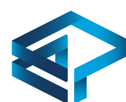
Opt-out payroll saving

The regulatory considerations

December 2021

BlackRock



Money & Pensions Service

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Contributors

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About Nest Insight

Nest Insight is a collaborative research unit set up by Nest Corporation to help understand and address the challenges facing Nest members and other defined contribution savers. For more information visit nestinsight.org.uk

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Invesco is an independent investment management firm dedicated to delivering an investment experience that helps people get more out of life. Building on its strong track record in defined contribution research, and its existing partnership with the University of Cambridge Judge Business School, Invesco partnered with Nest Insight to support their ambitious programme of research, publications and events. For more information visit invesco.co.uk NYSE: IVZ

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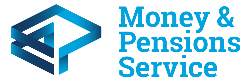
Our strategic partner, BlackRock, provides support for our workplace emergency savings research as well as the wider Nest Insight programme.



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1 Background to this work

There is growing recognition of the consequences of low levels of financial resilience for living standards, physical and mental health, and the ability of people to save for the future.

Analysis of the Wealth and Assets survey by the Resolution Foundation suggests that low financial resilience affects a significant proportion of people. Over a third of respondents (38%) said that at least once a year they run out of money before their weekly or monthly pay cheque. Almost half of respondents felt they could not cope for more than three months if their household lost their main source of income and one in ten said their savings would not last them one week[1]. An unexpected financial shock, like a car or boiler breaking down, or higher than expected energy bill, can mean that these people have to turn to high-cost credit to finance costs. This can lead to stress, deteriorating physical health, reduced productivity and earning potential, and make it difficult to save for the long-term and retirement.

Increasing levels of emergency savings amongst UK working people therefore has an important role to play in increasing financial resilience. By emergency savings, we mean money which is designated for managing unexpected costs and ups-and-downs in income, rather than saving towards a specific goal. Generally emergency savings accounts allow people to instantly access their money when they need it, and do not have penalties or other fees for doing so.

The need to increase savings participation is recognised in the UK Money and Pensions Service's 10-year UK Strategy for Financial Wellbeing. The strategy includes a 'Nation of Savers' ambition, with the goal of two million more working age financially 'Struggling' and 'Squeezed' people saving regularly by 2030[2]. Employers are also increasingly aware of the negative impacts of low financial resilience on their employees, and many want to help support them to build up emergency savings. This reflects a general concern for the wellbeing of their employees and also a recognition that more financial resilient employees will be happier, healthier, and more productive.

In the UK, there are a number of examples of efforts to improve financial resilience through workplace payroll emergency saving, in which employees contribute to an emergency savings account through payroll deductions or through in-app services. These are provided by a large number of credit unions and by commercial providers including Cushon, Level, Salary Finance and Wagestream. In January 2020, the UK Building Society Association's members committed to help create one million workplace savers by 2025 and Yorkshire Building Society has recently entered the market for workplace payroll emergency saving with a particular focus on small and medium-sized employers. The evidence is that for those who use them, these schemes help savers build up a level of emergency saving that protects them from financial shocks and improves financial wellbeing. As they increase financial resilience, they also support people to better save for retirement and the long term.

However, take-up of workplace emergency savings schemes is very low, with participation rates below 5% in most cases. The barriers to participation include low levels of awareness and also the behavioural challenges that are common to encouraging saving of any form, such as inertia (the tendency towards inaction and avoiding the costs of action) and present bias (the tendency to prefer smaller rewards today rather than greater rewards later).

In many ways this is a similar picture to the low levels of pension saving in the UK prior to the introduction of auto enrolment in 2012 (albeit at a much lower base level of participation). A change from an opt-in to an opt-out savings mechanism has been hugely successful in increasing pension saving in the UK, with 87% eligible employees saving into a pension in 2018, up from 55% in 2012[3]. It is possible that a similar mechanism

[1] Resolution Foundation, 'In this coronavirus crisis, do families have enough savings to make ends meet?' (April 2020) https://www.resolutionfoundation.org/comment/in-this-coronavirus-crisis-do-families-have-enough-savings-to-make-ends-meet/

[2] https://moneyandpensionsservice.org.uk/uk-strategy-for-financial-wellbeing/

[3] https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/883289/automatic-enrolment-evaluation-report-2019.pdf

could be effective in overcoming the structural and behavioural barriers to participation in workplace emergency saving, whilst preserving the choice not to save if a person wishes not to.

