



## Age discrimination

- What will the new laws mean?
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# Introduction

20 October 2003 marked the deadline for the Government's consultation on its forthcoming age discrimination laws, *Age Matters*.

This legislation is being introduced to implement the age discrimination aspects of the 2000 EU Anti-Discrimination Directive, which also covers religion or belief, sexual orientation and disability.

Further consultation will follow on draft legislation in spring 2004, with the Regulations due to be finalised and published by the end of the year. They will come into force in October 2006.

The following important questions arise for employers:

- what will the new laws mean for us?
- what should we be doing now?

In this guide we try to answer these questions. In some cases, we advise employers to await the final form of the legislation but in other respects we recommend taking action now.

## Scope of legislation

The new laws will:

- cover all types of worker, including employees, self-employed, agency staff, partners and those undertaking vocational training;
- apply to all stages of employment from recruitment, training, pay, benefits, promotion and dismissal to post-employment discrimination;
- prohibit direct discrimination, indirect discrimination, harassment and victimisation;
- extend to individuals of all ages and outlaw discrimination against the young as well as the old; and
- enable complaints to be made in employment tribunals for unlimited compensation.

The legislation will not, however, cover discrimination in the provision of goods and services.

## Justifying age discrimination

In exceptional cases, age might be a "genuine occupational requirement" (GOR) for a particular job, for example as an actor or possibly a model (see below). Otherwise, the test for justifying age-related employment practices or using age in employment decisions will be a very tough one.

To justify *direct* age discrimination, employers will have to:

- identify one of the legitimate business aims for the age bias set out in the legislation (e.g. health and safety); and

- show that using age was reasonably and objectively justified, appropriate and necessary. In other words, the employer will have to show that it could not have been expected to achieve its aim in a different, non-discriminatory way.

To justify *indirect* age discrimination, an employer will have two choices. It must either:

- satisfy the test described above for direct discrimination; or
- satisfy the traditional test for justifying indirect discrimination under other equality laws. While still requiring a legitimate aim for the employer's otherwise discriminatory practice, this will not be limited to those listed in the age discrimination legislation.

## Recruitment

Age limits in job advertisements will become almost entirely a thing of the past - as alien as specifying gender requirements is today. As mentioned above, an age limit will only be lawful if there is a GOR or if it is objectively justified.

There are very few situations where age is likely to be regarded as a GOR. The only job for which there is a consensus that age would be a GOR is an actor playing a young character. Models are another possibility, but even this is not universally accepted. It seems certain that shops, hotels or wine bars wishing to portray a particular "image" will not be able to say that being of a particular age is a GOR for working there.

Justifying age limits is unlikely to be much easier. Business profitability is not included as a potential "legitimate aim" under the Government's proposals. So arguments that a fashion store needs young sales assistants to attract custom, or that an insurance company needs older salespersons to sell to its identified market of older customers, would be bound to fail whatever the supporting evidence the business could put forward.

The fact that employment tribunals are prepared to draw inferences of discrimination and will often effectively mean that employers have to prove they did not discriminate. So, just as you would not ask a woman about her plans for a family, why ask for an applicant's date of birth if it is not relevant?

What message do adjectives such as "dynamic", "energetic", "senior" or "mature" portray? However well intentioned employers are, they will get such words thrown back at them by disgruntled unsuccessful candidates.

It is not just direct age discrimination with which employers need to concern themselves. Many common job requirements are potentially indirectly discriminatory on age grounds - that is, they disproportionately disadvantage people of certain ages.

In particular, experience requirements can indirectly discriminate. Take, for example, a requirement of “at least 10 years’ experience”. The employer might well have found difficulty justifying this when faced by a claim from a 30-year-old rejected because he or she had only nine years’ experience.

Graduate recruitment schemes will also come under scrutiny. Even if a scheme contains no specific age criteria, it may not be easy for the employer to satisfy a tribunal that the candidate needed to have graduated within the last two years or be a “first jobber”.

#### Action points

Employers should immediately review their recruitment practices for directly discriminatory features. These are highly unlikely to be lawful, whatever the employer’s current views. Although the new laws will not come into force for nearly three years, claimants may then look back over a defendant employer’s historic practices. The argument that you used to discriminate but stopped once the new laws came into force will not be an attractive one.

However good an organisation’s practices and procedures, legal claims can still arise from the prejudices and stereotypes of managers making day-to-day employment decisions. Training should therefore embrace ageism without delay.

It is, however, probably prudent to await the draft legislation before deciding what action to take on *indirectly* discriminatory practices (e.g. graduate recruitment programmes). In our view, it is far from clear what the final provisions will say and employers should not overreact prematurely in addressing elements of the new laws that remain “up for grabs”.

## Pay and benefits

It is rare for pay to vary with age. However, in two challenging respects, age discrimination laws promise to have a profound impact on pay and benefit practices.

Service-related pay and benefits represent an established feature of British practice. Many employers require staff to have a minimum period of service before becoming eligible for certain benefits (e.g. pension, increased holiday etc). Some pay schemes are still inexorably linked to service. Redundancy pay is traditionally based on years of service. Share option schemes and other incentives such as LTIPs (Long Term Incentive Plans) are service-based.

