

Age discrimination (3)

New legislation coming into force on 1 October 2006 will protect against discrimination on the grounds of age in the fields of employment and vocational training. This guidance note, the third in a series of four on age discrimination, looks at discrimination issues in relation to pay and benefits.

The Employment Equality (Age) Regulations 2006 (SI 2006/1031) prohibit age discrimination in the terms of employment afforded to employees. This prohibition mirrors the provisions of the other UK anti-discrimination legislation, but the potential impact on pay and benefits is far greater.

During the consultation on the draft version of the Regulations, the government recognised that the new laws could have the effect of requiring substantial changes to benefits and remuneration packages designed to motivate and reward employees on an equitable basis.

As a result, although the Regulations are likely to have a wide-ranging impact on pay and benefits, they also contain a number of exceptions to the general prohibition on age discrimination in terms and conditions of employment.

This article will consider:

- service-related benefits;
- the impact of the Regulations on pay and the national minimum wage;
- insured health benefits;
- pension provision; and
- redundancy payments.

Discrimination

Terms and conditions will fall foul of the Regulations if they discriminate either directly or indirectly and do not come under one of the exceptions, or cannot be objectively justified.

Direct discrimination

Where receipt of pay or benefits is dependent on a person's age, this may amount to unlawful direct discrimination. An employer might, for example, provide private medical insurance to only those employees under the age of 65, or company cars to only those aged 21 or over.

Indirect discrimination

Indirect age discrimination will arise where pay or benefits are provided to employees of all ages, but a certain age group is placed at a particular disadvantage when compared with others. For example, if pay increases are based on length of service, this may disadvantage younger workers, who are less likely than older workers to have worked for the employer for a lengthy period, so are more likely to receive lower pay. Another example would be where life assurance is provided

subject to employees passing a medical examination. This may put older workers at a disadvantage as they may be less likely than younger workers to pass the examination.

Justification

Age discriminatory pay and benefits will be unlawful unless the employer can rely on one of the exceptions in the legislation, or show objective justification. Unlike the existing discrimination legislation, the Regulations allow for the potential justification of direct – as well as indirect – discrimination.

However, the government does not intend objective justification to be an easy test to satisfy and it will be particularly difficult to justify direct discrimination. If employers provide benefits that are discriminatory, to establish objective justification, they will need to show that the way in which those benefits are provided is a proportionate means of achieving a legitimate aim.

The Regulations do not contain specific examples of possible legitimate aims. However, objectives that are likely to be regarded as legitimate aims in the provision of pay and benefits include: rewarding experience and skills; encouraging and rewarding loyalty; and motivating employees by provision of incentives.

Once an employer has identified a legitimate aim, it will need to show that the importance of the aim outweighs the impact of the discriminatory benefit on those employees who are put at a disadvantage by it. The Regulations do not specify what will be considered "proportionate" means of achieving the aim. This will need to be considered by employers – and the tribunals – on a case-by-case basis. However, it is unlikely that an employer will be able to show objective justification if it could have pursued its aim in a less discriminatory way.

Cost issues

Employers that are considering changes to their benefits to remove discriminatory elements are likely to find that there is an additional expense in providing the benefits in a less discriminatory way. They may, therefore, be tempted to rely on the extra expense as justification for continuing to discriminate. The government, however, stated explicitly during

KEY POINTS

■ The Employment Equality (Age) Regulations 2006, which come into force on 1 October 2006, prohibit discrimination in the terms of employment that employers afford to their employees.

■ Employers should review their pay and benefits arrangements for directly and indirectly discriminatory terms.

■ Both direct and indirect discrimination are potentially justifiable, but avoiding the extra expense of not discriminating will not provide an employer with valid justification.

■ Most service-related benefits will be exempt.

■ Health-related insurance benefits may be more expensive for older employees, but employers are likely to find it hard to justify not providing them across the board.

■ Enhanced redundancy schemes based on the statutory scheme will be exempt, but schemes that do not mirror the statutory scheme will have to be objectively justified.

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the consultation process that employers should not be able to justify discrimination simply on the basis that it is more expensive not to discriminate. Avoiding increased cost on its own is, therefore, unlikely to amount to objective justification.

