

# New law presents opportunity to tackle an age-old problem

Regulations to outlaw age discrimination are set to come into force next month. *Workplace Report* examines how union reps can make the most of them – and avoid the hazards that they present.

From 1 October, the *Employment Equality (Age) Regulations 2006* (EEAR) will ban age discrimination in the workplace – or so the theory goes. In fact, unions have criticised numerous aspects of the regulations, which they describe as lacking clarity and even having potentially negative effects on terms and conditions. (This issue will be covered in detail in the October issue of *Workplace Report*'s sister magazine *Labour Research*).

A GMB general union briefing on age discrimination warns that, "although the new regulations are very welcome, they are not hazard-free". Employers may use legal compliance as an excuse to remove previously agreed benefits, the union believes.

But there is still much in the regulations that reps can use to secure improvements for their members. As TUC senior policy advisor Lucy Anderson told a CWU communication workers' union seminar in July: "This legislation provides a good opportunity to push a range of industries on how employer policies and benefits can be made positive for as great a number of employees as possible, and [to] persuade employers that a 'good practice' approach is the best way forward."

## Who and what is covered?

Employees, agency and temporary workers, job applicants and self-employed people engaged to do work are covered by the EEAR.

As with existing legislation to abolish work-related discrimination on grounds such as sex and race, the regulations identify four types of discrimination:

- direct discrimination, where people are treated less favourably than others on grounds of their age;
- indirect discrimination, where people of a particular age group are disadvantaged by a provision, criterion or practice that does not itself involve age as a criterion;
- harassment; and
- victimisation.

A statement from the executive council of shopworkers' union USDAW earlier this year offers two examples: an advertisement for a

promotion opportunity would be *directly* discriminatory if it said that “only applicants aged under 60 need apply”, but could be *indirectly* discriminatory if it required applicants to pass a health or fitness test, since older people might be less likely to do so.

And the GMB briefing adds that graduate recruitment schemes or a requirement for job applicants to have IT skills may also count as indirect discrimination, since they may be seen as favouring younger workers.

All anti-discrimination legislation allows indirect discrimination to take place as long as it can be objectively justified, but the EEAR are unique in allowing employers to adopt directly discriminatory practices if they can justify them. For both direct and indirect discrimination, the employer will simply have to show that the practice is a “proportionate means of achieving a legitimate aim”.

But the regulations do not specify what constitutes a “legitimate aim” or “proportionate means”, so this will be left for the Employment Appeal Tribunal and the courts to determine. The government has indicated that discrimination will not be justifiable on the grounds of cost alone – meaning, as USDAW points out, that employers will not be able to offer private health insurance to some staff but exclude others because their age makes the premiums more expensive, for example. But USDAW also suggests that an employer may be able to exclude people near its retirement age from applying for jobs that require an initial period of training, since they would not be in the job long enough for the employer to recoup its investment.

In contrast, there is no justification for harassment or victimisation, although both are common in UK workplaces: both young and old workers can be the butt of jokes, insults and bullying because of their age. “Ageism is not yet the taboo that sexism, racism and homophobia have rightly become,” the GMB notes, so this may be an area where reps can use the legislation to good effect in tackling ageist workplace cultures.

### Length-of-service benefits

While the regulations should put an end to many discriminatory practices, there is one form of indirect discrimination against younger workers that is often highly valued: length-of-service pay and benefits. Examples on the Labour Research Department’s Payline database include:

- an extra day’s holiday at Messier Dowty (after 30 years’ service), Argos Direct (20 years), Balfour Beatty Rail Plant (10 years), S4C (five, six, seven, eight and nine years), International Paint (five years), Select Service Partner (two and five years) and Bentley Motors and Sixth Form Support Staff (two years);

