

# PENSIONS BRIEFING

## Pensions and COVID-19: considerations for employers

The Pensions Regulator (the Regulator) has been very active throughout the past few months, providing guidance to trustees, sponsoring employers and savers on the common issues that occupational pension schemes may face as a result of the 2019 novel coronavirus disease (COVID-19) (the guidance) ([www.practicallaw.com/w-025-1858](http://www.practicallaw.com/w-025-1858), [www.practicallaw.com/w-025-6458](http://www.practicallaw.com/w-025-6458)). A significant proportion of the guidance has been aimed at employers, with particular focus placed on the impact that the government's Coronavirus Job Retention Scheme (CJRS) has had, and will continue to have, on employer obligations, particularly in respect of employer pension contributions and automatic enrolment (see feature article "Furlough and COVID-19: looking for clarity", [www.practicallaw.com/w-025-1329](http://www.practicallaw.com/w-025-1329)).

The overall aim of the guidance is to provide clarity for employers on the ways in which COVID-19 will affect their pension obligations and assist them in navigating through these turbulent times. The guidance is not legally binding but employers that follow it are far less likely to face enforcement action.

When making decisions during the COVID-19 pandemic, employers should take the guidance into account and work closely with trustees. Employers should also bear in mind that statutory requirements continue to apply, although the Regulator has announced that it will take a fair and proportionate approach to enforcement. The Regulator is likely to update the guidance over the coming months, as the government seeks to wind down the CJRS and help the economy to improve.

### Automatic enrolment

The Regulator has stated that the auto-enrolment duties to which employers are subject continue to apply throughout the COVID-19 pandemic, including in relation to furloughed employees (see feature article "Workplace pensions: auto-enrolment and re-enrolment", [www.practicallaw.com/3-616-6832](http://www.practicallaw.com/3-616-6832)). Employers should therefore continue to assess employees and, if required, enrol or re-enrol them into a qualifying pension scheme. Employers will be able to postpone these duties for up to three months, provided

that employees are informed and the proper processes are followed.

### Pension contributions

Employers still have a duty to pay pension contributions, as set out in the rules of each scheme or employment contract, or both. During these difficult times, members may choose to reduce their contributions or cease active membership of a pension scheme but employers should not pressure any employees into taking this option. If employees choose to reduce their contributions, the employer may be able to reduce the employer contributions as well, depending on the pension scheme rules and the employee's employment contract. However, the employer would still need to satisfy the auto-enrolment minimum contribution requirements.

If any employees reduce their contributions below the statutory minimum or opt out of the scheme entirely, the employer must enrol them back into the scheme at the next re-enrolment date, providing that they:

- Meet the criteria for re-enrolment.
- Reduced their contribution below the statutory minimum or opted out more than 12 months before the re-enrolment date.

### Impact of the CJRS

Under the CJRS, employers can currently claim up to 80% of an employee's contractual salary, up to £2,500 per month, as well as the employer National Insurance contributions. When employees are furloughed and being paid, employer pension contributions will still need to be paid.

Employer pension contributions will be payable on the total amount actually paid to the employee. For example, if the scheme rules provide that an employer pays 5% of an employee's salary to a pension scheme a month and the furloughed employee is receiving 80% of their salary through the CJRS, the pension contribution will be 5% of the money that the employee actually receives rather than 5% of their full salary; that is, 5% of the 80% pay.

If an employer chooses to top-up the pay that the employee is receiving under the CJRS, so that the employee is being paid 100% of their total salary, the pension contributions will need to be based on the 100% level of salary.

### Auto-enrolment and furlough

Under the CJRS, employers are currently able to claim the auto-enrolment contributions that they pay, up to 3% of band earnings, although this part of the CJRS ends on 31 July 2020. The auto-enrolment contribution that can be claimed is based on the minimum required under the auto-enrolment legislation and the furloughed employees' salary, so if employers pay more generous pension contributions or are topping-up the salaries of their furloughed employees so that the employees are receiving the equivalent of 100% of their salary, employers will need to fund the excess employer pension contributions themselves. If, in light of this, employers wanted to consider reducing the employer pension contributions payable under a pension scheme to the statutory minimum, a number of factors need to be taken into account, including:

- The cost savings to be made as against the cost of implementing the change.
- Any pensions provisions in employee employment contracts.
- The impact of any trade union agreements.
- Whether a change to the scheme rules is required.
- Whether there is a requirement to consult members before making any changes.

