

Reporting Breaches of the Law to the Pensions Regulator

Background

In April 2015 the Pensions Regulator (the Regulator) published its Code of Practice no 14 (the Code) covering Governance and Administration of Public Service Pension Schemes.¹

This document sets out the procedure established to ensure that those with a responsibility to make reports are able to meet their legal obligations by describing the procedure for the West Sussex LGPS and relates to all of the Fund's areas of operation.

A Breach

There are a number of statutory requirements within the Local Government Pension Scheme (LGPS) for which there is a statutory duty to report to the Pensions Regulator if these are not complied with, i.e. a breach occurs. The objective is to:

- protect the benefits of pension scheme members
- promote, and improve understanding of, the good administration of work-based pension schemes;
- maximise compliance with the duties and safeguards of the Pension Act 2008;
- minimise any adverse impact on the sustainable growth of an employer (in relation to the exercise of the regulator's functions under Part 3 of the Pensions Act 2004 only) it therefore carries great weight in relation to pension Funds complying with their responsibilities under the above legislation.

Examples of breaches have been set out in Annex 1 and the Highlight report template is set out in Annex 2.

Reporters

Certain people are required to report breaches to the Pensions Regulator ("the Regulator") where they have reasonable cause to believe that a legal duty which is relevant to the administration of the scheme has not been, or is not being, complied with and the failure to comply is likely to be of material significance to the Regulator in the exercise of any of its functions.

People who are subject to the reporting requirement ('Reporters') for public service pension schemes are:

- scheme managers;
- members of the pension board (meaning, in the case of the WSPF, the Local Pension Advisory Board);
- any person who is otherwise involved in the administration of the Fund;
- employers, and any participating employer who becomes aware of a breach should consider their statutory duty to report, regardless of whether the breach relates to, or affects, members who are its employees or those of other employers;

¹ [Pensions Act 2004 –section 70\(1\), 70\(1\) \(a\) to \(e\), 70\(2\) and 70\(2\)\(a\) // Section 90A - Inserted by Schedule 4 of Public Service Pensions Act 2013](#)

- professional advisers including auditors, actuaries, legal advisers and fund managers; and
- any person who is otherwise involved in advising the managers of the scheme in relation to the scheme.

The statutory duty to report a breach of the Law or Regulations overrides any other duties a Reporter may have such as confidentiality but does not mean that oral and written communications between a professional legal adviser and their client, or a person representing that client, while obtaining legal advice, must be disclosed (legal privilege).

Process for notifying, considering and reporting (suspected) breaches

The table below sets out the process followed for notifying, considering and reporting a (suspected) breach.

1.	<p>A Reporter should notify the Principal Pensions Consultant (Administration and Employers) of a suspected breach in a timely and expedient manner.</p> <p>Tara Atkins, Principal Pensions Consultant (Administration and Employers) Room 216, East Wing, County Hall, Chichester, PO19 1RG 0330 222 8787 tara.atkins@westsussex.gov.uk</p> <p>In the absence of the Principal Pensions Consultant (Administration and Employers) a Reporter should notify the Pension Fund Strategist</p> <p>Rachel Wood, Pension Fund Strategist Room 216, East Wing, County Hall, Chichester, PO19 1RG 0330 222 3387 / 07540 641821 rachel.wood@westsussex.gov.uk</p>
2.	<p>The Principal Pensions Consultant will consider whether there is reasonable cause to believe that a breach has occurred and will investigate.</p> <p>In cases of potential dishonesty or suspected fraud checks which might alert those implicated or impede the actions of the police or a regulatory authority should be avoided.</p>
3.	<p>If the Principal Pensions Consultant determines that a breach has occurred it should be logged and actively managed by the Principal Pensions Consultant.</p>

4.	<p>The Principal Pensions Consultant will need to be notified of the proposed response to the breach.</p> <p>In all cases this should include the action taken to investigate and correct the breach, what steps have been put in place to minimise the risk of it happening again, how many members have been affected and whether those members have been notified of the breach.</p>
5.	<p>Once the relevant steps above have been taken the Principal Pensions Consultant should consider whether the breach should be considered material taking into account:</p> <ul style="list-style-type: none"> • the cause of the breach (dishonesty, poor governance or administration, slow or inappropriate decision making practices, incomplete or inaccurate advice and acting or failing to act in deliberate contravention of the law are all considered to be of material significance by the Regulator); • the effect of the breach including, any other breaches occurring as a result of the initial breach and the effects of those resulting breaches should also be taken into account. • the response to the breach (e.g. whether prompt and effective action is taken to investigate and correct the breach to a proper conclusion in order to minimise the risk of recurrence and if affected scheme members have been notified). • the wider implications of the breach (e.g. whether it is more likely that other breaches will emerge in the future). • other reported and unreported breaches of which they are aware (although historical information should be considered with care)
6.	<p>If a breach is considered to be material breach a recommendation will be made to the Scheme Manger. The report must include:</p> <ul style="list-style-type: none"> • Full name, address and registry number of the Fund; • Breach date and any relevant dates; • Description of the breach or breaches (and the reason the breach is thought to be of material significance to the Regulator); • Whether the breach has been rectified and the steps taken to rectify the breach; • Name of the employer or scheme manager (where known); • Name, position and contact details of the Reporter; and • Role of the Reporter in relation to the Fund.

