

Abolition of the Default Retirement Age (DRA) on 6 April 2011 – are you ready?

Subject to parliamentary approval the draft Employment Equality (Repeal of Retirement Age Provisions) Regulations published on 1 March 2011 will come into force on 6 April 2011. However, employers wishing to rely upon the transitional provisions must act before that date.

Assuming that the draft Regulations are enacted as drafted, some of the main changes for employers will be as follows.

The statutory retirement age and the procedures for retiring employees will be revoked as there will no longer be a default retirement age and retirement because of age will cease to be a potentially fair reason for dismissal.

Unless the transitional provisions apply (see below), any dismissal for the reason of retirement on or after 6 April 2011 will constitute –

- age discrimination (unless objectively justified as a proportionate means of achieving a legitimate aim); and
- unfair dismissal (unless justified as above, in which case the dismissal will be for 'some other substantial reason', subject to a fair procedure having been followed).

It is likely to be very difficult for most employers to objectively justify what ACAS has called an 'Employer Justified Retirement Age'. Even if they are able to do so from a general point of view, they may well find that they need to go further to establish that the general justification did in fact apply to the individual circumstances of the retired employee. It is an area fraught with difficulties and until there is case law to clarify the position employers should tread very carefully and take legal advice.

The potential consequences of getting it wrong are very serious. Awards in discrimination claims are uncapped and Tribunals are likely to take a 'whole of life' approach to loss of earnings on the basis that there is a real risk that older claimants (despite the legal protection they have) will never find alternative employment.

The transitional provisions

These will apply if the following conditions are met –

- (1) written notification to retire is given by 5 April 2011 (whether proper notification of not less than 6 months and not more than 1 year, or 'short notice' of not less than 14 days); and

(2) the person will attain the age of 65 (or the contractual retirement age if higher than 65) by 30 September 2011; and

(3) the procedures under the Equality (Age) Regulations 2006 are followed.

The transitional provisions will also apply if the contractual retirement age is lower than 65 (and is objectively justified as a proportionate means of achieving a legitimate aim), subject to conditions (1) and (3) above. The Regulations do not stipulate whether the employee in these circumstances is required to attain the contractual retirement age by 30 September 2011 but it is assumed that this requirement also applies in the same way.

Under paragraph 5 of Schedule 6 to the Equality (Age) Regulations 2006 an employee who is given notification to retire is entitled to request to work beyond the intended retirement date (within a specified time frame). The transitional provisions provide that no such request may be made on or after 5 January 2012.

The transitional provisions may appear relatively straightforward, but there are numerous pitfalls for employers (some of which are as follows) and those wishing to rely upon them should take urgent legal advice.

The procedures under the Equality (Age) Regulations 2006 are considerably more onerous than many employers appreciate and a case on this issue is making its way through the Employment Appeals Tribunal at the moment. Until there is further guidance from the Tribunal, employers should ensure that notifications are drafted as fully as possible (including expressly referring to paragraph 5 of Schedule 6 to the Equality (Age) Regulations 2006, and setting out the requirements of that paragraph for the employees' benefit, including highlighting the need for the employee to expressly refer to paragraph 5 when making a request to work beyond the intended retirement date) and that all aspects of the procedures are followed.

An employer can agree an extension to the intended retirement date of up to 6 months without having to issue a fresh notification to retire. Since it will be impossible to issue any notification to retire under the Regulations after 5 April 2011 it is strongly advisable that employers do not agree to extensions of longer than 6 months since this will prevent the employer from being able to compulsorily retire such employee.

There is debate amongst legal professionals as to what the last possible date of compulsory retirement is, in respect of an employee who is given 12 months notification to retire on 5 April 2011, and whose request to work beyond the intended retirement date has been granted for 6 months. The dates which have been suggested are 3, 4 and 5 October 2012. If the wrong date is relied upon this could invalidate the transitional provisions and the employer could lose the right to compulsorily retire the employee. Until the debate is conclusively resolved it is advisable that employers work on the basis

of the earliest of these dates, i.e. 3 October 2012, and should not agree to extend the retirement date beyond this point.

Employers which have already given notification to retire to employees who will not have attained the relevant age by 30 September 2011 or which have agreed to an extension of more than 6 months where the requirement to issue a fresh notice of intention to retire will arise after 5 April 2011, should take urgent legal advice.

What should employers do?

- decide whether they wish to rely upon the transitional provisions (even if as a precautionary measure) and if so, urgently review their workforce and take legal advice
- decide whether they wish to adopt an 'Employer Justified Retirement Age' from 6 April 2011 and if so consider what this might be and how it might be justified as a proportionate means of achieving a legitimate aim, ensuring that legal advice is taken
- review and amend contracts of employment, policies and procedures and communicate changes to employees
- provide training to HR and line management.

Free breakfast briefing

In May we will be running a free breakfast briefing in central London which will explore in more detail the challenges facing employers and how you might best respond.

To register your interest, or for further information, please contact Sophie Morrison – smorrison@levenesemployment.co.uk or 020 7148 7859.

If you are an employer we can –

- identify areas where you may be at risk and help you to address them
- support you with advice on day to day and major issues
- defend you against employment related claims
- revise your employment documentation and procedures
- provide training to your staff
- improve your health and safety compliance
- keep you informed on developments in the law and best practice
- draft compromise agreements for you to give employees and negotiate with their representatives.

If you are an employee we can –

- bring any employment related claims for you
- negotiate an exit from employment for you on favourable terms
- help you with any issues arising during your employment
- advise you on contractual documentation
- advise you on compromise agreements and negotiate improved terms.

For further information

Please call us on 020 7148 7850 or email info@levenesemployment.co.uk.

Alternatively please contact Audrey Onwukwe directly on 020 7148 7851 or aonwukwe@levenesemployment.co.uk.

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