

Update

Changes to employer debt regime – “flexible apportionment arrangements”

One of the most important areas of UK pensions legislation is the employer debt regime. An employer debt – sometimes known as a “section 75 debt” after section 75 of the Pensions Act 1995 – is a statutory debt that becomes payable in certain circumstances where an employer becomes insolvent, withdraws from or winds up an occupational pension scheme. The effect of the employer debt is that the employer is required to make good any deficit in the scheme – or a share of the deficit in the case of a multi-employer scheme – as assessed on a very conservative basis.

There are several exemptions to the employer debt regime which allow employers to avoid triggering the statutory debt or allow them to reduce the amount of any debt which is triggered. The Occupational Pension Schemes (Employer Debt and Miscellaneous Amendments) Regulations 2011 introduce a new exemption to the regime, which will be known as the “flexible apportionment arrangement” (FAA). The Regulations were presented to Parliament on 15 December 2011, and they came into effect on 27 January 2012.

It is intended that the new FAAs will be used in cases of corporate restructurings. In essence, they

will allow an employer that ceases to participate in a multi-employer scheme to apportion all of its liabilities under the scheme to one or more other scheme employers. The employer(s) to which the liabilities are apportioned become responsible for funding them in the future when their employer debt is triggered. The exiting employer avoids becoming subject to a section 75 debt to the extent that its liabilities are apportioned in this way.

A few points may be noted in connection with the new FAAs:

- The employers involved and the scheme trustees must consent to an FAA
- One of the conditions for their consent is that the trustees must be reasonably satisfied that the remaining employers of the scheme will be reasonably likely to be able to fund the scheme into the future and the security of members’ benefits is not adversely affected. This is the “funding test”, which is already applicable in cases where a “scheme apportionment arrangement” is used to avoid a section 75 debt
- The exiting employer must have ceased to employ any active members of the scheme
- An FAA cannot be used where the exiting employer has become insolvent

- The Pensions Regulator will be updating its guidance to take account of FAAs. Entering into an FAA will be a notifiable event to the Regulator

Aside from the FAA provisions, the new Regulations contain a further change to the employer debt regime. At present, if an employer withdraws from a multi-employer scheme, it can avoid triggering an “employment-cessation event”, and therefore becoming liable for a section 75 debt, if it proposes to employ another active member of the scheme within the next 12 months. The Regulations allow for this period of grace to be extended to 36 months, subject to the consent of the trustees of the scheme. The period for the employer to notify the trustees that it is going to make use of this provision is also extended to two months from one month.

Clyde & Co comment

FAAs are likely to give more flexibility to employers contemplating corporate restructurings than existing scheme apportionment arrangements, especially those involving a number of employers withdrawing from the scheme.

The extension to the period of grace may also help employers with very few active members and it may offer some help in relation to schemes for non-associated employers who will not be able to take advantage of FAAs.

The introduction of these measures is therefore to be welcomed. However, we will have to see whether this is borne out in practice as some previous attempts at easing the burden on employers have not worked as well as had been hoped.

Further information

If you would like further information on any issue raised in this update please contact:

Mark Howard

E: mark.howard@clydeco.com

Paul Hodges

E: paul.hodges@clydeco.com

Jack Wheeler

E: jack.wheeler@clydeco.com

Clyde & Co LLP
The St Botolph Building
138 Houndsditch
London EC3A 7AR

T: +44 (0)20 7876 5000

F: +44 (0)20 7876 5111

Further advice should be taken before relying on the contents of this summary.

Clyde & Co LLP accepts no responsibility for loss occasioned to any person acting or refraining from acting as a result of material contained in this summary.

No part of this summary may be used, reproduced, stored in a retrieval system or transmitted in any form or by any means, electronic, mechanical, photocopying, reading or otherwise without the prior permission of Clyde & Co LLP.

Clyde & Co LLP is a limited liability partnership registered in England and Wales. Authorised and regulated by the Solicitors Regulation Authority.
© Clyde & Co LLP 2012