

Breaches Policy

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Breaches of the law

Background

Cheshire Pension Fund (“the Fund”) has prepared this document in setting out its policy and procedures on identifying, managing and where necessary reporting breaches of the law as covered in paragraphs 241 to 275 of the Pensions Regulator’s Code of Practice no 14 (Governance and administration of public service pension schemes) – “the Code of Practice”.

This policy sets out the responsibility of members and officers of the Cheshire Pension Fund (“the Fund”) and the local pension board in identifying, managing and where necessary reporting breaches of the law as they apply to the management and administration of the Fund. This policy does not cover the responsibility of other “reporters” (described later in this policy) in relation to their obligation to report breaches in accordance with the Code of Practice where they relate to the management and administration of the Fund. Where a breach of the law is identified both the Fund and the local pension board will take all necessary steps to consider the breach and report to the Regulator, rather than having the breach reporting by any of the other “reporters”.

This policy will be reviewed and approved by the Fund at least annually. The Fund will monitor all breaches and will ensure that adequate resources are allocated to managing and administering this process.

The Head of Governance will be responsible for the management and execution of this breaches policy.

The Head of Pensions will ensure that training on breaches of the law and this policy is conducted for all relevant officers and elected members, as well as members of the local pension board at induction and on an ongoing basis.

Overview

The identification, management and reporting of breaches is important. It is a requirement of the Code of Practice; failure to report a breach without “reasonable excuse” is a civil offence that can result in civil penalties.

At the same time, in addition to identifying, rectifying and where necessary reporting a particular breach it provides an opportunity to learn from mistakes and review and improve processes in the areas where the breach occurred; and

All staff are expected, indeed required, to take a pro-active approach to the identification, management and reporting of all breaches that have occurred, or are likely to occur.

The Fund will maintain a log of all breaches of the law as applicable to the management and administration of the Fund.

The Fund and the local pension board cannot rely on waiting for other reporters to report a breach where it has occurred. Where a breach has occurred and has been identified by the Fund or local pension board it should be recorded, assessed and where necessary reported as soon as reasonably practicable.

What is a breach of the law?

A breach of the law is *“an act of breaking or failing to observe a law, agreement, or code of conduct.”*. In the context of the Local Government Pension Scheme (LGPS) it can encompass many aspects of the management and administration of the scheme, including failure:

- to do anything required under the LGPS Regulations;
- to do anything required under overriding legislation, applicable statutory guidance or codes of practice;
- to maintain accurate records;
- to act on any fraudulent act or omission that is identified;
- to comply with policies and procedures (e.g. the Funds Statement of investment principles, funding strategy, discretionary policies, etc.);
- of an employer to pay over member and employer contributions on time;
- to pay member benefits either accurately or in a timely manner;
- to issue annual benefit statements on time or non-compliance with the Regulator’s Code of Practice No 14.

Responsibilities in relation to breaches

Responsibility to report identified breaches of the law in relation to the Code of Practice falls on the following (known as “reporters”):

- Members and officers of the Fund, as the Scheme Manager;
- Members of the local pension board;
- Scheme employers;
- Professional advisers (including the Fund actuary, investment advisers, legal advisers); and
- Third party providers (where so employed).

This policy applies only to members and officers of the Fund and members of the local pension board. It is for the other reporters to ensure adequate procedures and policies are put in place in order to identify, assess and where necessary report breaches. Both the Fund and the local pension board will take all necessary steps to consider the breach and report to the Regulator, rather than having the breach reporting by any of the other “reporters”.

Requirement to report a breach of the Law

Breaches of the law which affect pension schemes should be considered for reporting to the Pensions Regulator.

The decision whether to report an identified breach depends on whether:

- there is reasonable cause to believe there has been a breach of the law;
- and if so, is the breach likely to be of material significance to the Regulator?

It is important to understand that not every breach that is identified needs to be reported to the Regulator. For example, where it can be demonstrated that appropriate action is being taken to rectify the breach, or the breach has occurred due to teething problems with new or revised systems or processes, it may not be necessary to report the incident to the Regulator. It is still necessary that all incidents of breaches identified are recorded in the Fund's breaches log. This log will be reviewed on an on-going basis to determine any trends in the breaches log that might indicate any serious failings or fraudulent behaviour.