This creates a difficulty in relation to the provision of benefits as, in many cases, cost is likely to be the sole reason that benefits are not already provided to all employees on a non-discriminatory basis. Employers will find it difficult to justify continuing to provide benefits in a discriminatory way, even if eliminating the discrimination results in a substantial expense.

Service-related benefits

Many employers use length of service as a basis for determining pay and benefits. As this might place younger workers at a particular disadvantage compared with older workers, the use of service-related criteria may be indirectly discriminatory. In addition to salary, other benefits that are often based on length of service include company sick pay, additional holiday entitlement and enhanced maternity pay.

The government recognises that there is widespread use of service-related criteria with regard to pay and benefits and has acknowledged that it would be unnecessarily bureaucratic for employers to justify their service-related schemes individually.

The Regulations therefore contain a two-part exception for service-related benefits:

- a blanket exception for benefits based on service of five years or less; and
- a general exception for all other service-related benefits provided that the employer reasonably believes that awarding benefits in this way fulfils a business need.

The exception covers only benefits based on length of service – not differentials on grounds of age. In addition, the exception does not extend to other criteria – such as experience-based criteria – which may also indirectly discriminate, and which employers will have to justify objectively. Importantly, the service-related exception does not apply to service-related benefits arising as a result of termination of employment, for example redundancy pay.

Counting service

Employers have a choice about how they count employees' length of service for the purpose of the exception. Employers can either:

- count only service at or above a particular level; or
- count employees' total service.

Regardless of which method employers choose, they are also allowed to discount certain periods from the calculation if it is reasonable to do so. These periods are:

- periods of absence (including absence that was thought to be permanent at the time); and

- periods of work that preceded a period of absence.

Employers must ensure that they treat all employees consistently in discounting these periods, and should be very careful not to discriminate on other grounds. They should not, for example, refuse to count periods of maternity or parental leave, or periods of sickness absence that relate to a disability when calculating an employee's length of service. Refusing to count those periods could give rise to other claims of discrimination or detriment.

The draft version of the Regulations appeared to require all periods of an employee's service to be counted, regardless of any breaks in employment. However, it seems that the provisions relating to "total service" in the final Regulations can be interpreted as allowing employers to count only continuous service. This means that an employer would not have to count the previous service of an employee who had left the organisation and returned at a later date.

For example, an employer might award three extra days' holiday after five years of service. Where an employee worked for the employer for three years until his or her resignation in 2003, and then starts working for the employer again in 2006, the employer will be permitted to discount the period of "permanent absence" between 2003 and 2006, as well as the period of work prior to the 2003 resignation. The employee will, therefore, be awarded the extra holiday in 2011.

Five-year exception

Benefits based on length of service are automatically exempt from the Regulations where the service taken into account is five years or less.

As an example, a scheme under which basic holiday entitlement is 20 days a year, but a service-related element entitles employees to one extra day's holiday per complete year of service, up to a maximum of five days after five years' service, would therefore fall within the five-year exception.

This exception could also be used in relation to qualifying periods of service for access to certain benefits, such as health insurance. Qualifying periods for benefits of this type tend to be well under five years. It is also common for employers to permit employees to join benefit schemes only after completion of their probationary period – this would also fall within the five-year exception.

Business-need exception

Where the length of service taken into account exceeds five years, the automatic exemption does not apply. Although it will not be required to justify the service-related benefit objectively, an employer will benefit from the statutory exception only if it reasonably appears to it that providing the benefit in this way fulfils a business need. The Regulations give the following examples of business needs:

- encouraging loyalty;
- encouraging motivation; and
- rewarding experience.

These are likely to be the most common reasons for employers to use service criteria in the provision of benefits. However, they are given as examples only, so employers should be able to use service-related benefits to fulfil other business needs.

The business-need test appears to be easier to satisfy than the objective justification test, as an employer is not required to show that the

service-related benefits are a proportionate means of achieving the aim in question. The employer will, however, need to show that it “reasonably appeared” to it that the service-related benefits fulfilled the business need identified.

