

# PENSIONS ACT 2008

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## EXPLANATORY NOTES

### COMMENTARY ON SECTIONS

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

22. The aim of Part 1 of the Act is to achieve increased overall participation of workers in employer facilitated pensions saving and implementation of a minimum standard of pension saving for the worker concerned.

#### *Chapter 1: Employers' duties*

##### *Section 1: Jobholders*

23. This section defines “jobholder” for the purpose of the employer duty as workers who ordinarily work in Great Britain, are aged between 16 and 75 and who earn qualifying earnings (see sections 13 and 15). This section also provides that where a jobholder has more than one employer, the employer duty provisions apply separately in relation to each employment.

##### *Section 2: Continuity of scheme membership*

24. This section prevents an employer in any way facilitating the end of a jobholder’s active membership of a qualifying scheme (by action or omission) without putting the member into another qualifying scheme (within a time period to be prescribed by Secretary of State). For example, an employer would not be able to withhold information from the scheme if by that action of the employer the jobholder ceased to be a member. This means that employers have an ongoing duty to ensure that jobholders always have access to a qualifying scheme. This duty does not apply if the jobholder ends membership of their own accord, and the duty only applies so long as the jobholder is employed by the employer.

##### *Section 3: Automatic enrolment*

25. *Section 3* introduces the employer obligation to automatically enrol jobholders aged between 22 and state pension age into a scheme that fulfils the criteria for an “automatic enrolment scheme” (see *section 17*). Automatic enrolment must take place when the individual first meets the relevant criteria (i.e. is a jobholder and is over 22) in that employment. This is known as the “automatic enrolment date” (*subsection (7)*).
26. The section contains a power which allows the Secretary of State to set out in regulations the steps the employer must take to arrange for the jobholder to be automatically enrolled (*subsection (2)*).
27. This obligation does not apply if, within a prescribed period, the jobholder has been an active member of a qualifying scheme in that employment, but chose to end membership (*subsection (4)*). This is to prevent jobholders being automatically enrolled into a scheme soon after they decided to leave.

28. The employer may be required, as part of the automatic enrolment process set out in regulations, to provide prescribed information to any person, in particular the trustees or managers of an occupational pension scheme or the provider of a personal pension scheme (*subsection (5)*). This will enable the provision of information about a jobholder to the scheme to enable their enrolment.
29. There is a power which enables the Secretary of State to make regulations under subsection (2) to deem an agreement to exist between the jobholder and the provider where the employer fulfils their employer duty obligation by automatically enrolling the jobholder into a personal pension scheme that meets prescribed conditions (*subsection (6)*).

#### ***Section 4: Postponement of automatic enrolment***

30. *Section 3* establishes that the effective date of automatic enrolment must be the first day on which the jobholder becomes eligible. *Section 4*, however, provides for the possibility of delaying initial automatic enrolment in circumstances described in regulations. The period of permitted deferral will be established in regulations.
31. Employers that are permitted to delay automatic enrolment may be required to ensure that members remain in such a scheme for a prescribed period of time, unless the jobholder leaves that employment or chooses to leave the scheme. This will enable the member to make up pension savings foregone during the initial delay period.
32. The powers conferred by section 4 are exercisable in relation to any automatic enrolment under section 3 and not just enrolment in the initial period of implementation.

#### ***Section 5: Automatic re-enrolment***

#### ***Section 6: Timing of automatic re-enrolment***

33. These sections set out the duty and the timing for employers to periodically automatically re-enrol, into an automatic enrolment scheme, jobholders who are aged at least 22 and under pensionable age and who are not already members of qualifying schemes.
34. As with automatic enrolment, this obligation does not apply if the jobholder chose to end membership in the same employment, within a prescribed period before the re-enrolment date (*section 5(4)*) or gave notice to opt out under *section 8*. This enables the delay of re-enrolment if it falls soon after the jobholder has chosen to leave the scheme.
35. *Section 6* requires regulations to determine that re-enrolment will not occur more frequently than once every three years. The three year interval may be by reference to the jobholder or the employer. The section then goes on to set out exceptions whereby regulations may be made to enable re-enrolment to take place more frequently than once in a three year period.

#### ***Section 7: Jobholder's right to opt in***

36. There may be jobholders who are not participating in workplace saving because they opted out or cancelled their active membership, or do not qualify for automatic enrolment because they are aged between 16 and 22 or between pensionable age and age 75.
37. *Section 7* allows such jobholders to require their employer to make arrangements to enrol them into an automatic enrolment scheme by giving the employer notice. The jobholder can give notice to opt in under this section more than once in a 12 month period, although the employer is not obliged to accept more than one notice in 12 months. Therefore employers are not required to keep enrolling a jobholder who has opted out a number of times in the same year.

38. This process, the details of the notice required and the date from which membership must be effected are to be prescribed in regulations (*subsection (4)*).

