

UP to speed

The Employment Equality (Age) Regulations 2006

Guidance Note 1 for Advisers - An introduction to the new Regulations

June 2006



Guidance Note 1

This guidance note is the first in a series to help advisers understand the background to important new 'age discrimination' legislation, and to help them work with and guide their clients so that they are prepared in good time to comply with the new Regulations by 1 October 2006.

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Guidance Note 1 for Advisers – An introduction to the new Regulations

The statements in this document do not constitute advice. Employers need to consider their circumstances and should obtain independent legal advice as appropriate to guide actions and decisions.

As an adviser, why do I need to know about the new Regulations?

If you are working within the corporate arena and advising clients on their group pension and group risk benefits, you will need to understand how the new Regulations can impact on group policies. For example, if you have clients with group income protection and group life arrangements, these may need alteration from a selected terminal age of 60 to 65. If your clients are offering benefits to employees that are age related, they may need to review these benefits to ensure these comply with the new rules. The Regulations will provide an ideal opportunity for you to contact your corporate clients to review their employee benefits arrangements.

Should my clients also be seeking advice from their employment lawyers?

The Regulations are complex and comprise some 65 pages, plus there are 55 pages of additional notes. Your clients will be best advised to obtain appropriate legal advice because the Regulations will impact on a wide range of areas including employment contracts, recruitment processes, interview protocols, termination procedures, unfair dismissal, employee communications, pay and reward benefits, promotions, and pension schemes. A dialogue between client, advisers and employment lawyers may be desirable to ensure that all parties are in agreement with any changes that may be required, and this in turn can provide advisers with opportunities to not only support clients but also to develop professional relationships.

How have the new Regulations come about?

The European Employment Directive (2000/78/EC) sought to end discrimination in a number of areas including age, disability, sexual orientation and religion. Although the UK has brought in legislation to cover most areas, there is currently no legislation dealing specifically with age discrimination. This means that employers are free to set any retirement age they choose, with the employee having no rights to stay in employment after that age. Many employees are therefore effectively being forced to retire regardless of their desire and ability to carry on working, and compulsory retirement ages of 60 are common.

In July 2003, the Government published a consultation paper entitled Equality and Diversity: Age Matters to discuss how it might deal with age discrimination, which led to draft Regulations in July 2005. The new Employment Equality (Age) Regulations 2006, which have now been approved by Parliament, will come into effect on the 1st October 2006.

What is the scope of the new Regulations?

Put simply, the new rules mean that from 1 October 2006 it will be unlawful for an employer to discriminate directly or indirectly on any aspect of employment or benefits, based on actual or apparent age. The rules apply to both employment and vocational training and although the bulk of legislation relates to older workers, it also affects how employers will need to consider younger workers.

In addition to the impact on retirement ages, the Regulations will

- remove the upper age limit of 65 for unfair dismissal and redundancy rights, giving older workers the same rights to claim unfair dismissal or receive a redundancy payment as younger workers, unless there is a genuine retirement;

- allow pay and non-pay benefits to continue which depend on length of service requirements of 5 years or less or which recognise and reward loyalty and experience and motivate staff;
- remove the age limits for Statutory Sick Pay, Statutory Maternity Pay, Statutory Adoption Pay and Statutory Paternity Pay, so that the legislation for all four statutory payments applies in exactly the same way to all;
- remove the lower and upper age limits in the statutory redundancy scheme, but leave the current age-banded system in place.

