Department for Work & Pensions

Workplace pensions automatic enrolment: miscellaneous technical changes to provide easements for employers

Government response to the consultation on regulations to simplify automatic enrolment processes and reduce burdens on employers

March 2016

Contents

Introduction

Since October 2012, employers have been required to enrol all workers who ordinarily work in the UK into a workplace pension scheme, subject to age and earnings conditions. The roll-out of automatic enrolment started with the largest organisations and will be extended to all employers over the next two 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, in relation to qualifying jobholders, 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 2008. The *Making Automatic Enrolment Work* review in 2010 introduced waiting periods; the automatic enrolment earnings trigger and gave employers more flexibility to choose their enrolment dates. The staging timetable has also been changed to give small and micro employers more time to prepare for automatic enrolment. Changes introduced in the Pensions Act 2014 simplified the enrolment processes to align them better with payroll processes and amended the legislation on Test Scheme Standards to deliver greater consistency across the various schemes.

The Government is committed to making automatic enrolment as simple as possible and minimising burdens on employers. From 26 January 2016 to 16 February 2016, the Department for Work and Pensions consulted on technical measures that seek 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; and
- Further exceptions to the employer duties in certain circumstances

We received 25 formal written responses from: employer organisations; pension providers; payroll specialists; accountants; lawyers; and actuaries. We are grateful to everyone who replied and to officials at the Pensions Regulator. A list of organisations that responded to the consultation is at Annex A.

Responses were broadly supportive of the aims of the regulations with respondents agreeing that they would reduce burdens on employers. There was one response that made suggestions that were outside the scope of this consultation.

Exceptions to the employer duty

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 that the employer can choose to exercise. 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 in the next section.

Company Directors

The Department has received representations suggesting that where a small business employs only its Directors, the business (employer) should be exempted from the automatic enrolment duty even where the Directors may be classed as 'workers' for automatic enrolment purposes.

We believe 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 likely to have their own pension savings[1] and an exception for this group will reduce the burden on them through preventing them having to go through the automatic enrolment process only to opt out.

We sought 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.

What the consultation asked

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?

[1] The 2015 Employer Pensions Provision survey asked employers to provide information about their reasons for not making pension provision: 15 per cent of respondents said that they just employed directors.

Responses to the consultation

Respondents confirmed that the widely drawn exemption for Company Directors was sensible. Some respondents raised the issue of defining this role clearly in order that the exemption applies only to the intended group. However, we believe it is important to remain consistent with HMRC legislation that provides the current definitions for these groups. We did not receive any estimates as to the scale of administrative savings but stakeholders agreed this exception would save businesses time and costs, and remove the need for Directors to opt-out of the automatic enrolment process. Several respondents agreed that retaining the opt-in rights would help protect individuals who might be at risk of being inappropriately excluded from pensions saving.

Government response

The Government welcomes the fact that the overwhelming majority of those who responded support the proposed exception for Company Directors as a proportionate easement, within the overall policy objectives of workplace pensions saving. We are confident from the stakeholder responses received that Company Directors are not the target group for automatic enrolment; however the opt-in rights that remain in place will offer protection to those who might need it. The impact of this change will be monitored by the department.

Other issues

Additional costs for employers

We asked whether employers might face additional costs as a result of this easement and responses indicated that costs, if any, would be minimal and related to communications material.

Limited Liability Partnerships (LLPs)

Stakeholders suggested creating an exception to the automatic enrolment duties for partners in Limited Liability Partnerships (LLPs) 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.

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.

The draft regulations turn the employer duty into a discretionary power: that the employer is able 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 do so.These changes are in regulation 4 (new 5EB) of the draft regulations.

The 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, the employer may therefore be enforced against in relation to those duties

What the consultation asked

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?

Responses to the consultation

Respondents were mostly supportive of the creation of an exception to the automatic enrolment duties for partners in Limited Liability Partnerships (LLPs) and all thought it would be a widely welcomed easement. A minority of responses suggested that all LLP members should be given a blanket exemption from the automatic enrolment provisions to provide a more complete solution. Several questioned whether the exception was necessary given that LLP members' remuneration is unlikely to be caught by the "qualifying earnings" provisions of the automatic enrolment legislation. One stakeholder was concerned about the use of the tax law definition for "salaried members" in respect of LLPs where a member may face changing financial arrangements throughout the course of a given tax year. We were asked whether a new definition of "salaried members" could be created for the automatic enrolment rules; or a minimum time period be introduced before the automatic enrolment duties apply to LLP "salaried members".

Overall, stakeholders believed that these changes could be communicated with small changes, or insert notes, in employers' existing automatic enrolment communications. Most respondents anticipated that the easement would provide cost savings for employers but they did not offer estimates of those savings.

Government response

The Government notes the appetite for the easements in respect of Limited Liability Partnerships. Whilst we appreciate the preference expressed by some stakeholders for a blanket exemption in this area, we have decided that the regulations strike the right balance to achieve the policy objective. Our aim is to give LLPs flexibility to exclude members who may now be classed as workers, but are not employees for tax purposes; and protect those who are actually more like employees than partners in a traditional partnership.

In response to the concerns raised around the definition of a "salaried member", we believe that the discretionary nature of the exception will allow sufficient flexibility for LLPs to make appropriate arrangements for their members; or seek independent professional advice where a member has complex financial arrangements.

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.

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.

Our intention was to amend legislation 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. It has, however, not proved possible to add the necessary provision to the Finance Act 2016, which would have allowed the revised provisions to be backdated to 6 April 2016. We therefore intend to introduce regulations at the earliest opportunity but cannot do so before the Finance Act 2016 becomes law.