### ***Section 8: Jobholder's right to opt out***

39. This section establishes the right of a jobholder who has been automatically enrolled (or re-enrolled) into an automatic enrolment pension scheme to opt out of that membership by providing a signed notice to their employer within a prescribed period indicating that they choose not to participate. The form and content of this notice will be set out in regulations, as will the prescribed period during which they can choose to opt out, to whom the jobholder must give notice of opt out and arrangements which must be made to give effect to an opt out decision. The opt out notice must include information relating to the effect of opting out on the jobholder. Opting out in this context refers to the specific decision not to participate in a pension scheme from the point of enrolment. Once in a scheme, an active member is free subsequently to cancel membership at any time and this section does not interfere with that established right.
40. Once a jobholder has opted out they will be treated as if they had never become a member of that qualifying scheme through that automatic enrolment. In effect this means that they will not have any rights in the scheme and any contributions collected from the jobholder and the employer (*subsection (2(b))*) will be refunded. However, when a jobholder chooses to opt out after being enrolled or re-enrolled in a pension scheme, any refund of contributions due is only for the current period of membership and not for previously accrued rights from past periods of active membership (*subsection (1)*).
41. Regulations will also establish how and by when refunds must be made and how they are calculated.

### ***Section 9: Workers without qualifying earnings***

42. There may be people who do not qualify for automatic enrolment and who are not participating in workplace saving. Although they ordinarily work in Great Britain and are aged at least 16 and under 75, (two of the three qualifying conditions for a jobholder in section 1) they do not have qualifying earnings, as defined in *section 13*.
43. *Section 9* allows workers without qualifying earnings to require their employer to make arrangements to enrol them into a pension scheme by giving notice. The worker may give notice to opt in under this section as many times as they like, although the employer is only obliged to act on one request in a 12 month period. This doesn't prohibit the employer allowing workers to join the scheme at other times by agreement. An employer is not obliged to make any matching contribution but may choose to do so.
44. The enrolment process, the details of the notice required and the date from which membership must be effected are to be prescribed in regulations (*subsection (3)*).
45. For the purposes of this section a pension scheme may be either an occupational pension scheme, or a personal pension scheme registered under the FA 2004. Also, a personal pension scheme must have direct payment arrangements between the worker and the employer. "Direct payment arrangements" are either where the employer makes a contribution and sends it to the worker's scheme or where the employer deducts contributions from the worker's earnings and forwards these to the worker's scheme on behalf of the worker.

### ***Section 10: Information to be given to workers***

46. This section requires the Secretary of State to set out in regulations the circumstances in which a prescribed person must give information to individuals about how the employer duty may affect them. This will include information about the effect of automatic

enrolment, re-enrolment, postponement of automatic enrolment, giving notice to opt in and the right to opt out.

### ***Section 11: Information to be given to the Pensions Regulator***

47. *Section 11* gives the Secretary of State power to make regulations requiring employers to provide information to the Pensions Regulator about how they are complying, or intend to comply, with the employer duties, including information relating to the pension schemes that are to be used. This section will enable the process by which employers will be required to register with the Regulator. An example of information that may be required through that process is information identifying the scheme into which an employer has automatically enrolled jobholders.
48. This section works with the provisions in Chapters 2 and 4 of this Part, by enabling the Regulator to obtain the information needed to support the compliance regime.

### ***Section 12: Introduction of employers' duties***

49. This section provides a regulation-making power which, combined with the Secretary of State's power to bring sections 2 to 9 into force under section 149(1), allows the Secretary of State to make provision requiring some employers to start discharging their duties under this Chapter (including those on continuity of scheme membership, automatic enrolment and re-enrolment, and allowing opt-in and opt-out) before other employers. This will allow the introduction of the employer duties to be staged over a period of time.

### ***Section 13: Qualifying earnings***

50. This section defines qualifying earnings. *Subsection (1)* defines them by reference to an earnings band, with lower and upper limits of £5,035 and £33,540 per annum (see section 14 for duties to review and if necessary amend these limits), on which pensions contributions will be calculated for money purchase schemes. Earning qualifying earnings (i.e. above £5,035) is a criterion of being a jobholder and so is a factor in determining whether a worker is to be automatically enrolled. *Subsection (2)* deals with cases where qualifying earnings are to be calculated otherwise than on an annual basis.
51. The section then defines "earnings" as sums comprising: wages/salary, commissions, bonuses, overtime and certain statutory benefits. The section enables the Secretary of State to set out (in regulations) other sums that can be considered as part of "earnings".

### ***Section 14: Review of qualifying earnings band***

52. This section provides that the Secretary of State must review annually the value of the "qualifying earnings" lower and upper limits annually against the general level of earnings and must amend the limits if they have not maintained their value measured against earnings.

### ***Section 15: Pay reference period***

53. The pay reference period is the period of earnings over which the calculation is made to work out (a) whether the jobholder should be automatically enrolled (i.e. with earnings more than £5,035 per annum) and (b) to calculate the level of contributions that the jobholder and employer need to pay for money purchase schemes. While the qualifying earnings band established in section 13(1) is expressed in annual terms this section allows the Secretary of State to prescribe other periods, where section 13(2) will apply. Because of the different types of workers and different pay periods used by employers, there is a need to enable the pay reference period to be tailored to specific worker and payment type. For example, agency workers might require a much shorter calculation period than salaried employees.

