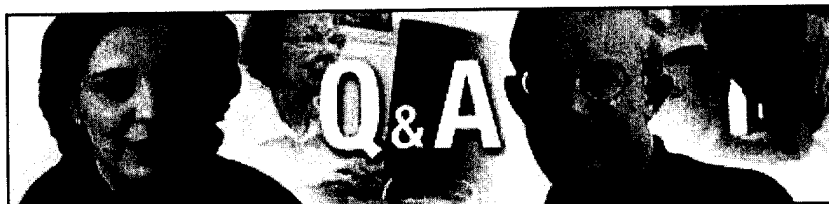


## Ask the experts: Age discrimination

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Dramatic changes to the law regarding age discrimination in Britain will come into effect on October 1 under the Employment (Age) Regulations 2006. The new legislation intends to give victims of age discrimination - whether they are old or young - legal rights against an employer for the first time.

Is ageism rife in British companies? Do you have any concerns or questions about the new legislation? Sam Mercer (above left), director of the Employers Forum on Age, and James Davies (above right), employment lawyer at Lewis Silkin, answer your questions.

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**I am 62 years of age and my company has just retired me against my will. I am fit and healthy and have spent the last 9 months working in the US. Because they chose to retire me whilst I was in the US I have had no opportunity to seek a job. Do I have any redress?**

**Steve Horrocks, Southampton, UK**

**James Davies:** If they retired you before October 1 then you would not be covered by the regulations. You should check whether you have any claims in the US as they've had age discrimination laws since 1967.

If the retirement took effect on or after October 1 the fact that you've been in the US is unlikely to prevent you from bringing an age discrimination claim in the UK and might not prevent you from bringing an unfair dismissal claim. Indeed, you might have an unfair dismissal claim even if you were retired before October 1 but we'd need more information about normal retirement ages in your company and your history with that company.

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**I currently offer a life assurance benefit where the benefit is a multiple of salary that is determined by an employee's age. I understand that this may be ageism, but how can I rectify the position without incurring excessive costs?**

**Lawrence Bridger, UK**

**Sam Mercer:** Insurance is a major problem area. As the regulations stand there are no exemptions which permit an employer to treat an employee differently on grounds of age. Cost alone is unlikely to be an acceptable justification for discrimination.

**James Davies:** I assume that this is an individually priced benefit. The legislation only applies to employment and not to goods and services so insurers remain free to discriminate in pricing.

It remains unclear whether or not you could take the price into account in determining the level of cover or, indeed, whether you could safely remove cover at a particular age. I have great sympathy with you as this is one of the unsatisfactory aspects of the regulations. You will probably find the cost increases significantly over 65.

Some employers are even responding to this by refusing to allow staff to continue beyond this age because of uncertainties about life assurance and similar benefits. This is a great shame. You could "self-insure" but this is unlikely to be attractive to a smaller employer.

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**If a 30 year old placed an ad saying: "Young energetic 30 year old with 6 years experience in an executive position seeks interesting post " and a company answered it, and employed him, who, if anyone, would be breaking the law? I am 73!  
Douglas Mayer, Edinburgh, Scotland**

**James Davies:** The 30 year old would not be breaking the law. The company would only be breaking the law if it employed him because of his age and denied other candidates who did not fit its desired age group. It seems highly unlikely that this could be proved.

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**My company closed its final salary pension scheme to new members 12 months ago and upped contributions for all active members. It is a mature scheme (10 per cent active members - 400 in number). Recently it has proposed to eject all active members under age 50 from the closed final salary pension scheme to defined contributions (liability costs expressed?). If you are over 50, you can stay an active member but with upped contributions. Can my company eject me from the final salary scheme simply because of my age when before my contributions were welcomed equally with all other active members?  
M Cooper, Norwich, UK**

**Sam Mercer:** Pensions are very complex and full of both direct and indirect discrimination. The pension aspects of the regulations have been delayed until December to allow for further consultation. Pension schemes will in the main be exempt from the regulations though we are still waiting clarification on the exact detail.

