



# Pensions Act 2008

## 2008 CHAPTER 30

### PART 1

#### PENSION SCHEME MEMBERSHIP FOR JOBHOLDERS

### CHAPTER 3

#### SAFEGUARDS: EMPLOYMENT AND PRE-EMPLOYMENT

##### *Prohibited recruitment conduct*

#### **50 Prohibited recruitment conduct**

- (1) An employer contravenes this section if any statement made or question asked by or on behalf of the employer for the purposes of recruitment indicates (expressly or impliedly) that an application for employment with the employer may be determined by reference to whether or not an applicant might opt out of automatic enrolment.
- (2) The reference in subsection (1) to a statement made or a question asked for the purposes of recruitment is a reference to one made or asked in the course of any of the following—
  - (a) inviting applications for employment;
  - (b) requesting information from an applicant, referee or other person in connection with an application for employment;
  - (c) providing information about employment;
  - (d) proposing terms or conditions of employment.
- (3) The reference in subsection (1) to an applicant opting out of automatic enrolment is a reference to the applicant, if becoming at any time in the course of the employment a jobholder to whom section 3 or 5 applies, giving notice in accordance with section 8 in relation to arrangements made by the employer under the relevant section.

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- (4) In this section and sections 51 and 52, “employer” means the prospective employer in relation to any employment.

## **51 Compliance notices**

- (1) The Regulator may issue a compliance notice to an employer if the Regulator is of the opinion that the employer has contravened section 50.
- (2) A compliance notice is a notice directing the employer to take, or refrain from taking, the steps specified in the notice in order to—
- (a) remedy the contravention, or
  - (b) prevent the contravention being repeated.
- (3) A compliance notice may, in particular—
- (a) state the period within which any step must be taken or must cease to be taken;
  - (b) require the employer to provide within a specified period specified information relating to the contravention;
  - (c) require the employer to inform the Regulator, within a specified period, how the employer has complied or is complying with the notice;
  - (d) state that, if the employer fails to comply with the requirements of the notice, the Regulator may issue a penalty notice under section 52.
- (4) A compliance notice must specify the contravention to which the notice relates.

## **52 Penalty notices**

- (1) The Regulator may issue a penalty notice to an employer if the Regulator is of the opinion that the employer—
- (a) has contravened section 50, or
  - (b) has failed to comply with a compliance notice under section 51.
- (2) A penalty notice is a notice requiring the person to whom it is issued to pay a penalty within the period specified in the notice.
- (3) The penalty—
- (a) is to be determined in accordance with regulations, and
  - (b) must not exceed £50,000.
- (4) A penalty notice must—
- (a) state the amount of the penalty;
  - (b) state the date, which must be at least 4 weeks after the date on which the notice is issued, by which the penalty must be paid;
  - (c) specify the contravention or failure to which the notice relates;
  - (d) notify the employer of the review process under section 43 and the right to make a reference under section 44 (as applied by section 53).
- (5) Section 42 (penalty notices: recovery) applies to a penalty payable under this section, and to a notice under this section, as it applies to a penalty payable under section 40, and to a notice under that section.

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

- (1) Section 43 (review of notices) also applies to a compliance notice issued under section 51 and to a penalty notice issued under section 52.
- (2) Section 44 (references to the Pensions Regulator Tribunal) applies in relation to a penalty notice issued under section 52 as it applies in relation to a notice issued under section 40 or 41.

### *Inducements*

### **54 Inducements**

- (1) An employer contravenes this section if the employer takes any action for the sole or main purpose of—
  - (a) inducing a worker to give up membership of a relevant scheme without becoming an active member of another relevant scheme within the period prescribed under section 2(3), or
  - (b) inducing a jobholder to give a notice under section 8 without becoming an active member of a qualifying scheme within the period prescribed under section 2(3).
- (2) Section 35 applies in relation to a contravention of this section as it applies in relation to a contravention of section 2(1), and sections 38 to 44 apply accordingly.
- (3) But the Regulator may not issue a compliance notice in respect of a contravention of this section unless the contravention occurred within the prescribed period before—
  - (a) the time when a complaint was made to the Regulator about the contravention, or
  - (b) the time when the Regulator informed the employer of an investigation of the contravention, if no complaint was made before that time.
- (4) A compliance notice in respect of a contravention of this section may direct the employer to take or refrain from taking specified steps in order to prevent the contravention being repeated.
- (5) For the purposes of this section a worker gives up membership of a relevant scheme if the worker—
  - (a) takes action or makes an omission by which the worker, without ceasing to be employed by the employer, ceases to be an active member of the scheme, or
  - (b) requests or authorises the employer to take such action or to make such an omission.
- (6) In this section, “relevant scheme” means—
  - (a) in relation to a jobholder, a qualifying scheme;
  - (b) in relation to a worker to whom section 9 applies, a scheme which satisfies the requirements of that section.

