

Have you planned for the abolition of the default retirement age?

Although it is clear that the Default Retirement Age (the DRA) is going to go, there is still some uncertainty as to when this will happen. Under current proposals, the DRA will be repealed from 1 October 2011, with transitional arrangements to nullify any notifications of retirement which take place on or after 6 April 2011. However, we understand that the Government is considering delaying the repeal by up to a year. We are likely to find out more in December when the Government responds to the consultation paper, but in the meantime, have you been thinking about how your business is going to manage without the DRA?

If the repeal is not delayed then, in effect, employers only have till April next year to determine their approach to retirement.

To dismiss an employee for retirement, an employer has to show that it has a fair reason (retirement is currently a potentially fair reason, although it is not clear from the Government's consultation paper whether it will remain so) and has followed a fair process. In the absence of the DRA, an employer will now also have to justify the discriminatory effect of forced retirement.

The options, in a nutshell, are:

1. Retain and justify an existing Normal Retirement Age (NRA)

To require an employee to retire lawfully an employer will have to be able to show that it has a NRA; that the NRA can be justified (as a proportionate means of achieving a legitimate aim); and that its decision to apply the NRA to that particular employee can also be justified.

There is currently little guidance as to what might be considered a legitimate aim that is capable of justification. UK case law has suggested that workforce and succession planning and the avoidance of the indignity of age-related capability dismissals ("collegiality") may be legitimate aims whilst the concept of intergenerational fairness (the sharing out of job opportunities between the generations) has also been recognised in several European cases. It is clear, however, that strong supporting evidence would be required both as regards the decision that having a retirement age is a proportionate means of fulfilling these aims and the choice of any particular age.

Where there are several categories of employees (for example office staff, manual labourers, drivers etc) it is unlikely that an employer will be able to justify applying the same retirement age to all. For example, whilst the physical demands of manual labour may give an employer legitimate health and safety reasons for identifying a particular age for retirement, that same age may not apply to office workers who do not face such physical demands. Similarly, succession planning might justify a retirement age for one category of employees but not

another. Those employers seeking to retain a retirement age will want to consider their workforce carefully and identify in relation to each category of employee what age would be appropriate.

2. Remove any retirement age

Many employers already operate without any retirement age at all. However, before abandoning a retirement age altogether, an employer will want to undertake statistical analysis to ascertain the ages of employees; how many continue to work to retirement age; how many request to work beyond retirement age; and how an absence of retirement age might affect the balance of the workforce. Only when these statistics are analysed can a proper determination be made as to the effect of the removal of any retirement age.

3. Retain the NRA but increase the age

Retaining the NRA, albeit at a higher age, would offer the continued comfort of a fall-back retirement. However, employers should not fall into the trap of thinking that just because the age is higher, it will necessarily be easier to justify. A requirement to retire at any particular age will have to be justified using proper statistical evidence to back up any claims of, for example, deteriorating performance or increased health and safety risks.

An employer would also want to monitor the Government's proposals to increase the state pension age. Matching the state pension age would allow an employer seeking to justify its retirement age to argue that it is keeping pace with the public policy shift towards longer working, and also that the financial impact of forced retirement is lessened by the ability to start drawing the state pension.

If the Government goes ahead to remove the DRA according to the timetable originally proposed under the consultation paper, then preparation and thought now will be key in managing the transition and employers have little time left to determine the right approach for their business.

If you have any questions about any of the issues raised, or want to talk through your own plans for managing without the DRA, then please do not hesitate to contact us or one of the team.