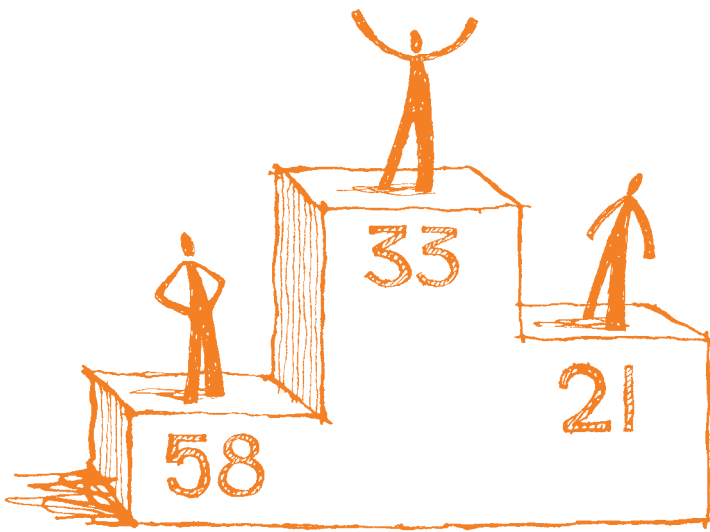

Age discrimination

Its time has come



Inside



- Recruitment
- Discrimination during employment
- Ending employment
- Avoiding age discrimination



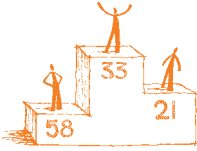
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The lawyers in Lewis Silkin's Employment and Incentives Department are experienced in providing advice and services on all aspects of employment law, business immigration and incentives.

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Introduction

On 1 October 2006, the majority of the Employment Equality (Age) Regulations 2006 ('the Regulations') came into force, representing one of the biggest changes in UK employment law for decades. The pension provisions of the Regulations came into force on 1 December 2006 after further consultation.

In countries where age discrimination laws have been in place for some time, claims are common and awards of damages high. Like all other forms of discrimination protection in the UK, compensation for unlawful age discrimination is unlimited.

The Regulations cover the entire life of the employment relationship – from recruitment, terms and conditions and promotion to termination and the provision of references. It is crucial for businesses to understand the implications of the legislation.

This booklet is designed to give you an overview of the Regulations and provide some practical examples to help you understand how they apply. If you would like further advice or assistance, please do not hesitate to contact us (age@lewissilkin.com).

What is age discrimination?

The Regulations cover the following types of discrimination:

- direct discrimination;
- indirect discrimination;
- harassment; and
- victimisation.

Direct discrimination

This is where a decision is made because of a person's age (or perceived age).

Example

An employer rejects a candidate for a job because she is over 50 and he thinks she will not portray the youthful image he wants for the business.

Example

An employee is overlooked for promotion because he is 61 and the employer thinks he'll be retiring soon.

Example

A 25 year old is rejected for a post selling insurance because the employer wants an older salesperson with gravitas.

Direct discrimination is not always, and does not need to be, intentional.

Indirect discrimination

This is where an employer applies a provision, criterion or practice which applies equally to all ages but which results in a disadvantage to people of a certain age or age group. Like direct discrimination, indirect discrimination need not be intentional.

Example

An employer requires that a candidate for a job has at least ten years' experience. This will disadvantage younger people and is therefore indirectly discriminatory.

Example

An employer selects for redundancy on the basis of 'Last In, First Out'. This will tend to disadvantage younger people, who are more likely to have joined recently, and is likely therefore to be indirectly discriminatory.

Harassment

This is defined as unwanted conduct which has the purpose or effect of:

- violating a person's dignity; or
- creating an intimidating, hostile, degrading, humiliating or offensive environment for the person.

Employers are responsible for ageist harassment by their staff in the course of employment, unless they can show that they took all reasonable steps to prevent it occurring.

Example

On her 50th birthday an employee receives a card describing her as 'over the hill'. Other employees in her department constantly tell her that she is 'past it' and 'out of touch' when she makes any suggestions during meetings. She is not invited to drinks after work as they are in a fashionable bar with a youthful clientele and other employees say she will embarrass them. She feels marginalised and upset as a result. This is likely to be unlawful age harassment.

Victimisation

The definition of victimisation is the same as that used in other discrimination legislation. Basically, anyone who makes a complaint of age discrimination (whether to the employer or to a tribunal), or assists someone else's complaint, is protected from being treated unfavourably as a result.

Avoiding the inference of age discrimination

Courts and tribunals accept that evidence of discrimination – the so-called 'smoking gun' – is quite rare. If the claimant can point to facts which suggest discrimination might have occurred, the burden of proof will switch to the employer to prove it did not discriminate.

Employees who bring age discrimination claims will therefore want to point to the practices adopted by their employer to support their allegations. Relevant information can be extracted from employers by using age discrimination questionnaires (including statistics) which will mirror those used in sex, race and other discrimination claims at present. Whilst this kind of information may not prove that age discrimination has taken place, it may be used to invite the tribunal to draw inferences of discrimination.

It is vital that employers can show why they made a particular employment decision in case they are forced to prove that they did not discriminate. Consistent, transparent and well-documented decision-making is, therefore, essential.

Statistics

Statistics may show that an employer's workforce as a whole is not age diverse. They may also demonstrate that a particular process (such as a recruitment or redundancy exercise) has led to an age-skewed outcome. In either case, this will not necessarily prove that age discrimination has in fact taken place. However, inferences may be drawn from such statistics requiring the employer to prove that it did not discriminate.

Points that employers should consider include:

- If the statistics suggest that the whole or part of the workforce is not age diverse, consider why and whether positive action may be appropriate (see below).
- If an employer adopts good practices, then it should be easier to rebut any presumption of discrimination from unfavourable statistics.
- Effective implementation of a comprehensive, up-to-date equal opportunities policy with appropriate training should have a beneficial impact on workforce statistics in the medium to long term. In the meantime, such measures will in themselves help the employer to resist discrimination claims.

