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Age Discrimination

On 1 October 2006, the Employment Equality (Age) Regulations 2006, one of the most far reaching pieces of legislation this century came into force to prevent discrimination against workers, employees, job seekers and trainees on the basis of their age.

Its importance is underlined by the fact that nearly a third of all workers will be over the age of fifty by 2020, which means that businesses increasingly need to recognise the benefits of age diversity in the workplace.

Unfortunately, a recent survey of over 150 organisations indicates that most businesses are not prepared for the changes. Employers need to ensure they have the appropriate policies and procedures in place to deal with age discrimination and should raise awareness of it so that acts of discrimination on the grounds of age can be prevented.

Direct and indirect discrimination

Both direct discrimination (treating someone less favourably because of their age or because of the age they appear to be) and indirect discrimination (having a policy or practice which puts people of a certain age at a disadvantage, compared with other people) are unlawful.

An example of direct discrimination would be where someone with all the skills and competencies to undertake a role is not offered the position just because they completed their professional qualification 30 years ago. Other examples could include refusing to hire a 40 year old because of a company's youthful image, not providing health insurance to the over 50's and not promoting a 25 year old because they may not command respect.

A business requiring applicants for a courier position to have held a driving licence for five years is likely to be guilty of indirect discrimination. A higher proportion of people aged between 40 and above will have fulfilled this criteria than those aged 25. Other examples of indirect discrimination could include seeking an 'energetic employee', requiring 30 years of experience or asking clerical workers to pass a health test.

Unlike other forms of anti-discrimination legislation, however, age discrimination can be objectively justified if it is both proportionate and necessary. For example, an employer might argue that it was appropriate and necessary to refuse to recruit people over 60 where there is a long and expensive training period before starting the job. However, cost by itself is not capable of justifying such an action.

Harassment

Harassment on the basis of age is equally unlawful. For example, a mature trainee teacher may be teased and tormented in a school on the grounds of age during the teaching experience. If no action is taken by the head teacher, this may be treated as harassment. An employee may be written off as 'too slow' or 'an old timer'. This too could be seen as harassment.

Recruitment

Employers must be aware of the significance of the legislation at all stages in the recruitment process and to avoid breaking the age rules they should consider:

- removing age/date of birth from adverts for example: 'Trainee Sales Representatives.... envisaged age 21-30 years'
- reviewing application forms to ensure they do not ask for unnecessary information about periods and dates

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- avoiding asking for 'so many years of experience' in job descriptions and person specifications for example: 'graduated in the last seven years'
- avoiding using language that might imply a preference for someone of a certain age, such as 'mature', 'young', 'energetic' or 'the atmosphere in the office, although demanding, is lively, relaxed and young'
- ensuring that other visible methods are used to recruit graduates as well as university milk rounds, to avoid limiting opportunities to young graduates
- focusing on competencies to undertake a role and not making interview notes that refer to age considerations
- never asking personal questions nor make assumptions about health or physical abilities.

Service related benefits

Employers are allowed to use a length of service criterion in pay and non-pay benefits of up to five years' service. Benefits based on over five years service are also allowed if the benefit reflects a higher level of experience, rewards loyalty or increases or maintains motivation and is applied equally to all employees in similar situations. It is for the employer to demonstrate that the variation in pay/benefits over five years can be objectively justified.

Employers are recommended to review their pay and benefits policies now to ensure that they are based on experience, skills and other non-age related criteria.

Redundancy

The existing statutory payment provisions remain in place. Employers can, as before, pay enhanced redundancy payments. However, to avoid discriminating, employers should use the same age brackets and multipliers as used when calculating statutory redundancy pay.

Retirement

An employer must give an employee notice of their intention to retire them, the intended retirement date and the employee's 'right to request' to continue working past the intended retirement date. This notice must be given not more than one year and not less than six months before the intended retirement date.

Employees have the right to request to work beyond 65 or any other retirement age set by their employers. Employers have a 'duty' to consider such requests and to hold a meeting with the employee to discuss the request.

The recent Heyday challenge (part of Age Concern) brought an application in the High Court challenging whether the mandatory retirement age of 65 in the Employment Equality (Age) Regulations 2006 is incompatible with the EC Equal Treatment Framework Directive. This has now been referred to the European Court of Justice (ECJ). This process should establish whether the scope of the Directive extends to the UK rules which allow employers to dismiss employees aged 65 or over by reason of retirement. A decision is expected in autumn 2009.

The government has said it will review the default retirement age in 2011.

Action for employers

Employers need to undertake the following to ensure that they are not breaking the law:

- review equal opportunities policies
- review employee benefits
- review policies and procedures on retirement
- undertake equal opportunities training covering recruitment, promotion and training.

How we can help

We will be more than happy to provide you with assistance or any additional information required.

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