

PENSIONS ACT 2008

EXPLANATORY NOTES

COMMENTARY ON SECTIONS

Part 1: Pension scheme membership for jobholders

Chapter 1: Employers' duties

Section 1: Jobholders

23. This section defines “jobholder” for the purpose of the employer duty as workers who ordinarily work in Great Britain, are aged between 16 and 75 and who earn qualifying earnings (see sections 13 and 15). This section also provides that where a jobholder has more than one employer, the employer duty provisions apply separately in relation to each employment.

Section 2: Continuity of scheme membership

24. This section prevents an employer in any way facilitating the end of a jobholder’s active membership of a qualifying scheme (by action or omission) without putting the member into another qualifying scheme (within a time period to be prescribed by Secretary of State). For example, an employer would not be able to withhold information from the scheme if by that action of the employer the jobholder ceased to be a member. This means that employers have an ongoing duty to ensure that jobholders always have access to a qualifying scheme. This duty does not apply if the jobholder ends membership of their own accord, and the duty only applies so long as the jobholder is employed by the employer.

Section 3: Automatic enrolment

25. *Section 3* introduces the employer obligation to automatically enrol jobholders aged between 22 and state pension age into a scheme that fulfils the criteria for an “automatic enrolment scheme” (see *section 17*). Automatic enrolment must take place when the individual first meets the relevant criteria (i.e. is a jobholder and is over 22) in that employment. This is known as the “automatic enrolment date” (*subsection (7)*).
26. The section contains a power which allows the Secretary of State to set out in regulations the steps the employer must take to arrange for the jobholder to be automatically enrolled (*subsection (2)*).
27. This obligation does not apply if, within a prescribed period, the jobholder has been an active member of a qualifying scheme in that employment, but chose to end membership (*subsection (4)*). This is to prevent jobholders being automatically enrolled into a scheme soon after they decided to leave.
28. The employer may be required, as part of the automatic enrolment process set out in regulations, to provide prescribed information to any person, in particular the trustees or managers of an occupational pension scheme or the provider of a personal pension

scheme (*subsection (5)*). This will enable the provision of information about a jobholder to the scheme to enable their enrolment.

29. There is a power which enables the Secretary of State to make regulations under subsection (2) to deem an agreement to exist between the jobholder and the provider where the employer fulfils their employer duty obligation by automatically enrolling the jobholder into a personal pension scheme that meets prescribed conditions (*subsection (6)*).

Section 4: Postponement of automatic enrolment

30. *Section 3* establishes that the effective date of automatic enrolment must be the first day on which the jobholder becomes eligible. *Section 4*, however, provides for the possibility of delaying initial automatic enrolment in circumstances described in regulations. The period of permitted deferral will be established in regulations.
31. Employers that are permitted to delay automatic enrolment may be required to ensure that members remain in such a scheme for a prescribed period of time, unless the jobholder leaves that employment or chooses to leave the scheme. This will enable the member to make up pension savings foregone during the initial delay period.
32. The powers conferred by section 4 are exercisable in relation to any automatic enrolment under section 3 and not just enrolment in the initial period of implementation.

Section 5: Automatic re-enrolment

Section 6: Timing of automatic re-enrolment

33. These sections set out the duty and the timing for employers to periodically automatically re-enrol, into an automatic enrolment scheme, jobholders who are aged at least 22 and under pensionable age and who are not already members of qualifying schemes.
34. As with automatic enrolment, this obligation does not apply if the jobholder chose to end membership in the same employment, within a prescribed period before the re-enrolment date (*section 5(4)*) or gave notice to opt out under *section 8*. This enables the delay of re-enrolment if it falls soon after the jobholder has chosen to leave the scheme.
35. *Section 6* requires regulations to determine that re-enrolment will not occur more frequently than once every three years. The three year interval may be by reference to the jobholder or the employer. The section then goes on to set out exceptions whereby regulations may be made to enable re-enrolment to take place more frequently than once in a three year period.

