

# Detailed guidance for employers

Employer duties and defining the workforce:  
An introduction to the new employer duties

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# About this guidance

This guidance is aimed at professional advisers and employers with in-house pensions professionals.

It is the first in a series of guidance that explains the new employer duties and safeguards in detail. Illustrative examples throughout the series show further how the laws will apply in practice.

It covers the points an employer must understand to comply with their new duties from their staging date (the date the new laws will apply to that employer for the first time).

This guidance tells an employer:

- how the working population is classified under the new legislation
- what is meant by ‘worker’, the different categories of worker and how to identify them
- how to assess their workforce and to identify which individuals they will have new employer duties for
- what the new duties are in relation to each category of worker.

We recognise that many employers will already have pension provision for their workers, and that this will often match or exceed the minimum requirements contained in the duties. In these cases, such employers may just need to check that the minimum requirements are covered in their existing processes.

It will help employers if they are familiar with the different categories of workers. These are explained further in this guidance and a quick reminder is available in the Key terms.

This guidance forms part of the latest version of the detailed guidance for employers (published April 2017). The Department for Work and Pensions (DWP) recently amended the legislation to include Fixed Protection 2016 and Individual Protection 2016 to the exception for protection from tax charges on pension saving. This guidance has been updated with these additions. We have also updated this guidance as a result of the transitional period for schemes with defined benefits ending on 30 September 2017. The section ‘Changes from last version’ has a list of these alterations.



**An  
employer must  
understand  
their new  
duties**

# Introduction

1. A number of new employer duties have been introduced that will give millions of workers access to pension provision, many for the first time.
2. What an employer needs to do will depend on whether they employ someone the legislation classifies as a 'worker'.
3. The term 'worker' is specific – it does not simply apply to the working population as a whole. There are different categories of worker, determined by a person's age and how much they earn.
4. A key requirement is to automatically enrol certain workers, known as eligible jobholders, into a pension scheme that meets specific conditions to be an 'automatic enrolment scheme'. More information on the conditions to be an automatic enrolment scheme can be found in **Detailed guidance no. 4 – Pension schemes**. However, automatic enrolment is only one of the duties.
5. For all employers, compliance with the new employer duties and safeguards is compulsory. It is crucial that all employers understand how their workforce is categorised under the new legislation.
6. An employer needs to know:
  - the criteria that determine whether someone is considered as a 'worker'
  - the criteria that determine what category of 'worker' that person is.
7. They also need to be able to apply this in practice to their own workforce so they can be compliant with the new duties.

# Identifying whether a person is a 'worker'

8. The first step for an employer is to see if they employ anyone classed as a 'worker'. To do this, they need to understand their contractual relationships.
9. A worker is defined as any individual who:
  - works under a contract of employment (an employee), or
  - has a contract to perform work or services personally and is not undertaking the work as part of their own business.
10. Anyone who has entered into a contract of this type with an individual is an employer and is required to comply with the new employer duties.
11. This may include agency workers if they have such a contract with either the agent or the principal (the third party to whom the individual is being supplied by the agent). Broadly, agency workers are individuals who are supplied by an agent to work for a third party (the principal) under a contract or arrangement between the agent and the principal, and who are not undertaking the work as part of their own business. For example, a person taken on by a recruitment agency that gives that person a temporary assignment to work for someone else.
12. In the absence of a worker's contract between the agency worker and the agent or principal, the agency worker may still be a worker for the purposes of the new duties (see paragraphs 20-21).
13. The final point to note about the definition of worker in paragraph 9 is that the physical location of the employer is not a determining factor when considering an individual's status as a worker, eg the employer may be based outside the UK.
14. The following sections set out more detail. There are a small number of exemptions from the definition of a worker, set out in paragraphs 29-39.

### A note about contracts

- A contract does not have to be in writing
- It can be a verbal contract between the employer and the worker
- The terms of employment can be implied, rather than explicitly stated
- Multiple contracts with one individual will require additional assessment to establish if they are separate contracts or if they should be treated as a single employment relationship **Detailed guidance no. 3 – Assessing the workforce** has more information
- Where a transfer occurs under the Transfer of undertakings protection of employment (TUPE) regulations, transferred-in workers should be viewed as being under a new contract and the new employer should therefore assess that individual's worker status at the point of transfer.

## Personal service workers

15. If an individual does not work under a contract of employment, they may still be assessed as a worker for the purposes of the new duties if they have contracted to perform work or services personally, other than as part of their own separate business ('a personal services worker'). However, an individual who is paid a fee as a self-employed contractor under a contract for services is not normally a worker.
16. The distinction between such a self-employed contractor and a personal services worker is much debated in employment law and employers will be used to making the assessment of employee status for employment rights and tax purposes.
17. However, employers should not rely solely on a person's tax status when assessing whether they are a worker. An individual considered by HM Revenue & Customs (HMRC) as self-employed for tax purposes may still be classed as a 'worker' under the new employer duties legislation, if they are in fact working under a contract to perform work or services personally, other than as part of a separate business of their own.

