

Summer 2005

THE ESSENTIAL GUIDE TO  
**AGE DISCRIMINATION LEGISLATION**

Age discrimination in employment is unacceptable. Soon it will be unlawful. Employers get to see draft regulations this summer. This final consultation is your

# LAST CHANCE

to let Government know how practical their proposals are. This fact sheet helps you to get up to speed, fast.

*The* **Employers Forum on Age**  
[www.efa.org.uk](http://www.efa.org.uk)

Age discrimination in employment will become unlawful on the **1st October 2006**. This summer the Government finally makes public its proposals. Age laws will mean a major shake up in retirement practices, statutory redundancy and unfair dismissal laws. They will also impact on service related benefits, occupational pensions and of course recruitment, training and promotion policies.

Age discrimination is bad for business. These laws won't force you to employ someone who can't do the job, but they will – if the Government gets them right – make you focus on ability, not age.

**As an employer you need to take these laws seriously and you need to prepare as soon as possible.**

### Age laws will be complex

We have been working very hard on behalf of employers over the last few years to try to ensure age laws are 'employer friendly'. But it is very important you now take the time to consider the Government's proposals. The Employers Forum on Age (EFA) fear new laws may adversely impact on other well-intentioned policies and make life more difficult for individuals and employers.

This short summary will help clarify the key elements of the proposed legislation. We've also provided 'scenarios' to make it real and help explain what's going to change in the future.

Acas will be publishing guidance in 2006 when the regulations have been approved by Parliament. The Government is also introducing a Commission for Equality and Human Rights (CEHR) to help employers and individuals with age discrimination, but not until October 2007 (at the earliest). In the meantime the EFA is here to help employers wherever we can.

**Take a hard look at how these proposed laws will impact on your policies and practices. If you believe there are any serious practical problems with what the Government is planning – this is your last chance to comment. The Government need to know your views before the end of the consultation (October 2005).**

### Burden of proof

Rules governing burden of proof have changed. You may find yourself having to prove you didn't discriminate on the basis of age.

### The Government Approach

**Age laws will protect all workers from direct and indirect age discrimination. Harassment and victimisation will never be allowed. Workers of all ages will be protected but age laws will allow for different treatment in limited circumstances.**

The Government has decided to approach this in three different ways. For clarity, in this leaflet, we're using green, amber and red to highlight risk in different policy areas.

'Green' means the Government has decided to allow you to maintain this policy (the Government will take responsibility for defending the policy if challenged).

'Amber' means you will be able to continue with the policy, though you may have to make reference to a 'legitimate aim' if the policy is challenged. But – and this is the important part – the Government's intention is that you won't need to provide evidence to back this up.

'Red' means you will only be able to continue with this policy or practice if you can give a good reason – legitimate aim – and provide evidence that the policy is 'proportionate' (the EU Directive's 'appropriate and necessary').

The Government isn't going to list specific legitimate aims and plans to leave it up to you (as an employer) to come up with suitable reasons for treating people of various ages differently<sup>2</sup>. But they have already indicated that 'cost' alone will not be considered an acceptable reason. This means an employer won't be able to refuse to employ, insure or provide other benefits to a person, just because their age may make them more expensive.

For example, this will impact on all employers who don't offer health insurance to employees above or up to a certain age because the insurance premiums are higher (usually for those below 25 or above 65)

**Will this be an issue for you? If insurance costs will discourage you from recruiting or retaining younger or older workers, you need to tell the Government.**

## Retirement

It is no secret that the Government wants to encourage people to work for longer and had something of a dilemma over the question of mandatory retirement. They now propose a compromise – a default retirement age at 65 and a 'Duty to Consider' allowing an individual to work beyond the default age.

The Government hopes the success of the flexible working legislation for parents will be replicated to give extended working and more flexibility in retirement for older workers.

If an employer wants to retire someone (either before, at or after the default retirement age) they will need to follow a set procedure. The Government calls this **'planned retirement'**.

If an employer wants to retire someone below the default retirement age of 65, they will have to objectively justify it. This is likely to prove difficult for many employers<sup>3</sup>. They will also have to follow the planned retirement procedure.

For retirement at or above the default retirement age (65), **an employer can only be challenged if they have not followed the correct procedure.** They cannot be challenged on the final decision itself.

### The proposed 'planned retirement' process

- An employer must give at least 6 months (but not more than 12 months) notice in writing to any employee they wish to 'retire'.
- At that time the employer should notify the employee that they have the right to request to work beyond the employer's retirement age and that the employer has a 'Duty to Consider' this (based on – but not exactly the same as – existing flexible working arrangements for parents of young children).
- Any employee must make their request to continue working beyond retirement age between 12 months and 6 weeks prior to their retirement date.
- The employer must meet the employee to discuss this – and let the employee have a decision **within 2 weeks of this meeting.**
- The employee has a right to appeal (within two weeks of hearing from their employer).
- If the process is still underway when the employee reaches retirement age, the employee can continue in employment until the decision is finalised.
- If the process is not carried out properly the employee can claim unfair dismissal.

