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## ACTION ON “AGE-DAY”

### 1 INTRODUCTION

From 1 October 2006 (“Age-Day”), a new age dawns in discrimination law for occupational pension schemes. The basic concept is simple enough: under the Age Regulations<sup>1</sup> it will no longer be possible to discriminate directly or indirectly against a worker on the grounds of their age. But with age being such an intrinsic part of pension provision, the new legislation looks set to have a significant impact.

### 2 KEY POINTS

- Age discrimination only applies to pensionable service from 1 October 2006 onwards.
- Employers and trustees should carry out an *urgent* audit of their scheme rules and practices to analyse whether there are any age discrimination problems. **(See section 4 below)**
- Any problem identified should then be assessed to see whether it falls within a regulatory exemption or it can be objectively justified. **(See sections 5 and 6 below)**
- In doing so, a general awareness of some of the “age danger zones” affecting all schemes is crucial. **(See section 7 below)**
- What considerations apply if scheme changes are envisaged? **(See section 8 below)**
- How can Sackers help? **(See section 9 below)**

<sup>1</sup> The Employment Equality (Age) Regulations 2006:  
<http://www.opsi.gov.uk/si/si2006/20061031.htm>

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## 3 BACKGROUND

The impetus behind the Age Regulations is the EC Framework Directive for equal treatment in employment and occupation (the "Directive")<sup>2</sup>. The Directive prohibits both:

- direct discrimination – which occurs if a person is treated less favourably on the grounds of their age; and
- indirect discrimination – which occurs where an apparently neutral provision puts a person of a specific age at a particular disadvantage when compared with others.

However, in implementing the Directive, the UK Government is taking advantage of a general permission to allow certain pension scheme rules, policies and practices that might otherwise be unlawful to be automatically justified. In addition, both direct and indirect discrimination can be objectively justified if they are a proportionate means of achieving a legitimate aim (see section 6).

## 4 CARRYING OUT AN AGE AUDIT

Age-Day will affect both employers and pension scheme trustees alike, although its impact on employment policies as a whole arguably makes it a more pressing issue for employers. Schemes should set the Age-Day ball rolling by carrying out an age audit with their advisers as soon as possible. This will entail:

- Reviewing pension scheme rules and practices to ascertain which might be considered discriminatory (**Step 1**);

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<sup>2</sup> This Directive was also responsible for the introduction in December 2003 of legislation outlawing discrimination on grounds of sexual orientation and religion or belief, and to disability discrimination changes from October 2004

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- Assessing which (if any) of those rules or practices fall within the legislative exemptions **(Step 2)**;
- Considering whether, to the extent that a potentially discriminatory rule or practice is not exempt, it can be objectively justified **(Step 3)**;
- Deciding what pension scheme changes may need to be made in the light of the age audit **(Step 4)**.

The Age Regulations also superimpose an age-related "equal treatment" rule onto pension scheme rules from Age-Day, placing an obligation on trustees to ensure compliance with the new law. This means that trustees will have to exercise their functions in relation to their scheme in a non-discriminatory way (unless provisions which have a discriminatory effect are exempt or can be justified).

## 5 REGULATORY EXEMPTIONS

The Age Regulations exempt a number of pension scheme rules and practices from amounting to age discrimination, including:

- the ability to set ages for admission and entitlement to benefits;
- the use of age criteria in actuarial calculations; and
- the ability to allow members to retire early or late (subject to certain conditions)<sup>3</sup>.

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<sup>3</sup> See our Sackers Extra News: "Age Discrimination – Take 2" dated March 2006

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But what if a rule or practice does not fall within an automatic exemption?

## 6 OBJECTIVE JUSTIFICATION

Objective justification is primarily an issue for employers, with trustees "piggy-backing" on the business aims of scheme sponsors. But the overriding duty to ensure compliance placed on trustees under the Age Regulations means that they have a vested interest in ensuring that any justification is a legitimate aim. According to the DTI consultation document published in July 2005:

*"A wide variety of aims may be considered as legitimate. The aim must correspond with a real need on the part of the employer (or other person or organisation wishing to apply discretionary practice). Economic factors such as business needs and considerations of efficiency may also be legitimate aims. However, discrimination will not be justified merely because it may be more expensive not to discriminate."*

The consultation document went on to describe possible legitimate aims as including: health, welfare and safety (including protection of young or older people); facilitation of employment planning; particular training requirements; encouraging and rewarding loyalty; and recruiting or retaining older people.