Can age discrimination be justified?

Employers are able to try to justify age discrimination, whether it is direct or indirect. (In this respect, the Regulations are different from other discrimination laws, which do not permit justification of direct discrimination.) Harassment, however, can never be legally justified.

Justification will be established if an employer can show that what it has done is a proportionate means of achieving a legitimate aim.

The European Equal Treatment Framework Directive No.2000/78 ('the Directive'), which makes age discrimination laws compulsory throughout the EU, gives some examples of possible legitimate aims:

- employment planning;
- the training requirements of a position;
- rewarding loyalty; and
- the need for a reasonable period before retirement.

Importantly, based on our experience of other discrimination laws, we do not expect considerations of cost alone are likely to justify otherwise discriminatory treatment. In other words, we do not expect employers to be able to justify age discrimination because it would cost more to avoid discriminating. Confirmation of this will be one of the important questions for courts and tribunals.

Example

An employer seeks an IT technician who has recently graduated. The employer concedes this may indirectly discriminate against older workers, but says this is justified because recent skills in new technology are extremely important for the position. This may possibly be justified, but only if there is no less discriminatory way of achieving the legitimate aim of ensuring up-to-date skills in new technology, such as testing all applicants for those skills.

Example

An employer limits its recruitment for manual labourers to those under 55. It seeks to justify this on the basis that it is a physically demanding job and it is essential that those employed are fit, healthy and able to do the job properly without endangering health and safety. Although these are likely to be legitimate aims, the assumptions are based on a stereotypical view of people over 55. An employment tribunal would almost certainly expect the employer to make a case-by-case assessment of fitness and health.

Example

An employer does not allow employees under 25 to drive a company car. It seeks to justify the discrimination on the basis that insurance premiums more than double for this category of employee. An employer is unlikely to be able to justify discrimination on cost alone.

Who is covered by the age discrimination laws?

In common with other equality legislation, the Regulations protect a wide variety of people who may have contact with your organisation, including:

- people who are directly employed (employees);
- people engaged on some other sort of contract (for example, agency workers or self-employed freelancers);
- people who apply for work;
- office-holders (such as company directors);
- partners; and
- people undertaking or applying for work-related training (for example, apprentices or interns).

As always, the difficulty will be in determining which self-employed people come within the legislation and which fall outside. It will, however, have broad coverage.

Example

A company hires a freelance IT consultant to work on a project for six months. The company contracts directly with the consultant and she is required to carry out the work personally, to submit VAT invoices and be responsible for all her own taxes. The consultant would be protected by the legislation.

Example

A builder is engaged to carry out maintenance work. He only works when he is needed and there are often periods of several weeks when he does no work for the company. He is treated as self-employed. The company contracts with him personally. The builder would be protected.

Example

A temp is supplied to a company by an employment agency. She is employed by the agency and protected from age discrimination at the hands of the agency. She would also be protected in relation to her treatment by the 'end-user' company.

Example

A company of contract cleaners has a large workforce consisting of a mixture of permanent employees and casual workers. The casual workers are treated as being self-employed and work on an ad hoc basis. The cleaning company has a contract to provide services to a particular client and sends whichever casual cleaners are available at the time. The cleaners would be protected in relation to discrimination by both the cleaning company and the end-user client.

What about overseas workers?

The Regulations have a wide geographical scope. As well as applying to employees who do all of their work in Great Britain, they apply to those who:

- do part of their work in Great Britain; or
- work outside Great Britain for an employer with a place of business in GB, provided that they do their work for the purpose of the GB business and they were GB resident when they were offered the job or at any time during their employment.

Example

A sales director is employed by a British company, but is based in Germany. The majority of his work involves visiting German clients but he also travels to London once or twice a month for meetings with colleagues and clients. He carries out his work partly in Great Britain and would therefore be covered by the Regulations.

Example

A British newspaper makes an offer to a journalist to become its American correspondent. The journalist is living in the UK when the offer of employment is made but moves to New York to write a daily column. This work is only for publication in the British newspaper. The journalist would be covered by the Regulations.

Example

An IT manager works for a company with offices in Great Britain and the Republic of Ireland and the work she carries out is for the purposes of both offices. She has never been resident in Great Britain and has never done any of her work in Great Britain. She would not be covered by the Regulations, although she might be covered by Irish age discrimination laws.

Apprenticeships/Internships

The Regulations apply to vocational training and employers have to justify any scheme conditions which directly or indirectly discriminate on grounds of age.

Example

A law firm runs a summer placement programme to give prospective lawyers a glimpse of the lawyer's work. It also helps the law firm to identify and attract prospective trainees. Only students in the last two years of study are eligible. This rule disadvantages older candidates who are less likely to be studying. The law firm would have to justify this rule and is likely to struggle to do this.

The Government funded modern apprenticeship scheme is only available to candidates under the age of 25. Nevertheless, employers would be taking a real risk in restricting apprenticeship candidates to those who would be eligible for funding, as the employer's aim would be to save costs. As mentioned above, we do not expect cost alone will justify age discrimination.

Recruitment

The key considerations for employers in relation to recruitment are as follows:

- Are they applying any job requirements that are directly or indirectly discriminatory? If so, can those requirements be objectively justified?
- What are the relevant exceptions to the Regulations?
- How can the recruitment process be improved so as to avoid inferences of age discrimination being drawn?



Job requirements

Age limits and ranges

Having an age or age range requirement for a position – whether explicit or covert – will constitute direct age discrimination, unless it is justified. Objective justification in these circumstances is likely to be difficult.

The employer will have to explain its need for age limits and show that there was no less discriminatory means of meeting that need. It will require cogent evidence in support.

During consultation on the Regulations, the Government gave examples of when an age limit may be appropriate (taken from the Directive):

- the training requirements of the post;
- the employer's need for employees with a reasonable period before they retire;
- to facilitate employment planning.

