

WORKPLACE PENSIONS & AUTOMATIC ENROLMENT FOR RECRUITMENT AGENCIES & THEIR CLIENTS

This document aims to:

- Provide a basic understanding of the requirements of the Pensions Act 2008, associated regulations, the Pensions Bill 2011 and draft DWP regulations;
- Investigate the broad impacts, obligations and risks for recruitment agencies;
- Consider potential impact for clients and candidates.

This document summarises the position known on the date in the footer of this document.

Please note that the term “*employer*” is used throughout this document to denote an organisation that employs or engages workers within the scope of this legislation. In this context, the term employer is deemed to be the company whose PAYE tax code is used to remunerate the individual. Similarly the term “*employee*” means any individual who falls within the scope of this legislation and who is employed or engaged under the PAYE tax code of the employer.

What is Auto Enrolment?

The purpose of this new legislation is to help more people save for retirement.

Auto Enrolment means that all employers must automatically enroll certain members of their workforce into a pension scheme and make a contribution towards their pension fund. Workers enrolled would also be required to make minimum contributions to their own fund.

The legislation obliges all employers to set up a pension scheme that meets the criteria for “auto enrolment”. Companies may set up their own scheme with a pensions’ provider as long as it meets the required criteria. There are a number of alternative schemes that have been specifically designed to cater for a typical Temporary worker. The schemes are provided by NEST (National Employment Savings Trust) and NOW Pensions.

Timescales (Staging Date) for Setting up the Scheme

Auto Enrolment comes into force for larger employers from 1st October 2012 and will be rolled out for all employers over the next 4 years. The size of your company was calculated based on the number of employees in your PAYE scheme as at 1st April 2012.

If you have more than one PAYE scheme, you must use the largest to make this calculation.

If you outsource your payroll, then the size of this third party's PAYE scheme as at 1st April 2012 would have dictated when this legislation will come into force for your company.

Any fluctuation in the size of your PAYE scheme after 1st April 2012 will not change your staging date.

Employers with less than 50 people in their PAYE scheme will have their staging date set based on the last two characters of their PAYE reference number.

To work out your company's staging date you will need to know:

- The size of your PAYE scheme as at 1st April 2012
- Your PAYE scheme reference.

You can then check out your own staging date using the [Pensions Regulator's List of Staging Dates by PAYE Scheme Size or Reference](#).

Who Does The Legislation Apply To?

The legislation applies to "workers" which are defined as individuals who:

- Work under a contract of employment; or
- Contract to perform works or services personally – this includes agency workers unless they are genuinely self employed.

Workers who are genuinely self employed do not fall within the scope of this legislation, however we have the usual conundrum of what constitutes "genuinely self employed". In this instance, use of the word "personally" shows that workers who are not able to fulfil a substitution clause in their contract would fall within the scope.

This legislation will therefore apply to the majority of temporary / agency workers.

There are three types of worker to whom the legislation applies as follows:

- Eligible jobholders – who must be automatically enrolled and must receive an employer contribution (this will include most temporary workers as shown in the table below).
- Non-eligible jobholders – who have the right to opt in and receive an employer contribution.
- Entitled workers – who have the right to opt in but without receiving an employer contribution.

The table below shows the earnings criteria and age that applies to each of these groups.

Earnings*	Age (inclusive)		
	16 – 21	22 – SPA**	SPA** - 74
Under £5,668	Entitled Worker		
£5,668 - £9,440	Non-Eligible Jobholder		
Over £9,440	Non-Eligible Jobholder	Eligible Jobholder	Non-Eligible Jobholder

*Qualifying earnings includes wages, commission, bonuses, overtime, statutory sick pay and statutory maternity/paternity/adoption pay

**SPA = State Pension Age.

Once you get to your “staging date” you must automatically enrol all “eligible Jobholders” into a qualifying pension scheme and make contributions in respect of them (eventually up to 3%).

What’s the Process?

All employers must register with the Pensions Regulator confirming that they have an automatic enrolment scheme in place within 4 months of their staging date and then re-register every 3 years.

The Pensions Regulator will be responsible for:

- Telling employers when their staging date is and how they can comply with their duties and obligations
- Making guidance and information available to all parties and educating employers to help them comply
- Fining employers who fail to comply!

Eligible Jobholders

The employer must provide eligible jobholders with certain information within one month of their automatic enrolment date including:

- Details of when they will be enrolled.
- Their right to opt out (but be very careful to comply with the anti-inducement provisions!)
- Terms and conditions / details of the scheme into which they will be automatically enrolled.

