PENSIONS BRIEFING

Automatic enrolment and re-enrolment: upcoming deadlines for employers

Most employers have passed their automatic enrolment staging date and are automatically enrolling new workers into a pension scheme as a matter of routine, in accordance with their Pensions Act 2008 (2008 Act) duties (*see feature articles "Pensions auto-enrolment: all aboard", www.practicallaw.com/3-517-8826 and "Pensions auto-enrolment: issues in practice", www.practicallaw.com/2-527-5427*).

Employers need to be aware of the following two important deadlines:

- A step-up of the minimum defined contribution (DC) rates from 6 April 2018, and again from 6 April 2019.
- Cyclical automatic re-enrolment, every three years, of those who have opted-out of membership of the scheme.

DC contribution rates

From 6 April 2018, the minimum contributions required to meet automatic enrolment obligations to a DC automatic enrolment pension scheme will increase. There will be a further increase from 6 April 2019. The step-up dates were originally 1 October 2017 and 1 October 2018, but the government put them back by a little over six months in October 2016.

Minimum required contributions. Contributions to a DC pension scheme must be paid of a minimum percentage of qualifying earnings, except in circumstances where an alternative measure of earnings is used (*see below*). Qualifying earnings are the worker's gross earnings between £5,876 and £45,000 per year (figures are for the 2017/18 tax year). This figure includes payments such as commission, bonuses, overtime and statutory payments.

The 2008 Act sets out the minimum contributions, as a percentage of qualifying earnings, that the employer must make, and the minimum total contribution that the scheme must receive (*see box "Minimum contributions"*). Workers' own contributions and any tax relief on them that is claimed by the scheme count towards the minimum total contribution. Alternatively, the total contribution obligation can be satisfied entirely by the employer.

Alternative quality standards. It is recognised that many schemes only treat workers' basic pay as pensionable, but do not limit pensionable pay to earnings above and below specified figures. As a result, employers with schemes under which at least all basic pay is pensionable may, as an alternative, annually certify compliance if their DC contribution arrangements meet one or more of the following alternative quality standards:

- At least 9% of the worker's pensionable earnings, which must include all basic pay, is contributed, including at least a 4% employer contribution.
- At least 8% of the worker's pensionable earnings (as defined by the scheme rules but which must include all basic pay) is contributed, including at least a 3% employer contribution, provided that the total pensionable earnings of all relevant workers to whom this contribution rate applies in aggregate constitute at least 85% of those relevant workers' total earnings.
- At least 7% of the worker's total earnings is contributed, including at least a 3% employer contribution, where all earnings are pensionable.

These rates apply from 6 April 2019. Before then, the minimum required contribution rates are being phased in, in a similar way to the contributions based on qualifying earnings (*see box "Alternative minimum contribution rates"*).

Action required. Employers that have not already done so should check their DC pension contribution rates against the minimum rates required from 6 April 2018 and 6 April 2019.

Many employers will take the step-ups in their stride because their DC contribution rates are already above the minimum required rates. In order to meet the new requirements, some employers will need to increase their contributions, or may wish to increase workers' contributions, or both, from 6 April 2018, and perhaps again from 6 April 2019.

An employer wishing to increase workers' contribution rates should take legal advice on the position under their employment contracts.

Minimum contributions

	From enrolment until 5 April 2018	From 6 April 2018 to 5 April 2019	From 6 April 2019
Minimum employer contribution	1%	2%	3%
Total minimum contributions from the employer and the worker (including any tax relief). *	2%	5%	8%

* If basic rate tax relief at source is given (mainly for personal pension contributions) then the 20% tax relief claimed by the scheme administrator counts towards this contribution.

Alternative minimum contribution rates

All basic pay is pensionable	From enrolment until 5 April 2018	From 6 April 2018 to 5 April 2019	From 6 April 2019
Minimum employer contribution	2%	3%	4%
Total minimum contributions from the employer and the worker (including any tax relief)	3%	6%	9%
Pensionable earnings are at least 85% of total pay	**From enrolment until 5 April 2018**	**From 6 April 2018 to 5 April 2019**	**From 6 April 2019**
Minimum employer contribution	1%	2%	3%
Total minimum contributions from the employer and the worker (including any tax relief)	2%	5%	8%
All earnings are pensionable	**From enrolment until 5 April 2018**	**From 6 April 2018 to 5 April 2019**	**From 6 April 2019**
Minimum employer contribution	1%	2%	3%
Total minimum contributions from the employer and the worker (including any tax relief)	2%	5%	7%

Consultation. The increases may give employers some additional steps to consider, due to the pension consultation requirements of sections 259 to 261 of the Pensions Act 2004 (2004 Act) and the Occupational and Personal Pension Schemes (Consultation by Employers and Miscellaneous Amendments) Regulations 2006 (*SI 2006/349*) (2006 Regulations). The 2006 Regulations do not apply to employers with fewer than 50 employees; that is, the total number of employees, averaged over the last 12 months, not just affected employees.

