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FLEXIBLE RETIREMENT: WHAT THE DICKENS?

1 INTRODUCTION

Perhaps following a haunting by the Ghost of Christmas Past, the Department for Work and Pensions (DWP) has finally published its response (the "Response")¹ to its consultation on Flexible Retirement and Pension Provision (issued in October 2007), together with alternative sets of draft regulations.

The initial consultation sought views on the application of the Employment Equality (Age) Regulations 2006 (the "Age Regulations") in relation to flexible retirement and pension provision.

In this Alert, we take a brief look at the current position in relation to flexible retirement and highlight the main points from the Government's proposals for the future.

2 KEY POINTS

- Responses to the consultation seem to illustrate the industry's lack of consensus on the issue of flexible retirement and age discrimination.
- Draft regulations to facilitate the provision of limited flexible retirement practices form part of the Response.
- Two alternative exemptions to the age discrimination legislation to cater for specific circumstances are put forward (see section 4).
- Formal guidance on flexible retirement may come in time but not in the immediate future (see section 7).

¹ The response can be accessed by clicking on this link:
<http://www.dwp.gov.uk/consultations/2008/flexible-retirement-next-steps.pdf>

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3 WHERE ARE WE NOW?

When the Age Regulations came into force back in 2006, it was not clear what approach to flexible retirement employers should take. Commentators also disagreed on what practices would (and would not) constitute age discrimination.

As Sackers explained in its response to the Government's consultation,² many employers decided to defer their decision on a flexible retirement policy until more guidance was available and more of an industry standard had emerged.

4. A TALE OF TWO EXEMPTIONS?

A particular concern in relation to flexible retirement has always been how best to handle provision of pensions and death benefits for members of occupational pension schemes who remain in employment beyond their scheme's normal pension age (NPA). With this in mind, the Response includes a new consultation on two distinct alternative options for a further exemption in the Age Regulations dealing with certain flexible retirement arrangements. Providing schemes with an exemption removes the need for them to objectively justify their practices.

The first option (which is the broadest) would permit schemes to stop accrual of further pensionable service and the provision of death in service benefits in respect of members working under a "flexible retirement arrangement".

(The draft regulations define a "flexible retirement arrangement", limiting this to an arrangement between a member and the employer under which, after becoming eligible to receive all or part of the age-related benefits under an occupational pension scheme, the member either reduces the number of hours they work or the grade they hold within the organisation.)

² A copy of Sackers' response is available on the client area of our website

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The second, more limited, option would simply add a new exemption in relation to death in service benefits. This would allow schemes to treat a member who dies during a period of flexible retirement as a pensioner member, rather than as an active member for death benefit purposes.

The exemptions would be permissive, allowing employers and schemes to consider the extent (if any) to which they wish to rely on them.

5. THE EXCEPTIONS

In a twist worthy of Mr Dickens himself, there are exceptions to the circumstances in which either potential exemption might apply. For example, if brought into force, neither exemption would affect members already working under flexible retirement arrangements.

The Government also proposes that either alternative exemption would only apply from age 65³, or NPA, if higher. The aim is to ensure that an employer or the trustees of the scheme “could not choose to prohibit further accrual or rights until the worker was in receipt of income from the state pension” (as well as being eligible for benefits under the occupational pension scheme).

6. POTENTIAL PROBLEMS?

Any exemption to the age discrimination requirements under the Equal Treatment Directive⁴ must have a legitimate aim and the means for achieving that aim must also be “appropriate and necessary”.

The Government must therefore be satisfied that there is robust evidence to suggest that current law gives rise to a genuine barrier to flexible retirement arrangements; and that its proposals are a proportionate way of meeting its aim of facilitating flexible retirement.

³ The link to men’s state pension age avoids sex discrimination

⁴ Directive 2000/78/EC

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7. WHAT NEXT?

The new consultation ends on 10 March 2009 and the Government's intention is to publish a summary of its response within three months of that date.

Recognising that the draft regulations do not address all the areas of uncertainty, the Government also hopes to "bring together interested parties...to exchange views and explore practical solutions to flexible retirement issues". Ultimately, its aim is to ensure that formal guidance on the issue (when it comes) will meet employers' needs.

For now the Ghost of Christmas Present (the Government's consultation) has raised the spectre of some form of resolution to the issue of age discrimination and flexible retirement, but the parameters of any exemptions will perhaps only become clear to the Ghost of Christmas Yet to Come.