EVERSHEDS SUTHERLAND

Legal speaking points

How you can support your workforce during a cost of living crisis

Current HR issues in the Consumer Sector

The cost of living crisis is a challenge that most people are facing. The double impact of rising inflation and interest rates can be crippling for many. Not only do these challenges impact peoples' pockets but they can also have a negative impact on work performance, morale and engagement in the workplace. In a recent YuLife survey, conducted in partnership with HR Ninjas, 91% of HR professionals said that they felt a responsibility to help. It is in this context we have set out below how, as an employer, you can provide support to your workforce.

1. Discretionary increases for DB pensions in payment

The increases that DB pension schemes are required to provide to pensioners are more limited than you might think. In times of high inflation, required increases are capped at 2.5 or 5% (depending on when benefits were accrued) and benefits accrued before April 1997 do not have to increase at all. This means that the minimum increases schemes are provide are well below the current rate of inflation and employers and trustees may well face difficult questions from unhappy pensioners.

Where trustees or sponsors want to give pensioners more they need to identify who has the power under the scheme rules to do this and what formalities are required.

In addition, it is not as simple as giving a one off increase to cope with difficult times. Tax rules say that once you have increased a pension, there are very limited circumstances in which you can reduce the pension back down its normal level in future years – there are severe tax consequences in doing so. Tax rules also limit the types of lump sums that can be paid from pension schemes and none readily conform to a one off payment for cost of living increases. That means that careful thought will need to be given as to whether and how a one off payment can be made.

2. Pension scams

In recent years thousands of members have been persuaded to transfer pension benefits to arrangements which promise high investment returns or to allow them to access their benefits earlier than tax rules permit. These arrangements often turn out to be scams resulting in members losing most or all of their pension benefits.

The Pensions Regulator and FCA have issued a joint statement warning members about the risk of pension scams in the current economic climate. Trustees are being asked to tell members about the heightened risk and tell them about some of the common signs of scams.

The Government is also aware of the risk of pension scams and in November 2021 introduced legislation which was intended to require members to seek guidance where there were certain "amber flags" relating to scams or to prevent them making a transfer at all where there were "red flags". Unfortunately, some of the red and amber flags catch legitimate activities (for example it is an amber flag where the receiving scheme holds overseas investments). This has resulted in a large number of members being referred to guidance which in turn has resulted in delays in transfers. It is possible that some members could complain as a result of the necessary delays.

3. LDI and liquidity issues

As a result the Government's mini-budget in September 2022, financial markets lost confidence in UK gilts which meant that gilt yields increased rapidly, beyond any expectations or financial modelling.

Many UK pension funds hold investments in Liability Driven Investments (LDI) funds which are a type of derivative investment that provides exposure to the gilts market (which closely tracks the value of scheme liabilities) whilst at the same time allowing schemes to invest in more return seeking assets. The sudden and unexpected rise in gilt yields resulted in huge collateral calls being made by funds to pension schemes under LDI contracts. Schemes did not have sufficient liquidity to meet these calls and were forced to sell gilts driving the yield up further. Disaster was averted when the Bank of England stepped in.

Although the markets have largely returned to normal, the Pensions Regulator has made it clear that it expects trustees to consider the liquidity buffer that any LDI investment requires and to review relevant internal governance processes, including ensuring that any collateral calls can be paid in the future. The Regulator says that in some cases schemes may want to establish a line of credit with a sponsoring employer but emphasises that this must only be used on a short-term basis and for liquidity purposes.

4. IFA advice on pension transfers

The current economic climate and the recent press coverage about pension schemes and LDI means that an increased number of members may be looking to transfer out of their DB schemes. Most transferring members would benefit from financial advice but tightening regulation around providing such advice has meant that it can be hard to find and costly.

Apart from pointing members to free guidance from MoneyHelper where there are warning flags of a scam, there is no requirement for employers or trustees to facilitate access to or arrange for financial advice. However, there are some benefits in doing so. In particular, advice is likely to ensure a better outcome for members and there may be economies of scale if it is arranged by trustees or employers for large number of members.

Some employers and trustees are concerned that facilitating advice in this way could amount to an FCA regulated activity. However, 2021 guidance from the Pensions Regulator confirmed that this was unlikely to be the case if appropriate safeguards are put in place such as using IFAs who offer a full range of available financial products.

Where employers or trustees propose to make arrangements for members to receive financial advice and want to cover the cost of such advice checks should be undertaken to understand the tax implications of doing so as in some instances such assistance can be considered a taxable benefit in kind.

5. One-off discretionary payments

One-off payments by employers can help support employees' financial wellbeing, but require careful planning. Employers should take care when rolling-out and communicating such payments to ensure that the terms and how entitlement will be determined are clear and to avoid the creation of any contractual right to future similar payments. Where conditions are attached to payments, including any repayment requirements, these should be made clear from the outset.

Some employers are making lump-sum payments in exchange for employees giving up certain benefits, including annual leave. Employers should ensure that in doing so, they do not breach any minimum contractual or statutory requirements.

For example, where employees are permitted to sell annual leave in exchange for a payment, this should be limited to any excess beyond the statutory minimum leave requirements.

The potential impact on other entitlements should also be considered. One-off discretionary payments have the potential to impact bonus and leave payments, as well as wider arrangements such as collective bargaining agreements in unionised environments that may prevent payments being unilaterally made.

