[Category – Payroll and Pensions, Sub- category – Auto-enrolment

Author: John Greenwood]

**Which workers are eligible and what earnings are relevant?**

In most cases it will be clear whether an individual is a worker for the purposes of auto-enrolment and which part of his or her remuneration counts as qualifying earnings. But the status of flexible working relationships such as those involving zero-hours workers, casuals, independent contractors, temporary and agency workers will all need to be considered by employers implementing their auto-enrolment strategy.

Auto-enrolment regulations are not entirely prescriptive and employers will in some situations have to make a judgement about how they interpret regulations. Legal experts expect precedents from employment and tax cases to inform the interpretation of the auto-enrolment regulations in borderline cases.

The regulations create three different classes of worker – ‘eligible jobholders’, ‘non-eligible jobholders’ and ‘entitled workers’. Eligible jobholders must be enrolled into a qualifying pension scheme and employers must contribute to their pensions. Non-eligible jobholders can choose to opt into a qualifying pension scheme and receive an employer contribution. Entitled workers can opt into the employer’s scheme but there is no obligation on the employer to pay in a contribution. Employees will fall into one of these three classes of employee provided they fall into the definition of ‘worker’ for the purposes of auto-enrolment.

If an employee is incorrectly excluded from the auto-enrolment process they will be able to make a complaint to the Pensions Regulator.

**Definition of ‘worker’**

To be included in the auto-enrolment process, whether as an eligible jobholder, non-eligible jobholder or entitled worker, an individual must be deemed to be someone who is a ‘worker’ for the employer. A worker is defined as an individual who works for the employer under a contract of employment, or someone who has a contract to perform work personally and who is not undertaking the work as part of their own business.

In most cases it will be clear whether an individual is a worker for the purposes of the employer’s auto-enrolment duties.

Employers will need to look at all their work contracts with those who perform work for them to make sure whether they are actually workers for the purposes of the auto-enrolment regulations. But they will also need to look beyond the wording of the contract to the facts of the relationship between the parties to consider whether a contract for employment would be inferred in a court or employment tribunal.

The 2011 case of Autoclenz Ltd v Belcher [please link underlined text to <http://www.bailii.org/uk/cases/UKSC/2011/41.html>] in the Supreme Court held that a contract of employment was inferred by the court even though the wording of the contract between the parties attempted to make clear there was not one.

In that case a group of 20 car valet workers were held to be employees with a contract of employment even though they had signed contracts that contained clauses expressly stating they were self-employed, had to pay for their own cleaning materials and there was no obligation for Autoclenz to provide work or for the workers to provide services.

Employers who engage individuals on contracts of this sort that describe them as self-employed risk compliance action from the Pensions Regulator if they do not automatically enrol them into a qualifying pension scheme.

**Agency workers**

Agency workers are generally included in the auto-enrolment regulations, with the obligation to pay pension contributions falling on whichever organisation is the employer for the purposes of the worker’s contract. The employer in this context is whoever is actually responsible for paying the worker, meaning it will be the agency that is responsible for automatically enrolling the worker into a qualifying pension scheme and making sure the appropriate contributions are made.

Employment agencies may want to structure their qualifying pension scheme in a way that minimises the number of individuals they have to automatically enrol. Doing so will enable them to remain competitive as well as reducing the administrative burden on HR.

It is common for agency workers to only seek work for a short period of time, and many are on the books of several agencies, meaning they are only employed by them for short periods. Employers are allowed to require that workers be employed for three months before they are automatically enrolled. By using this facility, known as postponement, employment agencies, or in fact any employer with a high turnover of staff, will be able to reduce the number of employees to be enrolled.

However, inducing workers to opt out is strictly prohibited and employers found to be doing so can expect enforcement action from the Pensions Regulator.

