

# Workplace Pension Reform – Automatic Enrolment and European Employers

Government response to consultation

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# Contents

Introduction..... 3

Background ..... 4

Responses to the consultation..... 6

Government’s response ..... 8

Annex A: Respondents ..... 11

# Introduction

Automatic enrolment into workplace pension saving will go live this year starting with the largest employers. These reforms will mean that employers will be obliged to automatically enrol eligible jobholders into a qualifying workplace pension scheme. Eligible jobholders are workers who are working or ordinarily work in the UK, who meet age and earnings criteria, and who are not existing members of a qualifying scheme.

On 20 February 2012, we published a consultation *Workplace Pension Reform – Automatic Enrolment and European Employers*, together with draft regulations and a supporting Impact Assessment.

The consultation sought views and evidence on proposals to exempt European employers from automatically enrolling 'dual-status' workers – individuals who are both jobholders as defined in section 1 of the Pensions Act 2008 and qualifying persons as defined in regulation 3 of the Occupational Pension Schemes (Cross-border Activities) Regulations 2005 (SI 2005/3381).

The consultation ended on 2 April 2012 and we received 19 responses from a range of organisations including pension providers, pension advisors, accountants and lawyers. We are grateful to everyone who replied. There were no responses from individuals. A list of organisations that responded to the consultation is at Annex A.

This document presents a summary of the responses to the consultation, our considerations, the evidence that we have taken into account, and our final proposals.

This government response is published alongside the Occupational and Personal Pension Schemes (Automatic Enrolment) (Amendment) (No. 2) Regulations 2012. These regulations come into force on 2 July 2012. Corresponding regulations will be made for Northern Ireland.

This document is available on the DWP website at:

[www.dwp.gov.uk/consultations/2012](http://www.dwp.gov.uk/consultations/2012)

# Background

## What the consultation said

UK legislation defines a 'European employer' as a person who employs a '**qualifying person**'. 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 that the relationship with the employer is subject to the social and labour law (relevant to the field of occupational pension schemes) of the other EEA state.

To offer a pension to a qualifying person, a UK occupational pension scheme must be able to comply with the social and labour law relevant to the field of occupational pensions of the other EEA state. This can be complex and costly for schemes and there is no obligation on a scheme to accept those individuals.

The Pensions Act 2008 requires employers to automatically enrol all '**jobholders**' into a workplace pension scheme. Jobholder is defined in section 1 of the Act to include an individual "who is working or ordinarily works in Great Britain under the worker's contract". The Pensions (No.2) Act (Northern Ireland) 2008 makes corresponding provision for Northern Ireland. Failure to comply could result in the employer being in breach of their duties and subject to sanctions by the Pensions Regulator.

A small number of individuals will have '**dual-status**' – being both a qualifying person and a jobholder simultaneously. The Impact Assessment sets out the available evidence, concluding that around 9,000 individuals could be 'dual-status' workers not currently saving in a qualifying pension scheme.

This overlap means that while an employer has a duty to automatically enrol the jobholder, there are consequences for any occupational pension scheme that wanted to accept them as a member. As a result, when automatic enrolment starts, an employer may find it difficult to comply with the new duty for 'dual-status' workers, as there may be no pension scheme willing or able to provide a workplace pension for such workers. The employer could therefore be in breach of the duty without any practical means of remedying the situation.

The accompanying Impact Assessment, estimates the potential costs and benefits of exempting European employers from automatically enrolling 'dual-status' workers, based on analysis of the current level of cross-border work. The cost to individuals who would not be automatically enrolled is estimated to total £10m per year on average, representing the lost employer contributions and income tax relief, based on a median salary among cross-border workers of £42,000. However, the equivalent annual net saving to business is estimated to be £7.4m.

The consultation proposed exercising the power in section 292A of the Pensions Act 2004 (inserted by section 18 of the Pensions Act 2011) to provide for regulations to

be made to exempt European employers from automatically enrolling 'dual-status' workers.

## Consultation questions

We asked whether all employers should be exempt from automatically enrolling 'dual-status' workers into a workplace pension scheme.

We asked in particular if the estimates provided in the Impact Assessment were correct in terms of the number of 'dual-status' workers likely to be affected by an exemption; and, the average earnings of 'dual-status' workers.

We asked for any additional information or evidence relating to: the number of firms employing 'dual-status' workers and the size of such firms; the current level of employer pension provision among 'dual-status' workers; and, whether the administrative cost of auto-enrolling a 'dual-status' worker would be disproportionately greater than the cost of enrolling a non 'dual-status' worker.

# Responses to the consultation

We received 19 responses from a range of organisations including pension providers, pension advisors, accountants and lawyers. The responses centred on four main themes – the scope of the regulations, guidance, qualifying scheme criteria for non-UK schemes, and additional evidence.

