

PENSIONS ACT 2008

EXPLANATORY NOTES

COMMENTARY ON SECTIONS

Part 1: Pension scheme membership for jobholders

Chapter 2: Compliance

Section 34: Effect of failure to comply

93. *Section 34* provides that no private right of action for breach of statutory duty arises against an employer who has failed to comply with requirements set out in the employer duty provisions (sections 2 to 11 or regulations under those sections). Under the Act the Pensions Regulator is the sole body responsible for taking action against such breaches.
94. *Subsection (2)* provides that nothing in Chapter 2, nor in the employer duty provisions, is intended to affect any right of action which might arise otherwise than under these provisions. This means for example that if contributions are set out in an employment contract, the individual would retain the right to pursue missing contributions as they would any other breach of contract.

Section 35: Compliance notices

Section 36: Third party compliance notices

95. This Act introduces powers for the Pensions Regulator to issue compliance notices. Where the Regulator is of the opinion that a contravention of the employer duties has occurred, a compliance notice will be the formal method of communicating the actions that should be taken to comply and the consequences of not doing so. Compliance notices would generally be the first step in the graduated compliance regime.
96. *Section 35* gives the Pensions Regulator the power to issue a compliance notice to a person who has breached an employer duty. Employer duties are the duties under sections 2 to 11 which apply to employers but the duty to provide information under section 10 may also apply to other persons specified in regulations. A compliance notice would direct the recipient to put right their breach of the employer duty.
97. A compliance notice may require the recipient to take specific steps to place the jobholder in the same position, as nearly as possible, as if the breach had not occurred.
98. *Section 36* provides that a “third party compliance notice” can be issued to a person (the “third party”) if the Regulator is of the opinion that person has contributed to a breach of the employer duties (by someone else who is subject to the duties). A third party compliance notice would direct the recipient to put right the action or inaction that had contributed to the breach of the duty.
99. An example of where a third party compliance notice might be issued is if a scheme or pension provider has failed to process the enrolment information it has received from the employer, and this prevents the employer from meeting the enrolment duty.

Section 37: Unpaid contributions notices

100. In addition to compliance notices, [section 37](#) provides the Pensions Regulator with the power to issue an unpaid contributions notice to an employer if it is of the opinion that an employer has failed to pay the required contributions on time.
101. [Section 37](#) makes provision for what an unpaid contributions notice is, to which contributions it is applicable and what information may be included in the notice.

Section 38: Calculation and payment of contributions

102. [Section 38](#) makes provision for the calculation of unpaid contributions. It provides that a compliance notice or an unpaid contributions notice may require the employer to calculate the amount of contributions that have not been paid into the scheme.
103. Where contributions are made within a prescribed period after a certain date, the unpaid contributions notice may require the employer to pay their own contributions with the worker having the option to pay their own but not being obliged to do so. However, where contributions are not made during that prescribed period of time, the employer will be required to pay all outstanding contributions.
104. [Section 38](#) also enables the Regulator to estimate the amount of unpaid contributions using information other than that provided by the employer (for example, information held by HM Revenue and Customs or the employee's scheme) and to require employers to pay interest on unpaid contributions.

Section 39: Meaning of relevant contributions

105. [Section 39](#) provides that the definition of relevant contributions includes both contributions payable directly by an employer into a scheme and contributions payable by an employer on behalf of a worker out of deductions from the worker's earnings. The section also provides that the meaning of relevant contributions is applicable for both jobholders and for workers without qualifying earnings under section 9.

