

## E-ALERT | Employment Law Briefing

April 2011

# ABOLITION OF THE UK DEFAULT RETIREMENT AGE

The UK government has confirmed that the default retirement age and statutory procedure will be abolished. A revised version of the draft regulations abolishing the default retirement age was published on 1st March 2011 and will come into force on 6 April 2011. Accordingly, employers will be unable to issue notice of retirement to employees in reliance on the default retirement age after 6 April 2011.

We summarise below the key implications this will have for employers and provide some **practical guidance**.

### BACKGROUND

Currently, compulsory retirement of employees at the age of 65 is neither discriminatory nor unfair provided the employer follows a mandatory statutory procedure. However, the 'default' retirement age has come under attack in the UK and EU courts and the government has confirmed that it will be abolished.

Industry bodies appear to support the government's proposal to eliminate the default retirement age and many employers already choose to operate without a fixed retirement age. However, there was some concern that the phase-out of the default retirement age was being implemented too quickly. Despite these concerns, the draft regulations abolishing the default retirement age will come into force on 6 April 2011.

Acas has published formal guidance for employers on "[Working without the Default Retirement Age](#)", which outlines the changes and provides advice on how employers and employees can manage both the transition stages and new procedures (the "Acas guidance").

### THE DRAFT REGULATIONS

The government published a revised version of the draft regulations abolishing the default retirement age on 1st March 2011 (the "Regulations"). The Regulations replaced the original draft which was widely criticised as not properly implementing the government's aims. The Regulations will come into force on 6 April 2011.

### KEY IMPLICATIONS FOR EMPLOYERS

Employers will be unable to issue notice of retirement to employees in reliance on the default retirement age on or after 6 April 2011. Following the abolition of the default retirement age, employers will only be able to operate a compulsory retirement age if it can be objectively justified; employers will need to demonstrate that the compulsory retirement age meets a legitimate aim and is a proportionate means of achieving that aim. Both the government and the Acas guidance suggest that this will not be an easy hurdle to overcome.

### CONTACTS

If you have any questions on UK or European employment or employee benefits issues, please contact any of the following members of our London employment team:



**Christopher Walter**

Partner

T: +44.(0)20.7067.2061

Email: [cwalter@cov.com](mailto:cwalter@cov.com)



**Chris Bracebridge**

Special Counsel

T: +44.(0)20.7067.2063

E: [cbracebridge@cov.com](mailto:cbracebridge@cov.com)



**Helena Laughrin**

Associate

T: +44.(0)20.7067.2070

E: [hlaughrin@cov.com](mailto:hlaughrin@cov.com)



**Robin Wolfenden**

Associate

T: +44.(0)20.7067.2117

E: [rwolfenden@cov.com](mailto:rwolfenden@cov.com)

#### The London Employment Team

For information on our full range of capabilities please [click here](#)

In the absence of a fixed retirement age, employers will need to justify the decision to retire a particular employee on a case-by-case basis. Employers will therefore be faced with the increased legal burden of ensuring that they can objectively justify all retirement decisions to avoid a claim of unlawful age discrimination.

Retirement will also no longer be one of the six “*fair reasons*” for dismissal under the Employment Rights Act 1996. However, the Acas guidance states that retiring someone where a retirement age is objectively justified may amount to dismissal for “*some other substantial reason*”. Employers should always ensure that they follow a fair procedure when retiring an individual to reduce the risk of an unfair dismissal claim.

Abolishing the default retirement age will also involve the removal of the current rule which allows employers to refuse to employ an applicant who is aged 64 and 6 months or more.

## RETIRING EMPLOYEES - TRANSITIONAL TIMELINE

- **Before 6 April 2011**, employees can be lawfully retired provided:
  - a) notice of intention to retire is given by 5th April 2011; and
  - b) the employee has attained, or will attain, the age of 65 by 30th September 2011.
- **From 6 April 2011**, employers will no longer be able to issue new notifications of retirement using the statutory retirement procedure. The provision allowing short notice of retirement will also be repealed and short notice notifications will not be permitted after this date.
- Employees have until **5th January 2012** to exercise their right to request to work beyond retirement, provided that they exercise this right at least three months before the employer’s notice expires.
- The employer may agree to a fixed or indefinite period of working beyond retirement if an employee makes a request; however, if it agrees to an extension of more than six months, it will have to issue a fresh notice of retirement (which it cannot do after 5th April 2011).
- There has been much debate over the last possible date on which an employee can be compulsory retired. The three possibilities for the last date for retirement are 3rd, 4th and 5th October 2012. This matter is currently unresolved. However, the most important deadline is to ensure employers serve notice of intention to retire on or before 5th April 2011.