### Member consultation

If an employer has over 50 employees, the employer must consult employees before it makes certain changes to the pension scheme, including a decrease in employer contributions in a defined contribution pension scheme. The consultation must satisfy certain conditions, including that it must last at least 60 days, although some relaxation of the rules is being permitted at the current time (see box "Consultation easement").

### Salary sacrifice arrangements

For employers that have employee salary sacrifice arrangements in place, the payment of pension contributions is slightly more complex. The starting point is that the furlough salary must all be paid “as money” to the employee, so employers are not allowed to make any deduction from their employee’s furlough salary in order to fulfil the terms of a salary sacrifice arrangement. This means that the money paid to the employee is treated as the post-sacrifice salary.

In practice, this means that if it is agreed in an employee’s contract of employment that:

- A set amount will be paid to the scheme per month, this amount should continue to be paid regardless of the furlough arrangement. HM Revenue & Customs has decided that COVID-19 is a life event that would enable salary sacrifice arrangements to be amended, so the terms of salary sacrifice arrangements can be changed if the relevant employment contract is also updated. However, whether this changes the employer’s obligations under the pension scheme rules will depend on the scheme rules.
- A set percentage of pay will be paid to a pension scheme per month, the furloughed salary will be treated as the post-sacrifice salary and used to calculate the notional pre-sacrifice salary in accordance with the formula set out in the guidance. The notional pre-sacrifice salary will then be used to determine the pension contributions payable, subject to any provision in the scheme rules overriding the government’s default approach.

Regardless of what is agreed under an employee’s contract of employment, the employer must still always pay the full contributions that it is required to pay to the scheme under the scheme rules during the furlough period. This means that, if the scheme rules require the employer to pay 10% of a member’s salary to the scheme, the employer has to pay this amount regardless of how much of the contribution it can deduct from the employee’s salary during the furlough period.

### Contribution holidays

If the current circumstances mean that employers are in financial difficulty and are struggling to pay their deficit repair contributions, they should liaise with the trustees or scheme provider in the first instance, in order to explore whether there is any flexibility for contributions to be deferred or temporarily suspended. The Regulator has said that trustees may consider granting employer requests for contribution holidays if:

- Trustees are able fully to assess the employer’s covenant in line with the guidance or the contribution holiday is only short term.
- The employer agrees to full and ongoing provision of employer covenant information.
- Banks and other creditors are supportive, and the employer is making no dividend payments or distributions. The suspension of dividend payments and distributions should ideally be underpinned by legally binding commitments. In exceptional circumstances, it may be appropriate for employers to make extraordinary and essential intra-group payments but trustees should: examine the effect on the employer’s ongoing covenant strength; understand the intention behind the payments, and the expectation and ability of employers to retrieve funds; and, if appropriate, seek mitigation.
- Contributions are ideally made up within the current recovery plan time frame, and the current recovery plan will not be lengthened unless there is sufficiently reliable covenant visibility.

If the request is to suspend or reduce future service contributions, rather than deficit recovery contributions, the Regulator states that the same principles will apply but suggests that trustees take legal advice. The Regulator has also said that it considers it unlikely that trustees agreeing to an employer request to release security will be in the best interests of members, and tells trustees to take appropriate specialist advice. When requesting

### Consultation easement

In light of the current circumstances due to the 2019 novel coronavirus disease, the Pensions Regulator has stated that until 30 September 2020, it will not take regulatory action against employers that fail to consult for the full 60 days, as long as all of the following apply:

- The employer has furloughed employees for whom they are making a claim under the Coronavirus Job Retention Scheme.
- The employer is proposing to reduce the employer contribution only in respect of furloughed employees. For those employees who are not furloughed, the existing contribution rate will continue to apply.
- The reduced contribution rate for furloughed employees will apply only during the furlough period, after which time it will revert back to the current rate.
- The employer has written to the affected employees and, where appropriate, their representatives, to inform them of the intended changes, and the impact on the scheme and the furloughed employees.

deferrals or suspensions, employers should be mindful that they are giving the pension scheme treatment that is equitable to their other creditors. In most cases, the pension scheme trustees should not be the first creditor that is approached when employers are in financial distress. Employers should also consider whether they can make use of any of the government support packages to aid cash flow in the short term.

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*The guidance can be found at: [www.thepensionsregulator.gov.uk/en/covid-19-coronavirus-what-you-need-to-consider](http://www.thepensionsregulator.gov.uk/en/covid-19-coronavirus-what-you-need-to-consider).*