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Pensions Law Summary
Notifiable Events

Scope and Summary

This note provides a practical summary of some key aspects relating to notifiable events as at November 2021.

The notifiable events regime has been in existence since 6 April 2005 and acts as an early warning system for the Pensions Regulator ("**TPR**") to protect calls on the Pension Protection Fund ("**PPF**"). The events are intended to identify risks relating to scheme funding, employer solvency or the employer covenant and the regime is due to be significantly extended from April 2022.

Takeaway points include:

- Employers and trustees have a statutory duty to report certain events to the Pensions Regulator;
- Those who fail to report these events, or who provide false information, could be subject to civil and/or criminal penalties;
- Employers are likely to face a more expansive notifiable events regime from 2022.

Summary of legal position

Sponsoring employers and trustees of PPF eligible schemes are subject to section 69 of the Pensions Act 2004 which imposes a statutory duty to notify the Pensions Regulator of certain events relating to the scheme or the employer. Notification must be in writing and must take place "as soon as reasonably practicable" after the person notifying becomes aware of the event.

The Pension Schemes Act 2021 introduced new s69A Pensions Act 2004 which, once enacted, introduces new requirements on employers to notify two additional events and also introduces a new obligation on "appropriate persons" (broadly defined as the employer and those associated and/or connected with the employer) to notify TPR and the trustees of:

- certain prescribed employer-related notifiable events;
- material changes to those events; and
- if the event does not take place.

Associated persons will also be under an obligation to submit an accompanying statement containing prescribed information relation to the main terms of the new employer related notifiable events and any subsequent changes to them.

The current notifiable events regime

Regulation 2 of the Pensions Regulator (Notifiable Events) Regulations 2005 contains a number of employer related events that employers must report and a number of scheme related notifiable events that trustees or scheme managers must report. Certain events are always notifiable and others are only notifiable if the scheme meets certain conditions that mainly relate to its PPF funding position, in accordance with a Direction by TPR. These are:

Employer Notifiable event	Scheme notifiable event
ALWAYS NOTIFIABLE	
Decision by the employer that will, or is intended to, result in a debt to the scheme not being paid in full	Decision by trustees or managers 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 where such funding was advised by the actuary
Decision by the employer to cease business in the UK (or ceasing business without an advance decision)	A decision by trustees or managers which will or is intended to result in entering into a scheme apportionment arrangement retrospectively (i.e. on or after the "applicable time", being the date on which the section 75 debt was triggered)
Advice that there is wrongful trading by the employer (or a director knows there is no reasonable prospect of avoiding insolvency) ***From 6 April 2022, it is proposed this notification requirement will fall away.***	A decision by trustees or managers which will or is intended to result in the taking effect of a flexible apportionment arrangement
Conviction in any jurisdiction of a director or partner of a scheme employer for a criminal offence involving dishonesty	A decision by trustees or managers which will or is intended to result in the taking effect of a deferred debt arrangement
	A decision by trustees or managers which will or is intended to result in an event which terminates a deferred debt arrangement under Regulation 6F(6) OPS (Employer Debt) Regulations 2005
NOTIFIABLE IF SCHEME IS UNDERFUNDED	
Decision by a controlling company to relinquish control of an employer (or the relinquishing of control without an advance decision). ***Notification not needed if condition A and B are met.*** ***From 6 April 2022, it is proposed this notification will apply at an earlier stage (see "Further extension of notifiable events regime for employers" section below).***	Decision by trustees or managers to take action which will, or is intended to, result in a debt to the scheme not being paid in full. *Notification not needed if condition A, B and C are met.*

Breach of a banking covenant by the employer, unless the bank agrees not to enforce the covenant ***Notification not needed if condition A and B are met***	Making or accepting a transfer payment the value of which is more than the lower of: (i) 5% of the value of the scheme's assets; and (ii) £1.5 million *Notification not needed if condition A and B are met*
	Granting benefits or a right to benefits to a single member the cost of which is more than the lower of: (iii) 5% of the value of the scheme's assets; and (iv) £1.5 million *Notification not needed if condition A and B are met*

Condition A - scheme is fully funded on PPF basis at most recent valuation

Condition B - trustees have not reported a non-payment of contributions in previous 12 months

Condition C – the debt not collected is less than 0.5% of scheme assets (as valued at most recent PPF valuation)

Guarantors under withdrawal arrangements agreed in relation to multi-employer schemes are also required to notify certain events as set out in Schedule 1B of the Occupational Pension Schemes (Employer Debt) Regulations irrespective of the funding position of the scheme.