- three days’ added leave at Flat Glass after 15 years’ service;
- a week’s added leave for Stagecoach North West employees with five years’ service;
- four weeks’ extra leave after 25 years at Windermere Lake Cruises;
- extra leave or a lump sum after five, 10 and 15 years’ service at Eurostar (UK);
- enhanced sick pay for staff with 10 years’ service at Caterpillar (UK) and SKF (UK), and those with five years’ service at companies covered by the Narrow Fabrics JIC;
- awards ranging from £65 to £200 for Cobble Tufting Machinery workers on their 10th, 15th, 20th and 25th anniversaries; and
- one-off payments of £300 to Belhaven Brewery staff after 25 years, £1,000 to those with 35 years’ service at Lever Brothers (Port Sunlight), and 5% of basic salary after 15 years for cabin crew at MyTravel.

Like other forms of indirect discrimination, contractual terms offering such benefits will be void unless they can be objectively justified. But there is an additional form of justification for length-of-service benefits: they are acceptable if it “reasonably appears” to the employer that they fulfil a “business need” by “encouraging the loyalty or motivation, or rewarding the experience, of workers”.

At present, it is unclear how easy it will be for employers to offer a legally acceptable justification for length-of-service benefits. USDAW is confident that reasons of “rewarding loyalty, maintaining or increasing staff motivation and providing benefits to reflect higher levels of experience are likely to be sufficient to avoid a legal challenge”; it notes that “the threshold of proof is very low and the employers doesn’t have to prove by evidence that service-based benefits actually achieve any business advantage”.

The GMB does not commit itself on the issue, but advises reps to remind employers that there is no automatic need to “renegotiate agreements or unilaterally amend contracts on the premise that certain clauses [whether related to length of service or not] are discriminatory” – both sides should first consider whether the clause can be justified, and it may be advisable for them to delay doing so until there has been some case law offering guidance on justification.

Additionally, length-of-service benefits are exempted from the regulations if the service required to gain them is *no longer than five years*. Such benefits are common – many bus companies have pay grades which drivers move through automatically in their first two years, for example – and can be retained without having to be justified.

This exemption could prove useful if an employer feels that it should scrap a long-service benefit to comply with the regulations

– reps can suggest simply that the benefit is retained but with the qualifying service reduced to five years or less. USDAW has indicated that it may adopt this approach.

If, however, the employer insists that a long-service benefit should be withdrawn (possibly with the union’s agreement, if it is accepted as being discriminatory), it is important that reps try to ascertain the cost of the benefit to the employer and to negotiate a non-discriminatory replacement benefit of the same overall cost to replace it.

For example, the FBU firefighters’ union and the fire service employers have agreed to abolish a long-service increment, payable after 15 years, and replace it with payments for staff undertaking continual professional development – although the development of the new system is taking longer than hoped.

### Other changes

The EEAR will also:

- abolish the upper age limit for claiming unfair dismissal;
- remove the upper and lower age limits for receiving redundancy payments;
- introduce a default retirement age of 65, and make it illegal for employers to have a compulsory retirement age below 65 unless it can be objectively justified;
- introduce the concept of “retirement dismissal”; and
- require employers to consider employees’ requests to work beyond retirement age, although they will not have to give reasons for refusing such a request.

Most of these changes should have a positive effect, but some have drawbacks – the law on retirement dismissals provides a strong disincentive for employers to keep workers on beyond 65 (or the employer’s own set retirement age), for instance.

Details of all these developments will be covered in a new Labour Research Department booklet to be published next month – call 020 7902 9819 for more information.

### Putting the regulations to use

Although they have not come into force yet, the regulations have already provided a catalyst for employers and unions to think about whether any of their practices are discriminatory: insurance firm Standard Life is scrapping its compulsory retirement age of 60, and supermarket chain Asda is no longer to ask job applicants for their date of birth.

There is plenty of scope for unions elsewhere to achieve similar results.

- *The charity Age Concern is holding a fringe meeting on mandatory retirement ages at Congress – 5.30pm, Monday 11 September, Brighton Centre*