In the context of emergency saving, we believe that these benefits could be considerable, while the risks to employees of harm from an opt-out model appear low. Employees could choose not to save, either by opting out from the start, or by pausing or stopping their payroll contributions at a later stage. Money held in an emergency savings account would be freely accessible, eliminating the risk that the money is illiquid in a time of need.

What do we mean by an opt-out approach to workplace payroll emergency savings?

Opt-out workplace payroll emergency savings models offer the potential to increase the numbers of people saving for financial shocks, and in doing so help improve physical and mental health and the ability of people to save for the future.

By opt-out, we mean savings mechanisms in which an employee will be defaulted into payroll saving by their employer without them having to do anything themselves. They would retain the choice to opt out of saving if they wished to, but the default is that they would be enrolled by their employer into an emergency savings account.

Opt-in model	Opt-out model
If an employee wants to save, they sign up via a form or webpage, entering the information required to open an account and choosing how much to save each pay period.	If an employee wants to save, they don't need to do anything. An account is opened in their name and they start to save a default amount each pay period unless they make changes to personalise the amount.
If you do nothing you don't save.	If you do nothing you do save.
In both models employees can choose not to save.	

In order for the default to be switched from 'not saving if you do nothing', to 'saving if you do nothing' there would need to be no actions required of the employee who wants to save in the period between the communication of the savings scheme and the commencement of payroll saving. Any requirement for the employee to give consent or actively provide information to initiate payroll saving or set up a savings account would interrupt the 'do nothing and save' default, rendering an opt-out approach unfeasible.

Our understanding is that there are a number of barriers and uncertainties that make it harder for employers and providers to implement an opt-out workplace emergency saving model - and that it is probably impossible to do so in the pure form of, for example, pensions auto enrolment. As far as we are aware, no employer has implemented a version of this model. Nest Insight is participating in the Financial Conduct Authority's (FCA) regulatory sandbox to explore opt-out payroll savings in a research trial setting and recently announced the launch of a trial with partners SUEZ and their credit union, TransaveUK. Alongside this trial development work, Nest Insight has been exploring employer and provider views around the idea of opt-out payroll saving, including working closely with Yorkshire Building Society to consider this question. This work is part of a wider Nest Insight research programme made possible by the support of BlackRock and the Money and Pensions Service.

In this paper, we set out our understanding of the current situation, which is based on both the practical lessons from developing our trial and conversations with different stakeholders to date. This includes the relevant legislation and regulations, the considerations they present to an opt-out workplace emergency savings model, and our first thoughts on steps that could potentially be taken to make it easier for any employer that wanted to adopt an opt-out approach to workplace payroll saving to do so. Our focus is on the barriers to an employer voluntarily adopting an opt-out approach to workplace payroll saving for some or all of their employees, and not on any separate debate about whether such an approach might be made mandatory or incorporated into the pensions auto enrolment framework. The purpose of the paper is also not to advocate for any specific change, but rather to identify the barriers as we understand them from a practitioner perspective and to prompt discussion about potential easements, in the event that government or regulators wished to make this easier for employers in the future.

We have assumed that emergency savings made by an employee through payroll would go into an savings account in their name, although there are other possible models that could be considered, such as trust structures and e-money ledgers, which are currently being used by some providers in their workplace saving models.

The paper includes considerations related to:

Employment law

- The Employment Rights Act 1996 and its implications for deductions from salary.

