



# CONSTRUCTION CONFEDERATION

## AGE DISCRIMINATION

### GUIDANCE FOR EMPLOYERS

Generic advice and other useful information including CIJC pay rates, holiday dates and other information on the Working Rule Agreement is available on the CC website at [www.thecc.org.uk](http://www.thecc.org.uk). Please remember you will need your password to gain entry to the members section of the website.

All members are able to access the ACAS (Advisory Conciliation Arbitration Service) free helpline on 08457 47 47 47

*This document is intended to give general advice and guidance and is not a definitive statement of the law on the particular subject. If in doubt consult your trade association or professional advisor.*

## INTRODUCTION

From 1<sup>st</sup> October 2006 the Employment Equality (Age) Regulations make it unlawful to discriminate against workers, employees, job seekers and trainees because of their age.

This pack outlines the new regulations and provides practical guidance for employers on how to comply with the new regulations. The information contained in this pack is designed to give a practical overview and, if in doubt, employers should seek professional advice.

Unlike other anti-discrimination legislation the new regulations do provide a number of exemptions and also allow for discrimination where it can be “objectively justified”. Also unlike other anti-discrimination legislation literally every single person falls within the scope of these regulations one way or another. For this reason this new legislation is likely to prove more problematical to comply with than existing anti-discrimination legislation.

By way of introduction listed below are 10 key points employers should be aware:

1. Age Legislation comes into force 1 October 2006.
2. Regulations cover employment and vocational training. This includes access to help and guidance, recruitment, promotion, development, termination, perks and pay.
3. The regulations cover people of all ages, both old and young.
4. All employers, providers of vocational training, trade unions, professional associations, employer organisations and trustees and managers of occupational pension schemes will have new obligations to consider.
5. Goods, facilities and services are not included in these regulations.
6. Upper age limits for unfair dismissal and redundancy will be removed.
7. A national default retirement of 65 will be introduced making compulsory retirement below age 65 unlawful (unless objectively justified). This will be reviewed in 2011.
8. All employees will have the “right to request” to work beyond the default retirement age of 65 or any other retirement age set by the company and all employers will have an ongoing ‘duty to consider’ all requests from employees to work beyond 65.
9. Occupational Pensions (defined benefit and defined contribution) are covered by regulations, as are employer contributions to personal pensions. However, the regulations generally allow pension schemes to work as they do now. See regulations for more details.
10. The regulations do not affect state pensions, or personal pensions unless provided by an employer.

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## 1 DIRECT DISCRIMINATION

Direct discrimination is less favourable treatment because of someone's age. For example it is unlawful on the grounds of age to:

- Decide not to employ someone.
- Dismiss them.
- Refuse to provide them with training.
- Deny them promotion.
- Give them adverse terms and conditions of employment.
- Retire an employee before the employer's usual retirement age or retire an employee before the default retirement age of age 65 without objective justification.

An example of direct discrimination would be deciding that an employee who has all of the experience and qualification necessary to perform the job is not suitable because of their age and seniority. A job applicant can make a claim to an Employment Tribunal if they have either not been offered an interview or not offered a job because of their age. It is not necessary for someone to have actually been employed to bring such a claim. The initial burden of proof is with the applicant but as soon as there is evidence that discrimination may have occurred the burden of proof switches to the employer. By way of example if someone with all of necessary qualifications and experience aged 55 was turned down for a job which was subsequently offered to someone of 25 it would be for the employer to demonstrate that the 25 year old was the most suitable person disregarding age. In this respect it is vital that employers retain full records of all job applicants, interview notes, assessments and reasons for choosing one applicant in favour of another. If employers do not retain documentary evidence they will be at a serious disadvantage in trying to defend an employment tribunal claim for age discrimination. Claims can be brought up to 3 months after the incident being complained of as occurred but Tribunals can extend this period and employers and therefore advise to retain documents for a minimum of 6 months.

## 2 INDIRECT DISCRIMINATION

Indirect discrimination means selection criteria, policies, benefits, employment rules or any other practices which, although applied to all employees, have the effect of disadvantaging people of a particular age unless the practice can be justified. Indirect discrimination is unlawful whether it is intentional or not.

