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Age Discrimination Briefing Sheet

October 1st 2006 saw the introduction of legislation that outlaws discrimination on the grounds of age. The regulations cover direct and indirect age discrimination (explained later in this briefing sheet) as well as harassment and victimisation. In addition the regulations prevent, in certain circumstances, discrimination on grounds of age after the working relationship has ended.

Important: It is not necessary for a person to be employed by an organisation to make a claim for age discrimination e.g. job applicant that doesn't get offered a job.

So, there are quite a few areas that you need to be certain about to ensure that you do not fall foul of these new discrimination laws. Please read on for further information.

Direct Discrimination

This is when someone is treated less favourably because of their age. For example it would be unlawful on the grounds of age to:

- Decide not to employ someone
- Dismiss them
- Refuse to provide them with training
- Deny them promotion
- Give them adverse terms and conditions
- Retire an employee before the employer's usual retirement age (if there is one) or retire an employee before the default retirement age of 65 without an objective justification (more about this later!)

Example of direct discrimination: Whilst being interviewed, a job applicant says that she took her professional qualification 30 years ago. Although she has all the skills and competences required of the job holder, the organisation decides not to offer her the job because of her age.

Indirect Discrimination

This happens when selection criteria, policies, benefits, employment rules or any other practices which, although they are applied to all employees, have the effect of disadvantaging people of a particular age unless the practice can be justified. Indirect discrimination is unlawful whether it is intentional or not.

Lawful Discrimination

There are very few circumstances where discrimination on the grounds of age will be lawful. This briefing sheet cannot cover every example however, it is worth noting that if a person is over the age of 65 or within 6 months of that age an employer can lawfully refuse to recruit them.

Lawful discrimination is also covered by one of the exceptions or exemptions referred to in the regulations e.g. the national minimum wage, liquor licence, redundancy payments

Any benefit earned by 5 years service or less will be exempt from claims of age discrimination e.g. enhanced holiday entitlement. Benefits earned by more than 5 years service will only be lawful if it is meant to reflect a higher level of experience, reward loyalty or increase or maintain motivation.

Harassment

This is an area that is likely to be a key area of claims in the future. Harassment refers to any behaviour that is deemed by the person as offensive, frightening or in any way distressing. The fact that it was not intentional is no defence. The problem here is that jokes, nicknames and teasing about a person's age or about the age of others that they associate with could very easily find you with a claim. Even if it is not aimed at anyone in particular a culture of ageist jokes is sufficient to cause problems for you.

In fact, the biggest concern for employers is that you can be held responsible for the actions of your employees even if you were unaware of any problem and the only way you can hope to defend yourself against a claim is to demonstrate that you had taken reasonable steps to prevent harassment e.g. regular staff training sessions about what is and isn't acceptable behaviour.

Examples of harassment: A young employee is continually told he is 'wet behind the ears' and 'straight out of the pram' which he finds humiliating and distressing.

An employee has a father working in the same workplace. People in the workplace often tell jokes about 'old fogies' and tease the employee about teaching 'old dogs new tricks'. This may be harassment on the grounds of age, even though it is not the victim's own age that is the subject of the teasing.

Victimisation

This would occur when an employee is treated detrimentally because they have made a complaint or intend to make a complaint about discrimination or harassment; or have given evidence or intend to give evidence relating to a complaint about discrimination or harassment. They may become labelled as a 'troublemaker', denied promotion or training, or be shunned by their colleagues.

Example of victimisation: An employee claims discrimination against their employer on the grounds of age. A work colleague gives evidence on their behalf at the employment tribunal. When the work colleague applies for promotion her application is rejected despite demonstrating all the necessary skills and experience. Her manager maintains she is a 'troublemaker' because she had given evidence at the tribunal and should not be promoted.

Issues following the end of a working relationship

Employers need to be very careful that they do not fall foul of the new regulations with issues such as the giving of references whether written or verbal.

Example of age discrimination after employment: A manager is approached by someone from another organisation. He says that Ms 'A' has applied for a job and asks for a reference. The manager says that he cannot recommend her as she was not accepted by other staff because she was 'too young and inexperienced'. This is direct discrimination because of age.

Retirement

The default retirement age is 65 and is to be reviewed in 2011. An organisation with a retirement age below the default retirement age would have to justify it objectively.

Retirement will only be fair where the retirement takes place on or after the default retirement age and the employee has received at least 6 months (but no more than 12 months) written notice of your intention to retire them. In addition you have to notify the employee of their right to request to work past this retirement date.