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### *Protection of employment rights*

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

- (1) A worker has the right not to be subjected to any detriment by an act, or a deliberate failure to act, by the worker's employer, done on the ground that—
  - (a) any action was taken, or was proposed to be taken, with a view to enforcing in favour of the worker a requirement to which this section applies,
  - (b) the employer was prosecuted for an offence under section 45 as a result of action taken for the purpose of enforcing in favour of the worker a requirement to which this section applies, or
  - (c) any provision of Chapter 1 of this Part applies to the worker, or will or might apply.
- (2) It is immaterial for the purposes of paragraph (a) or (b) of subsection (1)—
  - (a) whether or not the requirement applies in favour of the worker, or
  - (b) whether or not the requirement has been contravened,but, for that subsection to apply, the claim that the requirement applies and, if applicable, the claim that it has been contravened must be made in good faith.
- (3) This section applies to any requirement imposed on the employer by or under any provision of Chapter 1 of this Part.
- (4) This section does not apply where the detriment in question amounts to dismissal within the meaning of Part 10 of the Employment Rights Act 1996 (c. 18) (unfair dismissal).
- (5) In this section references to enforcing a requirement include references to securing its benefit in any way.

#### **56 Enforcement of the right**

- (1) A worker may present a complaint to an employment tribunal that the worker has been subjected to a detriment in contravention of section 55.
- (2) Subject to the following provisions of this section, the provisions of sections 48(2) to (4) and 49 of the Employment Rights Act 1996 (complaints to employment tribunals and remedies), apply in relation to a complaint under this section as they apply in relation to a complaint under section 48 of that Act, but taking references in those provisions to the employer as references to the employer within the meaning of section 55(1).
- (3) Where—
  - (a) the detriment to which the worker is subjected is the termination of the worker's contract, but
  - (b) that contract is not a contract of employment,any compensation awarded under section 49 of the Employment Rights Act 1996 by virtue of subsection (2) must not exceed the limit specified in subsection (4).
- (4) The limit is the total of—
  - (a) the sum which would be the basic award for unfair dismissal, calculated in accordance with section 119 of the Employment Rights Act 1996, if the

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worker had been an employee within the meaning of that Act and the contract terminated had been a contract of employment, and

- (b) the sum for the time being specified in section 124(1) of that Act which is the limit for a compensatory award to a person calculated in accordance with section 123 of that Act.
- (5) Where the worker has been working under arrangements which do not fall to be regarded as a worker's contract for the purposes of the Employment Rights Act 1996, the worker is to be treated for the purposes of subsections (3) and (4) as if any arrangements under which the worker has been working constituted a worker's contract falling within section 230(3)(b) of that Act.
- (6) In section 18(1) of the Employment Tribunals Act 1996 (c. 17) (proceedings where conciliation is available), after paragraph (u) insert “, or
- (v) under section 56 of the Pensions Act 2008.”

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

- (1) The Employment Rights Act 1996 (c. 18) is amended as follows.
- (2) After section 104C (flexible working) insert—

### **“104D Pension enrolment**

- (1) An employee who is dismissed shall be regarded for the purposes of this Part as unfairly dismissed if the reason (or, if more than one, the principal reason) for the dismissal is that—
    - (a) any action was taken, or was proposed to be taken, with a view to enforcing in favour of the employee a requirement to which this section applies;
    - (b) the employer was prosecuted for an offence under section 45 of the Pensions Act 2008 as a result of action taken for the purpose of enforcing in favour of the employee a requirement to which this section applies; or
    - (c) any provision of Chapter 1 of that Part of that Act applies to the employee, or will or might apply.
  - (2) It is immaterial for the purposes of paragraph (a) or (b) of subsection (1) above—
    - (a) whether or not the requirement applies in favour of the employee, or
    - (b) whether or not the requirement has been contravened,but, for that subsection to apply, the claim that the requirement applies and, if applicable, the claim that it has been contravened must be made in good faith.
  - (3) This section applies to any requirement imposed on the employer by or under any provision of Chapter 1 of Part 1 of the Pensions Act 2008.
  - (4) In this section references to enforcing a requirement include references to securing its benefit in any way.”
- (3) In section 105 (redundancy as unfair dismissal), in subsection (1)(c) (which refers to any of subsections (2A) to (7J) of that section applying) for “(7J)” substitute “(7JA)”.
- (4) After subsection (7J) of that section insert—

