Detailed guidance for employers

Resource: Employer duties and safeguards
1. There are a number of employer duties set out in the new legislation. There are also a number of safeguards in place to protect the rights of individuals to have access to pension saving under the reforms. In addition to the employer duties and safeguards, an employer must keep certain records about how they have met the duties.

**Employer duties**

2. The new employer duties mean that an employer of a worker will have to:

- automatically enrol any eligible jobholder into an automatic enrolment scheme, following a prescribed process
- make arrangements to establish active membership of an automatic enrolment scheme if a jobholder chooses to opt in to a pension scheme
- make arrangements to establish active membership of a pension scheme if an entitled worker chooses to join
- give information to their workers about how the different duties affect them
- complete a declaration of compliance (registration) with The Pensions Regulator to state what they have done to comply with their new duties
- process any opt outs from the pension scheme, including refunds of contributions
- ensure 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, without putting them into an alternative qualifying scheme
- ensure 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
- re-enrol any eligible jobholders who opted out or ceased active membership, after a certain amount of time (approximately every three years).

3. In addition, an employer of a worker will be able to choose to use postponement to delay automatic enrolment by a period of up to three months.
Safeguards

4. The new safeguards are in place to protect the rights of individuals. The safeguards mean employers must ensure:

- 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’)
- that during recruitment, they or their representative 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 new employment rights for individuals not to be unfairly dismissed or suffer detriment on grounds related to the new employer duties.

Exceptions from the employer duties in specific circumstances

5. 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.

6. 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 22)
d. a worker who holds the office of a director of the employer

e. a worker who is a member (partner) in 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 35 to 41) 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

1 Paragraph 32 of Detailed guidance no.1 – Employer duties and defining the workforce explains what it means to hold office as a director.
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.

7. 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**

8. 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.

9. 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.

10. 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.

11. 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.

12. 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**.

13. 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.

14. 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.

15. 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

16. 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.

17. 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.

18. 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 or re-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 21)
- 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

19. The information duty and safeguards continue to apply as usual throughout the notice period.

20. 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.

21. If the employer has chosen to apply the transitional period for schemes with defined benefits 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\(^3\)) 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
- automatic enrolment is triggered for the worker to whom the transitional period has been applied before the end of the 6 week period from the first enrolment date.

2 The transitional period for schemes with defined benefits allows an employer who provides a pension scheme with defined benefits to choose to delay automatic enrolment (until 30 September 2017) for workers who meet certain conditions. For more information see Detailed guidance no.3b – Transitional period for schemes with defined benefits.

3 For more information see paragraphs 20 to 24 of Detailed guidance no.3b – Transitional period for schemes with defined benefits.
22. 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.

23. Where the conditions in paragraph 21 are met and the notice is withdrawn, immediate automatic re-enrolment is not triggered.

**Primary, Enhanced, Fixed and Individual protection on pension saving**

24. 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 or fixed protection requirements.

25. 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

26. 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.

27. 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.

28. 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**

29. This exception applies to a worker who holds the office of director with the employer. Paragraph 32 of Detailed guidance no.1 – Employer duties and defining the workforce explains what it means to hold office as a director.

30. 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.

31. Employers should note the interaction with the exemption from the definition of worker described at paragraphs 29 to 32 of Detailed guidance no.1 – Employer duties and defining the workforce. 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

32. In 2014 the Supreme Court ruled in Clyde & Co v Bates van Winklehof 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 that case.

33. 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.

34. 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.

35. This exception applies to an LLP partner who satisfies the test to be a worker employed by the LLP, but who is not treated for income tax purposes as being employed by the 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’.

36. 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.

37. The automatic enrolment or automatic re-enrolment duty will only be triggered if the eligible jobholder criteria are met.

Winding-up lump sum payments

38. 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’.

39. 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:
      – ceased employment with the employer, and
      – were subsequently re-employed by the same employer.

40. 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 the date 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 whose automatic re-enrolment date falls 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.

41. 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.

42. 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.

43. 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

44. 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

45. 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 43)). 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 pensions reform, may also meet the definition of a ‘qualifying person’.

46. 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.

47. 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.

48. Where an employer assesses a worker as:
   - working or ordinarily working in the UK (see Detailed guidance no. 3 – Assessing the workforce)
   - aged between 16 and 74
   - 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.

49. These duties and safeguards that the employer is exempted from in respect of a worker that meets the criteria in paragraph 43 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.

50. 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.