Where such failings or fraudulent behaviour are identified immediate action will be taken to agree a plan of action to rectify the matter and prevent such an occurrence in the future.

Examples of potential breaches, including when they should and should not be reported to the Pensions Regulator are included in Appendix A.

When is a breach required to be reported to the Regulator?

The Code of Practice requires that a breach should be notified to the Regulator as soon as is reasonably practicable once there is reasonable cause to believe that a breach has occurred and that it is of material significance to the Regulator. In any event, where a breach is considered to be of material significance it must be reported to the Regulator no later than one month after becoming aware of the breach or likely breach.

Where it is considered that a breach is of such significance that the Regulator is required to intervene as a matter of urgency (for example, serious fraud) the matter should be brought to the attention of the Regulator immediately (e.g. by calling them direct). A formal report should then be submitted to the Regulator, marked as "urgent" in order to draw the Regulator's attention to it.

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.

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.

Assessing "reasonable cause"

It is important that the Fund and the local pension board are satisfied that a breach has actually occurred, rather than acting on a suspicion of such an event.

It will be necessary, therefore, for robust checks to be made by members and officers when acting on any suspicion of a breach having occurred. Where necessary this will involve taking legal advice from Legal Services (who may recommend specialist external legal advice if necessary) as well as other advisers (e.g. auditors or the Fund actuary or investment advisers).

Deciding if a breach is “materially significant” and should be reported to the Regulator

The Regulator has produced a decision tree to assist schemes in identifying the severity of a breach and whether it should then be reported. When determining materiality of any breach or likely breach the Fund and local pension board will in all cases consider the following:

- cause – e.g. dishonesty, poor governance, incomplete or inaccurate information, acting or failing to act in contravention of the law;
- effect – e.g. ineffective internal controls, lack of knowledge and understanding, inaccurate records, potential for further breaches occurring;
- reaction – e.g. taking prompt and effective action to resolve a breach, notifying scheme members where appropriate; and
- wider implications – e.g. where a breach has occurred due to lack of knowledge or poor systems and processes making it more likely that other breaches will emerge in the future.

The decision tree provides a “traffic light” system of categorising an identified breach:

Green – not caused by dishonesty, poor governance or a deliberate contravention of the law and its effect is not significant and a plan is in place to rectify the situation. In such cases the breach may not be reported to the Regulator, but should be recorded in the Fund’s breaches log;

Amber – does not fall easily into either green or red and requires further investigation in order to determine what action to take. Consideration of other recorded breaches may also be relevant in determining the most appropriate course of action. The Fund or local pension board will need to decide whether to informally alert the Regulator to the likely breach, formally reporting the breach if it is subsequently decided to categorise the breach as red;

Red - caused by dishonesty, poor governance or a deliberate contravention of the law and having a significant impact, even where a plan is in place to rectify the situation. The Fund or local pension board must report all such breaches to the Regulator in all cases;

If it is unclear as to whether the breach or likely breach is significant, in the first instance full details should always be reported to the Board to determine the appropriate course of action.

It should be noted that failure to report a significant breach or likely breach is likely, in itself, to be a significant breach.

The Fund will use the Regulator’s decision tree as a means of identifying whether any breach is to be considered as materially significant and so reported to the Regulator.

Any failure of a scheme employer to pass over employee contributions that are considered to be of material significance must be reported to the Regulator immediately.

