



The Employment Law Headache

Trying to keep up with the constant flow of legal changes governing employment can prove stressful. Thankfully, Nicola Walker of Hogan & Hartson is on hand to guide us through the ever-evolving legislative framework



Nicola Walker advises both employers and senior executives in English employment law and privacy. She advises on a wide range of matters, from recruitment issues and employment documentation to discrimination law. As a litigator, she has experience in the Employment Tribunals, the Employment Appeal Tribunal and the High Court. She has acted in many complex cases involving dismissals, transfer of undertakings and discrimination. Nicola also counsels companies on the employment aspects of large corporate transactions and recommends consultation strategies and the reorganisation of businesses, including motivating and retaining key employees and making large-scale workforce reductions.

Richard Barker, Director General of the Association of the British Pharmaceutical Industry (ABPI), was recently reported as urging the Government to consider tax breaks, as the ABPI reported a fall in the amount of pharmaceuticals business done in the UK and a need to reverse the trend for skilled work to be outsourced to low-cost countries such as India. A climate of cost pressures and a trend for outsourcing means that employers need to be careful to monitor the changing legislative framework where these issues arise.

However, as employment law is one of the most highly regulated areas in Government, keeping abreast of developments can be difficult. Pharmaceutical companies are used to dealing with Government regulation, and so it may not seem so difficult to learn the myriad of employment laws, but most employers find it difficult to keep up with the number of employment law changes. Importantly, the financial pressures faced by pharmaceutical companies who have to struggle with the downward pricing in real terms of medicines, leaves little time or money to spend on human resources.

Not long ago the Government bowed to the collective view of employers and agreed to introduce changes on only two dates per year to ease the burden. The key dates are the beginning of April and the beginning of October. This April, a number of changes were introduced; however none of these will trigger as much change as those due in October.

Most of the April changes are routine matters. There are some which will have an impact on pharmaceutical business, given the cost pressures they face, such as the new regulations which require employers to consult with employees or their representatives before making major changes to their occupational and personal pension schemes.

Some will be insidious and impact gradually. The Transfer of Undertakings (Protection of Employment) Regulations (or

TUPE, as they are mostly known) were re-issued and clarified (or so the Government hopes) in some respects, but the clarifications may raise many more queries and could impact significantly on outsourcing and second generation contracting. In particular, the new TUPE regulations specifically state that they apply to outsourcing, second generation outsourcing and insourcing. They can also apply to transfers, which are governed by the law of another jurisdiction, and to people who ordinarily work outside Great Britain. While this should not operate to prevent the transfer of operations to low cost, high skill areas such as India, they still require thought and planning.

In October 2006 there are further changes planned which are highly likely to be relevant. Most importantly, in October, Age Discrimination comes into effect. This potentially marks one of the most far-reaching reforms that have occurred for many years. This will impact on every aspect of the employment relationship including retirement and redundancies. Hence, it is age discrimination that employers should focus on in the next few months.

Employers should be carrying out a review of their practices and looking at every aspect of their processes. In recruitment, adverts should be examined and considered to see if there is any ageist language. Importantly, it will no longer be possible to advertise for specific age groups or indicate where youth or maturity might be an advantage.

Redundancy schemes can trigger age discrimination. For years, employers have tended to encourage older employees to leave when redundancies are planned. This has been achieved through a series of measures designed to make packages more attractive or to weed out older employees.

As with other types of discrimination law, the process of selection needs to be considered to avoid bias. Additionally, training and development opportunities need to be reviewed and checked to make sure that candidates are not ruled out because of their age. Rates of pay should be linked to experience rather than an individual's age, and handbooks and policies should be checked to see whether they have any language in them which indicates that age could be a barrier or that age triggers different treatment.

Redundancy schemes can trigger age discrimination. For years, employers have tended to encourage older employees to leave when redundancies are planned. This has been achieved through a series of measures designed to make packages more attractive or to weed out older employees. These arrangements need to be reviewed. Incentives for voluntary redundancy should be checked to ensure that they are not age related. Job criteria should be the primary issues driving redundancy selection.

Additionally, from October 2006, compulsory retirement below the age of 65 will no longer be legally permissible. Enforced retirements may not happen below that age. Many companies have compulsory retirement ages between 60 and 65. The Government has opted for a 'default' retirement age of 65 in the age discrimination regulations. However, even at that age, employees will have the right to request not to be retired. This means that it will be increasingly difficult to rely on an early retirement process to cut the cost of termination packages with departing employees safe in the knowledge that they have a healthy pension fund to rely on. Instead, retirements below 65 will have to be objectively justified. This, combined with the fact that many pension funds are in deficit, will lead to early retirement strategies no longer being the cheaper alternative when looking at cost cutting strategies.

The procedural requirements in relation to retirement at 65 and the employee's 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 within three to six months before the retirement date, then 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. 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 unfair automatically.

Compensation is uncapped for age discrimination. It is therefore extremely important that employers get to grips with the new legislation in advance of the 1st October implementation date.

In the pharmaceutical world, where technical skills are highly important and where the investment in business is often enormous, it will be important to ensure that the processes and procedures are organised and effective. In the past, it took some time before employees adjusted to the protection offered to them by the legislation. However, the newspapers regularly report discrimination cases and these claims are increasing well understood by the public.

In the case of age discrimination, we can expect that there will be significant interest in the early cases that arise. In fact, it is likely to jump into a prominent position in a very short time. One way for companies to protect themselves is to put in place a thorough and careful set of procedures having reviewed their current operations, with a view to preventing discrimination. Another way is to train staff, particularly management.

A proven way of ensuring effective training is to start with top management. Diversity training, which has been seen to be taken on board and adopted by the most senior management and rippled down through an organisation, can have immediate and significant benefits.

Age discrimination is not just a protection for older workers. It applies to younger workers too. However, older workers are most likely to feel the benefit of this legislation. That group has undoubtedly suffered in the job market, being seen as less flexible and often more expensive than younger workers. This is particularly so in highly sophisticated environments like the pharmaceutical world. The new legislation will make a big difference to how businesses approach their older workers. At this point in time, when we are facing what could be a revolution in the working environment, preparing for age discrimination is a very important item on any pharmaceutical company's agenda. ♦

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Look out for more from Hogan & Hartson in our Autumn issue, as they continue to guide us through the employment law issues affecting the pharma industry.