

Statement

Identifying your statutory employer

December 2013

The Pensions
Regulator

Introduction

Trustees have always been responsible for identifying who has a legal obligation to support their scheme.

This statement is aimed at the trustees of schemes with defined benefits (DB) and their advisers, to help them understand why it is important to be clear who legally stands behind their scheme, and what they need to do. It was first published in 2011 and has been updated to include additional information on overseas employers following the Court of Appeal judgement on Olympic Airlines.



**It is important
to understand
the legal duties
to support the
scheme**

Why is it important to identify your statutory employer?

1. An employer's legal obligation to support a scheme is the fundamental building block of the pensions framework in the UK and pension protection. It should directly inform the trustees' assessment of the employer covenant. This affects the level of technical provisions and investments that are appropriate for the scheme, as well as the recovery plan. Legal obligations also determine the outcomes for the scheme in the event of employer insolvency and scheme wind-up.
2. It is important to be able to identify the type of legal obligation an employer owes to the scheme. Not all employers associated with a scheme will necessarily be statutory employers¹.
3. The trustees should identify and assess the legal obligations of each of the scheme's employers, as well as the nature and extent of these obligations.
4. Since November 2011, the scheme return has explicitly required trustees to identify the statutory employers to their scheme.
5. The statutory employer(s) to a scheme will be the employer(s) legally responsible for:
 - meeting the scheme funding objective of the pension scheme
 - paying the section 75 debt when an employment cessation event occurs on employer departure from a multi-employer scheme, on scheme wind-up or on employer insolvency
 - triggering entry to a Pension Protection Fund (PPF) assessment period on insolvency.
6. The trustees of DB schemes therefore need to ensure that they identify which employer(s) fits the statutory definition as defined in the 1995 Act and 2004 Act², and therefore has these legal obligations.

1
Different statutory definitions of an employer (in different areas of pensions legislation) also vary slightly and have different implications for the scheme.

2
S124 Pensions Act 1995 and s318 Pensions Act 2004, as extended by regulation 9 of the Occupational Pension Scheme (Employer Debt) Regulations 2005, regulation 2 and paragraph 3 of Schedule 2 to the Occupational Pension Scheme (Scheme Funding) Regulations 2005, and regulation 1 of the Pension Protection Fund (Entry Rules) Regulations 2005 (as amended, or under previous legislation applicable at the relevant time).

Why produce this statement?

7. As more and more schemes close to future DB accrual, the risk of schemes not having statutory employers increases, particularly when there have been employer group restructuring or scheme transfers.

Example

An employer with a closed DB scheme is replaced by a new employer. The new employer does not employ an active DB member of the scheme and has never done so in the past. It is therefore unlikely to meet all of the relevant statutory definitions for all of the relevant purposes (including responsibility for the scheme's section 75 liabilities).

8. It is important that the trustees look out for certain situations that might cause a scheme to lose the employers legally responsible for meeting the scheme funding obligations and section 75 liabilities. If the trustees are vigilant they can make sure that everything is done to prevent that from happening. If it did happen, the scheme may not be eligible for entry to the PPF. This could occur if the employer(s) supporting the scheme does not fit within the relevant statutory definitions under the 1995 and 2004 Acts.

How do the trustees identify the statutory employer(s)?

9. For the majority of schemes, identifying the statutory employer(s) will be relatively straightforward. For example, schemes which are open to future accrual will almost certainly contain active members, so the employer of those members will meet the statutory definition.
10. As a starting point, the trustees should speak to the employer(s) which contributes to the scheme and is routinely involved in agreeing scheme funding matters. In the majority of cases, it will be straightforward to establish whether the statutory definition is met for this employer.
11. However, if employers have left the scheme in the past, the trustees may need to consider whether they could still fall within the definition of statutory employer³. This may require legal advice.
12. When former employers have been identified the trustees will need to establish whether those employers have previously discharged their liabilities to the scheme. If they did so, it could mean that they have ceased to fall within the definition of statutory employer⁴.
13. For schemes which are closed to future accrual and therefore by definition have no active members (or anyone eligible to join), identifying the statutory employer(s) may be more complicated. It may be appropriate for the trustees of closed schemes to seek legal advice (in respect of both pensions law⁵ and employment law) when carrying out the exercise to identify the statutory employer(s).

