

**THE NEW AGE REGULATIONS – PRACTICAL STEPS TO COMPLIANCE
BY RANJIT DHINDSA, PARTNER AT REEDSMITH**

On 1 October 2006 the Employment Equality (Age) Regulations 2006 will come into force in the UK. The Regulations are the UK Government's attempt to interpret a European Directive which will apply to all Member States.

The Regulations are regarded as a final piece of the discrimination jigsaw and considered to be likely to impact businesses whether large or small in a dramatic way.

For the first time employers will face potential claims of age discrimination from any member of their workforce whether young or old.

There are therefore serious and potentially expensive consequences of breaching the Regulations.

Time is also running out for employers to ensure that they are compliant with the law by 1 October 2006.

So what should employers be doing?

As a starting point employers should be auditing their current practices and procedures to ensure that there is no obvious non compliance.

This may include reviewing policies such as recruitment or retirement, as well as company handbooks or employment contracts which may for example refer to retirement ages. In addition other practices such as appraisals need to be reviewed to ensure that there is no indirect reference to age. ~~discrimination.~~

Employers also need to audit the age profile of their workforce and ensure that there is no indirect bias in particular job roles or divisions. However employers must ensure that any information obtained is handled in compliance with the Data Protection Act 1998.

It will be particularly significant for employers to ensure that all employees are informed and trained on the obligations set out in the Regulations. This will be particularly relevant in relation to any harassment claims. Employees need to be made aware that references such as "silly old codger", "old woman", may be forms of unlawful harassment and lead to not only the employer but the perpetrator being sued in the Employment Tribunal. Employers should always remember that they can be held to be vicariously liable for the acts of their employees done during the course of employment. It will therefore not be a defence for an employer to say that they did not know one member of staff was treating another member of staff less favourably on the grounds of age if comments or the acts of behaviour were carried out during working hours.

As well as these general practical steps, employers need to then specifically target particular areas of their business to ensure compliance.

For example employers should immediately review all recruitment and selection procedures. Although employers will be able to justify both direct and indirect forms of age discrimination, the justification defence may be difficult to establish. Thus on recruitment, all employers should immediately review whether requests for date of birth are required. The contents of job advertisements should be reviewed to ensure that no age bias exists. For example references to “graduates wanted” or “young and dynamic employees wanted” may be unlawful in the future. Employers should instead focus on the actual skills required rather than subjective opinions of the type of candidate they want to recruit.

Even more important, during the interview process, employers should ensure that no discriminatory questions are asked such as “how would you feel working with an older workforce”.

Another significant area that employers need to look at is the provision of pay and benefits. The Regulations do allow employers to use length of service as a criterion to provide different pay and benefits for employees who have less than 5 years service. However for employees with more than 5 years service, employers can only justify providing different pay and benefits if length of service is used as a criteria and the employer can show that there is a business advantage in doing so because the treatment rewards loyalty, encourages motivation or recognises experience.

It will not be enough for the employer to simply assert this exception. Instead employers will have to demonstrate that employees do in fact remain more loyal and recognised if for example additional contractual sick pay or holiday is provided after 5 years of service.

Perhaps one of the most significant areas to impact employers' businesses is in relation to retirement. The Government has introduced a default retirement age of 65. An employer immediately has to determine whether they can objectively justify a retirement age less than 65.

The Regulations also introduce a duty to consider procedure. The aim of this procedure is to prevent “cliff hanger” terminations of employment when employees reach a particular age.

Essentially employers will have to inform employees of their right to request to work beyond the retirement age. If the employee makes a request the employer will have to discuss it with the employee and consider it.

Significantly the employer has a duty to inform the employee of the right to request working longer, at least 6 months (but no more than 12 months) before the intended moment of retirement. An employer who fails to do this may have to pay the employee compensation of up to 8 weeks pay.

If the employer has not informed the employee as required, the employer still has an ongoing duty (until 2 weeks before dismissal) to inform the employee of his right to request working longer. If the employer fails to do this, in addition, the dismissal will be automatically unfair.

The maximum award the Tribunals can currently make in relation to unfair dismissal is £58,400.

However employees who bring claims before the Employment Tribunal are likely to sue the employer not only for unfair dismissal and failure to follow the duty to consider procedure but also direct or indirect age discrimination. There is of course no compensation limit on the amount of awards the Tribunal can order against an employer if they are found to have acted unlawfully.

Many employers will see the Regulations as a further bureaucratic burden. However the Government is introducing the Regulations as a business friendly piece of legislation. They advise that it will help employers to ensure that they are upholding their diversity obligations by employing a mixed age population, that it will assist with staff retention rates by opening up training, promotion and development opportunities to all, that there will be better productivity through increased staff morale and that there are in fact advantages to flexible working even beyond normal retirement ages.

It waits to be seen whether these reasons are actual or myth. However what is clear is that the Regulations cannot be avoided and it will be a high risk strategy for employers to simply ignore their obligations under the Regulations from 1 October 2006 onwards.