

DBULLETIN

Abolition of the Default Retirement Age

What should employers be doing about the abolition of the Default Retirement Age?

The Default Retirement Age (DRA) has been abolished with effect from 6 April 2011, although this is subject to transitional provisions for employees who were notified of their intended retirement on or before 5 April 2011 and who will be aged 65 or over by 30 September 2011.

The effect of this is that:

- compulsory retirement at a particular age will amount to age discrimination legislation unless it is objectively justified
- retirement is no longer a potentially fair reason for dismissal
- the provisions permitting employers to refuse to hire anyone over 64½ have been abolished.

What are the options now?

As employers are no longer able to instigate retirement at the DRA, they have two options available to them – cease to compulsorily retire employees or to adopt their own compulsory retirement age for all or part of their workforce.

Abandon compulsory retirement

Probably the safest, and currently the most popular option, for most employers will be to abandon compulsory retirement altogether.

The Acas guidance “Working without the Default Retirement Age” suggests that employers should encourage open dialogue with employees of all ages (not just older employees) about their future plans, training

needs and performance, for example, during their annual appraisals.

It may also be useful to consider implementing a retirement planning policy which makes it clear to employees what they can expect in terms of discussions about future plans at various stages of their career. This will help to introduce some clarity and certainty for both employers and employees. Employers might also want to consider introducing alternative options for discussions about phased retirement or part time working as employees move towards pensionable age.

Adopting a fixed retirement age

In order for an employer to lawfully maintain a contractual compulsory retirement age, it will have to pass the objective justification test. This involves the employer being able to satisfy an employment tribunal that its aim in requiring employees to retire at a specified age is legitimate, and that using compulsory retirement is a “proportionate means of achieving” that aim.

Potentially legitimate aims might include:

- maintaining a collegial atmosphere by allowing individuals to retire with dignity and without the need for aggressive performance management
- the recruitment and advancement of junior staff
- maintaining health and safety standards
- the particular training requirements of a job.

Abolition of the Default Retirement Age

Establishing a legitimate aim is probably the easy part of this test. The more challenging part will be to demonstrate that the implementation of compulsory retirement is a proportionate way of achieving those legitimate aims and that there is no less or non-discriminatory alternative. In order to pass this test employers will need to genuinely apply their minds to why compulsory retirement at a particular age is necessary and to gather evidence to substantiate their position. Ultimately this is a fact-sensitive question, and will depend on the working practices and business considerations involved. Notably, employment tribunals have been averse to finding that financial constraints alone are a sufficient in justifying unlawful discrimination.

In addition to justifying dismissal by reason of compulsory retirement employers will need to address the risk of unfair dismissal liability. A fair procedure following the abolition of the DRA is obviously still an untested area, but a safe approach at this stage would be to follow a procedure based on the former statutory framework.

What are the other consequences of the new regime?

Insured benefits for those aged 65+

Employers often place age restrictions or conditions on entitlements to group benefit schemes such as medical cover, life assurance and critical illness cover in order to keep premiums manageable. Employers may continue to do this, as the government has created an exemption to the principle of equal treatment on the grounds of age to enable employers to cease providing such benefits to

employees aged over 65 even if they remain employed.

Employees share and incentive plans

Whether or not employees retain their shares on leaving their employment is often determined by whether they are deemed to be a “good leaver” (which usually includes termination on the grounds of retirement) or a “bad leaver”. Going forward employers will need to decide whether retirement should remain a feature of such plans and to ensure that this is incorporated either by the exercise of trustees’ discretion in the event of voluntary retirement, or by referring the employer’s objectively justifiable contractual retirement age if it has one.

For further information or advice, please contact your usual employment contact or:



Amanda Harvey on 020 7880 4281
or amanda.harvey@devonshires.co.uk



Nicola Philp on 020 7065 1819
or nicola.philp@devonshires.co.uk