

# news

## Age-Day – focus on DB schemes

It is now only a matter of weeks until the new Employment Equality (Age) Regulations 2006 (“the Age Regulations”) come into force on “Age-Day” (1 October 2006). Although the Regulations automatically exempt a number of pension practices from being discriminatory, there are areas where employers and scheme trustees may be exposed to the risk of a discrimination claim. In this News, we highlight some of the more significant issues which defined benefit (DB) schemes commonly need to consider.

### Background

A reminder

- The Age Regulations implement the EC framework Directive for employment and occupation.<sup>1</sup>
- The new requirements *only* affect pensionable service from 1 October 2006.
- Unless a practice is specifically exempted by the Age Regulations, schemes will need to objectively justify any direct or indirect age discrimination, or make changes.

### DB pitfalls

Special concerns

- There are various common features of DB benefit design that are being questioned in the age discrimination context.
- Objective justification can be difficult to establish – cost alone is rarely enough. The practice in question must be a proportionate way of achieving a legitimate aim.

### Normal Retirement Age (NRA)

As date for ceasing accrual

- The Age Regulations allow schemes to set an age for entitlement to benefits, but do not appear to exempt schemes from continuing benefits after this age if the member actually carries on working.<sup>2</sup>
- Offering members a range of suitable (and genuine) benefit options over NRA therefore needs to be considered – including continued accrual.

<sup>1</sup> See our Sackers Extra News: “Age discrimination – Take 2” dated March 2006 and our Sackers Extra Alert “Action on Age-Day” dated 14 August 2006.

<sup>2</sup> On the flip side of this, it is also worth noting that in its April 2006 guidance on pensions and age, the Dti indicates that not offering flexible retirement from minimum retirement age may discriminate against younger workers.

### More flexible retirement

What controls will schemes have to give up?

- Early retirement consent requirements are not covered by a specific exemption and appear to discriminate against younger workers.
- Schemes that decide to take advantage of A-Day changes to allow members to take their pension and continue working look likely to have to offer this to all members from minimum retirement age.

### "Golden Numbers"

E.g. the so-called "rule of 85"

- An example of this is where members whose age + service = "85" are able to retire early without reduction.
- Seemingly discriminatory, and with no clear exemption, retaining a rule of 85 will require objective justification (which may not prove easy). That taking it away would be unpopular is unlikely to be enough.

### Capping pay

For benefit calculations

- In the post A-Day world, many schemes retained a pseudo "earnings cap".
- The Age Regulations allow schemes to impose a maximum level of pensionable pay for calculating benefits. However, difficulties may arise in practice if a cap applies to some scheme members, but not to others.
- Possible justification could include "uncapped" membership being dependent on senior management status.

### Death in service

Prospective service

- As the Age Regulations stand, there is no exemption for the common scheme practice of calculating dependants' death-in-service pensions by reference to prospective service to NRA.
- Consequently, this is another DB benefit design area where objective justification will come into play.

### Grey areas

Further legislation?

- Some of these problem areas may eventually be ironed-out, but this is unlikely to happen before Age-Day.
- Schemes may therefore have to make some key changes now, while keeping others under review.

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