

Responsibilities of business advisers acting as auto-enrolment consultants.

If you’re acting as an auto-enrolment consultant for your business clients then you run the risk of enforcement action being taken against you.

The Pension Regulator’s third party compliance enforcement approach includes Fixed Penalties of £400 and Escalating Penalties of £200 per day.

In addition, the ethics committee of your professional body can take further enforcement action against you. For example, a chartered accountant in England and Wales must only carry out tasks for which they have sufficient expertise and experience.

If you are currently assisting your employer clients with any part of the auto-enrolment process, it makes sense to ensure that you mitigate these risks.

At Workplace Pensions Direct we guarantee compliance with the auto-enrolment law. If our clients get fined, we pay it!

In other words - we not only keep our clients safe, we also keep our business adviser partners safe too.

Please find attached details of the relevant regulations and codes.

Workplace Pensions Direct – expert, experienced, and insured.



[Important information for accountants](http://lexisweb.co.uk/acts/2008/pensions-act-2008-2008-c-30)

[Pensions Act 2008 (2008 c 30)](http://lexisweb.co.uk/acts/2008/pensions-act-2008-2008-c-30)

**s36 Third party compliance notices**

**Section 36**

Third party compliance notices

***(1)    The Regulator may issue a third-party compliance notice if it is of the opinion that:-***

1. a person has contravened one or more of the employer duty provisions,
2. the contravention is or was, wholly or partly, a result of a failure of another person (the “third-party”) to do anything, and
3. that failure is not itself a contravention of any of the employer duty provisions.

***(2)    A third-party compliance notice is a notice directing the third party to take, or refrain from taking, the steps specified in the notice in order to remedy or prevent a recurrence of the failure.***

***(3)    A third-party notice may, in particular:-***

1. state the period within which any step must be taken or must cease to be taken;
2. require the third party to inform the Regulator, within a specified period, how the third-party has complied or is complying with the notice;
3. state that, if the third party fails to comply with the requirements of the notice, the Regulator may issue a fixed penalty notice under section 40.

***(4)    A third-party notice may give the third party a choice between different ways of remedying or preventing the recurrence of the third party's failure.***

**Compliance and enforcement policy for employers subject to automatic enrolment duties (June 2016) TPR**

**3. Investigation and enforcement policy**

**Third party compliance** **issues**

An employer may be in breach of the duties under the 2008 Act due to factors outside of their control. For example, an employer may have breached an employer duty or safeguard, but this is wholly or partly the result of a failure by a third party.

**Enforcement approach**

If the third party does not comply with the third-party Compliance notice, we may issue a fixed penalty of £400. The third party will be given a reasonable period of time to pay the penalty. This will usually be a minimum of 4 weeks from when the penalty notice is issued. In addition, the third party will be required to demonstrate the steps they have taken or are taking to comply with the notice.

If the third party continues to fail to comply with the third-party Compliance notice, we may issue an Escalating penalty notice, which accrues at a prescribed daily rate until the third-party notice is complied with.

* Prescribed daily rate £200
* Compliance notice (s35) - Prescribed daily rate £200
* s72 notice - Prescribed daily rate £200

In addition to considering the role of third-parties in the context of 2008 Act compliance, operational activity may also identify issues relating to the regulator’s wider statutory objectives, such as protecting the benefits of members of pension schemes. It is essential that the regulator adopts a strategic view across all of its operational objectives and activities. Therefore, whilst dealing with an employer compliance matter under the 2008 Act, if we identify an issue that demonstrates wider compliance issues with existing pensions legislation and which is relevant to our statutory objectives in the Pensions Act 2004 (the ‘2004 Act’), we will ensure that we:

* protect the benefits of members of work-based pension schemes
* promote good administration and improve understanding of work-based pension schemes
* reduce the risk of situations arising which may lead to compensation being payable from the Pension Protection Fund (PPF)

**Employers need to make every effort to meet their automatic enrolment duties**

* The decisions made by the tribunal to date have confirmed that all employers **and their third-party agent(s)** are expected to act professionally and take timely action in response to letters, emails and notices from The Pensions Regulator.
* Inattention or lack of effort **or diligence**, by individual employers, **third-party agents** or staff, is not a reasonable excuse for failing to comply with the duties on time.
* The fact than an employee **or third-party agent** of the employer made a straightforward mistake is also not a reasonable excuse even if the mistake resulted from a medical condition. If an employee’s personal circumstances mean they are no longer able to complete the employer duties, the employer should appoint someone else.