18. No single factor, by itself, is capable of being conclusive in determining whether an individual is a personal services worker. However, individuals are likely to be considered as such if most, or all, of the following statements are true:
- The employer relies on the individual's expertise and expects them to perform the work themselves
  - There is an element of subordination between the employer and individual, for example the individual reports to the employer's managers or directors in respect of the specific operation or project on which they are contracted to work
  - The contractual provisions state that the contract is not a contract for services between the employer and the individual's own business
  - The contract provides for employee benefits such as holiday pay, sick pay, notice, fees, expenses etc
  - There is a mutual obligation set down in the contract to provide or do the work
  - The individual does not incur any financial risk in carrying out the work
  - The employer provides tools, equipment and other requirements to the individual to carry out the work.
19. This list is not exhaustive. As when they are assessing an individual's status for tax purposes, an employer must take into account all relevant considerations.

## Agency workers

20. Where there is no worker's contract between the agency worker and the agent or the principal, an agency worker (as defined in paragraph 11) is treated as a worker for the purposes of the new duties.
21. The agent or principal will be the agency worker's employer depending on which is responsible for paying the worker under any arrangement between the agent and the principal. Consequently, whichever is responsible will be subject to the employer duties. If it cannot be determined who is responsible for paying the worker, for example, if the contract or arrangement between the principal and agent did not cover this particular issue, then whichever actually pays the worker will be the employer.

## Secondees

22. Individuals working on secondment from another company will usually remain a worker for the company from which they are seconded.
23. Therefore, an employer with a secondee is unlikely to have any employer duties in relation to that individual, but the employer who has seconded their worker usually will.
24. However, employers should examine the contractual and remuneration arrangements for secondees to ensure the correct party carries out the employer duties.

## Seafarers

25. Any person employed or engaged in any capacity on board a ship or hovercraft is to be treated as if they were a worker.

## Offshore workers

26. Offshore workers are people who are working in the territorial waters of the UK or in connection with the exploration of the sea bed or subsoil, or the exploitation of their natural resources, in the UK sector of the continental shelf (including the UK sector of a cross-boundary petroleum field).
27. They will need to be assessed in the same way as other individuals and will be classed as a worker if they meet the criteria in paragraph 9.

## Persons who are not workers

28. As described in paragraph 15, an individual working under a contract for services with the employer (ie as a self-employed contractor) is not normally a worker. In addition, there are a few situations where one or more individuals are employed, but they are not classified as workers. Employer duties do not apply to these people.

## Directors

29. If an individual is a director of a company and the company has no other employees, that individual is not a worker by virtue of any office that they hold or contract of employment under which they work. The company is therefore not subject to the employer duties in relation to that individual.

30. Similarly, if the company has more than one director, none of whom have a contract of employment with the company, none of the directors is a worker and the company is not subject to employer duties in relation to those directors. But if two or more directors have a contract of employment with the company, those directors will become workers. The company will have automatic enrolment duties in relation to them, with the modifications explained in paragraphs 107 to 109 below.
31. Where the company takes on one or more workers in addition to the directors, the company will have employer duties in relation to those workers, but will not have duties in relation to any of the directors unless the directors have contracts of employment with the company. Again where the company has duties in relation to any director, these will be modified as set out in paragraphs 107 to 109 below.
32. These rules apply to anyone holding office as a director. This does not include a person who is a director in name only. In the case of a company, it means a director formally appointed under the Companies Act 2006, and also anyone acting as a director in the sense of having a decision-making role in the corporate governance of the company even if they have not been properly appointed. In the case of corporate bodies other than companies, it means anyone holding an office of director created by the establishing legislation or Royal Charter.

## Armed forces

33. Any serving member of the naval, military or air forces of the Crown is not classified as a worker.
34. Members of the following forces are not workers when they are carrying out their duties as members of that force:
  - Combined Cadet Force
  - Sea Cadet Corps
  - Army Cadet Force
  - Air Training Corps.

## Office-holders

35. An office-holder is not normally a worker.
36. An office-holder has no contract or service agreement in relation to their appointment, nor do they usually receive a salary or regular remuneration for their services. They may however, be paid a fee for their services or to cover their expenses.



**Employers  
need to  
understand  
contractual  
relationships**

37. Examples of office-holders who are not normally workers include:
- non-executive directors
  - company secretaries
  - board members of statutory bodies
  - trustees.
38. It is very important to consider the specific circumstances of the individual. Sometimes a person who appears to be an office-holder may also have a contract of service for part of their duties and will therefore be a worker in respect of those duties. The particular position of directors is discussed in paragraphs 29 to 32 above and 107 to 109 below.

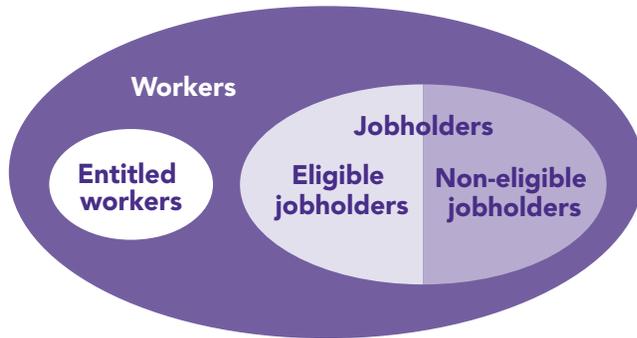
## Volunteers

39. Volunteers would not normally have a contract of service and are not workers. However, this may change if any form of payment or non-financial benefit is given to them.

