



Guide

# Managing age

A guide to good  
employment practice

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# Introduction

The Chartered Institute of Personnel and Development (CIPD) and the Trades Union Congress (TUC) have produced this guide, with funding from the Department of Trade and Industry (DTI), to help employers and trade unions understand how to develop good practice to meet the requirements of the Employment Equality (Age) Regulations 2006, which were introduced in October 2006 (for simplicity, we refer to the legislation throughout this guide as the 'age discrimination regulations').

We conducted focus groups across the country to identify areas of confusion and misunderstanding. This guide aims to address these. In particular, the guide aims to reassure employers that they can send birthday cards, reward loyalty and service with gold watches and maintain graduate recruitment programmes if they take steps to ensure that such decisions are not based on age.

The guide is designed to support the Acas guidance and reflect the business case for employing people of all ages, as well as giving guidance on good people management and development practice to support and sustain business success. The guide complements the DTI's technical guidance on the regulations and that provided by Acas and points to other useful sources of information.

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# Part 1: Introduction

Age discrimination is bad for business. Not only is it unfair, it also wastes talent, experience and knowledge. And it's now also illegal to treat someone less favourably in the workplace because of their age.

## Setting the legal context: overview of the age discrimination regulations

The new age discrimination regulations prohibit age discrimination in work and vocational training, and apply to employers, private and public sector vocational training providers, trade unions, professional organisations, employer organisations, and trustees and managers of occupational pension schemes.

They cover, to varying degrees, a broad category of workers, including, for example, agency workers, casual and contract workers, office-holders and the police. Political office-holders and members of the armed forces are excluded from the scope of the regulations.

Discrimination at work on the basis of gender, race, ethnicity, sexual orientation, disability and religion was already unlawful and the age discrimination regulations implement the final strand of an EU Framework Directive (Council Directive 2000/78/EC of 27 November 2000), which established a general framework for equal treatment in employment and occupation. The UK regulations must therefore conform to the objectives set out in that Directive.

The new regulations are likely to have a significant additional impact on organisations, since age is one of the commonest reasons for unfair discrimination in the workplace. Surveys for the Government's Age Positive campaign have found that people are more likely to have suffered age discrimination than discrimination on other grounds, and in countries where age discrimination at work is already illegal, like the United States, Ireland and New Zealand, age-related disputes are among the most common to reach the courts or tribunals.

Age discrimination is also often hidden and difficult to detect. Blatant forms of age discrimination, such as telling someone they are 'too old' for a job, do exist, but usually age discrimination reflects historical practices, false assumptions and 'conventional wisdom'. Many people take it for granted and regard it as 'normal' to treat younger or older people differently. This makes age discrimination difficult to eradicate. While it's easy to remove dates of birth from application forms, it's much harder to make sure a manager interviewing for a job doesn't jump to conclusions about a candidate's ability to do the job because of their apparent age.

The regulations cover workers of all ages. It's just as unlawful to discriminate against someone for being too young as for being too old, and there are many forms of age discrimination that affect young people, like pay systems based on age or length of service. However, research suggests that age discrimination is particularly likely to affect older workers: restricting their ability to stay in work, develop in their careers and access training.

The regulations aren't just aimed at making employment fairer. They're also a response to falling birth rates and rising life expectancy throughout Europe. As the population of traditional working age falls, employers will face labour shortages, and the growing proportion of retired people will put pressure on pension systems.

In response to this problem, the EU member states agreed, as part of the labour market reforms established in Lisbon in 2000, to set targets to increase the participation of older people (those aged 50–65) in work to 50% by 2010, and raise to 60 the real average retirement age (that is, the age at which people actually retire, as opposed to pension age or contractual retirement age).

The UK is doing better than most other EU states and has already met these targets. The UK's real average retirement age is currently 61.5 (only the Scandinavian countries have higher participation rates for older people). However, the Government is still keen to encourage people to stay in work longer, and aims to increase by 1 million the number of people aged over 50 in work.

This should be possible, as the numbers have already risen by 1 million since 1997, and real retirement ages are now lower than they were half a century ago, despite the fact that most work is physically less demanding, and people generally have longer and healthier lives. Fortunately, this policy also chimes with the capabilities and aspirations of older people. Research shows that most older people like work, and would like to stay longer if the conditions are right.

The age discrimination regulations not only prohibit discrimination in work, but also change how employers can manage the retirement process. They make it very difficult for employers to retire employees before the age of 65, or to use early retirement as an easy way to manage downsizing.

### **Who and what do the new regulations apply to?**

Age discrimination means treating someone less favourably because of their age. The regulations apply to all employers and vocational training providers in the private and public sectors. They also apply to trade unions, professional organisations, employer organisations, and trustees and managers of occupational pension schemes. They cover retirement, recruitment, pay, benefits, promotion, career development, transfers, dismissals and training. However, the regulations only cover work and vocational training. They don't cover voluntary work or the provision of goods and services (although the Government has this under review).

The new regulations are enforced through employment tribunals, and standard tribunal procedural rules apply. The new Commission for Equality and Human Rights (CEHR) will have overall responsibility for monitoring age equality and prosecuting infractions. The CEHR is responsible for investigating age discrimination, as well as for identifying and prosecuting double discrimination,

such as age and gender – for example, older workers with a disability are more vulnerable to discrimination than older people or disabled people individually. Therefore, employers should ensure that their full set of diversity policies are consistent and up to date.

### **Employers' and trade unionists' views**

During the past year, the CIPD and the TUC have conducted focus groups across the country with employers and trade unions to find out their understanding and views about the regulations, what they're doing to prepare for them, and their understanding of how the law will affect HR policies and practices. Employers of a range of sizes and sectors were consulted across the UK. As you'll see throughout this guide, many organisations had misunderstood the regulations, with key errors surrounding the default retirement age, recruitment, and long-service awards. For instance, many had felt, wrongly, that they would have to abandon the use of graduate recruitment schemes, sending birthday cards to staff and giving long-service awards such as gold watches.

Most employers will have questions about how the regulations apply to them and are uncertain about how to avoid legal hazards. Some of this uncertainty is unavoidable. Case law will shape the scope and application of the law in time, and nobody knows for certain what the courts will decide. But many misconceptions can be cleared up, and the purpose of this guide is to give employers and trade unionists guidance on good practice, which will help them fulfil their legal duties.

Another feature of our discussions with employers was a widespread hope that they can not only comply with the new law, but also use it to encourage good practice. Many employers recognise that working life is likely to get longer for most workers, and there are benefits to be had from good age management policies. This guide will therefore describe the regulations themselves, as well as describing best practice.

### **Frequently asked questions**

This section includes some of the most frequently asked questions about the new law. They are directed in the first instance to employers, who must ensure their

actions comply with the law, but will also be relevant to trade unionists, who need to participate in reviews of collective agreements, negotiate policies and procedures, help members who believe they've been discriminated against, and help to resolve disputes about age.

(Note: advice throughout this document is based on an informed reading of the regulations and the notes of guidance produced by the Government and Acas, but they don't constitute authoritative legal advice. On many issues the final decisions will depend on case law established through employment tribunals and the courts.)

**Do I need to ask my employees if they want to stay in work past retirement age?**

You must inform the employee of their proposed retirement date no more than one year and at least six months before that date. You must also inform the employee of their right to make a request to stay in work beyond the retirement date.

**We don't have a compulsory retirement age. Do we need one under the new regulations?**

Employers aren't required to have a compulsory retirement age – in fact, most firms don't have one. Even without one, you can still retire an employee after 65, and you're not required to accept job applications from people who are more than 64.5 years old. However, it makes good business sense to recruit and retain the best person for the job, regardless of age.

**Do I need to consult employees who are over our normal retirement age before retiring them?**

Yes. Regardless of age or whether there has been a previous discussion, you must inform the employee 6–12 months before the date you plan to retire them.

**Can I refuse to allow an employee to stay in work past our normal retirement age?**

If an employee asks to stay on after the proposed retirement date, you must meet with them and consider their request. If you consider the request but still wish to insist on the original date, the employee can appeal, and you must consider it again. However, an employee who is compulsorily retired after 65 can't claim unfair dismissal if you insist, provided that you follow the procedures laid down in the regulations. But, in any case, it's a good idea

to listen to an employee's suggestions and work out a solution that's mutually beneficial.

**Can an employee ask for a union representative to accompany them to a meeting about their retirement?**

Yes, an employee has a right to be accompanied by a friend, colleague or workplace representative. With knowledge about the business and workforce, the union representative may be able to help broker an arrangement that suits both employer and employee.

**Can I retire an older employee to free up a post for other employees?**

It's very difficult for an employer to demonstrate an objective justification for retiring an employee before age 65 for reasons of succession. After age 65, you don't need to give a reason for retiring an employee. However, you may want to discuss whether the employee can stay in work while taking on a new role or responsibilities, like mentoring another employee in order to pass on their skills.

**Am I no longer allowed to advertise for 'dynamic' or 'mature' candidates for jobs because such terms could be indirectly age discriminatory?**

An advertisement can use wording that attracts candidates who meet the specifications for the job, but you should consider carefully the way readers are likely to interpret the language you use. For example, if the aim is to find someone who can handle responsibility, it's better to say exactly that than to advertise for someone who is 'mature', which is commonly taken to mean 'older'.

**How can I prevent age entering into appointment decisions when anyone can work out a candidate's age by looking at their employment history?**

Age can never be completely eliminated from the recruitment process, but the amount of age-related information requested can be minimised. Many employers now ask candidates to describe their competencies, rather than list their employment history.

**Can I recruit a less-qualified younger/older candidate in order to address age imbalances in my workforce?**

Recruiting directly on the basis of age will always be hazardous, although you may wish to argue an objective justification in terms of business need, which is permissible under the regulations. However, if you plan

to do this, you should give it careful consideration and record the reasons for your decision, in case an unsuccessful candidate later claims unfair treatment. The judgement on whether you were right will rest with the employment tribunal if the individual takes their claim that far.

#### Can my union restrict membership on the basis of age?

No. The regulations apply to unions as much as to employers. Restricting membership on the basis of age is unlawful. Unions also need to make sure that access to support, services and learning opportunities aren't affected by a member's age.

#### Can I still use incremental pay scales?

Incremental scales inevitably discriminate against younger people. However, the regulations allow them without any justification, provided that they don't extend for more than five years. Incremental scales that are longer than this can only be used if there's an objective, and proportionate, business need. It's important to produce robust evidence to justify their use.

#### If I give long-service awards, do I have to limit them to rewarding less than five years of service?

Long-service awards are allowed if they are proportionate and objectively justifiable (for example, in terms of improved morale or staff retention). Again, evidence will be required.

#### My local managers decide what their subordinates are paid. How can I make sure their decisions aren't age discriminatory?

Even if you delegate responsibilities to local managers, you as an employer are responsible by law for ensuring that decisions on pay, training, promotion and other aspects of work are not directly or indirectly related to age. Monitoring HR practices is particularly important when line managers have a great deal of discretion, since research has shown that enlightened corporate policies aren't always applied in practice by line managers.

#### Can I level down age-related pay and benefits?

Some firms have schemes like parties or awards for long-serving employees, and these are often popular with employees and good for morale and loyalty. Levelling down such schemes, in other words giving the lowest option, will almost certainly have the opposite

effect. However, if these amount to substantial payments, they may be deemed to be discriminatory. If you think that a scheme conflicts with the regulations, it's important to discuss this with employee representatives to seek solutions that protect staff pay and benefits as far as possible and to avoid bad feeling in the workplace and the risk of falling foul of other employment law (such as breach of contract and unlawful deduction of wages).

#### Am I required to have an appraisal system?

No firm is required to have an appraisal or development review system, but it's a good way to monitor employees' performance, identify skills and training needs, and ensure that people are treated fairly. Documentation of appraisals and performance assessments is an important way employers can demonstrate that their employees aren't subject to discrimination – and can be vital tools for assessing whether people who want to stay in work past normal retirement age are competent to continue. Appraisal systems must, of course, be free from bias in relation to age, gender, race, disability, sexual orientation, religion or beliefs. They should enable the employee to participate fully and add value to the organisation for the work they do.

#### Where's the harm in going easy on an underperforming employee who is close to retirement?

Allowing poor performance to continue, whatever the age of the employee, is demoralising to them, unfair to their colleagues and bad for business. Research has found that many older workers resent being treated in this way. Going easy on them may seem the nice thing to do, but it may lead to the employer overlooking the training and skills the employee needs in order to have productive and enjoyable years of work until retirement.

Ignoring underperformance is, of course, different from a negotiated agreement for a worker to phase into retirement by going part-time, or taking on different job roles or responsibilities, both of which are popular with many older workers.

