SQUIRE PATTON BOGGS

Protect Against Unmitigated Liabilities #meetPAUL #How2DoPensions

Campaign Overview

Earlier this year, we conducted a survey to assess how confident trustees and corporate sponsors felt about 10 fundamental areas of pensions risk. We focussed on areas not directly covered by the Integrated Risk Management Framework, and asked respondents to rank the risks in order of their "stay awake" factor. We have now produced a series of 10 factsheets, each one commenting on one of the survey risks. Our red risk flags highlight some key warning signs, and our mitigation tips are designed to supplement existing areas of risk mitigation. Each factsheet assumes there is an established risk management system on which additional measures can be built.

Risk 2: Benefits Misaligned to Scheme Documents/Overriding Legislation

Survey Result

We were not surprised to find that this risk ranked second in our survey, but we were surprised to find that it is not on the risk register of 29% of schemes surveyed. This risk ranked highly across schemes of all sizes.

Comment

Finding out that scheme administration is not aligned with scheme documents or overriding legislation is a very unpleasant experience for trustees and corporate sponsors. This can affect a category of members, or the scheme membership as a whole, resulting in time and cost issues, reputational damage and benefit disputes.

In our experience, one of the most common (but preventable) problems is a failure to follow the amendment power when making changes to the pension scheme; this can result in amendments not being validly made. It is also not uncommon to find discrepancies between documents, administration practice and overriding law relating to the revaluation of deferred pensions or the calculation of increases to pensions in payment.

It is a fundamental duty of trustees to ensure that the correct benefits are paid to members. Trustees should be alert to this risk whenever benefit changes are implemented, and build administration checks into their scheme amendment process. Past errors that go unchecked tend to get more costly as time passes; benefit audits can help to cap such problems.

Red Risk Flags

- Does the scheme have a complicated benefit structure? For example, scheme mergers or bulk transfers, different benefit sections, or changes in employer remuneration packages that may impact the definition of "pensionable pay".
- Are there a high number of member complaints relating to the same issue?
- Is it a long time since the trust deed and rules were consolidated?

Mitigation Tips

- Check administration processes for accuracy against the scheme rules. This does not have to be a full benefit audit; it could target key processes, such as increases to pensions in payment.
- Where there has been a divergence, seek advice on whether it would be appropriate to rectify the rules. "Rectification" may be available where there is clear supporting evidence that the rules do not reflect the parties' intentions.
- Take advice on the level of insurance cover. Does this offer adequate protection to the scheme and the trustees? A mistake that affects a category of members could be very costly, and trustees' exposure to personal liability should be considered.
- If a mistake arises that may result in a dispute with a third party, involve a pensions litigator at an early stage. It may be possible to reach a settlement through negotiation or mediation. It may also be important to issue protective proceedings before time runs out.

A Word from The Pensions Ombudsman

"Many cases that we deal with require consideration of, often very old, deeds and scheme rules. The wording used can be ambiguous and contentious, with a trustee seeking an interpretation that is favourable to its analysis, which it may have adopted across a wider membership."

(From The Pensions Ombudsman's Annual Report and Accounts 2018/19)

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