

LOCAL PENSION BOARD OF GREATER MANCHESTER COMBINED AUTHORITY FIREFIGHTER'S PENSION SCHEMES

REPORTING BREACHES OF THE LAW TO THE PENSIONS REGULATOR

Introduction

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.

The Code in itself is not a statement of law, however its objectives are 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.

There are a number of statutory requirements within the Firefighters Pension Schemes (1992, 2006 & 2015) for which there is a statutory duty to report to the Pensions Regulator if a material breach occurs.

To assist, the Code states that a procedure should be established to ensure that those with a responsibility to make reports are able to meet their legal obligations.

This document sets out the procedure for the Firefighters Pension Schemes (1992, 2006 & 2015) and relates to all of the Schemes areas of operation.

Much of the text used is drawn from the Code itself. Where it has been, the Regulator's copyright applies.

Legal requirements

Certain people are required to report breaches of the law to 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;
- 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 manager;
- members of the pension board;
- any person who is otherwise involved in the administration of the Scheme;
- 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;
- professional advisers including auditors, and legal advisers; and
- any person who is otherwise involved in advising the managers of the scheme in relation to the scheme.

Process

Examples of breaches have been set out in Appendix 1.

Before a report is submitted, a reporter should obtain clarification of the law around the suspected breach from the Payroll and Pensions Manager.

The Payroll and Pensions Manager will consider whether the Regulator would regard the breach as being material taking into account:

- the effect of the breach
- whether there was a prompt and effective response to investigate and correct the breach
- whether members have been notified
- whether there are wider implications of the breach.

Each of the considerations is discussed in more detail below.

The Payroll and Pensions Manager will clarify any facts, if required and in the case of a complex case will seek advice, as required.

The Payroll and Pensions Manager will make a recommendation to the GMCA Treasurer about the notification made by a reporter.

Some breaches could be so serious that they must always be reported, for example a theft of funds by anyone involved with the administration or management of the Fire Pension account. It is difficult to be definitive about what constitutes a breach that must always be reported, but one test is: might it reasonably lead to a criminal prosecution or a serious loss in public confidence?

Reporting breaches which are considered to be material

Non-urgent but material breaches should be reported to the Regulator within 30 working days of them being confirmed.

Urgent matters should be reported immediately. Reporters should mark urgent reports as such and draw attention to matters they consider particularly serious. A written report can be preceded by a telephone call, if appropriate.

In any event the report will be sent to the GMCA Treasurer and must be made in writing as soon as reasonably practicable. The report must include:

- full name of the Authority and Scheme;
- description of the breach or breaches;
- any relevant dates;
- 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 Scheme.

The Scheme Manager also requires that the report should include:

- the reason the breach is thought to be of material significance to the Regulator;
- the address of the Authority and Scheme;
- the pension scheme's registry number (if available); and
- whether the concern has been reported before.

The GMCA Treasurer should ensure they receive an acknowledgement for any report they send to the Regulator. Only when they receive an acknowledgement can the reporter be confident that the Regulator has received their report.

The Regulator will acknowledge all reports within five working days of receipt, however, it will not generally keep a reported informed of the steps taken in response to a report of a breach, as there are restrictions on the information it can disclose.

The GMCA Treasurer should provide further information or reports of further breaches if this may help the Regulator to exercise its functions. The Regulator may make contact to request further information.

Recording breaches that have not been reported to the Regulator

Breaches that are not considered to be material to the Regulator must still be recorded. This is so that if similar breaches continue, then they become material. Recording all breaches also highlights where improvements are required, to try and prevent similar breaches.

Non-urgent but material breaches should be recorded within 30 working days of them being confirmed.

Breaches that are not being reported to the Regulator should be recorded on the Local Pensions Board Risk Register and reported to the Local Pension Board.

Consideration # 1: Reasonable Cause

Having 'reasonable cause' to believe that a breach has occurred means more than simply having a suspicion that cannot be substantiated.

Reporters should ensure that where a breach is suspected, they carry out checks to establish whether or not a breach has in fact occurred.

The more serious the potential breach and its consequences, the more urgently reporters should make these necessary checks. In cases of potential dishonesty the reporter should avoid, where possible, checks which might alert those implicated. In serious cases, reporters should use the quickest means possible to alert the Regulator to the breach.

Where the reporter does not know the facts or events around the suspected breach, it will usually be appropriate to consult with the Payroll and Pensions Manager regarding what has happened.

If the reporter is unclear about the relevant legal provision, they should clarify their understanding of the law in consultation with the Payroll and Pensions Manager to the extent necessary to form a view.

In establishing whether there is reasonable cause to believe that a breach has occurred, it is not necessary for a reporter to gather all the evidence which the Regulator may require before taking action. A delay in reporting may exacerbate or increase the risk of the breach. It is important to note that in cases of theft, suspected fraud or other serious offences where discussions might alert those implicated or impede the actions of the police or a regulatory authority, the reporter should alert the Regulator without delay.

Consideration # 2: Material significance

In deciding whether a breach is likely to be of material significance to the Regulator, it would be advisable for the reporter to consider 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);
- effect of the breach;
- reaction to the breach;
- the wider implications of the breach; and
- other reported and unreported breaches of which they are aware (although historical information should be considered with care, particularly if changes have been made to address previously identified problems).

Reporters should take into account expert or professional advice, where appropriate, when deciding whether the breach is likely to be of material significance to the Regulator. When deciding whether to make a disclosure, the reporter should consider these points together.

