

Employment law briefing

Spring 2011

Quick Reminders:

- You have less than 2 months to give notice of retirement to eligible employees. Act before 5th April
- Update your employment documentation to remove the default retirement age
- New paternity leave provisions enable parents to share care
- Have you updated your equal opportunity policy and recruitment forms following the implementation of the Equality Act 2010?

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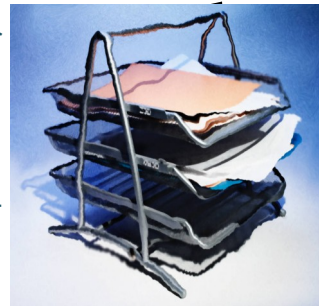
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2011 brings employment law changes

There are changes afoot in the world of employment law, some definite, others still only in the pipeline but employers will need to take them on board and adapt their policies, practices and procedures as necessary.

Most significant is the abolition of the default retirement age (DRA). With effect from 1st October 2011 employers will no longer be able to terminate an employee's employment simply because he or she has attained a particular age. In this issue we focus on the forthcoming changes and highlight the steps you will need to take to effect retirements before the new legislation comes into effect.

April is a particularly important month in the 2011 Employment Law calendar. Read about the forthcoming changes to paternity rights and flexible working about to come into effect.



Don't hide behind your in tray—get on top of those employment law changes NOW!

Do you sometimes feel you have missed something? There is so much these days for Employers to think about that it is inevitable that just sometimes an important change will take place without you realizing or something you set aside to read and attend to later gets pushed to the bottom of the in tray never to see the light of day again. In this issue we also take

the opportunity to remind you of the introduction of the Equality Act 2010 and its implications for your recruitment practices.

Extended flexible working rights

The Flexible Working Regulations are to be extended from April 2011 to include parents of children up to 18. Currently they apply to parents of children aged up to 17 (18 if disabled) and to carers

of adult dependants. Employees need to have been employed for 26 weeks before they can exercise their right but there is to be further consultation as to whether it should be extended to all employ-

ees. See inside this briefing for information about enhanced paternity rights also coming into effect this April. And watch out for possible further changes to maternity rights in the future.

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The default retirement age (DRA) is to be abolished

After 30th September 2011 Employers will no longer be able to retire employees automatically at 65.

From 1st October 2011 employers will only be able to set a Company retirement age or retire an individual employee at a specified age if that retirement age can be objectively justified, i.e

that it is a proportionate response to a legitimate aim. This could be for example where the role requires exceptional physical or mental fitness or to address health & safety requirements. The justification of a set retirement age will be particularly important if such a policy is chal-



Workplace retirement parties - a thing of the past?

lenged in an employment Tribunal and there will undoubtedly be some case law around this definition.

Abolition of the DRA

So how do you manage dismissal of older workers?

The ACAS guidance "Working without the Default Retirement Age" suggests that open discussions conducted in an atmosphere of trust can help facilitate the transition from work to retirement for both the individual and the business. The intention is

that the dismissal of older workers should be managed by discussion so chatting to your employees about their future plans both informally and in the context of appraisals is to be encouraged provided of course that you do not make reference to the need to

retire because of their age. Where you feel an older workers performance has declined, it is now expected that Employers use formal performance management procedures just as they would to deal with a younger member of the workforce.

Are there any exceptions?

Well of course older employees can still voluntarily retire at a time of their choosing and if you can establish an employer justified retirement age you can implement a policy based upon it. Though tread carefully if you decide to adopt this approach and be prepared to provide evidence to support

your policy in the event of a challenge. One specific discrimination exemption will be for group risk insured benefits (e.g. medical insurance). To counter concern that employers would not offer such benefits if it became too expensive to pay the premiums due to an ageing workforce, it



will not be unlawful to discriminate on grounds of age when providing benefits. Entitlement can therefore be stopped at a determined age.

What happens about retirement between now and 1st October?

