Further changes to automatic enrolment

Alert | 21 April 2016

Introduction

Following a consultation earlier this year, the Occupational and Personal Pension Schemes (Automatic Enrolment) (Miscellaneous Amendments) Regulations 2016 ("the Regulations") came into force on 6 April 2016, with the aim of easing the burden on employers in relation to auto-enrolment.

Key points

- The Regulations:
  - simplify the processes for employers to re-declare compliance and bring forward their staging date
  - introduce express exceptions from the employer's duty to auto-enrol in respect of company directors and members (or "genuine partners") of LLPs
  - clarify the current exception to the employer duty for workers who have received a "winding-up lump sum" (ie their benefits were commuted into a cash sum when a scheme wound up)
  - introduce a transitional easement for certain schemes which ceased to contract-out on 6 April 2016 to qualify for use as auto-enrolment vehicles using the "cost of accruals" test.
- Further regulations will be introduced "at the earliest opportunity" to extend the current exception to the employer duty to auto-enrol in respect of individuals with tax protected status so as to cover individuals with Fixed Protection 2016 ("FP16") and Individual Protection 2016 ("IP16").

Background

The auto-enrolment legislation divides "workers" into three distinct categories for the purpose of determining an employer's obligations towards them, with the duty to auto-enrol into a qualifying scheme (a scheme which meets the quality standards for auto-enrolment) applying to individuals who are "eligible jobholders".

The Secretary of State has power to make exceptions to the employer duty in respect of certain groups of individuals, broadly those who are not considered to be part of the target group for auto-enrolment. For example, with effect from 6 April 2015, employers may decide whether to auto-enrol individuals with specified tax protections, such as Fixed Protection 2012. Where an exception is introduced, the employer's duty is reduced to a discretionary power. However, if an employer chooses to go ahead with auto-

enrolment, the legislation is then read as if the employer was discharging a duty. This allows enforcement action to be taken, if necessary.

The Regulations create further exceptions to the employer duty to auto-enrol in respect of company directors and members of Limited Liability Partnerships ("LLPs"), as well as simplifying certain procedural requirements.

Re-declaration of compliance

There are currently two legal deadlines for re-declaring compliance with the auto-enrolment requirements.

Where employers have eligible staff to automatically re-enrol, they must complete the re-declaration within two months of their selected re-enrolment date. Any employer with no-one to re-enrol has a re-declaration deadline set as the day before the third anniversary of their original declaration of compliance.

On and from 6 April 2016, only one deadline will apply. An employer will need to send its re-declaration of compliance to TPR:

- where it is the employer's first automatic re-enrolment date, within five months beginning with the third anniversary of the employer's staging date
- in any other case, within five months beginning with the third anniversary of the employer's previous automatic re-enrolment date

whether or not the employer has any jobholders to re-enrol on the automatic re-enrolment date.

Bringing a staging date forward

Before 6 April 2016, employers had to satisfy certain prescriptive conditions if they wanted to bring their staging date forward. The Regulations simplify these conditions as follows:

- by removing the current requirement to obtain agreement from pension schemes for those employers who have no-one to enrol
- by removing the condition to give TPR one month's notice when an employer wants to bring forward its staging date. Instead, the employer will be required to notify TPR no later than the day before their chosen new staging date and will be able to declare its compliance at the same time
- by allowing an employer with no-one to enrol to bring forward its staging date to any date (not just the 1st of the month, as previously prescribed).

Transitional easement for certain former COSRs

Employers using DB schemes for their auto-enrolment duties used to able to demonstrate scheme quality by the existence of a valid contracting-out certificate.

DB contracting-out was abolished on and from 6 April 2016, as a consequence of the introduction of the new single-tier state pension. As a result, to ensure that a DB scheme qualifies for auto-enrolment employers will have to use either the "Test Scheme Standard" (see our Alert for details) or the alternative quality requirement for DB schemes, which is based on "the cost of accruals".

Cost of accruals test

The cost of accruals test is based on the cost to the scheme of the future accrual of active members' benefits. It:

- is applied at benefit scale level, rather than at scheme level
- can be calculated over the same period of time as that of the most recent actuarial report (for scheme funding purposes) or, in the absence of such a report, twelve months.

The Regulations provide for a transitional period during which employers of schemes that satisfied the DB contracting-out conditions on 5 April 2016, and who have not changed the benefits in their schemes, can apply the cost of accruals test at scheme level. This easement will apply until the earlier of:

- the date the actuary signs the first actuarial report after 5 April 2016 that breaks down the cost to benefit scale level, and
- 5 April 2019.

The DWP has published guidance on the alternative quality requirements for DB schemes and the DB elements of hybrid schemes.

New exceptions from the duty to auto-enrol

Company directors

Company directors are currently exempted from the definition of "worker" (and therefore from the auto-enrolment duties) unless they are employed under a contract of employment and at least one "other person" (including another director) is employed under a contract.

The Regulations create an exemption from the auto-enrolment duty for both:

- director-only companies, where two or more directors have contracts of employment, and
- directors of companies who employ workers.

The intention is to allow directors to decide for themselves whether they want a pension or not, and whether they would gain anything from auto-enrolment. However, where a company employs one or more workers in addition to its directors, it will still have to auto-enrol those workers who are eligible jobholders into a qualifying pension scheme.

Members of LLPs

In *Clyde & Co v Bates van Winkelhof*, the Supreme Court held that members of an LLP can be "workers" for the purposes of the whistleblowing legislation. By extension, members of an LLP are also "workers" under the auto-enrolment requirements which led to concerns that LLPs might be required to automatically enrol certain of their members into a qualifying scheme.

The Regulations convert any duty there may be to auto-enrol LLP members into a discretionary power. The Government believes "the discretionary nature of the exemption will allow sufficient flexibility for LLPs to make appropriate arrangements for their members; or seek independent professional advice where a member has complex financial arrangements".

In practice, this new provision will only be needed for LLP members who meet the conditions for being an

"eligible jobholder", the category of worker to whom the duty to auto-enrol applies. But LLP members will not necessarily be eligible jobholders as they may not be receiving "qualifying earnings" (which include salary, wages, commission, bonuses and overtime).

Further exceptions to employer duty expected

With effect from 6 April 2016, the LTA will be reduced from £1.25 million to £1 million. Transitional protections, in the form of FP16 and IP16, will be introduced to prevent retrospective tax charges arising as a result.

The DWP intended to amend the auto-enrolment legislation, with effect from 6 April 2016, so that the current tax protection exception to the employer duty would apply where an employer has reasonable grounds to believe that a worker has FP16 and/or IP16. However, in the response to consultation, the DWP noted that, while it still intends to introduce regulations at the earliest opportunity, it could not do so before the Finance Act 2016 (which will formally introduce FP16 and IP16) receives Royal Assent, most likely some time in July.

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