#### The jobs my employees do are too physically demanding for older people. Do I need to hire them?

It's illegal to use age as a proxy for capability. Some jobs require a great deal of strength or dexterity; or quick reaction times; or may be difficult for people



with particular health problems. However, while many of us experience declining capabilities as we age, the rate of decline is unpredictable, and some people can, at age 70, perform tasks that others find difficult at 55. If a particular job has specific physical requirements, these should be specified and appropriate tests should be applied to all applicants, whatever their age, and adjustments and appropriate support given where practicable.

I have an employee under 65 with arthritis. Can I medically retire him?

The new regulations don't prevent you from dismissing an employee who isn't able to fulfil their work responsibilities. However, you should also consider your duty under the Disability Discrimination Act, which requires you to make 'reasonable adjustments' to help an employee with such a disability to remain in work.

# Part 2: Retirement

## Key messages

- Workers have the opportunity to work beyond retirement age if their employer agrees.
- There is a national default retirement age of 65.
- Apart from exceptional cases, employers aren't allowed to compulsorily retire employees who are younger than 65.
- Employers can choose to have no retirement age at all, or to set a retirement age, provided that it's not below 65 (for men and women) unless they can justify it.
- Employers must give staff proper notice in writing before compulsorily retiring them and meticulously follow the due process for dismissal on the basis that the retirement is fair.
- Employees who want to stay in work past normal retirement age have the right to request to do so. Employers must consider such requests seriously, and consider appeals against a rejection of the original request. However, employers don't have to give reasons for not allowing a person to work for longer.
- The Government plans to review the default retirement age in five years' time, with the possibility of abolishing it altogether.

Perhaps the biggest change as a result of the age discrimination regulations concerns retirement age.

Before October 2006 employers had few restrictions on how they handled the retirement of employees. Some automatically retired employees once they became eligible to draw their pension. Others set low retirement ages because of (usually untested) assumptions about older workers' capabilities. Often, compulsory retirement ages are historical, having stayed the same despite the fact that older people are healthier now, and technology is helping us be productive longer.

In this part, changes to compulsory retirement age are discussed. Compulsory retirement age is the age set by an employer at which employees must retire. It's distinct

from pensionable age, when employees become eligible to draw a partial or full pension (at which point, many workers choose to retire). The compulsory retirement age is when employees have no choice but to leave work.

Under the new regulations, a 'national default retirement age' has been set at 65. This means that, apart from some exceptional circumstances, compulsory retirement ages below 65 are very likely to be unlawful. After 65, an employer can retire somebody without having to justify the decision, as long as procedures outlined in the regulations are followed.

## Review your retirement age

If you have a compulsory retirement age which is below 65 (for any group of employees), it's very likely to be unlawful. This is true of retirement ages both for men and women.

The regulations allow some scope for setting compulsory retirement ages below 65 if there are objectively justified reasons for doing this. If you set a lower retirement age, you'll need to be prepared to demonstrate to an employment tribunal that the retirement age is strictly necessary. Objectively justified retirement ages below 65 are expected to be rare.

Many employers can decide to set their retirement age at the default of 65. However, you can set it higher for some or all employees. Factors that may be taken into consideration when setting a retirement age include:

- recruitment and retention: can a higher retirement age help you address labour shortages?
- workforce planning: how will extending working life affect the balance of skills and experience in your workplace?
- knowledge management: can you encourage older employees to stay in work longer in order to pass their knowledge on to younger colleagues?

### You don't need to have a compulsory retirement age

Most British employers don't have a retirement age at all, so if you haven't set one, you're not alone.

The new regulations do not require employers to have a compulsory retirement age. Employers without a compulsory retirement age can still:

- allow people to choose when they want to retire
- have discussions with employees about their retirement plans
- agree a mutually acceptable retirement date with an employee
- dismiss employees (whatever their ages) who are incapable of carrying out their job responsibilities
- choose not to recruit employees who are aged 64.5 or older.

Why don't employers have retirement ages? Most employers that don't have compulsory retirement ages don't feel the need for one. But these employers will need to make sure they have systems in place to deal fairly with employees. They don't need to introduce a compulsory retirement age.

Many leading employers have decided to abolish their retirement ages for some or all employees. One of the main reasons for removing the compulsory retirement age lies in the recruitment and retention of skilled workers. People who are approaching 65 may be reluctant to apply for a new job, assuming that prospective employers would be unwilling to hire them. Abolishing the retirement age makes clear an employer's intention to look at skills and competence, rather than age, when making decisions on recruitment and retention.

The absence of a retirement age focuses attention on performance that adds value in some way that's relevant to the organisation's needs and best interests. Good practice and labour market pressures will increasingly force employers to abandon compulsory retirement as it is contrary to business and personal interests.

Some employers are abolishing their retirement ages in anticipation of the default retirement age itself being abolished. The Government has pledged to review the default retirement age in 2011, and a legal challenge regarding its status under European law is already in progress at the time of writing this guide. A decision on this is expected in mid-2007. In the meantime, public sector employees can register cases in anticipation of the decision that it would be discriminatory to be retired through the regulations' due process.

### Notifying employees of their retirement

The age discrimination regulations specify new and precise procedures which employers must follow in order to retire people fairly. It's important that line managers are trained both to understand the process and to use it properly, as failure to do so will automatically be against the law. Employers have to notify employees of their intentions to retire employees within 6–12 months of the retirement date. This must be done in writing and within the specified timeframe for the notice to be considered fair. An employee can claim up to eight weeks' pay if notification isn't given within this specified time frame.

### Being accompanied by a workplace representative

An employee has the right to be accompanied to a meeting by a union representative or work colleague to discuss staying in work past retirement age. The

## Case study: Marks & Spencer

In 2002, Marks & Spencer removed its company mandatory retirement age, which had been set at 65. The decision came after a review of retirement practices and a drive to retain and attract highly effective sales advisers. Removal of the mandatory retirement age was linked to an extension of flexible working policies to enable older retail staff to reduce working hours rather than retire. The firm now employs 700 staff aged over 65.

representative must be chosen by the employee and must also be employed by the employer.

The workplace representative can't speak on behalf of the employee, but can make an opening statement, participate in the discussions on options and confer with the employee. The workplace representative can also help to ensure that the meeting is conducted fairly and that the employee's request is considered seriously.

### Discussing alternatives to retirement

An employer doesn't have to give reasons for refusing to continue to employ an employee who asked to work beyond the notified retirement date, as long as the due process set out in the law is followed.

Under the regulations, the employer must allow an employee to request an extension of work as well as convening a meeting to discuss possible alternatives to retirement.

The regulations allow a great deal of flexibility about how discussions over extending work are held. Broadly, there are five key requirements that must be followed:

- The employer must give the employee sufficient notice of their right to make a request to stay in work longer. If the employer gives less than six months' notice, the employee will have at least six months to make a request.
- There must be a formal meeting at which alternatives to retirement are discussed. The employer can't simply reject out of hand an application to stay in work.
- If the employee wants to stay in work longer, they must make a request more than three months before the proposed retirement date.
- The employee has a right to be accompanied by a union or staff representative, or a friend, in the meeting.
- The employee must be informed of the employer's decision, and must be given, and be told of, their right to appeal. Although reasons for decisions don't have to be given, Acas guidance recommends that giving reasons is good practice.

The regulations don't specify how you must conduct the meeting, but the employee should feel confident

that the request has been given serious consideration. Retiring with a feeling of being treated unfairly can be a grim way to end work, and has been shown to have a bad effect on a person's quality of life in retirement.

In order to have a productive discussion, all parties should come prepared to discuss a range of options. Ideally, this should be part of a continued dialogue, for example, during appraisals or development reviews. Regular discussions can help the employee plan for retirement and help the employer plan how the employee's skills will be replaced.

Below is a list of issues that are worth considering before the meeting:

#### For the employer:

- Can the employee's hours be changed? Many older workers would like to continue in work but on reduced hours. Changing working hours can enable the employer to retain skills, while giving the employee the chance to combine work and retirement.
- Is change necessary? In many cases, an employee may want to continue in the same job they're doing, with no change to work content or hours. In this type of situation, change may not be necessary, and keeping an experienced employee in the job will benefit the employer unless performance is weak.
- Can the work content be changed? Variety of work can be as attractive to older workers as anyone else, and employees may wish to change work roles by reducing responsibilities, downshifting, moving to less stressful or physically less-demanding work, trying something new or building on their strengths and interests. As CIPD research shows, the use of flexible working arrangements continues to rise considerably among older workers.
- Can the employee take on mentoring responsibilities? Extending working life can benefit employers by retaining knowledge and skills vital to the organisation. The employee close to retirement can share their knowledge with colleagues through formal or informal mentoring. Some employers have also adopted knowledge management systems to enable employees to record and store their skills and experience.

- How will retention affect workforce planning? Retaining an employee past normal retirement age can address skills and labour shortages. It can also affect the succession plans (both real and perceived) of other employees.
- As an employer, can I benefit? Retaining older employees longer can be a way for you to save money on recruitment and training, retain skills, and benefit from flexibility.

#### For the employee:

- What kind of work do I want to do? Many employees who ask to stay in work simply want to continue with the work they're doing, but sometimes people want to try something new, reduce their responsibilities, or keep just some of the aspects of their work. You can propose changes to your work portfolio, and some suggestions may be beneficial to your employer. Consider what you value and enjoy most in your work.
- Do I want to change my hours? Most older workers would like to stay in work longer if they had more choice over the hours they work. Working part-time or flexibly can be a way to enjoy the benefits of both work and retirement. If you have a colleague who also wants to work part-time, you could suggest a job-share arrangement, and present ideas and solutions on how the work could be covered.
- Can I share my knowledge with colleagues? One of the benefits for employers of extending working life is that it creates a longer period with which to manage the transition from one employee to another in the job. You may wish to consider whether there are ways you can pass your knowledge and experience on to colleagues through mentoring or in-house training.
- How long do I want to work? Your employer may be willing to extend your working life, but would prefer to specify a timescale. You're not obliged to suggest one, but be prepared to discuss how long you might want to stay in work. Once you have an idea of your own preferences, you can negotiate a timescale for reviewing your retirement plans.
- What are the financial implications? The age discrimination regulations remove the age restriction for unfair dismissal claims, so you can't be treated unfairly with regard to pay and benefits. However, if your employer reduces your working hours or

changes your responsibilities, they can also change your pay and benefits either on a pro-rata basis or to match your new/revised job.

- What are the pension implications? Although the Government has made changes to the law to allow employers to continue to employ people who are drawing their company pensions, individual occupational pension rules vary. Not all schemes will allow this but some do, and others also allow people to continue to contribute to the employee's pension after the employee passes retirement age.

#### Workplace representative considerations:

- What arrangements could work? You can use the experience of successful arrangements for extending work drawn from within and outside the organisation. These examples could help the employer and employee think about creative ways to extend working life, which at the same time bring benefits to both.
- Can I get guidance from my union? Unions have a wealth of information not only on retirement, but also flexible work arrangements, job-sharing, training, and skills retention, which can help in your discussion.

#### Informing the employee, and the right to appeal

If an employer refuses an employee's request to continue working, and the refusal is based on a decision that breaches other employment regulations, this is legally hazardous. For example, if you refuse to allow a female employee to stay in work past retirement age because she is a woman, you will be in conflict with sex discrimination legislation.

If you refuse to allow the employee to stay in work, you're not legally required to give a reason, as the reason will always be retirement. But giving a reason will help the employee understand why the request wasn't granted and can help make them feel they've been treated fairly. Not giving a reason can lead to the perception that the request wasn't seriously considered.

You must, however, inform the employee of their right to appeal against your decision if you refuse the request or if you agree to allow them to stay in work longer but on terms they wouldn't particularly want. A meeting must be convened to discuss the reasons for the employee's appeal.

### **Staying in work beyond retirement age**

The regulations introduce two new measures that aim to maintain employment protection for workers over 65:

- Employees over 65 now have the same rights as younger ones not to be treated unfairly at work. This means they can't be discriminated against (for any prohibited reason, including age); unfairly dismissed; or suffer a loss of pay or benefits simply because of their age. The age limit for statutory redundancy has also been lifted.
- You remain obliged to inform the employee of your decision to retire them, and they have the right to make a request to stay in work.

