

Employment Equality (Age) Regulations 2006

On 1st October 2006, the Employment Equality (Age) Regulations 2006 came into force.

The regulations cover the whole life of the employment relationship from recruitment, terms and conditions and promotion to termination and the provision of references. It is therefore essential that employers consider the implications of this legislation as soon as possible.

The law covers employees, contract workers, agency temps, casual workers, unpaid volunteers who are volunteering as part of a course, freelancers who provide their services personally, directors, non-elected office holders and partners in firms.

The law covers age discrimination in employment and in training and education.

What is age discrimination?

Age discrimination can affect old or young people. Examples of misconceptions could include;

- Older employees are more likely to take time off for health reasons
- Younger candidates have more energy and ambition

In line with the other anti-discrimination laws, the age discrimination regulations defines four different forms of discrimination:

Direct discrimination: treating someone less favourably because of their age or because of the age they appear to be.

Indirect discrimination: having a policy or practice which puts people of a certain age at a disadvantage, compared with other people.

Harassment: unwanted conduct on the grounds of age, which has the purpose or effect of violating a person's dignity, or creating an intimidating, humiliating or offensive environment for that person.

Victimisation: being treated unfairly as a result of making a complaint of age discrimination.

Under the new law, direct and indirect discrimination are unlawful unless the employer can justify the discrimination on the grounds that it was appropriate and necessary or that an exemption applies. The government has said that it will not be easy for employers to justify any discrimination.

There are a number of exemptions set out in the new law. These mean that in certain circumstances, employers will be able to discriminate on the grounds of age, without having to justify it.

Length of service benefits: If the length of service required is less than 5 years it is automatically lawful, without the employer having to meet a business need test. This applies, for example, to increment payments. (See below).

Genuine Occupational Requirement: an employer can set an age requirement for a job if there is a genuine need for a person to have a characteristic related to a certain age

Statutory authority: An employer can discriminate on grounds of age if existing law requires this.

Positive Action: entails doing something to prevent or compensate for disadvantages experienced by people of a certain age group. This is allowed in 2 areas:

- 1) for access to training and education facilities and
- 2) to encourage people to take up employment opportunities

Recruitment over 64.5

Employers can refuse to hire someone who is over the age of 64.5 or over the employers normal retirement age; whichever is the higher, without having to justify this.

Retirement/State pensions

There is no retirement age. There is a state pension age of 60 for women and 65 for men. The new law does not affect state pension age and employees do not have to retire at this age.

Contracts

There is no need to remove a retirement age from your contract of employment (unless it is under 65). Contracts should be adjusted to give employees guidance of their right to request not to retire (see below).

Retirement under age of 65

The new law has introduced a new default retirement age of 65 (this is the same for both men and women). ***This means that employers cannot force employees to retire under the age of 65.*** If they do, the employee is eligible to claim for age discrimination and unfair dismissal. Employers can only justify forced retirement under the age of 65 in exceptional circumstances. The new law does not affect voluntary retirement. It is still possible for a person to choose to retire under age 65 if they wish to do so.

Retirement over age of 65

If an employer wants an employee aged 65 or over to retire, the employer must give the employee a minimum of 6 months (and maximum of 12 months) notice of retirement. At the same time, the employer must tell the employee that they have the right to request to continue working.

“Duty to consider” procedure

If the employee makes a request not to retire, the employer has a duty to consider that request.

The new right is only a right to request staying on. The employer can refuse the request and the law does not require the employer to give reasons for their decision.

If a request to retire is not granted, then an employee has the right of appeal.

Unfair dismissal

The upper age limit of 65 for claiming unfair dismissal has been removed.

The change means that employees over the age of 65 are able to challenge an employer’s decision to dismiss them. But the introduction of

the default retirement age creates a limit to this new right where the employer says the reason for dismissal is retirement.

Redundancy

The upper age limit for a redundancy payment has been removed. This means that all employees, including those over 65, are entitled to statutory redundancy pay if the reason for their dismissal is redundancy.

Age and length of service can still be used as a factor in calculating statutory redundancy pay (and compensation for unfair dismissal).

Statutory sick Pay

The upper age limit of 65 for payment of Statutory Sick Pay is removed. This means that people who are still working after age 65 are entitled to SSP for up to 28 weeks, in the same way as other workers.

Adult learning

The new law makes it unlawful for education and training course providers to discriminate against people on the grounds of their age.

Recruitment

In terms of recruitment the law has specific effects on practice. Employers should take care with recruitment advertisements, ensuring language that may discriminate is not used. For example, asking for someone who is 'mature' or someone 'youthful' or 'energetic'. Be sure instead to ask for abilities that match the requirement for the job. Avoid language that might deter someone of a specific age from applying. Job advertisements that specify ages are, in most cases, unlawful. Employers should avoid specifying a minimum/maximum length of experience, and should advertise in a cross section of media to ensure reaching all age groups.

Person specifications and job descriptions need to match the requirements of the job. Employers should avoid requirements that could unnecessarily exclude people on the basis of their age.

Employers should ensure questions raised about age for monitoring purposes are on a separate monitoring form.

Clearly an employment panel can work out a candidate's age by looking at their employment history. Age can never be completely eliminated from the recruitment process, but the amount of age-related information requested can be minimised.

Employers should ensure that staff who are responsible for shortlisting,

interviewing and selecting job applicants aren't basing their decisions on age biases and assumptions.

Workforce Age Imbalances

Theoretically when recruiting, an employer can favour younger or older candidates (as appropriate) in order to address age imbalances in my workforce. However, taking this action will always be hazardous, as an employer will need to provide an objective justification in terms of business need, which is permissible under the regulations. However, an employer doing this should give it careful consideration and record the reasons for their decision, in case an unsuccessful candidate later claims unfair treatment.

Conditions of Employment

It is illegal to impose a contractual term that depends on age.

Increments

Many employers pay increments based upon length of service. It is legal to do this for a limit of five years. Beyond this an employer has to prove there is an objective, and proportionate, business need. An employer would need to produce robust evidence to objectively justify their use. Evidence that might be acceptable includes evidence of improved morale or staff retention.

Capability

It is illegal to use age as a proxy for capability. Some jobs require a great deal of strength or dexterity; or quick reaction times; or may be difficult for people with particular health problems. However, if a particular job has specific physical requirements, these should be specified and appropriate tests should be applied to all applicants, whatever their age, and adjustments and appropriate support given where practicable

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LVSC's Personnel, Employment Advice and Conciliation Service

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