However, providing you hold a meeting to discuss their request to continue working past retirement and fulfil the retirement procedure properly you can refuse their request without giving a reason.

There are transitional arrangements in place for employees that reach the default retirement age between October 1st 2006 and March 31st 2007.

Please speak to James Turner at Human Performance Limited if you need further information about these transitional arrangements.

Employers can greatly protect themselves from “sleep walking” into claims by addressing some of the following:

1. **Equality Policy** - Introduce or update an equality policy that includes age.
2. **Application Form** - Review your application form and remove unnecessary requests for periods and dates. Remove date of birth requests and transfer this to a diversity monitoring form.
3. **Job Descriptions** - Review job descriptions, key result areas and person specifications for unnecessary age references e.g. number of years experience etc.

Example of unnecessary experience: A local driving school have been advertising for instructors who must be qualified and have a minimum of 10 years driving experience. Effectively this would prevent people under 28 applying for this job and could therefore be discriminatory. The employer would need to justify this 10 year experience criterion if challenged by a jobseeker under 28 especially as only four years experience is formally required to qualify as a driving instructor.

4. **Qualifications** - Educational and vocational qualifications have changed and developed over the years. Ensure that the qualifications you request do not disadvantage people at different ages e.g. GCSE's instead of CSE's or GCE's or an IPD instead of the IPM qualification. If you do need to be specific about qualifications ensure you can justify their need in objective terms and make it clear you will consider equivalent or similar level alternative qualifications.
5. **Advertising Media** - When advertising you will want to attract a wide field of applicants. Avoid using a publication or employment agency that is focused on a particular segment of the job seeking market. This may limit the diversity of applicants and may constitute indirect discrimination.

Example of indirect discrimination when advertising: An advertisement placed only in a magazine aimed at young people may indirectly discriminate against older people because they are less likely to subscribe to the magazine and therefore less likely to find out about the vacancy and apply.

6. **Job Adverts** - Write your job advert using the information in the job description and person specification (which you have already reviewed for age discrimination). Language that might imply that you would prefer someone of a certain age, such as 'mature', 'young' or 'energetic' would result in a claim of age discrimination. Which of the following vacancies is asking for an older person and which a younger person?

Examples of age discriminatory language: 'We require an enthusiastic person, flexible enough to fit in with our fast moving market place, not afraid of challenging the status quo and in touch with latest thinking'.

'Our ideal candidate will need to manage competing demands. He or she should be reflective, and have boardroom presence and gravitas'.

7. **Graduate Recruitment** - If you ask for graduates, remember that the term can be interpreted as code for someone in their early twenties. Graduates can be almost any age. Make it clear that you are interested in the qualification and not the age of the applicant.

Example of advertising for a graduate: A company is looking for a new Personnel Officer and advertises for applicants to be graduates and hold the IPD qualification. As many more people attend university today than say 25 years ago, there is a lower chance that older Personnel Officers will be university graduates even though they may hold the IPD qualification and have considerable practical experience. This graduate requirement may result in a claim for indirect age discrimination if the employer is unable to justify it.

8. **Recruitment Agencies** - Ensure they act appropriately and in accordance with your company's equality and diversity policies. If you tell them to discriminate on age grounds because you consider you have objective justification for doing so, then the regulations enable the agency to rely on this justification if challenged.
9. **Promotion & Training** - Is this available to all employees regardless of age?
10. **Internal References** - Are internal references (both verbal & written) free of age discrimination?

11. **Performance Appraisals** - Comments such as “does well despite their age” or “shows remarkable maturity for their age” could lead to further discrimination and land you in trouble.
12. **Redundancy** - Relying on “Last in, First Out” or length of service could result in age discrimination.
13. **Policies & Procedures** - Review all policies and procedures for age bias and amend as necessary.
14. **Bullying & Harassment** - Inappropriate comments such as “they’re wet behind the ears” or “they’re over the hill” or offensive jokes about age or even excluding certain individuals from social events could all resulting a claim of bullying and/or harassment.
15. **Grievance Procedure** - Ensure all employees are aware of your grievance procedure as this is your opportunity to resolve many issues before they go to an employment tribunal.

This briefing sheet is a short summary of some of the key areas relevant to the new age discrimination regulations and was produced to highlight areas for focus.

Please do not hesitate to contact James Turner of Human Performance Limited to discuss any areas of this Age Discrimination Briefing Sheet. If you need help to develop any of your policies or procedures to take into account this new legislation we will be happy to discuss this without cost or obligation.



This briefing sheet was produced with the aid of the ACAS "Age and the workplace – a guide for employers" and some of the examples used were provided by ACAS.