# The different categories of 'worker'

40. Once an employer has identified that they have a worker, the next step is to ascertain what type of worker they have. It is only in respect of certain types of workers that an employer will have duties.
41. There are two main categories of worker for which the employer duties apply:
- Jobholders
  - Entitled workers.
42. The category of jobholder then further subdivides into two groups:
- Eligible jobholders
  - Non-eligible jobholders.
43. Figure 1 illustrates how the different categories of worker relate to each other. (Note that the size of the components is not indicative.)

**Figure 1**  
**The different categories of worker**



44. The employer duties apply in respect of:
- eligible jobholders
  - non-eligible jobholders
  - entitled workers.
45. The duties are different for each of these categories and are described in the section called Employer duties and safeguards.
46. The category into which a worker falls is determined by their age and whether they earn qualifying earnings.

## Eligible jobholders

47. They are called this because they are 'eligible' for automatic enrolment. These are workers who:
- are aged at least 22 but under state pension age
  - are working or ordinarily work in the UK under their contract
  - have qualifying earnings payable by the employer in the relevant pay reference period that are above the earnings trigger for automatic enrolment<sup>1</sup>.

<sup>1</sup>  
The earnings thresholds for the current tax year are available on our website. The DWP will review these figures annually. We will publish the revised figures on our website as soon as they are announced. Visit [www.tpr.gov.uk/earnings-thresholds](http://www.tpr.gov.uk/earnings-thresholds) for details.

## Non-eligible jobholders

48. They are called this because they are not eligible for automatic enrolment but can choose to opt in to a pension scheme. These include workers who either:

- are aged between 16 and 74
- are working or ordinarily work in the UK under their contract
- have qualifying earnings payable by the employer in the relevant pay reference period but below the earnings trigger for automatic enrolment<sup>2</sup>.

or

- are aged between 16 and 21, or state pension age and 74
- are working or ordinarily work in the UK under their contract
- have qualifying earnings payable by the employer in the relevant pay reference period that are above the earnings trigger for automatic enrolment<sup>2</sup>.

## Jobholders

49. Together, non-eligible jobholders and eligible jobholders make up the jobholders group. So, jobholders are workers who:

- are aged between 16 and 74
- are working or ordinarily work in the UK under their contract
- have qualifying earnings payable by the employer in the relevant pay reference period<sup>2</sup>.

## Entitled workers

50. They are called this because they are 'entitled' to join a pension scheme. These are workers who:

- are aged between 16 and 74
- are working or ordinarily work in the UK under their contract
- do not have qualifying earnings payable by the employer in the relevant pay reference period<sup>2</sup>.

<sup>2</sup>  
The earnings thresholds for the current tax year are available on our website. The DWP will review these figures annually. We will publish the revised figures on our website as soon as they are announced. Visit [www.tpr.gov.uk/earnings-thresholds](http://www.tpr.gov.uk/earnings-thresholds) for details.

## Summary of worker category

- 51. Table 1 illustrates the categories relative to age and earnings for workers who are working or ordinarily work in the UK.
- 52. **Detailed guidance no. 3 – Assessing the workforce** explains the steps an employer must take to correctly identify the category of worker, in particular how to assess whether a worker is working or ordinarily works in the UK and whether qualifying earnings are payable to a worker in the relevant pay reference period.

**Table 1**  
**Categories of worker relative to age and earnings**

Earnings	Age (inclusive)		
	16-21	22-SPA*	SPA*-74
Lower earnings threshold or below	Entitled worker		
More than lower earnings threshold up to and including the earnings trigger for automatic enrolment	Non-eligible jobholder		
Over earnings trigger for automatic enrolment	Non-eligible jobholder	Eligible jobholder	Non-eligible jobholder

\*State pension age

# Employer duties and safeguards

53. All employers with at least one worker, regardless of their age or earnings, must:
- declare their compliance with The Pensions Regulator. This is an online process. You can find out more about it at: [www.tpr.gov.uk/dec-compliance](http://www.tpr.gov.uk/dec-compliance)
  - adhere to the safeguards. More information on the safeguards can be found in paragraphs 79-82.
54. If the employer has workers and chooses to use postponement, they will also need to give their workers information about how postponement affects them. (An employer can use postponement to postpone the relevant employer duty for the worker for a period of up to three months. Postponement is described in **Detailed guidance no. 3a – Postponement.**)
55. The employer duties for each category of worker are described next and table 2 provides a summary.

## Eligible jobholders

56. An employer must automatically enrol an eligible jobholder into an automatic enrolment scheme on the eligible jobholder's automatic enrolment date (or deferral date, where postponement has been used). Identifying the automatic enrolment date is explained in **Detailed guidance no. 3c – Having completed the assessment.** The deferral date is explained in **Detailed guidance no. 3a – Postponement.**
57. Part of the automatic enrolment process also requires an employer to give the eligible jobholder information telling them:
- they have been, or will be, automatically enrolled and what this means for them
  - their right to opt out and their right to opt back in.
58. The employer will also have to give information about the eligible jobholder to the scheme.
59. Full details of this information can be found in **Detailed guidance no. 5 – Automatic enrolment.**

60. The eligible jobholder may choose to opt out of scheme membership once they have been automatically enrolled. 'Opting out' has a specific meaning in the new employer duties. It refers to the provision of a mechanism under the law which has the effect of undoing active membership, as if the worker had never been a member of a scheme on that occasion. It can only happen within a specific time period known as the 'opt-out period'. More information on opt-outs can be found in **Detailed guidance no. 7 – Opting out**.
61. An employer will continue to have responsibilities towards the individual who has opted out. One of these is to automatically re-enrol them every three years, if they are still an eligible jobholder working for that employer.
62. The employer must pay employer contributions to the scheme.

