



Employer debt: restructuring exceptions

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Importance ★★☆☆☆

Fewer employer debts under section 75 will be triggered on group restructurings following changes in the legislation from 6 April 2010. But the new exceptions only apply if tight conditions are met.

The exceptions are intended to make life easier for groups sponsoring multi-employer defined benefit pension schemes. The conditions are designed to protect members' benefits and to maintain the strength of the sponsors' covenant to the scheme.

An employer can trigger a s.75 debt by having an "employment-cessation event". Generally speaking, this is when it ceases to employ active members without being the last employer to do so e.g. when its business is hived down to a subsidiary. Where one of the new exceptions applies, there is no "employment-cessation event" and so no debt.

There is a general exception and one for small scale restructurings.

Common features

Some features are common to both exceptions.

- They both require the employers and the trustees to complete a number of steps in sequence.
- Both operate one-to-one. They require **one** employer participating in the scheme (called the "exiting employer") to transfer **all** its business and workforce to **one** other participating employer (the "receiving employer"). The two employers must be associated and must each employ at least one active member. To consolidate the businesses of several employers, there would need to be a series of transfers.
- The transfer of the business and employees must happen under a legal agreement and must include the transfer of all the exiting employer's liabilities to the scheme. The transfer must take place within 18 weeks (or up to 36 weeks if the trustees agree) of the trustees accepting that the conditions have been met (see below).

- The employers control the process. Once the exiting employer tells the trustees it wants to use one of the exceptions, the trustees must go through the prescribed steps in a timely fashion. If the conditions are satisfied, the exception applies and the trustees cannot demand that the exiting employer pays a s.75 debt.
- The trustees can require one or both of the employers to pay their costs.

General exception

The general exception only applies if the restructuring test is met. This is that the trustees are satisfied the receiving employer will be at least:

- as likely as the exiting employer to be able to meet all the exiting employer's financial obligations to the scheme. These are widely defined; and
- as likely to be able to meet its own continuing financial obligations to the scheme as it would have been had the restructuring not taken place.

In making their judgment the trustees must consider whether there are grounds for revising the actuarial basis for the scheme's technical provisions. This means that the restructuring test looks at the future rather than the present. As part of their assessment, the trustees will normally want to consider the receiving employer's insolvency risk.

Before they make up their minds on the restructuring test, the trustees can ask for any information they require and must consult the exiting and receiving employers.

Small scale exception

The main difference from the general exception is that the conditions for the small scale exception are factual: no judgment is required. All the trustees are required to do is draw on data in the latest PPF valuation and scheme return.

The conditions are met if:

- the scheme is funded to the level of its protected PPF liabilities;
- the restructuring affects no more than two members or 3% of members (including pensioners and deferreds);
- the aggregate annual pension of affected members is no more than £20,000 (in tax year 2010/11, rising by £500 a year in future); and
- any restructurings under the small scale exception in the last three years affect:

- no more than five members or 7.5% of the total, and
- aggregate annual pension of no more than £50,000 (no escalation).

Next steps

The Pensions Regulator plans to issue guidance for trustees. The Department for Work and Pensions says it will explore extending the exceptions to restructurings that involve businesses being transferred between several employers.

Comment

Limited though they are, these exceptions will make some corporate activity easier.

The general exception looks a little like a scheme apportionment arrangement (one of the standard ways allowed for re-allocating liability in connection with an employer debt). But there are differences e.g. the trustees cannot stop the exception applying where the conditions are met whereas they could refuse to agree to an

apportionment. Also, the funding assessment focuses on the two employers concerned rather than the whole scheme.

The requirement that the scheme be funded to the level of its PPF liabilities is likely to mean that the small scale exception will be unavailable in many cases at the moment.

More information

For more information, please get in touch with your regular contact in the pensions team or with **Marcus Hellyer on 0117 902 7789 or at marcus.hellyer@burges-salmon.com**