Working without limits

Your responses to the abolition of the default retirement age

February 2011
Last month the Government confirmed that it is going ahead with its plans to abolish the default retirement age later this year. We invited recipients of our HR e-briefings to take part in a survey that would tell us how they are responding to the imminent change.

Thank you to all of those who took the time to respond to our survey. In total 330 employers representing well over 650,000 employees took part in the research. The information you have supplied has provided invaluable insight into how employers will be affected.

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Key findings

330 employers responded to our survey.

Of those who did so:

- A significant majority (69%) currently have a policy of mandatory retirement for some or all of their workforce (subject to an employee’s right to ask to stay longer).
- Less than 1% of respondents say they plan to retain a compulsory retirement age after 1 October this year and nearly two thirds (63%) say they intend to abandon mandatory retirement. About a third said they have not yet decided how to respond.
- More than 15 per cent said they felt that raising or abolishing the default retirement age would lead to an increase in costs.
- More than a quarter said the change in the law will have an impact on performance issues.
- Around 15% said abolishing the default retirement age will have an impact on workforce planning. Of this group, the majority feel that, if older workers are not retired, opportunities for recruitment or advancement of new or younger workers might be blocked. Some feel this could make it difficult to attract or retain talented people, with others expressing concerns about stagnation in the workforce.

Employers are still considering how to respond to the Government’s recent announcement that, in future, employers will not be guilty of age discrimination if workers above state pension age are excluded from the employer’s group insurance benefits: 57% of respondents who currently provide such benefits said they have not as yet decided whether to take advantage of the freedom not to extend insured benefits in future. Of those who have decided, about half will remove the benefits for employers over state pension age and half will keep them.

Most employers are taking steps to prepare for the new rules. The most common actions are:

- reviewing and revamping performance management policies
- amending employment contracts to remove any reference to age-based retirement
- amending retirement policy documents
- reviewing employment packages, such as flexible benefits schemes.

An unfortunate consequence of the new regulations may be that they will precipitate the retirement of some employees either approaching or, if the Regulations will allow, over 65 and who had been permitted to remain: one in seven of those employers who responded to this question told us they were considering how to deal with this group of employees. In some cases they had already decided to retire those whom they are able or, at least, to review each of them for efficiency and if necessary retire some of them.
Background

Since 2006 UK law has prohibited age discrimination at work. However, an exemption currently allows employers to retire employees against their wishes when they reach 65. This has become known as the ‘default retirement age’ (DRA).

The Labour Government initially said it would review the DRA in 2011 to assess whether it was still needed. That review was brought forward to 2010 in the face of a legal challenge brought by the charity Age UK (the ‘Heyday case’), coupled with pressure from a number of organisations to abolish the DRA.

Within months of the general election, the results of that review were published and the new Government began consulting on proposals to abolish the DRA completely in 2011. The Government confirmed last month that it intends to press ahead with this change.

From 6 April 2011, therefore, it will be unlawful age discrimination to compel someone to retire unless the employer can justify the retirement as a “proportionate means of achieving a legitimate aim”. There will be transitional arrangements to enable some retirements already set in train before that date to progress to completion, although final details are yet to be clarified.

Employers are now facing the difficult decision whether to retain a compulsory retirement age for some or all of their workforce. With many of our clients and contacts asking what other employers intend to do; we felt it would be useful to carry out a survey of employers that would give us, and them, a view of the national picture. This report details the results of that survey.

There is an associated change in the law which will be introduced at the same time: permitting employers to cease to provide group insurance benefits to employees over the state pension age. Our survey also asked employers whether they intended to make use of that exception.
Current retirement policies

A significant majority (69%) of those who responded to our survey currently have a policy of mandatory retirement for some or all of their workforce (subject to an employee’s right to ask to stay longer).

When we conducted a similar survey 18 months ago, the number of employers with a fixed age at which they normally require people to retire stood at 84%. This suggests that employers have, unsurprisingly, already started to move away from the idea of forced retirement, a trend that will gather pace over forthcoming months.
Abandoning retirement

Of those employers who still have a mandatory retirement policy at present, less than 1% say they plan to retain it after 1 October this year when the DRA is abolished. In contrast, nearly two thirds (63%) say they intend to abandon their mandatory retirement policy. About a third of survey respondents said they do not yet know whether or not they will abandon their mandatory retirement policy.

It is unsurprising that so few employers have firm plans to continue with their policy of mandatory retirement. In future, any decision to retire an employee against their wishes will have to be justified as a ‘proportionate means of achieving a legitimate aim’. This will not be easy.
Impact of the change in the law

We asked those who took part in the survey what they felt would be the impact of the DRA being abolished.

Performance/capability

More than a quarter of those who responded said the change in the law will have an impact on performance issues.

Only a few survey respondents (less than 5%) explicitly link age with a decline in performance, with a further handful (again, less than 5%) anticipating an increase in ill health absence.

Most employers did not spell out why they thought age related to performance, so the extent to which other employers associate age with declining performance is unclear from the responses. In most jobs it is inevitable that performance will decline with age at some stage, although when and to what extent that can be expected to happen does, of course, depend on the nature of the work. At present, most employees would voluntarily retire when they reached that point. However, with reduced pension provision it will become more common for someone to stay on to try to preserve their income (or even in the hope of a pay-off).

There are also those whose performance is not up to standard (for reasons not connected with age) but who, under the current regime, an employer (and work colleagues) would be prepared to carry because of their past good service and the knowledge that they will retire soon.

