



Pensions Act 2004

2004 CHAPTER 35

PART 1

THE PENSIONS REGULATOR

Contribution notices where avoidance of employer debt

38 Contribution notices where avoidance of employer debt

- (1) This section applies in relation to an occupational pension scheme other than—
 - (a) a money purchase scheme, or
 - (b) a prescribed scheme or a scheme of a prescribed description.
- (2) The Regulator may issue a notice to a person stating that the person is under a liability to pay the sum specified in the notice (a “contribution notice”)—
 - (a) to the trustees or managers of the scheme, or
 - (b) where the Board of the Pension Protection Fund has assumed responsibility for the scheme in accordance with Chapter 3 of Part 2 (pension protection), to the Board.
- (3) The Regulator may issue a contribution notice to a person only if—
 - (a) the Regulator is of the opinion that the person was a party to an act or a deliberate failure to act which falls within subsection (5),
 - (b) the person was at any time in the relevant period—
 - (i) the employer in relation to the scheme, or
 - (ii) a person connected with, or an associate of, the employer,
 - (c) the Regulator is of the opinion that the person, in being a party to the act or failure, was not acting in accordance with his functions as an insolvency practitioner in relation to another person, and
 - (d) the Regulator is of the opinion that it is reasonable to impose liability on the person to pay the sum specified in the notice.

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- (4) But the Regulator may not issue a contribution notice, in such circumstances as may be prescribed, to a person of a prescribed description.
- (5) An act or a failure to act falls within this subsection if—
- (a) the Regulator is of the opinion that the main purpose or one of the main purposes of the act or failure was—
 - (i) to prevent the recovery of the whole or any part of a debt which was, or might become, due from the employer in relation to the scheme under section 75 of the Pensions Act 1995 (c. 26) (deficiencies in the scheme assets), or
 - (ii) otherwise than in good faith, to prevent such a debt becoming due, to compromise or otherwise settle such a debt, or to reduce the amount of such a debt which would otherwise become due,
 - (b) it is an act which occurred, or a failure to act which first occurred—
 - (i) on or after 27th April 2004, and
 - (ii) before any assumption of responsibility for the scheme by the Board in accordance with Chapter 3 of Part 2, and
 - (c) it is either—
 - (i) an act which occurred during the period of six years ending with the determination by the Regulator to exercise the power to issue the contribution notice in question, or
 - (ii) a failure which first occurred during, or continued for the whole or part of, that period.
- (6) For the purposes of subsection (3)—
- (a) the parties to an act or a deliberate failure include those persons who knowingly assist in the act or failure, and
 - (b) “the relevant period” means the period which—
 - (i) begins with the time when the act falling within subsection (5) occurs or the failure to act falling within that subsection first occurs, and
 - (ii) ends with the determination by the Regulator to exercise the power to issue the contribution notice in question.
- (7) The Regulator, when deciding for the purposes of subsection (3)(d) whether it is reasonable to impose liability on a particular person to pay the sum specified in the notice, must have regard to such matters as the Regulator considers relevant including, where relevant, the following matters—
- (a) the degree of involvement of the person in the act or failure to act which falls within subsection (5),
 - (b) the relationship which the person has or has had with the employer (including, where the employer is a company within the meaning of subsection (11) of section 435 of the Insolvency Act 1986 (c. 45), whether the person has or has had control of the employer within the meaning of subsection (10) of that section),
 - (c) any connection or involvement which the person has or has had with the scheme,
 - (d) if the act or failure to act was a notifiable event for the purposes of section 69 (duty to notify the Regulator of certain events), any failure by the person to comply with any obligation imposed on the person by subsection (1) of that section to give the Regulator notice of the event,

- (e) all the purposes of the act or failure to act (including whether a purpose of the act or failure was to prevent or limit loss of employment),
 - (f) the financial circumstances of the person, and
 - (g) such other matters as may be prescribed.
- (8) For the purposes of this section references to a debt due under section 75 of the Pensions Act 1995 (c. 26) include a contingent debt under that section.
- (9) Accordingly, in the case of such a contingent debt, the reference in subsection (5)(a)(ii) to preventing a debt becoming due is to be read as including a reference to preventing the occurrence of any of the events specified in section 75(4C)(a) or (b) of that Act upon which the debt is contingent.
- (10) For the purposes of this section—
- (a) section 249 of the Insolvency Act 1986 (connected persons) applies as it applies for the purposes of any provision of the first Group of Parts of that Act,
 - (b) section 435 of that Act (associated persons) applies as it applies for the purposes of that Act, and
 - (c) section 74 of the Bankruptcy (Scotland) Act 1985 (c. 66) (associated persons) applies as it applies for the purposes of that Act.
- (11) For the purposes of this section “insolvency practitioner”, in relation to a person, means—
- (a) a person acting as an insolvency practitioner, in relation to that person, in accordance with section 388 of the Insolvency Act 1986, or
 - (b) an insolvency practitioner within the meaning of section 121(9)(b) (persons of a prescribed description).

