

PENSIONS ACT 2011

EXPLANATORY NOTES

COMMENTARY ON SECTIONS

Part 2: Automatic enrolment

Section 4: Automatic re-enrolment where scheme membership interrupted

46. *Section 4* amends sections 2, 5, 6 and 54 of the PA 2008. Under section 2, where the jobholder is an active member of a qualifying scheme, the employer must not take any action or make any omission by which the jobholder ceases to be a member of the qualifying scheme, or the scheme ceases to be a qualifying scheme, unless a specified exception applies. One of those exceptions is where the employer arranges for the jobholder to become an active member of another qualifying scheme, within a prescribed period. (The definition of “jobholder” is set out in section 1 of the PA 2008.)
47. As section 2 stands, there is no duty on the employer to automatically re-enrol the jobholder into another qualifying scheme, where the employer takes an action or makes an omission as referred to in paragraph 46. The employer can put the jobholder into another qualifying scheme but only with the jobholder’s consent. In the event that this consent is not forthcoming the employer could potentially be in breach of section 2 of the PA 2008 until the next automatic re-enrolment date arose.
48. *Subsection (1)* amends section 2 of the PA 2008 so that section 2 is not contravened if, in compliance with the duty to re-enrol under section 5, the jobholder becomes an active member of an automatic enrolment scheme from the day after the day on which the jobholder ceases to be an active member of a qualifying scheme or the scheme ceases to qualify. Alternatively, the Secretary of State may prescribe a period of time for re-enrolment if he or she considers it appropriate to do so.
49. *Subsection (2)* inserts new subsection (1B) into section 5 of the PA 2008. *Section 5* substitutes a new subsection (1) into that section. Section 5, as amended, imposes a duty to re-enrol a jobholder in the circumstances specified in new subsection (1) or (1B), with effect from a date specified in regulations.
50. Subsection (1) of section 5 of the PA 2008 (as substituted) applies to a jobholder who earns more than £7,475 and who fulfils certain other conditions. Subsection (1B) applies to a jobholder who earns £7,475 or below, where the jobholder has ceased to be an active member of a qualifying scheme by reason of an action or omission by a person other than the jobholder.
51. *Subsection (2)* also inserts new subsection (1A) into section 5 of the PA 2008. Subsection (1A) applies to a jobholder who earns £7,475 or below, where the jobholder ceases to be a jobholder for a period as a result of the conditions in section 1(1)(a) or (c) of the PA 2008 not being met.
52. *Subsection (3)* substitutes a new subsection (4) in section 5 of the PA 2008 (circumstances in which the duty to re-enrol does not apply) to allow for regulations to prescribe the circumstances where there is no duty to re-enrol in a case where:

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which received Royal Assent on 3 November 2011*

- the jobholder, or the employer at the jobholder's request, takes an action or makes an omission such that the jobholder is no longer a member of a qualifying scheme; or
 - the jobholder opts out of membership of a qualifying scheme, under section 8 of the PA 2008.
53. *Subsection (4)* removes the reference in section 5 of the PA 2008 to re-enrolment having to occur “after the automatic enrolment date”, given that re-enrolment of a person aged under 22 would occur before the jobholder's automatic enrolment date.
54. *Subsection (5)* amends section 6(4) of the PA 2008. It amends paragraph (a) to remove a reference to re-enrolment having to occur “after the automatic enrolment date” and to remove an unnecessary reference to a scheme ceasing to be a qualifying one. It amends paragraph (b) consequent on the amendments made by *subsections (1) and (2)* and *section 5* and amends paragraph (c) consequent on the amendment of paragraph (a).
55. *Subsection (6)* ensures that where an employer induces a jobholder to leave or opt out of a scheme, the employer must arrange for the jobholder to be enrolled in a replacement scheme without leaving a gap, in order to avoid possible compliance action for breach of section 54 of the PA 2008. In practice this would ensure that the jobholder has continuous pension saving. Alternatively, the amendment would allow for a period of time to be prescribed if the Secretary of State considered it appropriate to do so.
56. Regulations under section 5 of the PA 2008, as amended by the Act, will therefore be able to provide for a duty to re-enrol to occur whenever the employer takes an action or makes an omission as referred to in paragraph 46, subject to any exceptions that may be provided for.

