

Automatic enrolment

Compliance and enforcement

Quarterly bulletin 1 July – 30 September 2016



The Pensions
Regulator

This quarterly update provides information about our cases and the powers we have used relating to automatic enrolment and associated employer duties.

It is designed to help employers, their advisers and the pensions industry as a whole understand the type of compliance and enforcement interventions that follow our educative and enabling communications and support.

Preventing non-compliance

Penalties on the up – but not in proportion to numbers of employers staging

Between July and September this year, we've had to use our powers more often, as increasing numbers of small and micro employers reach their staging date and leave it to the last minute to prepare. Although the number of Compliance Notices has risen to over 26,000, we find the majority of employers subsequently comply when given this 'nudge' to remind them of their duties.

Our use of Escalating Penalty Notices has also increased – however, this is a very small proportion relative to the number of Compliance Notices, or to the number of employers staging. Less than 5% of Compliance Notices progress to an Escalating Penalty Notice, which demonstrates that our approach of educating and enabling before enforcing is both effective and proportionate.

When is a reasonable excuse not a reasonable excuse?

This period, we issued 3,728 Fixed Penalty Notices to employers for failing to meet their automatic enrolment duties. After asking us to review our decision, a number of them contested their fines at a tribunal, claiming that their non-compliance was unintentional and that they had a 'reasonable excuse'.

The circumstances that employers are citing in their defence include confusion between the employer and the payroll administrator as to who is supposed to be doing what, illness, and being short-staffed. However, as the case studies illustrate, in the eyes of the law, these reasons are not sufficient to avoid a fine.



'Our approach of educating and enabling is effective and proportionate'

The idea of a reasonable excuse is also used by HM Revenue & Customs (HMRC) for appeals against tax penalties, but the tribunal has made it clear that the two regimes are separate. The same basic principle applies, in that a reasonable excuse is something unexpected or outside your control that stopped you meeting your statutory duties. But because the automatic enrolment and tax duties are different, something that amounts to a reasonable excuse for HMRC's purposes may not be enough to avoid an automatic enrolment fine.

For example, HMRC guidance says that a problem with their online service is a reasonable excuse for failing to file a tax return on time. However, the tribunal has rejected it as an excuse for failing to complete a declaration of compliance, because we offer an alternative telephone service, and also because of the number of reminders that we give employers to complete their declaration in good time.

The following **do not** amount to a reasonable excuse, whether for a failure to file a tax return or a failure to complete the declaration of compliance:

- ▶ you relied on someone else and they let you down
- ▶ you found the online system too difficult to use
- ▶ you didn't get a reminder
- ▶ you made a mistake
- ▶ you or a member of staff were ill.



'A reasonable excuse for HMRC's purposes may not be enough to avoid an automatic enrolment fine'

Lessons learned from our casework

Case study 1

This Essex-based recruitment consultancy experienced difficulties on two fronts – staff illness and problems with the pension provider. The employer's illness meant that she was unable to carry out many of her business duties for the best part of a year, and the problems with the provider included delays with data transfer and the payment of contributions. After initially sending a Compliance Notice, we issued a Fixed Penalty Notice for failing to declare compliance, and the employer asked us to reconsider, based on her mitigating circumstances.

Although the judge was sympathetic to the employer's medical problems, he ruled that it was up to her to delegate the activities she was unable to complete to someone else in her absence. He added: 'TPR allowed a long period to elapse after the Contribution Notice deadline and exerted considerable pressure on the [employer] to live up to its responsibilities... If it made proper efforts to extract an adequate service from [the provider] and those efforts came to nothing, it was necessary well before February 2016 to look elsewhere'.

This process took place over a two year period – the employer's staging date was in May 2014, and despite many conversations with the employer throughout 2015, they didn't complete their declaration until May 2016.

Employers: As with any other business activity, if you're too unwell to complete your AE duties, you'll need to find someone else who can. You're still legally responsible, so whether it's due to pension provider failings or illness, a judge won't consider it a 'reasonable excuse' if there's something you or someone else could have done to remedy the situation in time.

Case study 2

This employer of this design company in Lancashire appealed the £400 Fixed Penalty Notice because he believed his excuse was 'reasonable'. As a small company, with the accounts department staffed by just one part-time employee, he claimed that the penalty we imposed was excessive due to the size of the business, as well as the fact that the pension contributions he should have been making were only small.

The judge noted that, not only was it reasonable for us to issue a Compliance Notice in the first place as a result of the employer failing to complete his declaration of compliance, but we were right to fine him when he was unable to give evidence of compliance. The judge said, 'these omissions are not excused by the fact that the employer is a small business with only a few workers, or by the fact that the pension contributions it should have been making may have been modest in amount.'

Employers: It doesn't matter how many staff you employ or how low your pension contributions are, the law still applies to you and you need to meet your duties so your staff don't miss out.

