Department for Work & Pensions

Technical Changes to Automatic Enrolment

Consultation on draft regulations

January 2016

Contents

About this consultation

Purpose of the consultation

This consultation is seeking views on proposals to further simplify the automatic enrolment process and reduce burdens on employers and on draft regulations intended to achieve these changes. These measures will introduce:

- A simpler process for the re-declaration of compliance
- A simpler process to make it easier for employers to bring their staging date forward
- Further exceptions to the employer duties in certain circumstances

We also want to ensure that those who will benefit most from pension saving continue to be automatically enrolled and that there are no unintended consequences for individual savers. An executive summary is provided on pages 6 and 7. This document is available on the Department's website at: www.gov.uk/dwp.

Who this consultation is aimed at

The consultation is aimed at employers, Trade Unions, employee representatives and pension industry professionals, including scheme administrators, payroll administrators, accountants, payroll bureaux, Independent Financial Advisors and employee benefit consultants.

Scope of consultation

This consultation applies to England, Wales and Scotland. It is anticipated that Northern Ireland will make corresponding regulations.

Duration of the consultation

The consultation period begins on 26 January 2016 and runs until 16 February 2016.

How to respond to this consultation

Please send your response, preferably by e-mail to:

Automaticenrolment.consultation@dwp.gsi.gov.uk

Or by post to:

James Newman
Department for Work and Pensions
Automatic Enrolment Programme
1st Floor

Caxton House
London SW1H 9NA

Please ensure your response reaches us by **16 February 2016**

When responding, please state whether you are doing so as an individual or representing the views of an organisation. If you are responding on behalf of an organisation, please make it clear who the organisation represents, and where applicable, how the views of members were assembled.

Any queries about the subject matter of this consultation should be addressed to James Newman at James.Newman@dwp.gsi.gov.uk.

Freedom of information

The information you send us may need to be passed to colleagues within the Department for Work and Pensions, published in a summary of responses received and referred to in the published consultation report.

All information contained in your response, including personal information, may be subject to publication or disclosure if requested under the Freedom of Information Act 2000. By providing personal information for the purposes of the public consultation exercise, it is understood that you consent to its disclosure and publication. If this is not the case, you should limit any personal information provided, or remove it completely. If you want the information in your response to the consultation to be kept confidential, you should explain why as part of your response, although we cannot guarantee to do this.

To find out more about the general principles of Freedom of Information and how it is applied within DWP, please contact:

Central Freedom of Information Team 4th Floor Caxton House Tothill Street London SW1H 9NA

Freedom-of-information-request@dwp.gsi.gov.uk

The Central FoI team cannot advise on specific consultation exercises, only on Freedom of Information issues. More information about the Freedom of Information Act can be found at https://www.gov.uk/make-a-freedom-of-information-request

Consultation principles

This consultation is being conducted in line with the Cabinet Office Consultation Principles.

Feedback on the consultation process

We value your feedback on how well we consult. If you have any comments about the consultation process (as opposed to comments about the issues which are the subject of the consultation), including if you feel that the consultation does not adhere

to the values expressed in the consultation principles or that the process could be improved, please address them to:

DWP Consultation Coordinator
2nd Floor
Caxton House
Tothill Street
London
SW1H 9NA

CAXTONHOUSE.LEGISLATION@DWP.GSI.GOV.UK

Executive summary

Since October 2012, employers are obliged to enrol all workers who satisfy age and earnings criteria into a workplace pension arrangement and pay at least a minimum level of contributions. The roll-out of automatic enrolment started with the largest organisations and will be extended to all employers over the next three years.

Automatic enrolment is designed to target non-savers and under-savers. This includes those individuals whose employer provided a scheme but did not pay into it; and those where the employer provided a scheme but not one that everyone could access. It obliges every employer, irrespective of size or industry, both public and private sectors, to provide a workplace pension and pay into it.