Data protection law

- UK General Data Protection Regulation (GDPR) – Article 6

Financial services regulation

- The FCA's Banking Code of Business Sourcebook
- The Responsibilities of Providers and Distributors for the Fair Treatment of Customers (RPPD)
- Responsibilities of providers to comply with Principles for Business (PRIN2)
- Financial Services Compensation Scheme (FSCS)
- Anti-Money Laundering (AML), Joint Money Laundering Steering Group (JMLSG) Guidance, and Know Your Customer (KYC) checks
- Foreign Account Tax Compliance Act (FATCA)
- International tax compliance regulations (Common Reporting Standard)

The paper represents our initial thoughts about the legislative and regulatory barriers to developing opt-out workplace payroll emergency savings models. We welcome comments and responses so that we can develop a fuller picture of the barriers and potential solutions. As the paper has been drafted by Nest Insight (a research organisation), working with Yorkshire Building Society (a building society), we are aware that there will be gaps and that our understanding will be skewed according to our areas of expertise. In addition to the considerations we describe here there may be other areas, for example those that apply to specific sectors of the financial services industry, which we have not covered.

For this reason, we are forming a working group of employers, providers, policymakers and other experts to help build a more thorough picture of the considerations and possible solutions and to help us to evolve the understanding set out in this paper. We would also welcome input on the considerations raised in this paper from interested parties outside of the working group. To provide more information on the barriers, the potential solutions to the barriers, or if you are interested in being a member of the working group please email insight.research@nestcorporation.org.uk. For more information on our next steps following this paper please see section 7.

2 Employment law considerations

The Employment Rights Act 1996

The Employment Rights Act of 1996 contains a section on the right not to suffer unauthorised deductions as follows:

1. An employer shall not make a deduction from wages of a worker employed by him unless:
   a. the deduction is required or authorised to be made by virtue of a statutory provision or a relevant provision of the worker's contract, or
   b. the worker has previously signified in writing his agreement or consent to the making of the deduction.

The Employment Rights Act 1996 sets out that an employer can make statutory deductions from salary required by law (such as National Insurance, income tax or pension contributions), but cannot decide for an employee where their pay goes without consent. Doing so would amount to a breach of employment contract and could be considered unauthorised pay deductions.

It is possible that money saved through payroll going into an instant-access savings account in the employee's name may not be considered a deduction as the amount being paid to the individual is not reduced, but merely split across two different accessible accounts.

Alternatively, should the payroll saving be classified as a deduction, an employer would either need to add a provision to their employment contract to cover the payroll savings deduction taking place if the employee does not opt out, or alternatively would need to obtain consent from the employee to divert part of the employee's salary into an employer-nominated savings account, even if the savings account is in the employee's name and the money in the savings account is easily accessible.

3 Data protection considerations

UK General Data Protection Regulation (GDPR) Article 6

The lawful bases for processing are set out in Article 6 of the UK GDPR. There are six lawful bases for processing data:

- **Consent:** the individual has given clear consent for you to process their personal data for a specific purpose.
- **Contract:** the processing is necessary for a contract you have with the individual, or because they have asked you to take specific steps before entering into a contract.
- **Legal obligation:** the processing is necessary for you to comply with the law (not including contractual obligations).
- **Vital interests:** the processing is necessary to protect someone's life.
- **Public task:** the processing is necessary for you to perform a task in the public interest or for your official functions, and the task or function has a clear basis in law.
- **Legitimate interests:** the processing is necessary for your legitimate interests or the legitimate interests of a third party, unless there is a good reason to protect the individual's personal data which overrides those legitimate interests.

In an opt-out approach to payroll saving, an account would need to be created on behalf of any employee who does not opt out. This would most likely mean that an employer would need to share data they already hold about an employee with the savings account provider to allow an account to be set up in their name. These would include personal information such as, for example, full name, address, and email address. Other data items may be required for identity checks to be conducted, and vary by the savings provider, for example, date of birth, nationality, previous addresses or current account bank account number and sort code.

Under GDPR, the employer would need to establish a lawful basis for sharing the employee's Personal Data with the savings provider for the account to be created.

The savings provider would then need to establish its own lawful basis for storing, processing, and sharing the employee's Personal Data in order to deliver the account and associated services.

It is possible that the basis for sharing the data could be 'legitimate interests'. The employer may have legitimate interests in looking after their employees' wellbeing, and the savings provider in providing savings accounts. It could also be deemed to be in the legitimate interests of the employee to set up a savings account that allows them to start saving if they do not opt out. The benefits to an individual of having emergency savings, as well as the broader benefits to the employer and wider societal benefits are well documented[4]. A legitimacy impact assessment could determine that this lawful basis can be relied upon. It is likely that the employer and the savings provider would each need to conduct this assessment for themselves for the data processing activities for which they are each Data Controller.