## Non-eligible jobholders

63. Non-eligible jobholders do not meet the additional criteria to be eligible jobholders, so do not need to be automatically enrolled. However, they have a right to opt in to an automatic enrolment scheme, if they choose, so an employer still has duties in relation to them.
64. An employer must give their non-eligible jobholders certain information about both the right of a jobholder to opt in to an automatic enrolment scheme and the right of an entitled worker to join a pension scheme.
65. The employer must give this information to the non-eligible jobholder within six weeks of the earlier of the date on which they become a non-eligible jobholder or the date they become an entitled worker, eg the employer's staging date or, if after staging, the non-eligible jobholder's first day of employment.
66. This requirement does not apply if the employer has previously given this information, for example because the employer chose to use postponement in respect of the non-eligible jobholder and gave them a postponement notice.
67. If a non-eligible jobholder chooses to opt in to a pension scheme, they must do so by giving the employer an 'opt-in notice'. On receipt of a valid opt-in notice, the employer must enrol the non-eligible jobholder into an automatic enrolment scheme by following the automatic enrolment process.
68. The employer must pay employer contributions to the scheme.
69. **Detailed guidance no. 6 – Opting in, joining and contractual enrolment** provides more detail.

## Entitled workers

70. Entitled workers do not need to be automatically enrolled. However, they do have a right to join a pension scheme. The pension scheme the employer chooses to use can be a different scheme to the one they may be using for automatic enrolment.
71. An employer must give their entitled workers certain information about both the right of a jobholder to opt in to an automatic enrolment scheme and the right of an entitled worker to join a pension scheme.
72. The employer must give this information to the entitled worker within six weeks of the earlier of the date on which they become a non-eligible jobholder or the date they become an entitled worker, eg the employer's staging date or, if after staging, the entitled worker's first day of employment.
73. This requirement does not apply if the employer has previously given this information for example because the employer chose to use postponement in respect of the entitled worker and gave them a postponement notice.
74. If an entitled worker chooses to join a pension scheme, they must do so by giving the employer a 'joining notice'. The employer must then arrange membership of a scheme for them.
75. The employer will have to deduct contributions on behalf of the entitled worker and pay these into the scheme.
76. However, the employer does not have to pay into the scheme themselves, unless they choose to do so, or have chosen a scheme that requires an employer contribution.
77. **Detailed guidance no. 6 – Opting in, joining and contractual enrolment** provides more detail.

## How the categories relate and what the employer must do for each

78. Table 2 sets out the different categories of worker and illustrates what the employer must do (including the employer duties) for each.

**Table 2: Categories of workers and what the employer must do for each**

Category of worker	What the employer has to do	Related guidance
Eligible jobholder	<ul style="list-style-type: none"> <li>Automatically enrol</li> <li>Make ongoing employer contributions to the scheme</li> </ul>	Detailed guidance no. 5 – Automatic enrolment
	Process any opt-out notice	Detailed guidance no. 7 – Opting out
	Automatically re-enrol approximately every three years or immediately if specific events caused active membership to cease	Detailed guidance no.11 – Automatic re-enrolment
	Keep records of the automatic enrolment process	Detailed guidance no. 9 – Keeping records
	If using postponement, give a notification to the eligible jobholder	Detailed guidance no. 3a – Postponement
Non-eligible jobholder	Give information about the right of a jobholder to opt in and the right of an entitled worker to join	Detailed guidance no. 10 – Information to workers
	If the non-eligible jobholder decides to opt in: <ul style="list-style-type: none"> <li>Arrange pension scheme membership</li> <li>Make ongoing employer contributions to the scheme</li> </ul>	Detailed guidance no. 6 – Opting in, joining and contractual enrolment
	Process any opt-out notice	Detailed guidance no. 7 – Opting out
	Keep records of the enrolment process	Detailed guidance no. 9 – Keeping records
	Automatically re-enrol if specific events caused active membership to cease	Detailed guidance no.11 – Automatic re-enrolment

continued..

Category of worker	What the employer has to do	Related guidance
Entitled worker	Give information about the right of a jobholder to opt in and the right of an entitled worker to join	Detailed guidance no. 10 – Information to workers
	If the entitled worker decides to join, arrange pension scheme membership	Detailed guidance no. 6 – Opting in, joining and contractual enrolment
	Keep records of the joining process	Detailed guidance no. 9 – Keeping records
Worker	If using postponement at their staging date or the worker's first day of employment, give a notification to the worker.	Detailed guidance no. 3a – Postponement

### Important reminder

If the employer has one or more workers, they must complete a declaration of compliance with the regulator no later than five months after their staging date. More details about this process and a full list of the employer duties are available on our website.

## Safeguards for all workers

79. There are a number of safeguards in place to protect the rights of individuals to have access to pension saving. These apply to all workers, irrespective of their category, although as with the duties, different safeguards apply to different categories of workers.
80. The safeguards are listed below and **Detailed guidance no. 8 – Safeguarding individuals** provides further information.