Employees who have already been given notice of intended retirement to take effect on or before 30th September 2011 are unaffected by the changes. For employees who will reach the age of 65 before 30th September 2011, employers can continue to give notice of intended retirement under the current law up to 5th April 2011. However, if notice is given be-

tween 30th March and 5th April the period will be less than 6 months and the short notice provisions apply. This means that employees may be able to claim compensation from the employer for short notice. (up to a maximum of 8 weeks' pay.) You may, however, decide that it is worth making a small payment of compensation tied into a Compro-

mise Agreement in order to effect a retirement before 1st October rather than have to use performance management procedures afterwards.



Increase to compensation limits

The maximum for a week's pay for the purposes of redundancy payments and the basic award in unfair dismissal claims has risen from £380 to £400 for dismissals on or after 1st February 2011. The new maximum compensatory award for unfair dis-

missal cases increases from £65,300 to £68,400. Therefore worst case scenario for compensation payable in an unfair dismissal claim (other than in special circumstances where there is no ceiling) is £80,400. This of course reflects the employee's age

and length of service so will only apply in certain cases. But it certainly makes one stop and think about the importance of following proper procedures when effecting dismissals, whether they are for misconduct or in genuine cases of redundancy.

Compensation limits rise

Additional paternity leave

Employees who are: the father of a child due on or after 3 April 2011, or their wife, partner or civil partner is pregnant and due to give birth to a child on or after 3 April 2011, or they and their partner receive notification that they are matched with a child for adoption on or after 3 April 2011 or their spouse, civil partner or partner (including same-sex rela-



tionships) is adopting a child from overseas and the child enters Great Britain on or after 3 April 2011 may be entitled to

additional Paternity Leave of up to 26 weeks. If the employee's partner has returned to work, the leave can be taken between 20 weeks and one year after the child is born or placed for adoption. Employees may be entitled to receive Additional Statutory Paternity Pay during their partner's Statutory Maternity Pay or Adoption Pay period.

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Looking back on.....the Equality Act 2010

This came into effect on 1st October last year. The old definitions for types of discrimination were replaced with nine 'protected characteristics' :-

Age,
Disability,
Gender reassignment,
Marriage and civil partnership,
Pregnancy and maternity,
Race,
Religion and belief,
Sex and Sexual orientation.
(There is talk of a possible additional 'protected characteristic' of caste.)

The Act unifies and clarifies the previous law and in many ways does not present significant new challenges for employers. However, there is one provision in particular which is likely to impact on your recruitment procedures.

Except in very restricted

circumstances or for very restricted purposes, you are not allowed to ask any job applicant about their health or any disability until the person has been: offered a job either outright or on conditions, or included in a pool of successful candidates to be offered a job when a position becomes available. This includes asking such a question as part of the application process or during an interview. Questions relating to previous sickness absence count as questions that relate to health or disability.

No-one else can ask these questions on your behalf either. So you cannot refer an applicant to an occupational health practitioner or ask an applicant to fill in a questionnaire provided by an occupational health

practitioner before the offer of a job is made (or before inclusion in a pool of successful applicants) except in very limited circumstances.

You can ask questions once you have made a job offer or included someone in a group of successful candidates. At that stage, you could make sure that someone's health or disability would not prevent them from doing the job. But you must consider whether there are reasonable adjustments that would enable them to do the job.

Exception: You can ask questions about health or disability when you are asking the questions to find out if any applicant needs reasonable adjustments for the recruitment process, such as for an assessment.

And finally - looking ahead

The Government is currently consulting over its proposed comprehensive review of employment laws. Under consideration are:

- Extending the qualifying period for employees to claim for unfair dismissal from one year to two;
- Requiring all claims to be lodged with Acas to allow conciliation to be offered and encourage settlement;
- Speeding up the tribunal process;
- Giving tribunals more powers to deal with weaker cases in ways which result in lower costs for employers.

This consultation period ends on 20th April but more proposals and more consultation is likely.