- An employee has the right to **one** request and **one** appeal; but
- The entire process can be repeated towards the end of each re-negotiated retirement age extension (there is no limit on the number of extensions), so if an employee stays on (with their employer's agreement) to 66, they can then make a request to stay on further.

**Note:** Existing statutory dismissal procedure will not apply to retirement dismissals as long as the 'Duty to Consider' process is carried out correctly.

The success of this policy will be reviewed by the Government in 2011. At this point the default retirement age may be retained, raised or removed.

It is likely Employment Tribunals will pay careful attention to ensure the 'planned retirement' process is not abused to facilitate a redundancy programme or performance dismissal<sup>4</sup>.

**How practical is this approach? Are you confident you can manage planned retirement on this basis? The Government needs to know if this process is workable.**

### Complying with age rules in other legislation

You will be able to discriminate against age groups that are excluded from certain jobs by other laws e.g. health and safety. To do this you will just have to make reference to the relevant legislation – you won't need to provide other evidence.

For example, you will be able to refer to laws which protect younger people from working with certain equipment or selling alcohol.

### Recruitment, Training and Promotion

Genuine Occupational Requirements' (GORs) are allowed. However, the only age related GOR identified so far is acting, and the EFA believe there will be very few circumstances where a Genuine Occupational Requirement can be cited.

You won't be able to advertise for<sup>5</sup>, employ, train or promote somebody on the basis of their age in other circumstances unless you can provide a good enough reason (legitimate aim). If challenged you'll have to provide evidence to support your decision, and you'll have to show that your decision was appropriate and necessary.

This will have a major impact on your policies because most lawyers believe it will be extremely difficult to provide satisfactory evidence to support any legitimate aim.

For example, you might choose to argue you couldn't recruit an older person because you already have an 'older' age profile in your business/team and you want to groom a new employee to replace someone who is due to retire (succession planning). In this case you will have to provide evidence that succession planning works effectively in your organisation. You'd probably need to have statistics analysing retention rates by age.

Trying to prove age is an essential requirement will prove difficult and costly. And for good reason: age is rarely the real issue. EFA recommend employers do not seek to justify age based practices in recruitment, training and promotion unless the circumstances are truly exceptional.

**If you have a policy you might seek to justify, what supporting information will you need in legislation guidance?**

### Pay and Service Related Benefits

Pay and non-pay benefits based on age will not be allowed unless objectively justified<sup>6</sup>.

Making service related benefits exempt from legislation was essential to EFA members from a purely practical perspective. Employers and employees both like these policies and EFA do not believe age legislation should require employers to unravel reward arrangements that everyone wants.

Service related benefits because of their inevitable link to 'time', are all potentially indirect age discrimination. But employers and employees want to retain these policies which they feel reward loyalty and service.

**The Government does not propose to make all service related pay/benefits completely exempt.**

Employers will be able to retain any service related pay or benefits up to 5 years (continuous/non-continuous) service.

Employers will be able to retain any service related benefits that mirror statutory requirements (e.g. redundancy).

Employers will have to provide a legitimate reason for providing any pay/service related benefits which extend beyond five years. For example: Sickness benefit scales often increase beyond 5 years and employers also offer awards at 10, 20 or 30 years service.

The most likely reason employers will provide in this case is 'rewarding loyalty'. **You won't have to provide evidence for this<sup>7</sup>.** This approach is meant to prevent employers abusing the exemption by, for example, removing benefits after specific time periods of service!

For example, offering additional leave at age 60 (or perhaps lighter duties) would be unlawful while providing additional leave (or lighter duties) after 30 years service would probably be lawful.

**Does this approach work for you?**

### Redundancy

Redundancy selection based on age will be unlawful.

The following changes will be made to the statutory redundancy payment scheme:

- Age related criteria in redundancy awards will be removed (this includes the age multiplier and lower age limits)
- The upper age limit (65 or NRA) will be removed
- The tapering down rule will be removed
- Maximum compensation at 20 years service will be retained
- Service criteria will be retained

For example, redundancy schemes will no longer be able to offer a 45 year old higher compensation than a 35 year old. Nor will they be able to operate last in, first out policies (which would probably indirectly discriminate against younger people)

The Government has not yet decided on the method of calculating compensation based on service criteria. They may choose to 'average out' compensation or to 'level up' so everybody receives the highest rate. **Employers may be able to influence this decision in the consultation.**

**What are your views on how the Government should calculate compensation?**

- 1 Indirect discrimination means any policy which potentially disproportionately disadvantages any age group could be unlawful.
- 2 In the last consultation the Government had proposed 5 specific legitimate aims against which employers could justify policy. They have subsequently decided not to list aims but to leave it up to employers.
- 3 This is a high risk strategy. No mechanism is in place to enable an employer to check their retirement age is lawful. This means if your retirement policy is successfully challenged, you will have little time to adjust all other employment policies which rely on your retirement age.
- 4 The EFA believe this could cause employers problems as the only route an employee would have to challenge a 'no' decision would be to argue their dismissal was not 'planned retirement' but redundancy or performance based.
- 5 Using expressions like 'mature' or 'young' could put you at risk of discrimination claims, also asking for inappropriate levels of experience (indirect discrimination).
- 6 The Minimum Wage is an exception to this. Employer pay scales which are based on minimum wage age groupings i.e. different rates for those below 18, between 18 and 21 and 22+ are also likely to be allowed.
- 7 This approach may be subject to case law.