81. The safeguards mean employers must ensure the following:

- They do not take any action or make any omission by which the eligible jobholder ceases to be an active member of the qualifying scheme. For more information about the criteria that must be met for a scheme to be a qualifying scheme, see **Detailed guidance no. 4 – Pension schemes**
- They do not take any action or make any omission by which the scheme ceases to be a qualifying scheme
- They do not take any action for the sole or main purpose of inducing a jobholder to opt out of a qualifying scheme, or a worker to give up membership of a pension scheme (this is known as ‘inducement’)
- During recruitment, they or their representatives do not ask any questions or make any statements that either states or implies that an applicant’s success will depend on whether they intend to opt out of the pension scheme (this is known as ‘prohibited recruitment conduct’)
- They do not breach employment rights for individuals not to be unfairly dismissed or suffer detriment on grounds related to the new employer duties.

## How the categories relate and what is prohibited for an employer for each

82. Table 3 sets out the different categories of workers and illustrates what the employer must not do (including the safeguards) for each.

**Table 3: Categories of worker and what the employer must not do**

Category of worker	Safeguards applicable
Eligible jobholder	All
Non-eligible jobholder	All
Entitled worker	<ul style="list-style-type: none"> <li>• Inducement</li> <li>• Prohibited recruitment conduct</li> <li>• Employment rights for individuals not to be unfairly dismissed or suffer detriment on grounds related to the new employer duties</li> </ul>
Any other worker	<ul style="list-style-type: none"> <li>• Prohibited recruitment conduct</li> <li>• Employment rights for individuals not to be unfairly dismissed or suffer detriment on grounds related to the new employer duties</li> </ul>

## Exceptions from the employer duties in specific circumstances

83. In certain circumstances the employer duties in relation to an eligible jobholder, non-eligible jobholder or entitled worker are changed or do not apply. This is the case where the conditions for any of the exceptions from the duties are met. The safeguards continue to apply in relation to the worker as usual.
84. The exceptions are:
- a. a worker who has opted out or ceased active membership of a qualifying scheme
  - b. a worker who has given notice or been given notice of the end of their employment
  - c. a worker where the employer has reasonable grounds to believe the worker is protected from tax charges on their pension savings under HMRC's primary, enhanced, fixed or individual protection requirements (see paragraph 103)
  - d. a worker who holds the office of a director of the employer (paragraph 32 explains what it means to hold office as a director)
  - e. a worker who is a member (partner) of a Limited Liability partnership and is not treated for income tax purposes as being employed by that limited liability partnership under section 863A of the Income Tax (Trading and other Income) Act 2005 (HMRC's salaried members rules)
  - f. a worker who has been paid a winding up lump sum payment (see paragraphs 115 to 121) whilst in the employment of the employer, and during the 12 month period that started on the date the payment was made, the worker:
    - i. ceased employment with the employer after the payment has been paid, and
    - ii. was subsequently re-employed by the same employer
  - g. a worker who meets the definition of a 'qualifying person' for the purposes of separate UK legislation on occupational pension schemes and cross-border activities within the European Union.
85. The modification of the employer duties varies according to the exception that applies. In some circumstances the employer is given the choice whether to comply with a duty or not, while in other circumstances the duty is removed altogether. It is also possible for a worker to meet the conditions for more than one exception at the same time.

## Ceasing active membership of a qualifying scheme

86. A worker may already be an active member of a qualifying scheme on the employer's staging date as a result of contractual enrolment. On or after the staging date, a worker may become an active member of a qualifying scheme as a result of automatic enrolment, opt in or automatic re-enrolment, or because the employer has chosen to use or continue to use contractual enrolment instead.
87. A worker who is an active member of a qualifying scheme may choose to cease that active membership at any point either through opting out in the opt-out period or by ceasing active membership under the scheme rules. At the point that they cease active membership they may no longer be an eligible jobholder or even a jobholder.
88. This exception applies to a worker who has ceased active membership, at their own request, of:
  - a. a qualifying pension scheme (whether that be by opting out or under the scheme rules), or
  - b. a pension scheme that would have been a qualifying scheme if they had been a jobholder.
89. In other words it applies in relation to a worker who opted out or ceased active membership of a scheme which met the qualifying criteria for them, irrespective of what category of worker they were on the day membership ceased. And it applies irrespective of the fact that they may have ceased active membership of the scheme before the employer's staging date.
90. Where this exception applies, the automatic enrolment and automatic re-enrolment duties are modified. All the other duties and safeguards continue to apply as usual. For more information on automatic re-enrolment see **Detailed guidance no. 11 – Automatic re-enrolment**.
91. The exception means the duty to automatically enrol does not apply in respect of any eligible jobholder who has previously opted out or ceased active membership more than 12 months beforehand.
92. Where a worker becomes an eligible jobholder within the 12 month period starting on the date that their active membership ceased at their request, then the automatic enrolment duty to that worker becomes optional. The employer can choose to automatically enrol the eligible jobholder if they wish, but they are not required to.

93. Similarly where the employer's automatic re-enrolment date falls within the 12 month period starting on the date active membership ceased at the worker's request, then the employer can also choose whether to apply the automatic re-enrolment duty to that worker or not.