Further extension of the notifiable events regime for employers

The DWP is currently consulting on proposed changes to the Pensions Regulator (Notifiable Events) Regulations 2005 as contained in the draft Pensions Regulator (Notifiable Events) (Amendment) Regulations 2021. Subject to the outcome of the consultation, which closes on 27 October, it is expected that the new changes will come into effect on 6 April 2022. The definitions used in the draft regulations potentially create quite a degree of uncertainty as to when the duties apply, as a result of the difficulty of covering a vast range of potential corporate activity and the need to balance potential over-reporting against the policy objectives. An update to TPR's Direction, and detailed guidance from TPR in due course may assist to some extent.

The three new proposed employer notifiable events are:

- A decision in principle by a controlling company to relinquish control of an employer or an offer being received to acquire control of the employer without an advance decision (this is an amendment of the existing change of control notifiable event).
- A decision in principle by the employer to sell a material proportion of its business or assets.
- A decision in principle by the employer to grant or extend a relevant security ranking above the pension scheme.

A "decision in principle" is defined as any decision prior to negotiations or agreements being entered into with another party.

A "material proportion of the employer's business" is defined as more than 25% of its annual revenue, either on its own or together with other business sales completed within 12 months of the notifiable event. A "material proportion of the employer's assets" is defined as more than 25% of the gross value of the employer's assets.

"Relevant security" is defined as security granted by the employer, or one of their subsidiaries, comprising more than 25% of the employer's consolidated revenue or gross assets. While this includes fixed and floating charges over the employer's assets, it does not include the refinancing of an existing debt nor security for specific chattels or for the financing of company vehicles.

New notifiable events and "accompanying statement" requirement for appropriate persons

For the three new employer notifiable events, there will be a two stage reporting process. As set out above, the first stage is that once a "decision in principle" has been made, the employer must make a notifiable event report to TPR.

There is then a completely new second stage reporting obligation on "appropriate persons" to submit a further notifiable event report and accompanying statement once "main terms" are proposed. The two stages are separate and distinct and may apply to different people. "Appropriate persons" are defined as the employer and those associated or connected with the employer. The policy rationale here is that the second stage notification should be provided by the transaction's corporate planners i.e. those negotiating the main terms. The second stage "accompanying statement" must be sent to both TPR and the trustees.

In contrast to the notifiable events report, s69A (7) of the Pensions Act 2004 is prescriptive as to what must go in the accompanying statement. It must contain:

- a description of the event;
- a description of any adverse effects of the event on the scheme;
- a description of any steps taken to mitigate those adverse effects, and
- a description of any communication with the trustees or managers about the event.

If, having submitted that report and statement, the terms proposed change materially or the notifiable event does not take place the appropriate person must submit a further notifiable events report to TPR and trustees (along with a further accompanying statement where there is a change in the proposed main terms).

Penalties for failing to comply with reporting requirements

Trustees and employers should be alive to the fact that civil and/or criminal penalties may be imposed if they are found to have deliberately or recklessly failed to comply with their reporting requirements.

	How does it arise?	The penalty
Failure to report a notifiable event	▪ The employer and/or appropriate person fails to comply without reasonable excuse; or ▪ The trustees or managers fail to take reasonable steps to comply	For events that occur on or after 1 October 2021, a discretionary fine of up to £1 million.
Providing false or misleading information to the Pensions Regulator	▪ Knowingly or recklessly providing information relating to notifiable events which is false or misleading in any particular way.	On summary conviction – a fine of up to £1 million On indictment – up to 2 years' imprisonment and/or an unlimited fine.

A failure to notify a notifiable event should also be reported as a breach of the law likely to be of material significance to TPR. If an employer or associated person fails to notify a notifiable event, they should be aware that TPR may have regard to that failure in deciding whether to exercise its moral hazard powers to issue a financial support direction or contribution notice.

Practical steps for employers, appropriate persons and trustees

- Trustees, employers and appropriate persons should notify TPR of the occurrence of a notifiable event as soon as reasonably practicable after becoming aware of it using one of the following:
  - TPR's online system, Exchange;
  - Post;
  - Email; or
  - Fax
- Employers and appropriate persons should keep up to date with any changes that may be made to the Pensions Regulator (Notifiable Events) (Amendment) Regulations 2021 following the conclusion of the consultation process.
- With the penalties for failing to comply with these requirements now so much higher than before, trustees, employers and associated persons should consider taking legal advice early on as to whether a report must be made when corporate activity is being considered, along with what information should be included in any report.
- Information sharing protocols and any regular confirmation of no notifiable events templates may need to be updated.

Please contact us if you would like further information or advice on anything in this note.

This practical summary is not intended to be a full statement of the law on this topic and is not legal advice. It does not take account of any developments since it was written or last updated.