

**EVERSHEDS  
SUTHERLAND**



**AUTOMATIC ENROLMENT AND THE LAW –  
HOW FAR DO EMPLOYERS' DUTIES EXTEND?**

**A Joint Policy Paper from Eversheds Sutherland and Royal London**

**2017**

## **AUTOMATIC ENROLMENT AND THE LAW – HOW FAR DO EMPLOYERS' DUTIES EXTEND?**

### **EXECUTIVE SUMMARY**

Since 2012, the UK has seen a transformation in workplace pension provision as a result of legislation requiring employers to 'automatically enrol' their workers into a pension. As of September 2017, the Pensions Regulator reports that 807,000 employers had declared compliance with the legislation and that a total of 8.7 million 'eligible jobholders' had been enrolled. By April 2018 the initial 'staged' rollout of automatic enrolment will be complete, and by April 2019, the final step in 'phasing' up of minimum contribution rates will also be complete.

There is a general assumption that once employers have met their initial duties by enrolling eligible jobholders into a compliant scheme, re-enrolling those who had opted out every three years, and enrolling new workers as and when they start work, this is largely 'job done'.

But this paper asks the question as to whether employers can simply sit back at this point and congratulate themselves on a job well done, or whether there are ongoing issues of which employers should be aware?

Our conclusion is that employers in general, and larger employers in particular, should be wary of taking their eye off the ball when it comes to automatic enrolment. We note that there are examples in other countries of employers facing legal action where they are deemed not to have done the right thing by their employees when it comes to pensions. We also note that it would not be unprecedented for UK regulators and politicians to decide in the future that the employers of today should have met higher standards than the legal minimum requirements would seem to suggest. Employers who wish to insulate themselves against these risks may wish to consider the following areas identified in the paper:

- In choosing a plan in the first instance, to undertake due diligence beyond simply selecting any 'compliant' plan;
- To recognise that automatic enrolment relies heavily on 'defaults' and that employees may be very passive in the whole process; in choosing a scheme, employers may therefore want

to look at service to members, suitability of the default fund and other investment options and comparative levels of costs and charges; employers may also wish to engage with their employees to ensure that they are aware that statutory minimum contribution rates may not be sufficient to enable workers to afford to retire at a time of their choosing; larger employers in particular might reasonably be expected to be in a position to go 'the extra mile' in this regard;

- To review the scheme on an ongoing basis; whilst there are no obvious UK precedents for legal action against employers who choose an underperforming pension scheme, US employers have paid out a total of over \$350 million to settle claims relating to failures in retirement plans for workers;
- To consider the position of employees who are members of the scheme but are non-taxpayers; some pension schemes deliver tax relief through the 'net pay arrangement' (NPA) which does not deliver tax relief to non taxpayers, in contrast to the 'relief at source' process which does; employers could be vulnerable to challenge by lower paid workers if they choose an NPA scheme without good reason, since the pension received by the lower paid worker in retirement is likely to be smaller as a result;
- To ensure that record-keeping is of a high-standard, not least given the large number of individuals who will build up 'deferred' pension pots as they change jobs repeatedly; individuals who have had no contact with a firm for many years may need information about their past pension arrangements, including help tracking down 'lost' pensions;

Whilst the automatic enrolment legislation itself is relatively tightly drawn, courts may find that employers have a broader 'implied' duty to look after their workers in various respects. In an increasingly litigious world, and one in which regulators and politicians sometimes legislate with the benefit of hindsight, we believe that employers should move beyond 'minimal compliance' when it comes to automatic enrolment. We hope that the issues raised in this paper will suggest areas in which employers, and larger employers in particular, might take further action both to improve outcomes for their employees and to insulate themselves to a greater extent against potential legal challenge.

## **1. What do employers have to do?**

Automatic enrolment was introduced in October 2012. It initially applied to only the largest employers but it now applies to medium-sized and small employers (even those with a single worker).

Under the automatic enrolment laws, an employer is required to:

- Choose a suitable pension plan into which eligible workers will be automatically enrolled
- Determine which workers are “eligible” to be automatically enrolled (see section 2)
- Enrol eligible workers within the statutory deadlines
- Pay contributions (see section 3)
- Notify workers of their rights under the auto-enrolment regime
- Automatically ‘re-enrol’ approximately every three years eligible workers who opt-out
- Complete a declaration of compliance and submit it to the Pensions Regulator within five months of their ‘staging date’ (i.e. the starting date for their auto-enrolment duties)
- Complete a re-declaration of compliance and submit it to the Pensions Regulator within five months of every subsequent re-enrolment date
- Maintain records including details of workers that have been automatically enrolled, contribution records and all opt-in, joining and opt-out notices for a minimum of six years (four years in the case of opt-out notices).

