

AGE REGULATIONS

# WHO WILL BENEFIT FROM NEW RULES?

JAMES DAVIES

What are the implications of next month's age regulations for employee benefits? The last article in this series answers some frequently asked questions

**Q Can we retain our upper age limit of 60 for income protection cover?**

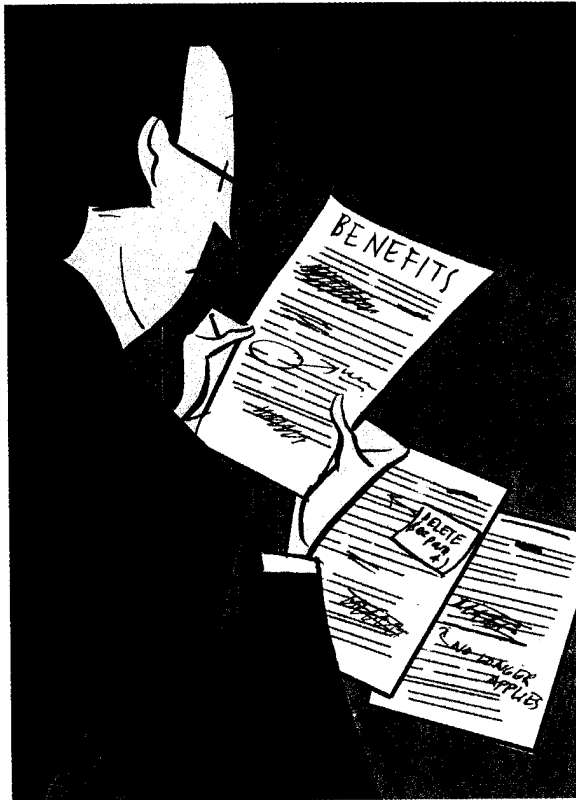
**A** Possibly, although there is no exception in the regulations for income protection schemes. Setting an upper age limit, stopping payments at that age, and removing cover from employees once they reach it, would be direct age discrimination. Employers are caught between a rock and a hard place. Insurers will probably agree to cover 60- to 65-year-olds for a hefty increase in premium, and up to 70 at vast cost, but are unlikely to extend cover for existing claimants. If an employer's occupational scheme has a pension age of 60, it might be possible to justify stopping cover at that age because employees will have an alternative source of income. But if the age limit is raised to 65, employees working past that age could compare themselves with those aged between 60 and 65, who are eligible for both a full pension and income protection cover.

**Q What changes do we need to make to our flexible benefits scheme?**

**A** Insured benefits are generally costed individually, taking age into account. So employees pay different amounts, depending on their age. The only justification for this might be cost, but this is unlikely to be valid on its own. Rather than completely overhauling schemes, the best advice might be to take a calculated risk but monitor case law carefully.

**Q What evidence do we need to justify our service-related benefits?**

**A** Benefits (except those payable on termination) based on five years' service or under are exempt, and those linked to longer



POINTS

- Finishing income protection at a set age might be justifiable if the pension scheme retirement age is the same. But claims are possible from employees above that age.
- Flexible benefits are potentially discriminatory, but employers may be best advised to leave schemes as they are and keep an eye on legal developments.
- Employers will need to establish a "business need" for benefits based on more than five years' service. Prudent employers will be collecting evidence now.
- Enhanced redundancy schemes are likely to be discriminatory and hard to justify.
- Stock option schemes that distinguish between retired employees and those who resign may be discriminatory. Employers should check their rules on "good" and "bad" leavers.

periods will be lawful provided the employer has a "reasonable belief" that they fulfil a business need. Employers should assess any benefits accrued over more than a five-year period and record it. Examples of business needs given in the regulations include "encouraging loyalty or motivation" and "rewarding experience": the most obvious, "rewarding loyalty", is unhelpfully omitted. Logically this would be an acceptable business need, and would apply to most service-related benefits.

**Q What should we do about our enhanced redundancy scheme?**

**A** This is an area employers should address urgently. The exception for enhanced redundancy schemes covers only a minority. Most other schemes base redundancy pay on length of service. That indirectly discriminates against younger workers, and the service-related exception does not cover enhanced redundancy schemes. So most organisations will need to justify linking the amount paid to service. This means identifying a legitimate aim and showing the discriminatory measure is a "proportionate" means of achieving it. The aim - rewarding loyalty - is legitimate but the

proportionality test could cause problems, given the discrepancy between most payments to long- and short-serving staff, and that the aim of redundancy pay is to cushion the financial implications of losing the job, which will not vary much with length of service.

**Q Do we need to review our stock option plans?**

**A** Yes, in particular plans that differentiate between employees who retire and those who resign, often referred to as "good" and "bad" leavers. Distinguishing between them is often difficult. It might be hard to defend an age discrimination claim from, say, a 43-year-old, whom the firm treats as resigned, when it permits a 53-year-old leaver in similar circumstances to retire. A company's position would probably be stronger if "good leaver" status was limited to employees leaving at its retirement age - say, 65 - although the 43-year-old might still challenge the less favourable treatment. The safest route would be to treat only those who wish to stay on but are forced to leave as having "retired", and thus eligible for stock options.

James Davies is head of employment and incentives at Lewis Silkin, an ius laboris member firm >> james.davies@lewisilkin.com