**What won't count as a reasonable excuse?**

* Lack of understanding of how to comply with your automatic enrolment duties.
* You didn’t get a reminder from us to complete your automatic enrolment duties.
* You were unable to comply in time due to pressure of work.
* You are a small business and didn’t have anyone to help you comply.
* You relied on someone else to carry out automatic enrolment for you and they didn’t.
* You relied on someone else to complete your declaration of compliance for you and they didn’t.
* You found it too difficult to complete the declaration of compliance online but didn’t contact us to find out other ways to complete it, for example by telephone or by post.
* You thought you had completed the declaration of compliance online but had failed to tick the box at the end of the online form to confirm your declaration.
* Your staff didn’t want to be put into a pension scheme.
* You complied late but only by a few days.

**What may count as a reasonable excuse (NB…burden of proof is with the employer)?**

The following are examples of circumstances that might be considered a reasonable excuse:

* If you, or a key member of staff, has prolonged and serious ill health or are bereaved, and there were no alternative staff who could reasonably be expected to carry out the work. **You will need to provide evidence that this has affected you over the time that we have been communicating with you.**
* Loss of business records through flood or fire, **and the records could not be replaced**.
* If you can show that you have had major technical problems with the on-line declaration of compliance **(you will need to provide the date and time, and supporting details such as screenshots of error messages, and explain why you didn’t contact us by phone).**
* Delays beyond your control, for example delays caused solely by your pension scheme provider **(you will need to explain why you could not switch to a different provider).**
* If you are asking for a review because you **cannot afford** to comply with your duties, you should complete **the financial hardship form** and send financial information about your business, such as your most recent profit and loss account, balance sheet and details of your cash flow.

A financial hardship form can only be used when applying for a review.

**ICAEW – Code of Ethics**

**Acting with sufficient expertise**

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| 330.1 | * The fundamental principle of professional competence and due care requires that a [professional accountant in business](http://www.icaew.com/en/members/regulations-standards-and-guidance/ethics/code-of-ethics-abc-definitions?letter=p) only undertake significant tasks for which the [professional accountant in business](http://www.icaew.com/en/members/regulations-standards-and-guidance/ethics/code-of-ethics-abc-definitions?letter=p) has, or can obtain, sufficient specific training or experience. A [professional accountant in business](http://www.icaew.com/en/members/regulations-standards-and-guidance/ethics/code-of-ethics-abc-definitions?letter=p) shall not intentionally mislead an employer as to the level of expertise or experience possessed, nor shall a [professional accountant in business](http://www.icaew.com/en/members/regulations-standards-and-guidance/ethics/code-of-ethics-abc-definitions?letter=p) fail to seek appropriate expert advice and assistance when required. |

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| 330.2 | * Circumstances that create a threat to a [professional accountant in business](http://www.icaew.com/en/members/regulations-standards-and-guidance/ethics/code-of-ethics-abc-definitions?letter=p) performing duties with the appropriate degree of professional competence and due care include having: * Insufficient time for properly performing or completing the relevant duties. * Incomplete, restricted or otherwise inadequate information for performing the duties properly. * Insufficient experience, training and/or education. * Inadequate resources for the proper performance of the duties. |

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| 330.3 | * The significance of the threat will depend on factors such as the extent to which the [professional accountant in business](http://www.icaew.com/en/members/regulations-standards-and-guidance/ethics/code-of-ethics-abc-definitions?letter=p) is working with others, relative seniority in the business, and the level of supervision and review applied to the work. The significance of the threat shall be evaluated and safeguards applied when necessary to eliminate the threat or reduce it to an [acceptable level](http://www.icaew.com/en/members/regulations-standards-and-guidance/ethics/code-of-ethics-abc-definitions?letter=a). Examples of such safeguards include: * Obtaining additional advice or training. * Ensuring that there is adequate time available for performing the relevant duties. * Obtaining assistance from someone with the necessary expertise. * Consulting, where appropriate, with: * Superiors within the employing organisation; * Independent experts; or ICAEW |

