Employment*Brief*

April 2012

Pensions and auto enrolment – prepare for changes

Businesses are making preparations for new requirements that mean all employers in Great Britain must automatically enrol eligible jobholders in a pension scheme from a future date after October 2012. Under a four-year staging process, employers must either use their own qualifying pension scheme or the National Employment Savings Trust (NEST).

New laws coming into force in October 2012 will require employers to automatically enrol eligible jobholders into a pension scheme. Here we describe the key points that companies need to consider.

Implementing the reforms

The new duties will apply to all employers in Great Britain and will be formally implemented over four years starting on 1 October 2012, with larger employers being affected before smaller employers and new businesses. The initial wave of employers will be able to voluntarily start auto-enrolment as early as July 2012. Starting with employers with over 120,000 employees and working its way down to all employers no matter how few employees by 2016.

From the date the employer duties apply - referred to as the "staging date" - an employer must arrange for all eligible jobholders to be automatically enrolled in a qualifying pension scheme (though it can impose a three-month waiting period for new jobholders). It can use its existing occupational or personal pension scheme if it meets certain quality requirements or enrol jobholders in NEST, the central government-established scheme.

Eligibility requirements and using NEST

To be eligible for auto-enrolment, a jobholder must be between age 22 and state pension age and must earn at least £7,475 a year (in 2011/12 terms): this starting point corresponds to the income tax personal allowance. "Jobholders" include permanent and temporary employees and agency workers. Non-executive directors are not included.

If an employer auto-enrols its eligible jobholders in a qualifying scheme, it must pay contributions of 3% of band earnings each year, although this requirement will be phased in over five years. The qualifying earnings band was originally due to cover earnings between £5,035 and £33,540 in 2006/07 prices, but the lower end of the band is likely to be changed so it corresponds roughly to the lower earnings limit (£5,304 in 2011/12). Jobholders will be required to contribute 5% of band earnings, again to be phased in over five years.

There will be an annual limit on contributions (£4,200 in 2011/12 prices), but this is due to be abolished in 2017.

Opting out and opting in

Jobholders who have been automatically enrolled will have a statutory right to opt out of whichever scheme they have joined, within prescribed time limits. Jobholders who have opted out will be automatically re-enrolled every three years during a six-month window. Jobholders who are not automatically enrolled (for example, because they earn less than the earnings trigger or they opted out or are aged under 22) can opt in by giving their employer notice requiring the employer to arrange for them to join an automatic enrolment scheme but they can only do this once in a 12-month period. Individuals earning less than the lower end of the qualifying earnings band can opt into a pension scheme too, but will not be entitled to receive any employer contributions.

Enforcing compliance

Employers will not be allowed to induce jobholders to opt out of scheme membership or make job offers conditional on opting out.

The Pensions Regulator will police employer compliance and has issued detailed guidance. Some of its functions will be delegated to the private sector. Employers that breach the new duties will face compliance notices and penalties that vary according to the employer's size. Large employers that do not comply could be liable for escalating penalties of £10,000 a day. Criminal penalties could apply in the case of "wilful" failure to comply.

NEWS IN BRIEF

Increase of qualification period on unfair dismissal claims

It is common knowledge now that from 6 April 2012 the qualification period for the right to claim unfair dismissal will be extended from 1 to 2 years. What has been less clear until recently is to whom does this apply? Recent UK Department for Business, Information and Skills commentary says that this new time limit will only apply to those employees whose start date is on or after the 1 April 2012.

New figures for redundancy calculations

The maximum limit on a week's pay increased from £400 to £430 for dismissals that take place after the 1 February 2012.

More time for small employers and pensions

The Government has put back the deadline for small employers to automatically enrol their workforce into a qualifying pension scheme. The deadline is now May 2015 (previously April 2014). Staging dates for other larger employers remain as previously stated, starting in October 2012.

GULLANDS SENTINEL INSURANCE

Coming soon to Gullands is an all inclusive package comprising a complete health audit of policies and contracts, a 9-5 helpline staffed by our specialists and insurance to cover tribunal costs and awards.

Gullands Sentinel insurance cover will provide speedy support and advice from those who know you and your business best.

For more information contact Amanda Finn by email at a.finn@gullands.com or call 01622 678341.

QUICK REFERENCE SECTION

Statutory minimum notice periods:
An employer must give at least

- one week's notice to an employee who has been employed for one month or more but less than 2 years.
- One week's notice for each complete year of service for those employed for more than 2 years.
- Once an employee has more than 12 years service the notice period does not extend beyond 12 weeks.

National Minimum Wage
(From October 2011)

16 – 17	£3.68
18 – 20	£4.98
21+	£6.08

Statutory Sick Pay
(from April 2012)
£85.85 per week

Statutory Maternity/Paternity/Adoption Pay
(basic rate) (from April 2012)
£135.45

Statutory Holiday
5.6 weeks for a full time employee.
This can include bank and public holidays.

