



The Pensions Act 2004

OBLIGATION TO REPORT SPECIFIC EVENTS TO THE PENSIONS REGULATOR

EMPLOYMENT, PENSIONS AND BENEFITS: BRIEFING 180 (SUPERSEDING BRIEFING 170)

Under the Pensions Act 2004 trustees and employers are required automatically to notify the Pensions Regulator of certain events. This briefing looks at the duty of trustees and employers and which events need to be reported.

This briefing is an updated version of briefing 170 (June 2008) and reflects changes to legislation that come into force on 6 April 2009.

The Pensions Act 2004 gives the Pensions Regulator (the Regulator) the main objectives of protecting pension benefits, reducing the risk of claims on the Pension Protection Fund (PPF) and promoting good administration of pension schemes.

The Regulator is therefore given wide powers and, to help it gather information, section 69 of the Pensions Act 2004 has imposed, since 6 April 2005, various duties on trustees and employers to make reports to the Regulator. These duties arise even in the absence of a request from the Regulator.

This briefing looks at trustees' and employers' duties to report certain events (section 69; others don't have this duty at the moment, although this may change).

What is the duty?

Except where the Regulator otherwise directs, the trustees or the employer must give the Regulator notice of any 'notifiable event'. The category of persons under this duty can be (but has not yet been) extended by regulations – for example, to include a former employer or an associated person of an employer.

'Eligible schemes' are those eligible to be covered by the PPF – ie all schemes that are not money purchase schemes, prescribed schemes (eg schemes that are not registered with HM Revenue and Customs) and schemes being wound up immediately before 6 April 2005.

A 'notifiable event' is an event prescribed in regulations relating to a scheme or an employer.

Which events must be reported?

The 2005 Notification Regulations and the Employer Debt Regulations 2005 set out the events that are notifiable (please see the tables attached).

In a formal direction, the Regulator has set out exceptions in which trustees and employers will not be under an obligation to report certain events that would otherwise be notifiable. The exceptions will not apply if the scheme is funded below the PPF buyout level (even if the employer and scheme have agreed a recovery plan to remedy a scheme deficit). The exceptions will also not apply if the trustees have reported a materially significant failure by the employer to make a payment to the scheme in accordance with the schedule of contributions.

Timing and formal requirements

The notice to the Regulator must be given as soon as reasonably practicable after the person making it becomes aware of the notifiable event (this must be before the actual action concerned for some events – eg a decision to make a transfer payment must be notified before the transfer is made).

The Regulator's guidance indicates that the obligation implies urgency: 'For example, where a trustee is made aware of a notifiable event on a Sunday, the Regulator should be notified on Monday.'

The code of practice suggests that a procedure for making notifications should be put in place. It envisages

that there will not be a need for specialist advice or to hold a trustee or board meeting about the notification.

The notice to the Regulator must be in writing; email and fax are acceptable. A standard form is available on the Regulator's website: www.thepensionsregulator.gov.uk.

An actuary or other person under a duty to report breaches in the law to the Regulator (see our briefing 'Reporting breaches of the law', number 125, January 2005) will be obliged to make a report if it becomes aware of a failure by the trustees or employer to notify under section 69.

Penalties

Section 10 of the Pensions Act 1995 (civil penalties) applies for non-compliance without reasonable excuse. The maximum civil penalty is £50,000 for companies and £5,000 for individuals. Directors who cause a company to fail to comply with the obligation can also be liable to a civil penalty under section 10(5).

The Regulator has indicated in the code of practice that it will seek an explanation of any failure to notify. It has a range of actions that it can take, including training or other assistance. The Regulator will also consider any failure to notify a relevant event when deciding whether to issue a contribution notice (under the moral hazard powers given to the Regulator).

Obligation on non-employers

If a financial support direction has been made, the persons subject to the direction will also be obliged to notify various matters to the Regulator. These include the section 69 events.

A guarantor under a withdrawal arrangement or an approved withdrawal arrangement for the purpose of the statutory debt on employer provisions (section 75 of the Pensions Act 1995) is also obliged to notify the Regulator of the section 69 events. There are minor differences between the events that require notification from guarantors and events that require notifications from employers and trustees.

Changes to the notifiable events regime

From 6 April 2009 trustees will no longer be required to notify the Regulator if there are two or more changes in key

scheme posts, and employers will not be required to notify the Regulator of changes in their credit ratings or two or more changes in key employer posts (see attached tables for more information on which events are notifiable).

These changes are not retrospective so presumably there will still be a duty to notify the Regulator if these 'events' happened before 6 April 2009. In October 2008 the government said that the Regulator proposed to clarify and update its directions that set out exceptions to the notifiable events regime. However, it has not yet published any formal proposals on this.