An example of possible indirect discrimination is insisting that job applicants must have a university degree. The reality is that far more people in the age range 22-32 have university degrees compared with those in the age range 52-62. Far fewer of those in the post war “baby bulge” age group had the opportunity to go to university and therefore this requirement would disadvantage them unless it can be objectively justified.

## 3 LAWFUL DISCRIMINATION

There are limited circumstances when it is lawful to treat people differently because of their age. It is not unlawful to discriminate on the grounds of age if:

- There is an objective justification for treating people differently. For example, it might be necessary to fix a maximum age for recruitment or promotion of employees where the job in question required a lengthy period of training which would result in the individual approaching retirement age (currently the default retirement age is age 65) shortly before training had been completed.
- Where a person is older than, or within 6 months of, the employers normal retirement age, or 65 if the employer does not have one. There is a specific exemption allowing the employer to refuse to recruit that person.
- Where the discrimination is covered by one of the “exceptions” or “exemptions” given by the regulations. These include pay related to the national minimum wage and redundancy payments based on age in accordance with the multiplier currently applicable. It should be noted that both of these matters are likely to be challenged in the European Court of Justice (ECJ).
- Where there is a Genuine Occupational Requirement (GOR) that a person must be of a certain age. In reality there will very few situations where this will apply and the best example currently given is where you are producing a play, film etc where parts are specifically designated for older or younger characters. By way of example it is unlikely that a 60 year old would be cast in the role of “Harry Potter” – but perhaps not impossible!

#### 4 HARRASSMENT

Harassment includes behaviour that is offensive, frightening or in anyway distressing. It maybe intentional bullying which is obvious or violent, but it can also be unintentional, subtle and insidious. It may involve nicknames, teasing, name calling or other behaviour which is not with malicious intent but which is upsetting. It may be about the individual's age or it may be about the age of those with whom the individual associates. It may not be targeted at individual but consistent of a general culture which, for instance, appears to tolerate the telling of ageist jokes. Employers may be held responsible for the actions of their employees as well as the employees begin individually responsible.

Employers must take allegations of harassment for any reason seriously, thoroughly investigate such allegations and take appropriate disciplinary action where they find complaints to be well founded. Employers are reminded that there is no limit on the amount of compensation an Employment Tribunal can award in cases of discrimination.

#### 5 VICITIMISATION

Victimisation is when an individual is treated differently because they have made a complaint or intent to make a complaint about discrimination or harassment or have given evidence or intend to give evidence relating to a complaint about discrimination or harassment.

An employee who has been "victimised" can make a complaint to an Employment Tribunal where both the employer and individual employees can be held personally liable if the complaint is upheld.

#### 6 EQUAL OPPORTUNITES POLICY

Employers should already have written Equal Opportunities Policies dealing with all of the pre-existing heads of discrimination ranging from sex, race, disability, religion or belief and sexual orientation. Employers are therefore advised to ensure that all policies also makes specific reference to age and individual employees know about these policies and what is expected of them.

Employers who are faced with claims for discrimination at an Employment Tribunal start at an immediate disadvantage if they cannot demonstrate that they not only have written policies dealing with equal opportunities but that these policies have also been communicated to workforce generally and that Manager's and Supervisor's have received training or instruction in how they should be applied. The lack of such policies and demonstrable guidance/training for Supervisors and Managers will immediately cause an Employment Tribunal to erred on the side of the claimant.

#### 7 RECRUITMENT

This is an area where many employers will have to completely rethink their approach and review documentation, application forms etc.

Often employers use length of experience in performing a particular job as a criteria for selection. By way of example a foreman with 20 years experience may well be selected in preference to a foreman with only 5 years experience. However, there is a clear correlation between length of experience and age. It would not be possible for someone age 30 to have achieved 15 years experience in the working world. In reality the individual with longer experience may have been performing at a marginal level whereas the individual with less experience in terms of years could well have greater capability and potential. Therefore employers need to base recruitment decisions on skill, competency and qualification as opposed to pure length of experience.