Alternative applicable lawful bases for the data sharing could be under contract or consent. Where consent is used, we understand that the consent needs to be explicit, rather than the implicit consent that could be deemed to be given if an employee does not opt out after receiving information about the payroll savings scheme. Where contract is used, an employer would need to make a provision in their employment contract, and this would need to be agreed to by the employee. Therefore, if either contract or consent are used as lawful basis for processing personal data to enable account creation on behalf of the employee, we believe an active step would be required before enrolment to obtain the employee's agreement.

[4] For a summary of the evidence base around workplace emergency savings please see Nest Insight's July 2021 paper: https://www.nestinsight.org.uk/wp-content/uploads/2021/07/Workplace-emergency-saving-a-landscape-review-of-existing-evidence.pdf

4 Financial services regulation considerations

Financial Conduct Authority (FCA) regulations

The FCA's legislative powers (and other provisions) for regulating financial services providers under the Financial Services and Markets Act 2000 (FSMA) are set out within the FCA Handbook. Providers and employers would need to take account of the principles of the Handbook and the rules for day-to-day conduct before enrolling employees into a workplace payroll emergency savings account.

Agreement to Account Terms and Conditions (BCOBS 3.1.6, 3.1.8, 3.1.12, 3.1.15)

In order to make the offer of a payroll deducted savings account to an employee by remote means (i.e. not in person), the process would need to comply with distance marketing regulation, as set out in Section 3 of the Banking Code of Business Sourcebook (BCOBS).

These rules state that a firm must communicate to the consumer all the contractual terms and conditions of the account in a durable medium (defined as paper, or another form which allows the recipient to store information for future reference for an adequate period of time), or that information be made accessible to the consumer in good time before the consumer is bound by those terms and conditions.

For agreements that happen at a distance (for example, over the phone) a firm may provide the contractual terms and conditions immediately after the agreement of the contract. For this to apply the contract must be set up at the consumer's request and the means of distance communication used must not allow for that information to be given in good time before the consumer is bound by the contract.

For unsolicited services where the consumer has not explicitly agreed the terms, the rules state that a firm must not enforce, or seek to enforce, any obligations under a distance contract against a consumer, the absence of a reply not constituting consent.

We believe this means that employee consent to the savings account terms and conditions would be required before an employer could enrol them into a payroll deducted savings account.

Financial Services Compensation Scheme (FSCS)

The FSCS is the UK's statutory deposit insurance and investors compensation scheme for customers of authorised financial services firms. The FSCS pays consumers compensation if a firm is unable to pay claims against it.

Although operationally independent, the rules for the FSCS are set by the FCA and Prudential Regulatory Authority (PRA) and contained within the FCA and PRA handbooks. The handbooks set out that before opening a savings account, an employee would need to confirm that they have been provided with an FSCS information sheet which provides information about the protection of deposits. This covers the amount of compensation available across a provider should that provider fail.

In order to meet this requirement, the savings provider needs to obtain one of the following:

- signature on the information sheet
- signature on an acknowledgement in a separate document to the information sheet
- a ticked box for online journeys
- an express acknowledgement over the telephone.

It is not considered good practice for the acknowledgement of the information sheet to be obtained alongside accepting other terms and conditions. In circumstances where the contract is entered into online, the employee would need to be provided with the information sheet and be required to confirm receipt prior to the contract being entered into[5].

We believe it would therefore be necessary to obtain confirmation from the employee that they have received the FCSC information sheet before enrolment into the savings account.

Anti-Money Laundering (AML) / Joint Money Laundering Steering Group (JMLSG) and Know Your Customer (KYC) checks

The FCA requires all authorised firms to have systems and controls in place to mitigate the risk that their product might be used to commit financial crime. This requires the savings provider to assess the risks that its business may be used for the purposes of financial crime and mitigate those risks effectively through identifying its customers, understanding its relationship with them, and monitoring the way they use its services to identify anything suspicious.

The AML regulations / JMLSG guidance do not specify what KYC checks must be taken. Instead, firms are responsible for ensuring that they take a risk-based approach and have appropriate controls in place.