Section 5: Earnings trigger for automatic enrolment and re-enrolment

57. *Section 5* amends sections 3 and 5 of the PA 2008. Section 3 provides that an employer is under a duty to enrol a jobholder (see section 3(7)) into an automatic enrolment scheme, with effect from the automatic enrolment date, where the jobholder is aged at least 22 and under pensionable age, and certain other conditions are met. Section 5 provides that an employer is under a duty to re-enrol a jobholder into an automatic enrolment scheme, on a date as set out in regulations, where the jobholder is aged at least 22 and under pensionable age, and certain other conditions are met.
58. The section provides that a jobholder will not be eligible for automatic enrolment under section 3 (or, with some exceptions, re-enrolment under section 5) unless, in addition to complying with the above conditions, the jobholder earns in excess of £7,475 per annum (the “earnings trigger”).
59. The earnings trigger is distinct from the band of “qualifying earnings” in section 13 of the PA 2008 (which concerns the earnings on which contributions are payable in the case of a “qualifying scheme” which is a money purchase or personal pension scheme). Therefore, where the jobholder has been automatically enrolled or re-enrolled, employers and jobholders must still pay contributions if the jobholder's earnings fall below the earnings trigger, but are above the lower limit of the qualifying earnings band (see section 13(1)(a) of the PA 2008).
60. *Subsections (2) and (4)* define the term “earnings” for the purposes of sections 3 and 5 of the PA 2008 and oblige an employer to use a proportionate amount of the earnings trigger where a pay reference period is shorter or longer than one year. For example, employers that pay weekly must convert the amount of the earnings trigger to a weekly figure.

Section 6: Postponement or disapplication of automatic enrolment

61. *Section 6* introduces an optional waiting period into the automatic enrolment process. This allows employers to defer the automatic enrolment date of a worker for up to three months by providing them with a notice. The notice must state that the employer intends to use a waiting period, together with details of the worker's new enrolment date.
62. The employer may apply the waiting period from one of three dates (according to their relevant situation):
- the employer's staging date (the date from which an employer is required to comply with the automatic enrolment duty);
 - the worker's first day of employment with that employer (where that falls after the employer's staging date); or
 - the first day on which a worker is eligible for automatic enrolment whilst employed by that employer. This could be, for example, the day on which the worker turns 22 or their earnings change, so that they become a jobholder who is eligible for automatic enrolment.
63. In the first two cases, the employer does not have to check the worker's eligibility to be automatically enrolled in a pension scheme before applying the waiting period. In all cases the employer must confirm the worker's eligibility at the end of the waiting period before automatically enrolling them.
64. The section amends section 7 of the PA 2008 so that the worker may opt into pension saving at any point during the waiting period. Regulations under the substituted section 4 (see below) may provide that the worker will be advised of this right in the notice provided by the employer.
65. *Subsection (2)* substitutes a new section 4 into the PA 2008. In the case of all three dates from which the employer may apply the waiting period, in meeting the conditions for using the waiting period, the employer must have made an active choice to use the waiting period. The employer indicates this choice by giving the worker a notice.
66. The provision for deferral from the staging date includes the following.
- Under section 4(1) of the PA 2008 a deferral notice may be given in the case of a worker who is employed on the employer's staging date. An employer may defer such a worker's automatic enrolment date to a date specified in the notice the employer gives to the worker – "the deferral date" – if, on that date, the worker satisfies certain eligibility criteria. The eligibility criteria in sections 1 and 3 of the PA 2008 determine whether the worker is eligible to be automatically enrolled. The employer must automatically enrol the worker, with effect from the deferral date, if the worker is eligible to be automatically enrolled on the deferral date. If the worker is not eligible to be automatically enrolled, the employer is under no duty to automatically enrol that worker into a pension scheme (and see section 4(4)).
 - Section 4(1)(a) of the PA 2008 provides that an employer must give a notice to all the workers whose automatic enrolment date he intends to defer. This notice should state the employer's intention to defer the automatic enrolment date of that worker until the date specified in the notice.
 - Section 4(1)(b) of the PA 2008 provides a power to prescribe further requirements in relation to the notice, such as its form and content.
67. Under section 4(2) of the PA 2008 a deferral notice may be given to a new worker who joins the company after the employer's staging date. An employer may defer the automatic enrolment date of such a worker to a date specified in the notice the employer gives to the employee – "the deferral date" – if, on that date, the worker satisfies certain eligibility criteria. The eligibility criteria in sections 1 and 3 of the PA 2008

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determine whether the worker is eligible to be automatically enrolled. The employer must automatically enrol the worker, with effect from the deferral date, if the worker is eligible to be automatically enrolled on the deferral date. If the worker is not eligible to be automatically enrolled, the employer is under no duty to automatically enrol that worker into a pension scheme (and see section 4(4)).

