
Managing without Fixed Retirement

A checklist and first briefing for
HR managers

This briefing for HR managers has been prepared by TAEN – The Age and Employment Network. TAEN is a registered charity and think tank around age and employment issues.

Overview

The Employment Equality (Age) Regulations 2006 were introduced to outlaw age discrimination in employment and vocational training. However, the Regulations allowed employers to continue to discriminate in certain limited respects. They introduced a default retirement age (DRA) of 65. This allowed employers to retire staff who had reached the normal retirement age for their organisation, providing this was no less than 65 (unless an employer could objectively justify a retirement age below 65).

At present, mandatory retirement at or above the DRA is not unlawful age discrimination. Moreover, mandatory retirement at or above 65 is an automatically fair reason for dismissal. All this will end when the DRA is abolished, the Government has now confirmed.

This checklist / briefing provides clear and authoritative guidance on this complex issue and covers the following topics:

- exactly what the Government is proposing and the transitional arrangements
- what choices employers have after 6 April 2011
- dealing with employees already over 65; and continuing with an enforced retirement age
- The checklist / briefing concludes with points for HR managers to consider.

Government's plans

The Government has taken the decision to abolish the DRA completely. There will be no new DRA to replace it (some had suggested introducing a new DRA of 70).

The DRA will be phased out from 6 April 2011. From this date it will no longer be possible to use the DRA to maintain a mandatory retirement policy for employees aged 65 or above.

The Government's plans were confirmed on 13 January 2011 when the Department for Business, Innovation & Skills (BIS) issued a response¹ to the extensive consultation that had taken place.

Transitional arrangements

Transitional arrangements will apply for the period from 6 April 2011 to 1 October 2011. These will apply where retirements have already been initiated, i.e. where the employer has chosen to give *longer* than the current minimum six months' notice of retirement (but no longer than 12 months), so that on 6 April 2011 some employees are already under notice that they are to retire.

Where notice has been given before 6 April 2011 and the retirement date is before 1 October 2011 (and the employee reaches his or her 65th birthday before 1 October 2011), the employer may continue to enforce the retirement, as long as the statutory procedure under Schedule 6 of the Employment Equality (Age) Regulations is followed.

If, however, notice has been given before 6 April 2011 to an employee who is to retire after 1 October 2011, such notice will no longer be valid. The Government intends to remove all the administrative procedure associated with the DRA, including Schedule 6. This means that notices of intention to retire employees and requests from employees to continue in employment beyond the DRA will no longer apply or be relevant.

Any retirement that is enforced after 1 October 2011 will have to be *objectively justified* even if notice has been served before 6 April 2011.

Choices for employers after 6 April 2011

Employers have the following two policy choices after 6 April 2011:

1. either to stop using retirement ages altogether, or
2. to continue to use an existing retirement age (or a new one), which *must* be objectively justified.

Adopting a retirement age which cannot be objectively justified will expose the employer to possible legal action for age discrimination and unfair dismissal. Since it will be difficult to be sure whether a particular set of circumstances would amount to objective justification, a cautious approach is advisable.

¹ See *Phasing out the Default Retirement Age: Government Response to Consultation* BIS January 2011
<http://www.bis.gov.uk/assets/biscore/employment-matters/docs/p/11-536-phasing-out-default-retirement-age-government-response.pdf>

Examples of how the changes will affect people approaching 65

The following examples (taken from the BIS and DWP consultation paper *Phasing out the default retirement age*) show how phasing out of the default retirement age will affect individual employees in some situations:

Person A: Is given notification of their retirement date in February 2011. Their retirement date is their 65th birthday, 30 September 2011. As they were notified before 6 April 2011, and their retirement will be completed before 1 October 2011, person A can be compulsorily retired using the DRA subject to the correct procedure being followed.

Person B: Is given notification of their retirement date in February 2011. Their retirement date is their 65th birthday, 5 October 2011. Although they were notified before 6 April 2011, because they do not reach their retirement date (which must not be before their 65th birthday using the DRA process) before 1 October 2011 they cannot be compulsorily retired.

