

# Client Alert

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Benefits and Compensation Practice

## New Age Discrimination Laws in Force 1 October 2006: Employers Must Prepare

After outlawing discrimination on the grounds of sex, race, disability, religion and sexual orientation, the next category of discrimination on the UK Government's agenda is discrimination on the grounds of age. Employers need to take action now to minimise the risk of any claims against them after the new laws come into force on 1 October 2006. This *Alert* summarises the key issues but please contact one of the London employment and benefits team for tailored advice on how to ensure your company is doing all it can.

### Summary

The Employment Equality (Age) Regulations 2006 (the Regulations) come in to force on 1 October 2006 and they will outlaw discrimination on the grounds of age in the UK. Whereas in the US federal age discrimination legislation only protects those workers older than 40, in the UK both young and older workers will be protected.

This means there is likely to be a lot of age discrimination claims brought by disgruntled employees. An employee does not need the usual 12 months service in order to bring a claim.

Key effects of the Regulations are as follows:

- Currently employees over the age of 65 cannot claim unfair dismissal or receive redundancy payments; these upper age limits will be removed.

- There will be a national default retirement age of 65, making compulsory retirement below 65 unlawful unless objectively justified (see section "Retirement" below for more about this).
- Benefits related to the employee's length of service are only lawful if the lesser benefit relates to employees with less than five years of service. If people with more than five years service are discriminated against, the employer must be able show that it is fulfilling a business need in providing greater benefits to employees with longer service (e.g. the need to retain workers with longer service).
- Statutory redundancy payments are calculated taking into account the employee's age and length of service and this will remain lawful. In addition, if employers wish to pay enhanced redundancy payments based on this statutory system, that will also be permissible. However, any different system used by employers that provides for redundancy benefits depending on the age of the employee will need to be objectively justified. In addition, the criteria used in selection for redundancy will need to be carefully reviewed as "last in, first out" is likely to be discriminatory.
- There are certain limited circumstances when discrimination may be lawful. These include where being a particular age is a genuine occupational requirement (e.g. a character in a play is a young person), where the employer is

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paying wages in accordance with the National Minimum Wage, or where the discrimination is as a result of an age requirement in another statute (e.g. licensees of premises serving alcohol must be over a certain age).

The Regulations also make it on the grounds of age, unlawful to:

- Discriminate directly against anyone – that is, to treat them less favourably than others because of their age, unless this can be objectively justified.
- Discriminate indirectly against anyone – that is, to apply a criterion, provision or practice which disadvantages people of a particular age, unless this can be objectively justified.
- Subject someone to harassment. Harassment is unwanted conduct that violates a person's dignity or creates an intimidating, hostile, degrading, humiliating or offensive environment for them.
- Victimise someone because they have made or intend to make a complaint or allegation or have given or intend to give evidence in relation to a complaint of discrimination on the grounds of age.

To succeed with a defence of "objective justification" an employer must show that the potentially discriminatory treatment was a proportionate means of achieving a legitimate aim. The aim must correspond with a real need of the employer, such as the particular training requirements of the job, or the health, welfare and safety of the employee. The DTI guidance on this point states that "the discriminatory effect of any age-based practice should be significantly outweighed by the importance and benefits of its legitimate aim, and the employer should have no reasonable alternative."

An example might be fixing a maximum age for promotion because of the need for a reasonable period of employment in the new post before retirement. Although the Government has suggested that any adverse financial effect on the employer of discontinuing the potentially discriminatory practice may be taken into account, it will not be sufficient objective justification to say that to discontinue the practice would be too expensive.

## **To Whom Do the Regulations Apply?**

The Regulations apply to all public and private sector employers, vocational training providers, trade unions, professional organisations, employer organisations and trustees and managers of occupational pension plans. In addition to employees, they also apply to other categories of workers (e.g. partners in a partnership and barristers, and to those who are applying for employment).

It will be unlawful to discriminate during the recruitment process, in determining terms and conditions, in providing opportunities for promotion, transfer, training or receiving any other benefit, and in dismissing the individual or subjecting him to any other detriment. However, there is an exception in that it will not be discriminatory for an employer to refuse to hire someone who is either over age 65 (or the employer's normal retirement age if different), or would turn 65 (or the employer's normal retirement age if different) within six months of the date of his application to the employer.