Section 40: Fixed penalty notices

Section 41: Escalating penalty notices

Section 42: Penalty notices: recovery

106. [Sections 40](#) to [42](#) provide the Regulator with powers to issue penalty notices where the Regulator is of the opinion that there has been a failure to comply with a compliance notice, a third party compliance notice, an unpaid contributions notice, a notice requiring certain information (section 72 of the PA 2004) or any of the provisions listed in [section 40\(2\)](#).
107. A fixed penalty notice (section 40) will require the person to whom it is issued to pay a penalty of up to £50,000 within a specified timeframe. Regulations will set out the actual penalty rate.
108. An escalating penalty notice (section 41) can be issued in cases where there is continuing failure to comply – such as where a fixed penalty notice has been ignored. The penalty will escalate at a rate prescribed in regulations but will not exceed £10,000 per day.
109. An escalating penalty notice cannot be issued if the Regulator is in the process of undertaking a review of a compliance notice, a third party compliance notice or an unpaid contributions notice, following an application for review by the person to whom such a notice was issued. The Regulator may not issue an escalating penalty notice if the person has exercised his right to make a referral (appeal) to the Pensions Regulator Tribunal against a fixed penalty notice and the referral has not yet been determined.

110. The Pensions Regulator can recover any outstanding fixed or escalating penalties. If the County Court (England and Wales) or Sheriff Court (Scotland) so orders, the money payable can be recovered by execution against goods. Any such penalties recovered by the Regulator must be paid into the Consolidated Fund.

Section 43: Review of notices

111. *Section 43* provides that the Regulator may review a notice issued under Chapter 2 if it is asked to do so by the person to whom the notice was issued, or if the Regulator considers it to be appropriate.
112. Regulations may prescribe the time period in which the person to whom the notice was issued can apply for review of a notice and the period in which the Regulator may otherwise review the notice.
113. *Subsections (4) and (5)* provide that the Regulator must suspend the effect of a notice until a review is completed, and must take into consideration any representations made by the person to whom the notice was issued.
114. *Subsection (6)* sets out the Regulator's powers in reviewing a compliance notice. The Regulator may confirm, vary or revoke the notice, or it can choose to replace the notice with a different one.

Section 44: References to the Pensions Regulator Tribunal

115. *Section 44(1)* provides that a person who has received a fixed or escalating penalty notice may submit an appeal to the Pensions Regulator Tribunal against the issue of the notice and/or the amount of the penalty.
116. *Subsection (2)* provides that a person making a reference (appeal) to the Pensions Regulator Tribunal must first request a formal review by the Regulator, unless the Regulator itself initiates a review. The Regulator may, however, decide not to undertake a review.
117. *Subsection (3)* suspends the effect of any notice which is the subject of a reference (appeal) to the Pensions Regulator Tribunal.

Section 45: Offences of failing to comply

Section 46: Offences by bodies corporate

Section 47: Offences by partnerships and unincorporated associations

118. *Sections 45 to 47* make it a criminal offence for employers wilfully to fail to comply with specified duties.
119. These duties are automatic enrolment (section 3(2)), re-enrolment of eligible jobholders into an automatic enrolment scheme (section 5(2)) and the requirement to enrol jobholders into an automatic enrolment scheme at the jobholders' request (section 7(3)).
120. *Section 45* provides that a person who commits such an offence could face imprisonment for up to two years and/or a fine. If convicted in a magistrates' court, the maximum penalty is a fine not exceeding the statutory maximum.
121. *Sections 46 and 47* enable the following to be prosecuted for the section 45 offence:
- specified individuals within a body corporate, as well as the body corporate itself (section 46);
 - partnerships and individual partners (section 47); and
 - unincorporated associations and officers within these (section 47).

Section 48: Offences of providing false or misleading information

122. *Section 48* amends section 80(1)(a) of the PA 2004 to include the offence of providing the Regulator with false or misleading information about the actions taken by the employer for the purpose of complying with the employer duties (under regulations under section 11 of this Act).

Section 49: Monitoring of employers' payments to personal pension schemes

123. Section 111A of the PSA 1993 makes provision about monitoring arrangements under which an employer pays contributions to personal pension schemes in respect of an employee. It also provides that fraudulent evasion of such arrangements is an offence. *Section 49* extends that section to apply to arrangements in respect of jobholders, defined in this Act, who would not otherwise fall within the definition of "employee", but who do fall under the definition of "workers".