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## Age Discrimination

### A. Background

The Employment Equality (Age) Regulations 2006 [SI 2006/1031] came into force on 01 October 2006. [Abbreviation - “EEAR”]

EEAR substantially follow the pattern of the latest discrimination regulations (i.e. on sexual orientation and on religion).

Key elements to the new rules are:

- **direct** and **indirect** discrimination, **victimisation** and **harassment** are all covered by the Regulations
- justifying **indirect discrimination** requires the employer to show the “provision, criterion or practice” that has the discriminatory effect is “a proportionate means of achieving a legitimate aim”
- **direct discrimination** can also be justified, if it is “a proportionate means of achieving a legitimate aim”. [This is not paralleled in other discrimination provisions.]
- where “possessing a **characteristic related to age** is a genuine and determining occupational requirement”, discrimination is allowable where it is proportionate “having regard to the nature of the employment or the context in which it is carried out”
- **contract workers** are covered, in the same way as with other discrimination legislation
- there are substantial provisions relating to retirement and pension schemes and dismissals within a year of retirement. [Click here](#) for a link to our retirement download .
- the age limit for claiming **statutory redundancy pay** (formerly 65) was removed, as were the tapering provisions (from 64 onwards) and the lower age limit (formerly service under 18 did not count). The age related multipliers will remain.
- the concept of **service-related benefits** IS allowed for by EEAR
  - benefits may be awarded on a ‘**length of service**’ taking into account **up to five year’s service** (subject to rules on eligibility and comparability) AND

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Age Discrimination - the new regulations - checklist

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- where two individuals **both** have **more than 5 years' service**, a benefit differential in favour of longer servers can be justified in limited and specific circumstances - **take advice** if you want to do this or continue to do this.
- length of service may mean length of service with the employer, or length of service in the same or similar jobs
- exceptions are also provided to allow for more generous benefits to replace statutory benefits - e.g. redundancy payments in excess of statutory entitlement, or statutory payments made notwithstanding that the individual does not fulfil the statutory service criterion. Employers who mirror the statutory scheme in their own schemes may be OK, but you should take advice before paying age related top up redundancy payments
- the Regulations provide for a 'discrimination questionnaire procedure'
- the employment tribunal has jurisdiction to hear complaints. There is a 3 month time limit from the act complained of in which to bring a claim. ***As with other discriminations, the 'inference test' effectively places the burden of proof on the employer to disprove age discrimination if the primary facts suggest that it could be a factor***

## B. Review points

- In the early stages of the **recruitment** process, assumptions about age will be very costly. Care will be needed in drafting advertisements (both internal and external), and in avoiding discriminatory elements in candidate specification.
- Dealing with **recruitment agencies**:
  - ensure that managers do not give discriminatory instructions, on or off the record, to agencies
  - make sure that agencies you use regularly know that discriminatory instructions, if given, are not to be followed
- Consider adopting a 'data protection' style test for the collection of 'age' information, i.e.
  - a) what do we need this information for? and
  - b) when is the latest point at which we need it?

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If you have not asked for nor been given 'age' data, then it will not be possible for you to have taken age into account when making a decision - thus ensuring that you cannot have breached the regulations!

But this may be difficult in practise - given the number of points where you do in fact need to know someone's age - or at least, age range. For example, in order to comply with the Working Time Regulations, you need to know whether or not a worker is over 18, as there are different limits set by age.