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- “(7JA) This subsection applies if the reason (or, if more than one, the principal reason) for which the employee was selected for dismissal was one of those specified in subsection (1) of section 104D (read with subsection (2) of that section).”
- (5) In section 108 (exclusion of right: qualifying period of employment) in subsection (3) (cases where no qualifying period is required) after paragraph (gi) insert—
- “(gj) subsection (1) of section 104D (read with subsection (2) of that section) applies.”.
- (6) In section 237(1A) of the Trade Union and Labour Relations (Consolidation) Act 1992 (c. 52) (cases where employee may complain of unfair dismissal despite participation in unofficial industrial action), in paragraph (a)—
- (a) for “, 103A or 104C” substitute “, 103A, 104C or 104D”;
- (b) for “protected disclosure and flexible working” substitute “protected disclosure, flexible working and pension scheme membership”.
- (7) In section 238(2A)(a) of that Act (cases where employment tribunal to determine whether dismissal of an employee is unfair despite limitation in subsection (2) of that section)—
- (a) for “, 103 or 104C” substitute “, 103, 104C or 104D”;
- (b) for “, employee representative and flexible working” substitute “, employee representative, flexible working and pension scheme membership”.

## **58 Restrictions on agreements to limit operation of this Part**

- (1) Any provision in any agreement (whether a worker’s contract or not) is void in so far as it purports—
- (a) to exclude or limit the operation of any provision of this Part, or
- (b) to preclude a person from bringing proceedings under section 56 before an employment tribunal.
- (2) The fact that an agreement is to any extent void under subsection (1) does not entitle the employer to recover any property transferred, or the value of any benefit conferred, as an inducement to enter into, or otherwise in connection with, the agreement.
- (3) Subsection (1) does not apply to any agreement to refrain from instituting or continuing proceedings where a conciliation officer has taken action under section 18 of the Employment Tribunals Act 1996 (c. 17) (conciliation).
- (4) Subsection (1) does not apply to any agreement to refrain from instituting or continuing before an employment tribunal any proceedings within section 18(1)(v) of the Employment Tribunals Act 1996 (proceedings under this Act where conciliation is available) if the conditions regulating compromise agreements under this Act are satisfied in relation to the agreement.
- (5) For the purposes of subsection (4) the conditions regulating compromise agreements under this Act are that—
- (a) the agreement must be in writing,
- (b) the agreement must relate to the particular proceedings,
- (c) the worker must have received advice from a relevant independent adviser as to the terms and effect of the proposed agreement and, in particular, its effect on his ability to pursue his rights before an employment tribunal,

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- (d) there must be in force, when the adviser gives the advice, a contract of insurance, or an indemnity provided for members of a profession or a professional body, covering the risk of a claim by the worker in respect of loss arising in consequence of the advice,
  - (e) the agreement must identify the adviser, and
  - (f) the agreement must state that the conditions regulating compromise agreements under this Act are satisfied.
- (6) A person is a relevant independent adviser for the purposes of subsection (5)(c) if that person—
- (a) is a qualified lawyer,
  - (b) is an officer, official, employee or member of an independent trade union who has been certified in writing by the trade union as competent to give advice and as authorised to do so on behalf of the trade union,
  - (c) works at an advice centre (whether as an employee or a volunteer) and has been certified in writing by the centre as competent to give advice and as authorised to do so on behalf of the centre, or
  - (d) is a person of a description specified in an order made by the Secretary of State.
- (7) But a person is not a relevant independent adviser for the purposes of subsection (5)(c) in relation to the worker—
- (a) if the person is employed by, or is acting in the matter for, the employer or an associated employer,
  - (b) in the case of a person within subsection (6)(b) or (c), if the trade union or advice centre is the employer or an associated employer,
  - (c) in the case of a person within subsection (6)(c), if the worker makes a payment for the advice received from the person, or
  - (d) in the case of a person of a description specified in an order under subsection (6)(d), if any condition specified in the order in relation to the giving of advice by persons of that description is not satisfied.
- (8) In this section “qualified lawyer” means—
- (a) as respects England and Wales—
    - (i) a barrister (whether in practice as such or employed to give legal advice),
    - (ii) a solicitor who holds a practising certificate, or
    - (iii) a person other than a barrister or solicitor who is an authorised advocate or authorised litigator (within the meaning of the Courts and Legal Services Act 1990);
  - (b) as respects Scotland—
    - (i) an advocate (whether in practice as such or employed to give legal advice), or
    - (ii) a solicitor who holds a practising certificate.
- (9) For the purposes of this section any two employers are associated if—
- (a) one is a company of which the other (directly or indirectly) has control, or
  - (b) both are companies of which a third person (directly or indirectly) has control;
- and “associated employer” is to be read accordingly.

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### *Employment Appeal Tribunal*

#### **59 Employment Appeal Tribunal**

In section 21(1) of the Employment Tribunals Act 1996 (c. 17) (jurisdiction of appeal tribunal), after paragraph (gc) insert—

“(gd) the Pensions Act 2008,”.