The Pensions Regulator’s website ([www.tpr.gov.uk](http://www.tpr.gov.uk)) provides comprehensive information about an employer’s duties under the automatic enrolment legislation.

Employers should be aware that there are subtle, but important differences between the automatic enrolment and the automatic re-enrolment processes, and they need to take these differences into account when preparing for their first automatic re-enrolment date.

### **a) Who is eligible?**

The automatic enrolment legislation is built around “workers”. As we explain later on, workers are a broader group than employees and generally a wider range of individuals fall within the “worker” definition. Workers are divided into three categories. These are:

- eligible jobholders
- non-eligible jobholders, and
- entitled workers.

Which category a worker falls into depends upon their age and earnings. An employer's obligations and an individual's rights vary depending upon which category they are in. The position is summarised in the table below.

Earnings per year (2017/18 tax year)	Age 16-21 (working/ordinarily working in UK)	Age 22-SPA* (working/ordinarily working in UK)	SPA*- Age 74 (working/ordinarily working in UK)
Above £10,000 (income tax personal allowance)	<b>Non-eligible jobholder</b> – Must be given the right to opt-in to a <b>qualifying pension scheme</b>	<b>Eligible jobholder</b> – Must be automatically enrolled in a <b>qualifying pension scheme</b> (may opt-out)	<b>Non-eligible jobholder</b> – Must be given the right to opt-in to a <b>qualifying pension scheme</b>
Between £5,876 and £10,000	<b>Non-eligible jobholder</b> – Must be given the right to opt-in to a <b>qualifying pension scheme</b>		
Less than £5,876	<b>Entitled worker</b> – Can request to be enrolled into a pension plan. However, this does not have to be a <b>qualifying pension scheme</b> and they are not entitled to receive employer contributions.		

\* State pension age

### b) Minimum contributions

Employers are required to pay a minimum rate of contributions on behalf of all eligible jobholders and all non-eligible jobholders who opt-in. The default total minimum contribution rate is currently 2% of 'qualifying earnings' with a minimum of 1% payable by the employer. The total minimum contribution rate is set to rise to:

- 5% of qualifying earnings from April 2018 (with a minimum of 2% payable by the employer), and
- 8% of qualifying earnings from April 2019 (with a minimum of 3% payable by the employer).

Qualifying earnings are earnings between £5,876 and £45,000 for the 2017/18 tax year.

### c) Who enforces the automatic enrolment laws?

The Pensions Regulator is responsible for ensuring that employers comply with their automatic enrolment obligations. The Regulator has been given various powers to enable it to ensure

compliance, including the power to issue fixed and escalating fines for non-compliance, the power to request information and the power to inspect employers' premises and records.

As at the end of June 2017, the Regulator had used its formal powers on over 75,000 occasions, issuing:

- 335 information notices
- 564 statutory inspection notices
- 49,123 compliance notices
- 2,234 unpaid contribution notices
- 19,300 fixed penalty notices
- 3,899 escalating penalty notices.<sup>1</sup>

The Regulator has recently confirmed the first prosecution of a company and its director for deliberately failing to comply with its auto-enrolment duties. It has also recently started to name and shame employers that it has issued with escalating fines for failing to comply with their auto-enrolment duties.

In one of the most high-profile cases of non-compliance to date, an employer was fined £22,900 by the Regulator. The employer also had to repay £13,613 in unpaid contributions (including the members' contributions that had not been deducted due to the failure to automatically enrol workers at the right time).

Where an employer chooses to use a contract-based pension plan (such as a group personal pension) to fulfil its automatic enrolment duties, the rules and regulations of the Financial Conduct Authority (FCA) will apply to the plan itself. The FCA also has oversight of the actions of anyone involved in giving advice to employers regarding automatic enrolment.

Workers can also enforce their automatic enrolment rights in an Employment Tribunal or before the Courts. They can also "blow the whistle" to the Pensions Regulator where their employer is failing to comply.