7.	<p>The Scheme Manager will then determine whether, in their opinion, the breach is of material significance.</p> <p>If the breach is considered to be of material significance to the Regulator, the Pensions Regulator must be informed and necessary responses and information will be provided.</p>
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Periodic Reporting

A highlight report showing all breaches will be provided to the Director of Finance, Corporate Resources and Services, and the Director of Law, Assurance and Strategy (the Scheme Manager) on a quarterly basis based on the Pension Regulators "traffic light system":

- Red breaches must be reported to the Pension Regulator;
- Amber breaches are less clear cut: and judgement is needed to decide whether it needs to be reported;
- Green breaches do not need to be reported to the Pension Regulator

A version of the report will be provided to the Pension Panel and Pension Advisory Board.

Whistleblowing protection and confidentiality

When a breach is reported, the Regulator will do his best to protect a Reporter's identity (if desired) and will not disclose this information except where lawfully required to do so. This is in addition to protection for employees making a whistleblowing disclosure to the Regulatory under the Employment Rights Act 1996 (ERA).

Where individuals employed by firms or another organisation having a statutory duty to report disagree with a decision from their employer not to report to the Regulator, they may have protection under the ERA if they make an individual report in good faith. The Regulator expects such individual reports to be rare and confined to the most serious cases.

The County Council's whistleblowing policy can be found in its [Constitution](#).²

² <https://www.westsussex.gov.uk/about-the-council/how-the-council-works/constitution/>

Annex 1

Example of breaches

The following table shows examples of potential breaches, set out using a traffic light system. These examples are not exhaustive and are illustrative only:

As each breach of law will have a unique set of circumstances, there may be elements which apply from one or more of the red, amber and green sections. Judgement should be used to determine which overall reporting traffic light the breach falls into.

Note: Red breaches must be reported to the Pension Regulator, Amber breaches are less clear cut: and judgement is needed to decide whether it needs to be reported and Green breaches do not need to be reported to the Pension Regulator

	Knowledge and understanding required by pension board members			
	Example scenario: The scheme manager has breached a legal requirement because pension board members failed to help secure compliance with scheme rules and pension law.			
	Potential investigation outcomes:			
	Cause	Effect	Reaction	Wider implications
● Red	Pension board members have failed to take steps to acquire and retain the appropriate degree of knowledge and understanding about the scheme's administration policies	A pension board member does not have knowledge and understanding of the scheme's administration policy about conflicts of interest. The pension board member fails to disclose a potential conflict, which results in the member acting improperly	Pension board members do not accept responsibility for their failure to have the appropriate knowledge and understanding or demonstrate negative/non-compliant entrenched behaviours The scheme manager does not take appropriate action to address the failing in relation to conflicts	It is highly likely that the scheme will be in breach of other legal requirements. The pension board do not have an appropriate level of knowledge and understanding and in turn are in breach of their legal requirement. Therefore, they are not fulfilling their role to assist the scheme manager and the scheme is not being properly governed

	Knowledge and understanding required by pension board members Example scenario: The scheme manager has breached a legal requirement because pension board members failed to help secure compliance with scheme rules and pension law.			
	Potential investigation outcomes:			
	Cause	Effect	Reaction	Wider implications
● Amber	Pension board members have gaps in their knowledge and understanding about some areas of the scheme's administration policies and have not assisted the scheme manager in securing compliance with internal dispute resolution requirements	Some members who have raised issues have not had their complaints treated in accordance with the scheme's internal dispute resolution procedure (IDRP) and the law	The scheme manager has failed to adhere precisely to the detail of the legislation where the breach is unlikely to result in an error or misunderstanding or affect member benefits	It is possible that the scheme will be in breach of other legal requirements. It is possible that the pension board will not be properly fulfilling their role in assisting the scheme manager
● Green	Pension board members have isolated gaps in their knowledge and understanding	The scheme manager has failed to adhere precisely to the detail of the legislation where the breach is unlikely to result in an error or misunderstanding or affect member benefits	Pension board members take action to review and improve their knowledge and understanding to enable them to properly exercise their functions and they are making quick progress to address gaps in their knowledge and understanding. They assist the scheme manager to take prompt and effective action to remedy the breach	It is unlikely that the scheme will be in breach of other legal requirements. It is unlikely that the pension board is not fulfilling their role in assisting the scheme manager

