

What Does the Law Require?

A report should be made to The Pensions Regulator (the Regulator) where a person has reasonable cause to believe that there has been a breach of the law which is relevant to the administration of a pension plan, and the breach is likely to be of material significance to the Regulator in the exercise of any of its functions. The Regulator interprets the term “administration” very widely; it includes matters which could potentially affect members’ benefits, such as funding and investment of the pension plan, the administration of benefits, member communications and pensions payroll.

The requirements allow for the exercise of judgement in assessing whether a breach of the law is of “material significance”. The Regulator’s code of practice and guidance set out how trustees and others are expected to comply with the law.

Who Must Report Breaches?

The duty to report a breach falls on trustees, employers, administrators, professional advisers and others involved in the administration or management of a pension plan. The duty falling on employers extends to insolvency practitioners who employ pension plan members. The requirement is very broad and would include, for example, employees who carry out a payroll function or routine pensions administration tasks. Note that the Employment Rights Act 1996 provides protection for employees who make a whistleblowing disclosure. Note that where there is a corporate trustee the obligation to report rests with the corporate trustee and not the individual trustee directors (although each will still have a duty as director to ensure that the trustee complies with its reporting obligations).

When Should a Breach Be Reported?

A report needs to be made when the reporter has “reasonable cause to believe” that a breach of the law has occurred. This means more than just a suspicion and it would normally be appropriate for the reporter to ascertain the facts by checking with the trustees or others (unless the reporter is concerned that theft, fraud or another serious offence has been committed). It is not necessary for the reporter to gather all of the evidence before making a report to the Regulator.

When Is a Breach of Material Significance?

To decide whether the breach is of material significance the reporter should consider:

- The cause of the breach
- The effect of the breach
- The reaction to the breach
- The wider implications of the breach

What Matter Might Interest the Regulator (but each issue depends on the facts)?

Cause of breach	Dishonesty, deliberate contravention of the law, poor governance leading to deficient administration.
Effect of breach	Incorrect or untimely payments into or out of the fund, assets not safeguarded, failure to comply with funding and investment policies/legislation, incorrect administration of member benefits.
Reaction to breach	Prompt action not taken, insufficient remedial action to stop the breach from recurring, failure to notify affected parties.
Wider implications of breach	Poor governance, lack of trustee knowledge and understanding, other pension plans may be affected.

The Regulator is unlikely to be interested in isolated errors that are rectified promptly and adequately in a well-run pension plan, such as a mistake affecting one member or an error resulting from teething problems with a new payroll system.

How Should a Report Be Made?

Reporters should react as soon as reasonably practicable. Trustees should make sure they have an agreed procedure for raising concerns, evaluating matters and making a whistleblowing report. Reports must be submitted in writing and where possible should use the standard format available on the Regulator’s website.

Very serious breaches or those indicating dishonesty should be reported in the quickest manner possible. In the case of a very serious breach there is no need to follow the usual procedures or report in the standard format. The key requirement is to report quickly.

What Will the Regulator Do When a Report Is Made?

This will depend on the nature of the breach, but in all cases the Regulator will acknowledge the report within five working days of receipt.

Can Collective Reports Be Made?

Where individually appointed trustees are in place (rather than a trustee company) the Regulator interprets the legislation as applying to each individual trustee. However, the trustees' reporting procedure can provide for collective reports to be made (i.e. a group of individual trustees or the trustees and their advisers). An individual's duty to report is not discharged by another party making a report, but when the Regulator is aware of a particular breach it will no longer regard that breach as being of material significance unless a reporter has additional or different information.

The Regulator will send an acknowledgement to the reporter. Unless the breach relates to suspicion of dishonesty or serious wrongdoing, the Regulator recommends that a copy of the report and acknowledgment should be shared with the trustees. The trustees will need to consider whether other parties should also be given a copy of the report and the acknowledgment.

What Are the Consequences of Failing to Comply?

If someone who falls within the scope of the reporting duty fails to report a breach of law without "reasonable excuse" the Regulator may impose a fine of up to £5,000 for an individual or £50,000 for a company. There are a number of other actions open to the Regulator, including removing a trustee from office.

Some Practical Points

Do...	Don't...
Do keep records. Where a breach occurs and it is decided not to report this, because it is not of material significance, trustees should record the decision. Past decisions may be material when deciding whether to make a future report, for example if a pattern of similar breaches emerges.	Don't actively search for breaches as there is no requirement to do so but everyone with a duty to report should be alert to breaches arising (in particular any breaches indicating dishonesty).
Do be aware that the requirement to notify breaches of the law is different to the requirement to report "notifiable events". Whether or not a notifiable event has occurred is a matter of fact and the reporter does not need to exercise discretion.	Don't ignore breaches relating to other employers in a multi-employer pension plan. Employers should note that the Regulator interprets the legislation as applying to any employer who becomes aware of a breach, whether or not the breach affects its own employees.
Do seek the advice of those advisers who have a statutory duty to make a whistleblowing report, before reaching a decision on whether or not to report a matter.	Don't wait for a consensus to be reached in relation to a collective reporting approach if a decision cannot be made in an appropriate timeframe.

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