

Chapter 10

Guidance on activities related to pension schemes



10.5 Employers and affinity groups (such as trade unions)

Q42. Will I, as an employer, ever need to be regulated for providing pension benefits to my staff?

No, unless you are carrying on a *regulated activity* and, if so, satisfy the by-way-of-business test (see Q44).

Q43. When am I, as an employer, likely to be carrying on a regulated activity?

You are unlikely to be carrying on a *regulated activity* in the case of an OPS (other than one that is also a *stakeholder pension scheme*) unless you provide services that involve *regulated activity* to the trustees (such as giving them advice or arranging trust transactions). Any service that you might provide to your employees concerning their rights under the OPS will not be a regulated activity unless you are *advising on conversion or transfer of pension benefits*. But if you provide your staff with the opportunity to participate in a *personal pension scheme* or a *stakeholder pension scheme*, you are likely to be *arranging*. You may also be *advising on investments* if you provide your employees with advice on the merits of their joining the scheme (see Q39).

In respect of any pension scheme that provides *safeguarded benefits*, you may be *advising on conversion or transfer of pension benefits* where as part of your services to employees you provide advice on the merits of requiring a trustee or manager of a pension scheme to convert, transfer or cash out *safeguarded benefits* (see ■ PERG 12.6).

Q44. As an employer, I may offer my staff a stakeholder pension scheme or a personal pension scheme. If I do so, will I satisfy the 'by way of business' test?

Most probably not. To need *authorisation* you would need to be carrying on the *arranging* activity on commercial lines. This means that you would need to be expecting to obtain some form of commercial benefit from providing your staff, or a third party such as the intermediary who sets up the scheme for you, with services. This also applies if you were to be advising your employees on the merits of joining the scheme. However, giving advice also brings into play the restriction on making *financial promotions* (see Q47 to Q50).

As an employer, you are likely to be obtaining a commercial benefit from providing a pension scheme for your staff if you receive a direct benefit such as a commission or introduction fee. Or the commercial benefit may be indirect, for example, a reduction in premiums payable on another product such as key man or buildings insurance as an alternative to a direct fee.

But you would not gain a commercial benefit purely because:

- you negotiate special terms for your employees or for your own contributions or for both; or
- you hope to acquire or retain a more satisfied or happier or efficient workforce; or
- you recover the actual costs of arranging for your staff to be able to participate in the scheme.

In addition, if your scheme is an insurance-based scheme, such as a *group personal pension scheme*, your activity will potentially involve *insurance distribution activity*. If so, to satisfy the by-way-of-business test, you would also need to be remunerated.

The vast majority of employers or affinity groups do not set out to make a regular profit from arranging pension benefits for their staff or members and so will not satisfy the 'by way of business' test and will not need to be an *authorised or exempt person*.

Q45. As an employer, administration services that involve regulated activities are provided to my OPS in-house by my staff. Does this mean that I or my staff will need to be authorised or exempt?

No, on the basis that neither you nor they are likely to satisfy the by-way-of-business test. This is unless you are providing the services on a commercial basis (see Q44). This would arise if you provide the service in return for a reward that goes beyond the mere recovery of the costs you incur in doing so.

Q46. As an employer, I have designated a stakeholder pension scheme for my employees in accordance with the statutory requirement to do so. Does this mean that I am carrying on the regulated activity of establishing a stakeholder pension scheme?

No. The scheme has already been established by another person and you are merely choosing it as the stakeholder pension scheme which is to be offered by you to your employees.

Q47. As an employer, are there restrictions on my providing staff with details of pension schemes?

Yes, but in most circumstances you should be able to make use of an exemption.

If you make an invitation or inducement to your staff to join a *personal pension scheme* or a nominated *stakeholder pension scheme*, you are likely to be making a *financial promotion*. This is prohibited under section 21 of the *Act* unless:

- you are an *authorised person* ; or
- its contents are *approved* by an *authorised person* with the necessary *approver permission* or within an *approver permission exemption* ; or
- it falls within a relevant exemption.

It should be noted that the prohibition applies to financial promotions made in the course of business. It is our view that employers who promote their chosen pension schemes to their employees will be doing so in the course of business.

There are no restrictions on your promoting a non-stakeholder OPS to your employees. This is because neither rights under an OPS nor interests in any

investments held under it (such as interests in additional voluntary contributions schemes) are treated as regulated investments.

Q48. What are the exemptions that are available to employers?

Where an employer is obliged by law to offer its employees a *stakeholder pension scheme*, any *financial promotion* made for that purpose will be exempt under article 29 of the Financial Services and Markets Act 2000 (Financial Promotion) Order 2005 ("the *Financial Promotion Order*").

There is also a specific exemption for employers who make financial promotions to their staff in article 72 of the *Financial Promotion Order*. This applies, broadly speaking, where:

- the promotion is about a *group personal pension scheme* or a *stakeholder pension scheme*;
- the employer contributes to the pension scheme and discloses details of its contribution to the employee;
- the employer does not obtain any direct commercial benefit from promoting the scheme to its employees; and
- the employer informs the employee in any written promotion of his right to seek independent financial advice from a regulated person.

Q48A. What are the exemptions that are available to contracted service providers that make financial promotions to employees?

There is a specific exemption for contracted service providers (or *persons* acting on their behalf) that make financial promotions to employees in article 72A of the *Financial Promotion Order*. This applies in circumstances broadly similar to those set out in Q48. Further details of the exemption are set out in PERG 8.14.40AAG.

Q49. Are there any other exemptions available to employers or any that apply to affinity groups?

There are a few exemptions that may be relevant. For example:

- follow-up promotions, such as may be made after the employer has made a promotion under article 72 of the *Financial Promotion Order* - see article 14 of the *Financial Promotion Order*; and
- one-off promotions (that is, promotions that take account of the personal circumstances of the recipient) - see articles 28 and 28A of the *Financial Promotion Order*.

Q50. Can I find out more about the financial promotion restriction?

Yes. Chapter 8 of PERG has detailed *guidance* about the scope of the financial promotion restriction and the exemptions that are available.