discuss the scope and application of any forfeiture provision under the rules of your scheme and the relevance of the Axminster case.

'The team has guided us through some interesting times in the unusual circumstances of our fund. They have all done this with sensible, pragmatic and practical advice delivered in a manner that has helped the trustee navigate some choppy waters.'

The Legal 500

'They do what they do in an unassuming but focused, timely and technically excellent way. They are friendly and welcoming and I see them as an integral part of the team.'

Chambers and Partners

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