Where an eligible jobholder is automatically enrolled, the employer must continue to deduct / make contributions as long as they remain in the scheme.

Automatic Re-enrolment of Eligible Jobholders

Any eligible jobholder who has opted out will automatically be re-enrolled every three years from the employer's staging date.

Non-eligible Jobholders

The employer (or agency / umbrella company) must provide non-eligible jobholders with certain information within one month of their automatic enrolment date, including a statement that they can enrol into an automatic enrolment scheme by completing an "opt-in" notice.

Where a non-eligible jobholder chooses to opt-in, the employer must continue to deduct / make contributions as long as they remain in the scheme.

Entitled Workers

The employer (or agency / umbrella company) must provide entitled workers with certain information within one month of their automatic enrolment date, including a statement that they can be enrolled into a pension scheme by completing a joining notice.

This does not have to be an "automatic enrolment scheme" and the employer, agency or umbrella company is under no obligation to make any contribution.

Where entitled workers choose to join a pension scheme in this way, the employer, agency or Umbrella Company must deduct the entitled worker's contributions from their salary and pay these into the scheme on their behalf.

How Much?

There is a transitional period during which both the employer and employee contribution will increase.

After 1st October 2018 the combined contributions will equate to 8% of “qualifying earnings” including tax relief. A firm definition of qualifying earnings is to be confirmed, but has currently been indicated to be gross earnings (including wages, commission, bonuses, overtime, statutory sick pay and statutory maternity/paternity/adoption pay) between £5,668 and £41,450. These thresholds are subject to change each tax year. We are awaiting confirmation of whether “gross earnings” means “gross taxable earnings” and whether it includes other elements such as expenses.

The employer will eventually be required to contribute 3% of “qualifying earnings” and the employee 5%. The transitional period is shown in the table below:

Timescale	Employer Contribution	Employee Contribution (incl. tax relief)
Employer’s staging date – 30 th September 2017	1%	1%
1 st October 2017 – 30 th September 2018	2%	3%
1 st October 2018 onwards	3%	5%

Who is Responsible for Making the Payments?

It is the employer’s responsibility to ensure that deductions are taken from employees / workers and that all contributions are paid into a compliant pension scheme. Even if an employer outsources their payroll, it is still technically their responsibility to ensure the collection and payment of contributions.

Opting Out

Eligible and Non-eligible Jobholders may opt out by completing an “opt-out” form. They must get the form from the pension scheme provider.

They have one month to opt out from the later of the following dates if they want to have their contributions refunded:

- The date on which they received the enrolment information.
- The date on which they received the terms & conditions/scheme details.

If a jobholder opts out after one month, then the employer will stop making and deducting contributions, but neither party will be able to reclaim the contributions already paid.

Once complete, the opt out form must be returned to the employer/agency/umbrella company, who in turn must:

- Check that it is valid (if not, they must return it to the jobholder and ask them to resubmit it). If the opt-out notice is defective then the opt-out period is extended to 6 weeks.
- Stop deducting contributions from the jobholder's salary
- Refund any contributions that have already been taken from the jobholder's salary

Employers are not obliged to continue making contributions if an Eligible or Non-Eligible Jobholder opts out.

Once opted-out, an employee may opt back into the scheme but can only do so once in a period of 12 months (to prevent them from dipping in and out of the scheme).

Any employee who opts-out is automatically re-enrolled after 3 years or on joining a new employer.

Anti-Inducement Provisions

There are very robust anti-inducement elements to this legislation designed to prevent employers (including agencies) from encouraging people to opt out.

NB - Anti-inducement legislation applies to ALL employers ALREADY (as of 1st July 2012), so even if you have not arrived at your staging date, this provision still applies to your company!

An inducement is defined as “any action taken by an employer, the sole or main purpose of which is to attempt to induce a jobholder to opt out of or cease active membership of a pension scheme without becoming an active member of another scheme”. It's not yet clear how the “sole or main purpose” test will be applied. The Pensions Regulator has provided examples of clear cut cases and less clear cut cases in their safeguarding provisions document which can be downloaded by clicking the link below.

It doesn't matter whether the "inducement" has been successful or not – it is the action taken by the employer with a view to inducing a person to opt out or cease membership that could be a breach of the law.

Employers cannot provide opt-out notices directly to workers and must be careful that statements made do not expressly or impliedly infringe "[safeguarding provisions](#)". Click the link to download a PDF which provides details on this from the Pensions Regulator.

