

### Age discrimination

#### Introduction

On 1 October 2006 legislation outlawing age discrimination in employment and vocational training will take effect. The Government's view is that tackling age discrimination is good for business, good for individuals and good for society. Age discrimination prevents people of all ages from realising their full potential in the workplace. This in turn prevents employers from getting the best performance out of their business and delivering the best service to their customers.

In July 2005 draft regulations were published for consultation and final regulations were published on 9 March 2006. A table at the end of this briefing identifies the principal changes between the draft regulations and the final version (which was approved by Parliament on 30 March 2006). ACAS is preparing guidance on the regulations due to be published in the next few weeks.

In this briefing, we have highlighted the key aspects of the regulations and the steps you should be taking now to prepare for them.

#### What are the key issues?

- Four principal types of unlawful conduct: direct discrimination, indirect discrimination, harassment and victimisation.
- Direct and indirect discrimination can be justified.
- Automatic exemption for service-related pay and benefits up to five years' service; after five years, the service requirement must fulfil a business need.
- Occupational pensions and employer contributions to group personal pension schemes will be largely exempt.
- New default retirement age of 65 – compulsory retirement at or above this age will not be discriminatory.
- Compulsory retirement ages of under 65 will be unlawful unless objectively justified.

- New duty to consider requests to work beyond retirement age.
- No upper age limit for unfair dismissal/redundancy payment claims.

If a claim for age discrimination is successful, there will be no statutory limit on the amount of compensation that can be awarded. Damages may also include an award for injury to feelings.

#### Remember...

The regulations do not outlaw discrimination on the grounds of old age, but on the grounds of age. This means that it will be unlawful to discriminate against younger workers as well as older workers. They will also apply to perceived age even if that perception is incorrect.

#### What are employers most concerned about?

We set out below some frequently asked questions which address the most common concerns for employers arising from the regulations.

##### 1. Who will the law cover?

- All workers including self-employed workers, contract workers, office holders, the police and members of trade organisations.
- Applicants for work, current workers and, in some instances, people who have left work. Job applicants are excluded where they are older than the employer's normal retirement age (or, if there is no normal retirement age, 65) or if they would reach the employer's normal retirement age (or 65) within six months of their application.
- People taking part in or applying for employment-related vocational training including all courses at Further Education and Higher Education institutions.
- Partners and members of limited liability partnerships. (However, the default retirement age of 65 does not apply to partners or members and therefore any



## Objective justification and service-related exemptions

1. Age discrimination can be objectively justified if you can show that the treatment (or, in the case of indirect discrimination, the provision, criterion or practice) in question contributes to the pursuit of a legitimate aim and is a proportionate means of achieving that aim ie, is the least discriminatory way of achieving it. For example, if you are employing airline pilots and your legitimate concern is safety, requiring everyone to pass a medical examination discriminates less than refusing to employ anyone over 50. Other possible legitimate aims suggested in the DTI's consultation on the draft regulations include facilitation of employment planning, particular training requirements and encouraging and rewarding loyalty.
2. On the face of it, basing benefits on length of service could amount to indirect age discrimination because older age groups are more likely to have completed the required length of service than younger ones. However, the regulations helpfully contain three exemptions which will allow you to retain service-related pay and benefits in certain circumstances.

### (a) General exemption

The general exemption for service-related pay and benefits will apply if you have reasonably concluded that the criterion will fulfil a business need such as encouraging loyalty or motivation or rewarding experience. You can decide to take into account either how long the workers have been working for you at or above a particular level or how long they have been working for you in total. The regulations set out certain rules for the calculation of length of service (eg, by reference to weeks of service, not hours worked, so part-time workers are not disadvantaged).

### (b) Specific exemptions

#### (i) Length of service of five years or less

This exemption provides that any length of service requirement of five years or less will be lawful.

#### (ii) Enhanced redundancy payments

This exemption allows employers to make certain enhancements to statutory redundancy payments (which remain related to age and length of service).

Any other service-related criteria outside these exemptions will have to be objectively justified. So, even if they do not fall within the above three exemptions, they will still be lawful if they are a proportionate means of achieving a legitimate aim.

retirement age (whether below or above 65) will have to be objectively justified.)

### 2. Who will not be covered by the regulations?

- Members of the regular armed forces, full-time and part-time reservists.
- Unpaid volunteers.

### 3. What will vocational training cover?

- All forms of training and retraining courses, including practical work experience and training provided by employers.

### 4. Are there any circumstances where treatment on grounds of age will be lawful?

- Direct and indirect age discrimination can potentially be justified.
- There will be some specific exemptions (eg, the default retirement age of 65 for employees and certain service-related pay and benefits).
- Discrimination will be allowed where there is a genuine occupational requirement.