### ***Section 16: Qualifying schemes***

54. This section defines a qualifying scheme. Qualifying schemes are those that meet minimum standards and quality requirements, which can be used by employers in discharging their obligations under section 2.
55. A qualifying scheme can be either an occupational pension scheme or a personal pension scheme. Qualifying schemes must meet the quality requirement for the scheme type (see sections 20 to 27). They must also be registered under Chapter 2 of Part 4 of the FA 2004, which means that they are registered for tax relief.
56. *Subsection (2)* enables regulations to disapply the requirement to be tax registered for schemes based outside the UK if they meet further requirements to be prescribed in regulations. The further requirements are likely to refer to schemes operating outside the UK with members who will receive UK tax relief on their contributions.
57. The Secretary of State may in regulations set out the circumstances in which a scheme, that would otherwise qualify, is not a qualifying scheme. This can be where the payments and contributions – for example annual management charges - that must be made to the scheme exceed a prescribed amount (*subsection (2)(a) and (b)*); or the scheme provides average salary benefits and contains prescribed features (*subsection (2)(c)*).

### ***Section 17: Automatic enrolment schemes***

58. There will be additional requirements on schemes that are used for the purposes of automatic enrolment, automatic re-enrolment and allowing opt in (as described at section 7). These schemes must be qualifying occupational pension schemes or qualifying personal pension schemes and must also enable automatic enrolment to take place. An automatic enrolment scheme must not require jobholders who are enrolled to express a choice, or provide information, in order to remain active members. For example, a jobholder will not be required to make a choice about the fund into which their contributions may be invested. Nor can the scheme refuse membership on the grounds that the jobholder does not provide information. An automatic enrolment scheme must also satisfy any further conditions that may be prescribed in secondary legislation.

### ***Section 18: Occupational pension schemes***

59. For the purposes of this Part, occupational pension schemes are those which fall within the definitions from UK or European legislation (set out in *paragraphs (a) and (b)*) or are of a prescribed description if they are based outside the European Economic Area (EEA).

### ***Section 19: Personal pension schemes***

60. Personal pension schemes are defined as those that fall outside the definition of an occupational pension scheme (see section 18).

### ***Section 20: Quality requirement: UK money purchase schemes***

61. In order to be deemed a qualifying scheme a UK occupational money purchase scheme must require an employer contribution equivalent to at least 3% of qualifying earnings and total contributions paid by the employer and jobholder equivalent to at least 8% (including tax relief).
62. The PA 2007 contains repeals of the contracting out arrangements for money purchase schemes currently provided for under the PSA 1993. However, in the event that those repeals have not yet been brought into force when the employer duties commence, *subsection (2)* enables regulations to be made to modify the contributions required for

money purchase schemes with members whose employment is contracted-out of the State Second Pension Scheme.

63. *Subsection (3)* contains a regulation-making power that allows the Secretary of State to set an amount below which trustees and employers could choose to decline to accept contributions. This could be used, for example, to enable schemes to not have to deal with such minor amounts of contributions which are uneconomic to administer.

### ***Section 21: Quality requirement: UK defined benefits schemes***

#### ***Section 22: Test scheme standard***

#### ***Section 23: Test scheme***

64. *Section 21* provides that the quality requirement for defined benefit schemes depends on whether or not the jobholder is in contracted-out employment, as defined under the PSA 1993. If a jobholder is in contracted-out employment, evidenced by a certificate issued under section 7(1) of the PSA 1993, the scheme satisfies the quality requirement in relation to that jobholder. *Subsection (3)* enables the Secretary of State to change, by order, the quality requirement where the jobholder is in contracted-out employment. The quality requirement may be changed so that the scheme no longer qualifies on the evidence of contracting out alone but is required to meet a modified version of the test scheme standard (see *sections 22 and 23*) with an accrual rate of no more than 1/80th, should this prove necessary in the future.
65. For jobholders who are members of a defined benefit scheme and are not in contracted-out employment, the scheme must meet the test scheme standard. *Section 22* provides that a scheme satisfies the test scheme standard if it provides benefits that are broadly equivalent to or better than the benefits provided by a model test scheme – set out in section 23. The comparison to the test scheme must be made by the employer for all of the jobholders they employ who are active members of the scheme and are not in contracted-out employment.
66. In making a comparison when applying this section, the pensions of relevant members must be considered together as a whole (section 22, *subsection (3)*). There is a regulation-making power (*subsection (4)*) enabling the Secretary of State to set out detail on how comparison with the model test scheme will be done and the regulations may provide for the comparison to be conducted in accordance with guidance (*subsection (5)*). Regulations may provide that an actuary will be required to confirm that the scheme meets the test (*subsections (6) and (7)*).
67. The model test scheme on which the comparison is made is set out at section 23. It provides a pension for life based on no more than 40 years of accruals at an annual rate of 1/120<sup>th</sup> of average qualifying earnings.

### ***Section 24: Quality requirement: UK hybrid schemes***

68. Hybrid schemes have a mix of defined benefit and money purchase elements. In order to qualify they will be required to satisfy the quality requirement for either money purchase schemes (section 20) or defined benefit schemes (section 21). The quality requirements set out in *subsection (1)(a)* and *(b)*, which are those for money purchase schemes and defined benefits schemes, respectively, can be modified by regulations in their application to certain hybrid schemes
69. Employers will be directed to the quality requirement they should use for a hybrid scheme in rules made by the Secretary of State under *subsections (2) to (4)*.