This means that it will not be sufficient for an employer simply to assert, when defending a claim, that it had a particular business need. Employers will be expected to demonstrate that they have given consideration to whether or not they actually have that business need. They will also need to be able to show an employment tribunal

Employment Equality (Age) Regulations 2006

32 Exception for provision of certain benefits based on length of service

(1) Subject to paragraph (2), nothing in Part 2 [discrimination in employment or vocational training] or 3 [other unlawful acts] shall render it unlawful for a person (“A”), in relation to the award of any benefit by him, to put a worker (“B”) at a disadvantage when compared with another worker (“C”), if and to the extent that the disadvantage suffered by B is because B’s length of service is less than that of C.

(2) Where B’s length of service exceeds five years, it must reasonably appear to A that the way in which he uses the criterion of length of service, in relation to the award in respect of which B is put at a disadvantage, fulfils a business need of his undertaking (for example, by encouraging the loyalty or motivation, or rewarding the experience, of some or all of his workers).

(3) In calculating a worker’s length of service for these purposes, A shall calculate –

- (a) the length of time the worker has been working for him doing work which he reasonably considers to be at or above a particular level (assessed by reference to the demands made on the worker, for example, in terms of effort, skills and decision-making); or
- (b) the length of time the worker has been working for him in total;

and on each occasion on which he decides to use the criterion of length of service in relation to the award of a benefit to workers, it is for him to decide which of these definitions to use to calculate their lengths of service.

(4) For the purposes of paragraph (3), in calculating the length of time a worker has been working for him –

- (a) A shall calculate the length of time in terms of the number of weeks during the whole or part of which the worker was working for him;
- (b) A may discount any period during which the worker was absent from work (including any period of absence which at the time it occurred was thought by A or the worker to be permanent) unless in all the circumstances (including the way in which other workers’ absences occurring in similar circumstances are treated by A in calculating their lengths of service) it would not be reasonable for him to do so;
- (c) A may discount any period of time during which the worker was present at work (“the relevant period”) where –
 - (i) the relevant period preceded a period during which the worker was absent from work, and
 - (ii) in all the circumstances (including the length of the worker’s absence, the reason for his absence, the effect his absence has had on his ability to discharge the duties of his work, and the way in which other workers are treated by A in similar circumstances) it is reasonable for A to discount the relevant period.

(5) For the purposes of paragraph (3)(b), a worker shall be treated as having worked for A during any period during which he worked for another if –

- (a) that period is treated as a period of employment with A for the purposes of the [Employment Rights Act 1996] by virtue of the operation of section 218 of that Act; or
- (b) were the worker to be made redundant by A, that period and the period he has worked for A would amount to “relevant service” within the meaning of section 155 of that Act.

(6) In paragraph (5) –

- (a) the reference to being made redundant is a reference to being dismissed by reason of redundancy for the purposes of the [Employment Rights Act 1996];
- (b) the reference to section 155 of that Act is a reference to that section as modified by the Redundancy Payments (Continuity of Employment in Local Government, etc) (Modification) Order 1999.

(7) In this regulation –

“benefit” does not include any benefit awarded to a worker by virtue of his ceasing to work for A; and

“year” means a year of 12 calendar months.

why they believed that the service-related benefit was effective in fulfilling that need, so some evidence will be required to show that the belief was “reasonable”.

Impact on pay

Although most pay decisions are unlikely to be expressly based on an employee’s age, employers will need to review their pay scales, and the factors that they take into account in determining pay, to ensure compliance with the new law.

Most employers will use either length of service or experience – or both – in their pay decisions. Those without rigid pay scales are still likely to take at least one of these factors into account. Experience is often a factor in setting starting salaries in particular. Using length of service or experience as a criterion is potentially indirectly discriminatory against younger workers.

Length of service

Service-based pay is likely to fall within the exception for service-related benefits. Employers should look at their pay systems to review the reasoning behind service-related pay, to ensure that they can rely on the business-need exception for service over five years. In many cases, the employer’s aims will be to encourage loyalty and motivation and recognise experience, but employers should consider whether or not they believe that structuring pay in this way fulfils their business needs.

If employers wish to rely on the exception for service-related benefits, they may also need to review the service that they count in their pay scales, particularly where pay is linked to grades, and increases are awarded according to length of service within a certain grade. Workers at the same or similar levels must be treated consistently.

Experience

Pay based on experience may need closer examination, as no specific exception applies. Employers will need to justify experience-related pay objectively where this places a particular age group at a disadvantage compared with others. As experience is usually taken into account when setting a starting salary, differentials can easily persist into the future.