The majority of respondents (16) expressed support for the proposal and saw the exemption as a welcome deregulatory measure. Many respondents believed there should be certainty for employers and that employers should not be put in a position where they could not comply with the employers' duty.

## Scope of the regulations

Five respondents commented that the regulations restricted the exemption to employers who choose an occupational pension scheme to meet the employers' duty; they felt that this could disadvantage employers who select a personal pension scheme to meet the duty as insurers faced similar issues selling products across EEA borders.

Although many respondents observed that the exemption was helpful for EEA workers, four responses suggested that non-EEA workers may also be subject to legislation that could impede participation in automatic enrolment or make it difficult for an employer to comply with their duty. In particular respondents highlighted that automatic enrolment may have tax consequences for non-UK residents.

One respondent sought a change in the draft regulations, asking that the exemption apply where an employer has reasonable belief that he is a European employer in relation to an individual.

One response expressed concern that individuals with enhanced or fixed protection could lose that protection if they were automatically enrolled and that these individuals should also be exempted.

## Guidance

Four respondents suggested that to support the regulations the Government needed to provide more clarity in guidance for employers and intermediaries to assist in assessing whether individuals are 'ordinarily working in the UK'. In addition, one respondent felt that guidance needed to be clearer on which workers could be qualifying persons.

## Non-UK Qualifying Schemes

Two responses commented that they believed the qualifying scheme criteria were too restrictive for non-UK pension schemes and proposed that the requirements for qualifying schemes should be relaxed.

## Additional Evidence

Only one response provided further evidence. This suggested that the number of 'dual-status' employees could be significantly higher than the Department's estimate if employees who are working in the UK and remain subject to the social and labour law of another EEA member state are included. It also suggested that mobile employees inbound to and outbound from the UK would in most cases be high earners with earnings of at least £40,000 per annum.

# Government's response

## Scope of the regulations

The power under section 292A in Part 7 of the Pensions Act 2004 provided for regulations to be made which would allow the enrolment duty under Part 1 of the Pensions Act 2008 not to apply to certain cases of cross-border employment where the employer is a European employer.

For the purposes of Part 7 of the Pensions Act 2004, including section 292A, a European employer is defined as a person who, in relation to an occupational pension scheme, employs a qualifying person and is making (or proposes to make) contributions to that scheme in respect of a qualifying person.

The Government's draft regulations extended this exemption as wide as possible with the power prescribed in section 292A. It is not possible to extend an exemption to any other groups without additional Primary legislation.

It is for the employer to select the scheme – or schemes – he will use to meet the employers' duty. The exemption provided by regulations under section 292A extends to employers making – or proposing to make – contributions into occupational pension schemes for eligible jobholders. We recognise that there are similar matters if an employer chooses a personal pension scheme to meet their duty. However, as the Impact Assessment demonstrated and several respondents concurred, the number of individuals affected will be small. This is because a significant proportion will have already made pension provision and will be less likely to be in the target group for automatic enrolment. Of the remainder, a proportion will be exempted by these proposals, and therefore the number of individuals working across borders who have to be automatically enrolled will be very small.

We note concerns that automatic enrolment of certain individuals who are non-UK residents may not necessarily be in their best interests. Although employers must automatically enrol all eligible jobholders who are not already members of a qualifying scheme (including non-UK schemes), automatic enrolment into a workplace pension scheme is not appropriate for everyone. If individuals know that it is not in their best interests to save into a pension they are free to opt out. The effect of opt out is that the jobholder is to be treated as not having become an active member of the scheme on that occasion. Employers are obliged to provide statutory information to their workers about automatic enrolment. The Department is working with The Pensions Regulator to provide communication material to support employers with this requirement. This material is accessible at [www.thepensionsregulator.gov.uk/workplacepensions.html](http://www.thepensionsregulator.gov.uk/workplacepensions.html)

Employers must signpost their workers to [www.direct.gov.uk/workplacepension](http://www.direct.gov.uk/workplacepension) for further information about automatic enrolment and things that individuals may wish to consider in deciding whether to remain in a pension scheme or opt out. If workers have further detailed questions about pensions they will be referred to The Pensions Advisory Service at [www.pensionsadvisoryservice.org.uk](http://www.pensionsadvisoryservice.org.uk)



The Department's evaluation strategy for the workplace pension reforms will be used to monitor implementation issues. The first report based on this strategy will be published before the onset of the employer duty and will describe the landscape before implementation. Subsequent reports will be published annually during implementation. As well as specific reporting, information will also be made public through publications linked to each of the data sources used in the evaluation. This will include information published by the Pensions Regulator. The evaluation strategy is available on line at: [research.dwp.gov.uk/asd/asd5/rports2011-2012/rrep764.pdf](http://research.dwp.gov.uk/asd/asd5/rports2011-2012/rrep764.pdf)

Section 292A permits the Secretary of State to choose between making regulations that relate to:

- (a) an individual in relation to whom the person is a European employer, or
- (b) someone whom the person reasonably believes to be such an individual.