Tax and regulatory implications should also be considered and clearly communicated to employees. For example, loans could be regarded as a taxable benefit in kind and the Consumer Credit rules may apply to them in certain circumstances.

6. Other financial support

Bringing forward pay rises, loans, salary advances, free meals, season ticket loans, staff discounts and meal subsidies are just some of the other types of financial support that employers are providing to employees.

Where financial support schemes already exist, employers are highlighting the availability of those benefits. Where employers are considering providing new support measures, consulting with staff to ensure that the provision is as aligned as possible to workers' needs will help ensure that the benefit is as impactful as possible. Consideration should also be given to the tax implications of any new benefits to ensure that any new benefit arrangements are delivered as tax efficiently as possible.

If existing benefits are to be removed to make way for new benefits to address cost of living issues, it will be important for employers to understand first whether the benefits to be removed are contractual, either expressly or as a result of custom and practice. The removal of contractual benefits, even when being replaced with alternative benefits, can have legal implications where the action is taken without employee consent.

Supporting employees' wellbeing through non-financial measures.

High inflation and the squeeze on disposable income can cause significant stress and anxiety for workers. Evidence shows that supporting employees' wellbeing through times of crisis can have a direct impact on employees' attendance, engagement and performance at work and improve their mental health and wellbeing.

Communication and understanding will be essential to any effective response, as well as ensuring that employees are aware of the available avenues for support. Such support may include resources to help workers manage finances and build financial resilience, reminding employees of employee assistance programmes, and counselling services.

Ensuring a culture of support for employees can have wider benefits too. The employee experience, including a company's culture of supporting its workforce, is often a significant factor in recruitment and retention. At a time of skills shortages, employers who are able to demonstrate their commitment to supporting the financial wellbeing of its workforce are likely to gain a competitive advantage.

7. Supporting employees' wellbeing through non-financial measures

High inflation and the squeeze on disposable income can cause significant stress and anxiety for workers. Evidence shows that supporting employees' wellbeing through times of crisis can have a direct impact on employees' attendance, engagement and performance at work and improve their mental health and wellbeing.

Communication and understanding will be essential to any effective response, as well as ensuring that employees are aware of the available avenues for support. Such support may include resources to help workers manage finances and build financial resilience, reminding employees of employee assistance programmes, and counselling services.

Ensuring a culture of support for employees can have wider benefits too. The employee experience, including a company's culture of supporting its workforce, is often a significant factor in recruitment and retention. At a time of skills shortages, employers who are able to demonstrate their commitment to supporting the financial wellbeing of its workforce are likely to gain a competitive advantage

8. Potential discrimination issues when providing support to employees

Employers should be mindful of potential employee relations and discrimination issues arising in its approach of supporting workers.

In many cases, employers will wish to target payments or support those it considers to be most in need, for example by specifying that only certain groups of workers or those who receive below a certain salary threshold should receive the support. Setting a threshold can however result in discrimination issues if a particular group suffers disadvantage as a result.

Where there is potential disadvantage created for any group of workers, employers will need to be in a position to show that its actions are a proportionate means of achieving its legitimate aim. For example where a threshold to entitlement is used with the aim of helping those most in need, employers will need to justify why they have chosen that particular threshold, that the threshold achieves the stated aim and that there were no less discriminatory means to achieve the same objective.

9. Second jobs

Ongoing cost of living increases have impacted many workers' disposable income, resulting in workers requesting additional hours from current employers or seeking a second job with another employer.

Many contracts will specify that workers are not permitted to be employed elsewhere without the employer's consent ("exclusivity clauses"). Employers should note however that, as a result of a recent change in the law,. any contractual provisions that prohibit a low-income worker (i.e. those receiving salary of £123 per week or less) from working for or providing services to another employer, or only permits it with the current employer's consent, are unenforceable. This change brings the position in-line with that of zero hours workers.

For contracts where exclusivity clauses are permitted, it will be important for the employer's decision on whether to give consent to be carefully considered and communicated. Employers are under a general obligation not to act in a manner likely to destroy mutual trust and confidence, so should ensure that any decision is reasonable and can be justified. Relevant considerations may include the nature of the roles, whether the second job is with a competitor, the combined hours of the existing and second job, the employee's current performance, and any health and safety impact.

10. Hardship funds

The cost of living crisis has led more employers to consider setting up Employee Assistance Programmes (EAP) to help alleviate some of the financial hardship being suffered by their employees.

When setting up an EAP there is lots to consider. For example: i) what support do you want to give employees, will employees receive one off cash awards and/or loans ? ii) what form will the EAP take, will it be delivered by an existing employee benefit trust or operated internally or should the company establish a charity ? iii) how will the EAP be funded, will it be funded solely from company funds or employee donations or a mixture of both?

Each of the above decisions will have opposing tax and legal implications, for example, cash awards may be taxable in full whereas loans may, in certain circumstances, be made tax free and operating the programme internally will have less governance implications than establishing a charity. Care will, therefore, need to be taken when designing an EAP to ensure that it is legally compliant and as tax efficient as possible.

Contacts

Emma King
Partner & Office Location Head

T: +44 121 232 1829
M: +44 777 633 7293
emmaking@
eversheds-sutherland.com

Wie-Men Ho
Legal Director

T: +44 121 232 1522
M: +44 782 446 0399
Wie-MenHo@
eversheds-sutherland.com