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The Pensions Regulator's new criminal offences policy

The Pensions Regulator is now able to prosecute two new criminal offences: avoidance of employer debt and conduct risking accrued scheme benefits.

It has issued [guidance](#) on investigating and prosecuting these new offences, which supplements its [general policy](#) on prosecutions.

In deciding whether a person or company has committed an act worthy of investigation, the Regulator will take the same approach as when considering issuing a material detriment contribution notice, and has accordingly laid an amended [code of practice](#) before Parliament.

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Background

The two new offences, introduced by the Pension Schemes Act 2021 from 1 October 2021, concern defined benefit (DB) or hybrid occupational pension schemes, and are broad in scope. The guidance includes a large section giving examples and case studies to assist in understanding the practical scope of the Regulator's new powers.

Avoiding an employer debt

A company or individuals commit an offence where they knowingly and without reasonable excuse:

- prevent the scheme from recovering all or part of a statutory debt due from the employer;
- prevent that debt becoming due;
- compromise or otherwise settle that debt; or
- reduce the amount of that debt which would otherwise become due.

Volume 2021

Issue 35

8 October 2021

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Conduct risking accrued scheme benefits

A company or individuals commit an offence where they knew (or ought to have known) their actions would materially and detrimentally affect the likelihood of accrued scheme benefits being received without reasonable excuse (whether or not the benefits are to be received under the scheme).

The benefits accrued are those accrued before the act or last of the acts in a series.

Extra care is needed in some cases

Whilst the offences are not retrospective, and prosecutions can only apply to acts taking place on or after 1 October 2021, past behaviour, either positive or negative, may be used to prove or disprove someone's intention in respect of acts taking place now.

What is not covered by the guidance

The guidance does not cover other powers the Regulator has, including its contribution notice power and its power to issue financial penalties for avoidance of employer debt or conduct risking accrued scheme benefits.

Who can be prosecuted?

Anyone can be prosecuted, regardless of their connection or otherwise with the pension scheme or sponsoring employer. The only exception is a duly appointed insolvency practitioner carrying out their professional functions.

What amounts to a reasonable excuse?

The Regulator will be considering this objectively and not subjectively. It will:

- consider each person's reasons for acting the way they did in isolation of the actions of other parties;
- take account of the circumstances in which the action took place; and
- take account of the person's own circumstances, including their duties, skills and experience and other relevant attributes.

There are three factors which will be significant in deciding whether a reasonable excuse exists:

1. The extent to which the detriment to the scheme was an incidental consequence of the act or omission. (The more incidental the detriment, the more likely a reasonable excuse defence would succeed.)
2. The adequacy and timeliness of any mitigation provided to offset the detriment. (The more the detrimental impact was mitigated the more likely that a reasonable excuse defence would succeed. In this respect the Regulator expects to see the scheme was treated fairly in relation to other stakeholders.)
3. Where no adequate, or inadequate, mitigation was provided, whether there was a viable alternative which would have avoided or reduced the detrimental impact. The existence of a viable alternative would make a reasonable excuse defence less likely to succeed.

The Regulator will also look at:

- the extent of the advanced communication with the trustees of the scheme;
- in the case of someone who owes a fiduciary duty to the scheme, whether they complied with those duties when undertaking the act or carrying out the course of conduct; and
- where the person was acting in a professional capacity, whether they acted in accordance with the applicable professional duties, conduct obligations, and ethical standards.

Although a person or company that has a reasonable excuse may not be prosecuted, it is for them to raise this issue in the first place. Care should be taken to have an appropriate paper trail which would include contemporaneous records, such as minutes of meetings, correspondence, and written advice. Once this defence is raised the burden falls on the Regulator to disprove it.

Clearance

An individual or company that could be the target of a contribution notice can apply to the Regulator for a clearance statement in relation to its contribution notice powers. Whilst no similar power exists in relation to the criminal offences, if a person has separately applied for clearance in respect of an upcoming transaction and received a clearance statement, then provided they have not misled the Regulator, this is likely to form the basis for saying that person has a reasonable excuse.

Regulator investigations

The Regulator will not open an investigation with a pre-determined action plan to prosecute. Instead it will gather information and establish the facts before deciding how to proceed. A criminal prosecution is more likely where:

- there is serious harm to the scheme and members as a consequence of the act;
- the person had extensive involvement or influence in the harm caused;
- significant financial gains have been made to the detriment of the scheme;
- the scheme has not been treated fairly;
- the trustees, the Regulator or the Pension Protection Fund has been misled or not appropriately informed; or
- there has been a lack of openness and timeliness of communication with the Regulator.

Where a prosecution is actively being considered, the target will be informed and an interview under caution is likely to occur. Cases will be selected for prosecution in the light of:

- whether the conduct is at the more serious end of the conduct that was already within the Regulator's contribution notice powers or would be if the person was connected to the scheme;
- the outcomes that might be achieved from a prosecution in the light of other options available to the Regulator;
- whether it might deter similar behaviour in other cases; and
- whether the evidence exists to achieve a conviction on the criminal standard of proof and it's in the public interest to prosecute.

Comment

The issuing of the guidance by the Regulator is to be welcomed. However, there is bound to be a period of uncertainty in the pensions industry as the Regulator starts using these powers going forward.

The Regulator has echoed comments made by the Pensions Minister that the vast majority of people do not need to be concerned by these new powers. It does not intend to prosecute behaviour which it considers to be ordinary commercial activity.

However, everyone involved with DB schemes, and particularly sponsors, need to exercise a degree of caution. The impact of corporate activity on DB pension schemes needs to be high on company agendas.

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