In the interim period, we have obtained agreement from HMRC to provide guidance in the Budget briefing on the steps individuals must take to protect their financial position in respect of their transitional protection rights for their pension savings under HMRC legislation. The Pensions Regulator will mirror this guidance their website. 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 amending 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 text, 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 regulations contain 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 for employers

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.

Now that automatic re-enrolment dates are coming round for some employers, it has been recognised that having two different deadlines is sometimes 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 would therefore like 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 has 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. 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 wanted 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 early 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. As 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 Pensions 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 workers 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

What the consultation asked

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

What the consultation asked

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.

Responses to the consultation

Respondents welcomed the proposals to move to one re-enrolment deadline date for all employers. Of those who commented, almost all respondents indicated that the +5 month deadline after the 3 year window seemed a reasonable time period. All respondents agreed the measures would simplify the existing compliance process.

Respondents, where they addressed the question, believed that these changes could be communicated effectively, requiring only minor changes to existing automatic enrolment communications materials. Some respondents noted that broadly the new requirements would be easier to explain in their communications. Several respondents said they did not believe there was a need to inform individuals about changes to re-declaration of compliance requirements for their employer.

Two respondents raised postponement and re-enrolment but these issues were outside the scope of the consultation, and it was not possible to consider them within this package of measures.

Most respondents did not offer views on potential additional costs for employers. One stakeholder did point out that cost might be one of the factors that employers took into account when deciding whether to take advantage of an early staging date. No stakeholder offered a view on whether employers would need to do anything in addition to what they must do to meet their existing duties, as a result of these new deregulatory measures.

Early staging date

Several respondents asked about the possibility of giving all employers, regardless of their status, the flexibility to bring forward their staging date to any date in the month. The Government considered this proposal but, due to the need to maintain an orderly

staging process for employers with eligible jobholders, it was not possible to give this additional flexibility.

One respondent raised a concern about employers who have eligible jobholders failing to engage with their pension provider about establishing the suitability of their designated qualifying scheme prior to early automatic enrolment. We can confirm that employers remain responsible for establishing that a qualifying scheme is in place if they need to enrol eligible workers.

Finally, we were asked to consider allowing retrospective notification, where an employer brought forward their staging date in error. As the use of an early staging date is a matter of choice by the employer we do not propose to allow this additional flexibility.

Government response

The Government welcomes the positive stakeholder response to these deregulatory and simplification measures for re-declaration of compliance and bringing forward an employer's staging date.

Following the consultation, the Government can confirm the new regulations make the following changes:

- the requirements for employers, who wish to bring forward their staging date, are simplified so that where the employer has no eligible jobholders to automatically enrol, they no longer need to seek the agreement of a pension scheme to bring forward their staging date;
- the measures remove the requirement for employers to give the Pensions Regulator one month's notice of their intention to bring forward their staging date so that notice can be given at any point up to and including their new early automatic enrolment date;
- employers, without anyone to enrol, can now bring forward their staging date to any date, between today and their original staging date, and are no longer restricted to a 1st of the month date;
- the measures align the timeframes for re-declaration, regardless of whether an employer has eligible jobholders. Employers without anyone to re-enrol are now treated in the same way as employers with eligible jobholders, so that they need only provide information to the Regulator within 5 months of the third anniversary of their original staging date; and then, broadly, at 3 year intervals from their last re-enrolment date.

Refinements have been made to the regulations to provide for a more straightforward process, for an employer without eligible jobholders to automatically enrol, to bring forward their staging date and submit their declaration of compliance to TPR at the same time, if they choose to make use of this facility.

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

Employers using defined benefits schemes for their automatic enrolment duties have been able to demonstrate scheme quality by the existence of a valid contracting-out certificate. However, 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 then 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.

For a transitional period only, we propose to allow the employers of schemes that satisfy the contracting out conditions on 5 April 2016, and who 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 two dates: either the date that actuary signs the first report after 5 April 2016 that breaks down the cost to benefit scale level, or 5 April 2019.

What the consultation asked

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?

Responses to the consultation

We received six responses from professional advisers to workplace pension schemes.

Government response

The Government is committed to exploring every opportunity to minimise burdens on business. Automatic enrolment has been very successful and employers have made a huge contribution to its success. We have listened to our stakeholders who asked us to introduce an easement for the employers of contracting-out schemes that typically deliver benefits above the minimum automatic enrolment requirements.

Employers who have not changed the benefits of their formerly contracted out defined benefits schemes will be able to use a scheme level cost of accruals test. This easement will be available until the earlier of two dates: either the date that the actuary signs the first report after 5 April 2016 that breaks the cost of accruals down to benefit scale level or 5 April 2019. The easement will obviate the need for employers to commission or undertake nugatory work to demonstrate that their scheme qualifies to be used for automatic enrolment.

Annex A – Respondents

Aon Hewitt

Association of Consulting Actuaries

Association of Convenience Stores

Association of Pension Lawyers

Aviva Life & Pensions

Capita

Crowe Clark Whitehill LLP

Federation of Small Businesses

Hargreaves Lansdown

The Institute of Chartered Accountants in England and Wales

Mercer

Peninsula Business Services Limited

Pensions and Lifetime Savings Association

Pensions Management Institute

PricewaterhouseCoopers LLP

Roderick Gunkel & Associates Limited

Sacker & Partners LLP

Standard Life plc

The Association of Accounting Technicians

The Association of Partnership Practitioners

The Chartered Institute of Payroll Professionals

The Pensions Advisory Service

The Society of Pension Professionals

University of the West of England

Willis Towers Watson