



## Statutory and overseas employers

Importance: ★★☆☆

### In brief

- Statutory employers have a crucial role in supporting schemes because of their funding and other obligations under legislation
- Trustees need to be able to identify their statutory employers at all times and to be vigilant for events that could mean any of them loses statutory employer status
- An overseas statutory employer presents trustees with particular risks when it comes to enforcing legal obligations and to PPF entry. They need to consider counter-measures.

The Regulator has reminded trustees<sup>1</sup> how important it is to identify their statutory employers and to be alert for events that mean they lose a statutory employer.

It puts a particular emphasis on the extra risks attached to overseas statutory employers.

Statutory employers have key obligations to trustees under pensions legislation. Central to them are scheme funding and the s.75 employer debt. In addition, PPF entry can depend on having a statutory employer.

### Losing statutory employers

A number of common moves can mean statutory employers are lost. These include:

- closing a scheme to new joiners and/or to accrual,
- corporate insolvencies,
- restructuring pension schemes,
- restructuring groups, whether involving disposals outside the group or internal reorganisation and
- changes in a scheme's principal employer.

The Regulator observes that the number of such events in the last few years has raised the general level of risk to schemes over their statutory employers.

One consequence of losing a statutory employer is that the trustees will need to reassess the employer covenant and their funding arrangements.

If trustees find they have no statutory employer, the Regulator asks to be notified promptly and expects the trustees to investigate why and how this happened. It stands ready to use its anti-avoidance powers, like contribution notices and financial support directions as appropriate.

### Definition of statutory employer

The meaning of the term is not entirely settled but a "statutory employer" is generally taken to be an employer of at least one person who is either an active member or is eligible to join the scheme. For several important purposes, an entity that used to employ such a person but no longer does remains a statutory employer for a time at least.

For the last couple of years, scheme returns have drawn attention to statutory employers by requiring trustees to name them.

The Regulator's statement lists sources of information useful in identifying statutory employers, like employment data and information from HMRC and Companies House. It can be a tricky task, often for want of employment data of the right kind.

### Overseas statutory employers

#### What does this mean in practice?

Steps trustees with an overseas statutory employer should consider to protect members include:

- have statutory employers as a standing agenda item,
- carry out regular financial and legal due diligence on the overseas employer's covenant,
- consider negotiating security over overseas assets and any UK assets,
- plan ahead by taking advice on the feasibility of enforcing funding obligations against overseas assets,

*continued below*

<sup>1</sup><http://www.thepensionsregulator.gov.uk/docs/identifying-your-statutory-employer-statement.pdf>

- require regular information apt to demonstrate whether or not the overseas employer remains a statutory employer,
- require advance notice of any planned corporate transactions or restructurings that could jeopardise statutory employer status and
- require regular information on the scale of the UK activity (in financial and resource terms).

The information required would need to be defined at some length to capture the various events and transactions that can decide whether an employer has statutory or non statutory status.

As the *Olympic Airlines* case illustrates, trustees need to be ready to act promptly if there are signs an overseas statutory employer might be at risk of insolvency.

Trustees of schemes sponsored by an overseas company (or companies) need to be particularly alert. They may find it difficult to enforce payment obligations against overseas assets and PPF protection may not be available to their members.

The typical overseas employer is registered in another legal jurisdiction and has its main assets there. In the UK it has a branch office (rather than a subsidiary company) and can have little in the way of assets.

### Overseas assets

Depending on where the employer is registered, enforcing funding obligations or an employer debt against its assets there can involve a range of legal hurdles to do with the local law on property ownership and legal procedures. In addition, the trustees may find themselves competing with numbers of non UK creditors for the available assets. In short, recovery may be significantly more problematic than with a UK registered employer.

### Qualifying insolvency

The branch office structure can make PPF entry - a vital protection for members - a particular difficulty. Overseas insolvency proceedings do not count as one of the "qualifying insolvency events" that trigger PPF entry. The trustees may find it is up to them, as the only party to whom it matters, to try to engineer a UK insolvency event that would qualify.

For employers registered in jurisdictions outside the EU, it might be possible to wind up the employer under UK insolvency law if the employer has a sufficient connection with the UK.

For employers in most EU jurisdictions, it is possible to create a secondary UK insolvency event under EU insolvency law. This requires that, at the time a UK insolvency is sought, the overseas employer has a business activity in the UK that involves people and physical assets. It is a question of fact

in each case whether, at the critical time, the UK presence is sufficient to count.

This was considered recently by the Court of Appeal in the *Olympic Airlines* case\*. At its peak, the Greek airline's UK booking operation had offices in London and Manchester, a bureau at Heathrow, a couple of dozen employees and office equipment. A year or so after the airline went into insolvency in Greece and ceased business, moves were made for a UK insolvency event. By then its UK presence had been reduced to the London office, an ad hoc staff of two and an inactive bank account. The Court held that this did not amount to a business capable of becoming insolvent. It was, in effect, too late for a UK insolvency event and it appears that the members will be denied PPF protection.

This case is one of the drivers for the Regulator's statement.

### PPF levy

Overseas employers (and their scheme trustees) need to be aware of any differences in the way the PPF levy works for them compared to UK employers.

In a recent example, a Luxembourg company's failure score was worse than it might have been because it was based on old company accounts. A court challenge failed because, unlike the UK arm of D&B, its Luxembourg branch did not have a practice of proactively collecting accounts: its normal practice was to rely on the last accounts a company had sent in. This meant that, under the terms of the levy rules, those were the correct accounts to use for the failure score.

Practices in other jurisdictions might be different again. Employers and trustees should work to understand how the local system works.

This is difficult at the moment because the PPF is in the process of switching from D&B to Experian and is not yet providing information on what, if any, changes this will bring. But the general point remains - employers and trustees should inform themselves about any particular features of how the failure scores of all their statutory employers will be generated.

### UK subsidiary company

To make the contrast, where the UK business of an overseas group has the form of a UK registered subsidiary company and it is a statutory employer, the scheme is, in principle, in a better position. Enforcing against any assets it has will be easier and it will be capable of having an insolvency event that qualifies for PPF entry.

### Non statutory employers

A non statutory employer is an employer that participates in a scheme without qualifying as a statutory employer.

Scheme rules impose obligations on all participating employers, statutory or non statutory, including funding obligations under the scheme's contribution rule. Obligations under scheme rules

are typically weaker than those statutory employers have under the legislation.

For statutory employers, duties under scheme rules are in principle in addition to their statutory obligations. But, in practice and with important exceptions, they are often subsumed within a corresponding and stronger statutory duty.

Non statutory employers give a scheme less support and protection than statutory ones. For example, rules rarely impose anything like the employer debt and the insolvency of a non statutory employer cannot trigger PPF entry.

That said, funding obligations under scheme rules can still have decisive effects.

- \* **Stop press:** we understand that permission has been given for an appeal to the Supreme Court. Meanwhile, the government has said it is exploring whether it can amend the PPF legislation to give members of the Olympic Airlines scheme PPF protection.

The general rule, though, is that the more statutory employers a scheme has, the more comfortable the trustees can feel.

### More information

If you would like more information, please get in touch with your usual contact in our pensions team or with **Richard Knight, Partner, Head of Pensions, tel: +44 (0) 117 939 2259 or email: richard.knight@burges-salmon.com**

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