



Safeguarding individuals

The new safeguards for workers

February 2012 v3.0

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The Pensions
Regulator

About this guidance

- This guidance is aimed at employers and professional advisers who will support employers to comply with the new employer duties.
- It contains essential information that will help them to ensure they are compliant with the new employer duties and safeguards.
- In this guidance we use 'jobholder' to describe both eligible jobholders (who have to be automatically enrolled) and non-eligible jobholders (who have a right to opt in).
- In conjunction with this guidance, employers should also read the following guidance:
 - **Detailed guidance no. 1 – Employer duties and defining the workforce**
 - **Detailed guidance no. 4 – Pension schemes**
 - **Detailed guidance no. 7 – Opting out**
- 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.
- We have identified **7 steps to prepare for automatic enrolment**, which summarises the main steps towards achieving compliance. Employers may find this helpful when navigating this guidance: www.tpr.gov.uk/7-steps
- It will be helpful to employers to be familiar with the different categories of workers. These are explained in detail in **Detailed guidance no. 1 – Employer duties and defining the workforce** or a quick reminder is available in **Key terms** on page 14.
- This guidance has been updated as a result of recent legislative changes including the Pensions Act 2011 receiving Royal Assent. Additionally, some content has been updated as a result of feedback from employers and general review. The appendix provides details of significant changes made to this guidance. Further minor changes have been made but where these do not significantly impact on the structure or content, they are not listed in the appendix.
- We will be updating this guidance when the revised figure for the lower level of qualifying earnings is published.

**Employers
must comply
with the new
duties and
safeguards**

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Key points

- Safeguards have been put in place to protect individuals under the workplace pensions reform. These apply to jobholders, entitled workers and also extend to job applicants.
- An employer must not take, or fail to take, any action that results in a jobholder ceasing active membership of a qualifying pension scheme, or which results in such a scheme ceasing to be a qualifying scheme.
- It is important that any jobholder's or entitled worker's decision to opt out of, or leave, their pension scheme without joining another should be taken freely and without influence by the employer.
- An employer must not try to screen job applicants on grounds relating to potential pension scheme membership – this is known as prohibited recruitment conduct.



**Safeguards
are in place
to protect
individuals**

Section 1: Introduction


1. The workplace pensions reform introduces new duties and safeguards that employers must adhere to. The safeguards are intended to protect individuals, meaning there are certain things the employer must not do, both before a person starts working for them and once that person is a member of a pension scheme with that employer.

Who the safeguards protect

2. The safeguards have been put in place to protect entitled workers and jobholders, but the prohibited recruitment safeguard extends this protection to job applicants as well.

Important note

3. This particular element of the legislation will come into force for all employers from July 2012, and not from an employer's staging date. So, if an employer has a staging date of 1 September 2015, they must ensure compliance with the safeguards detailed in this guidance from the date the law becomes effective in July 2012.



**The employer
must not treat a
worker unfairly**

Section 2: Stopping active membership of a qualifying scheme

4. Unless the jobholder asks to leave, or is already an active member of another qualifying pension scheme with that employer, the employer must not take, or fail to take, any action that results in either:
 - the jobholder ceasing to be an active member of a qualifying scheme or
 - the scheme of which they are an active member ceasing to be a qualifying scheme.
5. If either of the above should happen, the employer must automatically enrol the jobholder back into an automatic enrolment scheme, with effect from the day after active membership ceases, or the scheme ceased to be a qualifying scheme.
6. If a third party does anything that causes a jobholder's active membership to cease, or for the scheme to stop being qualifying, the employer must also automatically enrol the jobholder back into an automatic enrolment scheme with effect from the day after active membership ceases, or the scheme ceased to be a qualifying scheme.
7. Employers should note that as long as a jobholder is earning over the qualifying earnings threshold (currently £5,035¹), they must remain in an automatic enrolment scheme unless they ask to leave. Therefore if active membership has been stopped as detailed above and the jobholder's earnings are over this threshold, the employer must automatically enrol the jobholder back into an automatic enrolment scheme straight away.
8. More about qualifying schemes and automatic enrolment schemes can be found in **Detailed guidance no. 4 – Pension schemes**.

