

This note merely highlights some key points and is not advice or to be relied on.

Previous practical points were in my update of 31 December 2013.

earnings

- 1 "Qualifying Earnings" for the purposes of AE are defined in the Pensions Act 2008, s13(3) as: (a) salary, wages, commission, bonuses and overtime; (b) statutory sick pay; (c) statutory maternity pay; (d) statutory paternity pay; (e) statutory adoption pay; (f) statutory shared parental pay; and (g) prescribed sums (none have been). The same applies to the alternative basis of satisfying the quality test in the definition of "pensionable earnings".
- 2 All earning in the categories (a) to (g) must but no other earnings are required to be taken into account in the calculation of the minimum contributions that must be paid. The same applies also to employees who, because of membership of a qualifying pension scheme, are exempt from AE.
- 3 None of any contractual benefits that an employer provides for employees in excess of the statutory amounts are governed by the relevant legislation, but are paid by it either under a contractual obligation or gratuitously. Contract governs whether AE pension contributions are paid in respect of benefits in excess of the statutory amounts.

contributions above the statutory minimum

- 4 The contribution rates payable under the PA 2008 are minima. There is nothing to prevent higher amounts from being paid, but the law is silent whether an employer may require an employee to pay more. If the sole or main purpose of requiring employers to pay contributions at a higher rate is to induce them to give up membership, the employer would be guilty of an offence under s54 of the PA 2008. The prudent employer wishing to pay more should enrol employees automatically at the minimum rates and agree, eg, to match any higher rate paid by the employee up to a specified amount or multiple.

certification and records

- 5 A scheme is to be taken to satisfy the relevant quality requirement in relation to each of an employer's relevant jobholders if a certificate is in force: PA 2008, s28. The certificate is to be given by or with the authority of the employer for a period not over eighteen months, and copies must be provided on request to the Pensions Regulator, jobholders and unions. No certificate is required if the terms of the scheme require contributions in accordance with the quality requirement or if the employer makes individual entitlement checks on all its employees: TPR's *Detailed Guidance 4 Appendix F Entitlement check*. Small employers might find that individual checks are simpler and less burdensome than certification. All employers, however small, must keep records of their pension arrangements, the enrolment of employees, the opting-in and -out of their employees and their contributions: SI 2010/5.

(compulsory) contractual enrolment

- 6 The employer is not required to enrol an employee automatically if he is already an active member of a qualifying scheme. Some employers with existing schemes enrol employees compulsorily, into them and rely on inertia to keep them in. Although consent to join might be implied, consent to the deduction of contributions from wages must be in writing, so in law, even if not in practice, compulsory contractual enrolment is limited to non-contributory schemes or

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where the employment terms contain a sufficiently wide consent to deductions from wages. Any member who leave such a scheme will have to be assessed and if necessary enrolled under PA 2008, probably at the minimum rates.

Pensions Act 1993 s160

- 7 This provision, that any term of a contract of service to the effect that an employee must be a member of a or a particular pension scheme is void, applies to an AE scheme as to any other pension scheme. Therefore an employee, who did not opt out of his employer's AE scheme in the statutory opt-out period, cannot be compelled to remain a member of it. A employee who opts-out will receive an refund of his contributions to it, but whether or not he would receive a refund on leaving later depends on the terms of the scheme.

maternity and other statutory family pay

- 8 Maternity and other family related statutory pay listed in 1 apply for AE, but the ERA, s71(4)(a) (maternity pay) and the corresponding provisions for adoption, shared parental and parental leave raise an additional problem in respect of money purchase schemes.
- 9 The employee is entitled to the benefit of the terms and conditions other than remuneration that would have applied but for the leave of absence, but the employee's contributions are to be calculated by reference to the statutory pay. The benefits under a DB scheme are determined usually by final or average salary, regardless of the amount of the employee's contributions. In a money purchase scheme, the amount of the employee's benefits depends on the contributions paid. It can be concluded from this (but ignored in practice) that the employer must make good any shortfall in the employee's contributions, in order to ensure that the latter receives the same benefits that would have provided but for the leave. See also pension law article 4 on my website.

sick leave

- 10 The Social Security and Benefits Act 1992 s157 entitles employee to statutory sick pay of a specified amount, but does not give any statutory right to benefits other than pay during periods of absence because of illness or injury. The problem in 9 above does not apply.

directors and partners

- 11 With effect from 6 April 2016, an employer may, instead of must, enrol automatically into a pension scheme directors of a company who are employed by it or, in the case of an LLP, members, who are not treated for income tax as being employed by it.

salary sacrifice

- 12 Salary sacrifice is often introduced with AE. Because the employee would receive tax relief on his contributions, the benefit is the saving of NICs for both the employer and employee. The employer may but does not always give the employees the benefit of all or part of its NIC saving. Salary sacrifice is effected by an agreement between the employer and employee to change the terms of employment, and can be effected only for matters which can be changed by contract. The payment of SMP etc and the amount of them are determined by law and not contract and therefore cannot be altered by a salary sacrifice agreement. If an employer wishes to introduce salary sacrifice by an implied change, it should follow the procedure described in HMRC's Employment Income Manual page IEM42753. The salary sacrifice agreement can include terms for its termination unilaterally, by notice or automatically by a change in circumstances to avoid the need for a separate agreement whenever a change is needed.

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