

Workplace Pension Reform – Automatic Enrolment and European Employers

Consultation on draft regulations

February 2012

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Introduction

This consultation seeks views on proposals to exempt employers who employ individuals who work both in the UK and in other member states from automatically enrolling individuals who are subject to the social and labour laws of EEA member States relevant to the field of occupational pension schemes other than the UK.

Consultation arrangements

This consultation is aimed at employers, employee representatives and pension industry professionals, including occupational pension and workplace personal pension scheme administrators, payroll administrators, accountants, payroll bureaux, Independent Financial Advisors and employee benefit consultants. Comments from workers and the general public are also welcome.

This consultation seeks views on the draft Occupational and Personal Pensions Schemes (Automatic Enrolment) (Amendment) (No. 2) Regulations 2012 which set out the Secretary of State's proposals to exempt employers from automatically enrolling individuals who are subject to the social and labour laws of EEA member States relevant to the field of occupational pension schemes other than the UK. The regulations are intended to come into effect from 1 July 2012.

This consultation applies to England, Wales and Scotland. It is anticipated that Northern Ireland will make corresponding regulations.

Duration of the consultation

The consultation begins on 20 February 2012 and runs until 2 April 2012.

The Government Code of Practice on Consultation recommends a minimum 12 week consultation period public consultations, unless there are good reasons for a limited consultation period. In this case, the Department for Work and Pensions has already undertaken informal consultation with a range of industry, employer and consumer organisations on the proposals and our Minister has agreed that a limited consultation is appropriate.

The document is available on the Department's website at:

www.dwp.gov.uk/consultations/2012

Please send your responses, preferably by email to:

jane.woolley@dwp.qsi.gov.uk

Or by post to:

Jane Woolley
Department for Work and Pensions
Enabling Retirement Savings Programme
Floor 7 Caxton House
6-12 Tothill Street
London
SW1H 9NA

Please ensure your response reaches the Department by **2 April 2012**.

When responding, please state whether you are doing so as an individual or representing the views of an organisation. If you are responding on behalf of a larger organisation, please make it clear who the organisation represents, and where applicable, how the views of members were assembled.

Any queries about the subject matter of this consultation should be made to Jane Woolley at jane.woolley@dwp.gsi.gov.uk

We have sent this consultation document to a number of people and organisations who have already been involved in this work or who have expressed an interest. Please do share this document with, or tell us about, anyone you think will want to be involved in this consultation.

Freedom of information

The information you send us may need to be passed to colleagues within the Department for Work and Pensions, published in a summary of responses received and referred to in the published consultation report.

All information contained in your response, including personal information, may be subject to publication or disclosure if requested under the Freedom of Information Act 2000. By providing personal information for the purpose of the public consultation exercise, it is understood that you consent to its disclosure and publication. If this is not the case, you should limit any personal information which is provided, or remove it completely. If you want the information in your response to the consultation to be kept confidential, you should explain why as part of your response, although we cannot guarantee to do this. We cannot guarantee confidentiality of electronic responses even if your IT system claims it automatically.

If you want to find out more about the general principles of Freedom of Information and how it is applied within DWP, please contact:

Central Freedom of Information Team
Department for Work and Pensions,
The Adelphi,
1-11 John Adam Street,
London,
WC2N 6HT

Email: freedom-of-information-request@dwp.gsi.gov.uk

More information about the Freedom of Information Act can be found on the website of the Ministry of Justice, Freedom of Information pages.

The consultation criteria

The consultation is being conducted in line with the Government Code of Practice on Consultation – [Government Code of Practice on Consultation](#) (BIS). The seven consultation criteria are:

- **When to Consult.** Formal consultation should take place at a stage when there is scope to influence the outcome.
- **Duration of consultation exercises.** Consultations should normally last for at least 12 weeks, with consideration given to longer timescales where feasible and sensible.
- **Clarity of scope and impact.** Consultation documents should be clear about the consultation process, what is being proposed, the scope to influence, and the expected costs and benefits of the proposals.
- **Accessibility of consultation exercises.** Consultation exercises should be designed to be accessible to, and clearly targeted at, those people the exercise is designed to reach.
- **The burden of consultation.** Keeping the burden of consultation to a minimum is essential if consultations are to be effective and if consultees' buy-in to the process is to be obtained.
- **Responsiveness of consultation exercises.** Consultation responses should be analysed carefully and clear feedback should be provided to participants following the consultation.
- **Capacity to consult.** Officials running consultation exercises should seek guidance in how to run an effective consultation exercise, and share what they have learned from the experience.

Feedback on this consultation

We value your feedback on how well we consult. If you have any comments on the process of this consultation (as opposed to the issues raised) please contact our Consultation Coordinator:

Roger Pugh
Department for Work and Pensions' Consultation Coordinator:
Room 2A, Britannia House
2, Ferensway
Hull
HU2 8NF

Phone: 01482 609571
Fax: 01482 609658
Email: roger.pugh@dwp.gsi.gov.uk

Please also make any suggestions as to how the process of consultation could be improved further.

If you have any requirements that we need to meet to enable you to comment, please let us know.