In practice, these are likely to be very limited in scope.

Example

Andrew, a 63 year old, applies for a job that requires six months' training at a company which has a normal retirement age of 65. He is unsuccessful. The company may be able to justify its rejection of Andrew's application on age grounds by reference both to the training requirements and its need to get a reasonable period of work from him before he retires.

Experience requirements

Frequently, employers require applicants to have a minimum (or maximum) amount of experience.

Example

Bolans Investment Bank advertises for secretaries with 'at least five years' experience'. This condition may be indirectly discriminatory as younger applicants are less likely to be able to meet it. If so, Bolans will have to justify the requirement if challenged.

When considering justification, a tribunal will balance the discriminatory impact of the requirement against the employer's need (in this case to have a competent and skilled applicant). It will also consider whether a less discriminatory requirement could have been used – for example, whether the employer could have set out the types of skills and experience the ideal candidate would possess rather than refer to years of experience. It might also be preferable to say something like 'the ideal candidate will normally have several years' experience', or to set out the type of experience the candidate should have, rather than set prescribed limits.

In practice, it may be easier to justify a requirement for a lower number of years' experience than a higher number. Not only is the discriminatory impact less, as fewer candidates will be disadvantaged, but also it is more tenable to use experience as a proxy for individual competencies where a shorter period is concerned. But drawing the line will be difficult and employers are best advised only to use years of experience where absolutely necessary.

Points an employer should consider before adopting an experience requirement include:

- Does a candidate genuinely need a minimum level of experience for the post? If so, why? Remember, the higher the number of years of experience required, the harder it will be to justify.
- Does the employer genuinely need to specify a maximum level of experience for the post? If so, why? If the employer does not want an applicant who is 'overqualified', what does it mean by this? Assumptions that a more experienced person will not be able to take instructions from somebody junior, or will want more pay, or will be insufficiently motivated, or will leave soon for a better job, may not be sufficient to justify an upper limit on experience as these concerns could be addressed on a case by case basis, possibly at interview.
- Could a less discriminatory requirement be used instead? For example, could the requirement for experience be described in terms of types of experience rather than years?

Graduate recruitment

Limiting employment to those who are graduates – whether as a job requirement for a particular position or by operating graduate recruitment schemes – may, in itself, be indirectly discriminatory and so require justification.

Example

Sharper Sales requires its sales staff to be graduates. This requirement is indirectly discriminatory: it is less likely that older people would be able to comply with it as far more people graduate these days. Joe, who is aged 48, applies for the post and is unsuccessful. He has 20 years' experience in sales and a diploma, but no degree. Sharper Sales will have to show why a degree was necessary for the position and why a mix of education and experience like Joe's was not sufficient.

Example

An international management consultancy firm runs a graduate recruitment scheme which is limited to graduates who have completed their degree within the last five years. The firm targets recruitment for these positions by attending universities as part of the 'milk round'. The requirements to be a graduate and to have graduated within the last five years and the attendance at the 'milk round' are all potentially indirectly discriminatory as they are likely to place older workers at a disadvantage. The firm will have to justify these requirements on objective grounds, which may be difficult.

In most cases, the kind of jobs that are filled by means of a graduate recruitment scheme are limited to graduates because they require a minimum level of analytical skill and ability that is evidenced by higher education qualifications. As such, employers in many cases should still be able to justify the operation of such schemes. Certainly this has been the view of the Government. However, employers often add additional requirements to such schemes or operate them in ways which have the potential to expose them to claims of age discrimination.

There are a number of points that an employer should consider in relation to a graduate recruitment scheme:

- Is the requirement for the candidate to be a graduate really necessary? Is there an adequate alternative way of assessing relevant skills and abilities?
- Age limits in graduate recruitment schemes will be directly discriminatory and in most cases very difficult to justify. Such requirements should be removed.
- Is a requirement for the candidate to have graduated within a certain number of years necessary? This will be indirectly discriminatory – although graduates can be of any age, most of those who graduated recently will be younger. This may be easier to justify where the position requires up-to-date technical expertise, for example forensic scientists or computer programmers. But even then there may be less discriminatory ways of assessing their expertise.
- A requirement that candidates have no previous work experience will be indirectly discriminatory as older people will be less likely to meet it. Employers may struggle to justify such a requirement.
- Traditionally, employers who run graduate recruitment schemes have focused on universities. In the Government's view it should be easier for employers to justify this kind of indirect discrimination, provided they do not exclude applications from other sources. Employers would, however, be best advised to participate in recruitment drives beyond the 'milk round' to avoid claims of age discrimination.
- Review the graduate recruitment scheme brochure. Does the imagery and/or language used suggest the employer is seeking applicants of a particular age? Does it include a statement of commitment to equal opportunities?

Time at work requirements

Employers sometimes stipulate that applicants for a position must be able regularly to work late, work weekends and/or travel abroad. Such requirements may be age discriminatory (as well as potentially sex discriminatory). People within a particular age group are more likely to have childcare commitments which make it more difficult for them to comply with such requirements. (Importantly, it is not just 'old' and 'young' people who are protected by the Regulations.) Employers may therefore have to justify such requirements on objective grounds.



Exceptions to the Regulations

Applicants over the employer's retirement age

An exception to the Regulations allows an employer to refuse to employ applicants who are over or within six months of the employer's normal retirement age or, if the employer does not have one, the age of 65. However, if the employer does decide to offer employment to somebody over its normal retirement age, it cannot discriminate in respect of the terms of employment offered.

Where the normal retirement age is below 65, this exception will only apply if the employer can show that a retirement age below 65 is justifiable.

Genuine occupational requirements

Another exception applies where 'possessing a characteristic relating to age is a genuine and determining occupational requirement'. This exception is likely to apply only in very limited circumstances, for example in relation to actors and perhaps models.

Positive action

Employers who identify a lack of age diversity within their workforce may wish to take steps to redress this imbalance. They are best advised to rely upon the positive action exception. (Positive action must be distinguished from positive discrimination, which is unlawful.)