68. Under section 4(3) of the PA 2008 a deferral notice may be given to a worker who becomes a jobholder to whom section 3 applies after the employer's staging date. The eligibility requirements which must be satisfied for a worker to become such a jobholder are set out in sections 1 and 3 of the PA 2008 and include the age and earnings of the worker and the place where the worker is working or ordinarily works. If the worker satisfies those conditions, but only if they satisfy them after the employer's staging date, the employer may defer that worker's automatic enrolment date to a date specified in the notice the employer gives the employee – "the deferral date", subject to section 4(7) which prevents a deferral notice being given in relation to an occasion on or before a deferral date in a notice under section 4(1) or (2). If the worker is not eligible to be automatically enrolled on the deferral date, the employer is under no duty to automatically enrol that worker into a pension scheme (and see section 4(4)).
69. Section 4(4) of the PA 2008 applies when the worker does not satisfy certain eligibility criteria on the deferral date specified in a notice under this section. In that case the duty under section 3(2) of the PA 2008 on employers, to automatically enrol certain workers into pension schemes, does not apply to the employer in relation to the employment of that worker in the period beginning with the starting date and ending with the deferral date. Section 4(4) therefore has the effect that where the worker fails to satisfy the eligibility requirements in sections 1 and 3 of the PA 2008 on the "deferral date", but did satisfy those criteria before the deferral date, the employer is not required to automatically enrol the worker with effect from the date when he did satisfy the criteria.
70. Section 4(5) of the PA 2008 provides that the employer may give a worker a notice on or before the starting day, as defined in section 4(8), or within a prescribed period after that day. The employer, if he wishes to defer the worker's automatic enrolment date, must give the notice to the worker within this timeframe.
71. Section 4(6) of the PA 2008 provides that the employer can defer the automatic enrolment date of a worker under this section for a maximum of three months from the starting day.
72. Section 4(7) of the PA 2008 has the effect that an employer cannot defer the automatic enrolment date of a worker for more than three months. The subsection provides that an employer cannot give a worker more than one notice, which could extend the deferral of that worker's automatic enrolment date beyond three months.
73. Section 4(8) of the PA 2008 defines the "staging date" as the first day on which the automatic enrolment duties in section 3 apply to that employer. It also defines "starting day" for the purposes of subsections (1), (2) and (3) of the new section 4.
74. *Subsection (3)* repeals section 5(5) of the PA 2008 because the postponement provisions in section 4 of the PA 2008 are being replaced in the Pensions Act 2011. Section 6(4) (a) of the PA 2008 omits section 6(6) of that Act. Section 5(5) of the PA 2008 contains a reference to section 6(6) of that Act. The repeal of section 6(6) would mean that section 5(5) of the PA 2008 is redundant and is therefore repealed by this amendment.
75. *Subsection (4)(a)* repeals subsections (3) and (6) of section 6 as a consequence of replacing section 4 with a new provision.
76. *Subsection (5)* repeals subsection (2)(b) of section 7 as a consequence of the replacement of section 4. In effect, it allows a jobholder to opt in during the waiting period.

77. *Subsection (6)* amends section 30(7) to ensure that an employer, who uses a transitional period under section 30 to defer their automatic enrolment duties, may use a waiting period at the end of that transitional period.
78. *Subsection (6)(b)* corrects a drafting error in section 30(7). It also ensures consistency with new subsection (7)(b) of section 30.
79. *Subsection (6)(c)* inserts a new provision into section 30. This allows an employer, who uses the transitional period under section 30, to use section 4 to defer the automatic enrolment date of a worker by up to three months from the end of that transitional period.

Section 7: Timing of automatic re-enrolment

80. *Section 7* amends section 6(1)(b) of the PA 2008 to stipulate that automatic re-enrolment will not happen more frequently than once in every period of two years and nine months. The two years and nine months interval applies to the employer rather than the jobholder.
81. This section is relevant only where the Secretary of State chooses to make provision under section 6(1)(b) rather than section 6(1)(a).