The responses to the consultation will be published in a report on the DWP website that will summarise the responses and the action that we will take as a result of them.

Policy background

European employers

Article 20 of the Institutions for Occupational Retirement Provision (IORP) Directive [2003/41/EC](#) of the European Parliament is transposed into domestic legislation through Part 7 of the Pensions Act 2004 and the Occupational Pension Schemes (Cross-border Activities) Regulations 2005 (SI No. 2005/3381).

The Directive aims to:

- Ensure a high level of protection for members and beneficiaries of pension funds;
- Allow institutions for occupational retirement provision ('IORPs') to accept sponsorship from employers located in other Member States;
- Allow IORPs to implement investment strategies suited to the characteristics of their pension schemes; and
- Respect Member States' prerogatives regarding social protection and pension schemes.

For the purposes of meeting the Directive, the UK legislation defines a '**European employer**' (in relation only to the employer's employment of a 'qualifying person') as a person who employs a '**qualifying person**'¹. A qualifying person is an individual employed under a contract of service and whose place of work under that contract is sufficiently located in a EEA state other than the UK so 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. The Pensions Regulator has set out guidance on their website –

<http://www.thepensionsregulator.gov.uk/guidance/guidance-cross-border-schemes.aspx>

Automatic enrolment

The Pensions Act 2008 introduces a duty on employers to automatically enrol '**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". For most employers it will be clear that a member of their workforce is working in Great Britain. However for some multi-national employers and employers who move their workers regularly between countries as part of their employment, whether the worker ordinarily works in Great Britain will be less clear cut.

Where a worker is not wholly working in Great Britain, the primary issue to be considered is where the worker is based. The starting point for determining where a worker is based will be what the worker's contract of employment says and also how the contract is operated in practice. The Pensions Regulator has set out guidance on their website: <http://www.thepensionsregulator.gov.uk/docs/pensions-reform-assessing-workforce-v3.pdf>

¹ See Regulation 3 of the Occupational Pension Schemes (Cross-Border Activities) Regulations 2005 SI 2005/3381

Dual-status workers

It is possible that a small number of individuals will have ‘**dual-status**’ – being both a qualifying person and a jobholder simultaneously. This overlap means that while an employer has a duty to automatically enrol the jobholder, there are consequences for any occupational scheme that wanted to accept them as a member.

In order to accept a qualifying person as a member, an occupational pension scheme would need to register with The Pensions Regulator as a cross-border scheme. To operate as a cross-border scheme the scheme would need to be approved by both The Pensions Regulator and by the Regulator of the other Member State.

Case for change

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, and our understanding is that very few schemes currently offer cross-border provision. Further, there is no obligation on a scheme to accept qualifying persons and Government has no means to make them do so.

On the other hand, the Pensions Act 2008 requires employers to automatically enrol all jobholders into a workplace pension scheme. Failure to do so could result in the employer being in breach of their duties and subject to sanctions by The Pensions Regulator.

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 Government wants to ensure that all employers are able to comply with the automatic enrolment duties imposed by the Pensions Act 2008, and at reasonable cost.

Informal feedback

To build an understanding of the issue, and to ascertain any potential risks of making an exemption, the Department undertook a programme of informal engagement with a wide range of industry, employer and consumer organisations, as well as The Pensions Regulator. Responses were positive, all believed there should be certainty for employers and that employers should not be put in a position where they could not comply (at reasonable cost) with the automatic enrolment duty.

Proposal

Section 292A of the Pensions Act 2004 (inserted by section 18 of the Pensions Act 2011), provides for regulations to be made to exempt employers from automatically enrolling dual-status workers. The Government now proposes to exercise this power

and exempt employers from automatically enrolling dual-status workers. The draft regulations are set out at **Annex A**.

The Act offers two alternative propositions for the regulations, but in practical terms there is little difference between the two. Both require the employer to actively identify dual-status workers and exclude them from automatic enrolment. We therefore propose to use subsection (a) so that the enrolment duties do not apply in relation to a person's employment of an individual in relation to whom the person is a European employer.

Impact

The Department has estimated the potential costs and benefits of exempting European employers from automatically enrolling dual-status workers. These estimates are based on analysis of the current level of cross-border work, using published research reports, and data from the Annual Survey of Hours and Earnings (ASHE) and the Labour Force Survey (LFS).

Clearly, there will be a cost to the individuals who will not be automatically enrolled. This is the lost employer contributions and income tax relief which we estimate to be £10m per year on average. However, the Equivalent Annual Net Cost to Business (EANCB) of the proposal is -£7.4m, representing an average annual saving to business of £7.4m.

Estimates of the level of current cross-border activity are summarised in Table (1) below.

| | |
|--|---------|
| Total cross-border workers | 45,000 |
| Of which eligible dual-status workers, and not currently saving in a qualifying pension scheme | 9,000 |
| Of which remaining saving after opt out | 7,000 |
| Median salary among cross-border workers | £42,000 |

The Department estimates that around 9,000 individuals could be dual-status workers who may be subject to both the UK and another EEA State's legislative requirements. The estimate for the median salary among cross-border workers (£42,000) is calculated using the LFS.

