



## AGE DISCRIMINATION AND PENSIONS

The Employment Equality (Age) Regulations 2006 came into effect on 1 October 2006. However, the provisions relating to pensions were delayed until 1 December 2006, and the amending regulations published only shortly before that. The regulations imply an anti-discrimination rule into all occupational pension schemes which makes it unlawful for the trustees and managers of such schemes to discriminate against actual or prospective members on the grounds of age. The trustees and managers have, under the regulations, a power to amend the scheme rules to ensure compliance with the legislation. This *Commentary* summarises how the regulations will affect occupational pension schemes in practice.

### WHAT IS DISCRIMINATION FOR THE PURPOSES OF THE REGULATIONS?

The regulations differentiate between two types of discrimination:

1. **Direct Discrimination:** If the trustees treat one member less favourably than another member on

the grounds of the member's age. For example, direct discrimination could include not allowing any members under the age of 35 years old to make additional voluntary contributions.

2. **Indirect Discrimination:** If the trustees discriminate against one member by applying a provision, criterion or practice which they apply equally to all members but which puts that member or members of a particular age group at a disadvantage when compared to other members, and the trustees cannot show that it is a proportionate means of achieving a legitimate aim. For example, indirect discrimination could include service-related pension increases, whereby an employer increases its contributions in respect of members who have been in qualifying service for a certain number of years. Whilst such increases could be justified to retain valuable and experienced members of staff and reward loyalty, if the pivotal length of service is not significant, it could be indirect discrimination.

# IMPLICATIONS FOR TRUSTEES OF OCCUPATIONAL PENSION SCHEMES

The regulations contain certain exemptions of age-related rules and practices, including:

- Minimum and maximum ages and waiting periods for admission to a scheme.
- Using age criteria in actuarial calculations.
- Age-related contributions to a scheme, where these are actuarially justified to counter the lower value of contributions for older members.
- Settling the level of pension benefits or contributions by reference to years of service or limiting membership by maximum years' service.
- Using a normal retirement age.
- Providing different schemes for members of different ages.
- Age limits on payments of benefits to dependants or adjustments to the level of pension benefits where there is a difference of more than a given number of years between the member and his or her spouse or civil partner.

It is also possible to discriminate where there is "objective justification", for example, to comply with legislative requirement. However, it is extremely difficult to argue objective justification based on the high cost of benefits or difficulty in obtaining insurance.

## WHAT ACTION SHOULD TRUSTEES BE TAKING?

Trustees and managers of occupational pension schemes need to be wary in amending scheme rules and using their discretion to pay pension benefits. The main dangers relate to correctly interpreting the exemptions and the scope thereof and avoiding indirect discrimination. The scheme rules will need to be carefully checked for any age-related aspects which are not listed in the exemptions above, as

such rules will need to be capable of being objectively justified. Problems may arise in particular where:

- Benefits are fully actuarially reduced on early retirement. Some exemptions may apply, but certain benefits must be amended.
- Employees who remain in service past normal retirement date are treated differently, e.g., cannot contribute or accrue benefits or have different death-in-service benefits.

Amendment to the terms of a scheme must be considered carefully, and advice on potential breach-of-contract exposure and costs should be taken.

## BREACHING THE REGULATIONS

If trustees breach the regulations, the member discriminated against can bring proceedings in an employment tribunal against the trustees personally as well as against the employer. This may result in compensation, an order declaring the rights of both the claimant and respondents or a recommendation of action for the respondents to reduce the adverse effects of the discrimination.

## LAWYER CONTACTS

For further information, please contact your principal Firm representative or one of the lawyers listed below. General e-mail messages may be sent using our "Contact Us" form, which can be found at [www.jonesday.com](http://www.jonesday.com).

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