Age Discrimination

The Equality Act 2010 replaces all previous equality legislation, including the Employment Equality (Age) Regulations 2006. The Equality Act covers age, disability, gender reassignment, race, religion or belief, sex, sexual orientation, marriage and civil partnership and pregnancy and maternity. These are now called 'protected characteristics'.

The Act protects people of any age, however, different treatment because of age is not unlawful if you can demonstrate that it is a proportionate means of meeting a legitimate aim. Age is the only protected characteristic that allows employers to justify direct discrimination. Employers need to ensure they have the appropriate policies and procedures in place to deal with age discrimination and should raise awareness of it so that acts of discrimination on the grounds of age can be prevented.

Discrimination

Discrimination occurs when someone is treated less favourably than another person because of their protective characteristic.

There are four definitions of discrimination:

Direct Discrimination: treating someone less favourably than another person because of their protective characteristic

Indirect Discrimination: having a condition, rule, policy or practice in your company that applies to everyone but disadvantages people with a protective characteristic

Associative Discrimination: directly discriminating against someone because they associate with another person who possesses a protected characteristic

Perceptive Discrimination: directly discriminating against someone because others think they possess a particular protected characteristic

Examples of Age Discrimination

An example of direct discrimination would be where someone with all the skills and competencies to undertake a role is not offered the position just because they completed their professional qualification 30 years ago. Other examples could include refusing to hire a 40 year old because of a company's youthful image, not providing health insurance to the over 50's, colleagues nicknaming a colleague 'Gramps' and not promoting a 25 year old because they may not command respect.

A business requiring applicants for a courier position to have held a driving licence for five years is likely to be guilty of indirect discrimination. A higher proportion of people aged between 40 and above will have fulfilled this criteria than those aged 25. Other examples of indirect discrimination could include seeking an 'energetic employee', requiring 30 years of experience or asking clerical workers to pass a health test.

An example of perceived discrimination could be where an older man who looks much younger than his years is not allowed to represent his company because the Managing Director thinks he is too young.

However, different treatment because of age is not unlawful if it can be objectively justified and you can demonstrate that it is a proportionate means of meeting a legitimate aim. For example, an employer might argue that it was appropriate and necessary to refuse to recruit people over 60 where there is a long and expensive training period before starting the job. However, cost by itself is not capable of justifying such an action.

Harassment

Harassment on the basis of age is equally unlawful. For example, a mature trainee teacher may be teased and tormented in a school on the grounds of age during the teaching experience. If no action is taken by the head teacher, this may be treated as harassment. An employee may be written off as 'too slow' or 'an old timer'. This too could be seen as harassment.

The Equality Act 2010 covered harassment by a third party, making employers potentially vicariously liable for harassment of their staff by people they don't employ. However, this has been repealed with effect from October 2013, and employers will no longer have the risk of being held responsible if an external third party harasses an employee. However, employers must continue to take 'all reasonable steps' to ensure that employees don't suffer harassment at work; therefore it is recommended that your harassment policy still states that you show 'zero tolerance' towards such behaviour.

Recruitment

Employers must be aware of the significance of the legislation at all stages in the recruitment process and to avoid breaking the age rules they should consider:

- removing age/date of birth from adverts for example: 'Trainee Sales Representatives.. envisaged age 21-30 years'
- reviewing application forms to ensure they do not ask for unnecessary information about periods and dates
- avoiding asking for 'so many years of experience' in job descriptions and person specifications for example: 'graduated in the last seven years'
- avoiding using language that might imply a preference for someone of a certain age, such as 'mature', 'young', 'energetic' or 'the atmosphere in the office, although demanding, is lively, relaxed and young'
- ensuring that other visible methods are used to recruit graduates as well as university milk rounds, to avoid limiting opportunities to young graduates
- focusing on competencies to undertake a role and not making interview notes that refer to age considerations
- never asking personal questions nor make assumptions about health or physical abilities
- never ask health related questions before you have offered the individual a job.

Service related benefits

Employers are allowed to use a length of service criterion in pay and non-pay benefits of up to five years' service. Benefits based on over five years service are also allowed if the benefit reflects a higher level of experience, rewards loyalty or increases or maintains motivation and is applied equally to all employees in similar situations. It is for the employer to demonstrate that the variation in pay/benefits over five years can be objectively justified.

Employers are recommended to review their pay and benefits policies to ensure that they are based on experience, skills and other non-age related criteria.

Redundancy

The existing statutory payment provisions remain in place. Employers can, as before, pay enhanced redundancy payments. However, to avoid discriminating, employers should use the same age brackets and multipliers as used when calculating statutory redundancy pay.

Retirement

The default retirement age and the statutory retirement procedure were abolished from 6th April 2011.

Employers that wish to prescribe a compulsory retirement age may do so only if it is a proportionate means of achieving a legitimate aim.

Action for employers

Employers need to undertake the following to ensure that they are not breaking the law:

- review equality policies
- review employee benefits
- review policies and procedures on retirement
- undertake equality training covering recruitment, promotion and training.

How we can help

We will be more than happy to provide you with assistance or any additional information required. Please contact us for more detailed advice.

For information of users: This material is published for the information of clients. It provides only an overview of the regulations in force at the date of publication, and no action should be taken without consulting the detailed legislation or seeking professional advice. Therefore no responsibility for loss occasioned by any person acting or refraining from action as a result of the material can be accepted by the authors or the firm.