39 The sum specified in a section 38 contribution notice

- (1) The sum specified by the Regulator in a contribution notice under section 38 may be either the whole or a specified part of the shortfall sum in relation to the scheme.
- (2) Subject to subsection (3), the shortfall sum in relation to a scheme is—
- (a) in a case where, at the relevant time, a debt was due from the employer to the trustees or managers of the scheme under section 75 of the Pensions Act 1995 (c. 26) (“the 1995 Act”) (deficiencies in the scheme assets), the amount which the Regulator estimates to be the amount of that debt at that time, and
 - (b) in a case where, at the relevant time, no such debt was due, the amount which the Regulator estimates to be the amount of the debt under section 75 of the 1995 Act which would become due if—
 - (i) subsection (2) of that section applied, and
 - (ii) the time designated by the trustees or managers of the scheme for the purposes of that subsection were the relevant time.
- (3) Where the Regulator is satisfied that the act or failure to act falling within section 38(5) resulted—
- (a) in a case falling within paragraph (a) of subsection (2), in the amount of the debt which became due under section 75 of the 1995 Act being less than it would otherwise have been, or

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- (b) in a case falling within paragraph (b) of subsection (2), in the amount of any such debt calculated for the purposes of that paragraph being less than it would otherwise have been,
- the Regulator may increase the amounts calculated under subsection (2)(a) or (b) by such amount as the Regulator considers appropriate.
- (4) For the purposes of this section “the relevant time” means—
 - (a) in the case of an act falling within subsection (5) of section 38, the time of the act, or
 - (b) in the case of a failure to act falling within that subsection—
 - (i) the time when the failure occurred, or
 - (ii) where the failure continued for a period of time, the time which the Regulator determines and which falls within that period.
 - (5) For the purposes of this section—
 - (a) references to a debt due under section 75 of the 1995 Act include a contingent debt under that section, and
 - (b) references to the amount of such a debt include the amount of such a contingent debt.

40 Content and effect of a section 38 contribution notice

- (1) This section applies where a contribution notice is issued to a person under section 38.
- (2) The contribution notice must—
 - (a) contain a statement of the matters which it is asserted constitute the act or failure to act which falls within subsection (5) of section 38,
 - (b) specify the sum which the person is stated to be under a liability to pay, and
 - (c) identify any other persons to whom contribution notices have been or are issued as a result of the act or failure to act in question and the sums specified in each of those notices.
- (3) Where the contribution notice states that the person is under a liability to pay the sum specified in the notice to the trustees or managers of the scheme, the sum is to be treated as a debt due from the person to the trustees or managers of the scheme.
- (4) In such a case, the Regulator may, on behalf of the trustees or managers of the scheme, exercise such powers as the trustees or managers have to recover the debt.
- (5) But during any assessment period (within the meaning of section 132) in relation to the scheme, the rights and powers of the trustees or managers of the scheme in relation to any debt due to them by virtue of a contribution notice are exercisable by the Board of the Pension Protection Fund to the exclusion of the trustees or managers and the Regulator.
- (6) Where, by virtue of subsection (5), any amount is paid to the Board in respect of a debt due by virtue of a contribution notice, the Board must pay the amount to the trustees or managers of the scheme.
- (7) Where the contribution notice states that the person is under a liability to pay the sum specified in the notice to the Board, the sum is to be treated as a debt due from the person to the Board.

- (8) Where the contribution notice so specifies, the person to whom the notice is issued (“P”) is to be treated as jointly and severally liable for the debt with any persons specified in the notice who are persons to whom corresponding contribution notices are issued.
- (9) For the purposes of subsection (8), a corresponding contribution notice is a notice which—
- (a) is issued as a result of the same act or failure to act falling within subsection (5) of section 38 as the act or failure as a result of which P’s contribution notice is issued,
 - (b) specifies the same sum as is specified in P’s contribution notice, and
 - (c) specifies that the person to whom the contribution notice is issued is jointly and severally liable with P, or with P and other persons, for the debt in respect of that sum.
- (10) A debt due by virtue of a contribution notice is not to be taken into account for the purposes of section 75(2) and (4) of the Pensions Act 1995 (c. 26) (deficiencies in the scheme assets) when ascertaining the amount or value of the assets or liabilities of a scheme.