***Section 25: Quality requirement: non-UK occupational pension schemes***

70. *Section 25* enables the Secretary of State to make regulations about the quality criteria of non-UK based occupational pension schemes.

***Section 26: Quality requirement: personal pension schemes***

71. *Section 26* provides the conditions which a personal pension scheme must meet in order to satisfy the quality requirement. In order to qualify, personal pension schemes must only provide money purchase benefits (*subsection (3)*). The employer must be required to contribute an amount equivalent to at least 3% of qualifying earnings (*subsection (4)*) and the jobholder must be required to make up any shortfall in contributions up to a contributions total of an amount equivalent to 8% of qualifying earnings in the pay reference period (*subsections (5) and (6)*). There will need to be agreements between the scheme and the employer and the jobholder confirming the contributions required. The employer must be required to pass over contributions to the scheme on the basis of direct payment arrangements as defined by the PSA 1993 (*subsection (7)*).
72. As with money purchase schemes (section 20) there is also a provision to alter contribution levels should the repeal of contracting-out not have occurred by the time these duties commence.
73. *Subsection (9)* contains a regulation-making power that allows the Secretary of State to set an amount below which trustees and employers could choose to decline to accept contributions. This could be used, for example, to enable schemes to not have to deal with such minor amounts of contributions which are uneconomic to administer.

***Section 27: Quality requirement: other personal pension schemes***

74. This section allows the Secretary of State to prescribe in secondary legislation quality requirements for non-UK personal pension schemes.

***Section 28: Sections 20, 24 and 26: Certification that quality requirement is satisfied***

75. This section enables the Secretary of State through regulations to provide that a money purchase scheme, or a hybrid scheme to the extent that it must meet the money purchase quality requirement, is to be taken to meet the relevant quality requirement if there is a certificate in force.
76. The certificate must state that, in the opinion of the person certifying the scheme, it is able to satisfy the quality requirements under sections 20, 24(1)(a) or 26 (depending on whether the scheme is an occupational money purchase scheme, a hybrid scheme, or a personal pension scheme) for the duration of the certificate in relation to those of an employer's jobholders who are active scheme members.
77. The process and requirements of making a certificate will be detailed in regulations.
78. The effect of certification is subject to any provision made in regulations under subsection (6)(f) in relation to cases where a scheme is found in the event to have failed to meet prescribed conditions. Under subsection (7) regulations may for example require payments to be made into a scheme before it will be taken to have satisfied the relevant quality requirement.
79. The Secretary of State may repeal this section by order.

***Section 29: Transitional periods for money purchase and personal pension schemes***

80. This section sets out how employers operating qualifying occupational money purchase schemes and personal pension schemes will be able to phase in their contributions over two transitional periods.

81. This is achieved by setting lower contributions in the quality requirements over two transitional periods. Both transitional periods shall last at least 1 year and the exact duration of both will be prescribed in regulations.
82. In the first period, scheme rules must require employer contributions of at least 1% and a total contribution of at least 2% of the jobholder's qualifying earnings in the pay reference period. For the second period, the minimum contributions will increase to 2% from the employer and 5% overall.

### ***Section 30: Transitional period for defined benefits and hybrid schemes***

83. This section sets out the phasing arrangements for employers operating defined benefit or hybrid schemes. It enables those employers to delay automatic enrolment, for a specific group of jobholders for a transitional period that will be prescribed in regulations.
84. *Subsection (2)* defines the conditions which must be satisfied so as to be in this specific group of jobholders. They must be existing workers of the employer who have previously been and remain able to join a qualifying defined benefit or hybrid scheme.
85. The employer must automatically enrol such jobholders into a qualifying defined benefit or hybrid scheme by the end of the transitional period. If, before the transitional period ends, a jobholder ceases to be able to join a defined benefit or hybrid scheme or if the scheme they are eligible for ceases to qualify (*subsection (4)*), then the employer must automatically enrol the jobholder into alternative qualifying provision.
86. If the alternative scheme is another defined benefit or hybrid scheme, the employer must ensure membership is effective from the date on which the original scheme ceased to qualify or be available for the jobholder (i.e. the scheme closure date - *subsection (5)*). *Subsection (6)* provides that if the alternative scheme is a money purchase scheme then the employer must make membership effective from the original automatic enrolment date by paying backdated employer contributions.

### ***Section 31: Effect of freezing order or assessment period***

87. This section provides that active membership of a qualifying scheme does not cease for a jobholder or worker (this includes where a jobholder or worker has opted in to the scheme under section 9) for the purposes of the employer duties when the accrual of benefits in that scheme has been frozen either by an order imposed by the Pensions Regulator or because of an assessment by the Pension Protection Fund. Nor will the scheme cease to be a qualifying scheme in such circumstances.

### ***Section 32: Power of trustees to modify by resolution***

88. *Subsection (1)(a)* enables trustees to make changes to a scheme necessary to comply with the conditions in section 17(2) (automatic enrolment schemes). For example, making a scheme suitable for automatic enrolment by removing any condition of membership which requires a choice of investment to be made.
89. *Subsection (1)(b)* allows changes specified in *subsection (2)* to be made to enable contributions payable to a scheme to be increased to comply with section 20 or with section 24(1)(a). The permitted changes are to increase the contribution rate, the basis on which it is calculated or the frequency of its payment. However, changes cannot be made without consent of the employer.
90. *Subsection (3)* makes separate provision for those schemes where there is more than one employer
91. Regulations may prevent certain schemes from using this provision to modify their rules to facilitate automatic enrolment.