# Part 3: Recruitment, selection and promotion

## Key messages

- When recruiting a new employee, job and person specifications need to match the requirements of the job. Avoid requirements that could unnecessarily exclude people on the basis of their age.
- Job advertisements that specify ages are, in most cases, unlawful. When advertising for jobs, avoid language that might deter people in certain age groups from applying.
- If you ask for a candidate's age on your application forms, request this information on a separate monitoring form.
- Ensure that staff who are responsible for shortlisting, interviewing and selecting job applicants aren't basing their decisions on age biases and assumptions.
- Ensure all qualified staff have the opportunity and encouragement to participate in promotion and developmental opportunities.
- Employers can legally encourage job applications from particular age groups that are under-represented in the organisation. However, this can't justify recruiting specifically on age alone, which is unlawful.

## Matching the person to the job

Under the age discrimination regulations, it's unlawful to discriminate against someone when filling a job vacancy. This covers direct discrimination (for example, when you tell someone they're too young for the job) or indirect discrimination (for example, when you place unnecessary requirements on job applicants that only people in certain age groups could fulfil). If you discriminate, either directly or indirectly, on the basis of age, you must be able to produce a robust objective justification of your actions to stay within the law.

If a failed job applicant believes that your decision was based on age, they could submit a claim to an employment tribunal. It's important to ensure that you appoint the best-qualified person, irrespective of age.

The age discrimination regulations cover people of all ages, and it's equally important not to discriminate against younger or older applicants.

The starting point when filling a vacancy is establishing accurate and objective job and person specifications. This should be the basis of advertisements, application forms, and shortlisting and selection criteria.

Be aware that managers often think about the characteristics of the person who is in post rather than the job itself when they're writing or updating job and person specifications. In seeking a direct replacement, managers could unfairly discriminate. Remember, too, that some skills can be attained by training. A more inclusive approach to recruitment, based on removing unnecessary requirements that act as artificial barriers and block the way you access talent, will bring you organisational benefits. Factors to take into account include:

- Age range: in most cases, specifying an age range for job applicants will be unlawful. But there are two exceptions. First, an employer can specify an age range when there is a genuine occupational requirement – but these are likely to be very rare. Age shouldn't be confused with capability. For example, specifying that only young people can qualify for a physically demanding job is unlikely to be lawful, and can't replace proper health and safety or performance checks. Second, an employer can lawfully reject job applications from people who are older than, or within six months of, the company retirement age. If you don't have a mandatory retirement age, you can lawfully reject applications from people who are age 64.5 or older, because of the default retirement age in the age discrimination regulations.
- Anticipated length of service: you may wish to prevent high turnover, which can bring recruitment

and training costs. But be careful not to make assumptions about how many years of service a potential employee can give you based on their age. It's much easier for an employer to assume how close an older job applicant is to retirement than to guess when a younger one may leave for another job. On average, a worker who is recruited in their mid-50s is likely to give you as many years of service as a younger person. Refusing to recruit someone because you don't think you'll be able to recoup training costs before they retire can be a lawful justification, but you'll need to be able to demonstrate this justification.

- **Formal qualifications:** specifying formal qualifications for a job will be lawful if you evidence the need for them. You'll need to ensure that you accept equivalent qualifications in order to be fair, and remember that qualifications may have been renamed over time. You should also keep in mind that, generally, the current cohort of older workers is less likely to have attained formal qualifications. Instead, they'll have relied on their work experience or training on the job to gain skills.
- **Experience:** specifying the work experience necessary for a job is also lawful, provided you can demonstrate that it's proportionate to the job. Requiring too much experience can mean you're discriminating against younger job applicants. For example, requiring ten years of work experience will usually exclude people under 28, and an employer is likely to have difficulty justifying this requirement. Shorter periods of experience, say, less than five years, can generally be less problematic.
- **'Fitting in':** some employers may make assumptions about people in certain age ranges that are more or less likely to fit in with the team

of existing employees. For example, it might be assumed that a younger manager would have difficulty managing older employees. Specifying age ranges to mirror the age profile of your existing team is likely to be discriminatory.

### Where to advertise

When advertising a job vacancy, it's important to communicate with as wide a group of potential candidates as possible. Take care to consider the pros and cons of different recruitment techniques.

Many employers, particularly small ones, use word of mouth to find potential recruits. There might be legitimate reasons for using this as one way of finding people. For example, asking your employees for suggestions might be a way to find recommended staff. But relying only on word of mouth could be discriminatory if you don't have a particularly diverse workforce including workers with a range of ages.

### Graduate recruitment

Many employers run graduate recruitment schemes to recruit and train candidates for long-term careers with their organisations. But the tendency is to focus on younger graduates and ignore those who are older. It's not necessary to abandon graduate recruitment schemes altogether, but they need to be free from age bias to be lawful.

Not all university students are young people, and many people now return to higher education after a period in work. They might do this in order to start a new career or to improve their career prospects in their present occupation.

## Case study: Large catering company

The hospitality sector has one of the youngest workforces in the British economy. It also faces one of the biggest labour shortages, with many posts left unfilled. A large UK catering firm, identified by the European Foundation for the Improvement of Working and Living Conditions, recognised the value of older workers in meeting its recruitment needs. The company reviewed its job advertising strategy, the qualifications it demanded and its induction training in order to remove the barriers faced by older job applicants. It discovered that older employees tend to stay with the firm longer, thereby reducing its recruitment costs and labour turnover.



Excluding older graduates can be unlawful and a waste of talent that could otherwise benefit your business. Older recruits may be able to bring previous work experience to the job as well. Trawling your workplace for candidates can also encourage your employees to take up training opportunities, contributing to an upskilling of your workforce as a whole. It may also not be the case that a younger employee would give you more years of future service than an older one. While older workers may be closer to retirement, they're less likely to change employers for better job prospects. It may be worth monitoring your turnover rate to see whether younger recruits really do give you longer service.

It's therefore important that you carry out the following checks:

- Can you demonstrate that a younger candidate is likely to stay with you longer than an older one?
- How long does a graduate recruit need to stay with you before you can reasonably expect to have recouped development costs?
- What does the person specification state that you require from a graduate recruit? How closely are these characteristics based on the real needs of the job/training scheme?

### Gathering information about job applicants

There are different ways to gather information about job applicants, including standardised application forms, CVs, and informal discussions. Each approach carries some advantages and risks for the employer. Whichever ways you choose to gather information, be sure that they comply with the age discrimination regulations – and, of course, with other equality legislation.

### Job application forms

Standardised application forms give you most control over the information you gather about job applicants. Consequently, if you use application forms, you can reduce the risk of using age-related information, which can lead to discrimination.

Many employers ask applicants for their date of birth, and there are legitimate reasons for doing this. The two most common reasons are:

- Statutory reasons: some jobs, such as selling alcohol, are age-restricted, and asking for the applicant's date of birth is necessary to prevent you from recruiting someone who is too young.
- Monitoring reasons: employers may want to monitor recruitment practices to review the age profiles of job applicants, shortlisted candidates and interviewees in order to identify potential age biases.

Both reasons are legitimate, and usually necessary, measures. However, if you ask an applicant for their date of birth, you still need to make sure the information doesn't lead to age discrimination. It's a good idea to ask for the date of birth on a detachable page of the application form with other equal opportunity information, which your HR department can separate before passing the document to those responsible for shortlisting and interviewing.

Be careful not to ask for information that's not essential for the purpose of selecting the right candidate. Knowing when a candidate left secondary education may not add much in finding the right candidate, but will make it easy for someone to guess the applicant's age.

### Competency-based application forms

There are many reasons for employers to use competency-based job application forms as well as reducing possible age bias.

Whether or not you ask for the date of birth, or whether that information is available to your interviewing panel, other information you request may make it possible for staff to guess the approximate age of applicants. The most obvious way to do this is to look at the date the job applicant graduated from university or started their first job. Such a calculation could lead to age discrimination (even when the approximation turns out to be wrong), which would leave you vulnerable.

Many employers are now revising their job application forms in order to draw out information about applicants' skills and experience in ways other than through a time-sequential educational and employment history.

A competency-based application form may ask the applicant to explain how their skills can be used to

meet specific tasks involved in the job. The applicant doesn't need to say when the skills were attained, but can demonstrate how they're applied. The application form may also ask the applicant how they would manage certain situations, which would bring out not only skills and experience, but also innate skills such as tacit knowledge and decision-making.

### Using CVs

Many employers ask applicants to send in CVs for some or all jobs advertised. The employer has less control over the information provided on a CV than on an application form. Job applicants, for example, frequently volunteer their date of birth, even when the information isn't requested.

And unless you've made those responsible for recruitment decisions aware of the danger of age discrimination, legal problems could ensue.

Whether or not you request age-related information, as an employer, you are liable if the information leads to age-biased decision-making. In order to reduce your risk, it's a good idea to:

- Be clear about the job and person specifications for the job. You might want to send specifications to applicants before they send you their CV, so that applicants aren't relying on short job advertisements in order to tailor what they tell you about themselves on their CV.
- Spell out the information you require from the applicant and how you will be making your decision. The more the applicant knows about what you need to learn about them, the better your chances are of selecting the right candidate.
- Make it clear that age isn't for making decisions but is needed for monitoring purposes. It's good practice to ask for this information on a separate monitoring form.
- Training staff responsible for shortlisting and interviewing can make them more aware of the risk of using age to make decisions.

### No written applications

Employers often don't ask for application forms to be filled in, particularly for low-skilled or temporary jobs. But you need to take care that your decision isn't based

on biased age perceptions. Without a written application form, you might not gather the information you need, or your approach might be inconsistent (for example, asking two applicants for differing information). If you need to defend your decision against a claim of discrimination, it could be difficult to demonstrate how you arrived at your decision.

### Shortlisting job applicants

If you have clear job specifications and application forms, shortlisting candidates for job interviews should be a relatively straightforward matching of the skills offered by the applicants to those you need. Few individuals will have all the attributes you want, so it's good practice to distinguish between essential and desirable requirements.

Take care to ensure that, when sifting job applications, you take into account equivalent training and experience. If a skill can be acquired through, for example, formal training, apprenticeship or work experience, be aware of this when selecting candidates.

It is a good idea for staff who are responsible for shortlisting to be trained in age issues, particularly the new age discrimination regulations. You need to take steps to prevent those who are shortlisting from introducing their own biases when selecting candidates for interview. And be clear to the person doing the shortlisting about the skills you require.

You could have more than one person responsible for shortlisting. Then they can cross-check each other's choices and confer to make sure the right people are selected for interview.

It's also sensible to document as much as possible about how decisions on shortlisting are arrived at. Using a scoring system can help you document how you decided to select particular candidates. This can be vital if a complaint is made by a job applicant who wasn't selected.

Remember that a person doesn't need to be an employee to bring a claim under the age discrimination regulations. A person who is qualified for the job, but isn't selected for interview, could bring a claim at an employment tribunal.

## Interviewing

It's often a good idea to have more than one person doing the interviewing. The multiple perspectives of an interview panel can help eliminate biases in the recruitment process. Where practical, interview panels that are diverse help improve selection decision-making. Also, your interviewers should avoid questions that reflect age prejudices. Some age-related questions can be consistent with the law, but only when there's an objective business justification for asking them. Be careful if you do, and don't dwell too much on age. Questions like: 'How would you feel about managing people older than you?' or 'Will you be able to work with younger colleagues?' are unlikely to be justifiable.

All interview panel members should take notes, and all must be collected. If a job applicant makes a complaint, you might need to produce these. They can also be useful to demonstrate how selection decisions were arrived at.

## Recruitment agencies

You can't legally ask a recruitment agency to find candidates based on age as this would amount to an instruction to discriminate.

If a recruitment agency discriminates on the basis of age, it will be liable for claims from aggrieved applicants. Agencies that collude with employers to discriminate unlawfully on the grounds of age may be treated as knowingly aiding an unlawful act and would therefore be jointly liable with the employer. If an agency can show that it reasonably relied on the employer's assurance that the discriminatory instruction was objectively justified or was specifically exempted (for example, because age was a genuine occupational requirement), the agency wouldn't be liable.

The agency may ask for the criteria to be given in writing with an explanation of why the age-based criteria are justified. An employer who knowingly or recklessly gives a false or misleading assurance will have committed a criminal offence, punishable with a fine.

## Positive action

If age groups have been historically disadvantaged in recruitment or under-represented in your firm or industry, you can take 'positive action' to encourage people in that age group to apply for job vacancies. If you've found that applications tend to be less frequent from a particular age group, you can take measures to encourage people in that age group to apply for jobs by, for example:

- reviewing where you advertise vacancies
- reviewing the job specifications and conditions of employment to find ways to make the job more attractive to the under-represented group (say, by inviting job-sharing applications)
- training existing employees to take up promotion opportunities
- declaring in advertising and job application literature that you would particularly welcome applications from people in a particular age group that has been historically under-represented in your sector.

