



Pensions Act 2004

2004 CHAPTER 35

PART 1

THE PENSIONS REGULATOR

Contribution notices where avoidance of employer debt

[^{F1}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

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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
 - (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);

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- (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.]

Textual Amendments

- F1** Ss. 38A, 38B inserted (for specified purposes and with effect in accordance with Sch. 9 para. 15(1) of the amending Act and 29.6.2009 so far as not already in force) by [Pensions Act 2008 \(c. 30\)](#), s. 149(2)(3), [Sch. 9 para. 2\(2\)](#); S.I. 2009/1566, art. 2(1)(b)(ii)

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