Prohibited Recruitment Conduct

You need to ensure your staff don't inadvertently (or deliberately!) breach the anti-inducement provisions. You/they must not:

- Screen candidates on the basis of whether they opt-out
- Ask express or implied questions about opting-out at interview or at any point during the recruitment process
- Suggest or imply that a job applicant's success could depend on whether they choose to opt-out or not. This applies to advertising, application forms, during the interview and subsequent elements of the recruitment process and in terms & conditions.
- Make offers based on whether a candidate has chosen to opt-out or not

The Pensions Regulator specifies that for agencies, any attempt to persuade an individual to opt out during the initial recruitment process is likely to be considered "prohibited recruitment conduct". Once "on the books" any attempt by the agency to encourage the individual to opt out could amount to "inducement".

Employers are not prohibited from communicating the positive benefits of the qualifying scheme that they provide.

Unfair Treatment of Workers

Employers must not treat workers unfairly because they have decided not to opt out. If any employer does so, the worker can enforce their rights at an employment tribunal.

Agencies should be very careful about participating in cost reduction models that don't offer parity between workers who have opted out and workers who have not opted out as this could be construed as inducement (e.g. charging less for workers who have opted out).

What Happens If We Don't Comply?

The Pensions Regulator has powers to issue compliance notices and impose penalties on employers who do not comply (e.g. for failing to automatically enrol eligible jobholders, failing to refund contributions etc).

There is a three stage process that the Pensions Regulator is expected to use although this may be preceded by informal intervention.

Stage 1	<p>Compliance / Unpaid Contributions Notice</p> <p>This will detail the breach and require the employer to put things right within a specific timescale. The notice may also require the employer to make contributions with interest added.</p>												
Stage 2	<p>Fixed Penalty Notice - £400</p> <p>This will require employers to put right the breach identified in the previously issued compliance notice. Employers will be given a specified timescale of at least 4 weeks to achieve this. Failure to do with within the specified timescale will result in the fixed penalty fine being applied.</p>												
Stage 3	<p>Escalating Penalty Notice</p> <p>If an employer fails to comply with the original compliance notice and subsequent fixed penalty notice, they will face daily escalating penalties which will be calculated from the date specified in the fixed penalty notice and will depend on the size of the employer:</p> <table border="1" data-bbox="376 1301 1401 1576"> <thead> <tr> <th>Number of People*</th> <th>Daily Rate</th> </tr> </thead> <tbody> <tr> <td>1-4</td> <td>£50</td> </tr> <tr> <td>5-49</td> <td>£500</td> </tr> <tr> <td>50-249</td> <td>£2,500</td> </tr> <tr> <td>250-499</td> <td>£5,000</td> </tr> <tr> <td>500+</td> <td>£10,000</td> </tr> </tbody> </table> <p>*This is generally the number of workers in the employer's PAYE scheme or the number of workers affected by unpaid contributions. Where this number is not readily available, the Pensions Regulator may use various sources of information to estimate this number (e.g. the number of workers affected by unpaid contributions).</p>	Number of People*	Daily Rate	1-4	£50	5-49	£500	50-249	£2,500	250-499	£5,000	500+	£10,000
Number of People*	Daily Rate												
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Employers may appeal to the Pensions Regulator by using a specific procedure which will be set out in compliance notices.

The Pensions Regulator will decide the outcome of any compliance failures – not the courts.

Other Penalties!

There are a number of other penalties that will apply for breaching this legislation including:

- **Wilful failure to comply** – employers who wilfully fail to comply with their employer duties face fines and /or up to 2 years imprisonment.
- **Inducement** – Employers who induce workers not to join or encourage them to opt out will be subject to the three stage compliance process detailed above.
- **Prohibited recruitment conduct** – Employers are not allowed to make any statement or ask any question during the recruitment process which indicates either explicitly or implicitly that the worker may not join in or may opt out of the pension scheme.

Agencies and Umbrella companies are likely to be on the Pensions Regulator's radar so should ensure that they maintain detailed records of automatic enrolment, opt-in and opt-out processes / contributions. The Pensions Regulator has powers of inspection and it is anticipated that high levels of opt-outs relative to other employers may cause an investigation.