#### **d) Grey areas**

There are a number of grey areas under the automatic enrolment laws, which are causing difficulties for employers. These include:

Who is a worker? The auto-enrolment laws apply to "workers". A worker means "an individual who has entered into or works under: (a) a contract of employment, or (b) any other contract by which the individual undertakes to do work or perform services personally for another party to the contract". Whilst in most cases it will be fairly straightforward to determine whether someone is a worker or not, this is not always the case.

---

<sup>1</sup> Pensions Regulator Compliance and Enforcement Quarterly Bulletin, April-June 2017.

Guidance from the Pensions Regulator on the meaning of worker says: “an individual who is paid a fee as a self-employed contractor under a contract for services is not normally a worker”.

Alternatively, an individual who has “contracted to perform work or services personally, other than as part of their own separate business” will be a worker.<sup>2</sup>

The line between these two different relationships is not always easy to draw. This was illustrated in the recent “gig economy” cases, notably those involving Uber and Pimlico Plumbers. These cases involved “ad hoc” working patterns where there was no mutual obligation either for the individual to work or for the employer to provide work. Each case was found in favour of the individuals, who were held to be workers for employment law purposes. Amongst other things, this means that they are covered by the auto-enrolment requirements. However, it should be noted that the Uber decision is being appealed and the Pimlico Plumbers case is off to the Supreme Court<sup>3</sup>. The Employment Appeal Tribunal also has a number of similar cases before it including cycle courier cases involving City Sprint and Addison Lee and a foster carer case involving Glasgow City Council.

Where the line lies on worker status will be a question of fact in each case and the Regulator’s guidance highlights a number of factors which ought to be considered, including:

- whether an individual is working in the course of their own business
- whether an individual must perform the work themselves
- who carries the financial risk of putting things right if the work goes wrong
- whether the individual is entitled to benefits such as sick pay and holiday pay.<sup>4</sup>

Where an individual’s status is unclear the Regulator expects employers to exercise “reasonable judgment”, to document their approach and to apply this consistently across their workforce.

The Government’s recent review of the gig economy<sup>5</sup> is unlikely to alter the underlying position materially given the fundamental shifts in working and employment patterns which are underway. This means that the complexities of operating automatic enrolment going forward are unlikely to become any simpler for employers.

Working or ordinarily working in the UK? The auto-enrolment obligations only apply to someone who “is working or ordinarily works in Great Britain”. For the purposes of this test, it does not matter whether the worker is a UK national or whether they make occasional business trips overseas.

Problems arise when the individual habitually works in a number of countries, including the UK and does not have a fixed workplace. In these cases, the Pensions Regulator says “the primary

---

<sup>2</sup> Pensions Regulator’s Detailed Guidance for Employers (No. 1) – Employer duties and defining the workforce: A introduction to the new employer duties, paragraph 15.

<sup>3</sup> There has been some discussion that the Uber appeal may head straight to the Supreme Court and be heard jointly with the Pimlico Plumbers appeal.

<sup>4</sup> Pensions Regulator’s Detailed Guidance for Employers (No. 1) – Employer duties and defining the workforce: A introduction to the new employer duties, paragraph 18

<sup>5</sup> Good Work: The Taylor Review of Modern Working Practices, July 2017.

issue to be considered is where the worker's employment base is located".<sup>6</sup> The Regulator then goes on to list a number of considerations to take into account, including where the worker begins and ends their work, the currency the worker is paid in, where their employer's headquarters is and whether they pay UK national insurance contributions and/or tax. Again, it will ultimately be a question of fact in each case.

Where a worker is on overseas secondment, the employer will need to consider "whether the worker's employment base remains in the UK or their connection to the UK remains sufficiently strong despite their placement overseas".<sup>7</sup>

There are also special rules for seafarers and off-shore workers (such as those working on oil platforms).

---

<sup>6</sup> Pensions Regulator's Detailed Guidance for Employers (No. 3) – Assessing the workforce: How to identify the different categories of worker, paragraph 36 onwards.

<sup>7</sup> Pensions Regulator's Detailed Guidance for Employers (No. 3) – Assessing the workforce: How to identify the different categories of worker, paragraph 46.



## 2. How far do an employer's duties extend?

At first glance it would seem that an employer who fulfils the minimum duties outlined in section 1 will be legally compliant with the automatic enrolment laws. However, is this the full extent of an employer's legal duties? And is this enough to insulate an employer from potential liability in the future should things go wrong?