Under the current regime, employers do not need to performance manage employees in either of these categories as the DRA enables the employee to be retired, which some consider to be a more dignified approach.

Workforce/succession planning

Around 15% of those who took part in the survey said abolishing the DRA will have an impact on workforce planning.

Of this group, the majority feel that if older workers are not retired, opportunities for recruitment or advancement of new or younger workers might be blocked. Some feel this could make it difficult to attract or retain talented people, with others expressing concerns about stagnation in the workforce.

A number of those who responded also highlight issues with succession planning: not knowing when employees are going to leave can make succession planning difficult, especially where a significant period of training is needed for a particular role.

Linked in with workforce planning, a handful of organisations (less than 5%) anticipate an increase in requests for flexible work arrangements.

Finally on this point, two participants made the point that with less ‘natural wastage’ there could be an increase in redundancies.
Impact of the change in the law

**Increased costs**

More than 15 per cent of those who took part in the survey said they felt that raising or abolishing the DRA would lead to an increase in costs.

Concerns mentioned in this and previous surveys include: higher salaries where pay is linked to length of service; costs associated with increased management time spent on performance matters; costs associated with certain benefits; cost of increased sickness absence; increased redundancy costs.

**Increased claims**

More than 15 per cent of those who responded anticipate an increase in tribunal claims when the DRA is abolished.

The 2006 Regulations introduced retirement as a fair reason for dismissal. Provided the strict notification provisions and procedure were followed (in Schedule 6 of the Regulations) employers were safeguarded from claims of both unfair dismissal and age discrimination.

The repeal of the DRA will also result in a change to the UK’s unfair dismissal laws effective from 1st October 2011 – in future an employee may choose to retire by resigning their employment or an employer will have to terminate for legitimate reasons.
Impact of the change in the law

The five fair reasons for dismissal which existed prior to 2006 will have to form the basis of an employer’s reason for dismissal (conduct, capability, statutory bar, redundancy or some other substantial reason) and instead of the Schedule 6 retirement procedure, an employer will have to follow a fair process as well as demonstrate that the reason for dismissal applied and the decision to dismiss was fair and equitable – applying the usual Acas principles and guidelines.

For those few employers who, from our survey, may seek to rely upon an employer justified retirement age (for a part of their workforce or in the organisation as a whole) a fair process will still have to be implemented and the legitimate aim will also have to be shown to amount to a substantial (fair) reason.

The scope for employees to challenge the genuineness of the reason for dismissal and whether it was a mask for age discrimination will increase and employees may well seek to challenge the process followed in particular cases contending it was unfair.

Moreover, there is a risk that liability or awards for unfair dismissal and/or age discrimination may increase. Whereas previously when assessing future loss, a respondent would have projected loss of earnings and benefits up to DRA, when the employee was likely to have retired, this natural cut off point will not exist. This means there is greater scope to argue about the period of loss and indeed the prospects of an employee continuing to work had he/she not been dismissed (for example the chances of ill health leading them to leave or performance having to be addressed). As a consequence it may become harder to resolve claims.
Insured benefits

The cost of some benefits commonly provided by employers increases in line with the age of employees. Examples include life insurance, travel insurance, private medical insurance and permanent health insurance/income protection, which are often paid out until retirement.

The cost to employers of providing such benefits would be likely to increase if employees remain working for longer and retire older following the abolition of the DRA. This might have led some employers to withdraw such benefits for all employees. To avoid these issues, the Government will introduce an exemption from age discrimination laws where group risk insured benefits are provided on behalf of an employer. The exemption will mean that this type of insured benefit can be withdrawn from employees aged 65 and above (though this age will rise in line with the state pension age) and could not form a complaint of age discrimination.

Nearly a third of those who responded say they currently offer insured benefits to those over retirement age.

It seems that employers are still considering how to respond to the Government’s recent announcement of this relaxation: 57% of those who currently provide such benefits said they have still to decide whether to take advantage of the freedom not to do so in future for those at 65 or state pension age. 13% have already decided to take up this option and 15% have decided not to do so. 15% did not respond to this question.

Two-thirds of survey respondents said that they do not currently provide insurance benefits to employees over the age of 65. It seems unlikely that all of those employers either have no employees over that age or do not provide group insurance to employees of any age.

A sizeable proportion of employers may already have taken the view that they can ‘justify’ in law not providing such cover for their oldest employers. If so, this new regulation will provide welcome reassurance for them.
Preparing for change

We asked those who took part in the survey what else they are doing to prepare for the change in the law.

A high proportion of employers are reviewing and revamping their performance management policies.

Many employers are amending their employment contracts and retirement policies to reflect the legal changes. The changes have also prompted many to review their employment packages, such as flexible benefits schemes.

One in seven of those who responded to this question were considering how to deal with those employees who were already over 65, or would reach that age by the end of September. The extent to which the Regulations will permit employers to now apply the current retirement regime to those over the age of 65 for whom employment has been extended by agreement is unclear. The Regulations, once available, may only allow this for those approaching age 65. Even so, of our survey respondents, some employers have already decided to retire all 65s and overs, or to review each of them for efficiency and if necessary retire some of them. Other employers are still assessing whether to take either of these approaches.

The bringing forwards of retirements which might otherwise have been postponed would be an unfortunate, but entirely predictable, consequence of abolishing compulsory retirement: the abolition of the DRA may result in a considerable number of employees who are approaching 65 losing their jobs over the next seven months and, if the Regulations allow, many more over 65s.