Pinsent Masons

Making trustee liability easier

May 2016

Introduction

The role of a pension scheme trustee is not easy to sell. As if getting to grips with complicated legal and financial matters wasn't enough, there is also the potential risk of personal liability if a member makes a claim. However, trustees should not panic as there are several ways of protecting trustees from personal liability, provided the trustee has acted honestly and reasonably.

9 steps to understanding trustee liability

1. Trustees should comply with their trustee duties. They should act in the way set out in the scheme rules and in the interests of scheme members. Trustee decisions should be carefully minuted, giving the reasoning behind those decisions where appropriate.

2. Sometimes trustees have to make difficult decisions. If the issues are properly considered, advice is taken where appropriate, and a sensible decision is made, the courts are likely to respect the trustees' decision. Remember advisers are there to advise. The final decision will be yours.

3. Very occasionally, trustees will be found personally liable for their actions. Former trustees are still responsible for decisions they took whilst a trustee.

4. The majority of schemes contain provisions designed to protect trustees from personal liability. Some trustees also have insurance policies. Make sure that you understand what protection is in place, but try not to rely on it too much.

5. Scheme rules usually contain what is known as an exoneration for trustees which provides the best form of protection. If the trustees' actions fall within the scheme's exoneration provisions (and these will need to be checked carefully) then the trustees will not be liable. There are limits on what can be covered by an exoneration provision. For example, they cannot protect trustees in relation to fines from the Pensions Regulator and will not apply in the case of dishonesty.

6. Most schemes also contain indemnity protection for their trustees. The trustee remains liable for his actions but the employer or the scheme will pay any losses or damages imposed on the trustee following a claim. As with any indemnity, it is only as good as the person giving it; if they have no assets, the indemnity will be worthless. Regulatory fines cannot be paid out of scheme assets.

7. It may be better to use a trustee company rather than individual trustees. Any claims will be against the corporate trustee, whose assets are limited to its share capital, rather than against the trustee directors themselves.

8. Trustees could also consider taking out insurance to protect themselves against claims. Specialist insurance will be required as insurance taken out by the employer to cover its directors and officers will not cover the trustees. Trustees should check the terms carefully to make sure that they are properly covered. The cost of insurance can only be paid out of scheme assets if the rules allow.

9. It is difficult to introduce or amend these protections once you have been appointed as a trustee. Trustees considering doing so should first seek advice.

Continued on next page >

FT INNOVATIVE LAWYERS 2015
FINANCIAL TIMES
AWARD WINNER
The Most Innovative Law Firm in Europe

Pinsent Masons

Making trustee liability easier

May 2016

Further reading

The Pensions Regulator has published guidance for trustees and a code of practice on reporting breaches of the law. The Regulator also has an online learning toolkit covering the trustee role.

Pensions law can be tricky… but it doesn't have to be. These 'making it easier' guides explain key issues in simple terms, giving practical help to trustees and employers.

The series is growing; additional copies can be downloaded from
http://www.pinsentmasons.com/en/expertise/services/pensions/publications/

Current topics include: Employer covenants; Overpayments and Employer debt

Comments and ideas for further topics are welcome…

stephen.scholefield@pinsentmasons.com

WINNER LEGAL BUSINESS AWARDS 2016 LAW FIRM OF THE YEAR