An employer that takes a minimum compliance approach and only fulfils its basic legal responsibilities runs the risk that a disgruntled worker could bring a claim in the future or that a future regulator, Court or government could retrospectively decide - with the benefit of hindsight and as social and legal norms and expectations develop - that they could and should have done more.

Areas of difficulty, and potentially additional liability, for employers include:

- **Duties when choosing a pension plan** – Does an employer have any legal duties when selecting a plan? Is it enough to pick any compliant plan or do employers have to do more than this?

Under the automatic enrolment laws an employer is simply required to select a 'qualifying scheme' for its workers. To be a qualifying scheme, a plan must meet certain minimum legal requirements. This includes a requirement for it to:

- (i) be tax registered;
- (ii) ensure that the minimum level of contributions are paid or a minimum level of benefits are provided; and
- (iii) ensure charges imposed on members' funds invested in the plan's default investment fund are no more than 0.75% per annum.

However, the Pensions Regulator has made clear in its guidance that "*these criteria are the minimum features the pension scheme is required to have*" and "*there will be other things to consider before an employer makes a decision about what type of pension scheme to use*".<sup>8</sup> This should potentially include factors such as the service provided to members, the quality of a plan's communications, the suitability of its default fund and other investment options, and how the plan's costs and charges compare with other potential options.

Although there is not yet a precedent for an employer being found liable for its choice of auto-enrolment plan, the Courts have shown a willingness in the past to impose new duties on employers in relation to their employees in the right circumstances. For example, the Courts have implied a contractual duty on employers not to "*without reasonable and proper cause conduct [themselves] in a manner calculated [or] likely to destroy or seriously damage the relationship of confidence and trust between employer and employee*" (see for example, *Malik v BCCI SA* in 1997, where the House of Lords decided that damaging an employee's future job prospects breached this implied duty). The Courts

---

<sup>8</sup> Pensions Regulator's Detailed Guidance for Employers (No. 4) – Pension schemes: Pension schemes under the new employer duties, paragraph 14.

have also been willing to apply a similar duty to an employer's exercise of powers in relation to a pension plan (see *Imperial Group Pension Trust Limited v Imperial Group Tobacco Limited* in 1990 which was considered by the Court of Appeal this year in *IBM v Dalgleish*).

In a pensions context, the Courts have also implied a contractual duty to provide information to employees about their contractual and pension rights where not doing so could lead to an individual suffering financial loss. This duty was first identified by the Courts in *Scally v Southern Health and Social Services Board* in 1991 and its scope has since been applied and extended by the Courts and the Pensions Ombudsman in several other decisions.<sup>9</sup> Most recently the duty has been applied in contexts where there has been a taxation impact to require that employers provide workers with information about the potential tax consequences of decisions, particularly where the information is known to the employer but not to the individual.<sup>10</sup> As we explain below, since automatic enrolment (indeed any pensions saving) carries the possibility of tax consequences because of the operation of tax relief on employee contributions, this may well increase the legal onus on employers to communicate with their workers about the consequences of automatic enrolment and the rationale for the plan the employer has selected.

- **The importance of default saving** – automatic enrolment is the first time that apathy has been used to increase participation in pension saving on a large scale, and the longer term legal impacts are untested. Automatic enrolment means that employers are selecting a plan on behalf of their workers, and the workers have no choice over which plan is used. Once automatically enrolled, the vast majority of individuals will end up investing their savings in the plan's default investment fund, and many will not be aware of what is happening with their savings, how they are invested, at what cost, and the overall quality of their plan until many years later. This means that workers are reliant upon their employer making good choices on their behalf.

How far an employer is required to go in assessing the suitability of its plan is likely to be influenced by the size of the employer and the resources available to it. Larger, well-resourced employers are clearly better placed to assess the suitability of their choice of automatic enrolment plan.

As a minimum, at an HR and employee relations level, even though a plan may meet the statutory criteria to be used as an automatic enrolment plan, an employer could face significant criticism from workers if the plan is poorly run, delivers poor investment performance or offers poor value for money relative to other plans. In addition, as the automatic enrolment market evolves the suitability of certain plans may be called into question, particularly given the scrutiny now being applied to the master trust sector.

- **Ongoing duty to monitor and review plan** – The principle has never been legally tested in the UK Courts, but it is possible to construct arguments that an employer which has selected an automatic enrolment plan should not treat this as a “once and done” decision, and turn a blind eye to how it develops relative to its peers and the market.