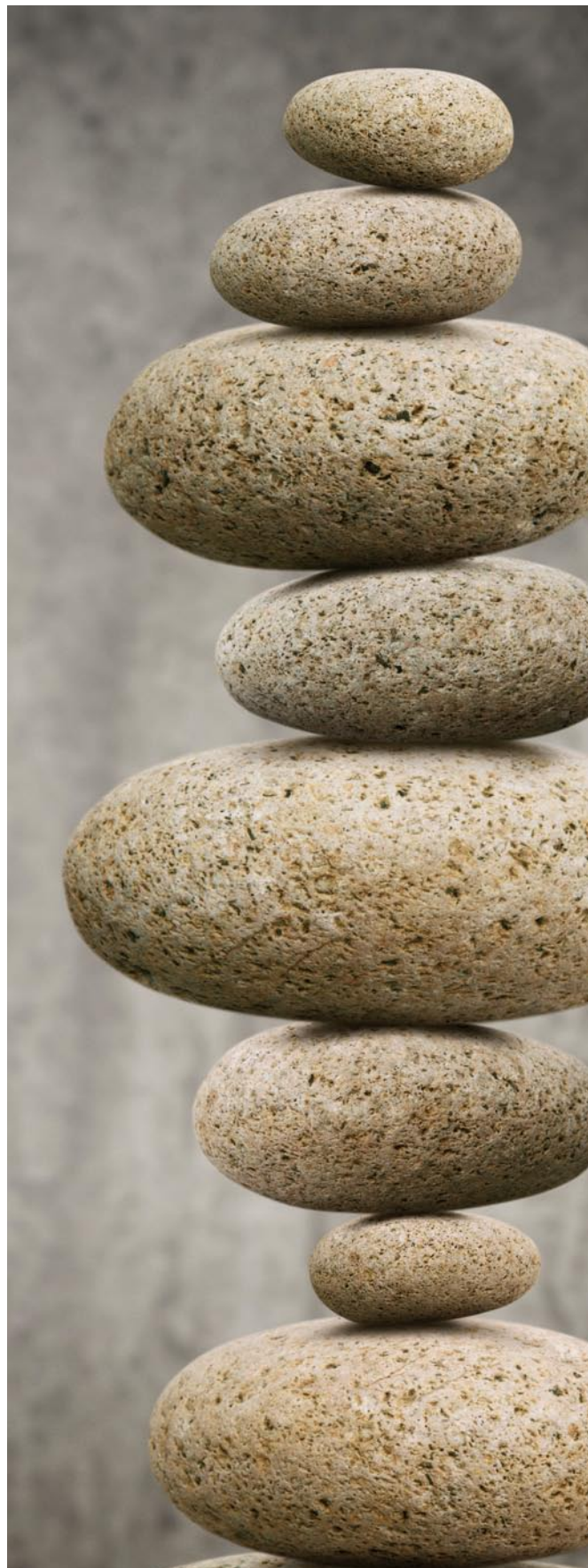
How will retirement ages be affected?

Compulsory retirement ages are a form of direct age discrimination although bona-fide retirement elected by the employee will not be regarded as discrimination. Employers will still be permitted to set a retirement age for their workforce, although this will be reviewed in 2011. But for most employers the new rules will impose a statute defined default retirement age for their workforce of 65 and they will be placed under a duty to consider any request by an employee to work beyond it. Acas has published good practice guidance on the Regulations – Age and the Workplace. The on line guide for employers and for individuals is available on the Acas website.

In theory, employers will still be able to select an earlier retirement age but in practice they will have to prove that this is objectively justified and for the majority of employers this will be difficult to prove. However, there will be some exceptions – for example, airline pilots who are not legally allowed to fly across certain international borders once they reach a certain age.

Are there any special provisions in the Regulations that apply to Partnerships?

Although Partnerships still fall within the new Regulations, the retirement exception definition of ‘employee’ does not extend to partners. So in the case of partners, expulsion from a partnership at any time (even over age 65) will constitute age discrimination unless objectively justified.



How is age discrimination defined?

The following categories of age discrimination are referred to within the Regulations: -

Direct

Where an employer treats one employee less favourably than another based on age or apparent age (unless objective justification can be shown)

Indirect

Where an employer treats a particular age group or apparent age group of employee less favourably than another (unless objective justification can be shown)

Victimisation

Where the employer treats an employee less favourably than others because of an action taken by the employee in connection with the Regulations (for example, the employee brings proceedings against the employer under the Regulations)

Instructions to discriminate

Where an employer treats an employee less favourably because they have not carried out an instruction which is unlawful under the Regulations

Harassment

Where an employer's conduct is perceived by an employee to be violating their dignity, intimidating, or creating a hostile or offensive environment to work in (or similar)

Vicarious liability

Employers can also be vicariously liable for any acts by their employees which contravene the Regulations unless they can show that they took every reasonable step to prevent the employee's discriminatory acts

Can age discrimination ever be justified?

There are circumstances where age discrimination can be justified, but it must meet certain criteria.

Objective justification

- Direct and indirect age discrimination will be lawful provided the difference in treatment can be objectively justified. This is the first time that direct discrimination can be justified. The test of objective justification consists of two elements:
 - Pursuing a legitimate aim; and
 - Proportionality.