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| 330.4 | * When threats cannot be eliminated or reduced to an [acceptable level](http://www.icaew.com/en/members/regulations-standards-and-guidance/ethics/code-of-ethics-abc-definitions?letter=a), [professional accountants in business](http://www.icaew.com/en/members/regulations-standards-and-guidance/ethics/code-of-ethics-abc-definitions?letter=p) shall determine whether to refuse to perform the duties in question. If the [professional accountant in business](http://www.icaew.com/en/members/regulations-standards-and-guidance/ethics/code-of-ethics-abc-definitions?letter=p) determines that refusal is appropriate, the reasons for doing so shall be clearly communicated. |



**Employer name and case ref:**

**Financial hardship questionnaire**

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| **A** | **Information about your business** | **Response** |
| **1** | Please provide us with copies of your:   * most recent annual accounts including profit and loss and balance sheet * most recent month end profit and loss account and balance sheet * any trading and cashflow budgets you have prepared for the current financial year. |  |
| **2** | Describe your business and the sector it operates in. |  |
| **3** | Explain the cause of your financial hardship,  for example, short term cash flow crisis, poor profitability generally, survival dependent on a critical event, imminent insolvency. Is the issue company or sector related? |  |
| **4** | Describe your current cash flow position:   * what overdrafts or loans do you have? * what other borrowing facilities are available to the business? * what cash inflows are you expecting? |  |
| **5** | Who owes money to the business? What steps are being taken to collect this? |  |
| **6** | Who are the main organisations that the business owes money to, for example PAYE/NIC and other taxes due to HMRC, rent etc. Which of these amounts are overdue? |  |
| **7** | Are the owners planning to wind up the business or cease trading in the near future? Please explain what is being planned. |  |
| **8** | How much salary or drawings are the owners or directors taking from the business in a typical month and in the last year? Do they owe any money to the business? |  |
| **9** | Is any third party threatening to wind up the business for example a creditor or HMRC? |  |
| **10** | Describe the trading outlook for the business over the next year:   * what profit/loss are you expecting to make? * what will the cash flow be like? * what is being done to improve the financial position of the business? |  |

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| **B** | **Information about automatic enrolment** | **Response** |
| **11** | Describe what you have done so far in relation to automatic enrolment, for example, have you set up a scheme, enrolled workers, paid any contributions? |  |
| **12** | Explain which elements of automatic enrolment you are claiming that your business cannot afford, for example, implementing automatic enrolment, making backdated contributions from your staging date, enrolling new workers, making ongoing pension contributions |  |
| **13** | How much did it or will it cost you to implement automatic enrolment, for example, the costs of setting up new payroll software or a new pension scheme? |  |
| **14** | How much are your monthly employer pension contributions? |  |
| **15** | What steps are you taking to ensure that the business can afford its automatic enrolment duties, for example raising finance from a bank, the owners of the business, other group companies, increasing sales, reducing other costs etc. |  |
| **16** | If you haven’t yet set up or put your workers into a pension scheme when will the business be in a position to do this? |  |
| **17** | If you have set up and put people into a pension scheme but have not paid over all  the contributions:   * have you agreed a payment plan with your pension provider? * when will you be able to pay over all of   the contributions due? |  |
| **18** | Have you deducted contributions from your workers earning which you have not paid over to the pension scheme? If ‘Yes’, what has happened to these contributions? |  |
| **19** | Please provide any other information which you feel is relevant. |  |

This form should be attached to your completed review application, along with supporting documentation. It should be returned within 28 days of the receipt of the notice.

If you are unable to apply online you can download and print a review application form from our website at [**http://www.thepensionsregulator.gov.uk/docs/application-for-review-of-notice-or-penalty.pdf**](http://www.thepensionsregulator.gov.uk/docs/application-for-review-of-notice-or-penalty.pdf)**.**

Please send the completed review application, supporting documents and this form to the return address in the reviews section of the notice you have received.