You can't, however, select a candidate for a job on the basis of their age. However you can encourage people from under-represented age groups to apply. Such direct forms of discrimination are unlawful under the age discrimination regulations.

# Part 4: Pay, benefits and pensions

## Key messages

- Except in rare circumstances, such as the application of the national minimum wage, paying people according to their age is directly discriminatory.
- Employers can use length of service to determine pay or benefits as long as the service being taken into account is limited to five years. Pay and benefit scales extending for more than five years need to be objectively justified.
- Paying people according to their length of service of more than five years is likely to be indirectly discriminatory, since older workers are more likely to have longer service.
- Employers must make sure that line managers with discretion for setting pay understand that it could be unlawful for people to be paid differently simply because of their age.
- Where unjustifiable age discriminatory pay and benefits exist, employers and unions should negotiate revisions that are not based on 'levelling down', which could be demotivating, contrary to the age discrimination regulations and bad for employee relations.
- Pension entitlements are covered by the age discrimination regulations, but a wide range of pension rules are exempt.

## Basing pay directly on age

Under the age discrimination regulations, paying employees according to their age is directly discriminatory and, in most cases, unlawful. It's also bad for business, as rewarding people just on the basis of their age does nothing to reflect the contributions they make.

A survey of employers across a range of sectors, commissioned by the Department for Work and Pensions, found that few employers have pay systems based directly on age. Those that do have usually just failed to get around to making appropriate changes.

The age discrimination regulations may well eliminate the few directly age-related pay systems left, because it will be difficult for employers to justify them on business grounds.

But age is still a factor in applying the use of the national minimum wage. The Government has chosen to exempt the National Minimum Wage regulations from the age discrimination regulations. Under the National Minimum Wage regulations, employers are allowed to pay 16- and 17-year-olds less than those aged over 17, and can pay 18–21-year-olds less than those aged 22 and older.

But this exception only applies in cases where employers either pay workers no more than the national minimum wage rates or they don't pay younger workers more than the main adult national minimum wage rate. So, for example, as the current national minimum wage rate (October 2006) is £5.35 per hour, an employer would not be permitted to pay an 18-year-old £8 per hour and a 23-year-old £10 per hour for doing the same job, but they would be allowed to pay the 18-year-old £5 per hour, while still paying the 23-year-old £10 per hour.

It could prove unlawful to pay different pay rates to an 18-year-old and a 24-year-old (for example) doing the same job simply because of their age, regardless of whether the pay differentials conform to the National Minimum Wage regulations.

Paying people less simply because they are above retirement age is direct age discrimination. If you agree to allow an employee to work past retirement doing exactly the same job, you can't reduce their pay and/or conditions. The 65-year age limit for unfair dismissal has been abolished, giving employment protection against unfair or constructive dismissal to employees above this age.

### Basing pay indirectly on age

While few employers base their pay systems directly on age, many have pay systems that are indirectly based on age, and are therefore vulnerable to claims of unfair age discrimination. Indirect age discrimination means that conditions are set that are more difficult for people of one age to meet than another.

Using length of service of more than five years to determine pay could potentially be indirectly discriminatory. This is because greater numbers of younger workers are more likely to have shorter periods of service than older colleagues and, as a result, they're more likely to be paid less, even when doing the same work.

But there are reasons why an employer may use length of service to influence what they pay employees. For example, remuneration based on length of service can encourage employees to stay with their employer longer, thereby reducing labour turnover and recruitment costs.

Employers may also use length of service as a way to reward employee loyalty and because length of service is assumed to be linked with increased competence.

However, while many jobs require that people follow a learning curve to become fully efficient and effective in what they do, as a rule of thumb, employees should be able to reach the full pay rate for their job within a period of five years or less. It's therefore unlikely to be justifiable to pay a competent employee with ten years of service more than a similarly competent employee with five years of service.

Recognising this – and relevant employment case law, which has determined that, for the average job, it takes around five years for a new employee to reach their maximum capability – the Government introduced into the age discrimination regulations a degree of flexibility in how length of service can be used in setting pay and conditions.

This flexibility allows employers to reward the progress of employees towards the achievement of job competence based on the use of periods of service up to a maximum of five years. Employers can use longer

periods of service to justify differences in pay if they can produce robust evidence to demonstrate reasons for doing this.

If, as an employer, you use a pay scale that extends for more than five years, the pay system must be objectively justifiable. This means demonstrating that:

- The pay system meets a legitimate aim.
- The discrimination is proportionate.

You'll need to be able to show that, while your pay system may be age discriminatory, the business needs strongly outweigh the discrimination suffered by the employee. That is, an employer has to demonstrate that it reasonably appears to them that applying the criterion of length of service fulfils a business need of the undertaking, and that there was no reasonable alternative than to maintain the use of such a pay system.

### Long-service awards

Many organisations give long-service awards to employees after 20 or 30 years of service. The awards are sometimes accompanied by a ceremony or party. Under the age discrimination regulations, long-service awards are indirectly age discriminatory (since it is impossible for a young person to have had long service).

Long-service awards can be used in cases where they are objectively justifiable – they meet a legitimate aim and the discrimination is proportionate.

Legitimate aims may include rewarding loyalty, increasing retention and improving working teams' performance. Long-service awards can make employees feel valued, particularly in view of the time they have given to the organisation.

It isn't possible to identify the 'size' of a long-service award that would be considered 'proportionate', as this has yet to be addressed by case law. However, a one-off gift certificate or small payment would be easier to justify than a consolidated pay increase or increase in benefits such as leave entitlement.

## Case study: Agenda for Change: The NHS Knowledge and Skills Framework

Length of service is frequently used in the public sector to set pay levels. It has been seen by public sector unions and employers as a fair system that can be understood by employees. While annual increments may be imperfect, their application was at least seen as objective, with managers' subjective perceptions playing little role in determining employees' pay.

Over time, pay bands across the public sector tended to become longer. Government sought to balance union wage demands with public spending constraints, which would eventually lead to pay increases favouring longer-serving employees. Long pay bands have also been tacitly used to retain employees with key skills.

As a result, parts of the public sector now have some very long pay bands, which take ten years or more to progress through. These have led to low pay for public servants at the bottom of the pay scale, and the link between pay and competence has been lost. Reducing the size of pay bands has proved to be a difficult but necessary task for public sector employers in order to reduce the risk of equal pay claims (not only based on age, but also gender, race and ethnicity).

As part of the Agenda for Change programme for modernising the National Health Service, NHS employers and unions have worked in partnership to identify the key skills and competencies needed for all NHS employees.

The Key Skills Framework covers taught, experiential, tacit, and acquired skills, and focuses on how those skills are applied to the job being undertaken.

Under the national pay framework, pay scales have been shortened. However, employees have two competency assessments, which are linked to pay progression: first, after one year of service, and then before the employee reaches the maximum. Assessments are meant to identify skills needs early and to encourage employers and employees to appraise and manage the career development of the employee.

The Key Skills Framework also establishes a stronger link between competence and pay progression which should reduce the risk of equal pay claims against employers.

### Addressing age discrimination at the workplace level

Many employers, particularly those in sectors like business services, information technology and sales, set pay on an individualised basis, with employees on 'personal' employment contracts. Pay may be linked to performance (individually or within teams), skills, targets, or a range of other criteria. However, it's normally up to the individual employee to negotiate their pay, usually with their line manager.

Many unions are now supporting their members by providing advice and information that can be used in such pay negotiations.

If employers give line managers discretion over setting pay and conditions, it's particularly important to ensure they understand the importance of eliminating age discrimination as well as other potentially discriminatory factors – gender, for example – from the process.

Managers may have personal age prejudices and make assumptions about people's performance based on their age that can't be justified. If line managers make discriminatory decisions about pay and conditions, employers are at risk of tribunal claims.

## Removing age discrimination from pay systems

It's important to review policies and practices relating to pay and benefit systems in order to identify potentially illegal practices and to train managers in understanding the importance of equality in pay and reward and to monitor practices.

Many employers have systems in place to identify unjustified pay gaps by gender or race. Equal pay review processes can be used to identify pay gaps by age. Questions to ask are:

- Are there differences in pay between employees whose job responsibilities are of equal value? (Equal value includes like work, work that is related or equivalent, work which a job evaluation review has determined is of equal value, or work which an independent consultant has determined is of equal value.)
- Is there a material defence for the pay and benefits gap? (Similar to objective justification, is there a business reason for the pay gap (such as differences in skills) which explains the gap, and is the discrimination proportionate?)
- Is there an age reason that could explain the pay gap (for example, is one employee significantly older than the other)?

If age gaps exist that can't be justified (whether in terms of formal policies or managers' discretion), it's important to rectify them before a complaint is made. And if an age discriminatory pay and benefit system is identified, you'll need to consider how to put it right.

Levelling down pay and conditions (that is, awarding all employees the minimum) may seem the cheapest way to remove discrimination. However, such approaches could lead to tribunal claims from affected employees.

Under the Employment Rights Act 1996, employees are protected from unfair deduction of wages. Varying an employee's contract of employment without their consent, for example, by reducing their pay, is also unlawful. Levelling down could therefore lead to a claim for constructive dismissal or unlawful deduction of wages. In addition, levelling down pay and benefits could undermine good employee relations.

An employment contract can be varied by agreement with employees or through collective bargaining with a recognised union. There are ways in which you can remove age discrimination without breaching other employment law, including:

- levelling up pay and conditions
- agreeing a change from age- to competency-related remuneration systems (for example, the NHS Agenda for Change model)
- buying out age discriminatory pay and benefits
- compensating lost pay and benefits with increases elsewhere.

Red-circling (continuing to pay existing staff according to the discriminatory pay system, but freezing the higher paid employees until the others have caught up) may also be possible, but care needs to be taken with this approach, as doing this can also be discriminatory.

## Pensions

The following types of pension schemes:

- occupational pension schemes (defined-benefit (final salary))
- defined-contribution (money purchase)
- hybrid (a mixture of the two above)
- registered or unregistered schemes
- life-cover-only schemes

are all covered by the age discrimination regulations, and pension trustees, as well as employers, must comply with the law.

As with other pay and benefits, age discriminatory rules that are not specifically exempt must be objectively justified or removed. Changes to the pension scheme in order to comply with the age discrimination regulations are exempt from statutory consultation requirements under the Occupational and Personal Pension Schemes Regulations 2006.

A wide range of pension rules are exempt from the regulations. This means that employers and trustees who operate these rules in their pension schemes don't have to objectively justify their retention of them.

Pension rules that are exempt include:

- age, pay and service restrictions for admission into a pension scheme
- actuarial reductions in pension entitlements for early retirement (or actuarial increases for late retirement)
- differences in contributions based on employees' pay
- members' or employers' contributions that differ by age, but only where there is an aim of producing equal pensions for workers of different ages with the same salary and length of service
- some age-related contribution rates for defined-benefit schemes (for example, to take into account the increased cost of pension entitlements as people get older)
- early retirement packages for existing and prospective members (but not new joiners)
- enhancing age-related benefits for ill-health early retirement
- bridging pensions for male employees between 60 and 64
- some age- or service-related death-in-service benefit calculations.

Employer contributions to employees' personal pensions (including group and stakeholder pension schemes) are covered, but other aspects, such as benefits, are not. This is because a personal pension scheme is considered an arrangement between the individual member and the pension provider rather than a part of the employee's pay and conditions.

Employer contributions to personal pension schemes are, however, within the scope of the age discrimination regulations. This means that employers shouldn't discriminate between employees on the grounds of age when deciding whether employees are eligible for employer contributions, or when deciding on the amount of the employer's contribution. Employers mustn't restrict access to a personal pension scheme or employer contributions to that scheme on the grounds of age or length of service unless the discrimination can be objectively justified.

The pensions arrangements of partnerships may be within the scope of the age discrimination regulations, depending on the particular arrangements of the partnership.

The list above is not exhaustive. The DTI has produced a comprehensive guide called *The Impact of the Age Regulations on Pension Schemes*, which employers and pension trustees should consult ([www.dti.gov.uk/files/file35877.pdf](http://www.dti.gov.uk/files/file35877.pdf)).



# Part 5: Appraisal, performance management and training

## Key messages

- Managing an ageing workforce requires robust appraisal or development review systems so that ways can be found to make the best use of older workers' skills and talents.
- Using retirement to deal with poor performance undermines productivity, demoralises older workers, and is unfair to their colleagues.
- Having a rigorous performance management system is the only fair way to address problems with performance. It may also be essential to prove that a disciplined employee was treated fairly.
- Employers must not discriminate on age when selecting employees for vocational training. Barriers to training faced by certain age groups should be removed.
- Although government training and education schemes continue to restrict education funding on the basis of age (for example, apprenticeships for those over 24), employers can still offer excluded employees the opportunity and facilities to participate in training.