A full Impact Assessment setting out our assessment of the impact on business accompanies this consultation.

Consultation questions

1. Do you agree that all employers should be exempt from automatically enrolling dual-status workers into a workplace pension scheme?
2. Do you agree with the estimates provided in summary form and in full in the Impact Assessment which accompanies this consultation of:
 - a. the number of dual-status workers likely to be affected by an exemption;
and
 - b. the average earnings of dual-status workers.

If not, please provide estimates and supporting information.

3. Can you provide any evidence relating to the number of firms (a) employing dual-status workers and (b) the size of such firms?
4. Do you have any information or evidence:
 - on the current level of employer pension provision among dual-status workers; or
 - to suggest that the administrative cost of auto-enrolling a dual-status worker would be disproportionately greater than the cost of enrolling a non dual-status worker?

Commentary on the draft Occupational and Personal Pensions Schemes (Automatic Enrolment) (Amendment) (No. 2) Regulations 2012

The following summary explains the purpose of the regulations:

Regulation 1 – Citation and commencement

This regulation gives the title and specifies the date on which the regulations are proposed to come into force. It is suggested that the regulations come into effect from 1 July 2012 to coincide with the earliest staging dates for automatic enrolment.

Regulation 2 – Amendment of the Occupational and Personal Pension Schemes (Automatic Enrolment) Regulations 2010

This regulation provides that the employer duty to automatically enrol jobholders does not apply to European employers. European employers are defined in the Cross-border Regulations (The Occupational Pension (Cross-border) Regulations 2005 – S.I 2005/3381).

It exempts employers from automatically enrolling jobholders where the employment relationship with the jobholder is subject to the social and labour laws relevant to the field of occupational pensions of an EEA member State other than the UK.

Annex A – Draft regulations

The draft Occupational and Personal Pension Schemes (Automatic Enrolment) (No.2) Regulations 2012

STATUTORY INSTRUMENTS

2012 No.[]

PENSIONS

The Occupational and Personal Pension Schemes (Automatic Enrolment) (No. 2) Regulations 2012

Made - - - - - ***

Laid before Parliament ***

Coming into force - - - ***

The Secretary of State for Work and Pensions, in exercise of the powers conferred by section 292A(a), 315(2) and 318 of the Pensions Act 2004⁽²⁾, makes the following Regulations:

In accordance with section 317(1) of the Pensions Act 2004, the Secretary of State has consulted with such persons as the Secretary of State considers appropriate.

Citation and commencement

1. These Regulations may be cited as the Occupational and Personal Pension Schemes (Automatic Enrolment) (No. 2) Regulations 2012 and come into force on xx.

Amendment of the Occupational and Personal Pension Schemes (Automatic Enrolment) Regulations 2010

2. After regulation 5 of the Occupational and Personal Pensions Schemes (Automatic Enrolment) Regulations 2010⁽³⁾ (pay reference periods for the purposes of section 20(1)(b) and (c) and section 26(4)(b) and (5)(b) of the Act) insert—

“PART 1A

EXEMPTIONS

Exemption of European employers in relation to qualifying persons

5A. Sections 2(1), 3(2), 5(2) 7(3), 9(2) and 54 of the Act (employers’ obligations under Part 1 of the Act) do not apply in relation to a person’s employment of an individual in relation to whom the person is a European employer⁽⁴⁾.”

⁽²⁾ 2004 c 35. Section 292A was inserted by the Pensions Act 2011 (c.19), section 18. Section 318 is cited for the meaning given to “regulations”.

⁽³⁾ S.I. 2010/772. Regulation 5 was substituted by the Automatic Enrolment (Miscellaneous Amendments) Regulations 2012, regulation 20 (S.I. 2012/215).

Signed by authority of the Secretary of State for Work and Pensions

| | |
|---------|--|
| Address | Parliamentary Under Secretary of State |
| Date | Department for Work and Pensions |

EXPLANATORY NOTE

(This note is not part of the Regulations)

These Regulations are made under section 292A(a) of the Pensions Act 2004 and amend the Occupational and Personal Pension Schemes (Automatic Enrolment) Regulations 2010.

Regulation 2 inserts a new Part 1A that makes provision exempting European employers from the employers' obligations under sections 2(1), 3(2), 5(2), 7(3), 9(2) and 54 of the Pensions Act 2008 in relation to qualifying persons. "European employer" and "qualifying person" are defined in the Occupational Pension Schemes (Cross-Border Activities) Regulations 2005.

An assessment of the impact of this legislation on the private sector and civil society organisations has been made. A copy of this impact assessment is available in the libraries of both Houses of Parliament, and is annexed to the Explanatory Memorandum which is available alongside the instrument on www.legislation.gov.uk. Copies may also be obtained from the Better Regulation Unit of the Department for Work and Pensions, Caxton House, Tothill Street, London SW1H 9NA, or from the DWP website.

Department for Work and Pensions
February 2012

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⁽⁴⁾ "European employer" is defined in regulation 3 and "qualifying person" is defined in regulation 2 of the Occupational Pension Schemes (Cross-Border Activities) Regulations 2005 (S.I. 2005/3381).