The Employment Equality (Age) Regulations 2006 place new obligations on employers, trade unions and professional associations. They create new rights for employees, the self-employed and contract workers.

The Age Regulations have possibly the greatest impact on employers by requiring new arrangements in the NHS for retirement and redundancy. This Briefing outlines the processes employers need to set up as well as significant differences between these two issues and pitfalls to watch out for. Failure in handling retirement or redundancy in line with age discrimination legislation could lead to expensive compensation claims.

The approach to reorganisation needs to be free of unlawful age bias in both the change management process and the calculation of benefits. Where job losses and potential redundancies are involved, past practices which may have been influenced by age-related factors will need to be changed.

New redundancy and early retirement arrangements apply in the NHS from 1 October 2006. Planned future pension changes will assist flexible retirement.
Extended working

The Age Regulations make age prejudice, ageism and many employment decisions based on age unacceptable and unlawful for people of any age. Demographic change is having an effect on the political, economic and social life of people everywhere. Fixed retirement ages are being seen as inequitable and unsustainable in terms of cost. Coupled with better health and increasing life expectancy, many individuals find the idea of retirement unappealing. In a recent national survey, one third of those questioned were happy to work until the age of 70.

In the future, the Government intends to remove all age aspects of retirement. For now, there will be a default retirement age of 65 which will be reviewed in 2011. The legislation allows employers to retire employees at or after the age of 65, if this is a genuine retirement. For example, requiring someone to leave because their performance has not been satisfactory is not a genuine retirement. Employers are, however, encouraged to offer employees the opportunity to stay on beyond this age in an effort to retain talented staff and reduce the impact of potential future shortages in the labour market.

The few NHS organisations that do not have a fixed retirement age will need to put the statutory process in place, as outlined below, using the default age of 65. Irrespective of whether you have a set retirement age below 65, at 65 or above 65 you will

Process for extended working beyond retirement age

- Employer gives notice of retirement in writing within six months of retirement date. Informs employee of their “right to request” to continue
- Employee makes request to continue prior to three months of retirement date
- Employer must hold face-to-face meeting to discuss
- Employment continues and employer must notify employee of decision within reasonable time
- If process not carried out properly, employee can claim unfair dismissal
- Employee retires or may appeal within two weeks
- Only one appeal allowed, which may take place after retirement takes effect
- Process may be repeated. No limit to number of extensions
- Employee continues to work for an agreed period
- Agreement
need to follow the retirement process as shown here.

The Age Regulations require every organisation, no matter how large or small, to introduce the process for extended working beyond retirement age, as shown in the diagram on page 2.

The full extent of the legal time limits is given in the detailed description of this process. Download this and template letters from our website.

Extended working and flexible retirement

Many organisations already have flexible employment options for staff of any age. Options for those approaching retirement currently include ‘wind down’ (working fewer days or hours) and ‘step down’ (moving to a less demanding role which uses skills and experience). These options will be enhanced under proposed new pension arrangements.

The current NHS Pension Scheme review proposes a new scheme for new entrants which includes improved options for flexible retirement. Members of the old scheme can also take advantage of these flexibilities by choosing to transfer into the new scheme. Proposals on the new scheme are out for consultation until 30 November 2006. Further details can be found at www.nhsememployees.org

Under the proposed new pension scheme, members will be able to take all or part of their pension whilst continuing to work. This will enable staff considering ‘wind down’ to supplement their income with their pension, and would be part of a phased retirement plan agreed with their employer.

Also under the proposed new pension scheme, benefits will be calculated on the basis of the average of the best three consecutive years’ membership in the ten years before retirement. For staff considering ‘step down’, this could improve annual pension.

The legislation confers the right for employees to request to continue working, and the manner in which these discussions are managed will have a powerful impact on the way people feel respected and valued by their employer.

The employer is not obliged to retain people beyond the default retirement age, or to give reasons, if after the mandatory meeting it is decided to retire them, but this will clearly require sensitive handling by line managers.

The opportunity costs of recruitment (put at £6,000 by the CIPD) plus induction to the organisation, on-the-job training and continuing professional development over a working life will be considerable. Add to this the disruption to teams and to the stability of working relationships, and the case for encouraging staff to stay and creating incentives for them to do so increases.

Organisational change

At times of organisational change, or if there is a need to reduce staffing costs, organisations have in the past looked to retire all those who have reached retirement age. In future, however, retiring people

Case study: ‘Step down’ under the new pension scheme

Thembi has worked for the NHS for 20 years and has a salary of £20,000 when she retires at 65. However, five years earlier she had worked in a higher paid job before deciding to ‘step down’ to a less demanding role in the run up to retirement. The current scheme would give her a pension of £6,667 calculated on her best salary in the last three years (£20,000). Under the new scheme her pension is £10,000, based on the average of the best three consecutive years in the last ten years (£30,000 after adjusting for inflation).
over 65 is permitted, but only where the statutory process has been followed and it is a genuine retirement.

Employers will not be able to retire someone whose performance is poor. Performance problems need to be addressed when they arise, through properly carried out and well documented performance appraisals and development throughout a person’s working life.