Automatic enrolment has already evolved. There have been changes to the legislation to make automatic enrolment easier to operate since the original framework was laid down in the Pensions Act 2008 ('the 2008 Act'). The Coalition Government's review in 2010 introduced waiting periods, the automatic enrolment earnings trigger and gave employers more flexibility to choose their re-enrolment dates. The staging timetable was also changed to give small and micro employers until at least 2015 to prepare for automatic enrolment. Changes introduced from November 2013 simplified enrolment processes to align better with payroll processes and amended the legislation on Test Scheme Standards to deliver greater consistency across the various pension schemes.

More recently, following a consultation on technical changes to automatic enrolment in November 2014, we introduced measures in secondary legislation that came into effect from 1 April 2015 to further simplify automatic enrolment and reduce burdens on employers. These measures:

- Introduced an alternative quality requirement for defined benefits (DB) schemes
- Simplified the information requirements on employers
- Created exceptions to the employer duties in certain circumstances

Building on these technical changes that were introduced last April the Department has drafted regulations that aim to further simplify the automatic enrolment framework to ease the burden on employers, particularly having regard to the small and micro businesses that have started to enrol their eligible workers into a workplace pension scheme. The draft regulations set out the detail of these measures and the Department is now seeking views, in particular on whether the draft regulations achieve the overarching policy intent of simplifying the process for employers. We also want to ensure that those who will benefit most from pension saving continue to be automatically enrolled and that there are no unintended consequences for individual savers.

We will publish a response to the consultation in early March 2016 with a view to making the regulations in the same month. The regulations would come into force in

April 2016 and would amend the existing Occupational and Personal Pension Schemes (Automatic Enrolment) Regulations 2010, the Employers' Duties (Implementation) Regulations 2010 and the Employers' Duties (Registration and Compliance) Regulations 2010.

Exceptions to the employer duty

Background

It became apparent during the early days of live running that pension saving, or further pension saving, may not be appropriate for everyone.

The Pensions Act 2014 inserted a new section 87A into the 2008 Act. It allows the Secretary of State to prescribe exceptions to the employer duty so that in certain situations an employer is not required to take action to achieve pension scheme membership. It provides that the exceptions may in particular turn an employer duty into a power. It also allows for the modification of any of the enrolment or joining processes, and turning the duties back on if the circumstances that triggered the exception come to an end. Following a consultation in December 2014 the Department introduced with effect from 1 April 2015 exceptions to the employer duty for individuals:

i) with tax protected status for existing pension savings;

ii) who have given or been given notice of termination of employment; and

iii) who cancel membership of a qualifying scheme or opt out before automatic enrolment.

Since the introduction of these exceptions it has become apparent that there are further groups of individuals for whom automatic enrolment may not be appropriate. These are individuals who are;

i) company directors; and
ii) genuine partners in Limited Liability Partnerships (LLPs)

The detail of how we intend these provisions to apply is set out below.

Company Directors

The Department has received representations suggesting where a small business employs only its Directors, then the business (employer) should be exempted from the automatic enrolment duty even where the Directors may be classed as ‘workers’ for automatic enrolment purposes. At the moment, section 90 of the 2008 Act operates to exempt company directors from the definition of ‘worker’ unless they are employed under a contract of employment and there is at least one other person employed under a contract of employment. The rationale being that in these circumstances Directors should be given the opportunity to decide at their own Board meeting whether they want a pension or not and would not gain anything from automatic enrolment.

We think there is a strong case that Director only companies where two or more directors have contracts of employment should be given the discretion to be exempted from the automatic enrolment duty. This group is not part of the target

audience for automatic enrolment. This group of individuals are also likely to have their own pension saving and an exception for this group will reduce the burden through preventing them having to go through the automatic enrolment process only to opt out. These provisions are not limited to small businesses. Although the policy intention is to reduce the burdens on small businesses, the exception is to be made available to all businesses

Furthermore, where the company takes on one or more workers in addition to the directors, the company will have employer duties in relation to those workers (and we are not seeking to exempt those workers). But we would welcome views on whether any companies who employ workers, of whom one or more are Directors, should be given the discretion to exempt those Directors from the duty to enrol where they may have a contract of employment with the company. The draft regulations have been produced on the basis of extending the exemption to include this group of Directors as well as Director only companies.