Suffice to say, the "objective justification" starting point is that you should not discriminate, and the legitimate aim must trump the aim of preventing discrimination. Real evidence is therefore required to establish the defence. Employers (and trustees) need to ask themselves:

- What is the aim? What is it trying to achieve?
- Is this is a legitimate aim?

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- Why is it necessary to achieve the aim by these means? Are there other reasonable alternatives which are non-discriminatory?
- Does the importance of the aim outweigh the discriminatory effect?

Finally, objective justification should be kept under periodic review because, what amounts to a legitimate aim in 2006, may be rendered obsolete in future.

## **7 SOME AGE DANGER ZONES**

The new age discrimination legislation will give rise to many areas of uncertainty for both defined benefit (DB) and defined contribution (DC) schemes<sup>4</sup>. However, there are some general danger zones applicable to both types of scheme which it is worth bearing in mind when conducting an age audit. These include:

- Different benefit structures set up within a scheme for members who have joined at different times. If there is a perceived disparity in "value" between different sections, younger members in one section may compare themselves with older members in another. (This is not covered by the Directive or directly by the Age Regulations, except to the extent that it can be argued that the "sections" are "schemes" within a scheme and therefore fall within the automatic exemption allowing schemes to close to new joiners from a particular date).
- Waiting periods for admission to membership – this may be a difficult area for trustees as there are no specific exemptions for them in the Age Regulations (there is however a service-related exemption which

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<sup>4</sup> We will be devoting forthcoming Sackers Extra News to the effect of Age-Day on DB and DC schemes.

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employers may be able to take advantage of for periods up to 5 years' service).

- Consent requirements for early / late retirements.
- Normal retirement age as the age at which benefits cease to accrue – providing options for members who work beyond this date will be important.
- Offering flexible retirement at normal retirement age only (but not before). (Also, according to the DTI guidance, not offering flexible retirement at all!).
- Dependants' pensions in respect of an active member calculated by reference not only to the member's years of pensionable service completed at the date of death, but also his/her prospective service to normal retirement age.

## **8 MAKING SCHEME AMENDMENTS**

Where scheme changes are contemplated to take account of age discrimination two usual suspects need to be assessed: the possible need to consult employees<sup>5</sup> and the possible application of section 67<sup>6</sup>.

The Occupational and Personal Pension Schemes (Consultation by Employers and Miscellaneous Amendment) Regulations 2006 set out an exemption from the need to consult when making "listed changes" to future benefits where the amendment is being made "for the purposes of complying with a statutory provision". Changes which are made to ensure compliance with the Age Regulations should therefore be looked at in the light of this exemption. Whether the exemption bites or not is likely to come

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<sup>5</sup> See our Sackers Extra Alert: "Consultation! Consultation! – an update" dated 17 January 2006

<sup>6</sup> See our Sackers Extra News: "The Changing face of Section 67" dated October 2005

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down to what the driver is behind the change, e.g. is it to meet the requirements of the new legislation or is the motivation to streamline costs?

The new sections 67 to 67I will be relevant if modifications are made to past service benefits (or "subsisting rights") using the scheme amendment power. But the Age Regulations also confer a statutory power on trustees to amend scheme rules by resolution where either:

- they do not have power to alter the scheme rules as may be required to secure conformity with the non-discrimination rule; or
- they have such a power but the procedure for securing conformity "is liable to be unduly complex or protracted" or involves obtaining consents "which cannot be obtained, or can only be obtained with undue delay or difficulty".

Changes made under this statutory power can be retrospective, but cannot pre-date Age-Day.

## 9 HOW SACKERS CAN HELP?

We have put together various documents to help our clients navigate their way safely through to Age-Day. These include checklists designed specifically to help you conduct your age audits. For help with this, or any of the issues raised in this Alert, please get in touch with your usual Sackers' contact.