Proper use of fixed-term contracts

Fixed-term contracts have been widely used in the NHS to cover periods of transition, but regulations made in 2002\(^1\) gave fixed-term employees new rights:

- to be treated no less favourably than comparable permanent employees
- to become permanent when, through extension or renewal, the fixed-term employment has been continuous for four years or more
- to become eligible for redundancy compensation (subject to qualifying service) when employment is not renewed on a temporary or permanent basis and the termination satisfies the definition of redundancy.

These changes are designed to encourage employers to consider their reasons for using fixed-term contracts and, at their conclusion, value the individual’s contribution and experience gained. Redeployment and dismissal procedures should be applied in exactly the same way as for permanent staff.

Redeployment

New organisational structures and changes in the workforce can create positive opportunities for people of any age to develop their careers, sometimes in a different direction. When considering the skills and experience present in the workforce, it is important to discover the individual potential in those whose jobs may be at risk. Redeployment policy and practice needs to account for skills which are both current and dormant. Coaching, training or simple encouragement could open up new possibilities.

Criteria for selection

Organisational change needs to emphasise the selection of the right people into the right job and avoid redundancy by encouraging flexible approaches to retaining staff. Some customary selection practices are no longer acceptable, including using ‘last in first out’ or the cost of redundancy compensation to select one individual over another. Selection criteria should be designed to meet local circumstances and adapted to produce a workforce in line with the needs of the service. It follows that skills and competence are likely to take priority over length of service as this carries the risk of being linked with age, and is therefore unlawful unless it can be objectively justified.

Some employers may have redundancy selection criteria, redeployment arrangements and/or pay protection formulae in their established policies and collective agreements which may be unfair or unlawful and require review in the light of the recent Age Regulations and other legislative changes to ensure that any bias or unlawfulness is removed.

How redundancy compensation has changed

To coincide with the Age Regulations, a revised collective agreement on redundancy has been negotiated that removes the former age-related thresholds and is intended to provide an objectively justifiable option for those over the

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\(^1\) Fixed Term Employees (Prevention of Less Favourable Treatment) Regulations 2002 and the Employment Act (Dispute Resolution) Regulations 2002
minimum pension age to choose early retirement. Any NHS member of staff whose employment ends through redundancy on or after 1 October 2006 will come under the revised arrangements, and this includes anyone who was given notice beforehand.

Entitlement to redundancy compensation depends on qualifying and reckonable service but can be complicated by individual employment history and service with different employers all of which is governed by statutory regulation and by NHS conditions of service.

For staff with sufficient qualifying employment, redundancy compensation provides one month’s pay for each full year of reckonable service up to a maximum of 24 months. As an alternative to the one month per year of service pay-out, NHS Pension Scheme members over the minimum pension age (normally 50) can instead request their employer to ‘spend’ the money on releasing their pension early with no actuarial reduction. Pension added years that were available under the old scheme are being phased out in transitional arrangements over the five years to September 2011. For more details on the new arrangements, visit our website.

N.B. NHS redundancy compensation includes any entitlement under the statutory redundancy scheme.

NHS Pension Scheme members aged over 50

New arrangements effective from 1 October 2006 provide that NHS Pension Scheme members who have reached the minimum pension age (normally 50) can choose to take their pension early without reduction in the value of pension benefits as an alternative to receiving the lump sum redundancy compensation payment.

There are transitional arrangements for NHS Pension Scheme members who were aged 50 years on 30 September 2006 or who reach 50 years between 30 September 2006 and 30 September 2011. These members can continue to access enhanced retirement on grounds of redundancy. Details can be found on our website.

Qualifying service for the new and transitional arrangements is different.

Pitfalls

This is a confusing and complex area. In relation to redundancy, this section covers the following:

1. Continuous service requirements for redundancy compensation
   • what is continuous service
   • what breaks continuity of service
   • when and why does it matter if continuity is broken
   • when service with a previous employer can be counted as continuous
   • how the arrangements introduced on 1 October 2006 bring changes for NHS Pension Scheme members above the minimum pension age (normally 50)
   • breaks in service and suitable alternative employment
   • breaks in employment and statutory redundancy.

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2 The revised collective agreement is set out in the Agenda for Change NHS terms and conditions handbook, section 16.
3 NHS redundancy compensation represents an improvement on the statutory redundancy scheme which has a maximum of 30 weeks’ pay and a salary cap of (currently) £290 per week. The NHS scheme has a maximum of 24 months and no salary cap.
4 The Finance Act 2004 allows for protection of a minimum pension age of 50 for members who had the right to take reduced benefits at that age on 5 April 2006. This protection may continue as long as members retiring early after 6 April 2010 take all their benefits payable under scheme rules. In the NHS scheme, for those without protection, members who first joined and some who returned to the scheme after 6 April 2006, and those who opt to move to the new pension scheme, minimum pension age will change from 50 to 55 from 6 April 2010.
2. Flexible retirement

• pitfalls to avoid when re-engaging retired NHS staff
• pitfalls to avoid when using the staff bank.

Download a full description of these pitfalls and how to avoid them, from our website.

For details on the new arrangements, and to access more information on the extended working process and potential pitfalls, visit

www.nhsemployers.org/pay-conditions/pay-conditions-504.cfm

Disclaimer

Legal information is provided for guidance only and should not be regarded as an authoritative statement of the law, which can only be made by reference to the particular circumstances which apply. It may, therefore, be wise to seek legal advice.