## Occupational Pensions

Occupational pension schemes are full of age related criteria. The Government is keen to protect occupational pensions and has therefore chosen to make the vast majority of direct/indirect age elements in pensions effectively exempt. They have provided a list of all pension scheme exemptions. You will need to get your pension experts to check that everything you do is on this list. **If things you do aren't on the list, let the Government know!**

If something you do that is age-based doesn't appear on the list, you will have to justify it and provide evidence it is appropriate – without reference to cost i.e. the argument 'it is simply too expensive'.

The Government's pension proposals mean you can still operate:

- Different schemes for different employees  
For example, if you operate two schemes e.g. a defined benefit scheme for existing employees and a defined contribution scheme for new entrants, this will be lawful.
- Age limits on entry and exit from a scheme  
For example, this means employers can still operate schemes which require employees to leave the scheme at 60 (even though they may continue working with you until 65+).

This means employers do not have to worry about:

- Schemes they have closed to new entrants
- Defined benefit schemes which close at 60 (despite employees potentially working past this date)<sup>8</sup>

**Will this enable you to continue to operate your pension scheme?**

## Unfair Dismissal

Changes will be made to unfair dismissal legislation. This means people in the workplace over 65 will be protected against unfair dismissal.

For example, you won't be able to treat a 77 year old any differently to a 37 year old. If you want to dismiss someone over 65 you will have to make them redundant or follow a poor performance procedure.

'Planned retirement' at or above the default retirement age (65) and justified retirement ages (below 65) will be regarded as 'fair dismissal'.

**Do you think employers (and employees) will appreciate the difference?**

## Positive Action

Age laws will allow for positive action to address age imbalance, but positive discrimination will be unlawful unless objectively justified.

For example, a graduate recruitment scheme requiring individuals to have graduated within the last two years in a non-vocational degree would probably be unlawful, even if the organisation argued that they needed to bring in younger people to address an older age profile. Asking for people to have graduated in the last 2/3 years indirectly discriminates against older people.

For example, advertising in a magazine with an audience of older people would not be unlawful as long as applicants from younger age groups were also considered for the job.

**Do employers need more clarity here?**

## Employer Guidance

In your response to this consultation you should make clear what you need to see in the age guidance, and you should urge Government to produce guidance as soon as possible.

## Age laws – at a glance

- No direct age criteria in redundancy
- No mandatory retirement before 65 (unless justified)
- New processes required to manage retirement for everyone
- No upper age limits on unfair dismissal
- No age criteria in pay and benefits (unless justified)
- Service related benefits generally allowed
- Pension schemes in most respects exempt
- No age criteria in recruitment, promotion and training allowed (unless justified)

EFA will be producing guides and support for members outlining what you need to do to prepare for age laws as soon as the regulations are agreed by Parliament (likely end 2005/beginning 2006) In the meantime EFA run workshops and masterclasses for employers to help them to prepare.

**8 The EFA would recommend employers have a new/different scheme available for those employees who will have to leave the scheme before or after the default retirement age to avoid potential claims based on a 'loss' of benefits.**

**WHAT NEXT** In addition to responding to the Government's consultation, or letting EFA know so we can raise concerns on your behalf (email [efa@efa.org.uk](mailto:efa@efa.org.uk)), you need to:

- Audit your employment policies for age bias
- Remove age elements in policies wherever possible
- Introduce a 'no tolerance' policy on ageist behaviour well before October 2006 (you can't change ageist attitudes overnight!)
- Roll-out an age discrimination awareness training programme for employees
- Sit down with employee representatives to decide how to best unpick age from existing contracts and agreements (employees need to understand why you are making changes to their terms and conditions. Age laws will supersede contract laws)
- Develop a system for analysing staff surveys and monitoring employee information by age to help you identify potential problem areas
- Review your pension scheme and retirement policies.

If you are an employer, and not a member of the Employers Forum on Age, please consider joining. We can help you prepare for the age laws.

Do take part in the consultation. Use the EFA age audit tool and make use of our help line (0845 456 2495). We are here to support you.

Read this, then read the [Government's consultation document and draft regulations](#)

[www.dti.gov.uk/er/equality/age](http://www.dti.gov.uk/er/equality/age)

**Disclaimer:** This fact sheet is EFA's interpretation of the Government's proposals. You should take legal advice and refer to the Government consultation documents when responding to this consultation and preparing your business for age laws.

## The Employers Forum on Age

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The EFA is the first ever employer-led initiative to promote the business benefits of an age diverse workforce. The EFA is the leading authority on age issues in the workplace and offers expert advice and support to employers on managing skills and age-mix of their organisation. The EFA provides an external voice for employers, while promoting this crucial business issue. The EFA is supported by over 180 forward thinking employers.

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