Redundancy Calculation

- 0.5 week's pay for each full year of service when age is less than 22.
- 1 week's pay for each full year of service where age during year is 22 or above, but less than 41.
- 1.5 week's pay for each full year of service where age during year is 41 and over.

Calculation is capped at 20 years.
Maximum week's pay is capped under the Statutory Scheme at £400 for dismissals prior to 1.2.12 and £430 for those after.

JOB APPLICANTS: THE BURDEN OF PROOF IN DISCRIMINATION CLAIMS

The law on discrimination applies equally to potential job applicants as it does through each stage of employment. In Meister v Speech Design Carrier Systems GmbH, the European Court of Justice (ECJ) has recently given an opinion on the burden of proof in the case where a job applicant is alleging discrimination. The employer, a German company, advertised for a software developer. Ms Meister, a Russian national qualified for the job and was rejected. She then re-applied when the job was advertised on the internet a few days later, and was again refused without interview. No reasons were given for the refusal.

The EC Race Directive implemented in Great Britain by the Equality Act, provides that if an individual can demonstrate on the balance of probabilities that there are facts from which a tribunal could decide that he has been treated less favourably for a discriminatory reason, it is for the employer to prove that this is not the case.

Ms Meister brought a claim in the German tribunal alleging race, sex and age discrimination and asked the employer to produce information about the successful applicant. The German court referred the matter to the ECJ for an opinion as to whether an unsuccessful job applicant has the right to be given information about the successful applicant and the selection criteria used, and whether if the employer does not disclose the information there is a presumption of discrimination.

The ECJ Opinion said that the law does not impose a positive obligation on employers to provide information in these cases. The court should consider whether it could infer from the refusal to give information that discrimination had taken place. For example an employer's silence would be viewed differently in cases like this where the applicant was qualified for the job and those where the applicant does not have the relevant attributes.

Whilst there is no duty to provide this information job applicants, employers would be well advised to keep a paper trail of each stage of the recruitment process. This will include details of the job description, interview notes and selection criteria. This together with a suitable equal opportunities policy, should mean that they are in a strong position to firmly rebut any allegations of discrimination by disgruntled applicants.

Checklist: Online and e-mail risks for your business

Information that is written on the internet or in e-mails can seriously damage your business' reputation and the reputation of individual employees. Your employees could lose their job, be sued or face criminal charges and your business could be sued or fined. So what can employers and staff do to protect themselves?

Stop and think before you click

- Writing something on the internet or in an e-mail is exactly the same as writing on paper and, because of the lack of control of who might ultimately see it, sometimes worse. Your business cannot control what the recipient does with an e-mail.
- Inappropriate information that is written online or in an e-mail can have severe financial repercussions for your business. It can also create serious personal and disciplinary issues for individual employees.
- Even if your employees are e-mailing or using social media in their own time, they could still get themselves and your business in serious trouble.

E-mails and internet postings can be used in legal proceedings

- E-mails and internet postings can be used against your business in legal proceedings or other regulatory investigations and you may have a legal obligation to disclose them to the other party, even if it is not aware of them.
- Your business should never delete e-mails relating to:
  - a legal dispute;
  - an investigation; or
  - a potential dispute or investigation.

It is very difficult to delete e-mails and online postings

Simply deleting e-mails or internet postings will not necessarily solve the problem. Forensic IT equipment can still find supposedly "deleted" messages.

Do not be hurtful or spread rumours

- Online content or e-mails that could be thought of as obscene, racist, sexist, bullying or hurtful should never be posted or sent. Your business can be held liable for discriminatory acts committed by your employees.
- If a comment is made about another employee online or in an e-mail that amounts to harassment, your business could be liable even if the employee was using their own equipment when they made the comment.
- Exaggerating or making false or inaccurate statements about another company or person online or in an e-mail could lead to your business being sued, even if the e-mail was only sent to one person.

Take care with confidential information

- Where possible, avoid sending confidential information by e-mail. Your business should take legal advice on how the information can be best protected.
- Any e-mail containing confidential information should be clearly marked as "confidential".
- If your business receives an e-mail that contains "dangerous" material (for example, another company's trade secrets), you should take legal advice immediately.

Do not make a contract by mistake

- A legally binding contract can be made by a simple exchange of e-mails.
- Your business should make it clear if it does not intend to be bound by what is communicated in an e-mail.

Do not copy someone else's work

- Other people's work should not be used in e-mails or online posts unless:
  - your business has permission from the original author; or
  - you know that it is not protected by copyright.

Do not send or view offensive or unknown material

- Encourage your employees to carefully monitor what arrives in their inbox, especially if they do not recognise the sender or the title of the e-mail seems peculiar.
- If there is a risk that an e-mail may contain a virus, it should not be opened and your IT department should be contacted immediately.
- Make your employees aware that they could be disciplined or even dismissed for forwarding inappropriate e-mails or accessing inappropriate websites at work. In severe cases it could also be a criminal offence.