Person C: Is not notified of their retirement date before 6 April 2011. Their 65th birthday is on 30 September 2011. They cannot be compulsorily retired because they were not notified before 6 April 2011, and the short notice provisions which allow less than six months' notice to be given are removed in April 2011.

Dealing with employees already over 65

Policies of 'clearing the decks' before the legislation comes into effect could be far from trouble free and might well attract adverse publicity. TAEN advises against such measures; quite apart from being an inhuman approach to long-serving employees, they are potentially disastrous if people with useful knowledge and skills are lost without appropriate measures of knowledge transfer being put in place.

The following measures are suggested as sensible approaches and to ensure compliance with the law.

Adhere to any arrangements already made to extend working of individual employees beyond the current DRA. They may well have contractual force.

Where such arrangements for continued working beyond the current DRA are due to expire or be considered for renewal, discussions and / or consideration should take place as already agreed. (Failure to follow an agreed and reasonable process to consider renewal could open an employer to a claim for unfair dismissal or breach of contract.)

Employers should consider the situation regarding any employees who have already worked beyond 65 without specific agreement and decide whether their situation should be clarified.

You might consider:

- leaving arrangements as they are and letting the employee know you value him or her in the job
- agreeing a revised set of working arrangements for the employee which will help them to remain in the workforce

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- reaching an understanding about the employee's retirement plans, preferably by agreement. (You may put this in writing before 6 April 2011 in the form of confirmation notice, in which case the leaving date must be before 1 October 2011.)

If you wish to impose the retirement of a 65+ employee, make it clear that they have the right to appeal and request to continue working and be clear too that you will *carefully consider* any such request.

Remember they can use your organisation's complaints and grievance procedures to query / contest any refusal. Any mandatory retirement must be notified by 6 April 2011 and carried out before 1 October 2011.

If the employee wishes to retire but wants to wind down, take a less demanding role, or reduce his or her working hours, etc, you should consider the options for this and come to an understanding.

Unwillingness to consider sensible arrangements that will allow older workers to continue in employment could conceivably be put forward as part of a case for indirect age discrimination and / or constructive dismissal, although this is a totally untested area of the law at present. Likewise, imposing contested changes in terms and conditions for people you are allowing to work on could also leave your organisation open to charges of constructive dismissal.

If the employee and his or her manager believe that retirement is the best option, set a date and arrange for retirement on a clearly agreed basis so that there is no suggestion of it being imposed.

If you reach the view that it is in the organisation's and / or the employee's interests that the employee should leave for reasons of capability or competence, etc, do all you would normally do to procure an amicable exit. But if you are forced to dismiss the employee it would be unwise to suggest you are forcing retirement if in fact the reason for dismissal is properly related to competence or ill health, for example.

If you wish to retire an employee above the age of 65, you have between now and 6 April 2011 to give effect to this decision. You should make sure that the requisite notice of six months is given, together with information on any appeals process and the right to request to continue to work, and the retirement is completed before 1 October 2011.

Continuing with an enforced retirement age

It is not true to say that mandatory retirement will be completely outlawed as a result of repealing the DRA. Article 6.1 of the Employment Framework Directive provides for differences of treatment on grounds of age "if they are objectively and reasonably justified by a legitimate aim, including legitimate employment policy, labour market and vocational training objectives and if the means of achieving that aim are appropriate and necessary".

Thus, while the *default retirement age* will be phased out, this does not mean that there may be no retirement ages in future in any circumstances. However, an employer adopting such a mandatory retirement age will need to be confident that it can be defended according to the above criteria.

As things stand, this is a potentially high risk area which HR managers will be wise to avoid, despite the case of *Seldon v Clarkson, Wright and Jakes* which seems to suggest that justifying a retirement will be possible.

Evaluation of risks facing employers after the DRA

There have been numerous warnings of difficulties for employers once the DRA is abolished. The Engineering Employers Association, for example, has warned that ending the DRA will be “opening a Pandora’s box, with the onus being placed on employers to prove whether older employees are capable of continuing in their current role”.

In TAEN’s view, such comments seem to exaggerate likely problems. HR managers should be reassured that other countries have handled an absence of mandatory retirement perfectly safely.