Postponement and declaring zero workers

We're currently carrying out a proactive compliance drive to see whether employers declaring that they have no staff to enrol are completing their declaration of compliance correctly. This involves cross checking their details against our database, and contacting them if our records show they have employees on the payroll. We've found that a proportion of these employers were using postponement and incorrectly completed their declaration during the postponement period when they had no staff to enrol. Employers can begin filling in their declaration of compliance at any point, but should wait to the end of the postponement period before completing the staff information and submitting it.

Case study 3

When we looked into a beauty product company that claimed it had no workers on its declaration of compliance, we discovered there were in fact 797 employees on the payroll. After trying to contact them by phone several times without success, we issued them with an information notice. This is a document which legally requires an employer to give us the information we need to help our investigation.

They promptly responded, admitting they'd made a mistake and were confused about how postponement worked and when they should fill in their declaration. We explained how and when to complete the form correctly, and the company is now fully compliant.

Employers: If you're using postponement, don't submit your declaration of compliance before the end of your postponement period. However, we do recommend gathering other information requested on the form before this date, so it's not all left until the last minute.

Cases closed

Automatic enrolment cases closed in the period

Cases closed in this quarter:	10,121
Cases closed to date ¹ :	20,050

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We define 'to date' as the period commencing from the outset of our compliance and enforcement activity for automatic enrolment (July 2012), and continuing all the way to the end of this reporting period (ie 30 September 2016). We occasionally identify a small number of cases which have been incorrectly marked as relating to automatic enrolment. When this occurs, an adjustment to the numbers from the previous quarter will have been made.

Selected powers² used in the period

Power	Description	Number in period	Number to Sep 2016
Information Notice	The power to demand information and documents under section 72 of the Pensions Act 2004	111	196
Inspection	The power to inspect premises under section 74 of the Pensions Act 2004	13	43
Warrant	The power to search premises and take possession of content under section 78 of the Pensions Act 2004	0	0
Compliance Notice	A Compliance Notice under section 35 of the Pensions Act 2008 to remedy a contravention of one or more automatic enrolment employer duty provisions	15,073	26,040
Unpaid Contributions Notice	An Unpaid Contributions Notice under section 37 of the Pensions Act 2008 to remedy a late or non-payment due to a qualifying pension scheme	324	904
Fixed Penalty Notice	A Fixed Penalty Notice under section 40 of the Pensions Act 2008 of £400 for failure to comply with a statutory notice or some specific employer duties	3,728	6,779
Escalating Penalty Notice	An escalating penalty under section 41 of the Pensions Act 2008 of between £50 and £10,000 per day (depending on size) for failure to comply with a statutory notice	576	741
Total		19,825	34,703

2

This report only provides data on the main powers that we anticipate using. Our annual commentary and analysis publication on automatic enrolment will provide data on any other powers we have used over the period. The numbers above include all powers that have been used regardless of whether they have been subsequently revoked. A small proportion of powers reported from previous periods will change as a result of retrospective updates or operational activity to replace powers issued in the previous period with those issued in this period.

Review of statutory notices

A review³ is where an employer who is the recipient of a statutory notice (such as a Compliance Notice, Fixed Penalty Notice or Escalating Penalty Notice) disagrees with our decision and requests a review.

Confirmed reviews are where we have carried out a review and decided that the statutory notice was issued correctly and appropriately and will continue to be applied to the employer. In some cases we revoke the statutory notice following the review. Where a notice is substituted, this may mean that a different breach has been uncovered and a different statutory power is used instead.

Reviews	Number in period	Number to Sep 2016
Requested	1,689	3,506
Completed	1,487	3,107

These are employer-instigated reviews only.

Outcome of reviews	Number in period	Number to Sep 2016
Confirmed	266	673
Revoked, substituted or varied	1,221	2,434

³

Note that these reviews may not relate to notices issued in the period, and that a review completed in the period may not have been requested in the period. A small proportion of reviews and review outcomes reported from previous periods will change as a result of retrospective updates or operational activity to replace powers issued in the previous period with those issued in this period.

Tribunals

Employers who receive a penalty notice and disagree with our decision to issue it must first ask us for a review. If they disagree with the outcome of that review they can then appeal the decision to the Tribunal Service. Employers have 28 days after the review decision is issued in which to appeal.

Tribunals	Number in period	Number to Sep 2016
Requested	27	97
Defended	15	62
Not defended	7	30

Outcome of tribunals	Number in period	Number to Sep 2016
Confirmed	21	42
Revoked, substituted or varied	0	0
Total	21	42

Confirmed includes struck out and dismissed.

Ongoing tribunals where the decision has yet to be made on how to respond: 5.

Defended tribunals still ongoing at the end of September 2016: 20.

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