

New criminal offences and unlimited fines: what employers need to know about the Pensions Regulator's new powers

January 2020

Pension briefing

HIGHLIGHTS

After the Carillion and BHS debacles, the Pensions Regulator (tPR) announced it was going to be "clearer, quicker and tougher". The new Pension Schemes Bill (the Bill) currently going through Parliament will give tPR significant new powers so it can beef up its approach. Corporate groups with defined benefit pension (DB) schemes should understand the Bill's new requirements because failure to comply could result in large fines or being charged with a criminal offence.

For corporate groups with DB schemes, this is the most significant change in regulation since the Pensions Act 2004. The key message is be alert to anything that could weaken the financial position of the employers supporting the DB scheme or that could prejudice the DB scheme in an insolvency. In these circumstances, exercise caution and take advice.



NEW CRIMINAL OFFENCES AND FINES

The Bill introduces two new offences punishable by up to seven years' imprisonment and / or an unlimited fine, the offences are:

- avoidance of a debt due under section 75 Pensions Act 1995 (known as a section 75 debt) - a person may commit this offence by doing an act (or failure to act) which, for example, prevents a section 75 debt becoming due or reduces the amount of a section 75 debt which would otherwise become due;
- committing an act (or failure to act) which "*detrimentally affects in a material way the likelihood of accrued scheme benefits being received*". The person must also have known, or ought to have known, that the act or course of conduct would have that effect; and not have a reasonable excuse.

As drafted, the circumstances in which these new offences might be committed are wide-ranging and could catch normal corporate activity such as: an employer borrowing to fund working capital (whether on a secured or unsecured basis); payment of dividends and mergers and acquisitions.

A number of industry bodies (many of whom Hogan Lovells is actively involved with) have written to the government to express concern about the potential breadth of these new offences and similar concerns have been raised by the House of Lords. Therefore, we are hopeful that changes will be made. However, even if the offences are narrowed, corporate groups with DB schemes (and individuals within these groups) will need to take advice to help manage the risk of any action exposing them to these new offences.

CONTRIBUTION NOTICES (CN) – TPR'S POWER EXTENDED

A CN requires a one-off contribution to be made to the DB scheme and can be issued where there has been an act or deliberate failure to act which has:

- as a main purpose the avoidance of a section 75 debt or
- the effect of detrimentally affecting in a material way the likelihood that scheme benefits will be received.

TPR must also be of the opinion that it is reasonable to issue a CN. TPR can take into account acts that took place up to six years earlier when deciding whether to issue such a notice.

Who can be subject to a CN?

TPR has the power to issue a CN to both the employer of a DB scheme and any person associated or connected with the employer. The latter will include, for example, group companies of the employer, shareholders who control more than one-third of the voting power in an employer and, in some cases, the employer's directors.

What's changing?

TPR's powers to issue CNs are being extended. There will be two new tests which, if satisfied, will also allow tPR to issue a CN. These are:

- an employer insolvency test; and
- an employer resources test.

The *employer insolvency test* will be met (note this does not require an actual insolvency) if tPR considers that immediately after the person's act or failure to act (the "relevant time"):

- the value of the scheme assets was less than the amount of the liabilities (as estimated by tPR, on the buy-out basis); and
- if a section 75 debt had fallen due from the employer, the person's act (or failure to act) would have materially reduced the amount of the debt likely to be recovered by the scheme.

The employer resources test will be met if tPR considers that:

- the act (or failure to act) reduced the value of the employer's resources; and
- that reduction was a "material reduction" relative to the amount of the estimated section 75 debt which would be due from the employer had the scheme started winding up.

Again, these tests could capture normal corporate activity. There will be a statutory defence to the above tests, which requires, very broadly, the person to have: considered the issue; taken steps to minimise the impact (where relevant); and reasonably concluded that there would not be such a reduction.

The Pensions Act 2004, which introduced CNs, allowed tPR to issue a CN in respect of an act that took place before the Pensions Act became law. It is not yet clear whether there will be any element of retrospectivity in relation to these new tests.

EXTENSION OF THE NOTIFIABLE EVENTS REGIME

Legislation already requires employers to notify tPR of certain events affecting the employer, for example, a decision by a controlling company to relinquish control of the employer. However, in our experience, notification can sometimes be an afterthought or even forgotten entirely.

The list of notifiable events will be extended. Details of the additional notifiable events will be set out in regulations, but we expect the list to include sale of a material part of a sponsoring employer and giving security to creditors ahead of the DB scheme. Notification will need to include an analysis of the impact on the pension scheme and steps taken to mitigate any adverse effects.

The obligation to notify applies to both the employer and any person connected or associated with the employer. Failure to comply could give rise to a fine of up to £1 million.

HOW WE CAN HELP

Through our active participation in the pension industry and involvement in some of the highest profile cases involving DB schemes, we can give you an informed view on tPR's approach and how that develops in light of these new powers. We can also help you build corporate processes and design solutions that do not fall foul of the new regime.

This note is written as a general guide only. It should not be relied upon as a substitute for specific legal advice.

KEY HOGAN LOVELLS PARTNERS

Katie Banks	+44 20 7296 2545	katie.banks@hoganlovells.com
Duncan Buchanan	+44 20 7296 2323	duncan.buchanan@hoganlovells.com
Claire Southern	+44 20 7296 5316	claire.southern@hoganlovells.com
Edward Brown	+44 20 7296 5995	edward.brown@hoganlovells.com
Faye Jarvis	+44 20 7296 5211	faye.jarvis@hoganlovells.com



Pensions360: the full picture

www.hoganlovells.com/pensions360

About Pensions360

Hogan Lovells' broad cross-practice capability covers the full spectrum of legal advice from lawyers who understand pension clients; advising on issues from scheme investments, corporate restructurings and transactions, to funding solutions and interaction with the Regulator or the courts. The ability to draw on specialists from other practices who are not only experts in their field but have an in-depth understanding of pension issues sets us apart from our competitors.

www.hoganlovells.com

"Hogan Lovells" or the "firm" is an international legal practice that includes Hogan Lovells International LLP, Hogan Lovells US LLP and their affiliated businesses.

The word "partner" is used to describe a partner or member of Hogan Lovells International LLP, Hogan Lovells US LLP or any of their affiliated entities or any employee or consultant with equivalent standing. Certain individuals, who are designated as partners, but who are not members of Hogan Lovells International LLP, do not hold qualifications equivalent to members.

For more information about Hogan Lovells, the partners and their qualifications, see www.hoganlovells.com.

Where case studies are included, results achieved do not guarantee similar outcomes for other clients. Attorney Advertising.

© Hogan Lovells 2020. All rights reserved. IL1802/BANKSKAT/9724887.3