

Detailed guidance for employers

Safeguarding individuals: The new safeguards
for workers

Publications in the series

- 1 **Employer duties and defining the workforce**
An introduction to the new employer duties
- 2 **Getting ready**
First steps to prepare for the new employer duties
- 3 **Assessing the workforce**
How to identify the different categories of worker
- 3a **Postponement**
- 3b **Transitional period for schemes with defined benefits**
- 3c **Having completed the assessment**
- 4 **Pension schemes**
Pension schemes under the new employer duties
- 5 **Automatic enrolment**
An explanation of the automatic enrolment process
- 6 **Opting in, joining and contractual enrolment**
How to process pension scheme membership outside of the automatic enrolment process
- 7 **Opting out**
How to process 'opt-outs' from workers who want to leave a pension scheme
- 8 **Safeguarding individuals**
The new safeguards for workers
- 9 **Keeping records**
Records that must be kept by law under the new employer duties
- 10 **Information to workers**
- 11 **Automatic re-enrolment**

Accompanying resources



Information to workers

Summary of information requirements in a quick-reference table format



The different types of worker

Diagram of the different categories of worker and the criteria for each category



Employer duties and safeguards

At-a-glance summary of the duties and safeguards

Contents

	page
About this guidance	5
Introduction	6
Who the safeguards protect	6
Stopping active membership of a qualifying scheme	7
Unfair treatment of workers	8
Inducements	8
What is an inducement?	8
Can the inducement safeguard be inadvertently breached?	9
Prohibited recruitment conduct	13
What conduct is prohibited?	14
To which applicants does prohibited recruitment conduct apply?	15
Can the prohibited recruitment conduct safeguard be inadvertently breached?	15
Key terms: Summary of the different categories of worker	16

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.

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 the Key terms.

This guidance forms part of the latest version of the detailed guidance for employers (published April 2017). There have been no updates since the last version.



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

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 notes

3. The particular elements of the legislation described from the section entitled Unfair treatment of workers onwards came into force for all employers from 1 July 2012. So even if an employer has a staging date of, for example, 1 September 2015, they must still ensure compliance with those safeguards from 1 July 2012.
4. Exceptions from some of the duties as set out in **Detailed guidance no. 1 – Employer duties and defining the workforce** may apply in respect of certain workers. However, even if a worker meets the conditions for any one of these exceptions, employers still have to comply with their safeguarding duties in respect of that worker.

Stopping active membership of a qualifying scheme

5. 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.
6. 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.
7. 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.
8. Employers should note that as long as a jobholder is earning over the lower level of qualifying earnings¹, 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.
9. More about qualifying schemes and automatic enrolment schemes can be found in **Detailed guidance no. 4 – Pension schemes**.

1
This figure will be reviewed from time to time by DWP. The amount for the current tax year is available on our website: www.tpr.gov.uk/earnings-thresholds.

Unfair treatment of workers

10. 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.
11. If an employer does so, the worker can enforce their rights in an employment tribunal.

Inducements

12. The law relating to inducements is an important safeguard for entitled workers and jobholders.
13. 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.
14. 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.
15. 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.

What is an inducement?

16. 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.

17. 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.
18. 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.
19. 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?

20. 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.

21. 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.
22. In other words, employers should think carefully about the motivation behind the action they are contemplating.
23. Employers should also 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.

24. To help employers, we have provided some guidance on the approach that we will take when applying the 'sole or main purpose' test in cases that come to our attention. Please note that where we give examples, these 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

25. The employer may actually state that their purpose is to get workers to opt out or cease membership. The employer may tell workers in clear terms what they want the workers to do, and link this to a reward or punishment.

Example 1

The employer tells their jobholders/entitled workers in an email to them that they **should** opt out of, or leave, their pension scheme, and if they do 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, in the event that the worker is put back in to pension saving following an inducement breach, 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. For example, they have no legal right to recover any of the higher salary level they gave them to opt out.

continued...

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

26. Where the employer does not state their purpose, or they put forward a purpose other than inducing workers to opt out or cease membership the regulator will have to carefully consider the employer's behaviour to establish the true purpose behind their actions. We will take account of all relevant evidence in relation to the employer's actions and the consequences for workers and for the employer. This may include the following factors:

- whether the employer stated the purpose in the original communication to workers
- whether the communication included the information necessary for workers to make a fair choice
- whether the communication was worded in such a way as to steer workers to choose to opt out or cease membership
- whether workers felt that they were being steered in that direction
- whether workers did actually choose to opt out or cease membership
- whether the employer stood to gain from workers making that choice

27. The presence or absence of any particular factor is not decisive. They are simply evidential matters that may help in determining the employer's sole or main purpose. The fact that an employer stood to make a direct financial gain from workers choosing to opt out or cease membership is a strong indicator that the employer intended to achieve that outcome. The regulator would then need to look at the other relevant factors to determine whether the employer genuinely had another purpose in mind. Please also note that there may still be an inducement breach even if the employer did not make a financial gain.

Example 3

The employer offers their staff a flexible benefits package where membership of a pension scheme is one of a range of elements on offer but also includes non-pensionable benefits or cash alternatives such as a higher rate of pay. The stated purpose is to attract and retain staff by allowing them to structure their own reward package.

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 or cease membership. An important consideration will be whether staff are given a free and fully informed choice.

Example 4

The employer offers staff the option of making pension contributions at a lower rate, which involves them moving into a non-qualifying scheme or non-qualifying section of the same scheme. The employer puts forward a legitimate purpose for this.

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.

continued...

Example 4 continued...

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 5

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 evidence of 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.

Prohibited recruitment conduct

28. The aim of this measure is to deter employers from trying to screen out job applicants on grounds relating to potential pension scheme membership.
29. 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.
30. 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?

31. 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.
32. 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

33. 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

34. 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

35. 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

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

To which applicants does prohibited recruitment conduct apply?

38. It applies to all applicants who could become eligible jobholders during the course of their employment.

Agencies

39. 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?

40. 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.
41. 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.

Key terms

Summary of the different categories of worker

Category of worker	Description of worker
Worker	An employee or 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 equal to or 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.

How to contact us

PO Box 16314
Birmingham
B23 3JP

T 0845 600 1011
F 0845 606 9970
E customersupport@autoenrol.tpr.gov.uk

www.thepensionsregulator.gov.uk
www.trusteetoolkit.com

Detailed guidance for employers no. 8 Safeguarding individuals

© The Pensions Regulator October 2018

You can reproduce the text in this publication as long as you quote The Pensions Regulator's name and title of the publication. Please contact us if you have any questions about this publication. We can produce it in Braille, large print or on audio tape. We can also produce it in other languages.

**The Pensions
Regulator**