

## New Retirement Regime—A Legal Quagmire?

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### Abstract

Draft regulations have now been published ahead of the abolition of the default retirement age on 6 April 2011. Diana Bentley discusses the implications of the draft legislation with Nicholas Lakeland of Silverman Sherliker and George Boyce of Acas

### Analysis

From 6 April 2011 employers will no longer be able to force employees who are 65 or over to retire. Ahead of this, the Department of Business Innovation and Skills has published the draft Employment Equality (Repeal of Retirement Age Provisions) Regulations. These provide transitional provisions for the abolition of the default retirement age (DRA), and, providing they receive the assent of Parliament, are due to come into force on 6 April 2011.

The previous procedure for issuing notices of retirement for people 65 or over were contained in the Employment Equality (Age) Regulations 2006, SI 2006/1031. The last date on which employers can give an employee notice of retirement under these regulations is 5 April 2011.

Considering the new regime, created by the Equality Act 2010, Nicholas Lakeland, employment law partner of London firm Silverman Sherliker, says: "Age is a potentially an unfair reason for dismissal now and the burden of proof has shifted to the employer. A lot of clients haven't cottoned onto this yet. To dismiss someone on the grounds of age they need an objectively justifiable reason. You may be able to find one—for instance, you may have too many older employees and not enough young employees. But to find and prove an acceptable reason may require a lot of work. The new rules add a whole new layer of complications to this area although Acas has provided business with guidance on the implementation of the new rules."

The new draft regulations however, have already received some comment—as a result of which they have been redrafted. Lakeland agrees with the observations made by some practitioners that the first draft of the new regulations provided a potential loophole on which employees could base a claim of unfair dismissal or discrimination. Some employers may have already served notice on employees who are turning 65 before October this year under the old regulations. However the first draft of the regulations provided employers could only retire someone before October if the employee turns 65 between 6 April and 30 September 2011.

The Department of Business Innovation and Skills, addressing the problem, recently issued a new draft of the regulations. "It spotted the problem in the drafting and in fact the government didn't mind when someone turned 65 so long as it was before October this year," says George Boyce, Senior Policy Advisor at Acas. There was also some confusion over the length of notice. "Under the existing DRA scheme employers must give employees at least 6 months notice of retirement but no more than 12 months. The new draft regulations now make it clear that employees given notice before 6 April and who are 65 or over by 30 September can work out their full notice even if it means them leaving after 1 October 2011," Boyce explains.

Nicholas Lakeland notes that employment law practitioners should be kept busy helping their clients comply with the new regime. "They'll be spending a lot of time advising clients on the objective reasons under which people may be retired on the grounds of age and how they can monitor performance. But it could be a quagmire. What do you do if someone is just slowing up or having more days off work due to ill health? To retire them on those grounds may invite a charge of discrimination against the disabled. And with the state

pension age being increased to 66 if they are retired at 65 they may argue they have nothing to live on for a year.”

In Lakeland’s view, the new age discrimination legislation is not particularly straightforward. “Charities like Age Concern started lobbying the government a while ago about people who were in their 60s who wanted to keep working. As practitioners know Age Concern also made their point by bringing the well known case of Heyday in the European Court of Justice. To bring in new rules suited the government’s social policies as well as helping alleviate some of the Treasury’s financial pressures to have people retire later. It would have been better however, to just raise the retirement age to 70 since it would have given employers absolute certainty.”

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