In the context of recruitment, employers are allowed to take steps to 'prevent or compensate for disadvantages linked to age'. So an employer can take steps such as targeting its advertising to older people if they are under-represented or perhaps state in its job advertisement that it would particularly welcome applications from those over a particular age, if that is the underrepresented age group. The employer must, however, accept applications from applicants of all ages and recruit based on merit rather than age.

Example

Wired Communications wishes to encourage age diversity within its workforce as the majority of its customer sales staff are young. It decides to limit future applicants to those over the age of 40. This will be direct discrimination which will require objective justification. Tribunals will be very reluctant to uphold this kind of requirement because of its discriminatory impact. Alternatively, Wired Communications could rely upon the less onerous requirements of the positive action exception and take steps to encourage applications from older workers, which would be risk free.

Advertising

Although job advertisements may not be openly discriminatory, they may be used by unsuccessful applicants to demonstrate that the employer had discriminatory attitudes or practices – so leading to an inference of age discrimination being drawn.

Example

An advertisement states that candidates must be ‘vibrant, enthusiastic and dynamic with lots of energy’. This tends to suggest that the employer is seeking a younger candidate.

Example

An advertisement states that candidates must be ‘mature’ and ‘have gravitas and boardroom presence’. This may suggest that the employer is seeking an older candidate.

Example

An advertisement states that the employer is seeking an ‘office junior’ and that ‘this is a fantastic opportunity to really kick start your career and get on the corporate ladder’. An unsuccessful older candidate may point to this advertisement and invite the tribunal to infer that the employer had a younger applicant in mind.

Points for employers to consider in relation to advertisements include:

- If an advertisement includes requirements for the position which may be discriminatory, consider whether they are necessary. Can such requirements be objectively justified? Could a requirement with a less discriminatory effect be used?
- Consider what competencies are required for the position and ensure this is reflected in the advertisement. If adjectives are used, consider whether the advertisement overall suggests that the employer has a younger or older candidate in mind.
- Be careful as to how the employer is described as well as the potential candidate. Stating that the employee will be joining a ‘funky young company’ may suggest the employer is seeking a younger employee.
- Consider including a commitment to equal opportunities in the advertisement.

Application forms

Again, asking for certain information in an application form will not be age discriminatory in itself, but inferences of age discrimination may be drawn from the information sought.

Points to consider in relation to application forms include:

- Can references to age or date of birth be deleted from the application form? Instead, this information could be provided on a separate form (such as a diversity monitoring form) not seen by those short-listing.
- Asking for dates of education and qualifications on an application form may suggest the age of the applicant.
- Dates of employment may also suggest an applicant's age. However, this information is usually relevant in order to assess experience, identify short periods of employment and identify employment gaps. Therefore, depending on the nature of the position, it is likely to be easier for an employer to justify requesting this type of information.

Short-listing and interviewing

It is vital for employers to shortlist and interview in a non-discriminatory manner to avoid claims of age discrimination:

- Candidates should be short-listed and selected using transparent and objective written selection criteria, based on competencies for the job, in order for the employer to be able to prove that the decision was not discriminatory.
- Notes should be taken of all interviews and the reasons why each candidate was successful or unsuccessful documented. This information should be kept for at least six months after the recruitment exercise.
- Ensure that those short-listing and interviewing have received equal opportunities and interview training. They should be able to recognise and avoid discriminatory questioning and avoid stereotypical and discriminatory assumptions based on a candidate's age.
- Have an equal opportunities policy in place which includes age discrimination and ensure interviewers have read it and understood it.

Discrimination during employment

As with other anti-discrimination laws, age discrimination during employment is prohibited in relation to:

- terms of employment;
- pay and other benefits;
- opportunities for promotion, training and transfer.

There is also a right not to be subjected to harassment on age grounds.

Service-related benefits

Remuneration packages, particularly pay, often have elements which are related to length of service. These may well place younger workers at a disadvantage compared to older workers and could therefore amount to unlawful indirect discrimination unless employers are able to justify them in each case. The Regulations contain exceptions for some service-related benefits, which apply to employees and other workers, including partners.

In counting employees' length of service for these purposes, an employer has the choice between counting service at or above a particular level or grade, or counting an employee's total service. If the employer chooses to count service in total, it may look at current employment only, and discount any previous period of employment (eg where an employee has left and returned some time later).

These exceptions do not apply to termination awards or payments such as enhanced redundancy pay which are dealt with separately (see below).

The five-year exception

There is an automatic exception for benefits based on up to five years' service. An employer who awards a benefit falling within this exception does not need to justify its policy, even if it is indirectly discriminatory.

Example

An employer has a basic holiday entitlement of 20 days a year, plus bank holidays. The employer also awards an extra day's holiday per year of service, up to a maximum of five years. This applies to all employees in the organisation. This benefit would fall within the five-year exception.

The business need exception

For benefits which are based on service beyond five years, there is a partial exception. Objective justification is not required, but the exception only applies where it reasonably appears to an employer that using a service-related criterion fulfils a business need, for example:

- encouraging loyalty or motivation; or
- rewarding experience.

Employers must be able to explain why they believe their service-related benefit fulfils the business need in question. However, we expect the test to be reasonably easy to satisfy and, therefore, that most service-related benefits will come within this exception.

Example

An employer has a sabbatical policy which allows employees to take six months' leave after ten years of service. This places younger workers at a disadvantage as they are less likely to have such long service. If the employer can show that it has a business need to reward or encourage loyal employees, and that the sabbatical policy fulfils that need, this is likely to fall within the exception.

Justifying other service-related benefits

Most service-related benefits are likely to come within one of the exceptions above.

In other situations, such as service-related termination payments, objective justification will be required if the service criteria put people in one age group at a particular disadvantage when compared with others.