## 7 Application forms

Employers are advised to remove questions relating to age, date of birth from the main application form and included in an equalities monitoring document along with ethnic origin, religion etc. Application forms should also be reviewed to ensure that they are “age neutral” and do not ask for unnecessary information about periods of employment and dates. Asking for age-relating information on an application form could expose an employer to a claim that this has been used in a discriminatory way either directly or indirectly.

## 9 Job Description and Person Specification

A job description outlines the duties required of particular post holder. A person specification gives the skills, knowledge and experience required to carry out these duties.

Avoid references, however oblique, to age in both job description and person specification. Asking for particular lengths of experience (unless this can be objectively justified) may rule out younger people who have the skills required but not the opportunity to demonstrate them over an extended period.

Educational and vocational qualifications have changed and developed over the years. Make sure the qualifications you specify are not disadvantaging people at different ages. Ask yourself are the qualifications really necessary, are they still current, and are there other ways of specifying the skill level you require?

If you are going to be specific about qualifications be sure you can justify their need in objective terms and make it clear you will consider equivalent or similar levels of alternative qualification.

## 10 Advertising

Employers should write job advertisements using the information in the job description and person specification. Avoid using language that might imply you would prefer someone of a certain age such as “mature”, “young” or “energetic” etc. As well as considering the language you use in advertisements, think also about the hidden message you may be conveying in your recruitment or promotional literature. Literature showing images of only young people will give a clear message that you do not wish to recruit more mature people!

Think carefully about where you place your advertisements as an advertisement placed in magazine aimed at young people may indirectly discriminate against older people because they are less likely to subscribe to the magazine and therefore less likely to find out the vacancy and apply.

## 11 Records

Unsuccessful job applicants have 3 months from the time they were notified of their rejection to make a claim in the Employment Tribunal for discrimination. However, this time period can be extended under certain circumstances. Employers are therefore advised to keep detailed records of reasons for not inviting an individual for an interview and also detailed records of interviews themselves for a period of less than 6 months. If faced with a challenge it is firstly up to the claimant to demonstrate that discrimination may have existed but then the burden of proof shifts to the employer to demonstrate that reason for not inviting the individual for interview or not selecting following interview was in no way influenced by age. If records, documents etc are not retained the employer will be at an immediate disadvantage.

## 12 Training for Recruiters

Those responsible for recruitment should be fully aware of the company's equal opportunities policies.

Interviewing is a skill and those with responsibilities for interviewing should have received training. Ideally more than one person should conduct interviews. This will help avoid allegations of bias and reach a more balanced decision.

Clearly it would be inappropriate to ask any questions which are age related or make any throw away comments such as "don't you think you are bit young for a job with this level of responsibility" or "don't you think someone like you should be looking for something with more responsibility"?

## 13 VOCATIONAL TRAINING

As well as training provided by employers for their own employees, the regulations also cover organisations providing vocational education and training to the wider community. For the purpose of anti-discrimination law, all forms of vocational training, including general educational and the provision of further and higher adult at education institutes are covered.

Where an employer has a training programme, offers apprenticeships etc then due consideration must be given to all applicants irrespective of age. There is an exemption that allows an employer to refuse an applicant who is within 6 months of retirement or when the training is completed would be so close to retirement as to justify rejection.

## 14 REDUNDANCY

Traditionally many employers have used length of service as a criteria for selection in cases of redundancy. This is known as “last in first out” (LIFO). Length of service is clearly established as correlating with age and therefore employers are advised not to use this criteria in any shape or form. Selection for redundancy should be based on an objective assessment of skill, capability, discipline etc.

The government has created a specific exception in respect of redundancy pay where the current multiplier related to age can still apply. However, the upper and lower age limits have been removed such that an employee starts to accrue an entitlement to redundancy pay from age 16 and this continues un-capped. The limit on the number of years to be taken into account (reckonable service) remains limited to 20 years. The fact that an individual age between 22 and 41 will accrue redundancy pay entitlement at 1 week for each year of service whereas someone aged over 41 accrues an entitlement of 1½ weeks pay per year of service is almost certainly to be challenged in the European Court of Justice and therefore may change in the future. Where an employer provides redundancy payments based on a different criteria but above the statutory minimum these may be considered to be discriminatory depending on the nature of the scheme. Where the enhancement is simply removing the statutory cap on earnings then this would not be considered to be discriminatory.