Sources of more information

- Section 69 of the Pensions Act 2004.
- The Occupational Pension Scheme (Employer Debt) Regulations 2005 (SI 2005/678).
- The Pensions Regulator (Notifiable Events) Regulations 2005 (SI 2005/900).
- The Pensions Regulator (Miscellaneous Amendment) Regulations 2009 (SI 2009/617).
- Occupational Pension Schemes (Miscellaneous Amendments) Regulations 2005 (SI 2005/2113).
- Paragraphs 2.56-2.62 of the government's response to the consultation on the amendments to the anti-avoidance measures in the Pensions Act 2004.
- The Pension Regulator's Code of Practice 02 – Notifiable Events.
- The Pension Regulator's Directions under section 69(1) of the Pensions Act 2004.
- The Pension Regulator's table of conditions.
- The Pension Regulator's notifiable events framework.

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Trustees: scheme-related events

Trustees (scheme-related) Regulation 2(1), Notifiable Events Regulations 2005 ¹	Exemption conditions	Comment
Debt recovery a any <i>decision</i> by the trustees to take action which will, or is intended to, result in any debt which is or may become due to the scheme not being paid in full;	A, B and C	<input type="checkbox"/> Debt includes a contingent debt. <input type="checkbox"/> Relates to any debt (not just ones from employer). <input type="checkbox"/> Applies at decision stage. <input type="checkbox"/> Wording could be fairly wide – eg apply to a release of a guarantee or change in employer?
Two changes in key scheme posts that occurred before 6 April 2009 b two or more changes in key scheme posts within the previous 12 months;	A and B	<input type="checkbox"/> From 6 April 2009 this notifiable event is removed from legislation. <input type="checkbox"/> Key scheme posts are scheme auditor or actuary. <input type="checkbox"/> Is cumulative: catches one change in each.
Transfer-in or out c a <i>decision</i> by the trustees of a scheme ('the relevant scheme') to make a transfer payment to, or accept a transfer payment from, another scheme, or where the trustees or managers are required to make or accept a transfer payment without such a decision having been taken, the making or acceptance of that payment, the value of which is more than the lower of: <ol style="list-style-type: none"> i 5 per cent of the value of the scheme assets of the relevant scheme; and ii £1,500,000; 	A and B	<input type="checkbox"/> Scheme assets are as in the most recent valuation under section 224 of the 2004 Act (ie scheme-specific) (or Minimum Funding Requirement (MFR) valuation if none under section 224). <input type="checkbox"/> Applies at decision stage (or, if no trustee decision, when payment is made or accepted).
Granting benefits without advice and funding d a <i>decision</i> by the trustees to grant benefits, or a right to benefits, on more favourable terms than those provided for by the scheme rules without either seeking advice from the scheme actuary or securing additional funding if such funding was advised by the actuary;	None	<input type="checkbox"/> Applies to all benefit grants – not just for new members or on redundancy or to directors. <input type="checkbox"/> Applies at decision stage.
Granting big benefits to single member e a <i>decision</i> by the trustees to grant benefits, or a right to benefits, to a member, or where the trustees or managers are required to grant benefits or a right to benefits without such a decision having been taken, the granting of those benefits or that right, the cost of which is more than the lower of: <ol style="list-style-type: none"> i 5 per cent of the scheme assets; and ii £1,500,000. 	A and B	<input type="checkbox"/> 'Cost' is not defined. For scheme assets see (c) above. <input type="checkbox"/> Applies to benefits for a single member credit, regardless of whether funding is provided. <input type="checkbox"/> Could apply eg if consenting to early retirement or invalidity pension (if large enough). <input type="checkbox"/> Applies at decision stage <i>or</i> when benefits are granted even if no trustee decision (eg when a member reaches Normal Retirement Age or retires?).
Schedule 1B, Employer Debt Regulations 2005		
Entering into a scheme apportionment arrangement (SAA) Any <i>decision</i> by the trustees to take action which will, or is intended to, result in entering into a scheme apportionment arrangement on or after the applicable time.	None	<input type="checkbox"/> The Pensions Regulator has confirmed that, in its view, entering into an SAA before the applicable time (ie the effective time at which the section 75 debt arises) will not constitute a notifiable event.

Condition A is that the scheme is fully funded for the purposes of a 'section 179 valuation' (likely to be PPF buy-out) (MFR applies where no section 179 valuation has yet been carried out).

Condition B is that the trustees or managers have not incurred a duty to make a report (to the Regulator) in the previous 12 months under section 228(2) of the Pensions Act 2004 of a materially significant failure by the employer to make a payment to the scheme in accordance with the schedule of contributions.

Condition C is that the debt compromise is of a debt with a full value of less than 0.5 per cent of the scheme assets calculated under a section 179 valuation or, pending such valuation, under MFR.