Avoid unproductive usage

- Most businesses allow light personal internet and e-mail usage as long as it does not interfere with their employees' duties. However, you should make sure your employees are aware that excessive, unproductive use of the internet and e-mails at work may be treated as gross misconduct for which they could be dismissed.
- E-mails can often be a waste of time. Encourage your employees to think carefully before copying someone in on an e-mail, especially if there is a long chain of e-mails attached.

DISCIPLINARY PROCEDURES FOR POOR PERFORMANCE AND CAPABILITY

How should misconduct or poor performance be handled?

Managing staff can be challenging and sometimes when things go wrong it can prove difficult to tackle problems. Facing up to difficulties and having a calm, planned approach usually leads to the best outcome. Here the Gullands employment team explains your obligations as an employer and some practical steps that can be taken.

You must investigate the issues

- Your business must carry out a reasonable investigation of the issue (for example, by conducting an investigatory meeting with the employee under investigation). Any investigatory meeting should not result in disciplinary action without a disciplinary hearing taking place first.
- If paid suspension is necessary during the investigation it should be as brief as possible and kept under review. You should clarify that this is not in itself a form of disciplinary action.

You should inform the employee of the issues in writing

- If there is a case to answer, your business should notify the employee in writing of the alleged misconduct or poor performance and its possible consequences in sufficient detail to enable them to respond at a disciplinary hearing. Any written evidence (for example, witness statements) should be provided to the employee.
- The disciplinary hearing should be held without unreasonable delay. However, you must ensure the employee has reasonable time to prepare their case.
- The notification should set out the:
  - time and place of the disciplinary hearing; and
  - your employee's right to bring a companion (a fellow worker or a trade union representative) to the hearing.

There must be a disciplinary meeting or hearing

- Your business should not make a decision to dismiss or take other disciplinary action without a disciplinary hearing or meeting taking place first.
- If the employee is persistently unable or unwilling to attend, without good reason, you are entitled to hold the meeting or hearing in their absence and make a decision on the available evidence.
- Either side should give advance notice of any witnesses they intend to call.
- At the hearing:
  - you should explain the allegations and go through the evidence;
  - the employee should be allowed to set out their case and answer the allegations; and
  - the employee should have a reasonable opportunity to ask questions, present evidence, call relevant witnesses and raise points about any information provided by your witnesses.

You should inform the employee of the decision in writing

After the hearing, your decision should be sent to the employee in writing without unreasonable delay. Written warnings should set out:

- The nature of the misconduct or poor performance.
- The improvement required.
- The timescale for improvement.
- How long the warnings will remain current.
- The consequences of further misconduct (or failure to improve) within that period.
- The employee's right to appeal the decision and the procedure they need to follow to do so.

The employee has a right of appeal

- If the employee feels the disciplinary action against them is unjust, they should appeal in writing, specifying the grounds of their appeal.
- If they bring a tribunal claim without appealing, any compensation they are awarded may be reduced.

Practical steps for your business to take to improve your disciplinary procedures

- Involve employees in developing workplace procedures, and make sure those procedures are transparent and accessible to employees.
- Encourage managers to manage conduct and performance issues quickly and informally before they get to a formal disciplinary stage.
- Investigate issues thoroughly. Even if the employee has attended an investigatory interview, always hold a disciplinary hearing once all the evidence is available, and allow the employee to put their side of the story before making any decision.
- Keep written records, including minutes of meetings.
- Communicate decisions effectively and promptly, setting out your reasons.

New unfair dismissal claim rules introduced

In our January update we reported on the extension of the qualifying period to bring a claim for unfair dismissal from one to two years. The change is due to come into force this month.

The Department for Business Innovation and Skills has confirmed that the change will only apply to those starting a new job on or after 6 April 2012. Existing employees who started before that date will still be subject to the one year qualifying period. This means that an employee with less than two years employment on 6 April will not lose their right to bring a claim. Equally, for example, existing employees with 11 months service at that date will only have to wait a month.

The change does not affect the position with unfair dismissal claims where the employee is alleging discrimination or in whistleblowing cases. In these situations there is no qualifying period and that will continue to be the case. As we reported in January, whilst the Government's intention was to cut the number of unfair dismissal claims, the changes to the qualifying period are likely to mean that disgruntled employees seek to claim that the dismissal was as a result of discrimination.

This is part of a wider initiative to reduce the number of tribunal claims. Last month the Government completed its consultation Charging Fees in Employment Tribunals and the Employment Appeal Tribunal on the introduction of fees to bring claims in the Employment Tribunal. Depending on the scheme adopted any changes are likely to come into play in 2013 or 2014.

CONTACT

If you would like any additional information on any of the subjects discussed in this newsletter please do not hesitate to contact us.

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