## 15 SERVICE RELATED BENEFITS

As length of service generally correlates with age benefits that accrue with length of service may be regarded as discriminatory. The regulations provide a specific exemption for benefits related to service up to 5 years. Therefore if an employer increases holiday pay entitlement, sick pay entitlement or any other benefit for each year of service up to 5 years service the exemption will apply. If the benefit continues to accrue after 5 years of service then the employer will have to justify it on the basis that the benefit fulfils a business need such as improving morale, staff retention, loyalty etc.

## 16 OCCUPATIONAL PENSIONS

Pensions rules are largely unaffected and the new Age Discrimination Regulations are aimed to disrupt occupational pension scheme arrangements as little as possible.

The regulations apply to occupational pension schemes and employer contributions to personal pensions. They do not apply to state pensions, which are completely unaffected. All pension rights accrued before 1<sup>st</sup> October 2006 are not affected.

Pension schemes are notoriously complex and detailed advice is beyond the scope of this “guide”. Where an age-base rule is being used as part of an existing pension scheme, and there is no exemption for it in the Regulations, employers will have the option of objectively justifying it. If the rule cannot be justified, the employer can change it, or if they cannot do so – get rid of it. An exemption in the Regulations allows pension schemes to be closed to new employees. This means different pension arrangements can be offered to existing employees and new joiners. For example, a firm may offer a defined contribution scheme for new employees while existing staff remain in a defined benefit scheme.

## 17 RETIREMENT

The Regulations set a default retirement age of 65 (to be reviewed in 2011). This means you can retire employees or set retirement ages within your company at or above 65. Retirements or retirement ages below the default retirement age will need to satisfy the test of “objective justification”. In practice this will not be easy and the vast majority of employees have the right to work until at least 65.

## 18 RETIREMENT PROCEDURE

The Regulations introduce a new procedure of pre-notification before someone can be “fairly” retired. The procedure requires that the employer write to the employee not more than 12 months but not less than 6 months before the planned retirement date. The letter must advise the employee of the planned retirement date and also of the right to request not be retired. An example letter dealing with can be found at appendix 1 in this guide.

If the employee does not wish to retire then he/she must write to the employer not more than 6 but not less than 3 months before the planned retirement date asking not be retired. Faced with such a request the employer must invite the employee to a meeting and advise the employee of the right to be accompanied if he/she wishes. The employer must listen to the employee request and give it serious consideration following which the employer must write to the employee with a decision. Example letters dealing with both the request not be retired and the employers decision can be found at appendixes 2 and 3 in this guide.

Currently the employer does not have to give any reason what so ever for his decision but can simply say “no”. However, the UK Government is likely to be challenged in the European Court of Justice (ECJ) and this may change in the future.

Faced with a request by an employee not be retired an employer is faced with 3 options:

- 1) To simply refuse the request
- 2) Agree to the request – in which case the employer will need to go through the notification process (see letter at appendix 1) if the employer wishes to retire employee at some stage in the future giving a minimum of 6 months notice and again the right not be retired.
- 3) Agree to continue the employment but under different terms/hours etc. In other words under a new contract but with continuity of employment. Employer will need to go through the notification process (see letter at appendix 1) if the employer wishes to retire the employee at any time in the future giving a minimum of 6 months notice and again the right not be retired.

If the employer refuses the employee’s request not be retired that the employer must give the employee the right to appeal against this decision. However, the appeal can be conducted after retirement has taken place.

## 19 Failure to Follow the Notification Procedure

If the employer fails to serve notice of intended retirement on the employee by 6 months prior to retirement the employer can serve “late notice” up to 2 weeks before retirement. However, under these circumstances the employee could make a claim in the Employment Tribunal and the employer will be liable to pay the employee up to 8 weeks pay (capped at the statutory limit) for failure to comply with the procedure.