Proposed changes

The draft regulations turn the employer duty into a power that the employer is able but not required to exercise where a worker holds the office as a director of the company by which they are employed. If employers find it easier to enrol all workers, regardless of whether they are a director they can.

The draft regulations provide for the exception to apply to automatic enrolment and automatic re-enrolment. However, the proposal is to keep the opt-in rights for those individuals who may want further pension accrual.

These changes are in regulation 4 (new 5EA) of the draft regulations attached as a separate document alongside this consultation.

Consultation Questions

Q1: Is the proposed exception welcomed and proportionate to the issue raised?

Q2: Do you think the exception should be this wide so as to include Directors of companies who employ workers where they may have a contract of employment with the company, in addition to Director only companies?

Q3: Will the proposed exception as drafted help reduce the administrative burden and costs for employers by allowing Directors to be kept out of the automatic enrolment process altogether? If so, what is the average saving for an employer due to a reduction in the administrative burden?

Q4: How many employers do you think will in scope for this exception, and how many do you think would take advantage of it?

Q5: Can this exception be communicated to employees within existing material?

Q6: Would this exception impose any additional costs on employers? If so, please provide a description and likely cost.

Q7: Is it considered appropriate to keep the opt-in rights for those individuals who may take advantage of this proposed exemption?

Limited Liability Partnerships (LLPs)

Stakeholders have suggested creating an exception to the automatic enrolment duties for partners in Limited Liability Partnerships (LLPs). The LLPs issue arose following a recent Supreme Court decision in Clyde & Co LLP v Bates van Winklehof that self-employed LLP members can be "workers" as defined in Employment law and so could also be subject to the automatic enrolment duties.

Like Directors of companies we think there is a strong case for LLPs who have genuine partners to be given the discretion to exempt those partners from the employer duties. In providing for this exemption we need to ensure it is only genuine partners that may able to be excluded from the duties and not risk excluding those individuals from automatic enrolment who are actual employees.

To try and achieve this we have looked to HMRC's Salaried Members Rules as a basis for determining whether a member of an LLP is a genuine partner as opposed to an employee. The Salaried Member provisions are intended to apply to those members who are more like employees than partners in a traditional partnership, in order to address the existing inconsistency in the ways that LLPs and general partnerships are treated for tax purposes. The proposed exemption is therefore for those genuine LLP members who may now be classed as workers but are not employees for tax purposes.

Proposed changes

The draft regulations turn the employer duty into a power that the employer is able but not required to exercise where an individual is a member of an LLP and is a genuine partner. If employers find it easier to enrol all eligible workers, even where they may be members of LLPs who are genuine partners they can.

The draft regulations provide for the exception to apply to automatic enrolment and automatic re-enrolment. However, the proposal is to keep the opt-in rights under section 7 and the right to join under section 9 for those individuals who may want further pension accrual.

These changes are in regulation 4 (new 5EB) of the draft regulations attached as a separate document alongside this consultation.

Consultation Questions

Q8: Is the proposed exception welcomed and proportionate to the issue raised?

Q9: Does the proposed exemption as drafted ensure it is only genuine partners of LLPs that may able to be excluded from the duties and not risk excluding those individuals from automatic enrolment who are actual employees?

Q10: How many employers do you think will take advantage of this exception?

Q11: Can this exception be communicated to employees within existing material?

Q12: Would this exception impose any additional costs on employers? If so, please provide a description and likely cost.

Q13: Will the proposed exception as drafted help reduce the administrative burden and costs for employers by allowing these LLP members to be kept out of the automatic enrolment process altogether? If so, what is the average saving for an employer due to a reduction in the administrative burden?

Q14: Is it considered appropriate to keep the opt-in rights for those individuals who may take advantage of this proposed exemption?