## Leaving employment

94. When a worker wishes to resign their employment (including on retirement) they must give their employer notice of their intent. And where an employer wishes to dismiss a worker from their employment they must give the worker notice of their intent. This exception applies in either scenario.
95. The exception does not apply where the worker is at risk of dismissal or redundancy but notice of the end of employment has not actually been given. Nor does it apply to workers who are on fixed-term contracts, including short term contract workers, as their employment comes to an end on the expiry of the fixed term, rather than by notice to terminate an otherwise ongoing employment relationship.
96. Where this exception applies, the automatic enrolment, automatic re-enrolment, opt- in and joining duties are all modified:
- the automatic enrolment duty becomes optional – the employer can choose to automatically enrol the worker but is not required to. However, there is limited application of this modification when the worker is a worker to whom the employer has applied the transitional period for schemes with defined benefits (see paragraph 99)
  - the automatic re-enrolment duty becomes optional – the employer can choose to automatically re-enrol the worker but is not required to
  - if the employer is given a joining notice, they are not required to make arrangements to create active membership of a pension scheme.
97. The information duty and safeguards continue to apply as usual throughout the notice period.
98. If notice is withdrawn these modifications fall away and the full employer duties start to apply again in relation to the worker and an immediate re-enrolment duty is triggered. See **Detailed guidance no. 11 – Automatic re-enrolment** for more information.

99. If the employer has chosen to apply the transitional period for schemes with defined benefits<sup>3</sup> to a worker, and the end of the transitional period has passed, the automatic enrolment duty will only be optional where:
- the employer's first enrolment date (the date that they first have an eligible jobholder<sup>4</sup>) falls within the period 19 August 2017 to 30 September 2017, and
  - the worker to whom the transitional period has been applied gives notice or is given notice to end employment before the end of the 6 week period from the first enrolment date, and
  - the worker to whom the transitional period has been applied meets the automatic enrolment criteria before the end of the 6 week period from the first enrolment date.
100. Unless the conditions in the bullets above apply, the employer will still be required to automatically enrol a worker to whom they had applied the transitional period for schemes with defined benefits even if notice to end employment has been given.
101. Where the conditions in paragraph 99 are met but the notice is withdrawn, immediate automatic re-enrolment is not triggered.

## Primary, Enhanced, Fixed or Individual tax protection on pension savings

102. A worker who has built up pension savings above the Lifetime Allowance for HMRC purposes is protected from tax charges on those savings under HMRC's primary, enhanced, fixed or individual protection requirements.
103. Under these provisions a worker may have:
- Primary protection
  - Enhanced protection
  - Fixed protection 2012
  - Fixed protection 2014
  - Fixed protection 2016
  - Individual protection 2014, or
  - Individual protection 2016
104. This exception applies where an employer has reasonable grounds to believe that a worker has one of these protections from tax charges on their pension savings.

<sup>3</sup> The transitional period for schemes with defined benefits allows an employer who provides a pension scheme with defined benefits (both defined benefit pension schemes and hybrid pension schemes where a defined benefit pension is offered) to choose to delay automatic enrolment (until after 30 September 2017) for workers who meet certain conditions. For more information see **Detailed guidance no.3b – Transitional period for schemes with defined benefits.**

<sup>4</sup> For more information see paragraphs 20 to 24 of **Detailed guidance no.3b – Transitional period for schemes with defined benefits**

105. In the regulator's view, 'having reasonable grounds to believe' means that the employer must actually believe that the worker has the protection, and there must be evidence which would lead a reasonable person to believe this. Workers have to apply to HMRC for these protections and so will have documentation from HMRC detailing the type of protection from tax charges they have. Sight of a copy of the certificate issued by HMRC to the worker for example would be one way of giving the employer reasonable grounds to believe that the relevant protection applied, as would documented confirmation from the worker that they have this protection. Other evidence from the worker may also be sufficient.
106. Where this exception applies, the employer can choose whether to apply the automatic enrolment duty or automatic re-enrolment duty to that worker in the event either duty is triggered but is not required to. All the other duties and safeguards continue to apply as usual.

## Directors

107. This exception applies to a worker who holds the office of director with the employer. Paragraph 32 explains what it means to hold office as a director.
108. Where this exception applies, the employer can choose whether to apply the automatic enrolment duty or automatic re-enrolment duty to that worker in the event either duty is triggered but is not required to. All the other duties and safeguards continue to apply as usual.
109. Employers should note the interaction with the exemption from the definition of worker described at paragraphs 29 to 32. Their first step will be to determine whether the director falls within the definition of a worker. It is only if they do that this exception to the automatic enrolment and automatic re-enrolment duties applies.

## Partners in Limited Liability Partnerships

110. In 2014 the Supreme Court ruled in *Clyde & Co v Bates van Winkelhof* that a partner in a Limited Liability Partnership (LLP) was a worker under the Employment Rights Act 1996 (the ERA), in the particular circumstances of the case.
111. Given the similarity in the definition of worker in the ERA and the Pensions Act 2008, the regulator's view is that an LLP should assume that the Supreme Court's decision is equally applicable to the Pensions Act 2008 for automatic enrolment purposes.
112. The effect of this is not that every partner in an LLP is necessarily a worker for automatic enrolment purposes, rather that they could be a worker for those purposes.
113. This exception applies to an LLP partner who satisfies the conditions to be a worker employed by the LLP, but who is not treated for income tax purposes as being employed by LLP under section 863A of the Income Tax (Trading and other Income) Act 2005. In other words, the partner is not treated by HMRC as a 'salaried member'.
114. Where this exception applies, the employer can choose whether to apply the automatic enrolment duty or automatic re-enrolment duty to the worker in the event either duty is triggered but is not required to. All the other duties and safeguards continue to apply as usual.

