

Mind the Age Gap

Age Discrimination Legislation to come in force on 1 October 2006

In this article, Emmanuelle Ries, Employment Partner at Miller Rosenfalck, looks at the draft regulations implementing the European Framework Directive on Equal Treatment and explains why employers should be preparing now for age discrimination legislation.

Subject to Parliamentary approval, the Government's proposals to legislate on age discrimination will now come in force on 1 October 2006. In summary the new regulations will:

- Prohibit contractual retirement age below the default age of 65 (unless objectively justified);
- Prohibit unjustified age discrimination and harassment in employment and vocational training;
- Require employers to inform employees in writing at least 6 months in advance, of their intended retirement date;
- Introduce a new duty that employers consider an employee's request to work beyond the age of 65;
- Remove the upper age limit for unfair dismissal and redundancy rights.

The draft regulations are the result of a long consultation period and looking closer at the principles outlined above reveals a number of exceptions to the new rules which allow some flexibility to the application of this new concept in practice.

A new default retirement age of 65

Retirement below the age of 65 will be unlawful – except where it can be objectively justified.

When the employee is aged 65, the employer will be entitled to compulsorily retire him without having to justify this decision but provided that the employer has considered the employee's request to work beyond retirement.

The employer is under a continuing Duty to Inform of Intention to Retire up to 14 days before the dismissal. Once informed, the employee can request extended employment any time up to six weeks before the dismissal. The employer must then hold a meeting with the employee and give a written decision to the employee within 2 weeks (but no reasons need be given). The employee has then two weeks to consider. If the employer has agreed to an extension of the retirement age, then the Duty to Inform (and consider any request) recurs in relation to agreed extensions.

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At present only 30% people are in employment by the age of 65. Due to falling population rates, the Government's view is that this will have to change. The Government is committed to reviewing the default retirement age in 2011 and it is anticipated that it will be increased or dispensed with altogether.

Direct and Indirect Age Discrimination

It will be direct discrimination to use age as a reason for different treatment in a comparable situation – unless there is an objective justification.

It will be indirect discrimination where a provision, criteria or practice disadvantages a particular category of person because of his or her age, even if this effect is unintentional – unless the provision, criterion or practice is a proportionate means of achieving a legitimate aim.

As an example, requiring applicants to pass a health or fitness test for recruitment or promotion would not constitute direct age discrimination. However it might be indirect age discrimination if people of certain ages were less likely to pass this test than other age groups (in which case the employer would have to objectively justify it – using a health test will be justifiable if the test is set at a level necessary to indicate whether someone was capable of doing the job).

Justifying Age Discrimination

Age discrimination will be potentially justifiable in 3 circumstances:

- 1. where the job falls within the scope of a genuine occupational requirement; or
- 2. where there is a difference in treatment on grounds of age, but that age based treatment is demonstrated to fall within a justification allowed by the Regulations (see below); or
- 3. where there is a provision, criterion or practice which is not based on age, but which places those in a particular age group at a disadvantage, so that the employer must justify the practice in terms of proportionality.

Direct and indirect age discrimination will be justified and lawful if it is a proportionate means of achieving a legitimate aim. The Government has said that the test of objective justification will not be an easy one to satisfy and the principle remains that different treatment on the ground of age will be unlawful: treating people differently on the ground of age will be possible but only exceptionally and only for certain reasons.

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The draft regulations set out a non-exhaustive list of situations where direct age discrimination may, depending on the circumstances, pursue a legitimate aim. These are:

- the setting of requirements as to age in order to ensure the protection or promote the vocational integration of people in a particular age group;
- the fixing of a minimum age to qualify for certain advantages linked to employment or occupation in order to recruit or retain older people; and
- the fixing of a maximum age for recruitment or promotion which is based on the training requirements of the post in question or the need for a reasonable period of employment before retirement.

In addition both direct and indirect discrimination may be justified in circumstances involving:

- health, welfare and safety (including protection of young or older people);
- facilitation of employment planning;
- particular training requirements;
- encouraging and rewarding loyalty;
- the need for a reasonable period of employment before retirement; and
- recruiting or retaining older people

Note however that the legitimate aim cannot be related to age discrimination itself. For example, it would not be lawful for a retailer of trendy fashion items to employ young shop assistants because it believes that this will further its aim of targeting young buyers. Trying to attract a young target group will not be a legitimate aim, because this itself has an age-discriminatory aspect.

Service related pay and benefits

Many employers require staff to have completed a certain length of service before a benefit is given or increased. This is seen to reward loyalty. Benefits include matters such as annual leave and a company car. Once the new age rules are in force, this will often amount to indirect age discrimination because some age groups are more likely to have completed the required length of service than others.

The draft regulations contain a number of specific provisions dealing with the use of length of service in employment benefits. If an age-related criterion, provision or practice meets the requirements of the legislation it will be lawful – an employer will not have to justify it. The Government's Age Matters consultation last year proposed that age discrimination in employment benefits should be allowed if employers could justify it under the general objective

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justification test (described above). This approach met with resistance from employers, who argued that it would not be helpful to have to provide individual justification for a wide range of service-related benefits, the protection of which was generally regarded as desirable by most respondents to the consultation.

Consequently the result is that the draft regulations contain a general provision and two specific exemptions on employment benefits, all of which cover the use of length of service as a criterion for awarding or increasing benefits in specified circumstances. These exemptions cover pay and non-pay benefits, such as annual leave and company cars. This will cover all instances of use of length of service for all types of employment benefits. It provides that such use is lawful if:

- awarding or increasing the benefit is meant to reflect the higher level of experience of the employee, or to reward the loyalty of the employee, or to increase or maintain the motivation of the employee;
- the employer has reasonably concluded that there will be a business benefit resulting from the higher level of experience of staff or from rewarding staff loyalty or increasing or maintaining staff motivation; and
- the employer applies the length-of-service criterion similarly to staff in similar situations.

The age regulations also contain two specific exemptions:

- (i) any length-of-service requirement of five years or less will be exempted and will be able to continue (the “five-year-exemption”). The employer must apply the length-of-service criterion to staff in similar situations
- (ii) any length-of-service requirement that mirrors a similar requirement in a statutory benefit (such as redundancy) will be exempted and will be able to continue.

Service requirements of longer than five years may still be justifiable but not automatically so.

October 2006 is just around the corner

Age discrimination claims by employees in the US where age discrimination legislation has been in place for decades are commonplace and one of the most costly for employers there. When age discrimination legislation becomes effective here, it is almost certain that British employees will follow suit and, as with any type of discrimination awards, there will be no ceiling as to damages. Employers who ignore the coming cultural sea change will do so at

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their financial peril. It is therefore important to start looking at your company's policies as to recruitment, promotion, rewards and termination now in order to be compliant by October 2006.

Contact

Should you wish to discuss the above further, please contact Emmanuelle Ries at Miller Rosenfalck (Tel: 0207 553 9938 – email er@europeanbusinesslawyers.com) Miller Rosenfalck is a law firm comprising solicitors and other European lawyers. Miller Rosenfalck provides advice in English, Danish, Swedish, German and French on all areas of law relevant to internationally focused businesses, specialising in international trade law and business migration.

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