**James Davies:** The pension part of the regulations has been delayed and will not come into force until 1 December. We expect the pension rules to change from those originally published. However, based on the original regulations, I think that ejecting only those aged under 50 could well be unlawful.

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**What affect will the new legislation have on reward systems such as "job ladders"?  
Denis Lenihan, London**

**Sam Mercer:** Hopefully it will shorten them. All benefits based on less than five years service will be automatically exempt from the legislation. Benefits based on more than five years will have to be justified, but this should be pretty simple if the employer can demonstrate the 'reward' recognised experience or loyalty. This should mean employers review benefits to ensure they are no longer based on unrealistic time frames.

**James Davies:** By job ladders, I understand that promotion is based on service with the company in the immediately less senior role. This would indirectly discriminate against younger employees but would come with the service-related benefit exception which means that it would probably be lawful.

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**The current retirement age at my company is 62. Does the new legislation mean that the current contracts are in breach of the law and will new contracts have to be drawn up? Will I now have the right to work to 65 with all employee rights and conditions unchanged after 62?  
Helen Bennett, London**

**Sam Mercer:** It will be unlawful to have a retirement age of 62 (unless your employer can justify it), so you do now have the right to work until 65. If your employers doesn't issue you with a new contract to 65, they should inform you in writing of your new rights. Don't forget this doesn't necessarily affect your pensions age.

**James Davies:** If the company wanted to keep a retirement age of 62 it would have to justify it. This will be unlikely in the extreme. You will, therefore, have a right to continue to 65. The company does not have to issue physical new contracts. It can merely confirm that you continue on your current terms. If it wanted to discontinue any benefits at 62 it would have to justify this. This again is unlikely but the position with continuing certain health benefits such as income protection is more uncertain.

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**According to the rules of my pension scheme, if you are over 50 (I am 51), you are early-retired instead of being made redundant. Would this qualify as indirect discrimination?**  
**Sue Christley, Gloucester**

**Sam Mercer:** Forcing you to take early retirement between 50 and 65 would in reality be direct age discrimination. In future employers won't be able to make you retire early (before the default retirement age 65) and would have to offer you redundancy.

**James Davies:** I think you're saying that your company has an enhanced redundancy scheme which pays out less to the over 50s as they are expected to retire and draw an early pension. This pension might be enhanced because the employee is redundant. If it is enhanced it might represent a very valuable benefit and it might be the under 50s who have the claim.

The company would have set this up on the basis that the right to receive the early pension legitimises a smaller redundancy payment. This approach is fraught with problems. The enhanced redundancy scheme would not come within the exception in the regulations covering such schemes as it does not mirror the statutory redundancy scheme. The employer would have to justify it.

I would have thought that this would be unlikely. If the company does enhance the early pension under the existing rules on pensions it could only do this for existing employees (the regulations on pensions have been delayed till 1 December and are being looked at again so might change).

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**I leave both my graduation and birth dates out of my CV as I am in my forties and seeking to return to the City after an absence spent running my own firm. Would it be wise to remove evidence of the chronology of my employment history as well as this enables employers to guess my age?**  
**John Croucher, UK**

**Sam Mercer:** The EFA recommend people drop birth dates from CVs, and we encourage the employers we work with to provide new age neutral formats for CV/application forms.

Chronological information is always an issue, anyone can do maths! In reality it isn't always practical to remove chronological evidence particularly in some sectors such as the City, where employers require a full career history to comply with FSA standards. You should have confidence chronology will not count against you, employers have to comply with age discrimination laws so you could challenge them in the future if you feel your age has been held against you.

**James Davies:** You seem to be assuming that the employers will discriminate against you. Hopefully, the new regulations will improve the position. I would not remove the chronology. As an employer, I would be concerned at the absence of this information which would tell me if there had been unexplained gaps in your employment or if you had moved around a lot without staying anywhere for any significant period.