## Good appraisal systems are important in extending working life

As most managers know, good appraisal or development review systems are important tools for getting the best out of employees. If you manage your employees' development well, you can ensure that they remain productive, feel valued, and contribute to your organisation. Research shows that employers who invest in their workers, rather than treating them as a cost, tend to receive better performance and more loyalty.

The extension of working life makes having a good appraisal system even more important. Employing staff who are working longer means that they need to be managed well, and employers need the tools to do this.

Employers often use retirement as a way to deal with the poor performance of older workers. When an employee isn't working well, or underperforms, allowing them to 'run out the clock' may seem like the most respectful way to address the problem. But it's really only a way of avoiding the problem.

By failing to appraise older workers, employers aren't serving the best interests of the individual or the organisation. Good appraisal systems not only identify performance problems, but also help employers map out a strategy for addressing them. Often there are underlying reasons for poor performance such as skills needs or the desire to change work routine. When appraisals are avoided, these solutions go undetected. Addressing problems with performance early means that the older worker can lead a more productive working life.

## Key principles for managing performance

The age discrimination regulations don't actually require you to have an appraisal or performance management system. Where there is no formal system for measuring performance, managers can deal with performance informally by working closely with employees. The four guiding principles include:

- Making appraisals routine: make sure you talk about performance and development opportunities regularly. Don't rely on problems to trigger conversations. Appraisal discussions should be good opportunities for employees to discuss their career plans, their role in the organisation, and their aspirations. This is particularly important for getting the best out of older workers, who may feel they're past the point at which their employers are willing to invest in them, and for younger workers, who may feel that their development or progression opportunities are being blocked by an organisational focus on the needs of older workers.

- Identifying work needs early: regular appraisals enable you to identify issues early and to head off surprises. The right training at the right time puts the employer and employee in a win–win situation.
- Treating everyone fairly: ignoring the underperformance problems of older workers, while disciplining younger ones, could be illegal. It's good practice and good business sense for employers to make sure that the organisation itself doesn't contribute to underperformance.
- Documenting discussions and their outcomes: during informal discussions, make sure that both you and the employee document separately what you have discussed and agreed together. This written evidence will be a defence if a claim is made. Remember that the age bar for unfair dismissal claims has been lifted, and employers need to be able to demonstrate that all employees, including those over 65, are treated fairly.

### Managing the careers of older workers

Of course, the four principles above should be used when managing the performance of all staff, regardless of their age. But inadequate performance management tends to affect older workers more regularly.

Employers often wrongly assume that older workers, being closer to retirement, will be with them for shorter periods of time than younger ones, and therefore fail to invest in their development. However, on average, a 50-year-old employee is more likely to stay with their employer than someone in their 20s or 30s. Investing in older workers' development is therefore an important investment for a manager to make, not a cost.

It's equally important not to make assumptions about people's career development aspirations just because of their ages. Remember that a 50-year-old still has 15 years of service before reaching the default retirement age. Research shows that there is a growing appetite for flexible working and retirement opportunities among older workers.

While it's important to treat every employee as an individual, patterns of job transitions do change over time. People switch jobs for a variety of reasons. More people in their 20s and 30s are more likely to do this to progress their careers and gain promotion, while more

older people may do this to achieve a better work–life balance and may welcome different kinds of work opportunities and/or different working hours, for example.

However, older workers find it difficult to get a new job, and the reasons for this are complicated. Employers often make assumptions about what older workers want and, conversely, older workers may not ask for career changes, as they perceive they have little chance of achieving them. As people move up the organisation's hierarchy, there may also be fewer senior positions to which an older employee can aspire, making promotion a less likely possibility.

These and other pressures mean that employers need to be active in encouraging older people to think about developing their careers and taking part in training in order to recruit and retain talent.

Many older workers who are dissatisfied with their jobs simply choose retirement rather than pursue work that better suits their needs and personal circumstances. A study of older women who work and have responsibility for looking after older relatives, for example, found that they were less likely to ask for reduced hours to balance home and work responsibilities than younger colleagues with childcare responsibilities. For them, work and home pressures tended to build up until they reached tipping point, at which point work was abandoned altogether.

Significantly, a survey of retired people by the Centre for Research into Older Workers (CROW), based at Surrey University, showed that less than 20% would like to return to work. However, half would have liked to remain in work longer if they had been allowed to work fewer or more flexible working hours.

This shows that employers need to think creatively about employment and development opportunities, particularly for older workers, who are a neglected segment of the labour market that, if used effectively, could help address skills shortages.

### Training employees

The age discrimination regulations prohibit employers, colleges, universities or other training providers from

using age as a criterion to select people for or support them in vocational training. Employers need to ensure that training policies and practices don't stop older workers from taking part, for example, by using age bars. Indirect forms of discrimination, such as restricting training to people who are close to retirement, could be illegal.

Under the regulations, employers can only use age when deciding who to train if they can objectively justify this approach. To do this, you need to demonstrate that the restriction:

- meets a real business need
- is proportionate, and the only reasonable option available.

One example of an objective justification may be barring employees who are close to retirement from participating in training. An employer may argue that they need to recover a return on training an employee. It might be argued that an employee close to retirement may not have enough time with the organisation to allow the employer to benefit in this way. Be careful, however, if making such a case. Ask yourself:

- What is the cost of the training and how long will it take to get a return? With most training, the employer can see a return on investment within a year. Restricting employees who are over a year from retirement may not be proportionate.
- What are the assumptions about how long people will stay with the firm? As noted above, an employee in their 50s is likely to stay with their employer as long as a colleague in their 20s or 30s. If you have high turnover, it may not be objectively justifiable to train a younger employee (who might leave to join your competitor) and not an older one.
- How essential is the training to the employee's work? When assessing the harm of discrimination, a tribunal will consider the impact on the employee. If training is essential for them to continue in work, necessary for progression, or required for a pay increase, restricting provision will be very damaging to the employee's career. Because the harm is greater, you will have to meet a higher standard for demonstrating the business necessity for discrimination in order to have your action considered proportionate.

- What are the costs of not training employees? You should remember that training benefits the employer by developing more productive employees. Workers who are not trained may rely on less efficient working patterns, which may cost you, as the employer, in terms of lost time and productivity. Restricting training may not only be legally hazardous, but is also bad for business.

### All training is covered

The age discrimination regulations cover all training providers, not just employers. Colleges and universities are covered, and they can't normally restrict people from participating in courses because of their age. Equally, you can't ask a college to select your employees for training on the basis of age.

It's important also to remember that the regulations cover trade unions, which are taking a growing role in the provision of vocational training. Unions should ensure that age doesn't play a role in selecting members for help in learning. Not only should policies be reviewed, but unions should also train and monitor officers and workplace representatives to ensure that their decisions aren't based on age.

### Government-subsidised training programmes

Even though employers and vocational training providers can't discriminate on the basis of age when providing training, government training programmes do have age limits. For example, the state-subsidised Modern Apprenticeships programme restricts funding to apprentices aged 16–24. The restrictions could put an employer in a bind. Say you wanted to appoint an apprentice under the programme, but had a candidate who was 25?

As the employer, you're not required to compensate an older learner for a lack of state support. But you can still provide the same level of support you would have provided to a younger applicant. An older apprentice may need to find other financial support to pay for their education, but they can still benefit from being appointed to an apprentice job, being given time for studying, access to a mentor, and all the other support you had envisaged providing to the appointee.

### Addressing the reasons for non-participation in training

A recent survey of employers found that very few have policies that explicitly bar particular age groups from taking part in vocational training. However, most research, including the National Institute of Adult Continuing Education Adult Learner's Week annual survey, has shown that participation in training declines steadily with age.

Perhaps it's generally felt that older people need less training than younger ones and that experience is an adequate substitute for formal training. It's true that those in the current cohort of older workers have fewer qualifications than younger ones, and have often gained their skills on the job rather than in the classroom. But it's unwise to assume that an older employee doesn't have a learning need. Experience is an important way to gain skills and complements skills learned in the classroom, though it's not necessarily a substitute for formal learning. Restricting training could affect an older employee's career opportunities and may stop them from improving their job performance.

Older employees are also less likely to ask for training, which self-restricts their opportunities. Sometimes training needs are ignored by default. For example, employers may not have high expectations when it comes to developing older employees, especially if current performance is satisfactory.

Older workers may themselves be reluctant to identify their learning needs for fear of risking their job and/or work reputation. Some older people associate 'training' or 'learning' with incompetence and take the suggestion to train as a personal affront. And asking for training might be thought to indicate a long-running job problem. Most jobs have changing skills needs, and it's common for people to need to update and refresh their skills from time to time.

CROW recently carried out research on learning in the automotive industry. They found that most older workers who have unmet skills needs say the reason they didn't participate in training was because neither they nor their managers thought to discuss training needs. This shows how age discrimination may not necessarily be conscious. It also reinforces the need for good appraisal systems (see above). If you, as an employer, regularly discuss the development needs of your employees, you are in a better position to identify skills needs early, ensuring that your employees are more efficient and effective and consequentially more productive, for longer.

# Part 6: Health and safety

## Key messages

- Don't assume that certain jobs are physically too demanding for older workers. Age shouldn't be used as a proxy for making objective decisions about capability and applying good risk management strategies and safeguards where appropriate.
- Physical ability changes as people get older, but adjustments can be made to help people stay in work longer.
- Mental capacity doesn't start to decline until very late in life. People in their 60s may process information differently to those in their 20s, but they are likely to be just as capable.
- Early identification of health and safety risks can enable employers to make small adjustments to prevent disabilities that can lead to early exit from work.

## Age and capability

Physically demanding tasks may become more difficult for people as they get older, and sometimes work requirements and challenges can cause work-related stress, which research shows is a growing workplace phenomenon generally. Managers have often dealt with work fatigue or the declining health of older employees by retiring people early on medical grounds.

The relationship between age and capability is often overstated, misinterpreted or false. In many respects, work capability doesn't decline at all. Up to the age of 65 at least, and perhaps much later, a wealth of evidence suggests that mental capacity doesn't decline with age. Older people may process information differently to younger people, but not necessarily for the worse. One study, for example, which looked at typists' speed and accuracy, found that younger typists were able to process information faster, but older ones were better able to handle larger chunks of information. The two groups did equally well on speed, although the

older typists tended to be slightly more accurate. Another study of bus drivers, even after controlling for experience, found that those in their 60s had fewest accidents or traffic infractions. The idea that workers' mental capacity slows with age, making them less capable for work, has largely been debunked.

In other respects, the perceived relationship between work and age masks a different reason for declining work capability which the employer can more directly control. Some evidence suggests, for example, that work-related stress does increase with age, particularly for older women. However, older people have fewer ways in which they can manage stress. Work-life balance policies usually focus on people with childcare responsibilities, while those for people with eldercare responsibilities are less common. Persistent unmet training needs can be misconstrued as declining work capability.

Physical capability can decline with age, and work design should reflect this. Physical capability declines most rapidly in work that requires full capacity. But few jobs now require a person to work at maximum strength for long periods of time. Many jobs are supported by technology, which can absorb the physical strain, and many require lower levels of endurance or shorter bursts of physical demand. Older workers who stay physically fit are likely to be able to continue fulfilling these work responsibilities.

## People with disabilities

The vast majority of labour market exits before the age of 55 are on the grounds of incapacity, especially in trade and low-skill work. There are currently 2.7 million people on Incapacity Benefit, Severe Disability Allowance, or Income Support in the UK. The Government wants to reduce this number by 1 million by 2016. According to Labour Force Survey data, 28% of people on Income Support would like to work but are not able to do so because of a disability.

Under the Disability Discrimination Act (DDA) 1995, employers are required to make reasonable adjustments to enable people with disabilities to stay economically active. This may mean making adjustments to workstations, working environments, working hours or using technology. The DDA applies, obviously, to age-related disabilities. Care should be taken to identify disabilities early. Age-related disabilities tend to be gradual, causing the individual to make compensations in order to conceal them. If identified late, work strain has already been compounded, and the adjustment needed is much greater.

The Workability Index Model uses four underlying factors to assess the likelihood that workers will be able to meet future work demands:

- **Work demands and environment:** the physical demands of jobs can be reduced through the better use of new technology. Because physical ability declines earlier and faster than mental ability, extended working life can be facilitated through a shift of work responsibilities from physically strenuous to mentally challenging job responsibilities. The Workability Index Model also takes into consideration the impact that ergonomics, workstations and built environments have on work in later life.
- **Work organisation and work community:** this includes the ability of workers to change their work routine and work content in order to reduce stress, improve job satisfaction and make use of experiential and tacit knowledge.

