AUTO-ENROLMENT: HOW TO …
… APPROACH THE ASSESSMENT OF ATYPICAL WORKERS

INTRODUCTION

It is now just over a year since the first employers reached their automatic enrolment staging dates and therefore many of the practical issues that arise for employers when implementing the reforms are now apparent. Updated versions of the guidance on certification of the quality requirement were issued in September and amendments designed to introduce technical improvements to the legislation to take account of practical experience came into force at the beginning of this month.

It therefore seems an appropriate time to look at some of the trickier practical issues that arise with automatic enrolment. There is no single answer to many of these issues, but in this series of three alerts we will look at practical steps employers can take to ensure compliance with the duties. In this first edition we look at "How To" approach unusual working or earnings patterns.

TERMINOLOGY

In this alert we use the following terminology which is set out in the Pensions Regulator's guidance and is now commonly used throughout the industry.

- "Eligible jobholders" means those workers who the employer will have to automatically enrol. The employer will also have to pay contributions to the scheme in respect of these workers.
- "Non-eligible jobholders" means those workers who have a right to opt in and, if they do so, the employer will have to pay contributions to the scheme in respect of them.
- "Entitled workers" means those workers who have a right to opt in but in respect of whom the employer will **not** have a duty to pay contributions.

In order to be caught by the reforms, a person needs to meet a statutory definition of worker and be working or ordinarily work in the UK. Which of the categories above the worker will then fall into depends on their age and qualifying earnings levels.

EMPLOYEES v WORKERS

Making the assessment

The issue here is whether individuals who do not work under a contract of employment would nevertheless still meet the wider definition of worker and therefore be caught by the reforms. Where employers have contractors or consultants in their workforce, they will need to consider the status of each of those individuals to assess whether there is a duty in respect of them.

This will largely be a question of fact, and the Pensions Regulator's guidance gives a non-exhaustive list of the factors to consider when making the assessment.

This assessment can seem a daunting task for employers, particularly as there are no hard and fast rules to follow to give employers certainty that they have categorised the person correctly. What should employers do about the more doubtful cases? The practical answer is that employers need to take a considered view, based on the facts, and should ensure a reasonable, logical and consistent approach. Employers should also document the reasons for reaching a particular decision, i.e. which factors were present or not present that indicated an individual's status?

That documentary evidence of the employer's approach should reduce the risk of successful challenge, either by the Pensions Regulator or by an individual (either because they think they have wrongly been excluded from automatic enrolment or have wrongly been automatically enrolled and had contributions deducted from their pay).

Checking the scheme rules

Another practical point to bear in mind here is that many employers will not have previously made any pension provision for workers who are not employees. The stakeholder legislation applied only to employees and, in our experience, scheme rules tend to limit eligibility to employees. This means that if an employer is planning to use an existing scheme to comply with the reforms, they should consider whether the eligibility clause needs to be amended to include workers and whether any other references throughout the Deed and Rules to employees also need to be updated.

FLUCTUATING EARNINGS

An issue that is particularly administratively complex for employers is dealing with workers who have fluctuating earnings.

The initial assessment

The first difficulty is making the initial assessment on the staging date as to which category the worker falls into. For example:

- if a large proportion of a worker's earnings are based on commission, it may not be possible to predict exactly how much will be payable in a particular pay period; or
- if a worker is on a zero hours contract it may not be easy to predict exactly when (if at all) they will be working and receiving payment.

A flexibility that will be introduced into the legislation next April should assist employers with this particular problem. The amendments will give employers a period of six weeks (compared to the current position of one month) from the date on which the duties apply to take action to automatically enrol workers or inform them of their right to opt in.

This extension should prevent employers having to make the difficult choice of deciding to either: (i) try and predict what earnings will be payable (with the risk of getting it wrong); or (ii) wait until payroll is run to make the assessment by which time there will be certainty as to the earnings payable (with the risk of this leaving time too tight and the one month window being breached).

Instead the employer can wait until it has the certainty of payroll having been run, knowing that it has six weeks to complete the joining processes. Active membership will still need to be backdated to the automatic enrolment date.

Continued monitoring

The second difficulty is that the worker's status may change from pay period to pay period. Processes will therefore need to be in place to continue to monitor these workers.

If the initial assessment was that the worker was a non-eligible jobholder or entitled worker, the employer will need to be ready to deal with an opt in request (should one be made) or to automatically enrol the worker should they become an eligible jobholder in a subsequent pay period.

If the worker is an eligible jobholder and is automatically enrolled, the next question for the employer will be how they deal with any further changes in status. Under the legislation, while the person remains a jobholder, the employer cannot remove them from the scheme or cease to pay contributions. However, if the person's earnings fall such that they become an entitled worker, the obligations to keep jobholders in the scheme and to continue to pay contributions in respect of jobholders, will not apply.

Nevertheless, to avoid the administrative complexity of people dipping in and out of membership, employers may prefer to operate their schemes so that once a person has been enrolled they stay in the scheme (unless they choose to leave) and contributions continue to be paid on the actual earnings, if any, in the particular period.

TYPES OF EARNINGS

A further difficulty is whether particular payments fall within the definition of qualifying earnings (or, where certification is being used, basic pay) and therefore need to be included in the assessment of the worker and the calculation of contributions.

For example, in the hotel and leisure industry, a tricky issue for employers is how to treat tips and service charges. The legislation does not address the status of such payments and therefore the particular facts of the case will need to be considered; there is no right or wrong answer. The question of whether the employer has some control over the distribution of the tips is a key factor in these considerations and may make it more likely that they form part of an individual's salary or wages, and therefore part of "qualifying earnings" for automatic enrolment purposes. Once again, having clear

documentary evidence in place to back up any decision will be a useful way of defending the decision if challenged.

