

Pension Bill's progress

1 BACKGROUND

A second draft of the Pensions Bill has been published. Following its first publication on 12 February 2004, the Bill has been extensively reviewed during the House of Commons' Committee Stage. A number of amendments, ranging from minor drafting corrections to major technical changes, have been put forward. We summarise below some of the most significant changes to emerge from this stage of the Parliamentary process. These include the introduction of:

- anti-avoidance measures enforceable by the Regulator regarding scheme debts;
- a statutory consultation procedure applicable when certain changes are proposed to future pension benefits;
- a new section 67 protecting past benefits.

2 ANTI-AVOIDANCE AND EMPLOYER DEBT

The introduction of these clauses was accompanied by a press release in which the Pensions Minister, Malcolm Wicks, commented that they "should act as a deterrent to employers who are considering dodging their pension obligations ... [and] will also provide reassurance to responsible employers that their levy payments [for the pension protection fund] will not be subsidising unscrupulous employers".

The new so-called "moral hazard" clauses will give the new Pensions Regulator further powers which fall into two main categories:

- Contribution notices – the Pensions Regulator may issue such notices if it believes that an act or a "deliberate failure to act" on or after 11 June 2003 has resulted in an employer avoiding paying a debt under section 75. This provision, which is retrospective, dates back to the day on which the Government first announced that solvent employers would need to meet the full buy-out cost on winding-up. A contribution can also be sought from

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parties "who knowingly assist in the act or failure [to act]" .

- Financial support direction – the direction can be aimed at group employers who do not participate in the pension scheme. This may be made where, for example, the Pensions Regulator is of the opinion that a pension scheme employer is "insufficiently resourced" to meet a prescribed percentage of the estimated section 75 debt. Financial support may include all group companies (or a holding company alone) becoming jointly and severally liable for the total section 75 debt. Regulations may set out further types of support. The Pensions Regulator can issue a "contribution notice" if a financial support direction is not complied with.

The Government has also announced plans to require employers withdrawing from schemes (for instance, because of a sale) to pay the full buy-out debt rather than have the debt assessed (as now) by reference to the minimum funding requirement. This will apply unless a financial support arrangement is put in place (which is likely to need the blessing of the Pensions Regulator).

3 CONSULTATION REQUIREMENTS

Clauses 230-232 set out proposals requiring employers to consult employees (i.e. active members) about certain "prescribed decisions" relating to future benefit provision. The types of decisions employers will need to consult on are to be confirmed by regulations but are likely to include switching from defined benefits (DB) to defined contribution (DC) and closing schemes to future accrual. If the changes are being put forward by trustees, the employer will need to be notified so that it can consult with employees. Regulations may also:

- introduce timescales to be used when consulting;
- prescribe the information which must be provided;

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- give the employer discretion (in some cases) as to which other parties to consult; and
- allow the Pensions Regulator to relax or waive the requirements.

Failure to consult will not, however, invalidate changes.

The driver behind these changes is the new EU Directive on informing and consulting employees in the workplace, which is due to be implemented in the UK in March 2005. The Government will need to ensure that its pensions proposals dovetail with the Department of Trade & Industry's separate consultation on employment changes generally resulting from the Directive.

4 THE NEW SECTION 67

Section 67 of the Pensions Act 1995 prevents a pension scheme's power of amendment being exercised in a way which would or might affect a member's accrued rights or entitlements, unless the member consents or the scheme actuary certifies that the amendment is not adverse. The Bill will introduce a new section 67, together with sections 67A through to 67I, to allow schemes greater flexibility to introduce change. The trade off seems to be that there will be even more hoops through which to jump.

The new section 67 will now protect a member's "subsisting rights" (essentially, a member's "accrued rights" or entitlements to benefits, and those of his/her survivors). The key elements of the new section 67 are as follows:

- In essence, it will only be possible to change a member's subsisting rights if he/she gives "informed" consent or the "actuarial equivalence" requirement is met. Like now, where the employer has the power to amend the scheme, the trustees must consent to the change.

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- It will not be possible to convert subsisting rights which are DB into DC benefits or reduce pensions in payment, unless the member consents (these are known as "protected modifications" and may be added to in regulations).
- To meet the new standard of "informed" consent, a member will first need to be given "information in writing adequate to explain the nature of the modification" by the trustees, and a chance to make representations. The modification must be made within a reasonable period after the member has given consent.
- The "actuarial equivalence requirements" will be met if the "actuarial value" of benefits after a change is equivalent to or greater than what it was immediately before (actuarial guidance will supplement the legislation here). If the actuarial equivalence test is used, members will need to be notified of the proposed change beforehand and given a chance to make representations.
- If the requirements of the new section 67 are not met, the Pensions Regulator can declare any change void. The Pensions Regulator will also have power to impose penalties for breach and intervene to prevent a modification taking place if the section is not being complied with.

5 MISCELLANEOUS

There are also a number of other more minor provisions which have been included in the reprint of the Pensions Bill. In brief, these include:

- Provisions to try to protect the pension protection fund by giving the Pensions Regulator the power to agree when schemes can be run as closed arrangements where the employer is insolvent;

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- the removal of the requirement for occupational pension schemes to offer additional voluntary contribution arrangements (although the Bill is silent as to the fate of existing AVCs);
- an increase in the age, subject to the scheme rules, at which short service benefit must be payable from 60 to 65 (but still no word on the possibility of short service vesting before two years);
- the broadening of the Pensions Ombudsman's jurisdiction to include one-off administrative acts (and the facility for the Secretary of State to appoint a deputy Pensions Ombudsman).

6 CONCLUSION

The Bill will now proceed to the Report Stage, which could result in further amendments. The Government anticipates that the Bill will receive Royal Assent in the Autumn (with most changes coming into force in Spring 2005 at the earliest). Rather disappointingly, there is still no official word on whether the simplification of guaranteed minimum pensions will be swept up by the Bill.