---

<sup>9</sup> See the Pensions Ombudsman's determination in *Bennett (PO-7182)*.

<sup>10</sup> See, for example, the Pensions Ombudsman's determination in *Cherry (PO-7096)*.

Automatic enrolment is leading to increased public awareness of pensions. The potential therefore exists for future legal challenges against employers should their chosen plan deliver poor outcomes for members due to high fees, poor investment returns or because they are sub-optimally run, and these challenges are likely to be higher profile than in the past.

Legal action on these grounds is common in the US and over the past decade US employers have agreed to pay over \$350m to settle claims about failures in relation to employee retirement plans (see table 1 below). Although the pensions and legal systems in the US and the UK differ, these class actions highlight the potential financial consequences for employers of being held accountable for their choice of pension plan.

Unlike most financial products (such as bank accounts or ISAs), an individual cannot choose to switch to a different automatic enrolment provider without losing the benefit of the employer's contribution. They are therefore reliant upon their employer maintaining oversight of the chosen plan and provider and its ongoing suitability. Some larger UK employers have set up internal pensions governance committees to perform this role. Those that haven't would be well advised to consider doing so, given the growing scrutiny around pensions and auto-enrolment.

The DWP has issued guidance on selecting default funds in an automatic enrolment context which suggests a review every 3 years or when material changes occur.<sup>11</sup> This is also the statutory period for re-enrolling workers who initially opted-out. There is therefore some logic to employers reviewing the suitability of their auto-enrolment plan at similar intervals.

#### **Announced 401(k) settlements since 2009**

<b>Year</b>	<b>No. of settlements</b>	<b>Total value (\$m)</b>
2009	2	30.4
2010	2	33.6
2011	1	13.5
2012	1	9.5
2013	1	35
2014	2	45
2015	4	149.5

<sup>11</sup> Guidance for offering a default option for defined contribution automatic enrolment pension schemes, May 2011, paragraph 23.

2016	2	34.7
2017	2	8
	Total	359.2

Source: FT.com

- **Workers missing out on tax relief** – Under a Net Pay Arrangement (NPA), contributions are deducted from workers' pre-tax income. Individuals only pay tax on the balance of their income after contributions are deducted. The alternative is to use Relief At Source (RAS) where contributions are deducted from post-tax income and the provider then adds tax relief at 20% to the pension pot. Higher rate tax payers may have to claim additional relief themselves under a RAS arrangement.

In theory, each arrangement looks like it should lead to the same outcome. However, where an individual earns below the income tax threshold (£11,500 for 2017/18), they may be disadvantaged if their employer uses an NPA arrangement as they won't receive any tax relief on their contributions. Under a RAS arrangement, they would still be credited with the 20% tax relief even as a non-tax payer.

There is currently no duty at UK law that employers should set up employee benefit arrangements to maximise the availability of tax relief. However, what has not been tested is whether an employee could argue that failing to maximise tax relief available in some way damaged the relationship of trust and confidence between him and his employer (see **Duties when choosing a pension plan** above).

The Pensions Regulator says that it expects employers “to provide members of your pension scheme with clear and accurate information about whether they qualify for tax relief on their contributions and if they have to do anything to claim it”<sup>12</sup>.

This stops short of legally requiring employers to choose an RAS arrangement for tax relief – Pensions Regulator guidance is just that. That said:

- the expectation is that Regulator guidance will be complied with unless there is a good reason to depart from it – and the burden of proof in terms of demonstrating that the alternative course of action adopted was reasonable is likely to be on the employer in this situation; and
- it is possible to envisage the law on implied employment duties developing further in this direction as automatic enrolment expands in importance.

As a minimum, the cases outlined in the **Duties when choosing a pension plan** section above would indicate that employers should at least explain to their workers how their automatic enrolment plan works in terms of tax relief. Employers that fail to take

<sup>12</sup> Pensions Regulator Guidance on Communications to members about tax relief on their contributions (part of the Guidance supporting the Code of Practice on DC governance and administration of occupational trust-based schemes providing money purchase benefits).

appropriate action could find that they face criticism, and perhaps even legal liability, in the future for this direct financial loss experienced by affected workers.

- **Individuals not saving enough to retire** – To date, automatic enrolment has resulted in over 7 million more people saving for their retirement. However, the average total contribution rate to workplace DC plans in the UK has fallen to 4% of pensionable earnings in 2015 down from 9.7% in 2012.<sup>13</sup> This is because, although more people are saving, most are only saving at the minimum rates.

