
Changes to legislation: Pensions Act 2008, Cross Heading: Contribution notices: material detriment test is up to date with all changes known to be in force on or before 01 March 2024. There are changes that may be brought into force at a future date. Changes that have been made appear in the content and are referenced with annotations. (See end of Document for details) View outstanding changes

SCHEDULES

SCHEDULE 9

CONTRIBUTION NOTICES AND FINANCIAL SUPPORT DIRECTIONS UNDER PENSIONS ACT 2004

Contribution notices: material detriment test

- 2 (1) In section 38(5)(a) (main purpose or one of main purposes of act or failure to prevent recovery of employer debt under section 75 of the Pensions Act 1995 (c. 26) etc.), after “is of the opinion that” insert “ the material detriment test is met in relation to the act or failure (see section 38A) or that ”.
- (2) After section 38 insert—

“38A Section 38 contribution notice: meaning of “material detriment test”

- (1) For the purposes of section 38 the material detriment test is met in relation to an act or failure if the Regulator is of the opinion that the act or failure has detrimentally affected in a material way the likelihood of accrued scheme benefits being received (whether the benefits are to be received as benefits under the scheme or otherwise).
- (2) In this section any reference to accrued scheme benefits being received is a reference to benefits the rights to which have accrued by the relevant time being received by, or in respect of, the persons who were members of the scheme before that time.
- (3) In this section “the relevant time” means—
- (a) in the case of an act, the time of the act, or
 - (b) in the case of a failure—
 - (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;
- and, in the case of acts or failures to act forming part of a series, any reference in this subsection to an act or failure is a reference to the last of the acts or failures in that series.
- (4) In deciding for the purposes of section 38 whether the material detriment test is met in relation to an act or failure, the Regulator must have regard to such matters as it considers relevant, including (where relevant)—
- (a) the value of the assets or liabilities of the scheme or of any relevant transferee scheme,
 - (b) the effect of the act or failure on the value of those assets or liabilities,
 - (c) the scheme obligations of any person,

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- (d) the effect of the act or failure on any of those obligations (including whether the act or failure causes the country or territory in which any of those obligations would fall to be enforced to be different),
 - (e) the extent to which any person is likely to be able to discharge any scheme obligation in any circumstances (including in the event of insolvency or bankruptcy),
 - (f) the extent to which the act or failure has affected, or might affect, the extent to which any person is likely to be able to do as mentioned in paragraph (e), and
 - (g) such other matters as may be prescribed.
- (5) In subsection (4) “scheme obligation” means a liability or other obligation (including one that is contingent or otherwise might fall due) to make a payment, or transfer an asset, to—
 - (a) the scheme, or
 - (b) any relevant transferee scheme in respect of any persons who were members of the scheme before the relevant time.
- (6) In this section—
 - (a) “relevant transferee scheme” means any work-based pension scheme to which any accrued rights to benefits under the scheme are transferred;
 - (b) any reference to the assets or liabilities of any relevant transferee scheme is a reference to those assets or liabilities so far as relating to persons who were members of the scheme before the relevant time.
- (7) For the purposes of subsection (6)(a) the reference to the transfer of accrued rights of members of a pension scheme to another pension scheme includes a reference to the extinguishing of those accrued rights in consequence of the obligation to make a payment, or transfer an asset, to that other scheme.
- (8) In this section—
 - (a) “work-based pension scheme” has the meaning given by section 5(3);
 - (b) any reference to rights which have accrued is to be read in accordance with section 67A(6) and (7) of the Pensions Act 1995 (reading any reference in those subsections to a subsisting right as a reference to a right which has accrued).
- (9) In deciding for the purposes of this section whether an act or failure has detrimentally affected in a material way the likelihood of accrued scheme benefits being received, the following provisions of this Act are to be disregarded—
 - (a) Chapter 3 of Part 2 (the Board of the Pension Protection Fund: pension protection), and
 - (b) section 286 (the financial assistance scheme for members of certain pension schemes).
- (10) Regulations may amend any provision of subsections (4) to (8).

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38B Section 38 contribution notice issued by reference to material detriment test: defence