Canada, the United States, New Zealand and Australia have all outlawed mandatory retirement ages. In the UK, many employers have functioned for some time without mandatory retirement ages.

Nonetheless, it will be important for employers to have clear policies for monitoring the performance of all employees (certainly not *just* older employees) and dealing with below par performance in supportive and responsible ways.

Concerns about the lawfulness of initiating conversations on the future employment or retirement intentions of employees are, on the whole, misplaced in TAEN’s view. Again, however, it is important that such conversations should be set in an age neutral context. An employer who adopts a policy of holding such conversations *only* with staff nearing say 65 might be liable to an unfair / constructive dismissal or age discrimination claim if the conversation were to be handled insensitively, or were it to assume a quasi performance appraisal or disciplinary character.

Prevalence of mandatory retirement currently in UK

At the time that the Age Regulations were introduced, a survey of employers’ policies and practices was undertaken for the Government. It showed that fewer than a third of employers used compulsory retirement ages. Moreover, even where mandatory retirement was in place, over 80 per cent of requests to remain were accepted.

A Government commissioned survey in 2010 again showed that 32 per cent of employers use retirement ages for some staff. Again, the majority of employers, employing over half the workforce, operate without using compulsory retirement already.

Fewer than half the employers surveyed felt it was important to be able to retire employees compulsorily. On the other hand, 39 per cent felt it was important to a greater or lesser degree to be able to retire employees lawfully. And 53 per cent felt it was not very important or not at all important.

Likely impact of working on

Whilst it is true that increasing numbers of people are working beyond state pension age and into their mid-60s, it is easy exaggerate the impact of people working longer. The employment figures released by the Office for National Statistics in December 2010 showed that 844,000 people over the age of 65 are working, representing an employment rate of 8.5 per cent. This figure includes those working part time and the self-employed.

Around four out of ten men working beyond 65 are self-employed. The Government's own impact assessment suggests that abolishing the DRA will only lead to an increase of 6,200 in the labour supply in 2011 and will then plateau around 10,500 a year through to 2020 – a relatively small amount (around 1 per cent of the number currently working past 65) because most employers are already choosing to retain older staff if they wish to stay on.

Most employees do not want to work beyond 65, although around a third of individuals want to work longer. Reasons for wanting to work longer include financial reasons, and wanting to retain 'softer' benefits of working such as keeping active and because they enjoy their work.

Many are interested in working flexibly. Employers who find ways of responding to this need may well find the talent and knowledge offered by experienced workers fills an important gap.

For all of the reasons outlined in this section of our checklist / briefing, TAEN believes a sense of proportion is needed in assessing the impact on workplaces

Points for HR managers to consider

Capability issues

If you abolish fixed retirement ages, does this mean that employees can go on working for ever?

No, of course not. No-one can expect to go on working in a job forever. They must be able to do the job and comply with the behaviour and performance requirements of the organisation. If they can do this and are satisfactory workers, you should want to hold on to them regardless of their age.

How do I deal with a failing older worker?

In much the same way as you deal with a failing worker of any age. You might decide to adopt a 'tea and sympathy' approach first. You should certainly find out what you can about the causes of the problem and only when all else fails should you reach for the capability procedure.

Must I stick exactly to the procedures for older workers or can I show some consideration for their dignity if I am concerned about performance standards?

If you have a capability issue, deal with it first as a human issue and only when all else fails as a formal matter. This is what you should always do. But be sure that you have the appropriate procedures in place so that you can use them if you need to do so.

Making allowances for older employees

Can we make allowances for older and long-serving employees or must we deal with them without fear or favour if we are to avoid charges of discrimination?

Common sense should allow managers to make distinctions between employees who have always performed well but for some reason may no longer be what they were, and others who are relatively new but showing signs that they may not meet the requirements of the job. A fine line should be steered, however, and it does no good to tolerate performance that is well below par purely on grounds of long-standing sentiment. On the other hand, it is worth noting that tribunals will expect employees with long and loyal service to be given consideration and support before being disciplined on grounds of incompetence or incapability, so discourage 'trigger happiness' among your managers and insist that they don't try cutting corners when dealing with competency and performance issues.

