

These notes refer to the Pensions (No. 2) Act (Northern Ireland) 2008 (c.13) which received Royal Assent on 15 December 2008

Pensions (No. 2) Act (Northern Ireland) 2008

EXPLANATORY NOTES

COMMENTARY ON SECTIONS

PART 1 – Pension Scheme Membership for Jobholders

CHAPTER 3 - Safeguards: Employment and pre-employment

Sections 50 to *58* represent a package of pre-employment and employment safeguards to ensure that individuals' entitlements under the Act can be protected. The package contains three key elements. *Sections 50* to *53* introduce a prohibition on employers attempting to screen out job applicants on the basis that they want to be a member of a pension scheme. *Section 54* introduces a prohibition on employers acting (or attempting) to induce employees to opt out from, or cease, membership of a qualifying workplace pension scheme. Both these prohibitions will be enforced by the Pensions Regulator. *Sections 55* to *58* provide employees with a range of employment rights to enable them to present a complaint to an industrial tribunal if they feel they have been put at a disadvantage or dismissed as a result of their pension choices. The Regulator will not have a role in the enforcement of these rights.

Section 50: Prohibited recruitment conduct

Section 51: Compliance notices

Section 52: Penalty notices

Section 53: Review of notices and references to the Pensions Regulator Tribunal

Sections 50 to *53* introduce a prohibition on certain recruitment conduct and provide the Pensions Regulator with powers to notify employers of breaches of this prohibition and, subsequently, to issue penalties. *Section 50* provides that the prohibition is contravened if, in an application for employment, an employer makes a statement or asks a question that indicates that the application might be conditional on whether or not an applicant might opt out of auto-enrolment. A typical example would be if a job advertisement indicated that the applicant might stand more chance of success if he was prepared to opt out of auto-enrolment.

Section 51 enables the Pensions Regulator to issue a compliance notice to an employer where it is of the opinion that the employer has contravened *section 50* and outlines what the notice may contain. Notices may inform the employer what it must do in order to remedy their non-compliance with *section 50* or prevent it re-occurring. For example, an employer might be required by a notice to change the wording of an application form or other recruitment material for the future.

The notice may also set out the time periods within which employers have to take certain actions such as provide information about the contravention of the prohibition and how they have now complied with the notice. Compliance notices may also state that if an employer fails to comply with the requirements of the notice, the Regulator may issue a penalty notice.

Section 52 provides that the Pensions Regulator may issue penalty notices in respect of *section 50* and failure to comply with compliance notices issued under *section 51*. The penalty must not exceed £50,000 and the person to whom the notice is issued (the employer) must pay the penalty within a specified period. *Subsection (4)* sets out what information must be in the penalty notice.

The Regulator will have the power to recover any penalties payable and any penalty recovered must be paid into the Consolidated Fund (*subsection (5)*).

Section 53 provides that the Pensions Regulator will have the ability to review both compliance and penalty notices, issued under *sections 51* and *52*, in respect of the recruitment conduct prohibition in *section 50*.

As with penalty notices issued under *section 40* or *41*, an employer will have the right of appeal to the Pensions Regulator Tribunal in respect of the issue of a penalty notice in relation to the recruitment conduct prohibition, or the amount of the penalty payable under that notice.

Section 54: Inducements

Section 54 introduces a prohibition on employers attempting to induce their workers to opt out from, or cease membership of, a qualifying workplace pension scheme and gives the Pensions Regulator the power to take compliance action against a contravention. An employer contravenes this prohibition if they take any action for the sole or main purpose of inducing a worker or jobholder to give up membership of a relevant scheme, without becoming an active member of another relevant scheme within the prescribed period under *section 2(3)*.

The Regulator may issue a compliance notice under *section 35* if it believes that the employer has contravened *section 54*.

A compliance notice cannot be issued unless the contravention occurred within a prescribed period before (i) a complaint to the Regulator was made about the contravention of the provision or (ii) the time when the Regulator informed the employer of an investigation of a contravention.

Section 55: The right not to suffer detriment

Section 56: Enforcement of the right

Section 55 provides a statutory right for workers not to be subjected to any detriment on specified grounds. For example, this right would protect a worker who might be denied promotion or training opportunities because of their decision not to opt out of pension scheme membership.

Subsection (4) provides that if the detriment in question amounts to dismissal, this section does not apply (but see *section 57*).

Section 56 provides that workers have a right to bring claims that they have been subjected to a detriment to an industrial tribunal. If the tribunal upholds a claim, it can make an award of compensation to be paid by the employer to the worker.

Section 57: Right of employee not to be unfairly dismissed

Section 57 inserts a new Article 135D into the Employment Rights (Northern Ireland) Order 1996, which protects an employee from being dismissed on grounds mirroring those specified in the right not to suffer detriment (*section 55*), for example, where an employee is dismissed for refusing to opt out of pension scheme membership.

As with the right not to suffer detriment, an employee who is dismissed on these specified grounds shall be regarded as having been unfairly dismissed, regardless of whether the employee concerned actually meets the eligibility criteria for the employer duty.

Section 58: Restrictions on agreements to limit operation of this Part

Subsection (1) renders void any agreement between a worker and their employer to either (a) exclude or limit the operation of any provision in Part 1 of this Act or (b) preclude a person from bringing proceedings under *section 56* (i.e. enforcement of the right not to suffer detriment) before an industrial tribunal.

Under the terms of this provision, an agreement between the worker and employer will be void and unenforceable by the employer, who will be further restricted (under *subsection (2)*) from recovering the financial or other benefit given in exchange for it.

Subsections (3) and *(4)* provide that *subsection (1)* will not apply where an employer and a worker have entered into any agreements under conciliation arrangements dealt with by a conciliation officer or under a compromise agreement (the conditions for which are listed in *subsection (5)*). These subsections ensure that *subsection (1)* does not undermine any conciliation process by inadvertently voiding any agreement made as part of the conciliation process.