³
This will depend on whether they remain 'former employers' under relevant extensions to the definitions.

⁴
See, for example, paras 29-35 of our guidance on multi-employer schemes and employer departures at www.tpr.gov.uk/multi-employer. Note that legislation has been subject to numerous amendments, so when trustees are considering historical employer departures they may need legal advice on the statutory definition and conditions at the relevant time.

⁵
Any pensions law advice should take into account the implications of the Pilots Judgment (PNPF Trust Co Ltd vs Taylor & Ors).

What information will the trustees need?

14. The trustees will need to request information from the employers to help them identify those which meet the statutory definition. If the trustees meet resistance which they are unable to resolve, they should contact the regulator.
15. The information that the trustees will require in order to identify the statutory employer(s) will depend on the scheme status and the complexity of the scheme's history. Such information may include:
 - employment records (which may include payroll information, National Insurance records, contract details, secondment information)
 - historic documents regarding employer participation and departures from the scheme
 - information from Her Majesty's Revenue & Customs (HMRC) may be helpful, for example a list of employers which have been allocated ECON numbers in relation to the scheme. This information can be requested by contacting HMRC at www.hmrc.gov.uk
 - information from Companies House about former employers
 - past scheme accounts to indicate the likely scheme funding position at the time of historical departures, and whether payments of section 75 debts⁶ were made to the scheme.

⁶
Under s75 Pensions Act 1995 and the Occupational Pension Scheme (Employer Debt) Regulations 2005 or previous legislation.

What if the trustees can't identify a statutory employer?

16. Where the trustees conclude that neither the employer which contributes to the scheme, nor any other employer, meets the statutory definition, they should discuss the situation with the contributing employer, and inform the regulator. The employer(s) in question can become a statutory employer by employing an active member accruing defined benefits (DB member) in the scheme, and this should be discussed with both the trustees' and employer's advisers.
17. We expect the trustees to also investigate why and how the scheme came to be without a statutory employer. The trustees should contact the regulator at the start of these investigations, and we will consider whether use of our anti-avoidance powers is appropriate.
18. If activity has occurred in the past which has left the scheme without a statutory employer responsible for DB liabilities, the trustees should carefully consider any advice they received.
19. If the trustees have failed to identify any employer which meets the statutory definition they should update Exchange accordingly.

What should the trustees do when the statutory employer(s) is identified?

20. When the trustees have identified the statutory employer(s), they should report this information to the regulator on Exchange.
21. The identification exercise may reveal changes to the employers the trustees had assumed were legally responsible for a multi-employer scheme. The trustees may discover that an employer(s) on whom they have based their covenant assessment is not a statutory employer, and does not wish to become one. Or they may discover additional employers which do meet the statutory definition. In this case, they may wish to revisit the assumptions used in setting the scheme's technical provisions and recovery plan, as well as the longer term plans for the scheme (including for example, investment strategy).

Defined contribution (DC) employers

22. A possible outcome of the identification exercise is that the trustees will establish that the statutory employer to their scheme is, or could in the future be, excluded from the statutory definition relating to section 75 because it is a DC employer⁷ who is only responsible for DC members. This is particularly likely where the DB section of the scheme is closed but there is an open DC section, or where a DC scheme has received a transfer in of past liabilities from a DB scheme.

Example

The employers of active DB members may have departed from the scheme leaving an employer who has only ever employed DC members. That employer may meet the PPF statutory definition, and the scheme may therefore still meet the PPF eligibility requirements. That employer is also likely to have scheme funding obligations. However, the employer may have minimal (or no) liability under section 75 of the 1995 Act. Therefore, being mindful of the minimal section 75 position, it is likely that the weight the trustees can place on this employer's covenant value is far less than if the employer had some section 75 liability. The trustees should be aware of this risk and review the situation accordingly. If the trustees discover that their DB scheme is only supported by a DC employer they should contact the regulator.

⁷ Regulation 2(1) and regulation 9(3)(a) of the Occupational Pension Scheme (Employer Debt) Regulations 2005.