### ***Section 33: Deduction of contributions***

92. An employer who automatically enrolls, re-enrolls or arranges opt in for a jobholder into a scheme is permitted to deduct the jobholder's contributions from the jobholder's pay from the date on which they are to become active members and give this to the scheme. This means that a deduction from earnings made by an employer in order to comply with the employer duty is not otherwise an unlawful deduction from earnings under the Employment Rights Act 1996, section 13.

## ***Chapter 2: Compliance***

### ***Section 34: Effect of failure to comply***

93. *Section 34* provides that no private right of action for breach of statutory duty arises against an employer who has failed to comply with requirements set out in the employer duty provisions (sections 2 to 11 or regulations under those sections). Under the Act the Pensions Regulator is the sole body responsible for taking action against such breaches.
94. *Subsection (2)* provides that nothing in Chapter 2, nor in the employer duty provisions, is intended to affect any right of action which might arise otherwise than under these provisions. This means for example that if contributions are set out in an employment contract, the individual would retain the right to pursue missing contributions as they would any other breach of contract.

### ***Section 35: Compliance notices***

#### ***Section 36: Third party compliance notices***

95. This Act introduces powers for the Pensions Regulator to issue compliance notices. Where the Regulator is of the opinion that a contravention of the employer duties has occurred, a compliance notice will be the formal method of communicating the actions that should be taken to comply and the consequences of not doing so. Compliance notices would generally be the first step in the graduated compliance regime.
96. *Section 35* gives the Pensions Regulator the power to issue a compliance notice to a person who has breached an employer duty. Employer duties are the duties under sections 2 to 11 which apply to employers but the duty to provide information under section 10 may also apply to other persons specified in regulations. A compliance notice would direct the recipient to put right their breach of the employer duty.
97. A compliance notice may require the recipient to take specific steps to place the jobholder in the same position, as nearly as possible, as if the breach had not occurred.
98. *Section 36* provides that a "third party compliance notice" can be issued to a person (the "third party") if the Regulator is of the opinion that person has contributed to a breach of the employer duties (by someone else who is subject to the duties). A third party compliance notice would direct the recipient to put right the action or inaction that had contributed to the breach of the duty.
99. An example of where a third party compliance notice might be issued is if a scheme or pension provider has failed to process the enrolment information it has received from the employer, and this prevents the employer from meeting the enrolment duty.

#### ***Section 37: Unpaid contributions notices***

100. In addition to compliance notices, *section 37* provides the Pensions Regulator with the power to issue an unpaid contributions notice to an employer if it is of the opinion that an employer has failed to pay the required contributions on time.
101. *Section 37* makes provision for what an unpaid contributions notice is, to which contributions it is applicable and what information may be included in the notice.

### ***Section 38: Calculation and payment of contributions***

102. *Section 38* makes provision for the calculation of unpaid contributions. It provides that a compliance notice or an unpaid contributions notice may require the employer to calculate the amount of contributions that have not been paid into the scheme.
103. Where contributions are made within a prescribed period after a certain date, the unpaid contributions notice may require the employer to pay their own contributions with the worker having the option to pay their own but not being obliged to do so. However, where contributions are not made during that prescribed period of time, the employer will be required to pay all outstanding contributions.
104. *Section 38* also enables the Regulator to estimate the amount of unpaid contributions using information other than that provided by the employer (for example, information held by HM Revenue and Customs or the employee's scheme) and to require employers to pay interest on unpaid contributions.

### ***Section 39: Meaning of relevant contributions***

105. *Section 39* provides that the definition of relevant contributions includes both contributions payable directly by an employer into a scheme and contributions payable by an employer on behalf of a worker out of deductions from the worker's earnings. The section also provides that the meaning of relevant contributions is applicable for both jobholders and for workers without qualifying earnings under section 9.

### ***Section 40: Fixed penalty notices***

### ***Section 41: Escalating penalty notices***

### ***Section 42: Penalty notices: recovery***

106. *Sections 40* to *42* provide the Regulator with powers to issue penalty notices where the Regulator is of the opinion that there has been a failure to comply with a compliance notice, a third party compliance notice, an unpaid contributions notice, a notice requiring certain information (section 72 of the PA 2004) or any of the provisions listed in *section 40(2)*.
107. A fixed penalty notice (section 40) will require the person to whom it is issued to pay a penalty of up to £50,000 within a specified timeframe. Regulations will set out the actual penalty rate.
108. An escalating penalty notice (section 41) can be issued in cases where there is continuing failure to comply – such as where a fixed penalty notice has been ignored. The penalty will escalate at a rate prescribed in regulations but will not exceed £10,000 per day.
109. An escalating penalty notice cannot be issued if the Regulator is in the process of undertaking a review of a compliance notice, a third party compliance notice or an unpaid contributions notice, following an application for review by the person to whom such a notice was issued. The Regulator may not issue an escalating penalty notice if the person has exercised his right to make a referral (appeal) to the Pensions Regulator Tribunal against a fixed penalty notice and the referral has not yet been determined.
110. The Pensions Regulator can recover any outstanding fixed or escalating penalties. If the County Court (England and Wales) or Sheriff Court (Scotland) so orders, the money payable can be recovered by execution against goods. Any such penalties recovered by the Regulator must be paid into the Consolidated Fund.