- **Health and functional capacity:** employers can help employees stay active longer by promoting healthy living through daily exercise and healthy eating. Early intervention is required, and the model recommends that free time is made available during work to enable workers to take part in exercise. The research found that older blue-collar workers, who are most vulnerable to early exit from the labour market, are the least likely to participate in daily exercise.
- **Maintenance of professional competence:** job training and opportunities to improve skills is the final factor in the assessment of an individual's workability. It's particularly important in making opportunities available to older workers to shift from physically demanding to mentally challenging work.

The Workability Index Model stresses the importance of early intervention to enable workers to stay economically active longer. Most of the tools workers need (for example, a healthy lifestyle, good skills) take a long time to acquire. So workers of all ages should be supported.

### Health and safety risk assessments

Risk assessments are important tools that enable employers to assess and manage the potential health risks that could lead to early exits from work or pose a health danger to employees. Few employers regularly conduct risk assessments, limiting their use to when an employee starts work, is promoted, or changes work responsibilities.

## Case study: Workability Index Model

Finland is the only European country that has been able to raise its population's real retirement age. One of the most significant contributors to this has been a system for identifying and eliminating factors that are likely to lead to early retirement. The Workability Index Model was developed by the Finnish Institute for Occupational Health. Some of the factors relate to older workers' ability to develop in their jobs and refresh their skills (see Part 5). Other factors include changing attitudes towards work and retirement through anti-discrimination HR policies and better retirement management. However, much of the model is focused on managing changing physical capacity through better work design.

Employers may consider using risk assessments as part of an overall assessment about the ability of older workers to extend working life, particularly after normal retirement age. But it's important that risk assessments are carried out routinely, not just when an employee reaches a certain age, such as the company's pension age, for two reasons:

- Age-related criteria could be illegal if older workers are more likely to be assessed than younger workers. Older employees could claim that they're being targeted for dismissal on health or disability grounds. Conversely, a younger person could argue that their health and safety needs are not being properly addressed.
- As noted above, most interventions an employer can make to help people stay in work longer require early and long-term solutions. Assessing health risks for young employees is therefore as important as for older ones in promoting healthy working.

It's good practice to review health and safety policies with your occupational health practitioners, health and safety representatives and union representatives to identify potentially hazardous practices in your health and safety procedures, as well as ways that positive approaches, like the Workability Index Model, could be used to help older workers stay in work longer.

# Part 7: Redundancy and termination

## Key messages

- When making redundancies, avoid using age and length of service as selection criteria.
- Avoid encouraging early retirement as a way of dealing with job attrition. In losing older employees, you may lose experience and tacit knowledge that are essential for your business.
- Enhanced pension entitlements for early retirement are exempt from the age discrimination regulations, but only for existing and prospective members. Early retirement pension enhancement for new joiners needs to be objectively justified.
- You can use age or length of service to calculate redundancy payments, but you must make sure that your method of calculation complies with the law.
- Age bars for statutory redundancy have been lifted. Therefore you can't exclude people who are under 18 or over 64. You can exclude employees with less than two years of service with your organisation, although the two-year qualifying period arguably has a disproportionate adverse effect on young workers.

## Selecting people for redundancy

Most employers have had to deal with job attrition at one time or another, and redundancies are sometimes necessary. Many employers have procedures that have been agreed with their unions for selecting workers for redundancy.

Age and length of service are often used as criteria for selecting employees for redundancy. Age is often used in order to take into account the effect the job loss will have on the individual worker: younger people are thought to be better able to find new jobs, and are therefore selected first for redundancy, while older workers or those with families are assumed to suffer greater financial hardship and are therefore the most likely to be retained. In other cases, employers may decide to select those who they see as 'approaching

retirement' as being first in line for redundancy. A few employers use selection criteria to ensure they have a balanced age profile in their workforce, purposely selecting a particular age mix of workers.

Selecting workers for redundancy based on length of service may be done for much the same reasons. Length-of-service criteria, such as last in/first out (LIFO) may be used because it's felt that longer-serving employees would find it more difficult to re-enter the job market. Length of service could also be used as a proxy for experience and competency: the longest-serving employees are thought to be the most experienced and therefore most competent employees and it's these workers the employer would want to retain.

Additionally, age and length of service have also been used by employers and unions as selection criteria for redundancy because they are considered straightforward and objective. Employees know, for example, who has worked the longest or shortest time, and therefore understand the reasons for selection.

However, under the new age discrimination law, these practices may leave employers vulnerable to claims. Using length of service as a criterion for selection is likely to be unlawful, while using age will almost certainly be. Selection criteria such as LIFO could be discriminatory on other grounds too, such as race and gender, since under-represented groups tend to have shorter periods of service.

These traditionally used criteria could also be bad for business because they are arbitrary criteria for retaining employees. Using LIFO, for example, you may be left with a workforce with the wrong mix of skills and competencies. Employees with essential knowledge could have been dismissed simply because they didn't have the right age or service profile.



Many employers are moving towards a system that takes into account a range of factors when selecting candidates for redundancy. Factors that are more appropriate than age and length of service include:

- **Job posts:** the first criterion should always be to look at the jobs that have been deemed redundant (that is, those whose functions will no longer be performed in the company). Post-holders are normally considered for redundancy first. If a person is made redundant, but most of the work continues to be undertaken, this could be an unfair dismissal case. In redundancy situations, jobs are often merged and reorganised, leaving more than one employee with a claim to a job, so other factors also need to be taken into consideration.
- **Skills and competencies:** what skills and competencies do you need to retain in the workforce? Which skills are essential and which are desirable? In the same way that you can allocate a points system in recruitment to assess how closely applicants' skills match the needs of the organisation, you can adopt this technique in selecting candidates for redundancy. Be careful to take into account all the ways people can acquire skills, and don't rely just on formal qualifications.
- **Team skill balance:** as well as considering the skills of individuals, you can also take into account the skills mix in the workforce. Ensuring that your organisation has all of the skills it needs should form part of such a process.
- **Performance:** having a good appraisal system will enable you to take into consideration past and current performance in selection. Documented performance management can demonstrate that your assessment is fair and objective.
- **Disciplinaries:** taking care not to consider expended disciplinaries or open cases, you can consider sanctions that have been made against individual employees.
- **Attendance:** attendance records can be used in selection, but care should be taken to avoid putting at a disadvantage people with long-term illnesses or disabilities. This could be discriminatory against older or disabled people, or women, who traditionally tend to take more time off for caring responsibilities than men.

Age and length of service can be part of the overall mix of criteria you use, but only if you have objectively justified reasons for doing so. If you can demonstrate, for example, that experience within the organisation is an important asset to the organisation, you may have a stronger case for using criteria that take length of service into account.

It's advisable to have, where appropriate, a dialogue with the union to explore ways of reviewing and ensuring that redundancy criteria are transparent and fair, and free from age and other discriminatory biases.

### **Voluntary redundancy and early retirement**

Many employers use voluntary redundancy and early retirement in order to avoid making compulsory redundancies. These may still be allowed under the age discrimination regulations, but case law will determine how the law applies. In other countries that have age discrimination laws, such as the United States, courts have looked at the age profile of the exiting workforce when assessing whether employers' calls for volunteers were discriminatory. If you do use voluntary redundancy, care should be taken to ensure that employees, regardless of age, are not pressured into volunteering.

Many pension schemes, particularly defined-benefit pension schemes, provide enhanced entitlements for people who take early retirement. In order to avoid redundancies, for example, an employer might offer to let older employees retire before their pension age with an enhanced pension so that they receive a full, rather than actuarially reduced, entitlement. These pension rules are exempt from the age discrimination regulations, but only for existing and potential (that is, employees who were eligible before October 2006) members of the pension scheme. If, as an employer, you want to cover new joiners, you need to demonstrate that there is an objectively justified reason for doing so.

### **Redundancy pay**

Statutory redundancy pay is based directly on age and length of service, but the scheme is exempt from the age discrimination regulations. The statutory redundancy scheme has been reviewed, and the main change is that years of service under 18 and over 64 are now counted when calculating redundancy entitlement.

Further, employees aged 65 and over are now entitled to redundancy payments.

Many employers offer enhanced redundancy entitlements, either for voluntary or compulsory redundancy or both. The exemption for the statutory redundancy scheme is linked to enhanced redundancy, so the age discrimination regulations allow employers to use age and length of service when calculating enhanced redundancy payments, provided that the enhanced scheme closely mirrors the statutory redundancy scheme.

To be exempt from the age discrimination legislation, an enhanced redundancy scheme must be calculated in accordance with the statutory scheme, but the employer can increase the amount paid over and above the statutory minimum by either:

- ignoring the statutory limit on a week's pay (currently £290) and setting a higher limit, or basing redundancy payments on employees' actual pay
- applying an 'enhanced multiplier' to the amount of statutory redundancy pay, so that employees under the age of 22 receive one week's pay for each complete year of service, instead of half a week's pay. If this method is chosen, the multiplier must be increased proportionately for all the age bands (that is, employees between the ages of 22 and 40 would then be entitled to two weeks' pay, instead of one week's, for each year of service, and employees over 41 would be entitled to three weeks' pay instead of one and a half weeks' pay)
- applying a single multiplier to the statutory redundancy payment.

These exceptions are rather limited in scope. And employers that operate different redundancy payment schemes need to be able to objectively justify them if they are based on age and/or length of service.

Levelling down redundancy schemes in order to age-proof them will undermine good employee relations and may expose employers to claims of breach of contract or constructive dismissal.

### **Making people 65 and over redundant**

The age discrimination regulations lifted the age bar on statutory redundancy entitlements, which had excluded people over 65. This means that employees over the age of 65 are entitled to redundancy pay if they have been made redundant. The 'taper' provision, under which an employee's redundancy payment was reduced by one-twelfth for every month of service over the age of 64, has also been removed.

For employees who are above the organisation's normal retirement age and with whom you have agreed to extend work for a fixed period, you can take this into consideration when selecting people for redundancy. However, the employee would be entitled to redundancy payment.

# Part 8: Harassment and victimisation

## Key messages

- Harassment and victimisation of workers on the basis of age is unlawful.
- Employers have a duty to protect employees from being harassed or victimised at work, including by their managers or colleagues.
- Harassment can include not only verbal and physical abuse, but also excluding people from formal or informal groups.
- Training line managers in age discrimination, and identifying potential problems early, can help reduce the risk that a complaint of harassment is made.
- Protection from harassment and victimisation extends beyond the worker's period of employment.
- Employees with a complaint about harassment have a right to representation.

## Harassment

The new regulations make harassment on the basis of age unlawful. Employers have had a general 'duty of care' to protect employees from harm, including harm caused by bullying behaviour. Harassment on the grounds of sex, race, disability, sexual orientation, religion or belief was already specifically outlawed. The new regulations make it possible for an employee to make a direct complaint if the harassment is age-related.

Harassment is defined as unwanted conduct that violates dignity or creates an intimidating, hostile, degrading, humiliating or offensive environment for the person complaining. Harassment on grounds of age can't be objectively justified.

Complaints of harassment can be made against both the individual and the employer. Age-related harassment can affect workers of all ages. Many employers have already put systems in place to protect young workers from harassment and bullying from older or longer-serving colleagues. This is particularly the case in

workplaces where the initiation of new recruits has involved bullying and/or harassing new recruits.

Acas describes harassment as:

'... behaviour that is offensive, frightening or in any way distressing. It may be intentional bullying which is obvious or violent, but it can also be unintentional, subtle and insidious. It may involve nicknames, teasing, name calling or other behaviour which is not with malicious intent but which is upsetting. It may be about the individual's age or it may be about the age of those with whom the individual associates. It may not be targeted at an individual(s) but consist of a general culture which, for instance, appears to tolerate the telling of ageist jokes.'

As an employer, therefore, you have a duty to protect employees not only from direct verbal or physical abuse, but also a work environment that is generally ageist. You are also responsible for protecting employees from work-related harassment outside the workplace, for example, at an office party or a get-together after work.

Harassment on other discriminatory grounds is already unlawful. Tackling age-related harassment can present a new challenge to employers, because ageist attitudes are pervasive and less identifiable as socially unacceptable than other forms of discrimination. As with racism and sexism, social attitudes take a long time to catch up with the law.