Proportionality

- If the discriminatory treatment, provision, criteria or practice pursues a legitimate aim, it still needs to be proportionate. Although in general terms "proportionate" means that the method of pursuing the aim must be "appropriate and necessary" this is not an absolute test but involves balancing the discriminatory effects of a measure with the importance of the aim pursued.
- The discriminatory treatment, provision, criterion or practice must actively contribute to the pursuit of the legitimate aim. For example if the stated aim is to encourage loyalty then the employer must be satisfied that using an age related provision will actually encourage loyalty.
- There must always be a balance between the importance of the legitimate aim and the adverse impact of the discriminatory practice. For example if the legitimate aim is to protect health and safety then a more significant adverse discriminatory impact may be acceptable than when the legitimate aim is less important, for example it is simply rewarding loyalty.
- Employers must always consider whether the legitimate aim can be achieved by other measures which do not have such a discriminatory effect. Evidence that an employer has considered other alternatives will be required if the discrimination is to be justified.

Legitimate aim

- For an aim to be legitimate it must correspond with a real need on the part of the employer. Employers will need to provide evidence of the legitimate aim and not merely make assertions about it. A legitimate aim can include:
 - 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
 - Recruiting or retaining older people.

Cost

- Employers are likely to ask whether cost can ever objectively justify discriminatory treatment. Although economic factors (such as business needs and considerations of efficiency) may be legitimate aims, discrimination will not be justified merely because it may be more expensive not to discriminate.
- The Acas guidance outlines some of the Government's thinking, but until there is established case law on this, a practical interpretation is extremely difficult. Although cost may amount to a legitimate aim it can only be taken into account along with other legitimate aims in determining whether or not a particular treatment is proportionate.

What are the permitted exemptions and exceptions?

There are a number of exemptions and exceptions allowed for within the Regulations.

Exception for retirement

It's this exception that sets out the default retirement age of 65 mentioned earlier, but this doesn't apply to everyone (e.g. Partnerships are excluded). Provided the reason for employee dismissal is bona-fide retirement and a set procedure is followed, the employer will not be in breach of the Regulations.

Exception for statutory authority

Employers will have a complete defence if they have to follow legislation which contains age related rules. For example, a pub landlord cannot employ anyone under age 18 to serve alcohol.

Exception for national security

Providing it can be justified, age discrimination will not be unlawful if it is essential to safeguard national security.

Exception for positive action

This protects employers who are positively trying to encourage training or work opportunities for employees within a specific age range, where this is intended to prevent or compensate for a disadvantage.

Exception for the national minimum wage

This allows employers to discriminate wage structures for different ages in line with minimum wage legislation, provided the employer is bona-fide basing pay structure on the national minimum age.



Exception for provision of certain benefits based on length of service

One of the key exceptions for employers in relation to pay and benefits is for certain benefits linked to the employee's length of service. An employer can treat employees differently for this purpose if that difference is based on the employee's length of service. An example of this might be where longer serving employees receive greater employer pension contributions, or have access to an additional benefit such as private medical insurance. Provided that the link to service is not more than 5 years, any length of service criteria does not need to be justified.

Where the difference in entitlement to benefits is based on service of more than 5 years, the employer must be able to reasonably demonstrate that the use of length of service as a criterion is intended to fulfil a need of its business undertaking, such as encouraging motivation or loyalty, or rewarding the experience of some or all of its workers.

Two approaches are allowed to calculate the length of service in order for an employer to claim this exception. It can either be based on: -

- The length of time workers have been doing work at or above a particular level, or
- The length of their entire continuous service.

Benefits awarded on termination of employment fall outside the scope of this provision e.g. it does not apply to redundancy payments.

Exception for recruitment of older persons

An important exception is that employers are allowed to refuse employment to anybody who is over, or within six months of, the employer's normal retirement age. If the employer does offer a position to anyone over normal retirement age (or 65 if the employer has no formal retirement age) then it must be offered on the same terms and conditions as it would be offered to a younger one. This will mean that if benefits such as income protection and life assurance arrangements are offered to younger employees, the employer will need to provide the same levels of cover to older employees.