- **Application forms:** you do NOT need to include 'date of birth' on a form for application for employment, as you do not need the information to decide whether or not to interview. It will be necessary to collect date of birth information for employees - possibly on 'new starter' forms, or, preferably, on a separate 'monitoring' form (where you could also collect race, gender and other potential 'discrimination' data). On age, you do need to know when people are coming up to age 65!
- the key issue is to ensure that your 'decision criteria' - whether in relation to recruitment, promotion, training, discipline, dismissal or any other work-related issue - are objective, business related, and not influenced by age. This parallels the requirements in relation to keeping on the right side of other discrimination rules.
- you could seek to exclude the apparent acquisition of 'age data' by using devices - e.g. only asking for the latest qualifications. Application forms often get pretty close to a 'life history', which inevitably give one a pretty good idea of an individual's age. . The key point here, is to make the judgement about your forms explicitly. If your application form remains as it has been because "it's always been that way", then you are at risk. **Take advice** if you have not recently reviewed your application forms.
- **appraisal and training paperwork** may also have subtle 'age clues' built into them. Give them a quick check to ensure that this is avoided as far as possible. But, as with recruitment and promotion decisions, the key aspect here is always going to be the objective assessment against business-related criteria. If you get the positive parts right, the negative ones will not get a look-in!
- your **pension scheme trustees** should be taking independent advice about the requirements in relation to them. We are only looking at the employment law issues here.

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- **Pay systems:** To the extent that you have any service-related increments to pay, you should have a paper trail on file that shows that you have made an explicit assessment against the EEAR reg 32(2) test [ ... reasonably appears ...to fulfil a business need of the undertaking ...].

If you have service-related increments, it may however be advantageous to review whether you want such increments in place at all. I believe pay should be linked to job outcomes as far as possible - it helps in motivating individuals towards achieving the organisation's goals, and such an approach normally ensures that 'equal pay' problems do not arise. Service is an objective factor in pay, but length of service in a job does not necessarily correlate to improved performance. Where one person may have fifteen years' experience, another may have one year's experience repeated fifteen times! Those are usually worth different amounts of money.

## C. Checklist

### Documents to review:

- application form:
  - to remove 'date of birth' question;
  - to consider whether the full dated history of education and employment is necessary or relevant in your context
- 'starter' form or equivalent
  - to consider whether this document should contain 'age' data
- Employee Handbook - many organisations already include 'age' as one of the non-discrimination criteria. The 'Retirement' section will need an overhaul.
- 'manager guidance' documents
  - on recruitment: amend to highlight the importance of avoiding age-related assessments and/or language;
  - on appraisals: amend to highlight the importance of avoiding age-related assessments and/or language;
  - on disciplinary/grievance procedures : amend to highlight the importance of avoiding age-related statements; in relation to discipline, to highlight the importance of taking advice from HR in the case of any dismissal in the 12 months before retirement age, due to the possibility of findings of unfair

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  - dismissal because of the statutorily-implied reason for dismissal
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  - consider whether your personnel database can be interrogated to show the age profile of your employees. If it can, run some reports to see if anything shows up as a result that could indicate the previous use of age as a recruitment/promotion factor.
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  - pension documents will also need a careful review by your pension advisers.
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  - Processes to review:

    - manager training courses/material - to ensure that awareness of statutory age discrimination rules is in place before Oct 2006
      - equal opps training material needs to highlight the introduction of statutory age discrimination, including harassment protection
      - discipline and dismissal material will need careful updating to take account of the provisions about 'close to 65' dismissals - which are going to set up a 'manager-trap' unless carefully dealt with
    - recruitment packs/guidance
      - job advertisement standards - internal and external: to remove age-related language; eg age range, 'young'
      - ensure that the focus is clearly on job need and job outcomes; review the extent to which current and recent 'person specification' documents have in fact had 'ageist' elements
      - consider separating personal details when sifting job applications, and only recombining at interview time [this also helps avoiding other '-isms']
    - pay and benefit systems
      - check for service-related elements
      - review for compliance with the Regulations
      - prepare and keep on file a 'benefit assessment' (a positive version of a risk assessment!)
    - redundancy
      - review Company redundancy payment arrangements against the detail of the Regulations

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- retirement and pre-retirement materials and support. [Click here](#) for a link to our retirement download .

## D. Conclusion

The principal issues for review in relation to age discrimination will be 'manager practice'. If 'age' is already a contractual non-discrimination criterion, and managers are well trained on your equal opportunity policy and practices, then there may not be too much 'upgrading' to be done.

Christopher Head  
Christopher Head  
Director  
Irenicon Ltd  
20 November 2007

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