Effect of the exercise of a discretion

The draft regulations provide for a corresponding amendment to the existing regulation 5F in SI 2015/501 to ensure that where the employer has the power to automatically enrol or re-enrol and chooses to exercise that power positively, the relevant legislation is to be read as if he were discharging an employer duty. Accordingly, he may therefore be enforced against in relation to those duties.

This change is in regulation 4 of the draft regulations attached as a separate document alongside this consultation.

Tax Protected Status

In March 2015, in the Budget, the Chancellor announced that the Lifetime Allowance for pension contributions will be reduced from £1.25million to £1million with effect from 6 April 2016. Transitional protection for individuals who think they will be affected by the change will be introduced alongside this reduction to ensure that individuals are protected from potentially retrospective tax charges arising from the reduction.

DWP is aware of the need to make a consequential amendment to our regulations that came into effect in April 2015, which provided for an exception to the employer duty where an employer has reasonable grounds to believe that a worker has transitional protection rights for their pension savings under HMRC legislation, to mirror this new tax protected status to be effective from the same date.

This will allow for the policy intent to continue so employers can take advantage of this exception for individuals that are not the core target audience for automatic enrolment. This will also help prevent the risk of individuals being subjected to substantial tax charges should they fail to opt out.

Legislation will be therefore be amended to provide the discretion for employers under automatic enrolment legislation to be exempt from the duties in relation to anyone with the new tax protected status from 6 April 2016. The Department is working with HMRC to ensure the consequential amendment is made and

Regulations 5D in SI 2015/501 will be amended through an additional provision in the Finance Act 2016, which will be backdated to 6 April 2016.

The Pensions Regulator will also be updating their employer guidance to reflect this proposed change. HMRC will also ensure their guidance is appropriately amended so that individuals are aware of the further exception under the new protections.

Winding Up Lump Sums (WULSs)

We are taking the opportunity to amend the regulations that provided for this exception to the duty introduced in April 2015 in order to clarify the policy intent. This legislation allows the employer to choose whether or not to enrol workers to whom they have paid a WULS subject to an undertaking given by the employer to HMRC, who are then re-employed by the same employer within 12 months of the payment of the WULS.

We have been made aware of a possible unintended consequence of the current drafting, particularly where the WULS has been paid more than 12 months before automatic enrolment applies. If section 3(2) of the Act has been lifted permanently following the payment of a WULS, which may have been prior to 12 months' previous, then the employer has no obligation to automatically enrol a worker who reaches eligibility. The policy intention is that the duty may be lifted only where a worker receives a winding-up lump sum, ceases to be employed and is re-employed by the same employer but becomes eligible for automatic enrolment or re-enrolment; **all of those events** occurring within the same 12 month period.

The draft legislation attached as a separate document alongside this consultation therefore contains an amendment to Regulation 5E in SI 2015/501 to clarify the policy intention, so the exception only applies where an individual receives a WULS and is re-employed by the same employer within the 12 month period, and attains eligibility for automatic enrolment. If the worker who received the WULS only becomes eligible for enrolment after the 12 month period has elapsed, they should be auto-enrolled in the usual way.

Compliance Easements – reducing complexity and decisions that have to be made by employers

Background

There are currently two deadlines prescribed in law for the re-declaration of compliance. One for employers who have no one to re-enrol, and a different one for those employers who do.

As a result of the implementation of automatic re-enrolment this is considered to be difficult to communicate and confusing for employers to implement. It means that employers have to be sure they have someone to re-enrol if they pick a re-enrolment date later than the third anniversary of their staging date (at the first cycle) otherwise, they will may miss their re-declaration deadline if it turns out they have no one to re-enrol. In effect the current regulations limit the length of the re-enrolment window for many employers. The Department is therefore minded to have one re-declaration deadline date for all employers.

As the roll out of automatic enrolment continues it has become apparent that the current conditions employers must meet to bring forward their staging date are fairly restrictive and in particular the current requirement to give TPR at least one month's notice have caused employers some issues.