If the employer fails to notify the employee within 2 weeks of retirement (including the right not be retired etc) then the dismissal would be considered “automatically unfair” and an Employment Tribunal could make a full award.

Providing the employer has followed the procedure of pre-retirement notification (see letter appendix 1) duly considered any request not to be retired (see letters at appendixes 2 and 3) then the reason for dismissal will automatically be considered as retirement and the employer will be protected from a claim in the Employment Tribunal.

The message is clear! Employers must follow the pre-retirement notification procedure to gain protection from claims in the Employment Tribunal.

## 20 TRANSITIONAL RETIRMENT ARRANGEMENTS

Although the new Regulations come into force from the 1<sup>st</sup> October 2006 it is clearly not possible for employers to comply with the requirement to give 6 months pre-notification of retirement for people retiring between 1<sup>st</sup> October 2006 and the 31<sup>st</sup> March 2007. Transitional arrangements are in force for people retiring within this period and these are detailed in the Construction Confederation employment briefing September 2006.

## 21 NATIONAL MINIMUM WAGE

Nothing in the Regulations will alter the provisions of the national minimum wage. The exemption linked to the national minimum wage will allow employer’s using exactly the same age bands, i.e. 16 and 17, 18 to 21 and 22 and over, to pay at or above the national minimum rates provided those in the lower age groups are paid less than the adult minimum wage.

However, if an employer pays an employee aged under 22 more than the national minimum wage for an adult worker (£5.35 from October 2006) but less than adult workers doing comparable work the exemption will be lost.

## 22-25 STATUTORY SICK PAY (SSP), STATUTORY MATERNITY PAY (SMP), STATUTORY PATERNITY PAY (SPP) and STATUTORY ADOPTION PAY (SAP)

The upper age limit of 65 for all of the above statutory payments is removed from the 1<sup>st</sup> October 2006.

## 26 ACTS UNDER STATUTORY AUTHORITY

Age criteria are widely used in legislation, notably to qualify for various licences, serve alcohol etc. Where there this is the case the employer must follow the criteria laid down by statute and will not be contravening the age regulations by doing so.

## Appendix 1

### Letter informing employee of retirement date

Dear:

I am writing to inform you that your date of retirement will be *(date- last working day before reaching 65)* and that you have a right to request not to be retired.

I will give careful consideration to any request you make to work beyond this date and will inform you if I cannot allow you to continue working. I am not required by law to give a reason.

Your request not to be retired must be returned to *(Insert Name)* no later than three months before the date stated above *(date stated in first paragraph)*. Failure to do so will mean that you lose your statutory right to have your request considered and you will be retired on the retirement date above.

Name:

Signature:

Job Title

## Appendix 2

### Letter informing employee of meeting to discuss a request not to retire

Date & Address

Dear:

I am writing to inform you that after receiving your request not to be retired, there will be a meeting to discuss your request.

The meeting will be held on *(Date)* at *(time)* at *(location)*.

You have a right to be accompanied at the meeting by a fellow worker or a trade union representative. Your companion may be someone that you have chosen, but they must work for *(name of organisation)*. Your companion can address the meeting but not answer questions on your behalf although you may confer with your companion during the meeting.

After the meeting if it is decided to continue your employment beyond the intended retirement date of *(date)* you will receive written notification reflecting these agreed changes to your contract.

If no agreement is reached you will receive further notification confirming your intended retirement date and informing you of your right to appeal.

Name:

Signature:

Job Title

### Appendix 3

#### Letter informing employee of outcome of meeting requesting not to retire

Dear:

I am writing to confirm the outcome of the meeting held on *(Date)* following your request not to be retired.

*Refusal to continue:*

After much consideration we have decided that we will not be continuing your employment at *(name of organisation)* beyond the intended retirement date.

I must inform you that you have a right to appeal against this decision. This appeal must be submitted to *(Name)* by *(date- 7 days after receipt of the letter)*.

*Acceptance to continue:*

After much consideration we have decided that we will be continuing your employment at *(name of organisation)* beyond the intended retirement date. The following will be the new stipulations of your contract:

Name:

Signature:

Job Title