Joint CIPD and TUC consultations highlighted employer concern about the acceptability of allowing employees to give each other birthday cards containing derogatory remarks based on age. Banning the use of birthday cards to avoid this would be an unintended consequence of the regulations, and this should not be the case. The key is to ensure that employees treat each other with respect and dignity and understand how

certain actions might be offensive. It's important to remember that what constitutes harassment is defined by the perspective of the individual subject to the harassment. Employers are expected to take complaints of harassment seriously and take steps to prevent an ageist culture from developing.

### Having a strategy for tackling harassment

Acas recommends a four-step strategy for tackling harassment in the workplace. This approach won't guarantee that harassment will never occur, but it at least reduces the chances by making it clear to employees that ageist behaviour is unacceptable. It also provides managers with clear guidelines on how to deal with complaints of harassment:

- 1 Have a formal policy: employers, regardless of size, should have formal policies on harassment. The purpose of having a policy is to make it clear that harassment is unacceptable behaviour.

Trade unions can play a role in helping to create a climate at work that's free from harassment and can help the employer get the message across to employees.

It's particularly important to highlight what types of behaviour might be regarded as harassment on the basis of age. Behaviours might include:

- telling ageist jokes
- excluding work colleagues from work teams or social gatherings on the basis of their age
- using ageist stereotypes, nicknames, or insulting language.

Everyone in the organisation should be made aware of, and understand, the organisation's policy on harassment.

- 2 Set a good example: harassment feeds on a workplace culture in which such behaviour is tolerated. Leadership from the senior management team can help to foster a more positive workplace culture. The formal policy should include a statement of commitment from senior managers, and line managers should be encouraged to champion the policy with their employees.

Harassment by managers against their line managers should be addressed particularly quickly as it gives employees the impression that such behaviour is acceptable.

- 3 Have fair procedures in place for dealing with complaints: the most effective way of dealing with harassment is to understand that all incidents are dealt with seriously and quickly. This is because people are reluctant to use formal processes and by the time they're confident enough to do this, often too much damage has already been done. However, grievance and disciplinary procedures should be used for dealing with complaints of harassment that have not been resolved informally.

Acas recommends a range of measures that can be taken by a manager to deal with a complaint, including informal approaches, counselling and taking formal disciplinary measures. Which approach is used depends on the severity of the complaint, and whether the complaint is a one-off or a more persistent problem. Care should be taken to ensure that procedures are applied consistently, for example, dealing with a complaint from a young employee in the same way as from an older one.

- 4 Make it clear to employees that harassment complaints will be dealt with fairly, confidentially and sensitively: employees will be reluctant to come forward if they feel that they will be treated unsympathetically or if the complaint will compound the abusive treatment they are receiving.

### Harassment from people other than employees

The age discrimination regulations make employers responsible for protecting workers from harassment by other workers. Harassment can also occur in the workplace from people who are not employees of the organisation. For example, front-line sales representatives could be subject to harassment from customers. Make sure that your employees are protected from harassment from external people. Even though you are not obliged to do so under the regulations, employers have a common-law duty of care to provide a safe working environment.

Customers should be made aware that harassment is not tolerated in your organisation. A statement could be posted in the public area to make clear that harassment is not tolerated. Complaints of harassment from customers should be dealt with seriously by managers.

If you have a contractual relationship with another employer in which employees from the two organisations are working closely together, it is good practice to ensure that the other employer has a policy and procedure in place to deal with harassment. Many organisations, particularly in the public sector, contractually require this.

### **Victimisation**

The age discrimination regulations also protect employees from victimisation. Victimisation occurs when an individual:

- is treated detrimentally because they've made a complaint
- intends to make a complaint about discrimination or harassment
- has given evidence or intends to give evidence relating to a complaint about discrimination or harassment.

As with all harassment, a complaint can be made against both the individual and the employer.

Victimisation can also include:

- being harassed by managers or colleagues
- being denied promotion, training or development opportunities
- being given reduced or demeaning work tasks
- being excluded from work teams
- being managed more harshly.

Employees are protected from victimisation after their contractual relationship with their employers ends. This would include, for example, letters of reference which an employee might request to take to their next job. Labelling an employee a troublemaker because they have made a complaint is unlawful.

# Annex A: Age equality policy

Most employers have an equal opportunities policy that's written into their HR policies. The policy is usually part of employees' conditions of service, and can be found in the staff handbook. In anticipation of the age discrimination regulations coming into force, many employers took measures to include age as a form of discrimination that is prohibited in the workplace.

Employers aren't required under the age discrimination regulations to have an equal opportunities policy in relation to age, but having such a policy can help to:

- raise awareness among employees about their rights not to be discriminated against on the basis of age
- raise awareness among managers about their responsibilities both not to discriminate and to address age-related harassment in the workplace
- make employees aware of prohibited and unlawful behaviour.

Having a written age-related equal opportunities policy may help to make employees and managers aware of organisational policy, but simply having a written policy alone does little to remove age discrimination from the workplace. Having a policy may help in the defence of an employer against an age discrimination complaint, but an employment tribunal will also consider how the policy is implemented.

It's good practice not only to have a policy, but more importantly to have a joint strategy with the union for putting it into force. Measures you could consider include:

- Staff awareness training: raising awareness of the organisation's policy on age through, for example, induction training can help employees become aware of their rights and responsibilities. Employees should be made aware of what the company policy

is and also how they can make a grievance if they feel they've been unfairly treated. Raising awareness about the organisation's retirement, appraisal and development policies can also help employees plan their transition from work to retirement.

- Management training: the new regulations affect managers at all levels of an organisation. Line managers who have responsibilities over setting pay, appraisals, performance management and managing the retirement of staff need to comply with both the regulations and company policies. Age management should be part of the HR training strategy for managers. It's helpful to train managers both in legal compliance and good practice. For example, training managers in how to handle retirement decisions may help your organisation find ways to retain skilled older workers.
- Monitoring HR policies and practices: this can help to identify hazardous practices before a tribunal situation is reached. In the run-up to the age discrimination regulations coming into force, many employers reviewed their HR policies to identify and eliminate hazardous practices. Continuous monitoring can help to change age-biased HR practices early. For example, a review of recruitment procedures could show that you're unable to attract older candidates. This may reflect a weakness in your job advertising strategy. Part 4 discussed equal pay reviews, which can be used to identify age discriminatory pay systems. The same principles apply to monitoring other aspects of management: if an age-related difference exists which you can't justify, it would be best to eliminate the discrimination before it reaches a tribunal.
- Sharing and exchanging good practice: good practice on age management can occur at the workplace level but might not be known in other parts of the organisation. This happens in large organisations in particular. Multinational companies may already have experience of working within age

discrimination legal frameworks in other countries and lessons learned abroad can therefore be used back in the UK. Covering age and retirement management in management workshops, team meetings, intranet sites, newsletters and other parts of the organisation's communication strategy can help ensure that good practice is widely shared throughout the organisation.

- Publicising age diversity policy: many firms are now including their age diversity policy and age management strategies in their annual reports and corporate social responsibility programmes. This can raise public awareness of company policy, enhancing the organisation's reputation as a responsible employer. It can also demonstrate to shareholders, customers, unions and other stakeholders how the firm is making best use of the skills in its workforce.

# Annex B: The law in a nutshell

The Employment Equality (Age) Regulations came into force on 1 October 2006. They are the final strand in the EU Framework Directive on Equal Treatment in Employment and Occupation to be implemented by the UK. This Directive committed EU member states to legislate on disability, religion and belief, sexual orientation and age.

The regulations apply to employers and vocational training providers in the private and public sectors, to trade unions, professional organisations, employer organisations, and trustees and managers of occupational pension schemes. They cover, to varying degrees, a broad category of workers, including employees, agency workers, casual and contract workers, office-holders and the police. Political office-holders and members of the armed forces are excluded from the scope of the regulations.

As with other equality legislation, the regulations prohibit both direct and indirect discrimination in employment and vocational training. At the moment, they don't extend to other areas such as the provision of goods and services. They outlaw age discrimination against young and old alike. Employers are generally liable for the discriminatory acts of their employees committed in the course of their employment. It's a defence if the employer can show that it took such steps as were reasonably practicable to prevent the discrimination. There is no minimum service requirement for discrimination claims, so workers are protected from their first day at work.

## **Direct and indirect age discrimination**

Direct age discrimination occurs when a person is treated less favourably because of their age, or perceived age, than other people are or would be treated. Direct discrimination based on assumptions about how old someone is, even if the person's actual

age isn't known, is therefore also unlawful. To establish a claim of direct discrimination, the claimant needs to show that:

- there was different treatment
- on the face of it, age was the reason for, or a significant factor in, the different treatment
- they suffered a detriment as a result of the treatment.

An example of direct age discrimination would be an employer denying access to training opportunities to an employee because they are 50 years old; or excluding an employee from a promotion opportunity simply because they are seen as being too young.

Indirect age discrimination occurs when a provision, criterion or practice is applied equally, but it puts, or would put, people of one age group at a particular disadvantage when compared with those of a different age group. An example would be linking access to certain benefits with length of service, as older people are generally more likely to have longer service than younger people.

Uniquely, under the age discrimination regulations, both direct and indirect discrimination are lawful if the employer can show that the discrimination is objectively justified. Generally, under equality legislation, there is no defence to direct discrimination and only indirect discrimination is capable of being objectively justified.

Note that the claimant in an employment tribunal case doesn't need to prove conclusively that the different treatment was age-related. It's enough if they can produce evidence from which the tribunal can infer age discrimination. The employer would then have to show either that age was not a (significant) factor or that the discrimination was justified.



## Objective justification

The EU Directive permits direct discrimination on the grounds of age, provided the discrimination is objectively and reasonably justified by a legitimate aim and if the means of achieving that aim are appropriate and necessary (Article 6.1, Council Directive 2000/78/EC). The UK regulations state that an employer must show that the discrimination was a proportionate means of achieving a legitimate aim.

## Legitimate aim

It's important to note that an aim which is in itself discriminatory can't be described as 'legitimate'. For example, an employer in the advertising sector wouldn't be able to argue that it is justified in only recruiting people under 25 because it needed to have a young profile in order to attract clients.

In its 2005 consultation document on the draft regulations, *Equality and Diversity: Coming of age*, the Government cited the following as examples of legitimate aims:

- facilitation of employment planning
- health, welfare and safety (including protection of young or old people)
- the need for a reasonable period of employment before retirement.

However, even though an aim is legitimate, the discriminatory treatment isn't justified if the means of achieving that aim is disproportionate. So, for example, refusing to employ anyone above the age of 55 wouldn't be a proportionate means of fulfilling the need for a reasonable period of employment before retirement in posts where the employee can normally be expected to work to age 65 and beyond.

*Coming of Age* also cited 'economic factors such as business needs and considerations of efficiency' as possible legitimate aims. But the extent to which costs can be taken into consideration as a legitimate aim will need to be viewed in the light of the proportionality test. The less pressing and immediate the legitimate aim, the more scrutiny it is likely to be subjected to – for example, discriminatory treatment based on public safety reasons is likely to require less robust justification than discriminatory treatment based on costs.

## Proportionality

In order for discriminatory treatment to be justified, it must not only pursue a legitimate aim, it must also be a proportionate means of achieving that aim. This is essentially a balancing exercise – the relative benefits and importance of achieving the legitimate aim must be weighed against the negative impact of the means chosen to achieve that aim. Where the aim in question can be achieved equally well by less or non-discriminatory means, these must take preference.

The European Court of Justice decision in the case of *Mangold v Helm* [2006] IRLR 143 provides a useful illustration of how the courts may approach the question of proportionality in age discrimination cases. This case concerned direct age discrimination in the treatment of fixed-term contract workers. In transposing the EU Directive on fixed-term contracts, German law limited fixed-term contracts to a maximum term of two years. Within that maximum limit of two years, a fixed-term contract could be renewed three times at most. However, in the case of employees aged 52 and over, German law specifically allowed the renewal of fixed-term contracts for an indefinite number of times, without the prospect of a permanent offer of employment.

The German Government argued that this discriminatory measure pursued a legitimate aim: to promote the vocational integration of unemployed older workers, as they encountered considerable difficulty in finding work. The ECJ agreed that the legitimacy of such a public interest objective could not reasonably be doubted. However, the Court concluded that the means of achieving that objective was not proportionate as all workers who had reached the age of 52, without distinction and regardless of whether or not they were unemployed before the contract was concluded, could lawfully be offered fixed-term contracts of employment, which could be renewed an indefinite number of times until their retirement. This group of workers, solely on the basis of their age, could be excluded in this way from the benefit of stable employment during a substantial part of their working lives. The German Government had failed to demonstrate that there was no other less discriminatory means of achieving the same objective (or that it had even considered whether there were less discriminatory means available to it).