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**I have experienced age discrimination first hand after my graduation at 30 and was wondering whether employers will still be allowed to openly state in their graduate applications that only graduates aged 24 or less can apply. This is what I experienced in 2000 when I graduated. How will perspective employees be able to demonstrate when there has been discrimination during the recruitment process if they didn't get the job?**  
**Fabio Casula, London**

**Sam Mercer:** Going forward any employer specifying an age, the year of graduation (or a time period since graduation, two years for example) would have to justify it and this is likely to be very difficult. Graduate schemes are likely to be under close scrutiny so hopefully opportunities will open up for more mature graduates in the future.

The burden of proof has shifted for discrimination claims. It will be for the employer to prove they haven't discriminated, rather than for the unsuccessful candidate.

**James Davies:** Employers will only be able to place an age limit on graduates if they can "objectively justify" the limit. It is highly unlikely that they could justify a limit of 24. It is, of course, difficult to know when one has been subjected to discrimination. However, there are steps you can take to find out. You can serve a questionnaire on the employer. This enables you to seek answers to questions to help you ascertain whether or not you've been discriminated against.

Also, if you can show circumstances from which a tribunal could possibly conclude that discrimination took place (in other words it looks as if it might have happened. For example, no graduates over a particular age have been taken on) then the employer must prove it didn't discriminate (which could be tricky).

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**Hello, I am 68 years old, fit and doing nicely in a job that I like and want to stay in. Recently I learned that my company's policy is not to employ people beyond the age of 70. Under the new rulings, can an employer still have this policy, or does it have to go? I would like to continue, health permitting, beyond that age.**  
**Don Paul, Wiltshire, UK**

**Sam Mercer:** The new age regulations allow an employer to retire you at any age over the default retirement age of 65, as long as they follow a set 'retirement' process. This means an employer can legally set a retirement age of 70. Put simply, all an employer has to do is provide six months notice of your retirement date and a letter informing you of a right to request working on.

The employer can refuse any request you make to keep working and, as the regulations stand, although you can appeal against a no decision, you are unfortunately unable to legally challenge it. The government hopes employers will opt to keep people on, but in reality you have very few rights once an employer chooses to retire you.

**James Davies:** I'm afraid that your employer can have a policy not to employ people beyond 70. Indeed, many employers will not now employ people beyond 65. The policy may well not be farsighted if it results in the loss of skilled and experienced staff but it will be lawful. In reality, the new regulations provide significant new rights for the under 65s but little protection for those beyond that age.

Your company will have to go through a procedure which gives you the right to request to stay on beyond 70 and they will have to consider that request. However, if they refuse the request there will be little you can do about it. They don't even have to give you a reason.

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**I am a part-time taxi driver and last year I was asked to provide a medical to the council costing me £160. It is council policy to ask for medicals for anyone over 65. Despite a completely clear bill of health, I have again been asked to provide another medical costing me £160. This policy is based purely on age. I have told the council if they so wish they can write to my doctor for any update on last year's clean bill of health. I feel strongly that this action is purely age-based and comes under age discrimination. Can you offer me any advice?**  
**Tony Clayton Chance, York**

**Sam Mercer:** This is likely to be a lawful requirement because your council has to comply with regulations relating to private hire vehicles and taxis. This may be challenged in the future but at the moment unfortunately you have little recourse.

**James Davies:** This would seem to me to come within the legislation. I do not know whether or not there is some legal obligation on council's to test beyond 65. If there is they could rely on the statutory authority defence in the regulations. If not, the council would have to justify its discriminatory policy. If it could show that there was a real correlation between risk and the age 65 it might be able to do this.

### **Background**

Research from the Employers Forum on Age has discovered that 61 per cent of British people in employment have been aware of ageist behaviour in their workplace and 50 per cent are unaware that age discrimination at work will become unlawful.

Ms Mercer said "ageism is endemic in our society and rife in our workplaces. These attitudes need to be challenged and outlawed so that they become as unacceptable as sexism or racism."

**Beginners guide: Age discrimination act**

**Companies have to tackle a new age-old problem**

**Delay as pensions fall foul of agediscrimination rules**

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