- (1) This section applies where—
 - (a) a warning notice is given to any person (“P”) in respect of a contribution notice under section 38, and
 - (b) the contribution notice under consideration would be issued wholly or partly by reference to the Regulator's opinion that the material detriment test is met in relation to an act or deliberate failure to act to which P was a party.
- (2) If the Regulator is satisfied that P has shown that—
 - (a) conditions A and C are met, and
 - (b) where applicable, condition B is met,the Regulator must not issue the contribution notice by reference to its being of the opinion mentioned in subsection (1)(b).
- (3) Condition A is that, before becoming a party to the act or failure, P gave due consideration to the extent to which the act or failure might detrimentally affect in a material way the likelihood of accrued scheme benefits being received.
- (4) Condition B is that, in any case where as a result of that consideration P considered that the act or failure might have such an effect, P took all reasonable steps to eliminate or minimise the potential detrimental effects that the act or failure might have on the likelihood of accrued scheme benefits being received.
- (5) Condition C is that, having regard to all relevant circumstances prevailing at the relevant time, it was reasonable for P to conclude that the act or failure would not detrimentally affect in a material way the likelihood of accrued scheme benefits being received.
- (6) P is to be regarded as giving the consideration mentioned in condition A only if P has made the enquiries, and done the other acts, that a reasonably diligent person would have made or done in the circumstances.
- (7) For the purposes of condition C—
 - (a) “the relevant time” means the time at which the act occurred or the failure to act first occurred;
 - (b) the reference to the circumstances mentioned in that condition is a reference to those circumstances of which P was aware, or ought reasonably to have been aware, at that time (including acts or failures to act which have occurred before that time and P's expectation at that time of other acts or failures to act occurring).
- (8) In the case of acts or failures to act forming part of a series, P is to be regarded as having shown the matters mentioned in subsection (2) if P shows in the case of each of the acts or failures in the series that—
 - (a) conditions A and C are met, and (where applicable) condition B is met, in relation to the act or failure, or

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- (b) the act or failure was one of a number of acts or failures (a “group” of acts or failures) selected by P in relation to which the following matters are shown.
 - (9) The matters to be shown are that—
 - (a) before becoming a party to the first of the acts or failures in the group, condition A is met in relation to the effect of the acts or failures in the group taken together,
 - (b) condition B is (where applicable) met in relation to that effect, and
 - (c) condition C is then met in relation to each of the acts or failures in the group (determined at the time at which each act or failure concerned occurred or first occurred).
 - (10) If at any time P considers that condition C will not be met in relation to any particular act or failure in the group—
 - (a) the previous acts or failures in the group are to be regarded as a separate group for the purposes of subsection (8), and
 - (b) P may then select another group consisting of the particular act or failure concerned, and any subsequent act or failure, in relation to which P shows the matters mentioned in subsection (9).
- Nothing in paragraph (b) is to be read as preventing P from showing the matters mentioned in subsection (8)(a).
- (11) If—
 - (a) P is unable to show in the case of each of the acts or failures in the series that the matters set out in subsection (8)(a) or (b) are met, but
 - (b) does show in the case of some of them that those matters are met,
 the acts or failures within paragraph (b) are not to count for the purposes of section 38A as acts or failures to act in the series.
 - (12) In this section—
 - (a) “a warning notice” means a notice given as mentioned in section 96(2)(a);
 - (b) any reference to an act or failure to which a person is a party has the same meaning as in section 38(6)(a);
 - (c) any reference to the accrued scheme benefits being received has the same meaning as in section 38A;
 and subsection (9) of section 38A applies for the purposes of conditions A to C as it applies for the purposes of that section.
 - (13) Regulations may amend this section.”

Commencement Information

- II** Sch. 9 para. 2 wholly in force at 29.6.2009; para. 2 in force for certain purposes at Royal Assent see s. 149(3)(a)(ii); para. 2 in force so far as not already in force at 29.6.2009 by [S.I. 2009/1566](#), [art. 2\(1\)\(b\)\(ii\)](#)

- 3 In section 90(2) (the matters in relation to which the Pensions Regulator must issue codes of practice), after paragraph (a) insert—
- “(aa) the circumstances in which the Regulator expects to issue contribution notices under section 38 as a result of being of the

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opinion that the material detriment test is met in relation to an act or failure;”.

4 In section 96 (standard procedure), after subsection (1) insert—

“(1A) In any case where—

- (a) a warning notice is given to any person in respect of a contribution notice under section 38, and
- (b) the contribution notice under consideration would be issued wholly or partly by reference to the Regulator's opinion that the material detriment test is met in relation to an act or failure,

the standard procedure must provide for the following matters.

(1B) The matters are—

- (a) a requirement for the warning notice to explain the general effect of section 38B, and
- (b) a requirement for the person to be given an opportunity before the contribution notice is issued to show the matters mentioned in subsection (2) of that section.”

5 In section 316(2) (subordinate legislation that is subject to affirmative resolution procedure), before paragraph (a) insert—

“(za) regulations under section 38A(10) or 38B(13) (section 38 contribution notices: “the material detriment test”);”.

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Changes and effects yet to be applied to the whole Act associated Parts and Chapters:

Whole provisions yet to be inserted into this Act (including any effects on those provisions):

- s. 3(1A) inserted by [2023 c. 44 s. 1\(2\)](#)
- s. 5(1C) inserted by [2023 c. 44 s. 1\(3\)](#)
- s. 13(3)(ec) inserted by [2023 c. 20 Sch. para. 56](#)
- s. 13A inserted by [2023 c. 44 s. 1\(4\)](#)
- s. 24(1)(c) inserted by [2015 c. 8 Sch. 2 para. 43\(2\)\(d\)](#)
- s. 143(6)(7) inserted by [2023 c. 44 s. 1\(5\)\(b\)](#)