

Compulsory Workplace Pensions

From 2012, the existing requirements to designate access to a stakeholder pension will be removed.

Key Points for Employers

Under the Pensions Act 2008 (the "2008 Act"), all employers will be required to:

- automatically enrol eligible workers (not just employees) into either the national Personal Accounts scheme (to be established by the Secretary of State) or an alternative workplace pension scheme, which meets certain quality criteria; and
- pay minimum employer pension contributions to a defined contribution arrangement (or provide minimum defined benefits) based on qualifying earnings between £5,035 and £33,540 per annum.

Workplace schemes will need to be annually certified that they meet the quality criteria under the 2008 Act, including the provision of the required contributions or benefits.

An employer's failure to comply with these new obligations could result in enforcement action by the Pensions Regulator, who will have power to issue notices requiring compliance (at risk of a financial penalty of up to £50,000), and to prosecute for wilful breach of the requirements. Prosecution could lead to a fine and/or imprisonment. The Regulator will also have power to inspect workplaces and demand information.

Workers will be entitled to opt out of the Personal Accounts scheme or alternative workplace scheme if they choose, but the employer must not require or induce opt outs either at recruitment or during employment. Those who opt out must be automatically re-enrolled after 3 years, subject to further opt out.

New employment protection rights, enforceable in the Employment Tribunal, will apply to safeguard workers from dismissal and/or detriment, if they seek to enforce their rights under the 2008 Act. Dismissal of employees, where the reason (or principal reason) is their assertion of rights under the 2008 Act, will be automatically unfair and no minimum period of continuous employment will be required.

Key Action Points

Employers must take steps to review their current pension arrangements (if any) and their current level of staff take up.

Those who do not currently pay pension contributions for staff will need to do so for the first time and will need to decide how to manage and plan for the increase in staff costs. Those with existing schemes may need to modify them to meet the quality criteria. Automatic enrolment is also likely to increase take up and hence staff costs from 2012.

Employment contracts and information will need to be updated in due course and managers involved in the recruitment and management of staff will need to be informed of the new rights.

Full briefing includes:

- Automatic Enrolment
- Compulsory Contributions
- Alternative Quality Schemes
- Opt Outs
- Employer Compliance
- New Employment Rights
- Action Required

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The articles in this briefing are not intended to be definitive statements of the law but instead provide general guidance.

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Automatic Enrolment

Employers must make arrangements to automatically enrol all “jobholders” between the age of 22 and state pension age, into either the Personal Accounts scheme or a qualifying alternative scheme. The employer must provide appropriate information about the new pension rights to jobholders and enrol each jobholder with effect from when he/she first becomes eligible. This is not a one-off requirement; employers will also be required to re-enrol those who opt out at prescribed intervals (not less than 3 years apart).

Jobholders are workers under a contract of employment or personal service contract, who ordinarily work in Great Britain, are between the ages of 16 and 75 and to whom qualifying earnings of between £5,035 and £33,540 are payable. Qualifying earnings include salary, wages, commission, bonuses, overtime and statutory payments for sickness, maternity and other types of family leave.

Agency workers will be covered; their employer will be deemed to be the person who pays them. However, a worker will not be covered if under his/her contract with the employing business, the business is a client or customer of the worker’s profession or business undertaking. A director will be covered if he/she has an employment contract with the company and is not the company’s only employee.

Those workers not subject to automatic enrolment as a jobholder (for example, those under the age of 22 and those being paid less than £5,035 per annum) may require their employers to arrange for them to join a qualifying scheme, but compulsory employer contributions are based only on qualifying earnings. This means that no employer contributions will be payable in respect of those paid less than £5,035 per year.