Section 7: Jobholder's right to opt in

36. There may be jobholders who are not participating in workplace saving because they opted out or cancelled their active membership, or do not qualify for automatic enrolment because they are aged between 16 and 22 or between pensionable age and age 75.
37. *Section 7* allows such jobholders to require their employer to make arrangements to enrol them into an automatic enrolment scheme by giving the employer notice. The jobholder can give notice to opt in under this section more than once in a 12 month period, although the employer is not obliged to accept more than one notice in 12 months. Therefore employers are not required to keep enrolling a jobholder who has opted out a number of times in the same year.
38. This process, the details of the notice required and the date from which membership must be effected are to be prescribed in regulations (*subsection (4)*).

Section 8: Jobholder's right to opt out

39. This section establishes the right of a jobholder who has been automatically enrolled (or re-enrolled) into an automatic enrolment pension scheme to opt out of that membership by providing a signed notice to their employer within a prescribed period indicating that they choose not to participate. The form and content of this notice will be set out in regulations, as will the prescribed period during which they can choose to opt out, to whom the jobholder must give notice of opt out and arrangements which must be made to give effect to an opt out decision. The opt out notice must include information relating to the effect of opting out on the jobholder. Opting out in this context refers to the specific decision not to participate in a pension scheme from the point of enrolment. Once in a scheme, an active member is free subsequently to cancel membership at any time and this section does not interfere with that established right.
40. Once a jobholder has opted out they will be treated as if they had never become a member of that qualifying scheme through that automatic enrolment. In effect this means that they will not have any rights in the scheme and any contributions collected from the jobholder and the employer (*subsection (2(b))*) will be refunded. However, when a jobholder chooses to opt out after being enrolled or re-enrolled in a pension scheme, any refund of contributions due is only for the current period of membership and not for previously accrued rights from past periods of active membership (*subsection (1)*).
41. Regulations will also establish how and by when refunds must be made and how they are calculated.

Section 9: Workers without qualifying earnings

42. There may be people who do not qualify for automatic enrolment and who are not participating in workplace saving. Although they ordinarily work in Great Britain and are aged at least 16 and under 75, (two of the three qualifying conditions for a jobholder in section 1) they do not have qualifying earnings, as defined in *section 13*.
43. *Section 9* allows workers without qualifying earnings to require their employer to make arrangements to enrol them into a pension scheme by giving notice. The worker may give notice to opt in under this section as many times as they like, although the employer is only obliged to act on one request in a 12 month period. This doesn't prohibit the employer allowing workers to join the scheme at other times by agreement. An employer is not obliged to make any matching contribution but may choose to do so.
44. The enrolment process, the details of the notice required and the date from which membership must be effected are to be prescribed in regulations (*subsection (3)*).
45. For the purposes of this section a pension scheme may be either an occupational pension scheme, or a personal pension scheme registered under the FA 2004. Also, a personal pension scheme must have direct payment arrangements between the worker and the employer. "Direct payment arrangements" are either where the employer makes a contribution and sends it to the worker's scheme or where the employer deducts contributions from the worker's earnings and forwards these to the worker's scheme on behalf of the worker.

Section 10: Information to be given to workers

46. This section requires the Secretary of State to set out in regulations the circumstances in which a prescribed person must give information to individuals about how the employer duty may affect them. This will include information about the effect of automatic enrolment, re-enrolment, postponement of automatic enrolment, giving notice to opt in and the right to opt out.

Section 11: Information to be given to the Pensions Regulator

47. *Section 11* gives the Secretary of State power to make regulations requiring employers to provide information to the Pensions Regulator about how they are complying, or intend to comply, with the employer duties, including information relating to the pension schemes that are to be used. This section will enable the process by which employers will be required to register with the Regulator. An example of information that may be required through that process is information identifying the scheme into which an employer has automatically enrolled jobholders.
48. This section works with the provisions in Chapters 2 and 4 of this Part, by enabling the Regulator to obtain the information needed to support the compliance regime.

Section 12: Introduction of employers' duties

49. This section provides a regulation-making power which, combined with the Secretary of State's power to bring sections 2 to 9 into force under section 149(1), allows the Secretary of State to make provision requiring some employers to start discharging their duties under this Chapter (including those on continuity of scheme membership, automatic enrolment and re-enrolment, and allowing opt-in and opt-out) before other employers. This will allow the introduction of the employer duties to be staged over a period of time.

