HERBERT SMITH FREEHILLS WARNS DIRECTORS NOT TO IGNORE NEW PENSIONS CRIMINAL OFFENCES

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Legal Briefings

Despite considerable publicity about new pensions criminal offences and regulatory sanctions, which come in to force on 1st October, a significant proportion of pension professionals remain concerned that senior executives are either not sufficiently aware of or are not taking the changes seriously.

A poll conducted by Herbert Smith Freehills reveals that 1 in 5 pension professionals (22%) believe that most company directors in organisations with Defined Benefit (DB) pension schemes, do not see the new offences as a material risk. Worryingly, an additional 14% suggest that the majority of directors are unaware of these changes.

Samantha Brown, partner and regional head of employment, pensions and incentives at Herbert Smith Freehills, warns that "*the introduction of these new offences and regulatory sanctions is the most significant change to the UK pensions regulatory regime since 2005*."

She says: "*Although the chances of being prosecuted may be remote for the vast majority of directors, the Pensions Regulator will nevertheless be under pressure to use these new powers. This will particularly be the case where a DB scheme suffers a material detriment as a result of corporate activity and it can be shown that the directors have not acted reasonably or taken the interests of the scheme seriously enough*."

Alongside the new offences, the Pensions Regulator is also being given the power to issue fines of up to £1 million in a wide range of circumstances, extended powers to issue contribution notices and enhanced information gathering powers.

Brown adds: "*In practice, parties that endanger a DB scheme are more likely to be hit with a significant financial penalty or a contribution notice as the burden of proof is lower in civil as opposed to criminal proceedings*."

Herbert Smith Freehills' poll also reveals that 37% of respondents have identified the Regulator's extended contribution notice powers as the change which will have the most impact on corporate activity.

Focusing on this point, **Natasha Johnson**, partner at Herbert Smith Freehills, who advises directors on their legal duties adds: "*A director's primary duty is to their company's shareholders, or to its creditors as a whole where the company is insolvent. However, these new offences and sanctions will mean that directors will have to give particular consideration to the interests of their DB scheme whenever they are contemplating material corporate transactions, re-financing or restructuring*."

She concludes: "*These changes will, in effect, mean that DB schemes will need to be given preferential status and it is not yet clear how this will interact with director's long-established legal duties particularly when directors are seeking to rescue a distressed business whilst balancing multiple stakeholder interests*."

KEY CONTACTS

If you have any questions, or would like to know how this might affect your business, phone, or email these key contacts.

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