**The three different classes of worker**

- Eligible jobholders

For most employers, eligible jobholders will form the largest part of their workforce.   A worker is an eligible jobholders if he or she earns more than £9,440 (in the 2013/2014 tax year), is aged between 22 and state pension age and is working or ordinarily working in the UK. These employees must be automatically enrolled into a qualifying pension scheme into which both employer and employee contributions must be paid.

The level of contributions is being phased in over several years. From the employer’s staging date to 30 September 2017, employer minimum contributions will be 1% of earnings in a band between £5,668 and £41,450, with a total minimum contribution of 2%. From 1 October 2017 to 30 September minimum contributions rise to 2% from the employer and 5% total, rising again on 1 October 2018 to 3% and 8% respectively.

- Non-eligible jobholders

Workers aged between 16 and 20 or between state pension age and 74 who work in the UK and earn more than £9,440 are classified as non-eligible jobholders, as are workers between 16 and 74 who earn between £5,668 and £9,440. Non-eligible jobholders have the right to opt into a qualifying pension scheme and receive employer contributions at the auto-enrolment level.

- Entitled workers

Workers aged between 16 and 74 who work in the UK and earn less than £5,668 have the right to join the employer’s qualifying pension scheme although the employer is not required to make a contribution on their behalf.

**‘Ordinarily working in the UK’**

There is no legal definition of what is meant by working or ordinarily working in the UK. For most employees it will be clear if they satisfy these criteria. But for multi-national staff operating across multiple jurisdictions, it will be less clear. The Pensions Regulator’s guidance says the primary consideration is where the worker is based. A worker in offshore employment in the territorial waters of the UK or in the exploration of UK seabed exploration is considered as working in the UK. Details of how seafaring staff should be treated can be found on the Pensions Regulator’s website [please link underlined text to <http://www.thepensionsregulator.gov.uk/>].

**Qualifying earnings**

When calculating qualifying earnings to see if a worker should be automatically enrolled employers should include salary, commission, wages, bonuses, overtime, statutory sick pay, statutory maternity pay, statutory paternity pay and statutory adoption pay.

**Qualifying earnings and self-certification**

The auto-enrolment regulations require employers to pay contributions for eligible workers of a percentage of earnings between £5,668 and £41,450. But some employers already have decent schemes in place that pay a percentage of all earnings, including from £0 to £5,668. Yet some of these schemes base contributions on pensionable pay, which may not include commission, overtime or bonuses.

In recognition of this, employers with schemes of this sort are able to self-certify that their scheme meets set minimum alternative requirements. Employers are able to self-certify their scheme as a qualifying pension scheme if its contribution structure fits within one of three tiers: -

* Tier 1. A total minimum contribution of at least 9% of pensionable pay, of which at least 4% must be the employer’s contribution.
* Tier 2. A total minimum contribution of at least 8% of pensionable pay, at least 3% of which must be the employer’s contribution, provided the pensionable pay is at least 85% of total earnings.
* Tier 3. A total minimum contribution of at least 7% of earnings, at least 3% of which must be the employer’s, provided all earnings are pensionable.

**Postponement**

An employer is entitled to postpone automatic enrolment by up to three months from its staging date. If it wishes to do so it must serve a postponement notice on its workers.

Using postponement effectively means the employer can put off paying its first employer contributions until three months after its staging date. Not only can postponement save the employer three month’s contributions, it is also likely to enable the employer to reduce the number of employees to be automatically enrolled if its staging date is within three months of April 2014.

This is because the earnings threshold for auto-enrolment is expected to rise from its current level of £9,440 to £10,000. The auto-enrolment earnings threshold has so far been linked to the level of the individual personal allowance for income tax and is likely to remain so in 2014/2015. Employers with staging dates between January 2014 and April 2014 will be able to postpone auto-enrolment until the new tax year, meaning some employees may no longer be included.

However, the postponement facility does not entitle employers to simply put back their staging date by three months. They still need to have a qualifying pension scheme in place by their staging date so that eligible jobholders, non-eligible jobholders and entitled workers are able to opt into it if they choose.