The current one month's notice has been an issue with employers wanting to bring their date forward at the last minute, or forgetting to tell TPR and then having to put right the error. Where this happens and they have automatically enrolled workers they are deducting contributions without the legislative requirement to deduct applying and without the consent of the jobholder. However, in order to be able to rectify this situation the employer must give TPR one month's notice before the next available staging date, in order for the staging date to be changed under the legislation. In the worst case scenario this could be nearly two months from identifying the error. We want employers who have brought forward their staging date and begun pension saving, but have made a genuine mistake to be able to rectify their position as soon as possible.

Evidence suggests that a proportion of the employers left to stage between now and 2018 will have no workers who are eligible to be automatically enrolled. Because these employers have no-one to enrol they do not require a pension scheme and they cannot comply with the condition that asks them to get the agreement of a pension scheme that it can be used to meet their employer duties. So under the current provisions, for those employers with no-one to automatically enrol, there is no way they can bring their staging date forward unless they set up a shell pension scheme, which we want to actively discourage. We want to give these employers the same flexibilities as those employers who have people to enrol.

These employers still have duties under the legislation. They must provide information to their workers about the right of a jobholder to opt in and the right of an entitled worker to join and they must still submit their declaration of compliance to the regulator. Employers with a stable workforce where earnings do not fluctuate have to wait until their staging date to be able to submit their declaration of compliance even though they can be sure that they will still have no worker to automatically enrol on that date. We want to provide these employers with the facility to bring forward their staging date and submit their declaration to TPR at the same time to make compliance easier for them, if they choose to make use of this facility.

Changing the current conditions brings benefits to employers who have struggled with the one month notice condition. Making changes for those employers with no-one to automatically enrol is part of our aim to make compliance easier for the small and micro employers. It would also relieve an administrative burden and prevent empty shell schemes being set up that impact on provider capacity.

Re-declaration of compliance

There are currently two deadlines in law for re-declaration of compliance. One for employers who have no one to re-enrol, and a different one for those employers who do. Where employers have eligible staff to automatically re-enrol, they must complete the re-declaration of compliance within two months of their selected re-enrolment date. Any employer with no-one to re-enrol currently still has a re-declaration deadline (set as the day before the third anniversary of their original declaration of compliance).

We have received feedback from interested stakeholders indicating that these existing requirements are confusing for employers. We therefore think there is a strong case to provide one re-declaration deadline date for all employers and remove declaration requirements for those employers who have no one to re-enrol at their re-enrolment date. Thus simplifying the process and removing an administrative burden for employers.

Proposed changes

The draft regulations amend the registration regulations in SI 2010/5 so that the time at which an employer sends the information by regulation 4 to TPR is the same whether or not an employer has any jobholders to re-enrol on the automatic re-enrolment date.

The draft regulations therefore provide to have the same +5 month deadline whether an employer has someone to re-enrol or not. The deadline would therefore be 5 months after the 3rd anniversary of the staging date, with subsequent deadlines being 5 months after the 3rd anniversary of their last re-enrolment date.

These changes are in regulation 3 (new 2A) of the draft regulations attached as a separate document alongside this consultation.

Consultation Questions

Q15: Is the proposed change to have one re-declaration deadline for all employers welcomed?

Q16: Is the proposal to have the same +5 month deadline whether an employer has someone to re-enrol or not considered appropriate?

Q17: Is it agreed that these changes will simplify the existing process?

Q18: Can this change be communicated to employees within existing material?

Q19: Would employers have to do anything in addition to what they must do to meet their existing duties?

Early Automatic Enrolment – bringing your staging date forward

Existing provisions set prescriptive conditions which employers must satisfy if they want to bring their staging dates forward; including that employers must first obtain agreement from a pension scheme. In practice, for those employers with no-one to enrol, there is currently no way to bring their staging date forward unless they set up a shell pension scheme, creating an added, unnecessary administrative step.