Benefits related to experience

Employers sometimes make particular benefits dependent on experience. Experience most often has an impact on pay, especially in setting starting salaries. Unlike service-related benefits, there are no 'automatic' exceptions applicable to experience requirements. The general principles apply and employers will have to justify experience criteria that put employees in one age group at a particular disadvantage when compared with others. Benefits or pay which are related to experience which can be gained over a short period of time are unlikely to have such an impact.

Example

Intec, an IT company, employs Joe, aged 45, as a Sales Executive. His starting salary of £60,000 was based on 15 years' experience. Harry, 34, is also a Sales Executive with a salary of £52,000, based on 6 years' experience. Harry complains that he has outperformed Joe while at Intec and the salary differential based on years of experience is indirectly discriminatory. Intec may struggle to justify this pay differential.

The national minimum wage

The pay bands in the national minimum wage (NMW) legislation have a special exemption. The hourly rates from 1 October 2006 and 1 October 2007 are:

	1.10.06	1.10.07
Workers aged 22 and over (adult minimum age)	£5.35	£5.52
Workers aged 18 to 21	£4.45	£4.60
16 and 17 year-olds	£3.30	£3.40

The exception allows employers to pay employees aged 22 and over more than those aged 18 to 21 doing the same job, as long as the 18-21 age group is paid less than the adult minimum wage rate (even if this is more than the rate for 18-21 year-olds). Employers are also able to pay the 18-21 group more than those under 18, as long as the under 18s are paid less than the adult minimum wage.

Example

A restaurant owner pays waiters aged 21 and under £5 per hour, while paying waiters 22 and over £7 per hour for doing the same work. This is permitted under the Regulations, because the younger group is being paid less than the adult minimum wage (£5.35 per hour, or £5.52 from October 2007).

Example

An employer pays 18-21 year-olds £6 per hour for doing the same work as staff aged 22 and over who are paid £8 per hour. This is unlawful age discrimination. The NMW exception does not apply because the 18-21 group is paid more than the adult minimum wage.

Example

An 18 year-old is paid £4.75 per hour while a 20 year-old doing like work is paid £5 per hour. This is unlawful. The exception does not apply because both workers are in the same NMW age group.



Health-related insured benefits

One of the most difficult areas for employers is likely to be health-related insurance benefits, which tend to become more expensive for older employees. These include schemes such as private medical/dental insurance, income protection insurance (IPI), critical illness cover and life assurance.

These benefits schemes often have maximum ages for membership under the policy terms, usually tied to the employer's normal retirement age. Employers may have to shop around for insurance policies to cover the over-65s, in particular, and can expect to pay higher premiums.

Employers who do not provide the same benefits to all employees regardless of age will have to justify this in order to avoid unlawful discrimination. If an insurer refuses to insure employees over a particular age, the employer will be expected to purchase a policy from another insurer which will provide cover. This may, of course, be more expensive, but employers are unlikely to be able to use cost alone to justify a discriminatory practice. On the basis of existing discrimination case law, employers will probably only be able to use cost as a justification if it is combined with other justifying factors. If an employer is unable to find cover it might be expected to self-insure.

Possibly, employers will be able to justify discrimination in the provision of these benefits by providing a cash payment in lieu, but it is not clear whether this will be permissible. Moreover, this could give rise to other age discrimination claims if the cash alternative is not offered to all employees irrespective of age.

Also, employers might be able to justify ceasing to provide IPI cover to employees who remain beyond an age at which they become eligible for a full pension as these IPI schemes essentially are designed to ensure that employees on long term sick leave have some income. The pension could substitute for the IPI payments.

There is a specific exception for life assurance provided to workers who retire early on ill health grounds. Employers will be allowed to cease that insurance cover at the normal retirement age which would otherwise have applied to that worker, or at 65 if there is no normal retirement age.



Flexible benefits

The issues surrounding health-related insured benefits (see above) have an impact on many flexible benefits schemes. If an older employee is required to spend more than a younger colleague to 'purchase' the same benefit (reflecting the increased cost to the employer of this benefit for the older worker) this will amount to direct age discrimination even though the older employee could opt for another, non-discriminatory, benefit. The employer would have to justify this discrimination and, as its reason for discrimination would be cost, it may well struggle to do so.

Stock/share options

Some option plans contain discriminatory rules relating, for example, to good and bad leavers. The fact that the plan rules were drafted elsewhere (eg in the USA by a parent company and apply globally) will not release the UK employer from the obligation to justify any discriminatory elements.

Example

Oregon Technology (UK) grants stock options in its US parent company to its UK executives. It defines good leavers who retain their options as including those who retire and bad leavers as including those who resign. If the company treats those who elect to retire at retirement age differently from those who chose to leave earlier it will have to justify this. This might not be straightforward.

Redundancy payments

Statutory redundancy pay

Statutory redundancy payments remain calculated partly on the basis of age. An age-related multiplier is applied to employees' years of service as follows:

- ½ a week's pay for ages 21 and under;
- 1 week's pay for ages 22 to 40; and
- 1½ weeks' pay for ages 41 and over.

A week's pay is capped, currently at £290. A maximum 20 years' service can be counted, and an employee must have two years' continuous service to qualify at all. The upper age limit of 65 for entitlement to a statutory redundancy payment, and gradual reduction in payment for employees between 64 and 65, are removed by the Regulations.

Enhanced redundancy pay

There is an exception in the Regulations to allow the payment of enhanced redundancy pay, where this is based on the calculation method of the statutory scheme. This allows employers to:

- base payments on an uncapped week's pay;
- apply a multiple for the relevant number of weeks' pay per year of service. This would be a multiple (which must be the same for everyone) of the statutory multiple (which differs depending on age);
- apply a multiple (which must be the same for everyone) to the total payment; and/or
- include employees with less than two years' service.

In all other respects it must comply with the statutory redundancy pay calculation including, for example, maintaining the service cap of 20 years.

However, very few enhanced schemes come within this exception.

