

# Come of age

Age discrimination legislation will have a marked effect on employers when it comes into force in 2006. **Annette Partridge** outlines employers' requirements



Forty per cent of the workforce is expected to be aged 45 or over by 2010. With life expectancy increasing and people retiring younger, the ratio between those in work and those who are retired could, according to commentators, lead to an unsustainable situation.

For a number of years the government has been trying to resolve the situation by encouraging employers to retain and employ older staff, and train and recruit younger workers, publishing guidance in the *Code of Practice on Age Diversity in Employment*. Encouraging older staff to remain at work is a clear priority for the government and this coincides with the need to implement an EU directive which deals with age discrimination.

On 1 October 2006 the UK is due to implement the last strand of measures laid out in the *EC Equal Treatment Directive*, which will prohibit discrimination at work on the grounds of age.

The draft legislation isn't expected until the summer but the government has, in announcements and the two consultations on this subject, given an indication of what is to come.

## Background

The *Equal Treatment Directive* first introduced the concept of age discrimination in 2000, allowing member states six years to implement the provisions.

Due to the complex and sensitive issues surrounding age discrimination there were consultations on the subject in 2002 and

2003. In December 2004, the secretary of state for trade and industry indicated that draft regulations are likely to be published in the summer for a further consultation period.

## The basics

Direct and indirect age discrimination in employment and vocational training will be unlawful. Direct discrimination occurs when a person is treated less favourably than another on the grounds of age.

Indirect discrimination occurs when an employer treats all employees the same way, but this treatment particularly affects one group of people of a certain age.

The legislation is intended to protect:

- employees;
- agency workers;
- some self-employed people;
- some office holders;
- people who apply for work;
- people who undertake or apply for vocational training;
- in some circumstances, people who have left work or vocational training; and
- members of trade unions or trade and professional bodies.

The new obligations will fall on employers, providers of vocational training, trade unions and trade and professional bodies. Employers could easily fall into the trap of only looking at this issue from the context of their older members of staff, but they must remember that

the new legislation will apply to all members of staff, young and old.

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 which may be justified – for example, a maximum recruitment age being specified due to the training requirements of the post.

Regardless of the eventual wording of the draft regulations, 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 arguments.

## Pay and benefits

This is a difficult area. Differences 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. Yet responses to the consultations indicated that employers and employees alike wished to keep such practices.

It is envisaged that employers will be able to provide pay and benefits based on experience and length of service only if they can justify this by having a legitimate aim, such as encouraging and rewarding loyalty and providing evidence to that effect.

There will be issues with what happens to benefits which traditionally stop at retirement, such as permanent health insurance.

An impact assessment can address this issue, by proving the value

of such benefits to staff retention and length of service. Employers may be able to use such an assessment to justify discrimination, although this is purely speculation at this stage.

## Retirement age

The government announced in December 2004 that legislation would set a national default retirement age of 65 and create a right for employees to request working beyond that age. It is likely that the procedure for making such requests will follow the flexible working procedures.

Employers will only be able to set their own retirement age below 65 if they can objectively justify it, which is increasingly difficult to do in an environment where more and more companies are offering flexible retirement opportunities. In order to facilitate this new approach, individuals from 2006 will be able to draw on their occupational pension while continuing to work for the same employer.

## Recruitment, selection and promotion

Decisions on recruitment, selection and promotion should not be based on age and employers will only be able to apply an upper age limit to recruitment if this can be objectively justified by a legitimate aim. This will have a marked effect on recruitment practices.

Unless circumstances dictate otherwise, employers should initially ensure advertisements are very carefully worded, do not specify an upper or lower age limit, and any pre-requisites for length of previous experience are thought through.

For example, advertising for an "energetic" or "mature" person could be discriminatory. When was the last time you saw a job advertisement with the words "according to age and experience"? Probably not that long ago.

Interviewers should be aware of the impending changes to ensure age is not referred to at interview and, once the candidate is chosen, employers should ensure that any training and promotions are open to all regardless of age.

## Other issues

The draft regulations are expected to put in place measures allowing employees to seek redress for unfair dismissal at any age, instead of the current limit of 65 or normal retirement age. In light of this, it is expected that retirement at a justifiable retirement age will be a fair reason for dismissal.

The government has indicated that rules for calculating the basic award element of compensation and statutory redundancy payments are also to be changed so that age is no longer a factor.

Harassment on the grounds of age is expected to become unlawful and an employer could be liable at tribunal for taking inadequate action to prevent harassment. Employers must update the training they should already provide in relation to sexual harassment in the workplace to include age.

It is already clear that employers and providers of vocational training and trade unions will have to embark on a total review of their employment practices to include checking for any potential age discrimination in policies, procedures, recruitment, selection, promotion, pay and benefits and looking at the effect of the new default retirement age.

Employers, business advisers and HR professionals should begin this review now and implement training for managers on this important topic to ensure that they are ready for the October 2006 change.

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