MACFARLANES

THE 2012 PENSIONS REVOLUTION

AUTO-ENROLMENT: WHAT YOU NEED TO KNOW ABOUT EMPLOYER COMPLIANCE AND RISK

The auto-enrolment regime is backed up by a number of policing powers for the Pensions Regulator, including compliance and penalty notices and even criminal sanctions for the wilfully non-compliant.

EMPLOYER COMPLIANCE

Employers must not:

- Do anything that results in a **jobholder ceasing to be an active member of a qualifying scheme**, unless within one month the jobholder becomes a member of another qualifying scheme.
  - The prohibition covers acts and omissions and scheme changes and closures.
  - A change in benefit or contribution design would be permitted provided the new design met the minimum requirements.
  - A change of auto-enrolment scheme or closure and replacement of an existing scheme would be permitted.
  - The prohibition applies to members of existing schemes as well as employees who join a scheme under auto-enrolment.
- Take any action for the sole or main purpose of **inducing a jobholder to opt-out** or a worker to give up membership of a pension scheme.
  - This may preclude flexible benefit packages with options between additional salary and pension contributions unless auto-enrolment contributions are ring-fenced.
  - There is no exemption for warning employees about tax consequences such as losing enhanced protection or fixed protection or the life time allowance.
  - This applies to members of existing schemes as well as those who join under auto-enrolment.
  - It also applies to workers even though they are not entitled to employer contributions.
- Say anything or ask any questions during **recruitment** that might suggest a job applicant's success will depend on whether they intend to opt-out.
  - This does not preclude giving information about the auto-enrolment scheme and any other pension scheme but care is required.

CHECKLIST: EMPLOYER COMPLIANCE AND RISK

Compliance provisions:

- Employees cannot **contract out of auto-enrolment**
- Employers must not **induce employees to opt-out**
- Employers must not **engage in prohibited recruitment conduct**
- Employers cannot **take action to terminate auto-enrolment or existing scheme provision** without a replacement
- Employers must not **discriminate or dismiss** for a reason related to automatic enrolment or compliance
- Employers must not **provide false or misleading information** to the Pensions Regulator

Sanctions include:

- Back-dated contributions and membership
- Compliance notices
- Unpaid contribution notices
- Fixed and escalating penalty notices
- Unfair dismissal and Employment Tribunal claims
- Criminal conviction, fines and imprisonment for wilful breaches

SANCTIONS

For any breach of the above, the Pensions Regulator may issue:

- a **compliance notice** which may require a change of practice, specific steps including auto-enrolment, provision of information to the Regulator or, if appropriate, retrospective admission to a defined benefit or hybrid scheme for a jobholder;
- an **unpaid contribution notice** which may require payment of both employer and employee contributions to an auto-enrolment scheme;
- a **fixed penalty notice** for an amount of up to £50,000; or
- an **escalating penalty notice** if any of the above are not complied with.

There is a review and appeal process. The Pensions Regulator also has various investigative powers, including the ability to effect “dawn raids”.

Criminal sanctions apply too. A **criminal offence** is committed where an employer **wilfully fails** to comply with:

- its automatic enrolment duties for eligible jobholders;
- its enrolment duties for non-eligible jobholders who opt-in; or
- provides false or misleading information to the Pensions Regulator.

Such offences may lead to **fines or imprisonment**. Criminal charges may be brought against a company or partnership and against any director, officer, manager or partner. Such measures are perhaps likely to be used only in extreme cases or after other measures have failed to secure compliance.

This range of sanctions should enable the Pensions Regulator to deal proportionately with both unintentional and deliberate and persistent breaches.

In addition, workers are protected by two **specific employment rights**, each modelled on existing legislation:

- first, a worker has the right not to be subjected to any detriment short of dismissal on the grounds that the employer is facing enforcement action; and
- second, any dismissal will be automatically unfair if the reason for the dismissal is either that the employer is facing enforcement action or otherwise that the individual has or may have rights under the auto-enrolment legislation.

An equivalent right of unfair dismissal has been introduced for workers who might otherwise not be capable of bringing a claim under the ordinary legislation.

Any **agreement to limit** the application of auto-enrolment legislation **is void**, so that the employee will not be restricted from claiming membership or contributions despite any agreement. This could apply for instance to an agreement that a bonus or overtime will not qualify for auto-enrolment contributions so that the employee would be able to claim the contributions despite the agreement.

This could give rise to perhaps the most significant compliance risk: **double compensation**. This could also arise in relation to flexible benefit arrangements or an existing pension arrangement that falls short of the auto-enrolment standards in some respect.

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