

# news

## Age discrimination - the great escape?

Age discrimination laws, due to come into effect in October 2006, came a step closer this month with the publication of long-awaited Regulations. Whilst still in draft at this stage, far from requiring fundamental changes, they include numerous exemptions for pension schemes. But does this really mean that pension schemes hold a “get out of jail free card” against age discrimination claims?

### Age discrimination

#### The background

- The new law is being driven by the requirements of the EU Framework Directive for equal treatment in employment and occupation (the “Directive”).
- It encompasses all working practices from recruitment through to retirement and there is no exemption for pensions.
- Both direct and indirect age discrimination will be outlawed<sup>1</sup>.

### Discrimination

#### What schemes are affected?

- All types of occupational and personal pension provision will be caught by the new law (with an overriding non-discrimination rule being inserted into scheme documentation).
- Employers and trustees will have a duty to ensure schemes do not discriminate, and may face Employment Tribunal claims if they do.

### Defences / exemptions

#### Justification

- The Directive allows employers to justify both direct and indirect discrimination (because of legitimate aims), and also gives the UK Government freedom to:
  - permit pension schemes to set age limits for admission and entitlement to benefits;
  - use age criteria in actuarial calculations<sup>2</sup>.
- The draft Regulations take these exemptions on board but also go further, setting out different types of pensions practice that will be justified automatically.

<sup>1</sup> For an explanation of the difference between the two, please see our Sackers Extra News: “Age discrimination – when I’m 65?” dated January 2005

<sup>2</sup> So long as neither results in sex discrimination

## Exemptions

All schemes

- Schemes can keep normal retirement ages<sup>3</sup>.
- Minimum and maximum joining ages can be retained, as can waiting periods for joining.
- Different types of benefit can be provided for employees on different salary levels (even if older employees generally earn more).
- Age criteria can be used in actuarial calculations for determining benefits payable and the contributions needed to provide a benefit.

## DB Schemes

Protecting scheme design

- DB schemes will still be at liberty to:
  - base benefits on pay and years of pensionable service;
  - replace defined benefits with defined contribution, even if new (younger) employees potentially lose out;
  - provide service enhancements, for example, when calculating ill-health benefits (even though (older) members closer to retirement may stand to benefit less);
  - reduce benefits for young spouses and set age limits for children's pensions.

## DC Schemes

Calculating contributions

- Contributions can vary depending on seniority and salary level (even if older employees hold senior positions and are paid more).
- There is no bar to DC schemes having age-related contributions or to having the same rate applicable to all members.
- Service related contributions will also be permitted, heading off possible complaints that this favours older employees.

## Conclusion

- The Government's age discrimination proposals for pensions may come as a relief to employers looking to manage an ageing workforce and to adopt more flexible retirement structures from April 2006.
- But do the draft Regulations stretch the Directive exemptions too far and could they be open to challenge?

<sup>3</sup> Although employers could still find themselves in the dock if employees working beyond normal retirement age are not entitled to benefit accrual

This edition of Sackers Extra News was prepared by our Employment Team to draw your attention to important employment aspects of pensions law. If you would like further information about age discrimination please contact:

**Employment Team** [EmploymentUnit@sackers.com](mailto:EmploymentUnit@sackers.com)

**SACKER**<sup>®</sup>  
& PARTNERS

Solicitors specialising in pensions law

Sacker & Partners LLP  
29 Ludgate Hill  
London EC4M 7NX  
Tel 020 7329 6699  
Fax 020 7248 0552

[enquiries@sackers.com](mailto:enquiries@sackers.com)  
[www.sackers.com](http://www.sackers.com)