- Discrimination on age grounds in order to comply with other legislation will be permitted eg, bar staff serving alcohol must be at least 18.

### 5. Pay and benefits for my staff vary according to length of service. Can this continue?

- Benefits based on a length of service requirement of five years or less will be exempted and will be able to continue (the "five year exemption").
- For any length of service requirement in excess of five years, you will have to show that it "reasonably appears" to you that your use of the length of service criterion "fulfils a business need" such as encouraging loyalty or motivation or rewarding the experience of some or all of your workers.
- In calculating the length of service of a worker, you can choose to take into account either how long the workers have been working for you at or above a particular level or how long they have been working for you in total.
- If you do not fall within the five year exemption or cannot justify any longer period on the basis that it

fulfils a business need, you may still be able to rely on the general objective justification defence (ie, a proportionate means of achieving a legitimate aim).

#### 6. Will I, as an employer, be responsible for the actions of my employees?

- Yes, unless you can show that you have taken reasonable steps to prevent an employee discriminating, for example by providing comprehensive training for him/her. As with other forms of equal opportunities training, records should be kept of who attended the training and when.

#### 7. What should I know about the default retirement age?

- The default retirement age will be set at 65 for all employees. It means mandatory retirement before that age will be unlawful unless a lower age can be objectively justified (which will not be easy). All employees will have the “right to request” to work beyond any retirement age.
- You will have new responsibilities to inform your employees of their “right to request” six to twelve months before the retirement date and you will have a “duty to consider” all such requests.
- Where an extension of work is agreed, the “right to request” and “duty to consider” obligations will apply again when retirement is next considered.

#### 8. What about automatic termination clauses eg, in employment contracts or Articles of Association?

- The regulations do not impact on agreed retirements. However, it is thought unlikely that automatic termination provisions will constitute agreed retirements.
- Using such clauses creates a risk that, if the contract provides that dismissal will take effect on the employee attaining a certain age, you may forget to go through the notification and “duty to consider” procedure, thereby risking unfair dismissal claims. However, it may be worthwhile for the contract to state what the intended retirement date for the employee will be, although this will not avoid the requirement to notify an employee of the retirement date and the right to request to work beyond retiring age, six to twelve months before that date.

#### 9. How can I justify a lower retirement age than 65?

- You will have to show that having a lower retirement age is a proportionate means of achieving a legitimate aim.
- This will not be easy to do. Possible justifications may include necessary workforce planning or to avoid an adverse impact on the provision of occupational pensions and other benefits (both used by the DTI to justify the default age of 65), but it remains to be seen whether such arguments will be persuasive and what evidence will be required.

### Retirement

There will be a default retirement age of 65. This means it will be lawful under the regulations to retire employees at or above age 65. However, employees will not retire automatically at the default retirement age and you will be free to continue employing people past the default age of 65.

Retirement ages below 65 will be unlawful unless they can be objectively justified.

A new “duty to consider” procedure will be imposed on employers. Employees should be notified in writing, between twelve months and six months in advance of the intended retirement date, that you expect the employee to retire on that date. At the same time, you should notify the employee that they have a right to request to continue working. Failure to provide at least six months’ notice of the right to request to continue working will entitle the employee to claim up to eight weeks’ pay from the employer. In addition:

- the employee who has been notified of the right must make the request between six and three months before the intended retirement date and the request must specify whether they want the employment to continue indefinitely, for a stated period or until a stated date;
- you should meet with the employee to discuss the request within a reasonable period (the employee has the right to be accompanied by a colleague to the meeting);
- the employee should be notified of your decision in response to the request as soon as reasonably practicable and the employee has a right to appeal;
- failure by you to comply with the “duty to consider” procedure will render any dismissal automatically unfair.

The current upper age limit of 65 for bringing unfair dismissal claims will be removed.

- If a lower retirement age cannot be justified and you have to rely on the default retirement age of 65, you may have to improve your capability management procedures so that where employees are no longer capable of doing the job before reaching 65 they can be fairly managed out of the business.

#### **10. If I allow someone to work past 65, can I dismiss them at any stage subsequently?**

- You will still have to notify the employee of the new retirement date and follow the “right to request” and “duty to consider” procedure again.
- Dismissal for a reason other than retirement (and the regulations set out in detail when a dismissal will be treated as being for retirement) will need to be fair under the usual unfair dismissal rules, as employees aged 65 or over will be eligible to claim unfair dismissal.