Most schemes do not incorporate the statutory scheme's age bands. Some use a different cap on the number of years service which can count or calculate a week's pay differently. Many incorporate other elements such as a cap on the redundancy payment so that it can not be more than the employee's earnings to retirement. With enhanced schemes that are not covered by the exception it will be necessary to justify all indirectly or directly discriminatory features.

One common feature of enhanced schemes is the use of length of service (but not age multiples) in calculating the payment. This is likely to be indirectly discriminatory as it disadvantages younger employees. As enhanced redundancy payments do not fall within the service related benefits exception referred to above, this use of service will require objective justification. The employer's legitimate aim will presumably be rewarding loyalty but it should satisfy itself that the resultant effect of the scheme is proportionate.

Example

Westington Industries' enhanced redundancy policy provides for one month's pay for each year of service with a minimum payment of three months' pay and a maximum of 24 months' pay. The payment is capped at remuneration to normal retirement date. This scheme does not come within the statutory scheme because it does not incorporate the statutory age bands, provides for a minimum of three months' pay and caps redundancy pay at both 24 months' pay and pay to retirement. Any of these four elements would be enough to take the scheme outside the enhanced redundancy pay exception. Westington would have to objectively justify each directly or indirectly discriminatory aspect of the scheme (including the discriminatory aspects which would have been lawful if the scheme had come within the enhanced redundancy pay exception).

The cap on pay to retirement disadvantages those approaching retirement age but may well be justified on the basis that the principal aim of the redundancy payment is to cushion the financial implications of unemployment. The absence of any age bands and the minimum and maximum payments do not disadvantage particular age groups. However, Westington would have to justify tying redundancy pay to service. Their aim would be to reward loyalty. In order to justify this feature, the company would have to show that the results were proportionate. We would expect tribunals to accept this.

Employers are likely to find it more difficult to justify schemes where payments vary with age but not in accordance with the bands in the statutory scheme.

Remember that age discrimination claims can arise from enhanced redundancy payments whether they are made under a contractual scheme, or a scheme which is described as discretionary or even one which has never been published to employees.

Pensions

The Regulations cover pensions and there is a general rule that the trustees and managers of a pension scheme must not discriminate against its members on the grounds of age. However, as pensions are inherently linked to age the Regulations deal with the potential discrimination arising from this by providing a number of exceptions. The pensions provisions came into force on 1 December 2006.

Most of the exceptions relate only to occupational pension schemes (ie those administered by the employer). Where employers make pension contributions on behalf of employees into personal pension schemes, including group personal pensions (GPPs), only limited exceptions apply.

The following exceptions apply to employer contributions to personal schemes (including GPPs):

- Making contributions at different rates based on the age of employees is allowed, provided that the purpose of this is to equalise (or try to equalise) the amount of benefit (reflecting the greater cost of providing pension benefits to employees as they get older). Different rates which are attributable to pay differentials are also allowed.
- Equal rates of contributions irrespective of age are permitted.
- It is permissible to set a minimum age for commencement of payment of employer contributions. However, employers may not set a maximum age, and will not be permitted to reduce or cease contributions for employees over a particular age unless this can be objectively justified.

Some of the main exceptions applying only to occupational pension schemes are:

- Different contribution rates by employers or employees based on age are permitted, provided the aim is to equalise benefits/reflect the increasing cost of providing benefits (as for personal pension schemes).
- Age-related criteria can be used in actuarial calculations, for example in relation to employer and employee contributions, or for benefits taken before or after normal pension age.
- Minimum and maximum ages can be fixed for employees joining pension schemes, and different ages can be set for different categories of employees. However, there is no exception allowing employees to be removed from schemes or moved to less favourable schemes if they stay on past retirement.
- Pension schemes can fix a minimum age for entitlement to pension benefits (separate pensions legislation set a minimum age at which pensions benefits can be drawn).
- Some schemes provide for early retirement with enhanced or unreduced pensions in certain circumstances. Where this applies on redundancy or ill health, there is an exception allowing enhancement of benefits. In other circumstances, it is permitted for employees who were active or prospective members of the scheme on 1 December 2006, but not for new joiners. The exception allows a minimum age to be set for these benefits.
- It will not be age discrimination to close a scheme to new members.



Training, promotion and employment opportunities

Employers need to ensure that employees are not deprived of opportunities in employment because of their age. Employees of all ages should be given the same opportunities for training, personal development and to apply for promotion. They should also have their performance assessed in the same way.

In particular, employers should be careful to avoid making assumptions about employees based on their age and also implementing systems or training programmes which could indirectly discriminate against a particular age group.

Example

A manager undertakes annual appraisals and discusses with staff their training objectives and career aspirations. The manager does not have these discussions with an employee aged 62, assuming he is not interested in career development as he is close to retirement. As a result, the employee is denied the opportunity to undertake some presentation skills training. This would be unlawful age discrimination.

Example

A company's performance management system involves staff being assessed for 'potential'. Older workers generally receive low scores under this heading, affecting their opportunities for promotion and the amount of bonus they receive. This employer is at serious risk of successful legal challenges by disadvantaged employees.

Harassment

Employers need to take steps to ensure that employees are not exposed to a discriminatory working environment. The Regulations prohibit employers from subjecting employees to harassment by engaging in unwanted conduct which has the purpose or effect of:

- violating the employee's dignity; or
- creating an intimidating, hostile, degrading, humiliating or offensive environment for the employee.

Because of the way the harassment provisions are worded, it is also unlawful to harass someone because of the age of someone they are connected with, for example because they have a spouse who is much older or younger than them.

Employers are responsible for harassment by their employees in the course of employment, unless they can show that they took all reasonable steps to prevent it happening.

This is likely to be one of the Regulations' main problem areas for employers. In many workplaces, age-related harassment – such as teasing or joking with people about their age – appears to be currently acceptable in a way that sexist and racist 'banter', for instance, is not.

There does not need to be any intent to harass or to cause offence for conduct to constitute harassment. An employee can still suffer harassment if the effect of the actions is to violate dignity or cause humiliation or offence. This is assessed objectively, taking into account the perception of the victim.

