

# PENSIONS

## LEGAL

### Statutory or not?

**Trustees of DB schemes should do an audit to make sure they know who the statutory employer(s) are in relation to their scheme.** At worst, a scheme without a statutory employer has no-one responsible for:

- scheme specific funding or
- the employer debt under section 75.

And the scheme has no access to the PPF.

This is why the Pensions Regulator (TPR) has stressed\* the need for trustees to identify which sponsoring companies are within the statutory definition of an "employer" in the Pensions Acts.

The question is fundamental to the assessment of the covenant behind the scheme.

From November, scheme returns to TPR will have to list the statutory employer(s).

#### Statutory and non-statutory employers

A non-statutory employer is one that is outside the definition in the legislation but has agreed with the trustees to participate in the scheme and be bound by its rules. This agreement can be made through a deed of participation (in a multi-employer scheme) or by a company agreeing to be (or to become) the "principal employer" of a scheme run by a single sponsor.

The obligations of a non-statutory employer are defined by the scheme rules. Typically these give members significantly less protection than the legislation because:

- the contribution obligation imposed by the rules is often weaker than under the legislation and TPR does not have the same powers to intervene in funding negotiations,
- scheme rules rarely impose an obligation to bring funding to buy-out level in the way the s.75 employer debt does and
- scheme rules can do nothing to put a non-statutory employer in a position to trigger PPF entry.

#### Identifying a statutory employer

The statutory definition of an "employer" is not straightforward. In its primary sense it means employing an active member or someone who is eligible to join the scheme. Consequently, a scheme that is open to future

accrual will normally have one or more statutory employers.

Where a scheme is closed to future accrual, there is an extension to the definition that can mean a company remains a statutory employer even though it no longer has any actives or any employees who are eligible.

This extended definition can also keep employers under statutory obligations after they have ceased to participate in a scheme (e.g. on a change of ownership).

The practical point to grasp is that a company can cease to be a statutory employer as a result of a wide range of transactions, including a scheme merger or a group restructuring (whether or not involving sales of companies or businesses outside the group).

#### No statutory employer

In many cases, trustees will need to ask their contributing employer(s) for information to help them identify those within the statutory definition. Depending on the scheme's history, the information that will be useful could include: details about employment contracts; payroll and NIC records; ECON numbers; group structure charts at different times and corporate information from Companies House.

If trustees find they have no statutory employer, they should let TPR know the position (and, from November, amend Exchange) and take advice.

One step that can be considered is creating a new statutory employer. This involves a non-statutory employer agreeing to employ an active member or someone eligible to join the scheme, perhaps on nominal terms.

#### Statutory employer(s) other than expected

If it turns out the statutory employer(s) are not as the trustees thought, they should report the correct position to TPR.

Where the trustees have based their assessment of the covenant on non-statutory employers that are unwilling to become statutory employers, they should consider reviewing the scheme's technical provisions, recovery plan and longer term strategy (e.g. their investment policy).

Having identified their current statutory employers, trustees should remain alert in future for the sort of events that could separate them from the scheme.

\* [www.thepensionsregulator.gov.uk/docs/identifying-your-statutory-employer-statement-july-2011.pdf](http://www.thepensionsregulator.gov.uk/docs/identifying-your-statutory-employer-statement-july-2011.pdf)

## Welcome

Welcome to **Pensions**, our bimonthly update keeping you informed of developments in pensions law.

To find out more about how we can help you with your occupational pension scheme, please email [richard.knight@burgess-salmon.com](mailto:richard.knight@burgess-salmon.com) or call him on 0117 939 2259.

## Employer debt changes

Soon there is likely to be a new type of apportionment arrangement to manage the s.75 employer debt when an employer ceases to participate in a multi-employer scheme. However, it is not fundamentally different from the devices available today and will not radically change the discussion about how to deal with the debt.

Originally the DWP floated a proposal that no debt would be triggered if a group guarantee was put in place to cover the liability. That would have marked an entirely new approach but the idea was dropped because of the difficulty of defining the subsequent company or scheme events that would crystallise the guarantee.

The main differences between the proposed "flexible apportionment arrangement" (FAA) and the existing "scheme apportionment arrangement" (SAA) are limited:

- all the exiting employer's scheme liabilities must be assumed by another employer with active members (an SAA allows partial assumption by another employer and/or partial payment) and
- the funding test need not be applied if it has been met in relation to another FAA and the trustees are satisfied

## Closing date

On 6 April 2012 the fixed rate of GMP revaluation is expected to rise to 4.75% (up from 4%). The increase will apply where pensionable service ends on or after 6 April.

Where a scheme has GMP liabilities and thought is being given to closing it to future accrual, the employer is likely to

there is no need to repeat it (for an SAA, a new funding test must be done each time).

An FAA would be available on a wide range of corporate and scheme reconstructions, unlike the two options (the so-called general and de minimis exceptions) introduced last year that are only available on small scale, internal group reorganisations.

### Grace-note

There is also a proposal for a more flexible grace period suspending the debt (and potentially extinguishing it) in a multi-employer scheme. The grace period is available where an employer would otherwise trigger a debt by ceasing to employ active members but is likely to employ an active again within a year or, in the proposed extension, up to three years (if the trustees agree). The period for giving notice to use the grace period will go up from one month to two.

No date has been set for the introduction of these amendments to the regulations.

find it attractive to close before the change comes into effect.

The change has yet to be finally confirmed (the consultation period continues until early November) but it is likely to happen.

## REGULATORY

### DC outcomes

TPR will shortly explain in full what it will be doing to promote the availability and use of good quality DC schemes for auto-enrolment.

In a preliminary response in July to views it received following its discussion paper, Enabling good outcomes in work-based pension provision, TPR says it will foster what it sees as the six key aspects of DC saving:

- appropriate contribution decisions,
- appropriate investment decisions,
- effective administration,
- protection of assets,
- value for money and
- appropriate decisions on decumulation (i.e. selecting an annuity).

Over the autumn TPR will set out the detail of how it will do this.

Meanwhile, the preliminary response identifies a number of risks TPR will be addressing:

- value for money and governance standards in some small schemes,

- the transparency of charges and their clear communication,
- the security of scheme assets,
- administration standards,
- education on options for decumulation and
- the legal responsibility of the various parties like the product provider, advisers, the employer and the member.

When outlining its general expectations of the parties over auto-enrolment, TPR addresses employers directly:

*"Employers, the decisions you make now will have a profound effect on your business, your staff and the pensions landscape in the long-term. You must select a pension scheme which meets the qualifying criteria for automatic enrolment, but that also meets your needs and the needs of those who will be automatically enrolled into it.*

*You need to give careful consideration to the financial strength of the provider, the core product characteristics and the levels of ongoing engagement you are able to provide.*

*You should also consider the impact on scheme members of any advice that is paid for from their funds. Where this happens, the charges should provide value for money."*

## In the office



We welcome Chris Brown and Andy Prater to our pensions team.



Having trained with the firm they are joining us on qualifying as solicitors. They take our total number to 29 solicitors and 3 paralegals.

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