NEST and NOW Pensions versus Group Pension Schemes

There are benefits and disadvantages to NEST, Now Pensions and Group Pension Schemes. An overview of these is provided below:

NEST	
Benefits	Disadvantages
Provides a pension option for lower paid workers as there is no minimum contribution	No administration support so the employer and workers have to do everything themselves online
It's compliant with the auto-enrolment legislation	Not portable so workers who undertake a number of assignments for different agencies could end up with multiple pension pots with small amounts in each.
	Limited choice of funds (only 5)
	You can't transfer funds in and out of NEST (this is being reviewed in 2017)
	You cannot make additional payments above the cap of £4,400 per year which includes employee contributions, employer contributions and tax relief.
	As the scheme is administered by the employer, jobholders will not receive advice.

NOW Pensions	
Benefits	Disadvantages
Provides a pension option for lower paid workers as there is no minimum contribution	As the scheme is administered by the employer, jobholders will not receive advice.
It's compliant with the auto-enrolment legislation	Limited choice of funds (only 5)
Assessment tool can be used to establish entitlement and eligibility	
Communications suite available	

GROUP PENSION SCHEME	
Benefits	Disadvantages
Administration support may be provided to set up the scheme.	Providers may be selective and may choose not to work with companies: <ul style="list-style-type: none"> • Which have a small workforce • That are likely to have a low level of contributions • That are perceived to be a financial risk
Companies offering this option have experience/a track record of administering pension schemes and selecting funds	Providers often require a minimum number of employees. This varies by company and can be as low as 5 and as high as 20+.
Wide choice of funds so offers greater potential for a return on investment	Providers may require a minimum monthly level of contribution from the employer/workers.
As each worker has their own plan in their own name, the scheme will move with them from assignment to assignment.	

This is just an overview and it is recommended that you do significant research into the options and speak to a Financial Advisor. If you do not have an IFA, Edgar Brooks & Co are both TEAM and ALP service providers and are very experienced in this marketplace. They can provide services that include producing a report and recommendation, Create and implement your chosen Pension scheme and ongoing compliance and administration services. All services are offered on a stand-alone basis and for a fixed fee. They can be contacted on enquiries@edgarbrooks.co.uk www.edgarbrooks.co.uk telephone 01353 723007.

A Level Playing Field for Agencies?

This is an interesting one as some agencies will be required to commence operating a qualifying pension scheme (and making contributions to it) sooner than others, so there will be a period where there is a lack of parity.

The REC lobbied over this as they regarded it as “competitive distortion”, however this was unsuccessful.

Suggested Next Steps

This legislation is complex for recruitment agencies and umbrella companies. Even if you're staging date isn't for some time, it would be wise to start researching and assessing how this legislation will affect your business sooner rather than later. The Pension Regulator suggests planning 6 months before your staging date.

So, your next actions should be:-

- Conduct some research and make sure you understand the legislation and how it is likely to impact your company.
- Consider the way you might cover the costs of:
 - Administering the scheme
 - The contributions themselves
- Research the risks – what procedures are you going to put in place to ensure compliance?
- Establish what documentation you are going to give to your workforce (including temporary workers) to help them to understand their rights and options. Remember you are not qualified to provide financial advice so you need to be careful on this!
- Make sure your staff are thoroughly trained regarding what they can and can't state/ask during the recruitment process (see "What Happens if We Don't comply" and "Anti-Inducement Provisions" above). Ensure you and they fully understand the safeguarding legislation.
- Consider how you will charge – be careful about considering things like reduced pay for enrolled workers and higher pay for opted-out workers and don't "sell" on the basis of opt-out or other avoidance. It may be wise to seek clarification from the Pensions Regulator on your approach.
- Talk to your clients – discuss the potential cost implications and make sure they understand the legislation.
- Review your client contracts to establish whether you are able to increase your charges.
- For new contracts, ensure that you put in place disclaimers that specify you have the right to increase charges in line with changes to statutory costs, legislation and regulation.
- Research how you are going to implement a compliant scheme be it NEST or NOW Pensions or an alternative qualifying scheme.
- If you use an umbrella company, ensure you understand how they are going to operate. Review your contracts with any outsourced payroll provider / umbrella company as technically the employer is responsible for the collection of contributions and you therefore require recourse against the third party if they fail to carry out their assigned duties.

- Consider how your payroll software will be able to log and monitor changes in the worker's status for auto-enrolment.

Further Assistance

For further advice and guidance, contact:

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Additional information can also be obtained from the Pensions Regulator

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The contents of this document should not be relied upon as advice or for a recommendation. Each individual or employer should seek independent consultation in relation to Auto Enrolment legislation. This information is based on Edgar Brooks & Co's knowledge and understanding of Auto Enrolment legislation as at 17th January 2014 and this may be subject to change in the future.