

AGE LEGISLATION

AGE-BIASED FIRMS GIVEN THEIR CARDS

JAMES DAVIES

How can employers avoid age bias in recruitment? The first in a series of articles on the new age regulations answers some frequently asked questions

Q Can we use words such as "dynamic" and "energetic" in our job advertisements?

A Merely using such language will not be a breach of the new age laws, which come into force on 1 October. However, there is a danger that words of this kind could be used by unsuccessful job applicants to support age discrimination claims. Employers should therefore avoid them wherever possible.

Tribunals and courts have long accepted that direct evidence of discrimination – the so-called "smoking gun" – is rare. So if a complainant is able to persuade a tribunal to infer discrimination, the onus will be on the employer to establish it did not act on unlawful, ageist grounds. As the regulations put it, once the complainant has proved "facts in which the tribunal could conclude, in the absence of an adequate explanation," that the employer discriminated, then the employer must prove that it did not do so.

Of course, older candidates can be energetic and dynamic. But why mention these attributes when no employer would seek a candidate lacking energy or dynamism? It makes more sense – and will be safer – to list the skills and competencies that are actually needed to succeed in the advertised post.

Q Will we need to change the visual images accompanying our job adverts?

A Visual images – or a combination of words and images – could be used by an unsuccessful older candidate to persuade a tribunal to infer ageism and require the employer to prove that it did not discriminate on the grounds of age. Advertisements portraying only people in certain age groups should therefore be avoided.



HAS MILK GONE OFF?

Some commentators have speculated that the new age regulations could spell the end for the milkround, in which employers recruit directly from universities. This disadvantages older candidates, who are less likely to be currently in higher education.

Employers intent on using this method of recruitment should ensure that there are alternative ways for candidates to apply for their graduate programmes.

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Q Will graduate recruitment programmes be unlawful?

A No, but again, employers need to take care. Indirect age discrimination will be unlawful once the new laws come into force. A provision, criterion or practice that puts people of a particular age group at a disadvantage and which the employer cannot justify objectively will count as indirect discrimination. It's worth remembering that far more people graduate these days than, say, 20 years ago. Requiring candidates to be graduates could be said to put older candidates at a disadvantage. The employer might struggle to explain why candidates have to be graduates to get on to the programme. In reality, this requirement is often a lazy proxy for asking for a particular level of skill. It might be prudent to open the programme to both graduates and non-graduates with the required level of capability.

Q Will we be able to carry on targeting recent graduates when recruiting?

A Many graduate recruitment and training schemes are restricted to recent graduates. This requirement puts older graduates at a disadvantage as they are far less likely to be

able to satisfy it. The employer would probably not be able to justify it. Again, employers may actually be using this discriminatory condition as a proxy for something else – namely, a requirement for candidates with up-to-date skills. If that is what they are after, that is what they should stipulate.

Q Should we ban birthday cards that joke about someone's age?

A Yes – although some will say that this smacks of political correctness gone mad and that ageist birthday cards are merely inoffensive fun. But that's what people used to say about sexist or racist banter, which few employers would countenance nowadays. We will probably see very few claims relating to a single offensive card. It is more likely that such incidents will be used to support claims by portraying the employer as institutionally ageist. Employers who stamp down on ageist jokes will greatly increase their chances of establishing the statutory defence that they took steps to prevent discrimination from happening.

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