Section 8: Review of earnings trigger and qualifying earnings band

Section 9: Rounded figures for earnings trigger and qualifying earnings band

82. *Section 8* substitutes a new section 14 and *section 9* inserts a new section 15A in the PA 2008. These sections introduce a new mechanism to review and revise the new automatic enrolment earnings trigger and introduce a new mechanism to review and revise the qualifying earnings band in section 13 of the PA 2008.
83. The new section 14 provides that the Secretary of State must consider in each year whether the amounts for the automatic enrolment earnings trigger, or the upper or lower limits of the qualifying earnings band, should be increased or decreased. The section provides that the Secretary of State may take into account national insurance earnings limits and thresholds, the income tax personal allowances, the level of basic state pension for single adults, or the general level of prices and earnings. The Secretary of State may also consider any other factors that are considered relevant. Any changes will be made by order.
84. The amounts for the automatic enrolment earnings trigger, and the upper and lower limits of the qualifying earnings band, relate to a jobholder's gross earnings in a nominal pay reference period of 12 months. Sections 3, 5 and 13 provide that, where an employer's pay reference period is less or more than 12 months, then those amounts will be proportionately less or more. The new section 15A provides a power for the Secretary of State to specify rounded figures for any specified pay reference period in place of the exact proportionate amount that would otherwise apply. This allows the Secretary of State, for example, to specify rounded monthly or weekly figures. The Secretary of State may choose to round up or down.

Section 10: Qualifying schemes: administration charges

85. *Section 10* extends the existing reserve power in the PA 2008 to establish a charge cap for qualifying pension schemes used to fulfil an employer's duties under Part 1 of the PA 2008, so that it applies to charges made to deferred members as well as to charges made to active members. It also clarifies what charges are subject to the power.

Section 11: Test scheme standard for schemes that produce sum of money for provision of benefits

86. *Section 11* amends section 22 of the PA 2008 and substitutes a new section 23. These sections provide for the "test scheme standard". This is the quality requirement for

defined benefit schemes with members in employments that are not contracted out of the State Second Pension Scheme. The test scheme standard uses a benchmark known as the “test scheme”.

87. This section enables provision to be made in regulations for the detail of the Test Scheme. This is to accommodate a type of defined benefits scheme in which a member accrues a sum of money which is to be used to purchase an annuity from a provider or to secure a pension within the scheme.

Section 12: Certification that alternative to quality requirement is satisfied

88. *Section 12* amends section 28 of the PA 2008 and introduces alternative self-certification arrangements for employers.
89. Employers using money purchase occupational pension schemes, personal pension schemes or hybrid schemes to discharge their enrolment duties will be able to use section 28 to certify that their scheme (in the case of hybrid schemes, the money purchase element) satisfies the relevant quality requirements, where the scheme satisfies certain alternative requirements, to be prescribed in regulations.
90. *Subsection (2)* makes a consequential amendment to the title of section 28 of the PA 2008 to reflect that certification now applies also to European Economic Area (EEA) schemes following the changes made by section 13.
91. *Subsection (3)* makes a minor consequential amendment as a result of the changes to section 28.
92. *Subsection (4)* inserts a new subsection (1A) into section 28. This subsection defines “relevant jobholder” as a jobholder to whom a certificate applies, and provides that a reference to a “scheme” in the section includes a reference to part of a scheme.
93. *Subsection (5)* amends section 28(2) to include a new paragraph (b). The amended section 28(2) provides that the certificate must state that, in the opinion of the person giving it, the scheme being certified either satisfies the relevant quality requirement, or an alternative prescribed requirement, throughout the certification period.
94. *Subsection (6)* inserts new subsections (2A), (2B) and (2C) into section 28. These subsections provide that the alternative requirements that the Secretary of State prescribes must meet certain conditions. The requirements must be such that, if all jobholders were active members of schemes to which section 28 applies, for at least 90% of jobholders, the total contributions paid by the employer, and the employer and the jobholder together, would not be likely to be less than if the schemes had met the relevant quality requirement.
95. The Secretary of State is required to apply the test in subsection (2A) when regulations are first made and thereafter carry out a review to ensure that the test continues to be satisfied. The first review must take place in 2017 and subsequent reviews must take place at least every three years.
96. *Subsection (8)* amends subsection (1)(b) of section 32 of the PA 2008. The amended subsection enables trustees and managers (section 16 amends section 32 to add a reference to managers) of occupational pension schemes to modify their scheme by resolution and with the consent of any employer in relation to the scheme, to comply with:
- requirements in section 20(1) of the PA 2008 which relate to the quality requirements for money purchase schemes;
 - those requirements as modified under section 24(1)(a) of the PA 2008 with respect to hybrid schemes;
 - an alternative quality requirement prescribed under section 28(2)(b) of the PA 2008.