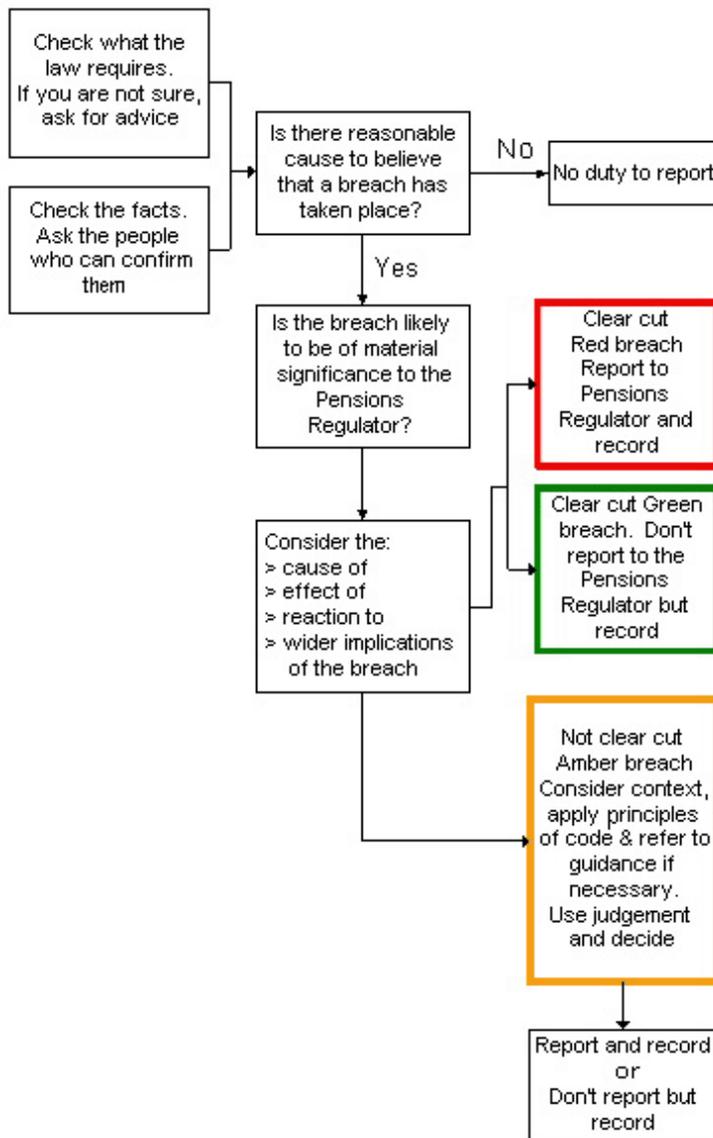
In order to determine whether failure to pay over employee contributions is materially significant or not the Fund will seek from the employer:

- the cause and circumstances of the payment failure
- what action the employer has taken as a result of the payment failure, and
- the wider implications or impact of the payment failure.

Where a payment plan is agreed with the employer to recover outstanding contributions and it is being adhered to or there are circumstances of infrequent one-off late payments or administrative failures the late payment will not be considered to be of material significance.

All incidences resulting from the unwillingness or inability of the employer to pay over the employee contributions, dishonesty, fraudulent behaviour or misuse of employee contributions, poor administrative procedures or the failure to pay over employee contributions within 90 days from the due date will be considered to be of material significance and reported to the Regulator.

Once a breach or likely breach has been identified, regardless of whether it needs to be reported to the Regulator, the relevant manager, in consultation with the Head of Governance, must review the circumstances of the breach in order to understand why it occurred, the consequences of the breach and agree the corrective measures required to prevent re-occurrence, including an action plan where necessary. All breaches must be recorded in the Fund’s breaches log.



Process for reporting breaches

All relevant officers and members of the Fund, as well as all members of the local pension board have a responsibility to:

- identify and assess the severity of any breach or likely breach;
- report all breaches or likely breaches to the Head of Governance;
- in conjunction with relevant colleagues agree a proposed course of action to rectify the breach and put in place measures to ensure the breach does not re-occur, obtaining appropriate legal or other advice where necessary;
- ensure that the appropriate corrective action has been taken to rectify the breach or likely breach and to prevent it from recurring; and
- co-operate with, and assist in, the reporting of breaches and likely breaches to the Pension Fund Committee, local pension board and where necessary the Regulator.

Responsibilities of the responsible officer

The Fund will appoint one of its senior officers to be responsible for the management and execution of this breaches policy. That officer will be the Head of Governance.