A breach will not normally be materially significant if it has arisen from an isolated incident, for example resulting from teething problems with a new system or procedure, or from an unusual or unpredictable combination of circumstances. But in such a situation, it is also important to consider other aspects of the breach such as the effect it has had and to be aware that persistent isolated breaches could be indicative of wider scheme issues.

Cause of the breach

The following are considered to be of material significance by the Regulator:

- 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.

Effect of the breach

The Regulator's role in relation to public service pension schemes and its statutory objectives mean that the following matters in particular should be considered likely to be of material significance to the Regulator:

Potential Issue		Effect
Local Board members not having the appropriate degree of knowledge and understanding	➔	Board not fulfilling its role, the Fund not being properly governed and administered and/or the Pensions Panel breaching legal requirements
Local Board members having a conflict of interest	➔	Board members being prejudiced in the way that they carry out their role, resulting in ineffective governance and administration of the scheme and/or breaching legal requirements
Adequate internal controls not being established and operated	➔	The Scheme not being run in accordance with the Scheme's Regulations and other legal requirements, risks not being properly identified and managed and/or the right money not being paid to or by the Scheme at the right time
Accurate information about benefits and Scheme administration not being provided to Scheme members and others	➔	Members not being able to effectively plan or make decisions about their retirement
Appropriate records not being maintained	➔	Members benefits being calculated incorrectly and/or not being paid to the right person at the right time
Anyone involved with the administration or management of the Fire Pension account misappropriating any of its money, or being likely to do so	➔	Money not being safeguarded

When considering the effects of the breach, any other breaches occurring as a result of the initial breach and the effects of those resulting breaches should also be taken into account.

Reaction to the breach

Where prompt and effective action is taken to investigate and correct the breach and its causes and, where appropriate, notify any affected members, the Regulator will not normally consider this to be materially significant and therefore it would not be necessary to report the breach. However, the breach would still need to be reported to the Pension Board for them to record.

However, in cases of immediate risk to the Scheme, for instance, where there is any indication of dishonesty, the Regulator does not expect reporters to seek an explanation or to assess the effectiveness of proposed remedies. They should only make such immediate checks as are necessary.

A breach is likely to be of concern and material significance to the Regulator where a breach has been identified and those involved:

- do not take prompt and effective action to remedy the breach and identify and tackle its cause in order to minimise risk of recurrence;
- are not pursuing corrective action to a proper conclusion;
- fail to notify affected scheme members where it would have been appropriate to do so.

Wider implications of the breach

Reporters should consider the wider implications of a breach when they assess which breaches are likely to be materially significant to the Regulator.

For example, a breach is likely to be of material significance where the fact that the breach has occurred makes it appear more likely that other breaches will emerge in the future. This may be due to the scheme manager or pension board members having a lack of appropriate knowledge and understanding to fulfil their responsibilities or where other pension schemes may be affected. For instance, public service pension schemes administered by the same organisation may be detrimentally affected where a system failure has caused the breach to occur.

Whistleblowing protection and confidentiality

The Pensions Act 2004 makes clear that the statutory duty to report overrides any other duties a reporter may have such as confidentiality and that any such duty is not breached by making a report. The Regulator understands the potential impact of a report on relationships, for example, between an employee and their employer.

The statutory duty to report does not, however, override 'legal privilege'. This means that oral and written communications between a professional legal adviser and their client, or a person representing that client, while obtaining legal advice, do not have to be disclosed. Where appropriate a legal adviser will be able to provide further information this.

The Regulator will do its best to protect a reporter's identity (if desired) and will not disclose the information except where lawfully required to do so. It will take all reasonable steps to maintain confidentiality, but it cannot give any categorical assurances as the circumstances may mean that disclosure of the reporter's identity become unavoidable in law. This includes circumstances where the regulator is ordered by a court to disclose it.

The Employment Rights Act 1996 (ERA) provides protection for employees making a whistleblowing disclosure to the regulator. Consequently, where individuals employed by firms or another organisation having a statutory duty to report disagree with a decision 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.

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Appendix 1

Examples of breaches

Example 1

An employer is late in paying over employee and employer contributions, and so late that it is in breach of the statutory period for making such payments. It is contacted by officers from the Scheme, it immediately pays the moneys that are overdue, and it improves its procedures so that in future, contributions are paid over on time. In this instance there has been a breach but members have not been adversely affected and the employer has made efforts to improve its processes regarding future payments. The breach is therefore not material to the Regulator and need not be reported.

Example 2

An employer is late in paying over employee and employer contributions, and so late that it is in breach of the statutory period for making such payments. It is contacted by officers from the Scheme, and it eventually pays the moneys that are overdue. This has happened before, with there being no evidence that the employer has made efforts to improve its processes regarding future payments. In this instance, there has been a breach that *is* relevant to the Regulator, because of the employer's repeated failures.

Example 3

An employer is late in submitting its statutory year-end return of pay and contributions in respect of each of its active members and as such it is in breach. Despite repeated reminders it still does not supply its year-end return. Because the Scheme Manager does not have the year-end data it is unable to supply, by 31 August, annual benefit statements to the Scheme members. In this instance, there has been a breach which *is* relevant to the Regulator, in part because of the employer's failures, in part because of the enforced breach by the Scheme Manager, and also because members are being denied their annual benefit statements.

Example 4

A pension overpayment is discovered and thus the Scheme Manager has failed to pay the right amounts to the right person at the right time. A breach has therefore occurred. The overpayment is however for a modest amount and the pensioner could not have known that (s)he was being overpaid. The overpayment is therefore waived. In this case there is no need to report the breach as it is not material.

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