Section 13: Qualifying earnings

50. This section defines qualifying earnings. *Subsection (1)* defines them by reference to an earnings band, with lower and upper limits of £5,035 and £33,540 per annum (see section 14 for duties to review and if necessary amend these limits), on which pensions contributions will be calculated for money purchase schemes. Earning qualifying earnings (i.e. above £5,035) is a criterion of being a jobholder and so is a factor in determining whether a worker is to be automatically enrolled. *Subsection (2)* deals with cases where qualifying earnings are to be calculated otherwise than on an annual basis.
51. The section then defines "earnings" as sums comprising: wages/salary, commissions, bonuses, overtime and certain statutory benefits. The section enables the Secretary of State to set out (in regulations) other sums that can be considered as part of "earnings".

Section 14: Review of qualifying earnings band

52. This section provides that the Secretary of State must review annually the value of the "qualifying earnings" lower and upper limits annually against the general level of earnings and must amend the limits if they have not maintained their value measured against earnings.

Section 15: Pay reference period

53. The pay reference period is the period of earnings over which the calculation is made to work out (a) whether the jobholder should be automatically enrolled (i.e. with earnings more than £5,035 per annum) and (b) to calculate the level of contributions that the jobholder and employer need to pay for money purchase schemes. While the qualifying earnings band established in section 13(1) is expressed in annual terms this section allows the Secretary of State to prescribe other periods, where section 13(2) will apply. Because of the different types of workers and different pay periods used by employers, there is a need to enable the pay reference period to be tailored to specific worker and payment type. For example, agency workers might require a much shorter calculation period than salaried employees.

Section 16: Qualifying schemes

54. This section defines a qualifying scheme. Qualifying schemes are those that meet minimum standards and quality requirements, which can be used by employers in discharging their obligations under section 2.
55. A qualifying scheme can be either an occupational pension scheme or a personal pension scheme. Qualifying schemes must meet the quality requirement for the scheme type (see sections 20 to 27). They must also be registered under Chapter 2 of Part 4 of the FA 2004, which means that they are registered for tax relief.
56. *Subsection (2)* enables regulations to disapply the requirement to be tax registered for schemes based outside the UK if they meet further requirements to be prescribed in regulations. The further requirements are likely to refer to schemes operating outside the UK with members who will receive UK tax relief on their contributions.
57. The Secretary of State may in regulations set out the circumstances in which a scheme, that would otherwise qualify, is not a qualifying scheme. This can be where the payments and contributions – for example annual management charges - that must be made to the scheme exceed a prescribed amount (*subsection (2)(a) and (b)*); or the scheme provides average salary benefits and contains prescribed features (*subsection (2)(c)*).

Section 17: Automatic enrolment schemes

58. There will be additional requirements on schemes that are used for the purposes of automatic enrolment, automatic re-enrolment and allowing opt in (as described at section 7). These schemes must be qualifying occupational pension schemes or qualifying personal pension schemes and must also enable automatic enrolment to take place. An automatic enrolment scheme must not require jobholders who are enrolled to express a choice, or provide information, in order to remain active members. For example, a jobholder will not be required to make a choice about the fund into which their contributions may be invested. Nor can the scheme refuse membership on the grounds that the jobholder does not provide information. An automatic enrolment scheme must also satisfy any further conditions that may be prescribed in secondary legislation.

Section 18: Occupational pension schemes

59. For the purposes of this Part, occupational pension schemes are those which fall within the definitions from UK or European legislation (set out in *paragraphs (a) and (b)*) or are of a prescribed description if they are based outside the European Economic Area (EEA).

Section 19: Personal pension schemes

60. Personal pension schemes are defined as those that fall outside the definition of an occupational pension scheme (see section 18).

Section 20: Quality requirement: UK money purchase schemes

61. In order to be deemed a qualifying scheme a UK occupational money purchase scheme must require an employer contribution equivalent to at least 3% of qualifying earnings and total contributions paid by the employer and jobholder equivalent to at least 8% (including tax relief).
62. The PA 2007 contains repeals of the contracting out arrangements for money purchase schemes currently provided for under the PSA 1993. However, in the event that those repeals have not yet been brought into force when the employer duties commence, *subsection (2)* enables regulations to be made to modify the contributions required for

money purchase schemes with members whose employment is contracted-out of the State Second Pension Scheme.

