Covid-19 issues for pension scheme trustees

March 2020

Introduction

The Covid-19 pandemic is constantly evolving, with the Government's advice being updated daily. There is to be emergency coronavirus legislation and the Department of Health & Social Care is due to publish a new Bill. This is expected to include pensions provisions to allow ex-NHS employees who have recently retired to return to work, and retired staff who have already returned to work to increase their commitments, without having their pension benefits suspended.

What actions should the trustees of private pension schemes consider taking? In the current climate of unprecedented market volatility, social distancing, remote working and limited travel, everyone needs to make adjustments, not least pension scheme trustees. In this briefing we look at possible issues that may arise in relation to the day-to-day running of a pension scheme during these challenging times. This covers key points and actions that trustees should consider to enable the smooth operation of their scheme to continue and also touches on regulatory expectations on scheme governance and the impact of current market uncertainty on their scheme funding and investment positions.

Summary checklist

Issue	Action
Regulatory Guidance	Read relevant TPR and PPF guidance notes as they are produced in response to the evolving crisis
Trustee meetings	Ensure appropriate governance to enable scheme business to continue Check scheme rules allow virtual meetings Check technology in advance Consider document signing practicalities
Scheme administration and third party advisers	Check the contingency plans in place for potential future lockdown and remote working Follow legal advice where a provider seeks to implement a force majeure clause
Funding and investment	Advice will be necessary on any investment adjustments or covenant impacts
Work with the scheme employer	Detailed discussions with the sponsor are likely to be required regarding contributions, covenant strength and member communications
Member communications	Consider communicating with membership to confirm steps taken to safeguard benefits

The Pensions Regulator's guidance on COVID-19

On March 12, 2020, the Pensions Regulator published online guidance *COVID-19: What pension schemes need to consider*. The guidance confirms that the Regulator expects trustees to have appropriate monitoring and contingency planning in place and to be "alive to risks that would have a significant consequence for their scheme and members". This includes business continuity planning for the scheme and its service providers. Trustees should understand what contingency is in place to mitigate any under-resourcing due to, for example, increase in work volumes or unavailable staff. It is currently engaging with key administrators "to understand their current preparedness".

On March 20, 2020, the Regulator updated the guidance further to set out what it expects from trustees. The Regulator expects trustees to make clear to the administrator which activities should be prioritised in the event of under-resourcing and stresses the importance of ensuring that payment of members' benefits, securing employer contributions and protecting members from scams are placed at the top of the list. David Fairs, Executive Director at the Regulator, has said that trustees will need to assist their members in being alert to the various new scams which are appearing, offering to assist members to transfer pension benefits to a "safer place". Mr Fairs recommended that trustees point members towards the FCA Scamsmart website and the and Money and Pensions Service and to be particularly alert in the current uncertain climate. It is acknowledged that certain administrative breaches may be unavoidable in the current climate and the Regulator will take a fair and proportionate approach where this is the case. There is also a further link to guidance for trustees where the employer may be in financial distress (see further below).

The Regulator has confirmed that it will be setting out its position for March and April valuations in its annual funding statement, to be published after Easter.

What practical steps can Trustees take now to meet the regulatory expectations and needs of their schemes?

Governance issues for Trustee meetings

In the midst of the current situation, a face-to-face meeting of several people is discouraged to protect participants' health . The governing provisions of most schemes, together with the articles of association for any trustee company, are likely to enable trustees to hold a meeting by telephone conference or video link. As trustees you'll need to check that your particular scheme rules allow for this, and if you are unsure, you should check with your legal adviser on the relevant provisions governing your scheme.

The Chair may wish to issue guidance in advance of the meeting to suggest appropriate software and use of VPNs. The formalities of the meeting, for example the quorum and the decision-making procedures, should also be reviewed to ensure any decisions are valid if not all trustees can attend.

Where roles are delegated to specific subcommittees or persons e.g. the Chairman, ensure that sufficient flexibility exists in your governance structures to enable the scheme to conduct business if one or more key individuals are absent or unavailable.