Exemption for genuine occupational requirement

Provided that an employer can reasonably demonstrate when recruiting for a post that the job role requires a characteristic related to age that is a genuine occupational requirement (GOR), then the employer is allowed to treat job applicants differently. The employer has to be able to demonstrate that it must be 'proportionate' (i.e. wholly reasonable in the circumstances) to apply a GOR in that particular case. The exemption also applies when promoting, transferring, training, or dismissing persons from a post. An example might be where high levels of physical fitness and personal strength are essential for a physical role such as a warehouse store worker.

How will pension schemes be affected?

Every occupational scheme will be treated as including a non-discrimination rule, which means that trustees and managers of an occupational pension scheme will not be able to discriminate against members or prospective members.

In respect of occupational pension schemes (including those providing additional death-in-service benefits) most age-related rules or practices are specifically exempted. These include:

- Selecting a normal pension age
- Eligibility requirements (e.g. minimum/maximum ages, qualifying period of employment, age bands)
- Contributions (e.g. different contribution rates based on age to achieve comparable target pensions at retirement, service, seniority)
- Benefits (e.g. reflecting different benefits based on pensionable service, contributions, seniority)
- Benefit enhancements (e.g. relating to pensionable service on death, early retirement, ill-health, redundancy)
- Age criteria in actuarial calculations (e.g. early/late retirement and commutation factors)
- Age limits on pensions to dependent children
- Closing a scheme in whole or part to new members; offering different schemes for different ages or service
- Adjustment of death benefits due to a defined age-range difference between spouses



There is no exception to cease pension accrual at a certain age and therefore such a practice would be discriminatory unless objectively justified.

In respect of registered stand-alone group life arrangements, the Regulations would prohibit the trustees or employer from operating minimum or maximum age restrictions.

The provisions of the European Employment Directive do not extend to contract based arrangements such as Group Personal Pension and Stakeholder Schemes with the exception of employer contributions which are considered as pay, and therefore subject to the Directive. Within the Regulations there is an exemption to permit age related contributions by both employee and employer where the aim is to provide more equal benefits to employees than might otherwise arise from equal contributions across all ages. However, none of the other exemptions listed above will apply, so there is not a level playing-field between occupational and contract based pension schemes - the new Regulations would seem to be more onerous for contract-based pension schemes.

What other themes should employers be aware of?

- Employers are under a legal requirement to comply with the Regulations, and this includes proper consideration of requests to continue working past age 65.
- The employer must notify an employee in writing not less than 6 months and not more than 12 months before the date on which the employer intends to retire the employee, and the employee has a right to make a request to continue employment (as above). If the process is not followed, dismissal will automatically be deemed to be unfair.
- It is unlawful to discriminate against or harass a contract worker. However, different treatment of contract workers may be permitted on grounds of age if they are required to do work for which possession of a particular age-related characteristic is a GOR.
- Employers will need to pay particular attention to their recruitment advertising and interview processes to ensure that they do not inadvertently breach the Regulations. For example, placing a recruitment advertisement with age requirements, or even describing the firm as 'young and dynamic' could breach the Regulations (unless GOR applies). Use of words such as 'under qualified' or 'inexperienced' could also amount to discrimination on the grounds of age as young workers are less likely to have as many years' experience or qualifications as older workers. Care should also be taken when seeking 'Graduates' as this could be deemed discrimination to under 21 year olds or to older workers for whom degree level education is less common.
- Employers should review their terms and conditions of employment to ensure that particular age groups are not being excluded from benefits and that any service related benefits requiring more than 5 years' service can be justified. If the firm's retirement age is under 65, this is likely to need review and, as mentioned earlier, employee benefits will need review, particularly if the terminal age is less than 65.



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Our income protection customers benefit from our expertise in the specialist areas of disability, rehabilitation and return-to-work. We enable individuals to protect their incomes, ensuring their financial security if they are unable to work because of illness or injury. For employers, we safeguard one of their most valuable resources by helping employees return to work following long-term absence.

At the end of 2005, UnumProvident protected over 2.3 million lives through almost 20,700 policies. During 2005 we paid total benefit claims of £291 million – of which more than £185 million related to income protection claims.

Our US parent company, UnumProvident Corporation, traces its history back to 1848 and is today the market leader of group and individual income protection insurance in the United States. Premium income for UnumProvident Corporation and its subsidiaries exceeded \$7.8 billion in the year ended 31 December 2005. Total assets were \$51.9 billion at 31 December 2004.

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