Undoubtedly, these practices indirectly discriminate against younger employees who are less likely than older ones to have the required service to be eligible for a particular benefit.

Employers will normally have a legitimate aim for the practice in question - namely, encouraging and rewarding loyalty. But as mentioned above, the practice would nonetheless have to be

justified. It might not be easy for an employer to prove that offering additional holiday did actually encourage people to stay. Equally, it could be difficult for a company to persuade a tribunal that it was proportionate for valuable options to vest after five years but for an employee who left after four years to be deprived of any benefit.

In many cases, employers would have some persuasive arguments. Moreover, the obstacles for disadvantaged claimants to overcome in establishing that workers of a particular age were disadvantaged should not be underestimated. But if an organisation were to lose a case, the costs could be immense as it would necessitate a levelling-up of benefits throughout the workforce.

The second key issue concerns benefits provided to older workers. Whatever the Government finally decides to do about mandatory retirement (see below), more and more employees will be working beyond their current normal retirement age. These workers will be protected from discrimination. They will be entitled to the same pay and benefits for the same work as younger colleagues. The potential cost to the employer cannot be used to justify any reduction in benefit levels.

Many current benefits, particularly those sourced from an external supplier, have age bars or age-related costs. How will the employer cope with, for example:

- life assurance which currently stops at 65;
- permanent health insurance which protects pay until retirement;
- redundancy pay for those past historic retirement ages; or
- medical cover that is more expensive for older workers?

Pensions are even trickier. They will only be excluded from the new laws in certain respects. How will employers cope with non-discriminatory pension benefits for those working beyond traditional retirement ages? What about enhanced pensions for those within certain age bands accepting early voluntary redundancy? It has even been reported that the legislation might mark the final death toll for defined benefit schemes.

#### Action points

It would be unfortunate if age discrimination laws were to have the effect of eradicating service-related benefits. We shall be arguing that the Government has the flexibility to exclude these from the scope of the legislation. If not, we fear it could be brought into disrepute as employers opt to remove many of the benefit packages that employees customarily enjoy at present.

Consequently, we suggest employers await the final law before thinking about altering their current practices. However, once the new law is published, this may be an area that organisations need to review urgently.

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Similarly, we advise a cautious approach to pensions and other benefits for older workers until we see the final text of the legislation.

## Harassment

Jokes about age are regarded as acceptable in many workplaces where jokes about race, sex or disability would be frowned upon. 40<sup>th</sup> or 50<sup>th</sup> birthday cards from colleagues will often mock the recipient's advancing years.

Harassment on the grounds of age will become unlawful when the new laws come into force. To some extent, the law can be seen as a driver of social change in forcing employers to tackle a practice that is not always regarded as socially unacceptable.

### Action points

We can be fairly certain what form the age harassment laws will take. Employers need not delay in tackling ageist harassment.

Organisations need to ensure that age is an integral part of their harassment policies. This involves not only updating policy documents but incorporating age into training programmes on harassment, dignity at work, equal opportunities and diversity. It is not too soon to start work on eliminating behaviour that will fall foul of age discrimination laws from 2006.

## Retirement

When the *Age Matters* consultation was announced in July 2003, the media focused on the issue of mandatory retirement. A common theme was that employees would now have to work up to age 70. These reports misunderstood the Government's thinking in two significant respects.

Firstly, abolishing or increasing the age for mandatory retirement is not about forcing employees to work longer. They will still be able to retire when they want. Eligibility for a full pension should not be confused with retirement.

Secondly, the current proposal is to outlaw mandatory retirement at a particular age unless the employer can objectively justify it. As discussed above, the test for justification will be very stringent and it is unlikely many employers will take the risk - particularly as many are already suggesting that they could manage perfectly well without mandatory retirement.

The consultation paper did float the possibility of a default age of 70, at or above which an employer would be able to retire an employee without facing possible legal claims. However, we understand the Government will take some convincing that it is allowed to take this approach and still comply with the Directive.

The main implication of abolishing mandatory retirement ages would be that employers would need a fair reason (e.g. performance) ever

to dismiss an employee, whatever his or her age. This would provide an impetus for employers to overhaul their performance management systems to ensure they are clear, robust, consistent and well documented.

### Action points

The final outcome on mandatory retirement remains uncertain. But employers still need to start thinking about their approach to this. If they believe compulsory retirement is necessary, why? How might they manage without it? If other major employers think it's possible to cope without it why can't they?

If employers are determined to retain mandatory retirement, they will need to start preparing their defence, as it will inevitably be challenged. If, however, they accept that it will disappear, they will need to start preparing for life afterwards. This will involve reviewing performance management systems, checking the benefits provided for older workers (see above) and possibly reviewing pension provision.

Problems will most likely arise in situations where workers cannot afford to retire and so want to carry on working once their performance declines. Adequate pension provision will reduce the likelihood of such cases arising.

## For further information

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