



The default retirement age will be abolished with effect from October 1 this year and notices of intended retirement date cannot be issued from April 6 2011 onwards.

Avoid the temptation to speak to the employee 'off the record'. Such conversations are fraught with difficulty. Simply saying this conversation is 'off the record', or 'without prejudice', does not mean that the employee cannot use the conversation against the employer. Therefore an employee could argue that these discussions are an attempt to force them out on the grounds of their age, and consequently sue for age discrimination.

The best time to speak 'on the record' is during annual appraisals, or at regular meetings. Indeed, it may make sense for employers to discuss future plans with all employees at appraisal time, as this will give the employer a better idea of who is looking for advancement, who is happy within their role, who is considering retiring, and plan accordingly.

Keep a close eye on performance. Many employers are concerned that the change in law means that they will be stuck with staff members who cannot perform and who cannot be retired. This is not the case. In fact, under the new law, employers will have to keep a closer eye on who is performing well, and manage all employees' performance equally, regardless of age or length of service.

Contrary to popular belief, employers will still be able to set a 'normal retiring age' for employees. Although this will be age discrimination, this will be justifiable if the decision can be shown to be a proportionate means of achieving a legitimate aim.

Succession planning

The most obvious difficulty for employers will be that there is no longer a ready-made timetable for retirement, meaning the path to senior positions could be blocked. Employers may also feel unable to ask when an employee is intending to retire, leading to 'shock' retirements that leave the employer without a proven successor.

Employee relations

Employers may also find it difficult to start discussions about retirement with employees as detailed above.

Retirement law

David Regan of Munday Solicitors explains the implications for optical practitioners of the abolition of the default retirement age



Even if they do, many employees may not take kindly to the idea that they should retire if they are not ready to do so. In addition, under the 'old' law, employees have often been allowed to continue to retirement with managers overlooking lapses in judgement or incremental changes in performance which can be attributed to an employee's age. Moving forward, employers will be faced with the unpleasant task of performance managing long-standing, cherished employees if they are not up to task rather than allowing them to continue with the knowledge that retirement is just around the corner.

What is a 'legitimate aim'?

Cases under the 'old law' have found legitimate aims to be workforce planning, enabling recruitment and retention of younger staff members, avoiding adverse impact on pensions and benefits, ensuring continued competence, and having an age balanced workforce ensuring job opportunities among the generations. However, employers will need to be careful when implementing a normal retirement age and will need to show that they have balanced the employee's rights and dignity against the needs of the business.

Flexible working

In practice some employers may be happy to allow an employee to continue working as long as they choose, and many employees will most likely want to at least reduce their hours, if not finish working completely, as they age. It is important to note that the abolition of the default retirement age has no effect on the flexible working law which is currently in place, and employers will not be under a duty to allow older employees to work reduced hours unless they are eligible for flexible working in the usual way.

Performance management

Managers must ensure that performance management processes are implemented fairly across the entire range of employees to avoid any accusations of age bias, or trying

to force out the older members of staff. In addition, managers will need to watch for age-related disabilities and, if any disability is found, will need to consider whether or not any reasonable adjustments may need to be made in relation to the employee and their employment.

Exceptions

There are two exceptions to the abolition of the default retirement age:

- It does not affect occupational pension schemes and the setting of a 'normal retirement age' for the purposes of occupational pension schemes
- Employers may withdraw benefits for employees at or over the age of 65 (with the age at which withdrawal will be legal rising in accordance with the state pension age). This exemption deals with a key concern of employers, namely that the rising costs of benefits and insurance for employees over the state pension age could make the provision of these benefits prohibitively expensive.

Conclusion

The abolition of the default retirement age has the potential to have a large impact on businesses, as staff may choose to remain in their position longer, hindering succession planning, and employers and managers will be forced in many cases to invoke disciplinary procedures to manage the performance of long-standing employees, with a subsequent negative effect on morale. However, where there is clear ongoing dialogue between managers and staff, and all parties are open to sensible communication, there is no reason why employees continuing to work past the current default retirement age should prove to be a problem. Employers are still free to choose to set a retiring age for their business, provided that they are able to justify this. ●

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