¹ This is in 2006-2007 terms. On 15 December 2011, the Department for Work and Pensions published a consultation on the amount of the lower level of qualifying earnings for the 2012-2013 tax year.

Section 3: Unfair treatment of workers

9. The employer must not treat a worker unfairly or dismiss the worker on grounds related to the employer duties. For example, an employer cannot deny a worker promotion or other training opportunities because the worker has decided not to opt out of pension scheme membership.
10. If an employer does so, the worker can enforce their rights in an employment tribunal.

Section 4:

Inducements

11. The law relating to inducements is an important safeguard for entitled workers and jobholders.
 12. For the automatic enrolment regime to work effectively, the minority of unscrupulous employers must be deterred from trying to gain an unfair commercial advantage over other compliant employers. It is important that any entitled worker's or jobholder's decision to opt out of, or leave, their current pension scheme should be taken freely and without being influenced by the employer.
 13. This measure is not intended to prevent employers from making pension arrangements that are suitable and appropriate for them in their particular circumstances, provided that the minimum requirements for their particular scheme type are still met. **Detailed guidance no. 4 – Pension schemes** details these requirements.
 14. Neither is it intended to stop employers from providing information about, and promoting the benefits of, the workplace pension scheme(s) to which they provide access, although they should avoid giving financial advice about pensions. This is covered in more detail in the **Less clear-cut cases** section on page 10.
- ### What is an inducement?
15. An inducement is any action taken by the employer, the sole or main purpose of which is to attempt to induce:
 - a jobholder to opt out without becoming an active member of a qualifying scheme with effect from the date on which they originally became an active member (ie their automatic enrolment date or enrolment date)
 - a jobholder or an entitled worker to cease active membership of a pension scheme without becoming an active member of another scheme with effect from the day after the original membership ceased.
 16. It does not matter whether the employer's inducement successfully persuades the person to opt out or cease membership without becoming an active member of another scheme. It is the action taken by the employer with a view to inducing a person to opt out or cease membership that could be in breach of the law.
 17. Employers should note that a new scheme must be a qualifying scheme for a jobholder. However, it can be a non-qualifying scheme for an entitled worker, provided it is tax registered in the UK and, if it is a personal pension scheme, has direct payment arrangements in place.
 18. However, there are other issues to consider and we would urge employers to consider their decisions carefully. For example, we would have concerns that members may be disadvantaged where incentive-led transfers out of defined benefit (DB) schemes are taking place. Our **Transfer incentives guidance**, available on our website, has more information:
www.tpr.gov.uk/guidance/incentive-exercises

Can the inducement safeguard be inadvertently breached?

19. The 'sole or main purpose test' is the key to establishing whether a particular action would be regarded as an inducement.



The 'sole or main purpose' test

This is whether the 'sole or main purpose' of the particular action is to persuade or cause an individual to opt out of or leave their pension scheme, without becoming an active member of another scheme.

20. When an employer is considering taking a particular action, they may be unsure whether or not it would be regarded as an inducement. They should apply the 'sole or main purpose' test, as described in the box above.
21. In other words, employers should think carefully about the motivation behind the action they are contemplating.
22. To help employers, we have provided some examples of cases that we are likely to consider to be evidence of clear-cut inducement, and others that would require more consideration. Please note that these examples are not exhaustive and are intended to give an indication of our approach. We will always adopt a case-by-case assessment looking at the specific circumstances of the case when determining whether an inducement breach has occurred.

Cases that appear clear cut

23. Below are two examples of cases where it would appear clear that the employer's intention was to induce opt out/cessation of membership. The regulator is likely to consider each of these as an inducement.