Duties and safeguards

51. The table below lists the employer duties and safeguards by categories of worker and highlights the guidance where the duties or safeguards are covered.
<table>
<thead>
<tr>
<th>Category of worker</th>
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| All workers        | • Employer must complete a declaration of compliance with The Pensions Regulator shortly after their staging date to tell us what they have done to comply with the new duties  
• If using postponement the employer must give a notification to workers | • See our content on our website: www.tpr.gov.uk/dec-checklist  
• Postponement: www.tpr.gov.uk/docs/detailed-guidance-3a.pdf | • Inducement  
• Prohibited recruitment conduct  
• Employment rights for individuals not to be unfairly dismissed or suffer detriment on grounds related to the new employer duties | • Safeguarding individuals: www.tpr.gov.uk/docs/detailed-guidance-8.pdf |
| Eligible jobholder | • Employer must automatically enrol  
• Employer must process any opt-out notice  
• Employer must automatically re-enrol | • Automatic enrolment: www.tpr.gov.uk/docs/detailed-guidance-11.pdf  
• Opting out: www.tpr.gov.uk/docs/detailed-guidance-7.pdf  
• Automatic re-enrolment: www.tpr.gov.uk/docs/detailed-guidance-11.pdf | • Inducement  
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<td>• Ensure 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, without putting them into alternative qualifying scheme</td>
<td>• Safeguarding individuals: <a href="http://www.tpr.gov.uk/docs/detailed-guidance-8.pdf">www.tpr.gov.uk/docs/detailed-guidance-8.pdf</a></td>
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<td>• Ensure 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</td>
<td>• Opting in and joining: <a href="http://www.tpr.gov.uk/docs/detailed-guidance-6.pdf">www.tpr.gov.uk/docs/detailed-guidance-6.pdf</a></td>
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<td>• Has the right to opt in and the employer must arrange pension scheme membership if the eligible jobholder decides to do so</td>
<td>• Transitional period for defined benefit and hybrid pension schemes: <a href="http://www.tpr.gov.uk/docs/detailed-guidance-3b.pdf">www.tpr.gov.uk/docs/detailed-guidance-3b.pdf</a></td>
<td>• Transitional period for defined benefit and hybrid pension schemes: <a href="http://www.tpr.gov.uk/docs/detailed-guidance-3b.pdf">www.tpr.gov.uk/docs/detailed-guidance-3b.pdf</a></td>
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<td>• If using the transitional period for schemes with defined benefits (DB), the employer must give a notice to the eligible jobholder</td>
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| Non-eligible jobholder | • Have the right to opt in and the employer must arrange pension scheme membership if the non-eligible jobholder does decide to opt in  
• Employer must give information about the right to opt in  
• Employer must automatically re-enrol if certain events cause active membership of a qualifying scheme to cease  
• Employer must process any opt-out notice  
• Ensure they do not take any action or make any omission by which the non-eligible jobholder ceases to be an active member of the qualifying scheme, without putting them into an alternative qualifying scheme | • Opting in and joining: [www.tpr.gov.uk/docs/detailed-guidance-6.pdf](http://www.tpr.gov.uk/docs/detailed-guidance-6.pdf)  
• Having completed the assessment: [www.tpr.gov.uk/docs/detailed-guidance-6.pdf](http://www.tpr.gov.uk/docs/detailed-guidance-6.pdf)  
• Safeguarding individuals: [www.tpr.gov.uk/docs/detailed-guidance-8.pdf](http://www.tpr.gov.uk/docs/detailed-guidance-8.pdf) | • Inducement  
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• Employment rights for individuals not to be unfairly dismissed or suffer detriment on grounds related to the new employer duties | • Safeguarding individuals: [www.tpr.gov.uk/docs/detailed-guidance-8.pdf](http://www.tpr.gov.uk/docs/detailed-guidance-8.pdf) |

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| Entitled worker   | • Have the right to join and the employer must arrange pension scheme membership if the entitled worker does decide to join  
• Employer must give information about the right to join | • Opting in and joining: [www.tpr.gov.uk/docs/detailed-guidance-6.pdf](http://www.tpr.gov.uk/docs/detailed-guidance-6.pdf)  
• Having completed the assessment: [www.tpr.gov.uk/docs/detailed-guidance-6.pdf](http://www.tpr.gov.uk/docs/detailed-guidance-6.pdf) | • Inducement  
• Prohibited recruitment conduct  
• Employment rights for individuals not to be unfairly dismissed or suffer detriment on grounds related to the new employer duties | • Safeguarding individuals: [www.tpr.gov.uk/docs/detailed-guidance-8.pdf](http://www.tpr.gov.uk/docs/detailed-guidance-8.pdf) |

• Ensure 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