63. *Subsection (3)* contains a regulation-making power that allows the Secretary of State to set an amount below which trustees and employers could choose to decline to accept contributions. This could be used, for example, to enable schemes to not have to deal with such minor amounts of contributions which are uneconomic to administer.

Section 21: Quality requirement: UK defined benefits schemes

Section 22: Test scheme standard

Section 23: Test scheme

64. *Section 21* provides that the quality requirement for defined benefit schemes depends on whether or not the jobholder is in contracted-out employment, as defined under the PSA 1993. If a jobholder is in contracted-out employment, evidenced by a certificate issued under section 7(1) of the PSA 1993, the scheme satisfies the quality requirement in relation to that jobholder. *Subsection (3)* enables the Secretary of State to change, by order, the quality requirement where the jobholder is in contracted-out employment. The quality requirement may be changed so that the scheme no longer qualifies on the evidence of contracting out alone but is required to meet a modified version of the test scheme standard (see *sections 22 and 23*) with an accrual rate of no more than 1/80th, should this prove necessary in the future.
65. For jobholders who are members of a defined benefit scheme and are not in contracted-out employment, the scheme must meet the test scheme standard. *Section 22* provides that a scheme satisfies the test scheme standard if it provides benefits that are broadly equivalent to or better than the benefits provided by a model test scheme – set out in section 23. The comparison to the test scheme must be made by the employer for all of the jobholders they employ who are active members of the scheme and are not in contracted-out employment.
66. In making a comparison when applying this section, the pensions of relevant members must be considered together as a whole (section 22, *subsection (3)*). There is a regulation-making power (*subsection (4)*) enabling the Secretary of State to set out detail on how comparison with the model test scheme will be done and the regulations may provide for the comparison to be conducted in accordance with guidance (*subsection (5)*). Regulations may provide that an actuary will be required to confirm that the scheme meets the test (*subsections (6) and (7)*).
67. The model test scheme on which the comparison is made is set out at section 23. It provides a pension for life based on no more than 40 years of accruals at an annual rate of 1/120th of average qualifying earnings.

Section 24: Quality requirement: UK hybrid schemes

68. Hybrid schemes have a mix of defined benefit and money purchase elements. In order to qualify they will be required to satisfy the quality requirement for either money purchase schemes (section 20) or defined benefit schemes (section 21). The quality requirements set out in *subsection (1)(a)* and *(b)*, which are those for money purchase schemes and defined benefits schemes, respectively, can be modified by regulations in their application to certain hybrid schemes
69. Employers will be directed to the quality requirement they should use for a hybrid scheme in rules made by the Secretary of State under *subsections (2) to (4)*.

Section 25: Quality requirement: non-UK occupational pension schemes

70. *Section 25* enables the Secretary of State to make regulations about the quality criteria of non-UK based occupational pension schemes.

Section 26: Quality requirement: personal pension schemes

71. *Section 26* provides the conditions which a personal pension scheme must meet in order to satisfy the quality requirement. In order to qualify, personal pension schemes must only provide money purchase benefits (*subsection (3)*). The employer must be required to contribute an amount equivalent to at least 3% of qualifying earnings (*subsection (4)*) and the jobholder must be required to make up any shortfall in contributions up to a contributions total of an amount equivalent to 8% of qualifying earnings in the pay reference period (*subsections (5) and (6)*). There will need to be agreements between the scheme and the employer and the jobholder confirming the contributions required. The employer must be required to pass over contributions to the scheme on the basis of direct payment arrangements as defined by the PSA 1993 (*subsection (7)*).
72. As with money purchase schemes (section 20) there is also a provision to alter contribution levels should the repeal of contracting-out not have occurred by the time these duties commence.
73. *Subsection (9)* contains a regulation-making power that allows the Secretary of State to set an amount below which trustees and employers could choose to decline to accept contributions. This could be used, for example, to enable schemes to not have to deal with such minor amounts of contributions which are uneconomic to administer.

Section 27: Quality requirement: other personal pension schemes

74. This section allows the Secretary of State to prescribe in secondary legislation quality requirements for non-UK personal pension schemes.

