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Proposals to change the notifiable events framework

Following on from the Pension Schemes Act 2021, the DWP is consulting on proposals to further strengthen The Pensions Regulator's powers by changing the requirements for sponsoring employers to notify the Regulator of certain events.

The consultation runs until 27 October 2021 and it is expected that the provisions will be brought into force in 2022.

Background

Trustees and employers are already required to notify the Regulator of certain prescribed events. Notifiable events concern the occurrence of, or the intention to take, action that could conceivably weaken a defined benefit pension scheme and possibly lead to the scheme applying to the Pension Protection Fund. There are currently 12 notifiable events split equally between employers and trustees. The government is to extend the number of employer-related notifiable events, while also removing and amending two existing events.

In addition to this, the Pension Schemes Act 2021 introduces a new duty for employers to give notices and statements to the Regulator and trustees in respect of certain events. These statements will set out the implications for the scheme in relation to specified corporate events relating to the employer, and how any risks to the scheme will be mitigated. This information will be required at a later point in a corporate transaction than a notifiable event notification, when there is greater certainty as to whether the transaction is going ahead, its nature and the implications for the scheme. This new duty is proposed to apply to three events: the two proposed new notifiable events plus an existing one.

Two new notifiable events

1. The intended sale by the employer of a material proportion of its business or assets, in respect of which a decision in principle has been reached.

2. The intended granting or extending of a relevant security by the employer over its assets – a decision in principle by the employer to grant or extend a relevant security over its assets, such that, should the employer become insolvent, the secured creditor would be ranked above the scheme in the order of priority for debt recovery.

One notifiable event to be removed

The requirement for employers to notify the Regulator where it has received advice that it is trading wrongfully, or circumstances have been reached in which a director or former director of the company knows that there is no reasonable prospect that the company will avoid going into insolvent liquidation will cease to be a notifiable event.

This is not meant to diminish the seriousness of wrongful trading, but instead acknowledges that the requirement to notify the Regulator is ineffective. The Regulator has confirmed it has never received a notification under this provision.

Events that will require the employer to provide a notice and a statement

Three events are to be included where a notice and statement must be given to the Regulator and the trustees when the main terms of the relevant event have been proposed. The statement must indicate the impact on the pension scheme of the transaction and what action is being taken to mitigate any detrimental effects.

The events are:

1. The intended sale by the employer of a ‘material proportion’ (see below) of its business or assets.
2. The intended granting or extending of a ‘relevant security’ (see below) by the employer over its assets which would result in the secured creditor being ranked above the scheme in the order of priority for debt recovery.
3. Where the employer is a company, the intended relinquishing of control by a controlling company of the employer company, or where the controlling company relinquishes such control without a decision to do so having been taken, the relinquishment of control of the employer company by the controlling company.

The intention is to balance the desire for the Regulator and the trustee to have the relevant information as early in the transaction as possible, with the acknowledgement that full details of the transaction, and any mitigation in respect of the pension scheme, may not be available until nearer the end of the process.

What must the statement include?

1. A description of the event, including the main terms proposed.
2. A description of any adverse effects of the event on the pension scheme.
3. A description of any adverse effects of the event on the employer’s ability to meet its legal obligations to support the scheme.
4. A description of any steps taken to mitigate those adverse effects.
5. A description of any communication with the trustees or managers of the eligible pension scheme about the event.

Material proportion

A material proportion of the employer's business accounts for more than 25% of its annual revenue and a material proportion of the assets of the employer is one that accounts for more than 25% of the gross value of its assets.

For these purposes, 'revenue' and 'assets' are either those recorded in the most recent annual accounts, or where the employer is not required to file annual accounts, its accounting records.

The aim is to capture significant changes and the government believes that 25% of revenue, or assets, provides a simple way of assessing this. The definition of 'material proportion' will include other disposals made, or agreed, in the 12 months prior to the date of the notifiable event.

Relevant security

This is a security granted or extended by the employer, or one or more subsidiaries of the employer. The level of the security will be at least 25% of either the employer's consolidated revenues or its gross assets.

It includes both a fixed charge, or floating charge, over assets of the employer, or the wider employer group, and an all assets floating charge which gives the charge-holder the right to appoint an administrator. It does not include the refinancing of an existing debt, security for specific chattels, or financing for company vehicles.

The Regulator will provide more information in its code of practice and accompanying guidance.

One existing notifiable event to be amended

The requirement to issue a notice and statement at the point main terms have been proposed will apply to the existing notifiable event of where a controlling company decides to relinquish control of the employer company.

The notifiable events regulations are, therefore, going to be amended to make it clear that this event needs to be notified when a decision in principle is made and is now, therefore, the first stage in a two-stage process (where stage two is the notice and statement).

Comment

There are few surprises in the DWP's proposals, as work on refreshing the notifiable events framework and the need to provide details to both the Regulator and the trustees of specific corporate transactions, had been well trailed ahead of the Pension Schemes Bill being introduced to Parliament nearly two years ago.

The key reason for these changes is to provide the Regulator with clear information more quickly, so that it can take appropriate action, where necessary. It remains to be seen whether the new framework provides a barrier to corporate activity, but the fact that trustees will have to be informed of a sponsor's plans for certain transactions should also be welcomed. The Regulator's intention is not to impede normal business activity, but to assist the Regulator in cases where a defined benefit pension scheme could be at risk (intentionally or otherwise).

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