

# alert

## AGE – THIRD TIME LUCKY?

### 1 INTRODUCTION

Last Friday, with just three weeks to go before pension schemes become subject to the age discrimination legislation<sup>1</sup> (the “Age Regulations”), the revised amending regulations<sup>2</sup> (the “New Regulations”) were laid before Parliament<sup>3</sup>. The New Regulations build on the helpful changes in the draft consulted on in October<sup>4</sup>, and it looks like we are now much closer to the Government’s original policy intention that pension schemes should on the whole be able to operate largely as before, leaving employers and trustees to focus on a few key issues.

### 2 KEY POINTS

- The exemptions now cover most common scheme design features, meaning schemes can finally focus on a few key issues.
- 1 December 2006 remains the date for compliance, although the DWP say they are still considering giving schemes a “compliance window”!
- New wording clarifies that schemes can close sections to new joiners without falling foul of age discrimination.
- Exemptions for enhanced early retirement have been improved, once again giving wide protection to current and prospective members on 1 December.
- A new exemption gives comfort to schemes retaining an earnings cap for post-1989 members.

<sup>1</sup> The Employment Equality (Age) Regulations 2006

<sup>2</sup> The Employment Equality (Age) (Amendment No.2) Regulations 2006

<sup>3</sup> We understand they are due to be published on the Stationary Office Website on 16 November 2006

<sup>4</sup> See our Sackers Extra Alert “Age – back with a vengeance?” dated 13 October 2006

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### 3 HELPFUL CHANGES

- *Schemes with more than one benefit section* – There is now a specific exemption for closing a section of a scheme to new joiners from a particular date. A “section” is essentially described as any group of members who joined by reference to a particular date, or a group who joined as a result of a block transfer (for example, because of a scheme merger or a transfer of a business). This should enable most schemes with e.g. closed defined benefit (DB) and open defined contribution (DC) sections to continue operating both within the same scheme without running the risk of age discrimination claims.

However, the new wording does not cover every type of section: for example, where two sections are open to new joiners. This could in theory make it easier for members to make age discrimination claims across benefit sections. In practice, however, differences between sections will not necessarily be on grounds of age (for example, different parts of the business offer different employment terms). In addition, most benefit sections will have arisen because of changing benefits for people who joined after a particular date, or because of scheme mergers, in which case schemes should be able to take advantage of the revised exemption in any event.

- *Early retirement* – A wide range of early retirement enhancements (adding prospective service to retirement or a fixed number of years, and applying no actuarial reduction or a lower actuarial reduction) are now allowed where active or prospective members of a scheme are entitled to the benefit on 1 December 2006. Similar enhancements can also be provided for members joining at any time, where the enhancement is on grounds of redundancy. New wording should also mean that members do not lose their early retirement rights simply because their scheme is merged into another scheme.
- *Earnings cap* – There is helpful new wording for schemes that have retained limits in line with the pre-6 April 2006 tax regime. This allows schemes to impose a limit on benefits for members who joined

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after a particular date, where the limit results from imposing a maximum level of pensionable pay. This should cover retaining an earnings cap for post-1989 joiners (without having to rely on the exemption for closing a benefit section to new joiners described above).

- *Age related contributions to DC schemes* – The exemption for having age related contributions to occupational DC schemes where the aim is to make the benefit “more nearly equal” has been amended, so schemes will need to consider whether the amount of the benefit is more nearly equal “in respect of comparable aggregate periods of pensionable service”. The equivalent exemption for age related contributions to personal pension schemes has been amended so it applies where the aim is to make more nearly equal the amount of the age related benefit derived from contributions made each year by the employer.
- *Bridging pensions* – The New Regulations contain more workable exemptions for schemes that pay a temporary additional pension to members until they reach state pension age. So, for example, this practice will now be exempt where the temporary pension does not exceed the basic state retirement pension, plus the additional state retirement pension that is payable to the member at state pension age.
- *Different retirement ages for actives and deferreds* – There is now a specific exemption covering this.
- *Life assurance only schemes* – There are some useful changes. The exemptions now extended to such schemes include using the member’s prospective service to normal pension age when calculating dependants’ benefits, and imposing a maximum level of pensionable pay for calculating the benefit.

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### 4 SIGNIFICANT ISSUES REMAINING

Although a much greater number of common scheme design features are now exempt<sup>5</sup>, schemes still need to check that they are not operating other age discriminatory practices not covered by exemptions, which may need to be objectively justified or changed. Headline issues where there is no specific exemption still include:

- Benefit accrual for people who work beyond normal pension age.
- Golden numbers – for example, the rule of 85, where members can take enhanced benefits where their age and service equal 85.
- Feeder schemes – for example, where members move from one benefit to another (typically DC to DB) at a specified age.
- Flexible retirement – whether schemes should be giving members the option of taking their benefits while continuing to work. It remains difficult to see that the law requires this, but where schemes do offer this option, it seems likely they will need to provide it to members at all ages from minimum pension age (unless they can objectively justify only offering this from a higher age). They will also need to be clear about what death benefits are payable to people who have opted to start their pension while they are still in work.

### 5 WHAT NEXT FOR SCHEMES?

Although the DWP has said it is still considering giving schemes a period to comply, with 1 December 2006 fast approaching, schemes cannot rely on this and should be aiming to have policies in place by then to deal with any age issues they have identified. It is important to remember that if age discriminatory practices are continued once the

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<sup>5</sup> It is still possible that the Government's exemptions will be challenged in future as going beyond what the EU Framework Directive on Equal Treatment allowed. It will therefore be important for schemes to keep this under review.

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## **AGE – THIRD TIME LUCKY?**

Age Regulations are in force, affected workers will claim to have their benefits “levelled-up” to the better benefit.

For help complying with the new requirements, or with any of the issues in this Alert, please get in touch with your usual Sackers’ contact.