Example 1

The employer tells their jobholders/entitled workers that if they opt out of, or leave, their pension scheme, they will receive any of the following:

- An extended or renewed contract in the case of a short-term worker
- A one-off payment
- A higher salary level
- A promotion.

It is worth noting that the employer has no legal right to recover any financial or other benefit from a jobholder/entitled worker that the employer may have given to them in exchange for their agreement to opt out.

Example 2

Unless they opt out of, or leave, their pension scheme, the employer threatens their jobholders/entitled workers with any of the following:

- Withholding a promotion
- Withholding a pay increase
- Redundancy
- Dismissal.

Inducements of this nature might occur where an employer offers annual bonuses to staff, eg in the year when their eligible jobholders are due to be automatically enrolled, they make it clear that greater levels of bonus will be given to those jobholders who indicate that they intend to opt out of qualifying scheme membership.

Less clear-cut cases

24. There will be many circumstances where the regulator will have to carefully consider the employer's behaviour to decide whether or not a particular action amounts to an inducement. Some examples are provided on this page.
25. The employer should bear in mind the purpose of the safeguards when considering proposed actions. In cases where they are unsure whether or not the proposed action could amount to an inducement, they should seek legal advice.

Example 3

The employer offers their staff a flexible benefits package where membership of a pension scheme is one of a range of benefits on offer.

The employer automatically enrolls all their eligible jobholders into the pension scheme. After being automatically enrolled, some individuals choose to opt out in favour of a non-pensionable benefit or cash alternative. Some may decide that they still want to make pension contributions but at a lower rate (ie into a non-qualifying scheme or non-qualifying section of the same scheme).

The intention of the legislation is to encourage pension saving at a minimum level, not to restrict flexible benefits packages that employers wish to offer their workers. The individual retains the right to choose the makeup of their flexible benefits.

However, employers must be confident that, in offering such a package, their sole or main purpose is not to induce individuals to opt out of a qualifying scheme. Although the jobholder may choose not to complete an opt-out notice if they move to a non-qualifying scheme or section of an otherwise qualifying scheme, they are still giving up membership of a qualifying scheme. The employer must therefore still be confident that they can demonstrate that, in offering membership of non-qualifying schemes or sections of an otherwise qualifying scheme as part of the overall package, their sole or main purpose is not to induce individuals to leave the qualifying scheme or section of the scheme.

Example 4

An employment agency charges a higher rate for individuals who are pension scheme members. This makes them an unattractive proposition for an employer client, compared to other agency workers who have opted out.

The individual may not be aware of the charging structure but notices that colleagues who have opted out are getting more work. This persuades them to opt out of, or leave, the scheme.

The regulator might consider this to be an inducement.

However, we recognise that there are many factors that determine the rates an employment agency charges for each of its workers. We would need to consider these factors when deciding whether the employment agency had charged a higher rate with the sole or main purpose of inducing opt out.

Example 5

There may be individuals for whom opting out would be a sensible decision (eg, those with enhanced or fixed protection). However, this is a decision that they must make independently, seeking financial advice if appropriate.

An employer may feel that they know the individual and their circumstances well, and believe that they could benefit from opting out. However, employers should avoid giving this kind of advice as it is unlikely that they would know enough about the individual's circumstances, or have the necessary expertise. Moreover, to provide advice in respect of personal pension schemes, the employer would need to be authorised by the Financial Services Authority.

Advice of this nature given by an employer could be considered to be an inducement.

Section 5: Prohibited recruitment conduct

26. The aim of this measure is to deter employers from trying to screen out job applicants on grounds relating to potential pension scheme membership.
27. We expect that only a minority of employers would seek to avoid their duties by recruiting staff on the basis that they will opt out of pension provision.
28. However, this measure is necessary, not only to protect individuals' ability to save in a workplace pension, but also to prevent this minority of employers from gaining an unfair commercial advantage over other compliant employers.

What conduct is prohibited?

