

Employment Legal News – Default Retirement Age of 65 to be Abolished

The Government has now confirmed that, in spite of widespread opposition from employers and recent calls from the CBI to delay the abolition for a year, the default retirement age (“DRA”) will be phased out from 6th April 2011 and abolished completely from 1st October 2011.



Supplied by Katie Franklin of Leathes Prior

Employers now have a very small window of opportunity in which to retire employees lawfully, if (and only if) they are due to turn 65

on or by 30th September 2011. On or after 1st October 2011 employers will only be able to operate a compulsory retirement policy if it can be objectively justified.

According to the current DRA procedures employers must give a minimum of six months' notice to employees that they will be retired at or after the age of 65, and advise them of their right to request to work beyond retirement. In practice, this means that the last date on which employers can make full use of the DRA and notify relevant employees of compulsory retirement is 30th March 2011.

Transitional Provisions

Short Notice Procedure:

Employers may still operate the DRA by issuing notification of compulsory retirement to employees between 31st March 2011 and 5th April 2011 but, since this would not provide the requisite minimum notice period of six months, such notifications would be on a 'short notice' basis. Allowance is made under the current DRA scheme for such short notice (i.e. notification periods of between a minimum of two weeks and six months), but retirements following these reduced notice periods may entitle the affected employees to claim compensation, up to a maximum of eight weeks' pay.

It has been confirmed that employers must not issue any new notifications of compulsory retirement to employees after 6th April 2011. This includes notifications under the short notice procedure set out above.

In summary, during the period from 6th April to 30th September 2011, retirement procedures which have already begun can continue to completion if:

- a notification of impending retirement was issued by the employer prior to 30th March 2011;

- a late notification is issued between 30th March and 5th April 2011;
- the date of retirement falls before 1st October 2011;
- the DRA procedure, as set out in the previous Employment Equality (Age) Regulations 2006, is followed correctly (including giving serious consideration to any employee requests to stay on);
- the other requirements of the former DRA procedure are met (e.g. the person is 65 or over; or is the employers' normal retirement age if this is higher than 65).

Retirement on or after 1st October 2011

The DRA will no longer apply with effect from 1st October 2011. This means that, on the face of it, retirement at any age on or after this date will be unlawful, unless employers can objectively justify it.

Retirement will be removed from the list of potentially fair reasons to dismiss someone, currently set out in the Employment Rights Act 1996 ("the Act"). This means that employers who do want to 'retire' one of their employees will have to rely on one of the other five remaining, permitted reasons listed in the Act; namely capability, conduct, redundancy, illegality or some other substantial reason ("SOSR").

The Government has worked alongside ACAS to formulate guidance for employers on how to effect retirements after 1st October 2011 and further helpful details can be found at www.acas.org.uk/retirement.

The guidance does make it clear that older workers can still retire voluntarily; they simply cannot be compelled to retire in the manner or at the age previously recognised. However, the change to the law does not mean that employers will never be able to retire anyone. If employers are able to objectively justify retiring employees after 1st October 2011, it is simply likely to amount to a SOSR dismissal. A fair procedure will still need to be followed in all the circumstances and employers should take advice on a case by case basis, if they are the least unsure how to proceed.

Insured Benefits and Share Schemes

The Government has recognised that certain group-risk insured benefits (for example: medical insurance, life cover and life assurance) cost employers more for older staff. It has therefore introduced an exemption in respect of these benefits, permitting employers to cease providing them for employees over the age of 65.

However, no guidance has been provided for employers in respect of share schemes. Although concerns were raised by employers regarding whether or not 'retiring' employees should be considered 'good' or 'bad' leavers under the new rules, the Government has chosen to leave it to organisations to decide whether or not their scheme rules are compatible with the law.

What should Employers be doing now?

It is a good idea for employers to assess the age profile of their current workforce and take careful stock of any ongoing retirement procedures. There is still time to commence retirement procedures if you have not already done so, and you believe that it is appropriate for your business. Just remember, notifications should be given ideally by 30th March 2011 but by no later than 5th April 2011.

Consider whether you want to retain a contractual retirement age for your employees beyond 1st October 2011, or remove this provision and operate without one. The former may prove problematic, bearing in mind that employers will be expected to explain why they wish to retain a retirement age and provide clear objective justification for their choice – although an early judicial decision suggests it may be possible. The latter option will undoubtedly encourage the need for increased dialogue with employees through carefully managed performance and appraisal systems (even workplace mediation), in order to administer effective staff planning.

Additional Paternity Leave and Pay

Under present rules, women are entitled to up to one year's maternity leave. The first six weeks is paid at 90% of salary, and the next 33 weeks are paid at the statutory maternity pay rate of approximately £125 per week – though some employers are more generous. Fathers are entitled to take up to two weeks' leave around the time of the birth, again paid at up to £125 per week.

From 6th April 2011 the position changes under laws introduced under the last government, and adopted by this one. The Additional Paternity Leave Regulations 2010 ("APL Regulations") provide parents of children due, or matched for adoption, on or after 3rd April 2011 greater flexibility in how they use maternity provisions, through the introduction of additional paternity leave and pay. This means that the new law will begin to benefit couples who fell pregnant from July 2010.

In effect, the new right to additional paternity leave allows for any remaining period of maternity or adoption leave to be transferred from the mother or primary adopter, to the father or partner.

Under the APL Regulations eligible fathers and partners will be entitled to take a period of additional paternity leave of up to six months, some of which may be paid, provided the mother (or primary adopter) has returned to work before the end of her full 12 month maternity (or adoption) leave period.

For more information contact Leathes Prior on 01603 610911 info@leathesprior.co.uk or visit www.leathesprior.co.uk