The Head of Governance will be responsible for recording and reporting breaches and likely breaches as follows:

- record all identified breaches and likely breaches of which they are aware in the Fund's breaches log;
- investigate the circumstances of all reported breaches and likely breaches;
- ensure, where necessary that an action plan is put in place and acted on to correct the identified breach and also ensure further breaches of a similar nature do not reoccur;
- report to the Pension Fund Committee and local pension board:
 - all materially significant breaches or likely breaches that will require reporting to the Regulator as soon as practicable, but no later than one month after becoming aware of the breach or likely breach; and
 - all other breaches at least quarterly as part of the Committee cycle.
- report all materially significant breaches to the Regulator as soon as practicable but not later than one month after becoming aware of the breach.

The Head of Governance will determine whether any breach or likely breach is materially significant, having regard to the guidance set out in the Code of Practice and after consultation with the Head of Legal Services and where considered appropriate the Pension Fund Committee and local pension board.

If appropriate, the matter will be referred to an external party to obtain any necessary legal or other advice before deciding if the breach is considered to be of material significance to the Regulator. Where uncertainty exists as to the materiality of any identified breach the Fund or local pension board will be required to informally notify the Regulator of the issue and the steps being taken to resolve the issue.

How should a breach be reported to the Regulator?

All materially significant breaches must be reported to the Regulator in writing. This can be via post or electronically. The Regulator encourages the use of its standard reporting facility via its on-line Exchange service.

The Fund will report all material breaches to the Regulator via the online Exchange function.

How are records of breaches maintained?

All breaches and likely breaches are to be reported to the Head of Governance as soon as they are identified. The Head of Pensions will log all breaches on the Fund's breaches log, including the following information:

- date the breach or likely breach was identified;
- name and address of the scheme;
- the pension scheme's registry number (if available);
- name of the employer (where appropriate);
- any relevant dates;
- a description of the breach, its cause and effect, including the reasons it is, or is not, believed to be of material significance;
- whether the breach is considered to be red, amber or green.
- a description of the actions taken to rectify the breach;
- whether the concern has been reported before, and
- a brief description of any longer term implications and actions required to prevent similar types of breaches recurring in the future.

The Head of Governance will be responsible for ensuring the effective management and rectification of any breach identified, including submission of any report to the Regulator. Any documentation supporting the breach will be maintained by the Head of Pensions.

Whistleblowing

It is a statutory duty to report breaches of the law. In rare cases this may involve a duty to whistleblow on the part of an employee of the Fund or a member of the local pension board. The duty to report does not override any other duties a "reporter" may have, such as confidentiality. Any such duty is not breached by reporting to the Regulator. Given the statutory duty that exists, in exercising this breaches policy the Fund will ensure it adheres to the requirements of the Employment Rights Act 1996 in protecting an employee's making a whistleblowing disclosure to the Regulator.

The duty to report, however, does not override 'legal privilege', so oral and written communications between the Fund or local pension board and a professional legal adviser do not have to be disclosed.

Training

The Head of Pensions will ensure that all relevant members and officers, as well as members of the local pension board receive appropriate training on this policy at the commencement of their employment or appointment to the local pension board as appropriate and on an ongoing basis.

APPENDIX A

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 administering authority, 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 put its house in order 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 also late in paying AVCs to the AVC provider. It is contacted by officers from the administering authority, and it eventually pays the moneys that are overdue, including AVCs to the AVC provider. This has happened before, with there being no evidence that the employer is putting its house in order. In this instance there has been a breach that is relevant to the Regulator, in part because of the employer's repeated failures, and also because those members paying AVCs will typically be adversely affected by the delay in the investing of their AVCs.

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 administering authority does not have the year-end data it is unable to supply, by 31 August, annual benefit statements to the employer's 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 administering authority, and also because members are being denied their annual benefits statements.

Example 4

A member of the Pension Fund Management Panel, who is also on the Property Working Group, owns a property. A report is made to the Property Working Group about a possible investment by the Fund, in the same area in which the member's property is situated. The member supports the investment but does not declare an interest and is later found to have materially benefitted when the Fund's investment proceeds. In this case a material breach has arisen, not because of the conflict of interest, but rather because the conflict was not reported.

Example 5

A pension overpayment is discovered and thus the administering authority 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.