## Winding-up lump sum payments

115. Under HMRC provisions the trustees of defined contribution (DC) occupational pension schemes in wind-up are allowed to commute sums of under £18,000 provided certain conditions are met. One of these conditions for members below retirement age is that the employer gives an undertaking to HMRC not to contribute to a registered pension scheme for 12 months after the commuted payment is taken in respect of the worker who has been paid the commuted sum. The payment of this commuted sum is known as a 'winding-up lump sum payment'.
116. This exception applies where a worker has:
  - a. been paid a winding-up lump sum payment whilst in the employment of the employer, and
  - b. during the 12 month period starting on the date the winding up lump sum was paid, they:
    - i. ceased employment with the employer and
    - ii. were subsequently re-employed by the same employer.

117. Where this exception applies the automatic enrolment, re-enrolment, opt in, joining and information duties are all modified:

- the automatic enrolment duty does not apply in relation to a worker who was paid the winding-up lump sum payment more than 12 months before they meet the eligible jobholder criteria provided that they ceased employment and were re-employed during the 12 month period starting on the date the winding up lump sum was paid
- the automatic enrolment duty becomes optional in relation to a worker who meets the eligible jobholder criteria within the 12 month period starting on the date the winding up lump sum was paid
- the automatic re-enrolment duty becomes optional in relation to a worker who meets the eligible jobholder criteria within the 12 month period starting on the date the winding-up lump sum was paid
- the opt in duty does not apply in relation to a worker during the 12 month period starting on the date the winding-up lump sum was paid
- the joining duty does not apply in relation to a worker during the 12 month period starting on the date the winding-up lump sum was paid
- the requirement to give information about the right of a jobholder to opt in to an automatic enrolment scheme and the right of an entitled worker to join a pension scheme does not apply in relation to a worker during the 12 month period starting on the date the winding-up lump sum was paid. For more information on the different information requirements see **Detailed guidance no. 10 – Information to workers.**

118. The automatic re-enrolment duty, opt in, joining and the information duties apply as usual from the end of the 12 month period that started on the date the winding up lump sum was paid. The safeguards continue to apply as usual throughout the 12 month period and after the end of the period.

119. Employers should note that these modifications only apply where the worker has been paid the winding- up lump sum whilst in their employment and they have subsequently ceased employment and been re-employed by the same employer during the 12 month period starting on the date the winding up lump sum was paid. All the employer duties and safeguards continue to apply as usual where the worker has continued to be employed by the employer who gave the undertaking, or if the automatic enrolment date falls after the payment was made but before employment ceased.

120. Offering the option of a winding-up lump sum is not obligatory. An employer should consider their obligations under the employer duties and whether they are in a position to give the required undertaking to HMRC. Relevant to their considerations are the following:
- the employer's staging date and whether this is more than 12 months away from the point of giving the undertaking (if postponement is used then that needs to be taken into account)
  - the workers to whom a winding-up lump sum payment is being offered, for example: whether they are likely to meet the eligible jobholder criteria on or after the staging date or at any time within the 12 month period of the undertaking to HMRC.
121. If the conclusion from consideration of the matters above is that the worker is likely to have to be automatically enrolled by the same employer during the 12 month period of the undertaking to HMRC, the employer is unlikely to be in a position to give the required undertaking.

## 'Qualifying person' for cross border legislation

122. An employer is exempt from a number of the employer duties and safeguards if they are a 'European employer' in respect of a particular individual. A European employer is someone who employs an individual who meets the definition of 'qualifying person' (and where other conditions are met, see paragraph 123). This is relevant for the purposes of separate UK legislation on occupational pension schemes and cross-border activities within the European Union. In a minority of cases, a worker whom the employer has assessed as an eligible jobholder, non-eligible jobholder or entitled worker for the purposes of the employer duties and safeguards, may also meet the definition of a 'qualifying person'.
123. A 'qualifying person' is an individual employed under a contract of service and whose place of work under that contract is sufficiently located in an EEA state other than the UK (the host EEA state) so that the relationship with the employer is subject to the social and labour law (relevant to the field of occupational pension schemes) of that EEA state.

124. As a general rule, people who are required by their employment contract to work habitually in another state for an indefinite period, are likely to be subject to any relevant social and labour laws in that state. Therefore, they are likely to be a 'qualifying person' if they have a contract of service. However, please note that workers on secondment fall outside the definition of 'qualifying person'. More information on seconded workers for the purposes of the cross-border requirements is available on our website:  
[www.tpr.gov.uk/crossborder](http://www.tpr.gov.uk/crossborder)

125. Where an employer assesses a worker as:

- working or ordinarily working in the UK (see **Detailed guidance no. 3 – Assessing the workforce**), and
- aged between 16 and 74, and
- meeting the definition of a qualifying person, and
- the employer proposes to, or is making contributions in respect of that worker to an occupational pension scheme

then the employer is exempted from a number of the employer duties and safeguards for that worker.

