

# **PENSIONS ACT 2008**

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## **EXPLANATORY NOTES**

### **COMMENTARY ON SECTIONS**

#### **Part 1: Pension scheme membership for jobholders**

##### ***Chapter 3: Safeguards: Employment and pre-employment***

124. *Sections 50 to 59* represent a package of pre-employment and employment safeguards to ensure that individuals' entitlements under this Act can be protected. This package contains three key elements. Sections 50 to 53 introduce a prohibition on employers attempting to screen out job applicants on the basis that they want to be a member of a pension scheme. Section 54 introduces a prohibition on employers acting (or attempting) to induce employees to opt out from, or cease, membership of a qualifying workplace pension scheme. Both these prohibitions will be enforced by the Regulator. Sections 55 to 59 provide employees with a range of employment rights to enable them to present a complaint to an employment tribunal if they feel they have been put at a disadvantage or dismissed as a result of their pension choices. The Regulator will not have a role in the enforcement of these.

##### ***Section 50: Prohibited recruitment conduct***

##### ***Section 51: Compliance notices***

##### ***Section 52: Penalty notices***

##### ***Section 53: Review of notices and references to Pensions Regulator Tribunal***

125. *Sections 50 to 53* introduce a prohibition on certain recruitment conduct and provide the Pensions Regulator with powers to notify employers of breaches of this prohibition and subsequently issue penalties. Section 50 provides that the prohibition is contravened if, in an application for employment, an employer makes a statement or asks a question that indicates that the application might be conditional on whether or not an applicant might opt out of auto-enrolment. A typical example would be if it was found that a job advertisement indicated that the applicant might stand more chance of success if he was prepared to opt out of auto-enrolment.
126. *Section 51* enables the Pensions Regulator to issue a compliance notice to an employer where it is of the opinion that the employer has contravened section 50 and outlines what the notice may contain. Notices may inform the employer what it must do in order to remedy their non-compliance with section 50 or prevent it re-occurring. For example, an employer might be required by a notice to change the wording of an application form or other recruitment material for the future.
127. The notice may also set out the time periods within which employers have to take certain actions such as provide information about the contravention of the prohibition and how they have now complied with the notice. Compliance notices may also state that if an

employer fails to comply with the requirements of the notice, the Regulator may issue a penalty notice.

128. **Section 52** sets out that the Regulator can issue penalty notices in respect of sections 50 and failure to comply with compliance notices issued under 51. The penalty must not exceed £50,000 and the person to whom the notice is issued (the employer) must pay the penalty within a specified period. *Subsection (4)* sets out what information must be in the penalty notice.
129. The Pensions Regulator will have the power to recover any penalties payable and any penalty recovered must be paid into the Consolidated Fund.
130. **Section 53** sets out that the Regulator will have the ability to review both compliance and penalty notices, issued under sections 51 and 52, in relation to the recruitment conduct prohibition in section 50.
131. As with penalty notices issued under sections 40 or 41 an employer will have the right of appeal to the Pensions Regulator Tribunal in respect of the issue of a penalty notice in relation to the recruitment conduct prohibition, or the amount of the penalty payable under that notice.

#### ***Section 54: Inducements***

132. **Section 54** introduces a prohibition on employers attempting to induce their workers to opt out from, or cease, membership of a qualifying workplace pension scheme and gives the Regulator the power to take compliance action against a contravention. An employer contravenes this prohibition if they take any action for the sole or main purpose of inducing a worker or jobholder to give up membership of a relevant scheme, without becoming an active member of another relevant scheme within the prescribed period under section 2(3).
133. The section also provides a power for a time limit, within which (i) a complaint to the Regulator must be made about a contravention of the provision or (ii) the Regulator must inform the employer of an investigation of a contravention. This time limit will be set out in regulations.

#### ***Section 55: The right not to suffer detriment***

#### ***Section 56: Enforcement of the right***

134. **Section 55** provides a statutory right for workers not to be subjected to any detriment by an act done on specified grounds. For example, this right would protect a worker who might have been denied promotion or training opportunities because of their decision not to opt out of pension scheme membership
135. *Subsection (4)* provides that if the detriment in question amounts to dismissal, this section does not apply.
136. **Section 56** provides that workers have a right to bring claims that they have been subjected to a detriment to an employment tribunal. If the tribunal upholds a claim, it can make an award of compensation to be paid by the employer to the worker.

#### ***Section 57: Right of employee not to be unfairly dismissed***

137. **Section 57** inserts a new provision (section 104D) into the Employment Rights Act 1996, which protects an employee from being dismissed on grounds mirroring those specified in the right not to suffer detriment (section 55), for example, where an employee is dismissed for refusing to opt out of pension scheme membership.
138. As with the right not to suffer detriment, an employee who is dismissed on these specified grounds shall be regarded as having been unfairly dismissed, regardless of

whether the employee concerned actually meets the eligibility criteria for the employer duty.

***Section 58: Restrictions on agreements to limit operation of this Part***

139. *Subsection (1)* renders void any agreement between a worker and their employer to either (a) exclude or limit the operation of any provision in Part 1 of this Act or (b) preclude a person from bringing proceedings under section 55 (i.e. enforcement of the right not to suffer detriment) before an employment tribunal.
140. Under the terms of this provision, an agreement between the worker and employer will be void and unenforceable by the employer, who will be further restricted (under *subsection (2)*) from recovering the financial or other benefit given in exchange for it.
141. *Subsections (3) and (4)* provide that subsection (1) will not apply where an employer and a worker have entered into any agreements under conciliation arrangements dealt with by a conciliation officer or under a compromise agreement (the conditions for which are listed in *subsection (5)*). These subsections ensure that subsection (1) does not undermine any conciliation process by inadvertently voiding any agreement made as part of the conciliation process.

***Section 59: Employment appeal tribunal***

142. This section provides that an appeal lies to the Employment Appeal Tribunal on any question of law arising from any decision of, or arising in any proceedings before, an employment tribunal under or by virtue of this Act - including the right not to suffer detriment as provided for by section 55. This right of appeal will be open to both employers and eligible jobholders. There is no need for an equivalent provision in this Act to extend to the change to unfair dismissal law in section 57. This is because the Employment Tribunals Act 1996, section 21, already provides that a right of appeal exists to the Employment Appeal Tribunal on any question of law arising under the Employment Rights Act 1996, which contains the principal provisions on unfair dismissal.