It seems likely that attracting and rewarding experienced staff will be a legitimate aim for employers to pursue – and the government appears to recognise this by including the rewarding of experience as an example of a business need in the service-related benefits exception. However, as there is no specific exception for experience, if such a criterion in pay decisions has a discriminatory impact, the employer will need to show that it is a proportionate means of achieving that aim.

Linking pay to a specific number of years’ experience may be hard for an employer to justify. It could, for example, be difficult to demonstrate a real difference between nine and 10 years’ experience.

Taking into account the particular type of experience for which the employer is looking is likely to be easier to justify, even if there is a discriminatory impact. Employers will be in a stronger position if they are able to demonstrate a need for particular types of experience, rather than asserting that a certain number of years’ experience is required without reference to the experience gained during that time.

Performance factors

Most pay decisions and pay scales will include factors other than service or experience. For example, many employers assess pay awards by taking into account performance. If service and/or experience is only part of a wider assessment, any discriminatory impact that results is likely to be smaller and should therefore be easier to justify.

However, employers should also consider if some aspects of assessing performance could give rise to age discrimination.

For example, employees with young children may find it more difficult to undertake a lot of travel or to work long or unsociable hours. In some organisations, this may impact on their performance assessment. As well as indirect sex discrimination against women, this could result in indirect age discrimination. Employees with childcare responsibilities are statistically more likely than not to fall within a particular age range, and those employees may be put at a disadvantage if there is an expectation that the workforce will work long hours, or undertake a large amount of travel.

Health issues can also affect performance, both in terms of absence and in terms of quality of work. Leaving aside disability discrimination issues, indirect age discrimination may arise if older workers tend to suffer more health problems than younger workers.

Employers sometimes take into account potential for development when assessing performance. Assumptions could be made about the potential of an older worker nearing retirement, which could be discriminatory.

It remains to be seen if these issues prove to be problem areas in practice. However, employers should take care with performance assessments. It may be assumed that basing pay on performance will avoid discrimination, but this will not be the case if the performance criteria contain discriminatory elements.

National minimum wage

The age Regulations allow for the pay bands in the national minimum wage legislation to remain, under a specific exception. The national

Employment Equality (Age) Regulations 2006**31 Exception for the national minimum wage**

(1) Nothing in Part 2 [discrimination in employment and vocational training] or 3 [other unlawful acts] shall render it unlawful for a relevant person (“A”) to be remunerated in respect of his work at a rate which is lower than the rate at which another such person (“B”) is remunerated for his work where –

- (a) the hourly rate of the national minimum wage for a person of A’s age is lower than that for a person of B’s age, and
- (b) the rate at which A is remunerated is below the single hourly rate for the national minimum wage prescribed by the secretary of state under section 1(3) of the National Minimum Wage Act 1998.

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minimum wage rates that will take effect from 1 October 2006 are:

- £5.35 for workers aged 22 and over (the “adult minimum wage”);
- £4.45 for workers aged 18 to 21 (or 22 and over and undertaking certain training); and
- £3.30 for 16- and 17-year-olds who are over compulsory school age.

The exception for the national minimum wage is not limited to circumstances where the employer pays only the minimum wage to all employees doing a particular kind of work. Under the exception, employers will be able to pay employees aged 22 and over more than those aged 18 to 21 doing the same job, where the 18 to 21 age group is paid less than the adult minimum wage rate. Employers will also be able to pay the 18 to 21 age group more than those under 18, where those under 18 are paid less than the adult minimum wage.

For example, where an employer pays employees aged 21 and under £4.45 per hour, while paying employees 22 and over £10.00 per hour for the same work, this is permitted under the legislation as the employees aged 21 and under are paid less than the adult minimum wage.

However, if the employer increased pay for the 18 to 21 age group to £6.00 per hour, this arrangement would not be permitted by the exception because the 18- to 21-year-olds would be paid more than the adult minimum wage. This is despite the fact that the younger workers would be better off under the new arrangement.

It would not be permissible for an employer to pay 18- to 20-year-olds £5.00 an hour and 21-year-olds £5.25 per hour, as different pay rates within the same age band are not allowed.

The effects of this exception have been widely criticised as allowing unfair treatment of younger workers.