#### **11. What will the new regulations say about occupational pension schemes?**

- The effect of various exemptions in the regulations is that most schemes will be able to operate largely as they do now. However, there are some areas of uncertainty, such as whether “golden numbers” rules (eg, allowing a member to retire on full pension when his or her age plus length of service totals 85) will be discriminatory.
- The regulations do not apply to personal pension schemes, except in relation to employer contributions to such schemes. However, the regulations confirm that age-related employer contributions will be lawful.

Our Pensions Group will issue a briefing shortly.

#### **12. What impact will the new regulations have on share schemes?**

- In general, discrimination against employees can potentially arise in determining eligibility for schemes and exercises/vestings on grounds of retirement or other age-related factors.
- The exercise of discretions under discretionary executive schemes may also need to be reviewed to ensure discrimination is avoided.
- Other schemes, including CSOPs and Sharesave Schemes which allow for rights of exercise upon early retirement, need to be reviewed at an early stage to see whether any changes are required.
- For further advice or information please contact Colin Chamberlain or Paul Ellerman or your usual contact in our Employee Incentives Group.

Our Employee Incentives Group will issue a briefing on the final regulations shortly.

#### **What should employers do now?**

- Conduct a thorough audit of all policies and practices, looking for criteria related to age, service, experience or qualifications. Identify those which may be caught by the regulations and think about whether or not they can be justified and what evidence you need to back this up. Consider whether these benefits need to be changed. If changes to contractual terms are necessary, make sure that the changes are made in such a way that employees cannot bring constructive dismissal claims. Where necessary, enter into discussions with your employees or any trade unions at an early stage, to ensure that these changes can be implemented before 1 October 2006.
- Make sure that you do not review policies and practices in a vacuum – if you want to make policies more “age friendly” make sure that your changes do not fall foul of any other legislation (in particular, other discrimination legislation).
- Monitor age groups for applicants, new recruits, promotions, departures, training and turnover to see whether there are any issues which need to be addressed. If there are no problems, the information will provide you with good evidence if someone does bring a claim.
- Evaluate the impact of new policies and practices to ensure they achieve the intended aim; obtain staff feedback where appropriate.
- Document each stage of the review process and the reasons for each decision made.

Specifically:

##### **(a) Recruitment, selection and promotion**

- Review recruitment methods to make sure they will reach all age groups eg, not just relying on the university milkround or the internet.
- Look at your instructions to recruitment agents.
- Review job adverts/person specifications, particularly where you ask for specific qualifications and years of experience, and make sure that any requirements which may be caught by the regulations can be justified; consider whether use of certain terms is appropriate eg, “young” or “mature”, “junior” or “senior”.

- Update application forms – these should be age neutral where possible. Consider, for example, whether date of birth and dates of education are necessary (it may be that they could be included in a separate form for the HR team – perhaps for monitoring purposes – but not made available to those conducting interviews).
- Provide training for those involved in recruitment and promotion so they avoid ageist assumptions/age-related questions or comments. It will be important to document decisions made.

#### **(b) Working life**

- Equal opportunities policies and diversity strategies should be reviewed.
- Review all benefits, particularly those based on age or length of service, such as pay-scales, holidays and medical insurance.
- Consider flexible benefits packages so people can choose benefits that are appropriate for their stage in life eg, younger people without families may prefer gym membership to life assurance.
- Review whether any enhanced redundancy scheme mirrors the statutory scheme sufficiently to come within the specific exemption. If not, consider whether it can be objectively justified or should be amended.

#### **(c) Harassment**

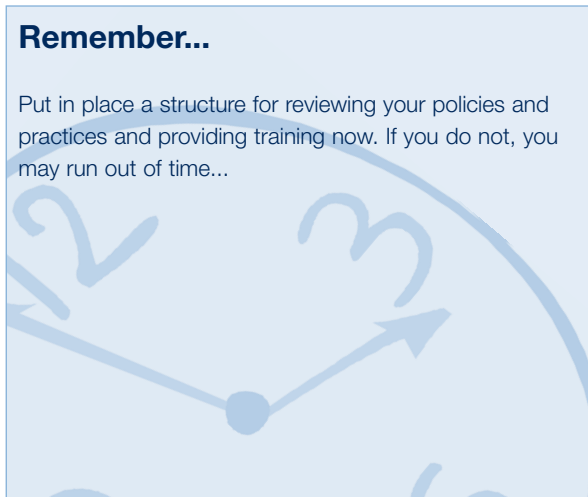
- Training for all staff on harassment should be undertaken. You need to be taking steps now to change your workplace culture. Address common misconceptions about the young and old and ensure staff cut out inappropriate jokes. Employers' claims that an ageist workplace culture pre-October 2006 suddenly transformed overnight on 1 October are going to be treated by Employment Tribunals with scepticism.
- It is vital to keep records of who has been trained so that you can provide evidence that you took reasonable steps in relation to specific employees to prevent discrimination. Managers will also need specific training eg, to ensure they apply performance management consistently to workers of all ages.

