

THE END OF WORKPLACE AGEISM?



Businesses can no longer get away with age discriminatory practices. Annette Partridge looks at the real implications for all concerned

Age discrimination in the workplace is now unlawful in the UK. This constitutes one of the biggest ever changes to UK employment law and a possible revolution in employee rights. Do you know the implications for your business and clients?

Employers should already have checked for potential age discrimination in all areas including recruitment, training, selection, promotion, pay and benefits, dismissal and retirement. Employers should also have new retirement procedures in place to take into account the new law encompassing the default retirement age of 65 and the right for employees to request to carry on working beyond this age. Early action is vital in order to avoid any costly and potentially headline-grabbing tribunal claims.

It is widely recognised that age discrimination is endemic in the UK and the introduction of legislation to prevent it raises complex and sensitive issues, as the culture of the workplace will have to change. Most people recognise that it is not acceptable to make sexist or racist jokes but ageism is rife and, some would say, acceptable. Just think of the last time you received a birthday card with a joke about your age on it. In the US, age discrimination legislation has been in place for many years but with one distinct difference; in most states, only workers over the age of 40 are protected. In the UK both the young and old are protected, making the legislation

and potential pitfalls far more complex.

The new law

Direct or indirect discrimination in employment and vocational training will be unlawful. Direct discrimination occurs when a person is treated less favourably on the grounds of age. Indirect discrimination can be harder to spot. It occurs where everyone is treated the same but one group is particularly disadvantaged because of their age.

In certain circumstances, employers may be able to directly discriminate if their actions can be objectively justified. The directive itself provides examples of age discrimination that may be justified, for example, a maximum recruitment age being specified due to the training requirements of the post. Employers will inevitably have to tread with care if they seek to objectively justify age discrimination and must ensure that they have evidence in support of their claims.

Recruitment, training and promotion

The recruitment process should not involve any consideration of age.

Employers should ensure that advertisements are carefully worded and do not specify an upper or lower age limit. For example, in Ireland, where age discrimination laws have been in place for some time, Ryanair was found to have discriminated on the grounds

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Action points

1. Review your business now and update all policies, practices and procedures.
2. Train managers and HR staff on the new laws, including the retirement process.
3. Check all recruitment processes, including advertisements and the interview process. Don't refer to age, instead focus on skills.
4. Review service-related awards and seek advice on those relating to five or more years' service.

of age in stating in an advertisement that 'the ideal candidate will be young and dynamic'. Another potential problem area, particularly for professional services firms, could be advertising for staff who have a particular level of post-qualification experience. For example, an accountancy firm in Ireland advertised for someone who had two to three years' post-qualification experience. An applicant with some 20 years' experience was rejected for interview twice on the basis that he was 'too senior' and this was found to be indirectly discriminatory.

Application forms should not ask for an individual's age or date of birth as in the majority of cases this should not be relevant to the person's ability to perform the job in question. Many companies use equal opportunity monitoring forms, which are separated from the application form, before the selection and interview stages and these appear to be the best place to ask for someone's age. Age-related questions at interview should be avoided altogether in order to avoid potential claims and notes should be made of the interview so that evidence can be produced in the event that a candidate brings a claim.

Training and promotions must be open to all regardless of age. This is particularly important as there is now scope for employees to work beyond the default retirement age of 65.

Service-related pay and benefits

Difference in pay and benefits based on experience or length of service such as annual holiday, redundancy pay and long-service awards may lead to indirect discrimination. This is because older workers are more likely to have completed the required length of service or obtained the necessary experience than younger workers.

During the consultation process prior to the legislation being introduced, it was recognised that service-related pay and benefits are used widely to motivate staff and reward loyalty. The final regulations therefore allow employers to continue to use service-related pay and benefits, as long as the period of service required is not more than five years. Any length of service criteria beyond five years would have to be objectively justified, which may be difficult to do. It is not clear why a period of five years was chosen.

Employers must review their policies and procedures and review all service-related pay and benefits. This includes benefits such as long service awards and additional holiday being given to employees after a certain length of service has been achieved. Any pay and benefits which are solely given to employees who have five or more years' service should be reviewed to see if they can be objectively justified.

Life insurance

It will not be unlawful for an employer to cease to provide life insurance cover for its employees after they have reached their normal retirement age, including those who have retired early on ill-health grounds. This exemption was provided in the regulations to prevent a scenario occurring where employers stopped providing life insurance benefits altogether.

No similar exemption exists for other insurances, such as healthcare and disability. Many employers have been concerned about the increased cost of providing these benefits to older employees but the response has simply been that this is a cost businesses will have to accept. Some commentators have gone as far as to state that insurance companies will eventually be forced to stop the increased premiums for older workers due to pressure from their clients.

Retirement

There will be a new default retirement age of 65. Any earlier retirement age will have to be objectively justified. Employees will have the right to request to work beyond retirement and employers have a duty to consider this request.

The procedural requirements in relation to retirement at 65 and employees' right to request not to be retired are complex. The employer must inform the employee of the right to request to work after retirement age at least six months and not more than 12 months before the anticipated date of retirement. At the same time, the employer must inform the employee of the intended retirement date.

If the employee makes a request to work beyond retirement within three to six months before the retirement date, the employer must consider the request. If the employer does not wish to allow the request it must invite the employee to a meeting to discuss the position and then notify the employee of its decision. The employee has the right to appeal this decision.

If the correct procedure is not followed the employee may be awarded eight weeks' pay and the dismissal may be deemed to be automatically unfair. Employers must therefore take notice of these new provisions and ensure that they have retirement policies in place to reflect the new statutory procedure. Training sessions should also be implemented to ensure that managers and HR staff are aware of the pitfalls.

Conclusion

Compensation is uncapped for age discrimination. The new law applies to the young and old. There is no carve-out for small businesses. It is therefore extremely important that employers get to grips with the new legislation as soon as possible.



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