

Client Alert

Latham & Watkins
Tax Department

Age Discrimination and the Provision of Benefits to Employees in the UK

The Employment Equality (Age) Regulations 2006 (the Age Regulations) are now a significant feature on the UK employment law landscape.

What do the Age Regulations do?

The Age Regulations are designed to protect employees from discrimination on the basis of their age. The Age Regulations protect young and old employees, and there are no specific age ranges to which they apply.

Amongst the forms of discrimination prohibited by the Age Regulations are:

- direct discrimination, where one employee is treated differently to another on the basis of the employee's age, and
- indirect discrimination, where an employer applies a provision, criterion or practice uniformly to all employees, but that provision, criterion or practice disadvantages employees in one age group when compared with employees of another age group.

The Age Regulations prohibit discrimination on the basis of a person's age that cannot be "objectively justified". An employer may "objectively justify" an otherwise discriminatory practice by demonstrating to an Employment Tribunal that its actions were a

proportionate means of seeking to achieve a legitimate aim. This will involve a careful consideration of the reasons for the difference in treatment, whether those reasons are sufficiently important that they could justify the discrimination, whether there were less discriminatory ways of achieving the same result, and the effect of the discrimination on the "victim" of the discrimination.

Age discrimination in the provision of benefits

It is common for employers to make **eligibility** for benefits, or the **level** of benefits provided to employees, dependent on an employee's age or length of service. This is potentially directly age discriminatory where the benefit varies with an employee's age, or indirectly age discriminatory where the benefit varies with length of service (because an older employee is more likely to have accrued longer service than a younger employee).

Please note that the Age Regulations treat pension plans differently to other types of benefits. Pension plans are outside the scope of this *Alert*.

There is a general exemption in the Age Regulations which allows employers to exclude employees from receiving a benefit, or to provide employees with a lower level of benefit, where those employees

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have less than five years' accrued service. Therefore an employer may, for example, give employees with three or more years' accrued service an extra day's vacation without infringing the Age Regulations. This exemption does not apply to end of service benefits such as severance payments.

Where eligibility for a benefit, or the level of benefit given, varies with length of accrued service for employees with more than five years' service, the employer will need to be able to show that this difference in treatment reasonably appears to fulfil a business need.

Age discrimination and redundancy payments

Many contractual redundancy plans provide for different payments to be made to employees on the basis of their age and/or length of service, and so these are likely to be vulnerable to challenge under the Age Regulations. There is an exemption for statutory redundancy payments, which are determined by reference to the employee's weekly wage, length of service and age.

A second exemption applies to redundancy plans which use the formula for calculating statutory redundancy payments except that:

- the cap on a week's pay is removed; and/or
- the age factor is multiplied by a number greater than one (being the same multiplier for each age range); and/or
- the total payment calculated by using the statutory redundancy formula is then multiplied by a number exceeding one (this multiplier must be the same for all employees).

Recent case law on age discrimination and benefits

The Age Regulations came into force in October 2006. The following principles have emerged from the case law concerning employee benefits:

- Providing benefits which differ on the basis of an employee's age is more difficult to objectively justify than providing benefits that differ on the basis of accrued service.
- Using length of service as one of a number of criterion in, for example, a redundancy selection matrix, is easier to justify objectively than using length of service as the sole factor to determine selection.
- Benefit terms which contain apparently age discriminatory provisions that have been agreed with trade unions are more likely to be objectively justifiable than where such terms have not been collectively agreed.
- A right that will arise in the future is an existing "benefit" for the purposes of the Age Regulations, *e.g.* where an employer gives a bonus to employees who accrue 10 years of service, all employees with less than 10 years' service have a presently existing right to that bonus in the future.
- In a flexible benefits plan, it is common for older employees to need to use up more of their "flex fund" to purchase certain benefits, *e.g.* private medical insurance, than is the case for younger employees. In one case, an employee claimed that because she received fewer benefits under such a flexible benefits plan, despite having the same flex fund as her younger colleagues, her employer discriminated against her. The Employment Tribunal dismissed the claim, holding that the question of whether there was a difference in treatment involved looking at the value of the flex fund given to employees. Provided this was the same for all employees regardless of their age, there was no discrimination.
- Possible legitimate aims for using age discriminatory provisions include:
 - (i) encouraging and rewarding loyalty,
 - (ii) seeking to avoid industrial unrest,
 - (iii) health, welfare and safety,
 - (iv) seeking to avoid compulsory redundancies, and
 - (v) facilitating

employment planning. Considerations of cost are not enough, by themselves, to amount to a legitimate aim.

What happens in practice if potentially age discriminatory benefits are currently offered to employees?

The Age Regulations state that age discriminatory benefit provisions are void, which appears to suggest that they cannot be applied to, or enforced by, employees. However, other sections of the Age Regulations seem to provide that an employee who would be disadvantaged by the benefit provisions that are “void” has a right, if the employer tries to remove or change the plan, to choose to enforce it in certain circumstances.

Please note that different sections of the Age Regulations apply depending on whether the benefits are included in an employee's contract of employment or are derived from collective agreements reached with a trade union.

The problem caused by the uncertain meaning of the legislation is perhaps best shown by an example, such as where a redundancy plan provides employees older than 50 with redundancy payments of twice the value of those payable to employees younger than 50. One interpretation of the legislation (but not the only one) is that employees older than 50 can still enforce their rights to a higher redundancy payment even though other parts of the legislation suggest that such an age discriminatory payment is void. If the older than 50s can enforce their rights, the younger than 50s can bring age discrimination claims arguing that if they were older than 50, they would have received double payment.

The result for the employer is either that it has to “level up” all the younger than 50s to the higher payments given to the older than 50s, or it has to dismiss and re-engage all of the employees with their new terms providing for a less expensive severance/redundancy

plan so as to avoid the very expensive “levelling up” of benefits—neither is a particularly attractive proposition. Of course, this is only one interpretation of the legislation, but it is certainly one that has some support amongst employment lawyers.

We will have to wait for the courts' interpretation to get certainty on this question.

What should employers do?

Employers of UK employees should consider whether any of the benefits they provide could be caught by the Age Regulations. If this is the case, the employer will need to analyse whether the age discriminatory elements of those benefits could be objectively justified. Such an employer should also think about replacing the benefit with a non-discriminatory benefit, so as to avoid claims by disadvantaged employees. It is difficult to replace such benefits unilaterally, without the consent of employees, and so careful thought should be given to the nature and timing of any such changes.

Latham & Watkins' employment and benefits team in London has experience of advising on these complex issues.

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