Compulsory Contributions

Employers will be required to contribute **at least 3%** of the jobholder’s qualifying earnings to the Personal Accounts scheme or to an alternative qualifying defined contribution scheme. Contributions will be phased in from 2012 over three years, so that they commence at 1% and increase to 3% in year 3. Once fully operational, the sum

of the member and employer contributions (inclusive of tax relief) must be at least 8% of qualifying earnings. The 2008 Act allows employers to deduct contributions from wages for this purpose, and if the alternative scheme is a personal pension plan, direct payment of contributions by the worker to the provider must be facilitated.

Employers will have the option of offering a defined benefit occupational pension scheme, instead of a money purchase occupational pension scheme, a personal pension plan or the Personal Accounts scheme. The defined benefit scheme will meet the necessary quality criteria, if it provides benefits broadly equivalent to or better than a pension provided under a “test scheme”. A test scheme must provide a specified level of final salary pension from age 65 (or from any higher prescribed age), based on accrual rates of either 1/120th or 1/80th of average qualifying earnings for each year of pensionable service (up to 40 years), depending on whether or not the employee is contracted out.

Alternative Quality Schemes

As well as providing for minimum contributions or benefits, an alternative workplace pension scheme must be able to accommodate automatic enrolment and must not be subject to conditions which undermine this, for example, membership must not be conditional upon the provision of information by the worker.

The trustees of an occupational pension scheme will have the power to modify their scheme by resolution, with employer consent, to comply with the requirements of the 2008 Act. In relation to contributions, this power can only be used to increase them to the level required.

Alternative schemes must be annually certified that they meet the quality conditions. Certification will be obtained by employers, but regulations will specify who is qualified to provide such certification. Regard will need to be given to guidance issued by the Secretary of State. To assist certification, contributions will be assessed over a full year, to help cater for fluctuating earnings, for example, bonuses.

Opt Outs

Jobholders will have the statutory right to opt out of the Personal Accounts scheme or an alternative qualifying scheme, subject to conditions to be prescribed by regulations. Those who do opt out or are not automatically enrolled for other reasons (for example they are under the age of 22) may give their employer notice, once in a 12 month period, requiring the employer to arrange to opt them in. Automatic re-enrolment is required after 3 years, subject to further opt out.

Employers will be under a duty not to take any steps (or make any omissions) as a result of which a jobholder ceases to be an active member of the Personal Accounts scheme or an alternative qualifying scheme, or as a result of which an alternative qualifying scheme ceases to be a qualifying one. The obvious exceptions to this are where the jobholder opts out, leaves work, or joins another qualifying scheme.

Employers will be prohibited from making any statements or asking any questions during the recruitment process, which indicate (expressly or impliedly) that the recruitment decision will be determined by reference to whether or not the applicant might opt out.

There will also be a prohibition on employers offering financial incentives, the sole or main purpose of which is to induce a jobholder to opt out (for example higher salaries or bonuses).

Employer Compliance

If an employer does not comply with the automatic enrolment requirements or unlawfully encourages or induces opt outs, the Pensions Regulator may issue a compliance notice requiring the employer to take specified steps to remedy the breach within a stated period. This could involve ensuring that the worker is included in an appropriate scheme without loss.

Such a notice could also be issued to a third party (a third party notice), where the employer’s non-compliance is wholly or partly the fault of that party (such as the trustees of an occupational pension scheme, or a pension plan provider or administrator).

The Pensions Regulator will also have power to issue an unpaid contributions notice to an employer,

if it is of the opinion that relevant contributions have not been paid on or before the due date. The notice will require the employer to pay the employer contributions due, with interest if required, within a specified period. The worker may however choose whether or not to make up his/her missing contributions and an instalment option will be available. If the unpaid contributions are not paid within a prescribed period after their due date, the employer may be required to pay both the employer and worker contributions due.

Failure to comply with such notices could lead to a fixed penalty notice being issued for an amount to be prescribed, up to £50,000. The Regulator will also have the option in some cases of issuing an escalating penalty notice, requiring the person to pay a daily penalty of up to £10,000 for continued non compliance beyond the specified date. Penalty notices are enforceable in the County Court.