The question of whether conduct is 'unwanted' will sometimes be unclear. It will not always be necessary for an employee to tell his or her harasser that the behaviour is unwanted.

Example

An employer dismisses a 60 year old employee for poor performance. The employee submits an employment tribunal claim for age discrimination, alleging that during the last few years of his employment, he has been the butt of ageist jokes. The employee never complained about this, but says that is because he joined in with the banter to avoid causing problems when in fact he felt humiliated and offended. The employee might have a claim for harassment if he brings his claim in time, but at the least the employment tribunal may consider that it is evidence of an ageist culture, which could support his claim that his dismissal was discriminatory.

Employers need to ensure that their harassment and dignity at work policies deal with ageist harassment and should take steps to foster a culture in which age discrimination is not tolerated. This issue should also be included in employers' equal opportunities and diversity training. Employers who fail to take such steps are likely to find tribunals drawing inferences of unlawful discrimination in subsequent claims.

Ending employment

Age discrimination claims can arise on the termination of employment in three ways:

- when the employer's reason for terminating the employment is age (normally retirement) – this is ostensibly direct age discrimination;
- when the reason for dismissal is potentially indirect age discrimination; or
- when the employee claims that age played a part in the dismissal.



Retirement

The impact of the Regulations on retirement is complex. The basic position is that requiring employees to stop working because they have reached a particular age potentially amounts to unlawful age discrimination. The upper age limit on unfair dismissal claims is also repealed.

But there is a major exception to this. Retirement ages for employees at or above 65 will be lawful, and retiring someone at that age will be both a fair reason for dismissal and justified age discrimination. Employers will merely have a duty to consider requests by staff to work beyond retirement age.

Importantly, this exception only applies to employees. It does not, for example, apply to the self-employed, agency workers or partners. In these cases, a retirement even at or above 65 would have to be justified. This is not likely to be easy.

Example

Bean Counters R Us, an accountancy firm, has a retirement age of 65 in its partnership deed. In an age discrimination claim from Albert, who is being forced to retire on his 65th birthday, it must justify the retirement age. As the Regulations specifically do not exempt partners' retirement ages, Bean Counters R Us would have to point to a legitimate aim. This might be 'workforce planning', in other words the freeing up of opportunities for new partners. However, if few partners actually remain to retirement age and the firm cannot show how it plans partner numbers it is unlikely to succeed in showing that the discriminatory impact was justified.

Under the Regulations, employers can decide whether or not to set a compulsory retirement age for employees and if so, whether to set it at the same level for all employees.

Retirement age must not be confused with 'pension age'. Traditionally, employees retired at the same age as they became entitled to a non-actuarially reduced pension. However, there is no reason why the pension age and retirement age should not be different. This divergence is likely to become more common.

Retirement age can be set below 65 but the employer must show an objective justification for this – which is likely to be very difficult. General concerns about declining fitness, stamina, strength, agility or concentration are unlikely to be sufficient.

Example

Broadway Removers sets a retirement age of 60 for its removers on the basis that their strength and stamina will decline after this age, they will become less able to do their job and have an increased risk of injury. This policy is unlikely to be justified under the Regulations. Broadway Removers' concerns could easily be addressed in a less discriminatory way, by subjecting the removers to regular fitness tests which might legitimately be less frequent for younger workers.

A retirement age lower than 65 might be justified where a law would be infringed by employing an older worker. For example, under French law aeroplane captains over 60 cannot fly over French air space. A European airline would, therefore, probably be able to justify imposing a retirement age of 60 for captains on affected routes.

When the Regulations were published in draft in 2005, employers were concerned that they could face legal challenges from employees being retired at 65 who claimed that retirement was not the real reason for dismissal – ie that it was poor performance, ill health or redundancy. Employers who allowed some staff to work beyond retirement and dismissed others would have been particularly vulnerable to such a claim.

However, the definition of 'retirement' has been changed significantly in the final form of the Regulations. Now, an employer who follows the prescribed procedure (see below) will be immune from such a challenge. This means that the dismissal will be fair and will not amount to unlawful age discrimination.

Employers are, therefore, free to retire employees from age 65 or a higher normal retirement age.

Example

Snowhill & Co has set its retirement age at 65. However, in practice it has generally allowed people to work on beyond that age. It has had serious performance concerns about Faye and she has been told that if her performance does not improve her continued employment will be reviewed. Her performance does not improve and, as she is approaching her 65th birthday, Snowhill decides to retire her. They give her six months' notice and comply with the other procedural requirements under the Regulations. Faye believes that the real reason for her dismissal was performance. As Snowhill has complied with the retirement procedures, Faye cannot claim unfair dismissal or age discrimination.

The only way an employee can legally challenge compulsory retirement at or above this age is to show that the reason for dismissal was unlawful discrimination for another reason. For example, if a female employee could show that men were allowed to stay on past 65 but women were not, then she would be able to claim sex discrimination. The most likely claim in these circumstances, however, will probably be disability discrimination.

Retirement procedure

In order for an employer to show retirement as the reason for dismissal, it must have given at least six months' notice to the employee advising that his or her retirement was approaching and that he/she had a right to request to stay on beyond retirement.

Employers will, of course, need also to check whether the employee's contract requires them to give notice of termination longer than six months, but that will be rare for all but the most senior employees.

As mentioned above, the Regulations oblige employers to consider requests to stay on beyond retirement. But once again, the duty is procedural only. If the employer follows the correct procedure, its decision to refuse a request cannot be challenged (apart from under other discrimination laws).

The procedure is as follows:

- The employer notifies the employee in writing between six and twelve months beforehand of the retirement date and the right to request to stay on.
- The employee makes a written request to stay on at least three months before the retirement date.
- The employer arranges a meeting – at which the employee has the right to be accompanied – to discuss the request. (In practice, this meeting is likely to foreshadow a refusal: if the employer plans to agree, the rest of the procedure is superfluous.)
- The employer notifies the employee in writing of the decision but need not give a reason.
- The employee can appeal against the refusal.