29. During the recruitment process, the employer or their representative must not ask any question, or make any statement (whether written or verbal), that either states or implies that a job applicant's success could depend on whether or not they opt out of an automatic enrolment pension scheme.
30. Such a question or statement (whether written or verbal) could arise in the course of any one of the following recruitment processes:

During the process of advertising the job or inviting job applications

31. An advert or invitation might state that applicants who wish to join a pension scheme need not apply, or simply that applicants will be expected to opt out of an automatic enrolment scheme.

During the process of asking for information (including any information requested from referees or others) in relation to an application

32. There may be a specific question on the application form asking whether the applicant intends to opt out of an automatic enrolment scheme. Or an interviewer may enquire about the applicant's current pension membership status and whether they would opt out if offered the role.

Providing information about employment

33. Information provided may state that an automatic enrolment scheme has been set up but that the successful applicant would be expected to opt out.

Whilst proposing terms or conditions of employment

34. The proposed terms may stipulate or imply that the offer is conditional on the applicant agreeing to opt out.
35. It is likely that each of the above would be considered prohibited recruitment conduct.

To which applicants does prohibited recruitment conduct apply?

36. It applies to:

- applicants with an immediate right to be automatically enrolled
- all applicants who could become eligible jobholders during the course of their employment, eg a 16-year-old, who was hired on a permanent basis, may have to be automatically enrolled when they turn 22 years old.

Agencies

37. For agency workers where the agency is the employer, any attempt to persuade an individual to opt out of the scheme during the initial recruitment process to put the applicant on that agency's books, is likely to be considered prohibited recruitment conduct. However, once on their books, any attempt by the agency to encourage the person to opt out could amount to an inducement.

Can the prohibited recruitment conduct safeguard be inadvertently breached?

38. Employers who are not trying to screen out applicants who do not want to opt out should find it easy to avoid making statements or asking questions that would give the impression that they were attempting to do so.
39. Employers who are concerned that any mention of pensions could be a breach of prohibited recruitment conduct, should note that the measure does not prevent employers from communicating to applicants or prospective employees the positive benefits of the qualifying scheme that they provide.

Appendix

Changes from v2.0

This guidance has been updated in light of changes made by the Pensions Act 2011, which has now received Royal Assent. Specifically, new content has been added relating to ensuring the continuity of scheme membership and the time periods in relation to inducements.

Significant changes from v2.0 (published July 2011) as a result of the above are as follows:

- Updated and new content in section 2 relating to continuity of scheme membership.
- New content in section 4 relating to inducements and continuity of scheme membership.

Table 1 lists significant additional changes included in this version.

This list is not exhaustive. It does not include minor editorial changes.

Table 1
Record of additional changes included in v3.0

Page	Location	Change
7	Section 3	Updated: Content regarding legislation on unfair treatment of workers – expanded upon and moved to main body to give more prominence.
10	Example 3	Additional: Regarding moving to a non-qualifying pension scheme or non-qualifying section of an otherwise qualifying pension scheme. Changes made for clarification.

Key terms

Summary of the different categories of worker

Category of worker	Description of worker
Worker	<ul style="list-style-type: none">• An employee or <ul style="list-style-type: none">• 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">• is aged between 16 and 74• is working or ordinarily works in the UK under their contract• has qualifying earnings.
Eligible jobholder	A jobholder who: <ul style="list-style-type: none">• is aged between 22 and state pension age• has qualifying earnings above the earnings trigger for automatic enrolment.
Non-eligible jobholder	A jobholder who: <ul style="list-style-type: none">• is aged between 16 and 21 or state pension age and 74• has qualifying earnings above the earnings trigger for automatic enrolment or <ul style="list-style-type: none">• is aged between 16 and 74• has qualifying earnings below the earnings trigger for automatic enrolment.
Entitled worker	A worker who: <ul style="list-style-type: none">• is aged between 16 and 74• is working or ordinarily works in the UK under their contract• does not have qualifying earnings.

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Detailed guidance no. 8

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