It is important for trustees to be prepared that a virtual meeting is likely to proceed much differently than a physical meeting. Accordingly, clear agendas, record keeping and effective chairmanship will be even more essential than normal to ensure all business is conducted and all participants are able to play their role.

What about the virtual execution of documents?

As trustees, you're likely to deal with two main types of agreement in practice:

- written contracts which are signed by all the parties
- deeds.

In the execution of deeds, the signatories will need a witness to their signature which may prove difficult if people are working remotely or in self-isolation.

Norton Rose Fulbright has detailed and specific instructions which can be circulated to the signatories of each type of document. We can also provide you with a template email to send to each party, setting out the clear and distinct steps which must be taken to ensure that any contracts and deeds signed virtually will not be invalid.

Relationships with third parties

Scheme administrators
It is essential that trustees ensure that the administration of the scheme can continue uninterrupted by the effect of COVID-19 and in accordance with any agreed service levels. Some actions that trustees can take to assess the scheme's position include:

- contacting their service providers and third-party advisers to ask what contingency arrangements they have. The scheme administrator could be asked to confirm that it has a business resilience framework in place, which could encompass:
  - remote running of the scheme payroll
  - confirmation of compliance with government and NHS guidelines
  - plans to operate in the event of staff shortages and mass remote-working. These would need to include IT security and data protection considerations.
- preparing for any loss of continuity in services provided to the scheme. It may be prudent to draft a member communication to explain any effect on issues such as pensioner payroll, the issue of cash-equivalent transfer values, and the possible delays affecting member queries generally.

Advisers
Similarly, trustees should make contact with their key external advisers to ensure that actuarial, legal, covenant or investment support will continue to be available to support the Scheme's needs and that appropriate business continuity plans are in place for their advisers. Trustees may also wish to consider whether advisers or administrators working remotely affects any data protection or confidentiality requirements and seek confirmation that these will not be impacted.

Additionally, trustees should ask third party advisers to confirm arrangements for holding future trustee meetings and what technology may be available etc. . Third-party advisers may be unable to host meetings with external parties or be unable to attend;

Force majeure clauses
The majority of contracts and service level agreements that trustees have with third parties will contain a force majeure clause. This entitles the service provider to modify or suspend the performance of its contractual obligations if certain events occur which make that performance difficult or impossible.

Legal advice may be needed if a third party service provider notifies informs the trustees that it intends to rely on a force majeure clause.

Funding and investment

The enormous impact on the world's financial market following the spread of COVID-19 means trustees will need advice on any adjustments that may need to be made to the scheme's investments and close contact with their investment consultants will be crucial.

If the scheme is in the process of any major restructuring exercise or liability management exercises, the trustees should take advice on whether this should be postponed.

Could COVID-19 affect the scheme's mortality assumptions? The trustees should contact the scheme actuary for advice.

Working with the scheme employer
The trustees may wish to work in tandem with the scheme employer when planning an appropriate response to the COVID-19 pandemic and this is clearly the regulatory expectation. Trustees should ask whether the employer intends to make any changes which may affect its ability to meet its funding commitments to the scheme any other changes that could impact on the administration of the scheme and the members' benefits.

Trustees will also need to understand the possible impact of COVID-19 on the sponsor's business, and the likely impact on the employer covenant, in both the short and longer term. The precise impact will depend on the nature of the employer's business, and in the event of a deterioration in the employer covenant, the trustees should consider whether they should look to alter the scheme's investment and funding strategies to reflect the potential impact on cash flow (and so the weaker covenant) and look to reduce reliance on the covenant in the long-term, if this is appropriate.

What about employers who are making deficit reduction contributions?
As noted above the Pensions Regulator acknowledges that these are turbulent times for pension scheme funding issues and may be particularly acute for some employers suddenly plunged into financially distressed situations. On March 20, 2020, the Regulator issued guidance for DB Scheme Trustees who may be faced with requests from employers to suspend deficit reduction contributions.