41 Section 38 contribution notice: relationship with employer debt

- (1) This section applies where a contribution notice is issued to a person (“P”) under section 38 and condition A or B is met.
- (2) Condition A is met if, at the time at which the contribution notice is issued, there is a debt due under section 75 of the Pensions Act 1995 (“the 1995 Act”) (deficiencies in the scheme assets) from the employer—
- (a) to the trustees or managers of the scheme, or
 - (b) where the Board of the Pension Protection Fund has assumed responsibility for the scheme in accordance with Chapter 3 of Part 2 (pension protection), to the Board.
- (3) Condition B is met if, after the contribution notice is issued but before the whole of the debt due by virtue of the notice is recovered, a debt becomes due from the employer to the trustees or managers of the scheme under section 75 of the 1995 Act.
- (4) The Regulator may issue a direction to the trustees or managers of the scheme not to take any or any further steps to recover the debt due to them under section 75 of the 1995 Act pending the recovery of all or a specified part of the debt due to them by virtue of the contribution notice.
- (5) If the trustees or managers fail to comply with a direction issued to them under subsection (4), section 10 of the 1995 Act (civil penalties) applies to any trustee or manager who has failed to take all reasonable steps to secure compliance.
- (6) Any sums paid—
- (a) to the trustees or managers of the scheme in respect of any debt due to them by virtue of the contribution notice, or
 - (b) to the Board in respect of any debt due to it by virtue of the contribution notice,
- are to be treated as reducing the amount of the debt due to the trustees or managers or, as the case may be, to the Board under section 75 of the 1995 Act.

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- (7) Where a sum is paid to the trustees or managers of the scheme or, as the case may be, to the Board in respect of the debt due under section 75 of the 1995 Act, P may make an application under this subsection to the Regulator for a reduction in the amount of the sum specified in P's contribution notice.
- (8) An application under subsection (7) must be made as soon as reasonably practicable after the sum is paid to the trustees or managers or, as the case may be, to the Board in respect of the debt due under section 75 of the 1995 Act.
- (9) Where such an application is made to the Regulator, the Regulator may, if it is of the opinion that it is appropriate to do so—
- (a) reduce the amount of the sum specified in P's contribution notice by an amount which it considers reasonable, and
 - (b) issue a revised contribution notice specifying the revised sum.
- (10) For the purposes of subsection (9), the Regulator must have regard to such matters as the Regulator considers relevant including, where relevant, the following matters—
- (a) the amount paid in respect of the debt due under section 75 of the 1995 Act since the contribution notice was issued,
 - (b) any amounts paid in respect of the debt due by virtue of that contribution notice,
 - (c) whether contribution notices have been issued to other persons as a result of the same act or failure to act falling within subsection (5) of section 38 as the act or failure as a result of which P's contribution notice was issued,
 - (d) where such contribution notices have been issued, the sums specified in each of those notices and any amounts paid in respect of the debt due by virtue of those notices,
 - (e) whether P's contribution notice specifies that P is jointly and severally liable for the debt with other persons, and
 - (f) such other matters as may be prescribed.
- (11) Where—
- (a) P's contribution notice specifies that P is jointly and severally liable for the debt with other persons, and
 - (b) a revised contribution notice is issued to P under subsection (9) specifying a revised sum,
- the Regulator must also issue revised contribution notices to those other persons specifying the revised sum and their joint and several liability with P for the debt in respect of that sum.
- (12) For the purposes of this section—
- (a) references to a debt due under section 75 of the 1995 Act include a contingent debt under that section, and
 - (b) references to the amount of such a debt include the amount of such a contingent debt.

42 Section 38 contribution notice: clearance statements

- (1) An application may be made to the Regulator under this section for the issue of a clearance statement within paragraph (a), (b) or (c) of subsection (2) in relation to circumstances described in the application.

- (2) A clearance statement is a statement, made by the Regulator, that in its opinion in the circumstances described in the application—
 - (a) the applicant would not be, for the purposes of subsection (3)(a) of section 38, a party to an act or a deliberate failure to act falling within subsection (5)(a) of that section,
 - (b) it would not be reasonable to impose any liability on the applicant under a contribution notice issued under section 38, or
 - (c) such requirements of that section as may be prescribed would not be satisfied in relation to the applicant.
- (3) Where an application is made under this section, the Regulator—
 - (a) may request further information from the applicant;
 - (b) may invite the applicant to amend the application to modify the circumstances described.
- (4) Where an application is made under this section, the Regulator must as soon as reasonably practicable—
 - (a) determine whether to issue the clearance statement, and
 - (b) where it determines to do so, issue the statement.
- (5) A clearance statement issued under this section binds the Regulator in relation to the exercise of the power to issue a contribution notice under section 38 to the applicant unless—
 - (a) the circumstances in relation to which the exercise of the power under that section arises are not the same as the circumstances described in the application, and
 - (b) the difference in those circumstances is material to the exercise of the power.