Whilst it might appear that (a) imposes a higher standard on the employer than (b), in practice, there is very little between the two alternatives. Either case would require the employer to satisfy himself whether any of his workers are qualifying persons. In the event of a dispute, it will be for employer to show that he did all that was reasonable to establish the position and for the Pensions Regulator to determine whether or not to take enforcement action.

Finally, we recognise that individuals with enhanced or fixed protection risk losing that protection if they are automatically enrolled and fail to opt out. To mitigate this risk, HMRC will be writing to all individuals of working age with enhanced protection to ensure those individuals know that they will lose their protection if they do not opt out when they are automatically enrolled. HMRC's claim form and guidance for fixed protection both give clear information about the effect of automatic enrolment. There will be content about the impact of automatic enrolment on those with enhanced protection status on Directgov. Additionally the Department is working with HMRC to write to all of those who have registered for enhanced protection on an individual basis.

## Guidance

We acknowledge the points made about supporting detailed guidance on 'ordinarily working'. Part of the role of The Pensions Regulator is to help employers get to grips with their new duties; this includes maintaining a series of guides aimed at professionals and employers to explain the duties in detail. The *Assessing the Workforce* guide was updated in February 2012 and includes sections on assessing whether a worker is working or ordinarily working in the UK with some detailed examples. The Pensions Regulator has also been involved in the consultation process and we have passed on feedback for The Regulator to consider for future updates. The detailed guides are available at:

[www.thepensionsregulator.gov.uk/pensions-reform/detailed-guidance.aspx](http://www.thepensionsregulator.gov.uk/pensions-reform/detailed-guidance.aspx)

The Pensions Regulator also provides detailed guidance to help employers determine if a worker is a qualifying person (referred to as 'European members' in

the guidance). This is available on the Regulator's website at:

[www.thepensionsregulator.gov.uk/guidance/guidance-cross-border-schemes.aspx](http://www.thepensionsregulator.gov.uk/guidance/guidance-cross-border-schemes.aspx)

## Non-UK Qualifying Schemes

Non-UK schemes can be qualifying schemes but only EEA schemes, which are subject to the same European regulatory requirements as UK schemes, can be used for automatic enrolment. To use a non-EEA scheme as a qualifying scheme for the employers' duties, an individual must already be a member of that scheme when the employer duty starts in relation to that individual and to have actively chosen to join the scheme (which in most cases would mean the individual had entered the scheme before they came to the UK). In addition, their employer would have to be content to pay their contributions into that scheme. This is intended to maximise existing good provision and ensure that individuals with existing provision do not have to be automatically enrolled into a UK scheme.

The rules surrounding qualifying schemes and income in retirement were relaxed by Part 13 of the Occupational and Personal Pension Schemes (Automatic Enrolment) Regulations 2010 (SI 2010/772). This sets out that (EEA and non-EEA) schemes which do not require annuitisation and may enable benefits to be taken before the age of 55 can be qualifying schemes. This means that more good quality non-UK schemes will be allowed to qualify without leaving individuals inadequately protected, and schemes in countries such as America, Canada, Australia and New Zealand will be able to qualify. This applies only to qualifying schemes (EEA and non-EEA), not for schemes eligible for automatic enrolment (EEA only).

## Additional Evidence

The additional evidence provided in response to the consultation questions covering the likely numbers of 'dual-status' workers and their probable incomes has been considered. However, although this has been noted in the final impact assessment, the Department concluded that a single response did not provide robust enough evidence to use in revising any of the estimates.

## Conclusion

The Government would like to thank all those people and organisations who have offered their views and advice in response to the consultation. We have noted the issues raised and the Department will undertake a review of the regulations should the evaluation show that to be necessary. Some minor technical changes have been made to the draft regulation. However, the main provisions have not been amended and the regulations were laid before Parliament on 11 June to come into force on 2 July 2012.

# Annex A: Respondents

ABI

Alexander Forbes Financial Services

AON Hewitt

Aviva

Bluefin Group

Chartered Institute of Personnel and Development

Capita Hartshead

Friends Life

FSB

ICAEW

KPMG

Law Society of Scotland

Legal & General

Mercer

NAPF

PwC

Society of Pension Consultants

Standard Life

Wragge & Co