Sackers

DWP consults on new employer debt option for multi-employer schemes

Alert | 25 April 2017

Introduction

Back in 2015, the DWP issued a call for evidence ("the Call for Evidence") in response to concerns about how the employer debt regime operates for employers in non-associated multi-employer schemes. Seeking to address this issue, the DWP has now published a consultation on draft regulations which will introduce a new option for employers in multi-employer schemes to defer the requirement to pay an employer debt on ceasing to employ an active member.

Key points

- Under the proposals, provided certain conditions are met, an employer in a multi-employer DB scheme will be able to defer the requirement to pay an employer debt on ceasing to employ an active member.
- This option is intended to sit alongside current options for managing employer debt, such as FAAs.
- In addition, the consultation and accompanying draft regulations propose a small number of technical amendments which aim to clarify the employer debt legislation.
- The consultation closes on 18 May 2017.
- We would not expect the regulations to be derailed by any change in government although we may have to wait until later in the year for further developments.

Background

Generally, if a company exits an underfunded multi-employer DB scheme, its share of the deficit (if any) becomes a debt due to the trustees (the "employer debt"). A debt calculation is currently triggered where an employer has "ceased to employ at least one person who is an active member" of the pension scheme, where another employer with DB liabilities continues to employ at least one active member (this is known as an "employment-cessation event" or "ECE").

Call for evidence

Responses to the Call for Evidence indicated that employers within associated multi-employer schemes are generally more likely to be able to take advantage of the various arrangements already available to manage an employer debt when an ECE occurs and, as such, are much less likely to be required to make payment of an employer debt in full at the point of exit. For example, an FAA is often used to apportion the liabilities of the exiting employer to another employer participating in the pension scheme. This prevents an employer debt being triggered.

However, respondents revealed that employers in pension schemes for non-associated employers were often unable to take advantage of such arrangements. There was also anecdotal evidence that a number of employers have been driven to insolvency by employer debts and several responding employers suggested that they could themselves be driven insolvent were they to trigger their employer debt as a result of an ECE. As a result, an employer may consider it preferable to remain in an ongoing scheme and continue to accrue unaffordable liabilities, rather than exit and trigger a debt.

Deferred debt arrangement (“DDA”)

The proposed DDA will enable an employer in a multi-employer scheme (whether the employers are associated or not) to defer the requirement to pay an employer debt following an ECE, provided the following conditions are satisfied:

- the funding test is met - broadly, this addresses the ability of all the remaining employers (including the exiting or “deferred” employer) to fund the scheme and whether the DDA would have an adverse effect on the security of members’ benefits
- the scheme is not in a PPF assessment period, or likely to start one in the next 12 months
- the scheme is not being wound up
- the trustees have consented, in writing, to the DDA (based on their satisfaction that the arrangement would not be detrimental to the scheme or its members).

The DWP does not intend a DDA to be available to employers who are restructuring, but it will be open to those who are already in a “period of grace”. (Subject to certain conditions, employers can use a “period of grace” to cease employing an active member of the pension scheme temporarily without triggering an employer debt.)

While the DDA is in place, the deferred employer will remain an employer for scheme funding purposes and may be required to make deficit recovery contributions as part of any recovery plan. It will also remain responsible for its share of any orphan liabilities.

Ending a DDA

There are a number of circumstances in which a DDA may come to an end and an employer debt could become due. For example:

- the deferred employer chooses to trigger the employer debt, subject to the trustees' consent
- the deferred employer commences winding-up
- the deferred employer restructures
- the scheme winds-up.

In addition, if the trustees are reasonably satisfied that:

- the deferred employer has failed to comply with its obligations under the scheme funding regulations, or
- the deferred employer's covenant to the scheme is likely to weaken in any other way in the next 12 months

they can serve a notice on the deferred employer stating that the DDA has come to an end. This is intended to deter employers from using a DDA to avoid their responsibilities and to provide adequate safeguards for all scheme members.

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