126. These duties and safeguards from which the employer is exempted in respect of a worker that meets the criteria in paragraph 123 are:

- automatic enrolment of any eligible jobholder who is also a qualifying person
- automatic re-enrolment of any eligible jobholder who is also a qualifying person
- making arrangements for active membership of an automatic enrolment scheme following an opt-in notice from any jobholder who is also a qualifying person
- making arrangements for active membership of a pension scheme following a joining notice from any entitled worker who is also a qualifying person
- ensuring that they do not take any action or make any omission by which a jobholder who is also a qualifying person ceases to be an active member of the qualifying scheme, without putting them into an alternative qualifying scheme
- ensuring they do not take any action or make any omission by which the scheme ceases to be a qualifying scheme without providing an alternative qualifying scheme
- ensuring they do not take any action for the sole or main purpose of inducing a jobholder to opt out of a qualifying scheme, or a worker to give up membership of a pension scheme.

127. An employer should note that the exemption from these duties only applies if the employer proposes to or is making contributions in respect of that worker to an occupational pension scheme. If the pension scheme the employer is using to fulfil their duties is a contract based scheme (also known as a 'personal pension'), the duties continue to apply in full, irrespective of whether the worker meets the 'qualifying person' definition.

## Keep track of age and earnings

128. Changes in age and earnings may see a worker move between the different categories of worker. The employer duties in relation to that worker will therefore change. For this reason, it is important to monitor age and earnings – this is especially important for workers who earn below the qualifying earnings threshold, or who are under 22 years old.

129. An employer will need to put procedures in place to monitor when their workers move from one category of worker to another, and alert them as to what this means in practice.

## Examples of monitoring age and earnings

### Reaching age 22

Simon is aged 20. He earns more than the earnings trigger for automatic enrolment. His employer does not need to automatically enrol him because he is not yet 22 years old. However, Simon can choose to opt in to the scheme. His employer will need to give him information about both the right of a jobholder to opt in and the right of an entitled worker to join.

The employer will also need to keep track of Simon's age because, on his 22nd birthday, Simon will then need to be automatically enrolled as he will become an eligible jobholder (assuming he still has earnings above the earnings trigger for automatic enrolment).

### Earning qualifying earnings

Jasmine is 27 years old and works part time in her local shop. Her employer does not need to automatically enrol her because her earnings are below the lower level of qualifying earnings. However, Jasmine is an entitled worker so her employer will need to give her information about both the right of a jobholder to opt in and the right of an entitled worker to join.

When her children start school, Jasmine starts working more hours, which pushes her earnings above the earnings trigger for automatic enrolment. Jasmine's employer must now automatically enrol her, as she has become an eligible jobholder.

## What next?

All employers should find out if they are subject to the new employer duties and, if affected, when these duties will apply to them. **Detailed guidance no. 2 – Getting ready** provides more information on the steps an employer can take to prepare for automatic enrolment.

Further information to help employers comply with the new duties and safeguards can be found in other guidance in this series.



**Employers should identify if they are subject to the new duties**

## Changes from last version

We have updated this guidance to include reference to those workers to whom the employer has applied the transitional period in line for the end of the transitional period on 30 September 2017. This has resulted in new paragraphs 99 to 101 being added to describe the interaction of the exception where notice is given when the worker is to be automatically enrolled following the end of the transitional period. As a result paragraph numbers will have changed since the last versions.

The DWP have amended the regulations to add Fixed protection 2016 and Individual Protection 2016 to the exception where an employer has reasonable grounds to believe that a worker has protection from tax charges on their pension savings. These amendments came into force on 6 March 2017. As a result we have amended paragraph 103 (previously paragraph 100 in the last version).

# Key terms

## Summary of the different categories of worker

Category of worker	Description of worker
Worker	An employee or someone who has a contract to perform work or services personally, that is not undertaking the work as part of their own business.
Jobholder	A worker who: <ul style="list-style-type: none"><li>• is aged between 16 and 74</li><li>• is working or ordinarily works in the UK under their contract</li><li>• has qualifying earnings.</li></ul>
Eligible jobholder	A jobholder who: <ul style="list-style-type: none"><li>• is aged between 22 and state pension age</li><li>• has qualifying earnings above the earnings trigger for automatic enrolment.</li></ul>
Non-eligible jobholder	A jobholder who: <ul style="list-style-type: none"><li>• is aged between 16 and 21 or state pension age and 74</li><li>• has qualifying earnings above the earnings trigger for automatic enrolment</li></ul> or <ul style="list-style-type: none"><li>• is aged between 16 and 74</li><li>• has qualifying earnings equal to or below the earnings trigger for automatic enrolment.</li></ul>
Entitled worker	A worker who: <ul style="list-style-type: none"><li>• is aged between 16 and 74</li><li>• is working or ordinarily works in the UK under their contract</li><li>• does not have qualifying earnings.</li></ul>

## How to contact us

PO Box 16314  
Birmingham  
B23 3JP

T 0845 600 1011

F 0845 606 9970

E [customersupport@autoenrol.tpr.gov.uk](mailto:customersupport@autoenrol.tpr.gov.uk)

[www.thepensionsregulator.gov.uk](http://www.thepensionsregulator.gov.uk)

[www.trusteetoolkit.com](http://www.trusteetoolkit.com)

### **Detailed guidance for employers no. 1**

Employer duties and defining the workforce:  
An introduction to the new employer duties

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