In summary:

- the Regulator recognises that pausing contributions may be appropriate depending on the circumstances
- trustees should get clarity on the timing for requests and challenge deadlines for responses to the request which are unnecessarily short as well as making sure they receive adequate information to make informed decisions
- the Regulator has suggested a list of questions which trustees should put to the employer to understand the impact of COVID-19 on the sponsor's business and the measures being taken to contain it
- the trustees should ensure payments are not being made by the employer to related entities or shareholders
- assurance should be sought that banks are supportive of the employer and not withdrawing borrowing facilities
- where other stakeholders (e.g. banks) are strengthening their claim on the employer's assets using security, trustees should ensure they get a fair share of any new security
- any suspension should have an end date as well as triggers for contributions to restart if trading returns to normal
- where timescales are very short (for instance where the employer urgently needs to suspend contributions) deferrals of contributions should be short-term with more information then being required for a longer-term decision on suspension of contributions to be made.

The Regulator has stated that it will update its online COVID-19 guidance on a regular basis and acknowledges that trustees will need to take actuarial, covenant and legal advice to fully understand what options may be open to it.

Member communications

Members may understandably be concerned about the security of their benefits and how they might be impacted by the global pandemic. As such, trustees should anticipate queries and may wish to consider communicating with members to provide them with reassurance that they are taking appropriate steps and imposing relevant safeguards to deal with the pandemic. Given the likelihood that some member services may be unavailable or delayed during the crisis whilst core transactions are prioritised, trustees may wish to issue communications via their websites or newsletters to explain this.

Life assurance benefits

Where the pension scheme's death benefit is provided through an insurance policy, the trustees should check the terms to confirm the impact of a pandemic on its terms. There is usually a clause concerning "event limits" that impose overall limitations on the cover provided, including a "catastrophe limit" provision. This imposes a limit to how much the insurer will pay if death occurs, directly or indirectly, as a result of a catastrophe. This will be defined in the policy but can include events that result in the death of more than one member related to one originating cause.

PPF guidance on COVID-19

On March 18, 2020 the Pension Protection Fund issued its own online guidance: *Our coronavirus (COVID-19) preparation*. This confirms:

- there are full contingency plans in place to ensure it can pay member benefits
- levy-payers do not need to take additional risks to comply with its requirements for submitting contingent asset documents. Electronic copies of contingent asset related documents are accepted and extensions to time limits will be considered on a case by case basis. Reasons for late submission should be submitted with emailed documents
- for PPF-specific documents, for example officer's certificates, it will accept other forms of confirmation that the form is authorised, such as signatures produced by e-sign software
- for documents such as contingent asset agreements, or documents to be filed at registries that may have other requirements, the PPF recommends seeking legal advice to ensure the documents are signed validly.

It has also added a new page to its website: *How trustees can prepare for the unexpected*.

Comment

The COVID-19 pandemic is a fast-changing situation which will inevitably have a significant impact on UK pension schemes. Deterioration in DB funding is likely and the circumstances remain volatile. Employers in certain industries (tourism and hospitality, for instance) are likely to suffer significantly, with the knock-on effect that their covenant may become less robust. The number of schemes falling into the PPF may also increase over the coming months although the Regulator appears to be willing to enable schemes to come to pragmatic interim solutions with their employers to help avoid such an outcome where possible.

The Regulator's annual funding statement now appears to be expected after Easter and there is likely to be significant delay to the implementation of the new DB funding regime. The progress of the Pension Schemes Bill through Parliament has been pushed back and it remains to be seen how long some sort of resolution to the COVID-19 pandemic may take.

In the current uncertainty of the world situation, we are here to help. Your Norton Rose Fulbright adviser is working remotely and can be contacted through the usual channels for advice and support, and updates will appear daily on all aspects of the legal implications of the crisis on our Norton Rose Fulbright website.

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