## **Retirement**

Currently in the UK, it is common practice for companies to have a set retirement age (typically 60 or 65) and for employment to terminate automatically on that date, or earlier if agreed between the employee and his employer. This will fundamentally change from October.

The Regulations set a default retirement age of 65. A company can use 65 or an age older than 65 as its retirement age. If it wishes to set a retirement age of lower than 65, it will need to be able to objectively justify this policy. Alternatively, the company can choose not to have a fixed retirement age at all.

## **Retirement Procedures**

Automatic termination of employment at retirement age can no longer take place. A strict procedure must be followed for a dismissal on the ground of retirement to be fair. The principal points are as follows:

- The retirement must take effect on or after the employer's normal retirement age, or on or after 65 if the employer does not have a normal retirement age. The employer must notify the employee of his or her intended retirement date at least six months (but not more than 12 months) before the intended date. At the same time, the employee must be notified of his right to request to continue working beyond his retirement date.
- If the employee wishes to continue working, he or she must request to do so more than three months before his or her intended retirement date.
- The employer will then have a duty to consider the request and must meet with the employee to discuss it. The employee can choose to be accompanied by a colleague or trade union representative at the meeting. The employer must then notify the employee of its decision, but need not give reasons.
- The employee can then appeal this decision, and a further appeal meeting will be held.

Failure to follow the above procedure will mean that the dismissal is automatically unfair. Compensation for unfair dismissal is currently capped at £58,400 but there is a risk that as well as claiming unfair dismissal the employee may decide to claim discrimination on the grounds of his age, and in such a case the compensation is uncapped.

The above procedure applies where an employee is given notice that he is to be retired on or after 1 April 2007. Before that date complicated transitional provisions apply.

## **Pensions**

Many of the rules of pension plans relate to a person's age, and are therefore potentially discriminatory (e.g. allowing members over a certain age to retire early, providing for higher employer contributions for older members, etc.).

In order to avoid the need for the rules of pension plans to be significantly rewritten, the UK Government has taken a practical approach. The Regulations provide that each occupational pension plan is to be treated as including a non-

discrimination rule, and they also set out a large number of exceptions from the age discrimination rules for pension plans. For example, it is acceptable for plans to have a minimum or maximum age for admission, have different benefits for those who retire early or retire late, and limit the amount of a benefit by imposing a maximum number of years of service which can be taken into account in calculating the benefit.

This means that in most cases, the number of amendments to a plan that are necessary will be relatively low. However, this is a complex area and specialist advice should be sought to ensure compliance with the law.

## **What Practical Steps Should Employers Be Taking Now?**

October is not very far away and employers should start ensuring that their policies and procedures are in compliance with the Regulations as soon as possible. There are a significant number of areas where change may be needed, and the remainder of this Alert sets out some examples. Please contact us for assistance to ensure that you are doing all you need to.

- Educate staff. Employers will be liable for discriminatory acts of their employees and so it is important that staff members are aware of the new laws and what will be and will not be appropriate.
- Review your policies for recruitment, selection and promotion, training, pay, benefits and other conditions, bullying and harassment, and retirement.
- Carry out an "age audit" and analyse the age range of your employees. Is there a wide range with similar numbers of employees in each band? If not, think of ways you could try and improve the diversity.
- Base your decisions about recruitment on the skills required to do the job. Remove age/date of birth from your main application form and include in it an anonymous diversity monitoring form to be retained by HR.
- Avoid references, or implied references, to age in job descriptions or adverts. Asking for candidates to have a particular number of years of

service is potentially discriminatory, as is stipulating that candidates should be “energetic and able to fit in with a fast-paced environment.”

- Review training opportunities to ensure they are suitable for people of all ages and everyone is encouraged to participate.
- Ensure performance appraisals do not contain bias (e.g. “X shows remarkable maturity for his age” is potentially discriminatory).
- Check redundancy selection processes – using length of service criteria is likely to be discriminatory.

- Check the age of workers who receive discretionary benefits such as bonuses – is there an even distribution between workers of all ages? If not, can the discrepancy be objectively justified?

This piece of legislation is potentially very significant and will give all employees of whatever age and length of service the right to claim discrimination on the grounds of age. It is worth noting that since similar legislation was introduced in Ireland, more than 20 percent of employment tribunal applications now contain an age discrimination claim.

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