Dealing with poor behaviour

Will I be in danger of a tribunal claim if I take a badly behaving older employee to task?

Of course not. Your duties not to discriminate on age grounds do not mean that there will never be any point in trying to get rid of an incompetent or badly behaved employee who happens to be beyond 65. Whatever rules you have in your organisation regarding conduct and misconduct should be applied regardless of age.

Differences in working conditions for older employees

Can we make adjustments, such as adjusting working conditions, for an older person that may facilitate their working longer?

The duty not to discriminate on grounds of age does not mean that everyone should always be treated identically regardless of any incapacity or limitation. Older people, in common with others (parents of small children, carers, etc) may have particular needs which should be taken into account if they are to be helped to remain in work. One problem is that they may not wish to ask for special treatment. An older worker, say with a growing arthritic problem, may not want to be seen as disabled, even though they have suffered a drop in mobility and work capacity. It is important to be alert to such situations and try to encourage the low key adoption of changes that facilitate ease and comfort of working longer. It is worth remembering that anyone at any age can acquire a disability and where this happens, the employer is under a duty to make reasonable adjustments to facilitate their remaining in the workforce or to support their ability to do the job.

Older workers and pensions issues

Will we need to make new arrangements regarding workers over 65 who might be entitled to draw their pensions or who might wish to continue to contribute into the pension scheme to accumulate additional pension entitlement?

Yes. If you have a company pension scheme that provides for pensions to be paid at 65, you will need to consider with your pension scheme manager whether new rules or administrative arrangements should be adopted to provide the flexibility that is possible so that employees may draw salaries but also receive their pensions under the pension scheme. There are complex issues concerning the cessation of accruals for scheme members who are past normal pensionable age, but these are beyond the scope of this checklist.

Employer justified retirement ages

My organisation would like to retain a mandatory retirement age for some of our employees. How do we go about adopting an employer justified retirement age (EJRA) that will not expose us to claims of unfair dismissal or age discrimination?

It is technically possible to do this. But as the question implies, the cost and uncertainty of being taken to an employment tribunal, where you will be asked to produce a case of justification, provides strong reason for eschewing this approach. Concerns over health and safety or work performance of some workers may not alone amount to *sufficient* reasons when the tribunal is considering the ‘proportionality’ of an enforced retirement policy. If, despite these risks, you feel that an EJRA is necessary in your organisation, you should only proceed with this approach if you have a sound evidence base for *justification* and a mechanism for achieving unambiguous employee *buy in*, for example via a collective agreement with a union.

Further information

Further information and guidance is available from Acas. See their publication *Managing without the Default Retirement Age*.

This checklist, provided by TAEN – The Age and Employment Network, is designed to provide general information only. Whilst every effort has been made to ensure the information provided is accurate, it does not constitute legal or other professional advice.

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Support from TAEN

TAEN can support you by:

- age awareness workshops / briefings
- age diversity workshops
- one to one discussions on age diversity strategy
- discussion of difficult problems
- free use of a workforce assessment tool to consider age and demographic risks
- advice about entering for AARP Best Employers for Workers Over 50 Award - International, a prestigious award for employers with age friendly policies and practices.

Corporate membership of TAEN entitles you to all of the above in addition to TAEN publications and newsletters and free admission to our practice and research seminars.

For more information on any of the above, including membership of TAEN, and the latest news on age and employment issues, visit our website www.taen.org.uk or; e-mail us (info@taen.org.uk) or phone (020 7843 1590).

About TAEN

TAEN - The Age and Employment Network is an independent not-for-profit organisation. Our aim is help create an effective labour market which works for people in mid and later life, for employers and for the economy.

We inform and advocate for effective age management policies to be adopted at all levels – in employing organisations, by individuals and across the labour market. We do this by promoting the best, most forward-looking practices in human capital management, particularly those aimed at maintaining health, optimising work design, planning and delivery learning, and changing the structure of careers.

TAEN is a network of member organisations with an interest in age and employment issues. Our members are drawn from across the labour market.

We work with individuals and organisations, including government agencies, academic bodies, employers and unions.