## INSURANCE BENEFITS EXEMPTION

The government has introduced an exemption for the provision of insurance benefits (such as death-in-service and private medical insurance) in response to concern about the potential increased cost and uncertainty of providing such benefits indefinitely. The exemption (which is detailed in the Acas guidance) will allow these benefits to be withdrawn for employees aged 65 or over (rising in line with the state pension age). It is expected that further details concerning the exemption will be issued shortly.

This exemption is however limited to group insured benefits and does not extend to other employee benefits which accrue with age (for example, enhanced redundancy schemes). Employers will therefore still face increased costs and uncertainty in relation to the provision of these benefits.

## SHARE SCHEMES AND OCCUPATIONAL PENSION SCHEMES

The government has confirmed that it will not make any legislative changes in respect of share schemes; it will be for the employer to determine whether someone is a “*good leaver*” or a “*bad leaver*” in accordance with the rules of the scheme. Employers may need to amend the retirement-specific leaver provision in their share schemes if it refers to a company fixed retirement age which is being removed. In such cases, the relevant documentation will need to be amended to refer to normal retirement age or else to define retirement as the situation where the employer and employee agree that the person is retiring.

The government has also stated that the abolition of the default retirement age will not affect the setting of a “*normal retirement age*” or “*normal pension age*” for the purposes of occupational pension schemes.

## THE FUTURE?

The government and the Acas guidance believe that it will be very difficult to operate a compulsory retirement age following the abolition of the statutory retirement procedure. The question of whether or not a fair retirement process has been followed will be a matter for the employment tribunal to determine on a case-by-case basis. There is therefore concern that the abolition of the default retirement age will result in uncertainty and an increased number of age discrimination and unfair dismissal claims.

Until there is further case law on these issues, the most cautious approach would be to remove any compulsory company retirement age and, instead, deal with retirement on a case-by-case basis. Employers should follow a fair procedure similar to the statutory retirement procedure contained in Schedule 6 of the Age Regulations or be prepared to complete a robust performance management process, where the employee is underperforming.

### WHAT DO EMPLOYERS NEED TO CONSIDER? [\(back\)](#)

**Compulsory Retirement Policies:** Employers will need to decide whether to continue to operate a compulsory retirement age and, if they choose to do so, will need to ensure that it can be objectively justified. The employer should maintain a paper trail evidencing their rationale for maintaining the compulsory retirement age.

**Handbooks, policies, employment contracts:** Employers who currently operate with a retirement age and are considering removing it, should consider whether existing handbooks, policies and employment contracts need to be updated.

**Performance management processes:** Employers should consider reviewing and updating their performance management processes so that concerns regarding under-performance (at any age) can be addressed fairly. Poor performance issues for individuals approaching, or beyond, pensionable age should be addressed in the same way as any other employee.

**Future planning with employees:** The Acas guidance suggests that employers have regular discussions with employees about “future plans”; it is recommended that any such discussion covers: (i) the employee’s performance against targets, activities and outcomes; (ii) development or training needs; (iii) the employer’s future plans; (iv) the employee’s aims and aspirations; and (v) future performance. A record should be kept of these discussions.

**Training and awareness:** Employers should ensure that line managers and HR personnel are trained and fully aware of the principal changes.

**Recruitment:** Employers must ensure that they treat older job applicants fairly and that recruitment decisions are based on merit, not age.

This information is not intended as legal advice. Readers should seek specific legal advice before acting with regard to the subjects mentioned herein.

Covington & Burling LLP, an international law firm, provides corporate, litigation and regulatory expertise to enable clients to achieve their goals. This communication is intended to bring relevant developments to our clients and other interested colleagues. Please send an email to [unsubscribe@cov.com](mailto:unsubscribe@cov.com) if you do not wish to receive future emails or electronic alerts.

© 2011 Covington & Burling LLP, 265 Strand, London WC2R 1BH. All rights reserved.