Insured health benefits

The provision of health-related insurance benefits is likely to be one of the most difficult areas for employers, as these benefits tend to become more expensive for older employees. Employers that do not provide the same benefits to all employees, regardless of age, will have to justify this objectively in order to avoid unlawful

discrimination. Benefits schemes likely to cause concern include:

- private medical/dental insurance;
- permanent health insurance, income protection insurance and long-term disability benefits;
- critical illness insurance;
- death in service benefit¹; and
- personal accident cover.

At present, under the policy terms, benefit schemes of this nature often have a maximum membership age, which is usually tied into the employer’s normal retirement age. As some insurers refuse to insure employees over a particular age, employers will be expected to shop around for insurance policies to cover older workers (the over-65s in particular), and can expect to pay higher premiums. Employers may try to argue that they cannot afford to do this.

Justification

The main difficulty faced by employers is that it is not clear to what extent cost and economic factors can be taken into account in justifying a discriminatory practice. The government’s view, which corresponds with sex discrimination case law², is that employers may not rely on cost as the sole justification.

It is unlikely that an employer will be unable to find a policy to cover older workers in respect of the benefits set out above. The main issue will be expense. It is difficult to identify any other reason on which an employer could seek to rely to justify discriminating in the way in which it offers these benefits.

As it appears that cost cannot be used as sole justification, the question arises as to what happens if the premiums are so high that the employer simply cannot afford them. While it is unlikely that a large organisation would have to cease providing the benefit immediately, it may result in some employers deciding to review the range of benefits that they offer. In smaller organisations, it may become impossible for a particular benefit to be provided.

Alternative solutions

As it is likely to be extremely difficult to continue to provide insured health benefits economically in a manner that does not breach the Regulations,

employers may wish to consider changing the way in which they provide benefits. There are two possible solutions to the problem:

- payment in lieu of benefits; and
- flexible benefits schemes.

Employers could consider providing a cash payment – to the value of the benefit provided to other employees – in lieu of insured benefits, where these have become prohibitively expensive for older workers. It is not clear whether this would be permissible under the Regulations, as it would still amount to less favourable treatment of the older workers: they would not receive the actual benefit and the amount paid would not purchase an equivalent benefit on the open market.

However, the employer may have a better chance of justifying the difference if the overall value of the benefits package is the same for everyone, and this approach has a less discriminatory impact than simply not providing the benefit at all. It will, ultimately, be for the employment tribunals to decide on a case-by-case basis whether or not such an approach can be justified.

It is worth bearing in mind that this approach could give rise to further problems if the cash alternative is offered only to people in the older age group – younger employees may complain that they are being discriminated against by not being given a choice.

A flexible benefits scheme – under which all employees are allocated a fixed sum that they can use to “purchase” benefits from the scheme – may offer a more workable solution. Again, older workers could still be at a disadvantage, as they might need to spend more of their allocated sum to buy health benefits. It remains to be seen whether the tribunals will consider that it is justifiable to provide all employees with exactly the same monetary value from which to purchase their benefits, where some benefits cost more for older workers.

Pensions

The age Regulations contain a non-discrimination rule that requires trustees and managers of pension schemes to refrain from doing anything in relation to the scheme that would constitute age discrimination. However, the government has also included various exceptions to the rule, in acknowledgement of the fact that pensions are inherently age related.

There are different exceptions depending on the type of scheme, with an important distinction between:

- employer contributions to personal pension schemes – including group personal pension schemes – to which only limited exceptions apply; and
- occupational pension schemes, which have a number of detailed exceptions.

Personal pension schemes

Employers commonly make contributions on behalf of employees into personal pension schemes, rather than administering a pension scheme themselves. They often make arrangements with a pension provider for a group personal pension scheme – a collection of individual personal pension schemes for employees, administered together – although they sometimes arrange to make contributions into employees’ own personal schemes.

The following exceptions apply to employer contributions into personal schemes, including group personal pension schemes:

- Employers have the ability to make different rates of employer contribution based on age, where the aim is to equalise the amount of benefit to which employees will become entitled. This essentially allows employers to increase rates of contribution with age, as it costs more to provide equal benefit to an older worker.
- Employers may make different contributions where they are attributable to differences in pay – which is inevitably the case where contributions are based on a percentage of salary.