The 2006 Regulations require employers to consult with their workers for 60 days before, among other things, making an increase in a worker contribution rate. There is an exception where the change is made for the purposes of complying with a statutory provision (*regulation 10(1)(a), 2006 Regulations*). Any consultation must be conducted in a spirit of co-operation, taking into account the interests of both sides.

It is unclear whether or not there is a requirement to consult where worker contributions are increasing to meet the automatic enrolment requirements. The question is whether the increase is being made for the purposes of complying with a statutory provision: if it is not, then consultation is required. For example:

- The increase in worker contributions may not exactly correlate to the statutory step-up in minimum contributions, such as where the worker's pensionable pay is different from qualifying earnings under the 2008 Act (*see above*), which is very common.
- The employer may wish to increase worker contribution rates from 1 April, rather than 6 April.

In this context, the Pensions Regulator's detailed guidance note 4, which was published in April 2014 and updated in April 2016, says that consultation will be required where the proposed increase does not explicitly match the statutory increases; for example, the increase in contribution rates may be different, or the date that the increase takes effect may be different (*www.thepensionsregulator.gov.uk/docs/detailed-guidance-4.pdf*).

While the Pensions Regulator cannot definitively determine what the legislation means, and there are alternative arguments, it can initiate proceedings to fine employers that breach the consultation requirements.

The 2004 Act says that failure to consult in accordance with regulations does not invalidate a change to a scheme (*sections 259(3) and 260(2)*). Workers may, however, be able to claim damages for breach of the employer's duty of

trust and confidence in some circumstances where there has been a failure to consult, or if a consultation was not genuine.

Therefore, in practice, many employers will consult on any worker contribution increases in order to reduce any risk of regulatory action and the likelihood of worker complaints.

Cyclical automatic re-enrolment

In addition to their ongoing duties for the enrolment of new workers, employers are now being affected by the cyclical automatic re-enrolment requirement, with the largest employers affected first (*see feature article "Workplace pensions: auto-enrolment and re-enrolment", www.practicallaw.com/3-616-6832*). This is a requirement, every three years, for every employer of UK workers to re-enrol eligible workers who have opted out of, or have otherwise voluntarily left, their automatic enrolment pension scheme. Workers must then opt out again if they still do not want to be a member.

The automatic re-enrolment exercise must be carried out every three years, on a date selected by the employer that falls within a six-month window period set out in regulation 12 of the Occupational and Personal Pension Schemes (Automatic Enrolment) Regulations 2010 (*SI 2010/772*). The first window period begins three months before the third anniversary of the employer's original automatic enrolment staging date.

Eligible jobholders. The automatic re-enrolment requirement applies only in respect of an eligible jobholder who:

- Has had an automatic enrolment date and who was either automatically enrolled in, or already an active member of, a qualifying scheme; that is, a scheme that is of sufficient quality to be used for automatic enrolment.
- Has opted out, or otherwise voluntarily ceased active membership, of the qualifying scheme, unless this was in the 12 months before the re-enrolment date.
- Has not rejoined the scheme or any other qualifying scheme.

An eligible jobholder is a worker who:

- Works, or ordinarily works, in the UK.
- Is 22 years old or over, but below state pension age.
- Has earnings in a relevant pay period above the equivalent of the relevant annual rate, which is currently £10,000 per year.

There are now some helpful exceptions to the employer automatic enrolment and re-enrolment duties in respect of certain categories of worker. Employers have a discretion, rather than a duty, to enrol or re-enrol these workers. The following categories of worker can be left out of the automatic enrolment or re-enrolment process, if the employer wishes:

- Company directors.
- Salaried limited liability partnership members who are not employees for income tax purposes.
- Workers who the employer has reasonable grounds to believe benefit from a protection against the lifetime allowance or its increase, including primary protection, enhanced protection, fixed protections and individual protections.
- Workers who are in a notice period, following resignation or dismissal, or who have given notice of retirement. This exception does not apply to the expiry of a fixed-term contract.

Procedure. For those workers who have to be re-enrolled, the procedure is in many ways the same as for the initial automatic enrolment exercise but on a much smaller scale. For example:

- The re-enrolments must be processed within six weeks of the employer's selected automatic re-enrolment date, with membership effective from that date.
- Re-enrolled workers have a one-month statutory opt-out right.
- An employer may contractually enrol workers into a qualifying scheme before its chosen automatic re-enrolment date, so that the worker is already a member when the time for re-enrolment comes. This removes the requirement to follow the statutory automatic re-enrolment procedure.

There are, however, some important differences: all of the employer's re-enrolments must take effect from a single date; and there is no option to postpone automatic re-enrolment, except by choosing a date late in the window period.

Information and declaration. Re-enrolled individuals must be given the same information about their re-enrolment as is given to an individual being automatically enrolled for the first time. This must be done within six weeks of the employer's selected automatic re-enrolment date.

As for automatic enrolment, employers must declare to the Pensions Regulator that they have complied with their re-enrolment duties. For the first cyclical re-enrolment exercise, this must be done within five months after the third anniversary of the employer's staging date.

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