¹ The wording in the first column of this table is based on wording found in The Pensions Regulator (Notifiable Events) Regulations 2005 (SI 2005/900) and The Occupational Pension Scheme (Employer Debt) Regulations 2005 (SI 2005/678).

Employers: employer-related events

Employers (employer-related) Regulation 2(2) Notifiable Events Regulations 2005 ²	Exemption conditions	Comment
Debt recovery a any <i>decision</i> by the employer to take action which will, or is intended to, result in a debt which is or may become due to the scheme not being paid in full;	None	<ul style="list-style-type: none"> <input type="checkbox"/> Debt includes a contingent debt. <input type="checkbox"/> Relates to any debt (not just ones from employer). <input type="checkbox"/> Applies at decision stage. <input type="checkbox"/> Wording is fairly wide – eg could apply to a release of a guarantee or change in employer. <input type="checkbox"/> The Pensions Regulator has commented that any decision to compromise the section 75 debt is a notifiable event.
Ceasing to carry on UK business b a <i>decision</i> by the employer to cease to carry on business in the United Kingdom, or where the employer ceases to carry on business in the United Kingdom without such a decision having been taken, the cessation of business in the United Kingdom by that employer;	None	<ul style="list-style-type: none"> <input type="checkbox"/> Applies at decision stage.
Wrongful trading advice etc c receipt by the employer of advice that it is trading wrongfully within the meaning of section 214 of the Insolvency Act 1986 (wrongful trading), or circumstances being reached in which a director or former director of the company knows that there is no reasonable prospect that the company will avoid going into insolvent liquidation within the meaning of that section;	None	<ul style="list-style-type: none"> <input type="checkbox"/> Section 214(4) says: ‘...the facts which a director of a company ought to know or ascertain, the conclusions which he ought to reach and the steps which he ought to take are those which would be known or ascertained, or reached or taken, by a reasonably diligent person having both <ul style="list-style-type: none"> a the general knowledge, skill and experience that may reasonably be expected of a person carrying out the same functions as are carried out by that director in relation to the company, and b the general knowledge, skill and experience that that director has.’
Breach of banking covenant d any breach by the employer of a covenant in an agreement between the employer and a bank or other institution providing banking services, other than where the bank or other institution agrees with the employer not to enforce the covenant;	A and B	<ul style="list-style-type: none"> <input type="checkbox"/> Bank waiver means no notification obligation (but waiver would need to be before breach occurred). <input type="checkbox"/> The Pensions Regulator has confirmed that the waiver would need to have been granted before the breach occurred.
Credit rating change that occurred before 6 April 2009 e any change in the employer’s credit rating, or the employer ceasing to have a credit rating;	A, B and D	<ul style="list-style-type: none"> <input type="checkbox"/> From 6 April 2009 this notifiable event is removed from legislation. <input type="checkbox"/> Applies to any change (even an improvement). <input type="checkbox"/> Applies only to employer – not to (eg) the parent.
Decision to relinquish control f a <i>decision</i> by a controlling company to relinquish control of an employer company, or where the controlling company relinquishes such control without a decision to do so having been taken, the relinquishing of control of the employer company by that controlling company;	A and B	<ul style="list-style-type: none"> <input type="checkbox"/> Covers the sale of any participating employer. <input type="checkbox"/> Covers some group restructurings and probably decisions to place the participating employer in the insolvency process. <input type="checkbox"/> Applies at parent company decision stage.
Changes in key employer posts that occurred before 6 April 2009 g two or more changes in the holders of any key employer posts within the previous 12 months; and	A and B	<ul style="list-style-type: none"> <input type="checkbox"/> From 6 April 2009 this notifiable event is removed from legislation. <input type="checkbox"/> Includes chief executive and any director or partner responsible in whole or part for financial affairs. <input type="checkbox"/> Cumulative for each.
Conviction of a director h the conviction of an individual, in any jurisdiction, for an offence involving dishonesty if the offence was committed while the individual was a director or partner of the employer.	None	

Condition A is that the scheme is fully funded for the purposes of a section 179 valuation (likely to be PPF buy-out) (MFR applies where no section 179 valuation has yet been carried out).

Condition B is that the trustees or managers have not incurred a duty to make a report (to the Regulator) in the previous 12 months under section 228(2) of the Pensions Act 2004 of a materially significant failure by the employer to make a payment to the scheme in accordance with the schedule of contributions.

Condition D is that the change in credit rating is not from investment to sub-investment grade where the credit rating is provided by a recognised credit rating agency (Standard and Poor’s, Moody’s or Fitch).

² The wording in the first column of this table is based on wording found in The Pensions Regulator (Notifiable Events) Regulations 2005 (SI 2005/900).