Section 13: Certification for non-UK schemes

97. *Section 13* introduces further regulation-making powers into section 28 of the PA 2008, as amended by section 12, so that the certification requirements can be applied to schemes with their main administration in a Member State of the European Economic Area (EEA) other than the United Kingdom.
98. Under section 28 of the PA 2008, as amended by section 12 of the 2011 Act, employers will be able to certify that their money purchase or personal pension scheme, or the money purchase element of their hybrid scheme, meets the relevant quality requirement or a prescribed alternative requirement.

Section 14: Transitional period for defined benefits and hybrid schemes to be optional

99. *Section 14* amends section 30 of the PA 2008. Section 30 of the PA 2008 allows employers using defined benefits and hybrid schemes to adjust gradually to the additional costs of the automatic enrolment reforms. Currently, section 30 provides that for certain jobholders, where the conditions in section 30(2) are met, the automatic enrolment date under section 3 of the PA 2008 is automatically deferred until the end of a transitional period as set out in regulations. This section amends section 30, so that employers can choose whether or not to defer automatic enrolment until the end of that transitional period.
100. *Subsection (2)* amends subsection (3) of section 30 to provide that deferral of the automatic enrolment date will only apply where an employer serves a notice on the jobholder, within a period set out in regulations, stating that the employer intends to defer.
101. *Subsection (3)* amends subsection (4) of section 30 (provision where certain conditions in section 30(2) cease to be satisfied during the transitional period) to take account of the fact that the employer has to give a notice in order to defer the automatic enrolment date.
102. *Subsection (4)* inserts a new subsection (7A) into section 30, allowing the Secretary of State to make regulations regarding the form and content of that notice.

Section 15: Arrangements where transitional conditions cease to be satisfied

103. *Section 15* also amends section 30 of the PA 2008. Under section 30(5) if certain conditions of deferral cease to apply, the employer must enrol the jobholder into an alternative scheme. Currently section 30(5) provides that the alternative scheme must be either another defined benefit or hybrid scheme, or a money purchase scheme. This section amends section 30(5) to give employers a further option of enrolling jobholders into a personal pension scheme.
104. *Section 15* also has the effect of requiring the Secretary of State to make regulations about the arrangements that must be made by an employer in order for the jobholder to become a member of a personal pension scheme.

Section 16: Power of managers to modify by resolution

105. *Section 16* extends section 32 of the PA 2008. Section 32 of the PA 2008 provides that the trustees of an occupational pension scheme may by resolution modify the scheme so that it complies with the requirements for an automatic enrolment scheme in section 17 of the PA 2008 or the requirements as to payment of contributions in sections 20 and 24 of the PA 2008. (Section 12 extends section 32 by adding a reference to an alternative quality requirement prescribed under the new subsection (2)(b) of section 28 as inserted by that section.)

106. *Section 16* extends section 32 of the PA 2008 so that managers, as well as trustees, of occupational pension schemes are able to use this power to modify a scheme.

Section 17: No indemnification for civil penalties

107. *Section 17* extends the prohibition (in section 256 of the PA 2004) on a pension scheme trustee or manager being reimbursed out of scheme funds for fines or penalties payable by the trustee or manager.
108. The extension covers penalties payable by a trustee or manager under section 40 or 41 of the PA 2008. A trustee or manager in receipt of a fixed or escalating penalty under the PA 2008 will not be able to take monies from scheme funds in order to pay those penalties.

Section 18: Power to exempt certain cross-border employment from enrolment duty

109. *Section 18* inserts section 292A into the PA 2004 to provide for a power to make regulations in connection with the duties imposed on employers by Part 1 of the PA 2008.
110. The regulations may provide that those duties do not apply to a person's employment of an individual in relation to whom the person is a European employer, as defined in regulations made under section 287 of the PA 2004, or of someone whom the person reasonably believes to be such an individual.