### ***Section 43: Review of notices***

111. *Section 43* provides that the Regulator may review a notice issued under Chapter 2 if it is asked to do so by the person to whom the notice was issued, or if the Regulator considers it to be appropriate.
112. Regulations may prescribe the time period in which the person to whom the notice was issued can apply for review of a notice and the period in which the Regulator may otherwise review the notice.
113. *Subsections (4) and (5)* provide that the Regulator must suspend the effect of a notice until a review is completed, and must take into consideration any representations made by the person to whom the notice was issued.
114. *Subsection (6)* sets out the Regulator's powers in reviewing a compliance notice. The Regulator may confirm, vary or revoke the notice, or it can choose to replace the notice with a different one.

### ***Section 44: References to the Pensions Regulator Tribunal***

115. *Section 44(1)* provides that a person who has received a fixed or escalating penalty notice may submit an appeal to the Pensions Regulator Tribunal against the issue of the notice and/or the amount of the penalty.
116. *Subsection (2)* provides that a person making a reference (appeal) to the Pensions Regulator Tribunal must first request a formal review by the Regulator, unless the Regulator itself initiates a review. The Regulator may, however, decide not to undertake a review.
117. *Subsection (3)* suspends the effect of any notice which is the subject of a reference (appeal) to the Pensions Regulator Tribunal.

### ***Section 45: Offences of failing to comply***

### ***Section 46: Offences by bodies corporate***

### ***Section 47: Offences by partnerships and unincorporated associations***

118. *Sections 45 to 47* make it a criminal offence for employers wilfully to fail to comply with specified duties.
119. These duties are automatic enrolment (section 3(2)), re-enrolment of eligible jobholders into an automatic enrolment scheme (section 5(2)) and the requirement to enrol jobholders into an automatic enrolment scheme at the jobholders' request (section 7(3)).
120. *Section 45* provides that a person who commits such an offence could face imprisonment for up to two years and/or a fine. If convicted in a magistrates' court, the maximum penalty is a fine not exceeding the statutory maximum.
121. *Sections 46 and 47* enable the following to be prosecuted for the section 45 offence:
  - specified individuals within a body corporate, as well as the body corporate itself (section 46);
  - partnerships and individual partners (section 47); and
  - unincorporated associations and officers within these (section 47).

### ***Section 48: Offences of providing false or misleading information***

122. *Section 48* amends section 80(1)(a) of the PA 2004 to include the offence of providing the Regulator with false or misleading information about the actions taken by the

employer for the purpose of complying with the employer duties (under regulations under section 11 of this Act).

#### ***Section 49: Monitoring of employers' payments to personal pension schemes***

123. Section 111A of the PSA 1993 makes provision about monitoring arrangements under which an employer pays contributions to personal pension schemes in respect of an employee. It also provides that fraudulent evasion of such arrangements is an offence. [Section 49](#) extends that section to apply to arrangements in respect of jobholders, defined in this Act, who would not otherwise fall within the definition of "employee", but who do fall under the definition of "workers".

#### ***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.

***Chapter 4: Supplementary provision about compliance and information sharing***

***Section 60: Requirement to keep records***

143. **Section 60** permits the Secretary of State, by regulations, to make provision requiring any person to keep records in a prescribed form for a period prescribed by regulations, not exceeding 6 years. Regulations may require the provision of such records, on request, to the Regulator.
144. These regulations can make provision for the Regulator to apply penalties under section 10 of the PA 1995 where a person fails to comply with this requirement.

***Section 61: Powers to require information and to enter premises***

145. This gives the Regulator, in pursuance of its new objective, powers to require information and to enter premises. It amends section 72 of the PA 2004 so as to permit the Pensions Regulator to require any person who holds or is likely to hold information relevant to the exercise of the Regulator's functions to provide an explanation of a document requested, at a specified time and place.
146. The Regulator will not be able to require anyone to answer any question or provide any information that might incriminate themselves or their partner or spouse.
147. This section also allows an inspector, appointed by the Pensions Regulator, to enter premises liable to inspection to investigate whether an employer is complying with requirements under Chapter 1, or sections 50 or 54 of Part 1.

### ***Section 62: Disclosure of tax information etc***

148. This section substitutes a new section 88 of the PA 2004. It allows HM Revenue and Customs (HMRC) to disclose information on specified matters to the Regulator to enable the Regulator to discharge its functions. The section allows HMRC to share any information it holds in relation to:
- tax or duty (including income tax);
  - national insurance contributions;
  - the national minimum wage.
149. The section also places controls on the Regulator's ability to disclose this information. Any information the Regulator receives from HMRC under this section must be treated as restricted information, and can only be disclosed if one of the following exceptions applies:
- HMRC has authorised the disclosure (or the disclosure is back to HMRC);
  - it is needed for criminal proceedings;
  - it is needed for civil proceedings started by the Regulator;
  - it is needed for the Regulator to carry out its functions; or
  - the data has been anonymised.
150. Information received by the Regulator from HMRC under this section is specifically excluded from some of the grounds on which the Regulator can normally disclose information it holds. These are set out in sections 82, 83, 85-87, and 235 of the PA 2004. This includes, for example, disclosure with the consent of the person to whom the information relates, or where necessary to help other specified regulatory bodies exercise their functions, or to the Secretary of State for the purposes of private pensions and retirement planning policy.