An employer might, for example, make pension contributions into a group personal pension scheme at the rate of 3% of salary for employees aged under 30, 5% of salary for employees aged 30 to 39 and 8% of salary for employees aged 40 and over, on the basis that its pension provider has advised that these percentages will help to ensure equality in the amount of benefit to which employees of different ages will ultimately become entitled. This falls within the exceptions.

Only the above exceptions apply in relation to personal pension schemes. If employers’ terms and conditions relating to pension contributions include any other discriminatory factors, these will need to be removed if they cannot be objectively justified.

For example, an employer might allow all employees to join its group personal pension scheme and make their own contributions, but start paying contributions on behalf of employees only once they reach the age of 25. There is no exception permitting this in relation to a group personal pension scheme, so the employer will need to consider removing this term. It is unlikely that it would be able to justify retaining it.

Occupational pension schemes

The exceptions relating to occupational pension schemes are more complex and employers will need to take specialist pensions advice to establish if their scheme is compatible with the new Regulations.

Some of the main practices that will be allowed are:

- different contributions based on age to equalise the amount of benefit to which members

of different ages will become entitled, or reflect the increasing cost of providing benefits in respect of older workers;

- using age-related criteria in actuarial calculations;
- minimum and maximum ages for admission to schemes;
- minimum ages for entitlement to pension benefits;
- the enhancement of employees' pensions through extra years of service where they retire early on ill-health grounds;
- early retirement without actuarial reduction in pension benefits under a defined-benefit scheme, for example on redundancy – but only for existing or prospective scheme members on 1 October 2006, and not new joiners;
- differences in benefits attributable to different pensionable service – including a qualifying period of up to two years to receive any benefits – and different pensionable pay; and
- the closure of schemes to new members.

Employers that wish to make changes to group personal or occupational pension schemes to avoid discrimination will need to take into account their consultation obligations under the Occupational and Personal Pension Schemes (Consultation by Employers and Miscellaneous Amendment) Regulations 2006 (SI 2006/349)³.

Redundancy payments

Statutory redundancy pay

Statutory redundancy payments are currently calculated partly on the basis of age, with an age-related multiplier being applied to employees' years of service as follows:

- half a week's pay for each year of service in which the employee was aged 21 and under;
- one week's pay for each year of service in which the employee was aged 22 to 40; and
- one-and-a-half weeks' pay for each year of service in which the employee was aged 41 and over.

There is a two-year qualifying period for entitlement to statutory redundancy pay and a maximum of 20 years' service can be taken into account. These provisions, along with the existing age multipliers, will continue to apply once the age discrimination legislation comes into force. A week's pay is currently capped at £290, and this cap will remain – subject to the annual February increase.

There is currently an upper age limit of 65 for entitlement to a statutory redundancy payment, and payments are reduced by one-twelfth for each complete month that an employee is over the age of 64. Employment while a person is under the age of 18 does not currently count. These age limits will be removed by the age Regulations.

Enhanced redundancy pay

The Regulations contain a specific exception for enhanced redundancy payments provided by employers. This does not apply to all enhanced schemes, but only to those that are based on the statutory scheme. The exception allows employers applying the statutory calculation method to enhance it by:

- treating a week's pay as being uncapped, or subject to a maximum amount above that set out in s.227 of the Employment Rights Act 1996 – currently £290; and/or
- multiplying the appropriate amount allowed for each year of employment by a figure of more than one.

An employer could, for example, apply a multiple of two to the statutory equation, and pay:

- one week's pay for each year of service in which an employee was aged 21 and under;
- two weeks' pay for each year of service in which an employee was aged 22 to 40; and
- three weeks' pay for each year of service in which an employee was aged 41 and over.

Regardless of whether either or both of the previous enhancements have been applied, the employer may also apply a multiple to the total redundancy payment. This multiple must be the same for all employees. For example, the employer could use a week's actual pay, apply the statutory multiples and then multiply the total payment by three.

Many employers make enhanced redundancy payments that are not linked to the statutory scheme and so would not fall within the specific exception. Most redundancy pay schemes are likely to have some kind of discriminatory impact, as they are usually based on length of service – but the service-related exception does not apply to termination benefits. Some schemes also have specific age limits.

