

News brief



Age discrimination

New horizons

The long-awaited Employment Equality (Age) Regulations 2006 (the Regulations) have now been published in final form. Subject to approval by both houses of Parliament, these are due to come into force on 1 October 2006. Once in force, they will have an impact on all stages of the employment relationship, from recruitment to termination.

Key amendments

The Regulations implement the age discrimination elements of the Employment Directive (2000/78/EC). The Regulations, among other things, prohibit both direct and indirect discrimination on grounds of age or, in the context of direct discrimination, perceived age (*regulation 3*). Discrimination by way of harassment and victimisation is also prohibited (*regulations 4 and 6*).

The previous draft of the Regulations was published for consultation in July 2005 (see feature article "The dawning of a new age: the draft age discrimination legislation", www.practicallaw.com/6-201-1664). There have been a number of notable changes in the final version (see box "Key changes").

Retirement ages

At present, it is common for contracts of employment to provide for a retirement age below 65 (often at age 60). Such contracts often provide that employment will cease with immediate effect on the retirement date (that is, without the need for notice).

Once the Regulations are implemented, however, employers will not

be able to require their employees to retire before the later of 65 or the company's normal retirement age (*regulation 30(2)*). Although the Regulations do permit employers to have a normal retirement age below 65, this must be objectively justified if it is to be lawful and it is likely to be extremely difficult for employers to make the case for any such justification.

It is likely that employers who currently have a retirement age of below 65 will uplift this to 65 with effect from 1 October 2006. The new normal retirement age can be included in the contracts of new joiners, which can provide that employment terminates on the employee's 65th birthday, subject to the duty to consider procedure (see below). However, including this new retirement age in the contracts of existing employees as a contractual term providing for immediate termination on reaching retirement would require a contractual amendment, necessitating employee co-operation.

If employers choose to rely only on a normal retirement age without a contractual amendment they will need to remember to give contractual notice to employees, as well as complying with the duty to consider procedure.

Duty to consider procedure

Employers who wish to retire their employees will now be obliged to notify them of their right to request to work beyond retirement (*paragraph 2, Schedule 6, the Regulations*). The Regulations also require employers to consider a valid request from the employee to con-

tinue working after the intended retirement date. The full duty to consider procedure will apply to employees who are due to retire from 1 April 2007 but the Regulations contain transitional provisions which will be applicable to employees due to retire between 1 October 2006 and 1 April 2007 (*Schedule 7, the Regulations*).

The notification requirements differ according to whether the employee is told about their impending retirement before or after 1 October 2006:

- If an employer gives an employee notice of retirement before 1 October 2006 to expire before 1 April 2007, and such notice is at least four weeks (or less if the employee's contract requires less than four weeks' notice), the employer will be treated as having complied with the requirements if, on 1 October 2006 (or as soon as practicable thereafter), the employer notifies the employee in writing that they have a right to make a request to work beyond retirement.
- If an employer gives an employee notice of their retirement on or after 1 October 2006, the notice should be at least that required by the employee's contract of employment, or the notice required under statute, if longer. In this case, the employer is also required to notify the employee of the right to request to work beyond retirement either before or at the same time as it gives this notice.

Request to work. If the employee takes advantage of the right to request (either

during the transitional provisions or once the full procedure is in force), the request must be made in writing and state:

- That the request is being made under paragraph 5 of Schedule 6 to the Regulations; and
- Whether the employee wants the employment to continue indefinitely, for a stated period, or until a stated date.

The employee also has to comply with specified time limits both under the transitional provisions and under the full procedure if their request is to be considered a valid request.

Non-compliance. If the employer fails to comply with the notification and duty to consider procedures (once the procedures are in full force), an employment tribunal may award up to eight weeks' pay (subject to the current maximum of £290 per week) (*paragraph 11(3), Schedule 6, the Regulations*). Any such award will be based on its assessment of what is "just and equitable".

There are, however, more significant ramifications for employers who fail to comply with the procedures (both during the transitional provisions and after 1 April 2007). A failure may have an effect on what is determined to be the "reason" for the dismissal. Rather than retirement being treated as the only reason for dismissal, which is the case if the procedures are properly followed, it will be for the tribunal to determine the reason for dismissal and it may conclude that the dismissal was for a reason other than retirement. In some circumstances, a procedural failing will mean that a tribunal must conclude that the dismissal was for a reason other than retirement.

Practical steps

Practical steps should be taken now to prepare for 1 October 2006:

- Consider the implications of the Regulations for your organisation and prepare a retirement procedure.

Key changes

Key changes in the Employment Equality (Age) Regulations 2006 (the Regulations) from the previous draft (draft Regulations) include:

Removal of examples of objective justification. It will be possible to justify objectively both direct and indirect age discrimination (*regulation 3(1)*). The justification must be a proportionate means of achieving a legitimate aim. The draft Regulations included examples of what would amount to objective justification: these have now been removed.

Exclusion of job applicants approaching 65. Job applicants who are within six months of the employer's normal retirement age or (if the employer has no normal retirement age) 65 are excluded from protection under regulation 7(4) of the Regulations.

Benefits provisions. The Regulations now provide that:

- All benefits that are based on employees' length of service are exempted unless the disadvantaged employee has more than five years' service (*regulation 32*).
- If the disadvantaged employee has more than five years' service, for a length of service benefit to be lawful, it must "reasonably appear" to the employer that the length of service requirement fulfils a business need, for example, rewarding experience of some or all of its workers (*regulation 32(2)*).
- Enhanced redundancy payments are permitted provided they are calculated in a certain way (*regulation 33*).
- Employers who provide life assurance cover for workers who take early retirement on grounds of ill health can arrange for such cover to cease when the workers reach the employer's normal retirement age or (where there is no normal retirement age) 65 (*regulation 34*).

Request to work beyond retirement. Meetings which the parties are obliged to hold under the duty to consider procedure must occur within a reasonable period after the employer has received the request, and the employer's decision must be given to the employee in writing as soon as reasonably practicable after the meeting (*Schedule 6, the Regulations*).

The requirement on employers to consider a request to work beyond retirement "in good faith" has been deleted. However, the usual obligations of trust and confidence will apply, so an employer who takes an unreasonable approach to consideration of a request could find themselves facing a claim for breach of contract (*see also "Duty to consider procedure" in the main text*).

- Train managers to deal with the issues that will arise and introduce dignity at work training to alert employees as to what amounts to age harassment and to highlight that this is unlawful.
- Review terms and conditions, policies and practices to remove age bias; for example, in recruitment and promotions.
- Introduce monitoring; for example, of new recruits and departing staff.

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The Regulations are available at www.dti.gov.uk/er/equality/draft_regs.doc.