AGENCY WORKERS

A group of workers whose earnings may be particularly prone to fluctuations is those who are sent to the employer for short periods of work by an agency.

If the entity using the agency workers wishes to remove the need to deal with the administrative complexities of these workers, the simplest approach is to ensure that the "employer" for the purposes of automatic enrolment is the agency. Under the legislation, the employer is the person responsible for paying the worker or, if nobody is so responsible, whoever actually pays them.

Businesses using agency workers should ensure that their agreement with the agency makes it clear that the agency is responsible for paying the worker and check whether this has an impact on price.

SHORT-TERM CONTRACTS

As well as using agency workers, employers may directly contract with workers on fixed short term contracts (for example, seasonal workers or interns) and be concerned about the administrative burden of having to deal with automatic enrolment for these workers.

The use of the three month postponement period may be useful for employers if a worker is joining them for a period of three months or less. This enables the employer to defer the assessment of jobholder status so that by the time the assessment has to be made, the person is no longer working with the employer.

The DWP has suggested that this is a legitimate use of postponement periods, allowing employers to avoid continuously having to automatically enrol short-term workers. However, employers should consider whether their approach could cause any issues under discrimination legislation. For example, there is legislation in place that protects fixed-term employees from being treated less favourably than permanent employees engaged in the same kind of work unless it falls within specified exemptions (for example workers who are required to complete up to one year's work experience as part of a higher education course).

Employers will also need to bear in mind that if they use postponement, the worker will retain the right to opt in during the postponement period. Whilst it might be unlikely that workers in this position will want to opt in, employers will need to have processes in place to deal with any such requests.

WORKERS WITH TAX PROTECTIONS

From the outset of the reforms, many employers have been concerned about the need to automatically enrol those with enhanced or fixed protection in case the worker does not opt out and therefore loses that protection. However, some employers are also concerned that alerting the worker to the need to opt out to retain the protection could mean they inadvertently fall foul of the prohibitions on inducements.

Currently there are no exemptions from the duties. Whilst a consultation issued by the DWP in March considered whether those with fixed protection should be excluded from the scope of the duties, it is by no means certain that this exclusion will be introduced. This is because the DWP has expressed concern that this could effectively require employers to check which of their workers have such protections, thereby creating an additional burden.

A further consultation on exemptions is due to be issued this autumn. In the meantime, the safest way for employers to deal with this issue is to automatically enrol these workers and at the same time to alert affected workers to the possible impact on their tax protections of not opting out. Communications should neutrally explain the facts and suggest that the individual considers taking independent financial advice, but should steer clear of giving any recommendation or advice to the individual.

INTERNATIONALLY MOBILE WORKERS

A worker will only be caught by the duties if they are "*working or ordinarily work*" in the UK but the legislation does not define what this means and there has not yet been any case law providing judicial interpretation of this phrase.

The Pensions Regulator takes the view that if somebody works wholly in the UK (save for occasional business trips abroad), they are "*working*" in the UK but if somebody is not wholly working in the UK, the test is whether they "*ordinarily work*" in the UK. This can be difficult to determine.

The Pensions Regulator has provided some guidance, including the starting point of where the worker is based, what the contract says and how it is operated in practice. Again, in reality it will be for the employer to make a decision about its workforce based on the guidance and legal advice where necessary. As long as there are sound reasons for reaching a particular conclusion, it is hard to see on what basis that could be challenged. Again, documenting the conclusions and the factors that led to those conclusions will help the employer to defend any challenge.

OVERSEAS SECONDMENTS

Outbound secondments

If an employer based in the UK sends a worker on secondment overseas, will that person continue to be caught by the duties? The Regulator's guidance indicates that if the contract remains with the UK employer and the employer expects the worker to resume working for them in the UK at the end of the secondment, the worker is likely to be ordinarily working in the UK.

Employers who send staff on secondment overseas should consider putting in place processes for making these assessments and documenting the considerations and decision. Some employers may already be familiar with completing similar assessments (or working with their scheme's trustees to do so) when considering whether a seconded worker can remain a member of the scheme from the perspective of the cross-border legislation and, if so, they may be able to adapt those processes for this purpose.

Inbound secondments

Similarly, if an employer based in the UK has somebody seconded to work with them from overseas, they will need to assess whether that person is subject to the automatic enrolment duties. The Regulator's guidance seems to take the view that a person who, alongside the contract which states they are based at a location in the UK, has a simultaneous employment relationship with an employer outside of the UK (ie because they have been seconded to the UK by an affiliated employer), is not "*wholly working*" in the UK and therefore the question is not whether that person is actually working in the UK, but whether they "*ordinarily*" do so.

The Regulator's guidance states that if the contract remains with the overseas employer and there is an expectation that the person will return to work based outside the UK at the end of the secondment, the worker is unlikely to be considered to be "*ordinarily working*" in the UK, but once again it will be a judgment call for the employer.

As with outbound secondments, employers who receive inbound secondees should consider putting in place processes for making and documenting these decisions.

CONCLUSION

There is no right or wrong answer to these questions. Instead employers will need to take a view, and perhaps advice. The key thing is to make sure that the view taken is sound, can be justified in the face of challenge and is documented as evidence of due process. If employers have approached these assessments rationally and logically, having regard to the Regulator's guidance and to any legal advice taken, then the risk of successful challenge is minimised.

FURTHER INFORMATION

Please click here to access other alerts that we have issued on automatic enrolment as well as our monthly Pensions News publication which contains a section on the latest developments in automatic enrolment.

If you would like to discuss the issues raised in this alert or any other aspects of automatic enrolment, please get in touch with your usual DLA Piper contact or contact Tamara Calvert.

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