One of the potential risks with automatic enrolment is that workers assume that saving for their retirement is now taken care of and do not give further thought to how much they actually need to be saving. In the absence of an express promise, it seems unlikely that an employer could face a successful legal challenge where a worker has not saved enough for their retirement. However, over time we may see more individuals being practically unable to afford to retire when they want or need to, particularly as the numbers of those with a defined benefit safety net (which supplements their DC retirement savings) dwindle. Since there is no default retirement age, having older workers who simply cannot afford to retire is likely to create significant practical headaches for employers in terms of managing corporate succession planning and recruitment, older worker capability, and a disgruntled workforce.

In other words, in addition to looking after their workforce, employers who do more than the legal minimum when automatically enrolling their workers are likely to reap real corporate benefits for the business in the longer term.

- **Mistakes and errors** – Over time employers may begin to discover errors in their automatic enrolment processes, such as failing to automatically enrol particular individuals at the right time, not deducting the correct level of contributions or failing to increase contributions at the right times. This could lead to employers being non-compliant with their automatic enrolment duties. Where employers become aware of an error such as this, the Pensions Regulator will expect them to take swift action to correct the error and to ensure that members are put into the position that they would have been in had the error not occurred. Where an error is not spotted and corrected promptly, this is likely to mean that the employer has to make good all member contributions that have been missed as a result of the error.
- **Failing to retain opt-out records** – The introduction of automatic enrolment is raising the public consciousness about pensions and, in future, people will expect to receive a pension from their former employers when they retire. If an individual opts-out it may be decades before they retire and they may have had multiple employers in the meantime.

In the future, employers and pension plans will inevitably receive an increasing number of speculative enquiries from individuals who opted out many years previously but who do not recall this and who are now seeking to trace their pension entitlement.

---

<sup>13</sup> Figures from Occupational Pension Schemes Survey 2012, ONS

In scenarios such as this, employers and plans could cut short potentially protracted disputes by being in a position to produce definitive evidence that the individual chose to opt-out of the plan in the dim and distant past. Therefore, keeping records of opt-out forms beyond the statutory minimum deadline of four years is highly recommended. There is, of course, a tension here with the requirement under the new General Data Protection Regulation to keep information from which a member can be identified for no longer than is necessary.<sup>14</sup> But there is also a sound argument that the introduction of automatic enrolment means that it is necessary for employers to keep pensions personal data long into the future in order to respond to these kinds of queries.

- **Individuals making poor decisions** – Since April 2015 individuals have much greater choice over what they do with their retirement savings. This increased choice has introduced greater complexity and there is concern that some individuals may not be equipped to make good decisions about what to do with their savings. This could result in people running out of money before they die or perhaps - , given that retirement savings can now be accessed from age 55 - even before they retire. Individuals are also vulnerable to unsuitable or high charging investment products and in some cases pension scams.

Although primary responsibility for avoiding poor choices in relation to accessing benefits sits with the members themselves, trustees or plan managers are under increasing obligations to provide members with information about the options available when taking their benefits.<sup>15</sup> Currently, there is no requirement for employers to do anything when their employees get to the point of taking benefits, but – for all the reasons outlined above - it would make sense for them to consider what role they can play to help ensure that their workers are equipped to make good financial decisions and can afford to retire when the time comes.

There is an argument that, by getting involved, employers risk taking on legal or moral responsibility. Employers do, of course, need to strike a balance here and avoid advising employees and workers where they do not have the expertise to do so.<sup>16</sup>

But there is also no completely risk-free option: the risks to employers of sitting back and doing nothing – employees making bad choices, blaming their employer, and being unable to retire at all or at the time of the employer's choosing – are pretty sub-optimal too. In our view, these risks support the case for employers actively considering how to ensure that their workers are equipped to make good financial decisions – for example by facilitating access to financial advice and/or making financial education available to workers.

---

<sup>14</sup> Article 5, Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data.

<sup>15</sup> See in particular The Occupational and Personal Pension Schemes (Disclosure of Information) Regulations 2013, Regulations 18A-19.