Employers will need to rely on the normal test of objective justification if they wish to retain schemes that contain discriminatory elements

Statutory redundancy pay

WHAT CHANGES?	WHAT STAYS THE SAME?
Upper age limit of 65 – or the employer's normal retirement age if lower – removed.	Age bands/multipliers remain.
Tapered reduction of payment over the age of 64 removed.	Two years' service still needed to qualify – and a maximum of 20 years' service counts.
Service under age 18 will now count.	Cap on a week's pay (currently £290) remains.

Employment Equality (Age) Regulations 2006**33 Exception for provision of enhanced redundancy payments to employees**

- (1) Nothing in Part 2 or 3 shall render it unlawful for an employer –
- (a) to give a qualifying employee an enhanced redundancy payment which is less in amount than the enhanced redundancy payment which he gives to another employee if both amounts are calculated in the same way;
- ...
- (2) In this regulation –
- “the appropriate amount”, “a redundancy payment” and “a week’s pay” have the same meaning as they have in section 162 of the [Employment Rights Act 1996];
- “enhanced redundancy payment” means a payment of an amount calculated in accordance with paragraph (3) or (4);
- ...
- (3) For an amount to be calculated in accordance with this paragraph it must be calculated in accordance with section 162(1) to (3) of the [Employment Rights Act 1996].
- (4) For an amount to be calculated in accordance with this paragraph –
- (a) it must be calculated as in paragraph (3);
- (b) however, in making that calculation, the employer may do one or both of the following things –
- (i) he may treat a week’s pay as not being subject to a maximum amount or as being subject to a maximum amount above the amount laid down in section 227 of the [Employment Rights Act 1996];
- (ii) he may multiply the appropriate amount allowed for each year of employment by a figure of more than one;
- (c) having made the calculation as in paragraph (3) (whether or not in making that calculation he has done anything mentioned in sub-paragraph (b)) the employer may increase the amount thus calculated by multiplying it by a figure of more than one.

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but do not mirror the statutory scheme. The extent to which such schemes could potentially be justified will depend on the way in which redundancy pay is calculated. It will be difficult to justify directly discriminatory elements of a scheme, such as age limits or bands that differ from those under the statutory scheme.

An employer might, for example, have a scheme whereby payments are based on four weeks’ actual gross pay per year of service – up to 20 years’ service – for all employees, irrespective of age. The scheme does not use the statutory age bands and multiples, so does not fall within the exception. However, it may be justifiable based on a legitimate aim of rewarding loyal employees.

Alternatively, an employer might have a scheme under which payments are based on one week’s actual gross pay per year of service, increasing to two weeks’ pay for service over the age of 40 and three weeks’ pay for service over the age of 50. This does not fall within the statutory exception, and it would be difficult to justify using these age bands instead of the statutory bands. The employer would need to have good evidence of what it was trying to achieve and why these age bands were appropriate.

Employers should review how redundancy pay is calculated, even where they do not have published policies, because payments in a one-off exercise may still give rise to discrimination. In addition, payments based on a particular formula that has been used for a number of years may

have resulted in redundancy payments becoming contractual by custom and practice.

Summary

The age Regulations potentially affect an array of employment benefits provided to employees, including pay. As it is now only months until the Regulations come into force, employers would be well advised to review their benefits packages to identify any discriminatory elements, and take steps to make changes where necessary.

Where benefits contain discriminatory terms, employers should first check whether they can rely on any of the exceptions in the Regulations. If not, to establish objective justification, they should consider why the benefits are provided in this way and the importance of any business need – bearing in mind that historical reasons may no longer be relevant. Finally, employers will need to consider whether their business need could be achieved in a less discriminatory way. If it could, it is likely that they will need to make changes to their benefits to avoid unlawful discrimination.

Our final guidance note in this series will consider the new age discrimination laws in relation to retirement – including the duty to consider working beyond retirement procedure – and discriminatory dismissals.

1. There is a limited exception for life assurance provided to employees who take ill-health early retirement. Employers can cease such insurance when the ill-health retiree reaches the normal retirement age.
2. *Cross and others v British Airways plc* [2005] IRLR 423.
3. For further information on these obligations see *IRS Employment Review* 846.