To establish what controls are appropriate, savings providers have to conduct a two-part risk assessment. The first part of this is a product risk assessment. This should consider how attractive the product is as a vehicle for money laundering. A payroll savings account could potentially be considered low risk, if the scheme included features such as:

- limiting deposits to only coming from the employer via payroll unless further checks are consented to by the employee
- a cap on monthly contributions and / or maximum balance at a low-risk amount, which could still be adequate for a short-term emergency saving purpose.

The second part of the assessment is the customer risk assessment to verify them as a trusted source. If the product risk assessment identifies the product as low risk, we believe it may be possible to designate the employer rather than the employee as the customer, with the employer vouching for their employees based on the employment checks already conducted. If the employee is deemed to be the customer then the AML and JMLSG requirements of the FCA mean that currently, some level of involvement from the employee may then be necessary to complete the KYC checks, for example, if consent is required for the employer to share relevant data with the provider or for the provider to share data with a third party such as a fraud prevention agency.

The Responsibilities of Providers and Distributors for the Fair Treatment of Customers (RPPD) and Responsibilities of providers to comply with Principles for Business (PRIN2)

The FCA Handbook sets out the responsibilities of providers and distributors for the fair treatment of customers[6] and 11 Principles for Business[7] which providers must adhere to. These are described in the table on the next page.

[5] The rules are set out in full here: https://www.bankofengland.co.uk/-/media/boe/files/prudential-regulation/supervisory-statement/2021/ss1815-march-2021.pdf

[6] https://www.handbook.fca.org.uk/handbook/document/rppd/RPPD_Full_20180103.pdf

[7] https://www.handbook.fca.org.uk/handbook/PRIN/2/?view=chapter

FCA Handbook Principles for Business	
1 Integrity	A firm must conduct its business with integrity.
2 Skill, care, and diligence	A firm must conduct its business with due skill, care, and diligence.
3 Management and control	A firm must take reasonable care to organise and control its affairs responsibly and effectively, with adequate risk management systems.
4 Financial prudence	A firm must maintain adequate financial resources.
5 Market conduct	A firm must observe proper standards of market conduct.
6 Customers' interests	A firm must pay due regard to the interests of its customers and treat them fairly.
7 Communications with clients	A firm must pay due regard to the information needs of its clients and communicate information to them in a way which is clear, fair, and not misleading.
8 Conflicts of interest	A firm must manage conflicts of interest fairly, both between itself and its customers and between a customer and another client.
9 Customers: relationships of trust	A firm must take reasonable care to ensure the suitability of its advice and discretionary decisions for any customer who is entitled to rely upon its judgment.
10 Clients' assets	A firm must arrange adequate protection for clients' assets when it is responsible for them.
11 Relations with regulators	A firm must deal with its regulators in an open and cooperative way and must disclose to the FCA appropriately anything relating to the firm of which that regulator would reasonably expect notice.

Of particular note are principle 6, Customers’ interests, which states a firm must pay due regard to the interests of its customers and treat them fairly, and principle 7, Communications with clients, which states that a firm must pay due regard to the information needs of its clients and communicate information in a way which is clear, fair, and not misleading.

In an opt-out model, the employer would potentially be fulfilling a role in distributing the savings product to the consumer and would need to adhere to the relevant principles for business. For example, the opt-out approach and employee communications surrounding it would need to be clearly and fairly communicated. Account information would need to be clear and not misleading. It would need to be clear to an employee how to opt out and the route for doing so would need to be easy. Cut-off dates for opting out would need to be clearly communicated and employees reminded in good time.

It would also need to be clear to the employee what the roles and responsibilities of both the employer and provider were. For example, it would need to be clear that the provider was responsible for post-sale servicing and activity on the account.

Future consumer duty

The FCA is currently consulting on a consumer duty that would set clearer and higher expectations for firms' standards of care towards consumers'[8]. In the consultation materials, the FCA states that it wants to see firms putting themselves in their customers' shoes, asking themselves questions such as 'would I be happy to be treated in the way my firm treats its customers?', or 'would I recommend my firm's products and services to my friends and family?'. As this work progresses, it would be useful to clarify whether a clearly and fairly communicated opt-out approach to support people who want to save to overcome behavioural and structural barriers to doing so is considered to be consistent with a duty of care to customers, and indeed whether offering this kind of support might be seen to be more in keeping with the spirit of this duty than an opt-in approach.