Section 28: Sections 20, 24 and 26: Certification that quality requirement is satisfied

75. This section enables the Secretary of State through regulations to provide that a money purchase scheme, or a hybrid scheme to the extent that it must meet the money purchase quality requirement, is to be taken to meet the relevant quality requirement if there is a certificate in force.
76. The certificate must state that, in the opinion of the person certifying the scheme, it is able to satisfy the quality requirements under sections 20, 24(1)(a) or 26 (depending on whether the scheme is an occupational money purchase scheme, a hybrid scheme, or a personal pension scheme) for the duration of the certificate in relation to those of an employer's jobholders who are active scheme members.
77. The process and requirements of making a certificate will be detailed in regulations.
78. The effect of certification is subject to any provision made in regulations under subsection (6)(f) in relation to cases where a scheme is found in the event to have failed to meet prescribed conditions. Under subsection (7) regulations may for example require payments to be made into a scheme before it will be taken to have satisfied the relevant quality requirement.
79. The Secretary of State may repeal this section by order.

Section 29: Transitional periods for money purchase and personal pension schemes

80. This section sets out how employers operating qualifying occupational money purchase schemes and personal pension schemes will be able to phase in their contributions over two transitional periods.

81. This is achieved by setting lower contributions in the quality requirements over two transitional periods. Both transitional periods shall last at least 1 year and the exact duration of both will be prescribed in regulations.
82. In the first period, scheme rules must require employer contributions of at least 1% and a total contribution of at least 2% of the jobholder's qualifying earnings in the pay reference period. For the second period, the minimum contributions will increase to 2% from the employer and 5% overall.

Section 30: Transitional period for defined benefits and hybrid schemes

83. This section sets out the phasing arrangements for employers operating defined benefit or hybrid schemes. It enables those employers to delay automatic enrolment, for a specific group of jobholders for a transitional period that will be prescribed in regulations.
84. *Subsection (2)* defines the conditions which must be satisfied so as to be in this specific group of jobholders. They must be existing workers of the employer who have previously been and remain able to join a qualifying defined benefit or hybrid scheme.
85. The employer must automatically enrol such jobholders into a qualifying defined benefit or hybrid scheme by the end of the transitional period. If, before the transitional period ends, a jobholder ceases to be able to join a defined benefit or hybrid scheme or if the scheme they are eligible for ceases to qualify (*subsection (4)*), then the employer must automatically enrol the jobholder into alternative qualifying provision.
86. If the alternative scheme is another defined benefit or hybrid scheme, the employer must ensure membership is effective from the date on which the original scheme ceased to qualify or be available for the jobholder (i.e. the scheme closure date - *subsection (5)*). *Subsection (6)* provides that if the alternative scheme is a money purchase scheme then the employer must make membership effective from the original automatic enrolment date by paying backdated employer contributions.

Section 31: Effect of freezing order or assessment period

87. This section provides that active membership of a qualifying scheme does not cease for a jobholder or worker (this includes where a jobholder or worker has opted in to the scheme under section 9) for the purposes of the employer duties when the accrual of benefits in that scheme has been frozen either by an order imposed by the Pensions Regulator or because of an assessment by the Pension Protection Fund. Nor will the scheme cease to be a qualifying scheme in such circumstances.

Section 32: Power of trustees to modify by resolution

88. *Subsection (1)(a)* enables trustees to make changes to a scheme necessary to comply with the conditions in section 17(2) (automatic enrolment schemes). For example, making a scheme suitable for automatic enrolment by removing any condition of membership which requires a choice of investment to be made.
89. *Subsection (1)(b)* allows changes specified in *subsection (2)* to be made to enable contributions payable to a scheme to be increased to comply with section 20 or with section 24(1)(a). The permitted changes are to increase the contribution rate, the basis on which it is calculated or the frequency of its payment. However, changes cannot be made without consent of the employer.
90. *Subsection (3)* makes separate provision for those schemes where there is more than one employer
91. Regulations may prevent certain schemes from using this provision to modify their rules to facilitate automatic enrolment.

Section 33: Deduction of contributions

92. An employer who automatically enrolls, re-enrolls or arranges opt in for a jobholder into a scheme is permitted to deduct the jobholder's contributions from the jobholder's pay from the date on which they are to become active members and give this to the scheme. This means that a deduction from earnings made by an employer in order to comply with the employer duty is not otherwise an unlawful deduction from earnings under the Employment Rights Act 1996, section 13.