There will be a right to apply for a review by the Pensions Regulator of any of the above notices issued by it. Under this process, the Regulator will consider representations made by the recipient of the notice and decide whether or not to confirm, vary, revoke or substitute the notice. Pending the outcome of the review, the notice will be suspended. If the review is unsuccessful, the recipient of the notice will be entitled to apply to the Pensions Regulator Tribunal for further consideration.

Wilful failure by an employer to comply with the automatic enrolment requirements under the 2008 Act will be a criminal offence, which could lead, upon conviction in the Crown Court, to imprisonment for up to 2 years or a fine of up to £50,000, or, upon conviction in the magistrates' court, to a fine of up to £5,000. Where the offence is committed with the consent, connivance or neglect of a company officer, such as a director, manager or company secretary or other similar officer, that individual will also be potentially liable.

The Pensions Regulator will also have extensive powers to require information to be provided to it and to inspect places of work for the purposes of fulfilling its enforcement duties.

New Employment Rights

New rights, enforceable in the Employment Tribunal, will be introduced to protect workers from detriment, including termination, if they take steps or propose to take

steps, in good faith, to enforce their rights to pension provision under the 2008 Act. It is not clear, however, whether applicants discriminated against at the recruitment stage will benefit from these rights.

Dismissal of employees for this reason (or where this is the principal reason), including selection for redundancy, will be automatically unfair. The 12 month qualifying period of employment will not apply to claims for unfair dismissal in these circumstances.

Only a compromise agreement will be valid to contract out of rights under the 2008 Act.

Action Required

Review Current Pension Arrangements

There are now less than three years to go before these new rights come into force and employers should be begin to consider their likely impact on their businesses. More detailed regulations are expected to be issued over the coming months.

Employers who do not currently contribute to a pension scheme for their workers should review their options and plan for the increase in their employment costs. They will need to decide whether to enrol workers in the Personal Accounts scheme or establish an alternative scheme which meets the quality criteria. The best option in the circumstances may depend of the nature of the workforce and their earnings and advice should be sought.

Employers with existing pension arrangements will need to review them to determine what modifications may be necessary to meet the quality criteria. They will also need to review current pension scheme take up and plan for the additional costs of automatic enrolment; it is generally believed that automatic enrolment, giving the worker the right to opt out, will result in a much higher level of take up.

All employers will need to modify their contracts of employment to provide for automatic enrolment and update staff handbooks to ensure that appropriate information is available to workers. Those involved in the recruitment and management of staff will also need to be aware of the new employer duties and employment protection rights.

Changing Existing Pension Arrangements

Concern has frequently been expressed that employers will use the new regime to reduce existing employer pension contributions to the new levels, but it is unlikely that employers will be able to unilaterally reduce pension provision for existing employees.

Occupational pension schemes can usually be amended by the employer and trustees, without employee consent, and benefits and/or contributions could be reduced for future service and/or for new members. However, the trustees would generally need to approve the change and they must act in the best interests of members. Employer contributions to personal pension plans, in contrast, tend to be contractual obligations, enforceable by the employee. In the absence of an express power to change such contributions, they could only be reduced with the employee's consent, otherwise a breach of contract would be committed. In both scenarios, the employer would need to consult with affected employees in accordance with requirements under the Pensions Act 2004.

New employees could, however, be offered the Personal Accounts and the reduced pension contributions in line with the 2008 Act.

Salary Sacrifice

One way of reducing the cost of pension contributions is through salary sacrifice and this remains possible under the 2008 Act. Under a salary sacrifice arrangement, the employer would pay the full contribution required under the 2008 Act (or both the employer and member contributions required by the alternative scheme) and reduce the member's salary by an amount equivalent to his/her contributions. Again, this would require careful drafting of the contract of employment. The reduction in wages leads to lower employee and employer national insurance liability, generating potentially valuable savings.

*This lawbite is a general briefing and is not a substitute for legal advice. If you have any questions or would like advice on any matter mentioned please contact **Claire Rankin**.*

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