[8] CP21/13: A new Consumer Duty | FCA

5 International tax obligations

Foreign Account Tax Compliance Act (FATCA) and International Tax Compliance regulations (ITC)

The FATCA requires non-United States (US) financial Institutions and certain other non-financial foreign entities to report on the foreign assets held by their US account holders. The savings provider is required to file an annual submission of US citizens to HM Revenue and Customs (HMRC) who in turn need to report this to the Internal Revenue Service (IRS) in the US This means the savings provider needs to know whether the employee is a US citizen. The penalties for non-compliance are high at 30% on total US dollar transactions for the savings provider.

The ITC regulations require a savings provider to report citizens who are currently resident elsewhere to HMRC. The savings provider needs to identify if the employee is resident for tax purposes anywhere other than the UK

A self-certification must be signed by the account holder (or a person authorised to do so for her/him under domestic law), or in the case of an account opened by telephone or the internet, the self-certification must be positively affirmed – that is, the account holder must confirm the information provided. The self-certification must be dated no earlier than the date the account holder received the form; undated self-certifications may be date stamped by the receiving Financial Institution on receipt and that date will be taken as the date of signature. A self-certification is required for all accounts, including those held in the names of minors.[9]

For products subject to these rules, savings providers are required to collect information on tax residency at point of application. Some savings account providers simply exclude individuals who would fall under these regulations from opening savings accounts by asking for a declaration that a saver is not a US citizen/taxpayer or tax resident outside the UK in their sign-up journey.

In an opt-out[10] savings model an employer may need to provide this information to the savings provider. It is possible that an employer would know whether an employee was a US citizen/taxpayer. For instance, for ITS purposes, it is likely that an employer would know from the home addresses of their employees whether they were currently a resident outside the UK However, an individual can be reportable without any obligations on the current UK payroll or may be living in a temporary address and so the employer is not guaranteed to hold this data under existing processes.

The challenge for the opt-out model is that the savings provider is not just obligated to hold this information but to actually obtain self-certification from the individuals, which would create an active step for the employee (see HMRC Manual excerpt above). The collection of self-certifications from employees could potentially operationally be completed by the employer but the savings provider would remain the party subject to regulatory accountability and potential penalties, so contractual and operational safeguards would need to be agreed.

An alternative solution would be to exclude some employees from the opt-out approach depending on their international tax status if enough information is held by the employer to do so. These individuals could still be offered payroll savings on an opt-in basis.

[9] Source: IEIM403140 - International Exchange of Information Manual - HMRC internal manual - GOV.UK (www.gov.uk)

[10] We understand that within a tax context the term 'opt out' may be used to refer to an account with US indicia but for which the account holder has provided evidence they are not reportable to the US. Throughout this paper the term 'opt out' is used solely in reference to the workplace savings proposition set out in section 1.

6 Solutions that could address legislative and regulatory barriers

In the preceding sections we have set out what we believe to be the legislative and regulatory barriers to developing an opt-out payroll deducted emergency saving account.

Summary of the legislative and regulatory barriers

Area of regulation / legislation	Consideration	Implication
Employment law	Employment Rights Act 1996	It could be concluded that opt-out payroll savings into an accessible account in an employee's name do not amount to deductions. If this is not the case, either a contract variation or explicit consent would likely be required for it to be legal for an employer to make payroll deductions to a savings account.
Data protection	General Data Protection Regulation (GDPR)	The legal grounds for data sharing between employer and savings account provider could be 'legitimate interests'. Otherwise, it is likely that it would be necessary to obtain the employee's consent to share personal information, if the 'consent' or 'under contract' legal bases are used.
Financial services regulation	Agreement to Account Terms and Conditions	Consumers must give their approval before a firm can begin the performance of a distance contract.
	Financial Services Compensation Scheme (FSCS)	It is necessary to obtain confirmation that an employee has read the FSCS information sheet.
	Anti-Money Laundering / Joint Money Laundering Steering Group and Know Your Customer Checks	It is likely that the employee would have to play some role in providing the information needed to complete KYC checks, even if it is just providing consent for the employer to complete this on their behalf in the majority of instances.
	The Responsibilities of Providers and Distributors for the Fair Treatment of Customers and Responsibilities of providers to comply with Principles for Business	The provider and employer would have to be satisfied that the savings account is consistent with the Principles for Business.
International tax obligations	Foreign Account Tax Compliance Act and International Tax Compliance regulations	Additional information may be required from the employee to satisfy these requirements.

