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New UK Age Discrimination Law May Impact US Employers

By Wendy L. Tice-Wallner and Ariel D. Weindling

As of October 1, 2006, age discrimination will become an unlawful employment practice in the United Kingdom. On that date, the Employment Equality (Age) Regulations 2006 (the "Regulations") will take effect, impacting the recruitment, retirement, benefit and redundancy programs of UK employers.¹ In addition, discrimination and harassment on the basis of age will become actionable in employment tribunals. These new regulations will impact U.S. employers with operations in the UK. As a result, covered U.S. employers should familiarize themselves with the Regulations and ensure compliance implementation in advance of the effective date.

The Employment Equality (Age) Regulations

The Regulations apply to employment and vocational training and prohibit unjustified discrimination (as well as harassment and victimization on the basis of age) regardless of the age of the person who suffers the discrimination. The Regulations:

- ban age discrimination in terms of recruitment, promotion and training;
- ban unjustified retirement ages of below 65;
- remove the current age limit for unfair dismissal and redundancy rights.

Who is protected by the new law?

The Regulations apply to all workers (including employees and contract workers); applicants for employment; partners, office holders appointed by the Crown; and some other paid office holders (including company directors and the members of some independent public bodies); police constables; people seconded to the Serious Organised Crime Agency; people who are members of, or who apply to join, trade unions or trade or professional bodies; and people undertaking vocational training.

What is prohibited under the new law?

The law prohibits "direct" and "indirect" discrimination, harassment and victimization on the basis of age.

"Direct" discrimination occurs where a person is treated less favorably on the basis of his/her age as compared to the manner in which others who are comparably situated have been treated.

"Indirect" discrimination occurs when a provision, criteria or practice which is applied to all employees causes particular disadvantage to employees within a cer-

¹ Redundancy is defined by the Employment Rights Act 1996 as a dismissal attributable wholly or mainly to:

- a. The fact that an employer has ceased, or intends to cease, to carry on the business for the purposes of which the employee was employed, or has ceased, or intends to cease, to carry on that business in the place where the employee was so employed, or
- b. The fact that the requirements of that business for employees to carry out work of a particular kind, or for employees to carry out work of a particular kind in the place where they were so employed, have ceased or diminished or are expected to cease or diminish.

tain age group (such as younger or older people).

Harassment occurs where, on grounds of age, a person engages in unwanted conduct which has the purpose or effect of violating a person's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for a person of a particular age.

Victimization occurs when an employer treats a person less favorably as a consequence of that person threatening to bring proceedings or providing evidence or information or making any allegation concerning the employer with reference to discrimination or harassment under the age Regulations.

The Regulations also introduce:

- a right for employees to request the right to work beyond retirement age, and a duty on employers to consider such a request;
- a new requirement for employers to give at least six months notice to employees about their intended retirement date so that individuals can plan better for retirement, and be confident that "retirement" is not being used as a pretext for an unfair dismissal.

As well as applying to retirement, the Regulations also:

- remove the upper age limit for unfair dismissal and redundancy rights, giving older workers the same rights to claim unfair dismissal or receive a redundancy payment as younger workers, unless there is a genuine retirement;
- allow pay and non-pay benefits to continue which depend on length of service requirements of 5 years or less or which recognize and reward loyalty and experience and motivate staff;
- remove the age limits for Statutory Sick Pay, Statutory Maternity Pay, Statutory Adoption Pay and Statutory Paternity Pay, so that the legislation for all four statutory payments apply in exactly the same way to all;
- remove the lower and upper age limits in the statutory redundancy scheme,

but leave the current age-banded system in place;

- provide exemptions for many age-based rules in occupational pension schemes.

(See the Department of Trade and Industry (DTI) website for full details on Employment Equality (Age) Regulations 2006.

Consequences for Employers with Operations in the UK

After October 1, 2006, employees in the UK will be able to bring claims in an employment tribunal for breach of the Regulations. Violations of the Regulations by employers may be remedied by, amongst other things:

- the granting of compensation to the employee for losses suffered, including an award for "injury to feelings." Future loss of earnings claims faced by employers could be large if filed by older employees who might find it difficult to obtain replacement employment;
- unfair dismissal compensation – the current upper age limit of 65 for unfair dismissal compensation is eliminated under the new law;
- up to eight weeks' capped pay for failure by the employer to properly notify the employee in writing of the retirement date and the employee's right to request the continuation of employment beyond that date.

Recommendations

Given the broad protections created by this change in U.K. law, U.S. employers with operations in the UK should consult with their employment counsel and take the following precautions:

- Review all procedures, policies, working practices and human resources programs to ensure compliance with the new regulations. Such a review should, at a minimum, encompass the following areas: recruitment, benefits, retirement, redundancy and dismissal policies and procedures.
- Reevaluate benefits packages carefully, especially if such programs are age or

service related.

- If not already provided, implement an age diversity policy and sensitivity training.

Wendy L. Tice-Wallner is a Shareholder in Littler Mendelson's San Francisco office. Ariel D. Weindling is an Associate in Littler Mendelson's Los Angeles office. If you would like further information, please contact your Littler attorney at 1.888.Littler, info@littler.com, Ms. Tice-Wallner at wticewallner@littler.com, or Mr. Weindling at aweindling@littler.com.