<sup>16</sup> See the FCA's "*Guide for Employers and Trustees on providing support with financial matters without needing to be subject to regulation*" published in September 2017

### **3. Conclusions**

Employers who have gone through the initial phase of auto-enrolment compliance may think that they can tick auto-enrolment off their to-do list. However, this is not something that they should do lightly. Auto-enrolment is not a one-off compliance issue. As a minimum, employers have ongoing legal obligations to:

- continually assess who is eligible to be automatically enrolled
- ensure that the correct level of contributions are paid over in every pay period
- ensure that their plan continues to be a qualifying scheme
- automatically re-enrol eligible workers who have opted-out every three years.

Individuals have no control over the plan that their employer chooses to use as its auto-enrolment plan and they cannot switch to another plan which may be more suitable or offer better value. Individuals are therefore reliant upon their employer to select a good plan and to ensure that it remains so. Employers that do not take this responsibility seriously run the risk that a future Government, Court, Ombudsman or regulator may hold them to account for failure to adequately protect the long-term financial interests of their staff.

The increased focus on the costs and charges imposed by UK pension plans and on ensuring that members get good outcomes and good value for money means that it would be a brave employer that simply turns a blind eye once its automatic enrolment plan is up and running. Failure to monitor and review a plan's suitability on a regular basis could end up costing employers in the long run.

Employers considering how to approach automatic enrolment from a legal and best practice perspective could do a lot worse than follow the wisdom of St Francis of Assisi: "Start by doing what's necessary, then do what's possible, and suddenly you are doing the impossible".

This is a special policy paper, jointly produced by Eversheds Sutherland and Royal London. Previous papers up to Number 15 in the series have been produced solely by Royal London.

## ABOUT ROYAL LONDON POLICY PAPERS

The Royal London Policy Paper series was established in 2016 to provide commentary, analysis and thought-leadership in areas relevant to Royal London Group and its customers. As the UK's largest mutual provider of life, pensions and protection our aim is to serve our members and promote consumer-focused policy. Through these policy papers we aim to cover a range of topics and hope that they will stimulate debate and help to improve the process of policy formation and regulation. We would welcome feedback on the contents of this report which can be sent to Steve Webb, Director of Policy at Royal London at [steve.webb@royallondon.com](mailto:steve.webb@royallondon.com)

Royal London Policy Papers can be downloaded at: <https://www.royallondon.com/media/policy-papers>

1. The "Living Together Penalty"
2. The "Death of Retirement"
3. Pensions Tax Relief: Radical reform or daylight robbery?
4. Britain's "Forgotten Army": The Collapse in pension membership among the self-employed – and what to do about it.
5. Pensions Dashboards around the World
6. The 'Downsizing Delusion': why relying exclusively on your home to fund your retirement may end in tears
7. Renters at Risk
8. Pensions Tax Relief: 'Time to end the salami slicing'
9. The Mothers Missing out on Millions
10. The Curse of Long Term Cash
11. The 'Mirage' of Flexible Retirement
12. Will harassed 'baby boomers' rescue Generation Rent?
13. A three-point Royal London manifesto for pensions
14. Could living together in later life seriously damage your wealth?
15. Has Britain really stopped saving?
16. Helping Defined Benefit pension scheme members make good choices (with LCP)



**Royal London Disclaimer:**

*This paper is intended to provide helpful information but does not constitute financial advice. Issued by The Royal London Mutual Insurance Society Limited in November 2017. Information correct at that date unless otherwise stated. The Royal London Mutual Insurance Society Limited is authorised by the Prudential Regulation Authority and regulated by the Financial Conduct Authority and the Prudential Regulation Authority. The firm is on the Financial Services Register, registration number 117672. Registered in England and Wales number 99064. Registered office: 55 Gracechurch Street, London, EC3V 0RL.*

**Eversheds Sutherland Disclaimer**

*The information within this document is for guidance purposes only and should not be regarded as a substitute for taking legal advice.*

**About Eversheds Sutherland**

*As a global top 40 law practice, Eversheds Sutherland provides legal services to a global client base ranging from small and mid-sized businesses to the largest multinationals, acting for 72 of the Fortune 100, 61 of the FTSE 100 and 120 of the Fortune 200.*

*With more than 2,400 lawyers, Eversheds Sutherland operates in 66 offices in 32 jurisdictions across Africa, Asia, Europe, the Middle East and the United States. In addition, a network of more than 200 related law firms, including formalized alliances in Latin America, Asia Pacific and Africa, provide support around the globe.*

[www.eversheds-sutherland.com](http://www.eversheds-sutherland.com)