The barriers are wide-ranging. Some, such as the regulatory requirements to obtain consent to account terms and conditions, would likely mean a step is required before an employee could be enrolled into the account, with the implication that it would not be a true opt-out approach. Other barriers, such as the contract variation that may be required for an employer to divert part of an employee's salary into an account, may mean that employers are deterred from adopting this approach to support their employees to save in the first place. In this paper, we have concentrated on the regulatory barriers, but clearly employers face other contextual barriers such as lack of time and resources which may limit appetite to implement an opt-out approach to payroll saving if the path to doing so is not clear. Legal advice can be costly, and, particularly in the current business environment, employers may not have the resources or inclination to take non-essential risks, even if they are motivated to support employee wellbeing.

Within the current regulatory context, we believe that it is possible for an employer to adopt an opt-out approach to payroll saving for new joiners if the necessary consents and information requirements can be met through an onboarding stage, for example within the employment contract and employment checks. Indeed, this is the basis on which Nest Insight has designed its current opt-out payroll savings trial. However, it is clearly a step away from the pure 'no employee action' version of an opt-out model such as we see with pension saving in the UK and covers only the new joiners rather than all employees.

If we wanted to make it easier for UK employers to adopt an opt-out approach to supporting all their employees to save, should they wish to, we believe that action would need to be taken to ease the barriers identified here.

We can see three potential solution areas:

Guidance for employers:

Case study: US Consumer Financial Protection Bureau (CFPB)'s Compliance Assistance Statement of Terms Template (CAST)

Similar to the situation in the UK, one of the critical barriers to automatic emergency savings in the US has been a lack of clarity around employers' ability to direct an amount from their employees' pay to a designated financial institution savings product through payroll without violating the US Electronic Fund Transfer Act and associated regulation.

In 2020, working with the CFPB's Compliance Assistance Sandbox (CAS), Commonwealth developed a template to support employers with this. Now, the CFPB CAST Template gives employers standardised method to apply to the CFPB for approval to enable their employees to save more easily.

The arrangement confirms that employers will be able to apply for CFPB approval to designate a default financial institution and savings account even if the employee lacks or has not designated a savings account. Employees can still choose their own savings account or opt out of the programme. While it stops short of regulatory guidance or change and does not address other barriers to automatic emergency saving in the US, such a template should help reduce uncertainty for employers and providers by making it easier to eliminate this particular concern.

Carve-outs for payroll-deducted emergency savings schemes:

The second solution would be to create carve-outs to the relevant regulations, specific to emergency savings payroll schemes where employers and providers meet specific conditions. This might include exceptions to the requirement for active consumer acknowledgement of the account terms and conditions or FSCS cover if they are provided this information in good time and given the opportunity to opt out. As part of this exercise, it would likely be necessary to identify criteria for a savings scheme to be eligible for the carve-out and to define requirements for a good opt-out journey including guidance on appropriate opt-out approaches and communications.

Legislation:

Finally, the Government could pass legislation to provide employers with the necessary powers to enrol employees into a payroll deducted savings account if an opt-out approach is taken.

The UK Pensions Act overrides the considerations identified in this paper by making it a legal requirement for employers to enrol an employee into a workplace pension and to deduct pension contributions if the employee does not opt out. We are not suggesting here that employers should be mandated to adopt opt-out payroll savings but rather are highlighting the general case of legislation creating an override to some of the barriers discussed in this paper. We are aware of examples where governments have passed primary legislation to overcome barriers posed by existing regulation and legislation, to enable employers to play a greater role in supporting their employees' financial wellbeing.