#### **(d) Retirement**

- Check any contractual retirement ages and whether these have been applied in practice. Consider, if there is any room for doubt, what your "normal retirement age" is.
- Check what retirements are due in the six months between 1 October 2006 and 31 March 2007. Special detailed transitional arrangements apply but you must still give the employee notice of the intention to retire them, inform them of the right to request working longer and follow the rest of the "duty to consider" procedure.
- If you are giving notice of retirement prior to 1 October 2006 (to expire between 1 October 2006 and 31 March 2007), you should give at least four weeks' notice (or less if the contract permits this) and make the employee aware before 1 October 2006 that you consider the employee is being retired when notice expires. You should then notify the employee of his/her right to make a request to continue working on or as soon as practicable after 1 October 2006.
- If you are giving notice of retirement after 1 October 2006 to expire before 1 April 2007, you should give contractual notice (or the statutory minimum if greater) and ensure you give the employee notice of his/her right to request before or on the same day as the notice of dismissal.

#### **Remember...**

Put in place a structure for reviewing your policies and practices and providing training now. If you do not, you may run out of time...



## What has changed between the draft regulations published in July 2005 and the regulations published in March 2006?

- **Job applicants**

There is a new exemption where a job applicant applies for a role within six months before the employer's normal retirement age or, if there is no normal retirement age, 65. These applicants will be exempt from the protection accorded to job applicants in relation to the terms of employment they are offered or whether they are offered employment at all.

- **Service-related benefits**

Employers are no longer automatically required to count non-continuous service when awarding benefits – this can be discounted, as can periods of absence, where it is reasonable to do so. It must now “reasonably appear” to the employer that the particular length of service criterion fulfils a “business need”, examples of which are encouraging loyalty or motivation or rewarding experience (previously these were the only three possible justifications, rather than examples).

- **Statutory redundancy pay**

The age and length of service multipliers used in the calculation of statutory redundancy payments have been retained. The way in which employers can enhance statutory redundancy payments has been clarified. The wider exemption for benefits which mirror statutory benefits has been taken out. Benefits such as enhanced maternity pay and leave will now have to be justified under the service-related benefit exemption.

- **Work-related invalidity benefit schemes**

The specific exemption for these schemes in relation to the ages for admission to such schemes or ages for entitlement to benefits under such schemes has been removed. Employees wishing to use such admission/entitlement conditions will need to establish the general objective justification defence, which may be difficult. It has been suggested that employers will choose to reject requests to continue working rather than pay the increased premiums insurers may charge to provide medical and permanent health insurance to those over 65.

- **Life cover for retired workers**

There is a new exemption which allows employers to cease providing life cover to employees who have retired early on grounds of ill health once they reach the normal retirement age or 65.

- **Retirement**

The concept of “planned retirement date” and the method used to determine the reason for dismissal has been replaced by a more straightforward system whereby a dismissal is deemed to be for retirement if it takes place:

- at or after 65 (if there is no normal retirement age);
- at or after a normal retirement age of 65 or more; or
- at or after a normal retirement age of under 65 if justified.

This addresses employers' concerns that employees could seek to argue in some circumstances that the real reason for dismissal was not retirement. Provided the “duty to consider” procedure is followed and the dismissal takes place on the notified retirement date, then the dismissal will be a fair one for retirement.

- **Duty to consider procedure**

This has not materially changed save that the time limits for notification of the decision on a request or appeal are not fixed but must be done within what is a “reasonably practicable” period. The duty to consider the request “in good faith” has been removed and there is still no requirement that the employer must give reasons for its decision on the request or on the appeal (though employees could perhaps argue that in some cases a failure to do so amounts to a breach of the implied duty of trust and confidence).

## Contacts

If you would like further information on the matters covered in this briefing please contact:

**Andrew Brown**  
+44 20 7466 2090  
andrew.brown@herbertsmith.com

**Fiona Bolton**  
+44 20 7466 2017  
fiona.bolton@herbertsmith.com

**Louise Ferrell**  
+44 20 7466 2638  
louise.ferrell@herbertsmith.com

If you would like to receive more copies of this briefing, or would like to receive Herbert Smith briefings from other practice areas, or would like to be taken off the distribution lists for such briefings, please email [louise.willows@herbertsmith.com](mailto:louise.willows@herbertsmith.com) or call business development on 020 7466 3500. You can also contact us to say whether you would prefer to receive these publications in a printed or electronic format.