We are therefore of the view that there are strong grounds to remove the requirement to obtain agreement from pension schemes for this group of employers who have no-one to enrol. In addition, where the employer has no-one to enrol we think there is a strong case to allow such an employer to bring forward their staging date to any date, not just the 1st of the month date as currently prescribed. We have also included a facility to allow these employers to choose to bring forward their staging date and submit their declaration of compliance to TPR at the same time if they wish.

The current one month's notice has also been an issue with employers wanting to bring their staging date forward at the last minute, or forgetting to tell TPR and then having to put right the error retrospectively.

Therefore, we think there is also merit in removing the condition to give the Regulator one month's notice for all employers whether they have workers to automatically enrol or not. As part of these proposed changes we think it is also sensible to provide a condition in order for the employer to bring forward their staging date. That is the employer must tell TPR no later than the day before their chosen new staging date.

Proposed changes

The draft regulations change the conditions which employers must satisfy if they want to bring their staging dates forward.

Firstly, they remove the current requirement to obtain agreement from pension schemes for those employers who have no-one to enrol.

Secondly, they remove the condition to give TPR one month's notice when an employer wants to bring forward their staging date.

Thirdly, where the employer has no-one to enrol the draft regulations allow such an employer to bring forward their staging date to any date, not just the 1st of the month date as currently prescribed.

Lastly, the draft regulations provide that where an employer wishes to bring forward their staging date the employer must notify TPR no later than the day before their chosen new staging date, and allows them to declare at the same time.

These changes are in regulation 3 of the draft regulations attached as a separate document alongside this consultation.

Consultation Questions

Q20: Is it agreed that the proposal to remove the requirement to obtain agreement from pension schemes for those employers who have no-one to enrol a sensible one and removes an unnecessary administrative step?

Q21: How much administrative savings would this change bring?

Q22: Is the proposal to remove the condition to give TPR one month's notice when an employer wants to bring forward their staging date welcomed?

Q23: Is the proposal to allow an employer who has no-one to enrol to bring forward their staging date to any date, not just the 1st of the month date as currently prescribed a welcome one and considered to be an administrative easement? If so, what is the likely associated saving?

Q24: Is it considered appropriate to have two processes for employers wanting to bring their staging date forwarded depending on whether they have eligible or non-eligible jobholders?

Q25: What impact would this have on pension providers?

Q26: Is it agreed that these changes will simplify the existing process?

Q27: Can this change be communicated to employees within existing material?

Q28: Would this change impose any additional costs on employers? If so, please provide a description and likely cost.

A Transitional easement for certain formerly contracted-out salary-related schemes

Background

Employers using defined benefits schemes for their automatic enrolment duties were able to demonstrate scheme quality by the existence of a valid contracting-out certificate. From 6 April 2016, employers offering defined benefits schemes will no longer be able to contract their employees out. To ensure that their schemes qualify for automatic enrolment, employers would have to use the Test Scheme Standard or the alternative quality requirements for defined benefits schemes. We expect that most using the alternative quality requirements will apply a test based on the cost of the future accrual of benefits provided by the employer for the active scheme members.

Proposed change

We propose to allow, for a transitional period only, the employers of schemes that satisfy the contracting out conditions on 5 April 2016 and have not changed the benefits in their schemes to apply the cost of accruals test at scheme level.

Without this easement, regulation 32M(4) of the Occupational and Personal Pension Schemes (Automatic Enrolment) Regulations 2010 would require the test to be applied at benefit scale level in a scheme with more than one benefit scale and where there is a material difference in the cost of the benefits accruing to the relevant members in each benefit scale.

Under the easement the test can apply at scheme level even if there is a material difference in the cost of the benefits accruing to different groups of members. The easement applies until the earlier of the effective date of the first actuarial report on or after 6 April 2016 or 5 April 2019.

Consultation Questions

Q29: We would welcome any general or specific comments on the easement. Have we captured the formerly contracted out schemes to which the proposed easement applies?

Q30: Will this change bring about any administrative savings?