Summary

- Amid ensuring that pension schemes are run properly and that members' benefits are secure and paid correctly, trustees must keep up with the rapidly-changing pensions landscape in order to evolve and ultimately protect themselves.
- The Exoneration and Indemnity clause in the trust deed exonerates the trustee from personal liability and provides an indemnity from the sponsoring employer or scheme. These can differ depending on scheme structure, the type of scheme and whether the sponsoring employer is solvent.
- Trustees can also cover themselves through taking an active approach to wholly grasping their roles and responsibilities. This can be through individual education, such as using The Pensions Regulator's Trustee Toolkit or 21st Century Trusteeship guides.
- Forming a trustee company can shield trustees from personal liability.
- To cover any remaining exposure, many trustees take out liability insurance.

Protection first

Talya Misiri considers the protections in place for trustees and what they can do to protect themselves

The role of a pensions trustee is not one that can be handled lightly. Amid ensuring that pension schemes are run properly and that members' benefits are secure and paid correctly, trustees must keep up with the rapidly changing pensions landscape in order to evolve and ultimately protect themselves.

If a trustee is unable to adhere to their duties, however, they risk the possibility of being sued or prosecuted for their failings. With the addition of the pension freedoms, as well as countless consultations and amendments being made to pensions-related law, it is crucial for trustees to have protections in place and to take certain steps, such as continued education and company protections to keep up to date.

Commenting on this, Gowling director Christopher Stiles says: "Pension trustees benefit from several layers of protection."

Legal protections

Of the legal protections in place for trustees, the Exoneration and Indemnity clause in the trust deed exonerates the trustee from personal liability and provides an indemnity from the sponsoring employer or scheme.

While scheme structures differ within defined benefit plans, both the fund and employer tend to offer the indemnity. In defined contribution schemes, however, the indemnity is solely provided by the employer.

Nonetheless, an indemnity from the employer is only effective while the employer is solvent and sufficiently resourced. In an increasing number of cases, trustees are still having to manage schemes long after the employer itself has ceased to exist. Given the length of time it can take for errors in relation to schemes to be recognised, this is a considerable risk.

Squire Patton Boggs head of pensions practice Clifford Sims states: "These *[exoneration and indemnity clauses]* vary but will generally protect trustees unless they have been guilty of some willful dishonesty or fraud. They will even protect against negligence (although that would not apply to a professional trustee)."

In addition, if a case against a trustee is taken to court, the judge has the power, under Section 62 of the Trustee Act 1925, to excuse the trustee from liability if the trustee has acted "honestly and reasonably and ought to be excused", explains PTL director David Hosford.

"Legislation also provides protection for trustees in specific circumstances, such as a statutory discharge from further liability in respect of a member for whom a cash equivalent transfer value has been paid, or where day-to-day decisions about investment management have been delegated," he adds.

Personal protections

Further to legal protections, trustees are able to secure themselves through taking an active approach to wholly grasping their roles and responsibilities.

Xafinity senior consulting actuary Steven Scott notes: "Trustees can protect themselves by having the appropriate skills and experience to do the job. This can be achieved by ensuring that appropriate training is in place.

"A trustee board without a structured training plan is like a plumber without any tools. Clear, trustee-focused and structured training can provide the armour that protects these valiant volunteers from harm."

Ultimately, "trustees can protect themselves by following guidance," Lincoln Pensions managing director Darren Redmayne agrees.

According to The Pensions Regulator's *21st Century Trusteeship*

and Governance discussion paper published in 2016, over half of all schemes and 73 per cent of small schemes had not documented or formally assessed trustees' learning needs in the past year. Some schemes relied on more informal approaches, including leaving it to trustees themselves or advisers to initiate training.

The Pensions Regulator's Trustee Toolkit, which provides free interactive modules for trustees, is largely commended with 96 per cent of trustees noting they felt more confident to carry out their duties as a direct result of engaging with the platform. Ninety eight per cent also said they would recommend the toolkit to others.

"The obligations placed on trustees are greater now than they ever have been and it is therefore incumbent on schemes to facilitate a learning environment for them," Scott adds.

While schemes may not be equipped to provide learning resources per se, directing trustees to the toolkit, or correspondingly to TPR's 21st Century Trusteeship and Governance guides, can assist trustees with completely understanding their responsibilities, thus protecting themselves from any damaging claims.

Company protections

In addition to providing learning tools, trustees can also be protected by forming a corporate trustee company. This involves the formation of a company, with the individual trustees becoming directors.

Rather than holding individual trustees accountable for any possible prosecution, trustee companies shield directors from personal liability. The company collectively takes responsibility.

"Directors of a corporate trustee have protection from the corporate veil and in principle are in a better position than individual trustees," Hosford says.

Nonetheless, Hosford also notes that if certain protections are in place, a trustee's position does not differ, whether they are an individual trustee or part of a corporate trustee.

"In practice if the trust deed and rules provide comprehensive exoneration and indemnification, and/or indemnity insurance is in place, an individual trustee should not see any real difference in protection compared to a director of a corporate trustee," he explains.

Sole trusteeship is another area that is growing in popularity and could reduce the potential risks that traditional trustees can face. Sole trustees take the place of traditional trustee boards, and are appointed by companies to improve and somewhat streamline overall pension governance.

Sole trustees can protect schemes by limiting the difficulties of having many trustees keeping up to date with changing legal and regulatory requirements, essentially streamlining the process by working as an individual entity.

Insurance

In order to cover any remaining exposure, many trustees take out liability insurance, Stiles states.

Redmayne observes the trend that recently, "more trustees are buying insurance to protect themselves".

Trustees sometimes use member assets to buy insurance – this is generally accepted. It is "relatively ordinary course and is becoming regular market practice," Redmayne comments.

In addition to providing protection to trustees, insurance can offer cost-effective protection for scheme assets and ultimately pension scheme members. In some cases, where insurance cover is not paid for from scheme assets, it can also cover civil fines and penalties.

But, "whether *[insurance]* will pay out will depends on policy wording and whether the trustees have first to claim under their trust deed (ie from the employer's indemnity)," Simms says.

It is advised that: "For schemes that have insurance, it is probably sensible to review the policy and scheme rules carefully to identify any gaps in protection as insurance policies do vary," Occupational Pensions Defence Union senior claims executive Zoe Staniforth previously told *Pensions Age*.

To tackle the challenge that is pension trusteeship, most trustees will need to take advantage of all the protections available in order to protect schemes and themselves from harm. Trustees should be aware of the details of their exoneration and indemnity clause, take an active approach to continued education and have insurance in place to ensure maximum, sustained protection.

Written by Talya Misiri

Common complaints:

Law firms Gowling and Squire Patton Boggs (SPB) discuss the most common complaints received regarding trustees.

"In our experience, most claims against trustees relate to disputes over benefits – eg the accuracy of data or the interpretation of the rules – or to the manner in which the trustees have exercised their discretions," says Gowling director Christopher Stiles.

In terms of where the complaints are directed, SPB head of pensions practice Clifford Simms explains: "It is cheap and easy for a beneficiary to complain to the Pensions Ombudsman and that is the forum most commonly used.

"As for what they are most frequently sued for, I would imagine it is maladministration under the Pensions Ombudsman regime."

In contrast, breach of trust claims through the courts are rare, encompassing everything from negligence to fraud, he adds.

However, more complaints may occur in the future, "as future pensioners will be more reliant on defined contribution pensions, we expect to see an increase in claims relating to investment decisions also," Stiles explains.