	Scheme record-keeping Example scenario: An evaluation of member data has identified incomplete and inaccurate records			
	Potential investigation outcomes:			
	Cause	Effect	Reaction	Wider implications
● Red	Inadequate internal processes that fail to help employers provide timely and accurate data, indicating a systemic problem	All members affected (benefits incorrect/not paid in accordance with the scheme rules, incorrect transactions processed and poor quality information provided in benefit statements)	Action has not been taken to identify and tackle the cause of the breach to minimise the risk of recurrence nor to notify members	It is highly likely that there are wider scheme issues caused by inadequate processes and that the scheme will be in breach of other legal requirements
● Amber	A failure by some – but not all – participating employers to act in accordance with scheme procedures, indicating variable standards of implementing those procedures	small number of members affected	Action has been taken to identify the cause of the breach, but progress to tackle it is slow and there is a risk of recurrence	It is possible that there are wider scheme issues and that the scheme may be in breach of other legal requirements
● Green	A failure by one participating employer to act in accordance with scheme procedures, indicating an isolated incident	No members affected at present	Action has been taken to identify and tackle the cause of the breach and minimise the risk of recurrence	It is unlikely that there are wider scheme issues or that the scheme manager will be in breach of other legal requirements

	Providing Information to Members Example scenario: An active member of a defined benefit (DB) public service scheme has reported that their annual benefit statement, which was required to be issued within 17 months of the scheme regulations coming into force, has not been issued. It is now two months overdue. As a consequence, the member has been unable to check: <ul style="list-style-type: none"> • personal data is complete and accurate • correct contributions have been credited • what their pension may be at retirement 			
	Potential investigation outcomes:			
	Cause	Effect	Reaction	Wider implications
● Red	Inadequate internal processes for issuing annual benefit statements, indicating a systemic problem	All members may have been affected	Action has not been taken to correct the breach and/ or identify and tackle its cause to minimise the risk of recurrence and identify other members who may have been affected	It is highly likely that the scheme will be in breach of other legal requirements
● Amber	An administrative oversight, indicating variable implementation of internal processes	A small number of members may have been affected	Action has been taken to correct the breach, but not to identify its cause and identify other members who may have been affected	It is possible that the scheme will be in breach of other legal requirements
● Green	An isolated incident caused by a one off system error	Only one member appears to have been affected	Action has been taken to correct the breach, identify and tackle its cause to minimise the risk of recurrence and contact the affected member	It is unlikely that the scheme will be in breach of other legal requirements

	Internal Controls Example scenario: A DB public service scheme has outsourced all aspects of scheme administration to a third party, including receiving contributions from employers and making payments to the scheme. Some contributions due to the scheme on behalf of employers and members are outstanding.			
	Potential investigation outcomes:			
	Cause	Effect	Reaction	Wider implications
● Red	The administrator is failing to monitor that contributions are paid to them in time for them to make the payment to the scheme in accordance within the legislative timeframes and is therefore not taking action	The scheme is not receiving the employer contributions on or before the due date nor employee contributions within the prescribed period	The administrator has not taken steps to establish and operate adequate and effective internal controls and the scheme manager does not accept responsibility for ensuring that the failure is addressed	It is highly likely that the administrator is not following agreed service level standards and scheme procedures in other areas. The scheme manager is likely to be in breach of other legal requirements such as the requirement to have adequate internal controls
● Amber	The administrator has established internal controls to identify late payments of contributions but these are not being operated effectively by all staff at the administrator	The scheme is receiving some but not all of the employer contributions on or before the due date and employee contributions within the prescribed period	The scheme manager has accepted responsibility for ensuring that the failure is addressed, but the progress of the administrator in training their staff is slow	It is possible that the administrator is not following some of the agreed service level standards and scheme procedures in other areas. It is possible that the scheme manager is in breach of other legal requirements
● Green	Legitimate late payments have been agreed by the scheme with a particular employer due to exceptional circumstances	The employer is paying the administrator the outstanding payments within the agreed timescale	The scheme has discussed the issue with the employer and is satisfied that the employer is taking appropriate action to ensure future payments are paid on time	It is unlikely that the employer is failing to adhere to other scheme processes which would cause the scheme manager to be in breach of legal requirements

Annex 2

Highlight Report Template

		[Date]	[Status]	[RAG]
Case	[Summary] [Actions / Escalations]			
Description	Cause Effect Response Wider Implications			
Themes and mitigations	Related breaches Future Mitigations			
Next Steps				
Other Notes				

		[Date]	[Status]	[RAG]
Case	[Summary] [Actions / Escalations]			
Description	Cause Effect Response Wider Implications			

Themes and mitigations	Related breaches Future Mitigations
Next Steps	
Other Notes	

Key			
● Red Must be reported.	● Amber Judgement required.	● Green Do not report.	● Unclassified Status pending