

Sixty second summary

Breaches of the law

It’s been 4 years since changes to the public service pension governance arrangements were introduced. Much has been achieved in that time in putting all the structures in place. One area where we still see uncertainty, and where understanding could be improved is “breaches of the law”.

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 LGPS, this could encompass a failure to do anything required under the Regulations, Framework or overriding legislation, as well as potentially extending to the provision of incorrect information in general correspondence or telephone conversations, no matter how large or small.

That’s quite a wide-ranging definition. So it’s perhaps unsurprising that questions remain even now, in this whole area. Questions like – *When* do you need to report a breach? *What* is material significance? *Who* is responsible for reporting breaches? Do I need to record *every* breach?

Let’s take a look.

When do you need to report a breach?

First, you need to check out the facts to establish whether a breach has actually occurred or that a legal duty has not been complied with (you must have what’s known as “reasonable cause” to believe a breach has occurred). It’s not enough to act on a suspicion alone. Wherever possible, you should work together with other “reporters” (more on that later) to reach a conclusion. **But be careful to avoid “tipping off” where theft or fraud is suspected. In these cases you may require to whistleblow and independently go straight to the Pensions Regulator.**

What is “Material Significance”?

In our experience of speaking with funds about breaches, we know that deciding whether a breach is materially significant or not can be difficult to judge. Checking against the following list might help*:

| Materially significant | Not materially significant |
|---|---|
| Dishonesty | Isolated incidents stemming from major rules changes, implementation of a new administration system or an unusual set of circumstances (i.e. not repeated errors) |
| Poor governance or administration | |
| Slow or inappropriate decision making | Where prompt action is taken to investigate and resolve an issue and scheme members have been informed |
| Incomplete or inaccurate advice | |
| Contravention of the law or framework requirement | |

*The Pensions Regulator’s guidance on what constitutes “Material Significance” with regards to breaches is well worth a look if you remain uncertain.

You also need to consider the cause and effect of any breach, along with the reaction and any wider implications. The Pensions Regulator’s public service toolkit provides handy examples of reporting categories: **red** (must report), **amber** (exercise judgement as less clear cut) and **green** (don’t report, but do record), to help you reach your decision.

Who is responsible for reporting breaches?

The following are “reporters”, although not all of them are within the control of the scheme manager.

- **Elected members** – Pension Committee and full Council;
- **Officers** – including the pension and finance teams;
- **Local Pension Board** – in its role of supporting the scheme manager;
- **Scheme Employers** – in relation to own actions/responsibilities and those of the scheme manager;
- **Professional advisers/third party providers** – e.g. the Fund actuary, legal advisers, auditor, etc.

It's important to appreciate that you cannot abdicate responsibility to report a breach by relying on any of the other parties to do so. Where you choose not to submit an additional report, with regards to a reportable breach, it's advisable to request a copy of the other party's acknowledgement receipt from the Pensions Regulator and attach to your own breaches log as evidence of reporting. You should also seek confirmation from the Pensions Regulator that they do not require the submission of a separate report.

Here at Hymans Robertson, we have our own responsibility to consider breaches where they come to light, separately recording and reporting them as required. We are keen to work with you to discuss the material significance of any potential breaches and, where required, we are keen to agree to the submission of a joint report to the Pensions Regulator. However, if necessary we will lodge our own separate report to the Regulator if we feel this is appropriate.

Do I need to record every breach?

We suspect this is an area where many funds need to apply a little more rigor. While it might be concluded that a single breach is considered to be immaterial, in certain circumstances a series of immaterial breaches can cumulatively amount to a material breach. This is particularly relevant where the series of breaches indicates more systemic issues which would only be identified by considering all recorded breaches in the round, even if the previous breaches have not been reported.

It is vital, therefore, to ensure that all breaches are recorded, no matter how small. If you haven't already done so you should consider implementing a formal breaches log. This should include a description of the breach, the reasons for it, the action taken to remedy it, as well as confirmation as to whether it was reported or not.

Top tips for best practice

Failure to report a breach could land you with a Civil Penalty (up to £5,000 per individual or £50,000 in any other case). So we'll leave you with some top tips to ensure you can keep on top of this:

- **Checks** - if you suspect a breach, carry out the necessary checks to ascertain if there is **reasonable cause** to show that a breach has occurred;
- **Material significance** – undertake a RAG (**red, amber or green**) assessment to determine if reportable;
- **Collaborate** – wherever possible, work with others to submit a joint report to the Pensions Regulator;
- **Suspected fraud?** – don't tip off, but report directly to the Regulator;
- **Breaches log** – record all breaches whether reported or not with rationale for decision and review regularly to see if any trends emerge;
- **Learning from experience** – key to managing breaches is identifying how things could be improved: especially if matters have escalated to being reported. The Regulator will be keen to see what is being done to avoid reoccurrence in the future; and
- **The Pensions Regulator's Code** - you should always refer to the Pensions Regulator's guidance on assessing and reporting breaches (Code 14: Governance and Administration of Public Service Pension Schemes).