### ***Section 63: Information for private pensions policy and retirement planning***

151. *Section 63* amends Schedule 10 to the PA 2004. Schedule 10 allows the Secretary of State (or the Northern Ireland Department) to make use of information collected in the course of carrying out a wide variety of functions (social security, child support, war pensions, employment or training, private pensions policy, retirement planning). This section adds private pensions policy and retirement planning to that list of functions.
152. This section also allows the Pensions Regulator to supply the Secretary of State with information in the first place, so that the latter (and the Northern Ireland Department) can use this information to help perform functions relating to private pensions policy or retirement. The section also utilises a definition of “private pensions policy” so as to incorporate the definition of pension schemes introduced in Part 1 of the Act.

### ***Section 64: Penalty for disclosure***

153. *Section 64* increases the maximum sentence on summary conviction for officials, contractors or any other people who directly or indirectly receive restricted information from the Pensions Regulator and who disclose such information without authorisation. Such unauthorised disclosure is already a criminal offence under section 82(5) of the PA 2004. This section makes anyone who is convicted of this offence in a magistrates' court liable to a prison term of up to a year (rather than a fine not exceeding the statutory maximum, which was the previous extent of a magistrates' court's powers for this offence). This may be imposed together with, or instead of, a fine up to the statutory maximum.

### ***Section 65: Objectives of the Regulator***

154. *Section 65* provides a new statutory objective for the Pensions Regulator. In addition to those listed at section 5(1) of the PA 2004, the Regulator's objectives will now include maximising compliance with the new duties being placed on employers under Chapter 1 of Part 1, and the safeguards in sections 50 (prohibited recruitment conduct) and 54 (inducements).

### ***Section 66: Functions of the Pensions Ombudsman***

155. *Section 66* gives the Pensions Ombudsman a new function, in addition to those under section 146 of the PSA 1993, to investigate complaints relating to a jobholder opting out of a pension scheme.

## ***Chapter 5: Duty to establish a pension scheme***

### ***Section 67: Duty to establish a pension scheme***

156. *Section 67* places a duty on the Secretary of State to establish a pension scheme. That scheme will be a trust, which is generally how occupational pension schemes are established. All trusts are run by trustees. The corporate trustee established by *section 75* must be a trustee of the scheme when the scheme is established (see section 68(1)). There may be other trustees. The trustees will be required as a matter of trust law to act within the terms of the trust in the best interests of its beneficiaries.
157. The trustees must ensure that the scheme is tax registered under Chapter 2 of Part 4 of the FA 2004, which will allow tax relief on pension contributions and investment returns. In general terms, members will be able to access their savings in the same way as members of any other tax registered money purchase pension scheme – including by taking a tax free lump sum. The scheme must be an automatic enrolment scheme (see section 17) in relation to any jobholder who is employed by a participating employer and who must be enrolled under section 3 (automatic enrolment), section 5 (automatic re-enrolment), section 7 (jobholder's right to opt in) or section 9 (workers without qualifying earnings).
158. The scheme must be established by order made by statutory instrument which under section 143 will be subject to the draft affirmative resolution procedure (that is, a draft must be laid before, and approved by, both Houses of Parliament before it can be made). This Order will set out the legal framework of the scheme and is the equivalent of a trust deed. In addition, the scheme may have a separate set of Rules, also equivalent to part of the trust deed, for its operation. These Rules will not be subject to a formal Parliamentary procedure but must be compatible with the Order and cannot be made about certain provisions of the scheme, listed at *subsection (12)*.

### ***Section 68: Scheme orders: general***

159. *Section 68* sets out the general provisions which must, or may, be in the Order. The Order must provide for the trustee corporation established by section 75, to be a trustee when the scheme comes into force.
160. The Order may:
- allow for any provision of the Trustee Act 2000 to apply as if the Order and Rules were a trust instrument. This is one way in which it will be possible to ensure that existing UK trust law will also apply to the scheme established under section 67.
  - give the trustees the power to make Rules. This would allow trustees to make further provisions in connection with the day-to-day operation and running of the scheme.
  - limit the trustees' power to make Rules in prescribed circumstances and or subject it to conditions. This will enable the Secretary of State to ensure that matters of



wider public policy continue to be given are given effect, or to set out procedural safeguards for the making of rules by the trustee.

- provide for protection of the trustees against liability, where appropriate, arising from the administration of the scheme.