The US Pension Protection Act of 2006 is such an example. It's built on the existing positive perception of automatic enrolment and the proof of concept that had been developed in the years leading up to the Act. The legislation minimised several remaining barriers which could not be resolved through the clarification of existing law, at the regulatory level.

Case study: The US Pension Protection Act (PPA) of 2006

The US Pension Protection Act 2006 (PPA) was originally intended mainly as a defined benefit pension funding reform bill but also included a number of measures to remove obstacles to employers using automatic enrolment in defined contribution (DC) schemes.

Before PPA became effective, around one third of large employers offering a DC scheme were already using auto enrolment. In the years leading up to the Act, a number of US Treasury rulings had been made to approve opt-out and make it clear to employers what was acceptable. However, the PPA was helpful in clarifying the legal bounds of three points in particular.

First, the PPA made it possible for employees to access their auto enrolment contributions penalty-free within 90 days of being automatically enrolled. This gave greater confidence to employers that they were not diverting wages to an essentially illiquid account against the wishes of their employees. Otherwise, employees wishing to undo auto enrolment would be subject to a 10% early withdrawal penalty which employers were concerned employees would object to if they had not had the advance notice of auto enrolment (although the employer match, regular communications and gradual small contributions meant the risk of losing money was already low).

Second, concern about employers' fiduciary responsibility when choosing the default investment for auto enrolment contributions had led some to avoid using auto enrolment or to enrol employees in overly conservative default investments. PPA dispelled the uncertainty by explicitly authorising auto enrolment into diversified target date funds, balanced funds, or managed accounts.

Third, the PPA confirmed that state laws prohibiting garnishment of wages or other wage withholding without an employee's express written authorisation posed no obstacle to auto enrolment in DC schemes.

Finally, as an additional incentive to adopt auto enrolment, the PPA gave DC schemes a safe harbour exemption from required non-discrimination testing if they adopted auto enrolment that increased default contributions over time and met other requirements. This safe harbour, while not widely adopted, combined with the PPA's other auto enrolment provisions to send a clear positive signal from Congress that helped publicise auto enrolment as an option for employers.

While Treasury rulings beginning in 1998 laid the groundwork for defining and approving the use of automatic enrolment under applicable legislation and regulation, the PPA, by addressing the concerns described, gave the market greater confidence, and gave opt-out an important boost through public marketing.

7 Next steps

This paper is a first attempt to detail the regulatory and legislative barriers to developing an opt-out model for payroll deducted workplace savings accounts. We recognise that it may be incomplete or unrepresentative of all possible barriers for saving account providers and employers. We will be seeking input from our working group of employers, providers, and other experts to gain a greater insight on what other barriers may exist and the potential solutions to them. We would welcome responses to the paper and expressions of interest in joining the working group.

Nest Insight has recently launched a trial of an opt-out payroll savings approach at one UK employer, SUEZ recycling and recovery, working with its credit union, TransaveUK[11]. Payroll savings will be offered on an opt-out basis only to new joiners during a trial period. This provides a natural point where the necessary information, consent and contracting for setting up an opt-out payroll saving account can be sought before the individual begins employment. Once onboarded into the organisation, employees receive information about the payroll auto-saving scheme, along with details of how to opt out if they choose to. It is expected that this trial will provide an indication of not only the efficacy of such a mechanism at growing the short-term savings of low- to mid-earners, but also the effect it has on longer-term employee savings behaviours and broader financial wellbeing. We believe this information will provide key evidence to further the debate around opt-out payroll saving.

The workplace is a potentially powerful channel for supporting saving amongst employees who are financially ‘Struggling’ or ‘Squeezed’. Having savings can help people avoid costly debt and support broader individual and community wellbeing. Employers and the wider economy also stand to benefit from improvements in workforce financial wellbeing. It is very unlikely though that ambitious goals around building savings behaviours and financial wellbeing in the UK will be achieved on the basis of the workplace savings participation seen under opt-in models. Opt-out approaches have the potential to help overcome inertia and remove sign-up friction whilst also, importantly, preserving choice. If the regulatory considerations identified in this paper could be addressed so that employers and providers felt comfortable adopting this approach, then this could drive a step-change in savings rates.

[11] https://www.nestinsight.org.uk/opt-out-payroll-savings-trial-launch/

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