Schemes with an overseas employer

23. Where a scheme has an overseas employer, trustees will need to consider how this may impact on the scheme's ability to access both ongoing funding and to enforce debts in the employer's jurisdiction. Trustees should be mindful of the fact that any assets located in the UK will be available to a wider pool of creditors and not just creditors of the UK branch and may be moved offshore without or at short notice.
24. Trustees will also want to consider the scheme's ability to enter the PPF. In particular, trustees are encouraged to be vigilant as to the extent of the economic activity being conducted in the UK and any decline in that activity. In the event that there is insufficient economic activity in the UK (eg where the UK branch office is not conducting any external economic function), this may impact on whether it will be possible to commence a UK insolvency process⁸. Trustees should be ready to act quickly to protect the scheme's position in the event of overseas insolvency proceedings being instigated in respect of the employer.
25. Overseas insolvency proceedings do not constitute a 'qualifying insolvency event'⁹ in relation to PPF entry. This means that, if there is no UK insolvency process, there is a risk that the scheme will not be able to enter the PPF. It may fall to the trustees as creditors of the employer to instigate UK insolvency proceedings. For employers registered within the European Union (excluding Denmark), trustees will need to consider the availability of either primary or secondary winding up proceedings in accordance with the European Insolvency Regulation¹⁰. Where the employer is registered outside the European Union or in Denmark, trustees will need to consider whether they are able to issue proceedings in the UK including the possibility of petitioning for winding up under Part V of the Insolvency Act 1986.
26. This is a complex area and trustees are encouraged to seek legal advice as soon as possible where there is concern over this issue.

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Trustees of the Olympic Airlines SA Pension & Life Assurance Scheme v Olympic Airlines SA [2013] EWCA Civ 643.

9

Sections 121 and 127(3) of the Pensions Act 2004.

10

Council Regulation (EC) 1346/2000.

What should trustees look out for in the future?

27. The trustees need to ensure that their current position is clear, and be vigilant for any change that could separate the scheme from its statutory employer(s). Any such separation would have serious consequences for members – it could render the scheme ineligible for PPF protection and they are unlikely to qualify for help from FAS. It could also reduce or prevent future funding and support available for the scheme.

Examples

Some scenarios which trustees need to look out for to prevent a scheme from losing its statutory employer(s) include:

- an employer substitution takes place and the new employer does not meet the statutory definition or is a DC only employer
- there is a bulk transfer of DB liabilities to a scheme in which no DB liabilities have accrued or will accrue
- where employers depart from the scheme under the employer debt regulations leaving an employer which may not be a statutory employer, or is a DC employer
- a 'phoenix event' – an arrangement resulting in the employer's business being sold to a new entity following an insolvency event, where the new entity has never employed any active DB members.

28. Trustees should be particularly mindful of the risk of the scheme being left without a statutory employer, or without an employer who is responsible for the scheme's section 75 liabilities, when faced with any of these scenarios, and should contact the regulator if they are concerned.
29. The regulator would consider such an outcome to be of material detriment to the scheme and would almost certainly consider use of its anti-avoidance powers.
30. Going forward, the trustees should ensure that any change to the statutory employer(s) (eg departure using a mechanism under the employer debt regulations or payment of the section 75 debt) is updated via Exchange.

31. If a future employer substitution or bulk transfer takes place, the trustees must ensure that the new employer takes on responsibility for the DB scheme liabilities as a statutory employer (and not only a DC employer) and ensure that any detrimental event caused is adequately mitigated¹¹. The most robust way of doing this is to ensure that the new employer employs an active DB member, even if this means amending a scheme (for example, by re-opening it) to admit such an active member.
32. Where a scheme has an overseas employer, trustees should be aware of and monitor the extent of the economic activity being conducted in the UK, particularly where there is a risk of the overseas employer entering insolvency and the steps they may need to take.
33. This statement must be read in conjunction with the relevant legislation. It does not override the legislation or provide a definitive interpretation and trustees should seek their own legal advice.

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See our clearance guidance at www.tpr.gov.uk/clearance for more detail on 'detrimental events', 'materially detrimental events' and 'adequate mitigation'.

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