### ***Section 69: Consultation of members and employers***

161. *Section 69* provides that the scheme order must require the trustees of the scheme to make arrangements for consulting the scheme members and participating employers about the ongoing operation, development and amendment of the scheme. These arrangements must include the establishment of members' and employers' panels to represent the interests of members of the scheme and participating employers.
162. The trustees will have decisions to make about the operation of the scheme. These will include decisions on how the scheme should be developed and whether it should be amended. The trustees will have to consult the scheme members and employers about these decisions. To help with the consultation, the trustees will have to create panels to represent the members and employers. The make-up and functions of these panels could be set out in the Order or under it (e.g., in Rules). The members' panel could be allowed to propose people for appointment as members of the trustee corporation. The panel could use those proposals to help ensure that their interests are represented. (This would be in the spirit of the provisions for member nominated trustees and directors in the PA 2004.)
163. The Order will also be able to allow for payments to be made to panel members from scheme funds. This could include payment for their time and expenses.
164. A scheme created under section 67 could potentially cover a very wide and diverse range of employers and employees, making it difficult for the trustees to keep in touch with all their opinions. The members' and employers' panels will act as representative bodies to keep the trustees informed and provide feedback about how the scheme is working. The trustees will consult both panels before any changes are made to the scheme.

### ***Section 70: Contribution limits***

165. This section requires the Secretary of State to set out in the Order the maximum amount a member of the scheme established under section 67 can contribute (including the employer contribution and tax relief) in a tax year. This allows the Order to set a contribution limit of £3,600 (by reference to the level of earnings in 2005). It would also allow the Order to provide, for example, a higher limit in the first year of the scheme and for the contribution limit to be uprated in line with earnings.
166. The power will enable the Secretary of State to include in the Order:
- what a contribution is;
  - when a contribution is to be treated as made;
  - how contributions are treated where the maximum is exceeded;
  - the value of any amount to be repaid in respect of excess contributions (whether the same or more or less than the contribution, because of investment or otherwise), and;
  - who makes the refund payments and to whom.
167. *Subsection (3)* allows the Secretary of State to set out in an Order more than one contribution limit. The Order could allow, for example, a lump sum contribution limit over the member's lifetime.

168. *Subsection (4)* enables the Secretary of State to remove the requirement to have a contribution limit in the scheme established under section 67. This allows [section 70](#) to be repealed if, for example, a review is carried out which concludes that a contribution limit is not appropriate for a scheme under section 67.

### ***Section 71: Procedure for scheme orders***

169. [Section 71](#) sets out the procedure for consulting on and seeking consent to changes to the scheme Order (see the note to section 67). When a trustee is in place (i.e., once the scheme has been established), subsequent changes to the Order may be made by the Secretary of State only if he has the consent of the trustee. Trustees must consult the members' and employers' panels before giving consent.
170. Examples of what could be included in the Order are: the structure of members' charges; access to the scheme for the self employed; the way that members will be able to access their savings; the provision of payments to members' and employers' panel members; a default fund for members who do not wish to choose where their contributions are invested.

### ***Section 72: Procedure for rules***

171. [Section 72](#) sets out the procedure for publication and consultation on proposed scheme Rules.
172. A draft of the proposed Rules must be published by the person proposing to make them and comments invited. That person – which will be the Secretary of State or trustees – must then consider any comments received and publish a summary of the comments, together with a response. If the Rules are made, they must be published in a way designed to bring them to the attention of interested parties.
173. The trustees will have to consult the members' and employers' panels before making any Rules or giving their consent to changes to the Rules proposed by the Secretary of State. The Secretary of State will not be able to make any change to the Rules without the consent of the trustees.
174. Although the Rules will not be subject to a formal Parliamentary procedure, the effect of this section is that they must be open to debate by interested parties.

### ***Section 73: Application of enactments***

175. [Section 73](#) sets out how the scheme should be treated within current legislation to ensure that the scheme is established and can run as intended. It ensures that the scheme will not be treated as a public service scheme under the PSA 1993 and FA 2004. It also sets out that the Interpretation Act 1978 will apply to rules as if they were in a deed (which would be appropriate to other occupational schemes) rather than made under an enactment (provisions of the personal accounts scheme order).

### ***Section 74: Review***

176. This section requires the Secretary of State to appoint a person to carry out a review of two aspects of the scheme established under section 67 that are designed to focus it on the target market specifically: namely the policy on contribution limits and restricting pension fund transfers to and from the scheme. It also allows the Secretary of State to bring other topics within the review's scope.
177. *Subsection (2)* requires the Secretary of State to appoint the person on or after (i) 1st of January 2017 or (ii) at the end of five years beginning with the first day on which contributions are paid to the scheme by or on behalf of members, whichever is the later.

*These notes refer to the Pensions Act 2008 (c.30)  
which received Royal Assent on 26 November 2008*

178. The section also requires the person to prepare a report of the review and send a copy of it to the Secretary of State, and the Secretary of State is under an obligation to lay before Parliament a copy of that report (*subsections (3) and (4)*).

***Section 75: Trustee corporation***

179. *Section 75* establishes the trustee corporation which under section 68(1) must be appointed trustee of the scheme. The name of the corporation will be determined by the Secretary of State by statutory instrument. This will allow for completion of research on names that are most appropriate for both the scheme and the trustee corporation.
180. This section also provides for the corporation not to be regarded as the servant or agent of the Crown and not to enjoy any status, immunity or privilege of the Crown, nor can property it holds (including property held in its capacity as trustee) be considered to belong to the Crown.
181. This section introduces Schedule 1 which details the provisions relating to the members, proceedings and funding of the trustee corporation.