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# Herbert Smith

## Amsterdam

Stibbe  
Stibbetoren  
Strawinskylaan 2001  
PO Box 75640  
1070 AP Amsterdam  
T +31 20 546 06 06  
F +31 20 546 01 23

## Bangkok

Herbert Smith (Thailand) Ltd  
1403 Abdulrahim Place  
990 Rama IV Road  
Bangkok 10500  
T +66 2657 3888  
F +66 2636 0657

## Beijing

Herbert Smith LLP  
Units 1410-1419  
China World Tower 1  
1 Jianguomenwai Ave  
Beijing 100004  
T +86 10 6505 6512  
F +86 10 6505 6516

## Berlin

Gleiss Lutz  
Friedrichstrasse 71  
D-10117 Berlin  
T +49 30 800 979-0  
F +49 30 800 979-979

## Brussels

Herbert Smith LLP  
15 Rue Guimard  
1040 Brussels  
T +32 2 511 7450  
F +32 2 511 7772

Gleiss Lutz  
Rue Guimard 7  
B-1040 Brussels  
T +32 2 551-1020  
F +32 2 5121568

Stibbe  
Rue Henri Wafelaertsstraat 47-51  
1060 Brussels  
T +32 2 533 52 11  
F +32 2 533 52 12

## Budapest

Gleiss Lutz  
Cooperation partner:  
Bán, S. Szabó & Partners  
József nádor tér 5-6  
HU-1051 Budapest  
T +36 1 266-3522  
F +36 1 266-3523

## Frankfurt

Gleiss Lutz  
Mendelssohnstrasse 87  
D-60325 Frankfurt/Main  
T +49 69 95514-0  
F +49 69 95514-198

## Hong Kong

Herbert Smith  
23rd Floor Gloucester Tower  
11 Pedder Street  
Hong Kong  
T +852 2845 6639  
F +852 2845 9099

## Jakarta

Associated firm  
Hiswara Bunjamin and Tandjung  
23rd Floor, Gedung BRI II  
Jl. Jend. Sudirman Kav. 44-46  
Jakarta, 10210  
T +62 21 574 4010  
F +62 21 574 4670

## London

Herbert Smith LLP  
Exchange House  
Primrose Street  
London EC2A 2HS  
T +44 20 7374 8000  
F +44 20 7374 0888

Stibbe  
Exchange House  
Primrose Street  
London EC2A 2ST  
T +44 20 7466 6300  
F +44 20 7466 6311

## Moscow

Herbert Smith CIS LLP  
4th Floor  
Korobeinikov Pereulok 24  
Moscow 119034  
T +7 495 363 6500  
F +7 495 363 6501

## Munich

Gleiss Lutz  
Prinzregentenstrasse 50  
D-80538 Munich  
T +49 89 21667-0  
F +49 89 21667-111

## New York

Stibbe  
350 Park Avenue, 28th Floor  
New York, NY 10022  
T +1 212 972 4000  
F +1 212 972 4929

## Paris

Herbert Smith LLP  
20 Rue Quentin Bauchart  
75008 Paris  
T +33 1 53 57 70 70  
F +33 1 53 57 70 80

## Prague

Gleiss Lutz  
Jugoslávská 29  
CZ-12000 Prague 2  
T +420 2 24007 500  
F +420 2 24007 555

## Shanghai

Herbert Smith LLP  
38th Floor, Bund Center  
222 Yan An Road East  
Shanghai 200002  
T +86 21 6335 1144  
F +86 21 6335 1145

## Singapore

Herbert Smith LLP  
#09-02 Caltex House  
30 Raffles Place  
Singapore 048622  
T +65 6868 8000  
F +65 6868 8001

## Stuttgart

Gleiss Lutz  
Maybachstrasse 6  
D-70469 Stuttgart  
T +49 711 8997-0  
F +49 711 855096

## Tokyo

Herbert Smith  
Toranomom 2-Chome Tower  
2-3-17 Toranomom  
Minato-ku  
Tokyo 105-0001  
T +81 3 3508 4508  
F +81 3 3508 4509

## Warsaw

Gleiss Lutz  
ul. Sienna 39  
PL-00121 Warsaw  
T +48 22 52655-00  
F +48 22 52655-55

[www.herbertsmith.com](http://www.herbertsmith.com)  
[www.gleisslutz.com](http://www.gleisslutz.com)  
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