The Court said: 'Observance of the principle of proportionality requires every derogation from an individual right to reconcile, so far as is possible, the requirements of the principle of equal treatment with those of the aim pursued.'

An employer wishing to use an objective justification defence needs to produce good supporting evidence, showing that the aim pursued is legitimate and that they have properly weighed up the benefits of achieving that aim against the detriment to both the individuals and groups of individuals who will be affected by the discriminatory measure. The employer must also show that there were no available alternatives that would have produced a less discriminatory effect.

### Exceptions

The Government has chosen to deem many examples of age-related treatment to be objectively justified by means of specific provisions in the age discrimination regulations. This means that age-related treatment is automatically justified and employers do not need to produce their own separate justification for applying the measures. However, it remains to be seen whether all the exceptions within the age discrimination legislation will withstand challenges to their compliance with the EU Directive.

For example, the default retirement age is already the subject of a judicial review challenge on the basis that the regulations offer no protection for people dismissed from employment at or over the age of 65 when the reason for dismissal is retirement; that people who are forced to retire are unable to challenge whether the decision has been made for discriminatory reasons; and that employers have been given scope for justifying direct discrimination that is wider than the Directive permits.

Looking to achieve best practice, rather than following the strict letter of the law, will help to avoid difficulties that may arise as and when aspects of the age discrimination regulations are tested in the courts.

### Genuine occupational requirements

Age discrimination is automatically justified where the employer can show that being of a particular age is a genuine and decisive requirement for the position in question, and it is proportionate to apply this

requirement in the particular circumstances. This exception is likely to be very narrowly construed. As the Government pointed out in the *Coming of Age* consultation paper, there will be very few cases where age is genuinely a requirement. The example often cited is that of requiring an actor of a certain age to play a character whose age is specified. However, actors are expected to have the skills and expertise to portray themselves in different lights – and therefore as different characters of different ages.

### Default retirement age

The regulations allow employers to compulsorily retire employees at the age of 65, as long as the retirement procedure is properly followed. Without this exception, having a compulsory retirement age would be unlawful direct discrimination as, except for the fact of their age, the employee would have been able to continue in employment. Further, the regulations don't prohibit an employer from discriminating against job applicants by refusing to employ them because they are 65 or over, or are within six months of reaching that age or the employer's normal retirement age. A consequence of the default retirement age is that it is unlawful for employers to set a normal retirement age of below 65, unless they can demonstrate exceptional circumstances. The default retirement age is the subject of a legal challenge and, in any event, is due to be reviewed in 2011. Employers may want to consider whether having a compulsory retirement age makes business sense. Retirement is discussed in detail in Part 2.

### National minimum wage

The differential wage rates for younger people, under the National Minimum Wage regulations, have been exempted from the scope of the age discrimination regulations. As at October 2006, the national minimum wage rates are:

- £3.30 per hour for 16- and 17-year-olds
- £4.45 per hour for 18–21-year-olds
- £5.35 for those aged 22 and over.

The Government's justification for retaining the age bands is that they make it easier for young people to find employment while, at the same time, encouraging them to stay in education after age 16.

The exception to pay differentials based on age and the national minimum wage structure is examined further in Part 4.

### Service-related benefits

Pay and benefits, such as holiday entitlement, based on length of service are potentially indirectly discriminatory, as older workers are more likely to have completed the required length of service than younger workers.

However, service-related benefits are generally regarded by both employers and employees as promoting good employee relations, encouraging and rewarding loyalty and useful for staff retention strategies. Under the age discrimination regulations, employers may continue to award pay and benefits to employees based on length of service not exceeding five years. But if the length-of-service criterion that is applied to the award of a benefit exceeds five years, the employer must justify its use by showing that it fulfils a business need of the undertaking (for example, by encouraging the loyalty or motivation, or rewarding the experience, of some or all of its workers).

For the purposes of this exception, five years of service can either be calculated by reference to the total amount of time an employee has been working for the employer or by reference to the length of time the employee has been working at a particular level or grade within the organisation. It's for the employer to decide (preferably in consultation with the trade union) which method of calculation will apply to a relevant benefit. To avoid falling foul of the regulations, employers should document which method of calculation has been selected for each service-related benefit.

The employer may disregard absences when calculating length of service unless it would be 'unreasonable' to do so. The exception doesn't apply to benefits that are awarded to a worker by virtue of the termination of their employment. The exception would therefore not apply, for example, to enhanced redundancy payments.

### Enhanced redundancy payments

Enhanced redundancy payment schemes that rely on age and length of service are permitted under the age discrimination regulations, as long as their structure closely follows that of the statutory redundancy scheme

(SRS). Under the SRS, employees aged 21 and under are entitled to half a week's pay; those aged 22–40 to one week's pay, and those aged 41 and over to one and a half weeks' pay. The lower age limit for accruing service (18) and the upper age limit for entitlement to a payment (65) have been removed.

Redundancy payments that 'enhance' the statutory rates are paid in the following ways:

- paying a multiple of the total statutory calculation
- increasing the multipliers, by increasing the maximum weeks' pay
- paying a redundancy payment to an employee who doesn't qualify for the statutory scheme. This is explained further in Part 7.

### Pensions

The age discrimination regulations require trustees and managers of pension schemes not to discriminate against or harass members of schemes on the grounds of age. However, pension schemes often use age bands or cut-offs to assess contributions and calculate benefits, and the EU Framework Directive and the age discrimination regulations allow these practices to continue, including practices relating to 'early' receipt of pensions without actuarial reduction. The age discrimination regulations also contain more extensive exemptions for other indirectly discriminatory pensions practices, which may be subject to testing under the EU Framework Directive. These might include closing schemes to new members, and calculations or criteria relating to levels of pensionable pay and length of service. See Part 4 for further information on pensions.

### Positive action

In cases where an employer can demonstrate that employees from a particular age group are at a career disadvantage or are under-represented in the workforce, the age discrimination regulations allow the employer to take 'positive action' by:

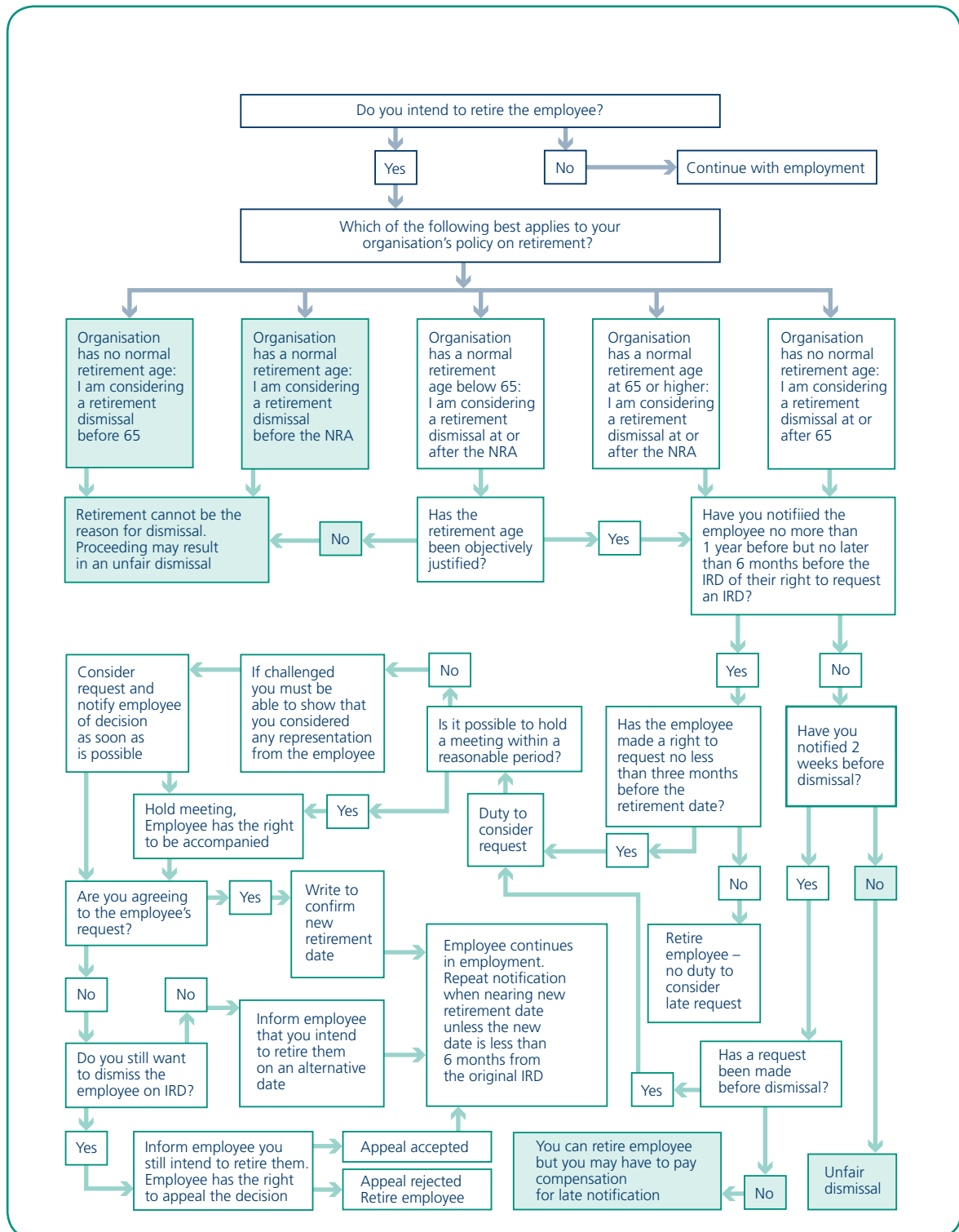
- affording employees from that age group access to facilities for training that would help fit them for particular work, or
- encouraging them to take advantage of opportunities for doing particular work.

Positive action should not be confused with positive discrimination, where, for example, an employer recruits somebody to a post because of their age alone. This remains unlawful unless, exceptionally, the employer can justify it. Positive action can include a statement in a job advertisement to the effect that, while all applications are welcome irrespective of age, the employer would particularly like to see applications from people in a certain age group.

### **Acts under statutory authority**

Any act done in order to comply with a requirement of any statutory provision is exempted from the scope of the age discrimination regulations. This exception only applies to acts that are mandated by a statutory provision and so doesn't apply to cases where a statutory provision gives permission or discretion to act.

# Annex C: Acas fair retirement flowchart



# Annex D: Where can I get more information?

Information and advice is available from a range of sources, many of which are free. Both the CIPD ([www.cipd.co.uk](http://www.cipd.co.uk)) and the TUC ([www.tuc.org.uk](http://www.tuc.org.uk)) provide guidance to employers, unions and individuals.

The Government maintains a website with a wealth of information for employers looking to improve their age management policies ([www.agepositive.gov.uk](http://www.agepositive.gov.uk)), and Acas provides help to social partners looking to negotiate age positive approaches to HR practices ([www.acas.org.uk](http://www.acas.org.uk)). The age discrimination regulations themselves can be obtained from the Department for Trade and Industry ([www.dti.gov.uk](http://www.dti.gov.uk)), as well as guidance on the impact of the regulations on pension schemes.

There are many organisations championing age positive employment practices, including the Employers' Forum on Age ([www.efa.org.uk](http://www.efa.org.uk)), Age Concern ([www.ace.org.uk](http://www.ace.org.uk)) and Help the Aged ([www.helptheaged.org.uk](http://www.helptheaged.org.uk)).

Information on the European Union's programme for eliminating age discrimination and extending working life can be found at the respective websites of the European Commission on Employment and Social Affairs ([ec.europa.eu/employment\\_social/employment\\_strategy/index\\_en.htm](http://ec.europa.eu/employment_social/employment_strategy/index_en.htm)) and the European Older People's Platform ([www.age-platform.org](http://www.age-platform.org)). Case studies of good age management practice across Europe can be found on the website of the European Foundation for the Improvement of Working and Living Conditions ([www.eurofound.eu.int/areas/populationandsociety](http://www.eurofound.eu.int/areas/populationandsociety)).

Finally, the authors, Dr Matt Flynn and Professor Stephen McNair, maintain a website disseminating their own research on the older workforce and best age management practices ([www.olderworkforce.org.uk](http://www.olderworkforce.org.uk)).

We explore leading-edge people management and development issues through our research. Our aim is to share knowledge, increase learning and understanding, and help our members make informed decisions about improving practice in their organisations.

We produce many resources on reward issues including guides, books, practical tools, surveys and research reports. We also organise a number of conferences, events and training courses. Please visit [www.cipd.co.uk](http://www.cipd.co.uk) to find out more.



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