The original draft Regulations included an obligation on the employer to consider the request in good faith. This was removed from the final Regulations, so further reducing the employee's ability to challenge a refusal.

The fact that employers need not give a reason for refusal has been widely criticised. Giving reasons may make a legal challenge less likely and avoid unnecessary conflict and ill-feeling in the workplace. And in any event, refusal may not be the best policy.

If employees are allowed to stay on beyond retirement age, their terms of employment must not discriminate on grounds of age. For example, medical insurance, life assurance, pensions and other benefits should be made available to them in the same way as to employees under retirement age – even though it may be more difficult or expensive to provide these benefits (see above). Likewise, only allowing members of staff to stay on as 'consultants' will also be discriminatory.

Transitional provisions

Different rules applied to compulsory retirements which took effect between 1 October 2006 and 1 April 2007.

Indirectly discriminatory dismissals

If employees are dismissed because of their age, they have a direct age discrimination claim. However, an employee might also have an indirect discrimination claim if a provision, criterion or practice was applied in the dismissal decision which disproportionately disadvantaged his or her age group and cannot be objectively justified by the employer.

Example

Paxford Ltd is making several of its drivers redundant and is selecting on the basis of last in, first out (LIFO). Aled, who is 28 years old, is selected as he only joined a couple of years ago. He believes that selecting the drivers who are the most recent joiners unfairly discriminates against younger workers, arguing it would have been fairer to use other criteria such as absences, punctuality, disciplinary record etc. This may well be found to constitute unlawful indirect discrimination. Paxford may struggle to justify its selection criterion as there would seem to be other less discriminatory ways of selecting fairly. It might be that LIFO could be used with more confidence as one of several criteria, or as a 'tie-break' if drivers scored equally on other criteria.

Indirectly discriminatory dismissals could also arise in the area of performance, if competencies were being required which older workers would find greater difficulty in satisfying.

Example

Broadway Removers has now introduced fitness tests for its removers. One test requires removers to be able to carry a 30kg weight up three flights of stairs in a set time. George, who is 60, is unable to pass this test yet he has been performing his job for the past 20 years without difficulty. He argues that the test is unrealistically onerous (as the job does not require lifting of such heavy weights) and only younger employees could comply with it. George might well succeed with his claim as it is unlikely that the company could justify the test. However, he would still have to show that the over 60s were less able to satisfy the test than younger workers. Expert medical evidence would probably be needed to establish that.



Disputed reasons for dismissal

Federal age discrimination laws have existed in the USA since 1967. Although they were introduced to tackle obstacles in recruitment faced by blue-collar workers, it has been so-called 'pale stale males' – well-paid white male executives – who have benefited most.

You don't need a crystal ball to foresee this group as major beneficiaries of the Regulations. Their claims will arise where redundancy or performance has been given as the reason for dismissal but the employee believes that his age was a factor. These will be direct discrimination claims.

UK employment tribunals are often ready to draw inferences of discrimination from a variety of factors including an organisation's general approach to equal opportunities. Once the inference is drawn, the burden passes to the employer to prove that it did not discriminate. Performance management, particularly at a senior level, is often deficient leaving many employers vulnerable to age discrimination claims.

Example

Gold Emblem Financial Services has been performing reasonably well. Its profits have been increasing but the parent company Gold Emblem Inc. believes that it needs 'fresh blood' to take it to its next level. It therefore dismisses Rupert, the 56 year old managing director and replaces him with Hank, who is 38. It dispenses with any process as it believes this would be pointless once the decision has been made and wants Rupert out of the company as soon as he is told. It is happy to pay him £60,000 in respect of his six months' notice pay and another £60,000 to satisfy any unfair dismissal claim.

Rupert brings an age discrimination claim for over £1 million, asserting that at his age he will not be able to find another job. Rupert is able to persuade an employment tribunal to draw inferences of discrimination as the company has never undertaken any equal opportunities training, has a diversity policy but has never communicated it and has no records of the age profile of its employees. Gold Emblem must now prove that the reason for dismissal was performance. It faces an uphill struggle as Rupert's last appraisal (four years ago) was very positive, he has a letter from the chairman praising his performance and recently received a decent bonus. He has received no warnings and is able to produce an email in which the HR director refers to the need for 'new blood' and a fresh outlook.

Avoiding age discrimination – main points

- **Retirement age** – Setting a retirement age below 65 will be unlawful unless objectively justified (which will be very hard). Raise it to 65 or above – or consider abolishing it altogether.
- **Managing performance** – Beware the ‘pale stale male’ and ensure that the performance of all workers, whatever age and however senior, is managed in a transparent, consistent and well-documented way.
- **Recruitment** – Avoid indirectly discriminatory criteria or language in job and person specs.
- **Graduate recruitment** – Seeking or favouring recent graduates or relying exclusively on the ‘milk round’ is likely to discriminate against older candidates. Make sure your policies and processes avoid this.
- **Benefits** – Review your insured benefits and pension schemes to ensure they comply with the new laws and assess any increased costs of including older workers.
- **Service-related benefits** – Despite indirectly discriminating against younger workers, service-related benefits can be lawful. Check yours fall within one of the exceptions.
- **Redundancy** – Enhanced schemes can only take age into account in a limited way. Check yours complies.
- **Overseas employees** – The Regulations will apply to many workers employed outside Britain. Be sure you know who is covered.
- **Training** – Make sure that equal opportunities training covers ageism – and that recruiters and performance managers know the rules.

Further details

For more details, please contact Lewis Silkin LLP's Age Discrimination Team at age@lewissilkin.com or your regular contact at Lewis Silkin LLP.

Lewis Silkin has set up www.agediscrimination.info, a web site dedicated to all things age discrimination related, including analysis of key issues and important cases and summaries of age laws around the world. The site is constantly updated and we welcome contributions from others with an interest in this area.

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