

## The New Age Discrimination Legislation

October 2006 saw the introduction of new legislation, the Employment Equality (Age) Regulations (Northern Ireland) 2006. Broadly speaking, these regulations prohibit employers, regardless of size, from subjecting its applicants and employees, including contract workers and former employees, to age discrimination and harassment. This legislation now applies equally to public and private bodies, and also on education and training providers.

While some forward thinking employers, in seeing the trends leaning towards clamping down on all forms of discrimination may have little changes to make to their policies, the majority of employers will need to re-evaluate a number of their practices. The Regulations are very broad and require employers to prohibit discriminatory practices in a number of areas including:

- Recruitment and selection
- Terms and conditions of employment
- Working environment (as this may extend to conduct and harassment)
- Access to employment related benefits
- Opportunities for promotion, training and transfers.
- The termination of employment, such as dismissal or redundancy.
- Post-employment situations, such as the provision of references
- Admission and attendance of further and higher education institutions.

Employers must also be aware that they can be held vicariously liable for the actions and words of their employees, even if these are not within the employer's knowledge, or resulting from the employer's instructions or guidance. In this regard, employers must be vigilant in imposing good business practices. It is important that employers and management, by both their words and actions demonstrate a genuine commitment to eradicating unlawful discrimination. This is

just as true of age discrimination as other forms. Comments that may have previously been considered innocent, such as joking that someone is "past it", "can't keep up at their age" or conversely is "wet behind the ears" may now give rise to legal liability and it is the employer who will bear this burden. Therefore, employers should create a workplace ethos and culture which fully integrates equality of opportunity, and in which all the employees understand clearly what is and is not acceptable. Employers can avoid liability if they show that they have taken such steps as reasonable possible to prevent any discrimination, and the employee deliberately violated this.



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### What are the changes?

In summary, the main changes are:

- 1) Individuals over the age of 65 can claim unfair dismissal
- 2) Employees over 65 are entitled to redundancy payments
- 3) Retirement can now be a fair reason for dismissal, provided that the proscribed procedures are adhered to.

Employers should also note that although the main provisions appear to relate only to the older end of the employment spectrum,

younger employees are also protected. As a practical example employers may have difficulties imposing requirements for a mandatory or desired number of years experience in job applications or promotions, as this may limit the lower age group of those who can apply.

### **What are the exceptions?**

There are circumstances when actions, decisions or policies that appear to be discriminatory on the basis of age will not be illegal. If there is a genuine occupational requirement that employees be of a certain age, then an employer may rely on that to justify their actions and policies. However, they must be able to demonstrate proof of this requirement, merely asserting it will not be enough.

The employer must be able to show that the discriminatory practice is no more than is strictly necessary to achieve their aim. The reasons for imposing an age limitation may include an economic justification if there are also other concerns, but a purely financial motivation will not be considered a sufficient reason for age discrimination by the tribunal. Therefore the employer who is seeking to reduce their margins using redundancies, and wants to make all their older employees redundant, may find themselves the defendants of an unfair redundancy action.

The other significant concern pertaining to genuine occupational requirements is that they must only, even in exceptional circumstances, affect recruitment provisions, training or promotion. There is no acceptable disparity in pay, terms and conditions of employment or benefits that can be justified by a genuine occupational requirement.

The only other frequent exception to the age discrimination regulations will be in circumstances where the regulations would in themselves violate a statutory provision and therefore be unlawful. This is most common in occupations where licenses are required such as driving.

### **What is the retirement procedure?**

The new legislation ensures that there are still fair ways to retire your employees, but only by adhering to a strict procedure. Any

deviations from this process may render an employer vulnerable to legal claims.

The employers' first step is to write to the employee between 6 and 12 months before the anticipated date of retirement. The default age at present for retirement is 65, and if an employers' policy is to have a retirement age that is lower than this, they may be called upon to justify that. Therefore, in general, employers will be informing the employees of their intention to retire them on their 65<sup>th</sup> birthday. At this time, the employee should be notified of their right to request to work beyond their 65<sup>th</sup> birthday and of the employers' intention to consider any request. If an employer fails to give this notice, then the employee may be entitled to compensation of up to eight weeks pay, capped at £280 per week. If an employee is not notified until two weeks before the retirement date, the dismissal will be automatically unfair.

If the employee desires to work beyond the anticipated date of retirement, the employee should write to their employer informing them of this intention three months prior to that date. This letter should also clarify whether the employee would like their employment to continue indefinitely, for a specified period or until a specified date. Once the employer has received this letter of request, they have a duty to hold a meeting with the employee to discuss the matter and must consider their request. Failure to do so could also result in an automatically unfair dismissal. Once the employer makes their decision, they should inform the employee in writing and inform them of the right to appeal that decision. Any appeal should be dealt with, if possible, by a different person who heard the original request. If these procedures are used correctly, an employer can still retire their employees fairly.

### **Conclusion**

Employers need to be aware of their responsibility to ensure good practices in the area of age discrimination. There are inherent benefits for the employer in doing so. A proactive approach in promoting values of diversity and equality will enhance the reputation of a business or employer, and enhance their attractiveness to customers and clients alike.