

Employment Equality (Age) Regulations 2006

The TAEN Guides to the Age Regulations are primarily for individual employees, jobseekers and learners and aim to give a simple, clear explanation. They are neither a legal opinion nor a statement of Government views..

2 : Exemptions

The exemptions contained in the Age Regulations are more extensive than in other discrimination legislation.

Basic position

The Age Regulations allow justification of direct as well as indirect discrimination. Other discrimination law does not allow direct discrimination except in the case of what are known as 'genuine occupational requirements'.

While many of the exemptions are explained in the other TAEN Guides, they are grouped here to given an overall picture of the exemptions.

Some exemptions relate to the business objectives of employers, others relate to the public policies of Government which then have an impact on employers, employees and training activity.

Justifiable and legitimate employer actions

The Age Regulations allow an employer to put forward a legitimate aim to justify an exemption, for example, a case where it is acceptable to base a recruitment decision on someone's age. In order to do this lawfully, the employer will need to have a:

- 'legitimate business reason' or aim for doing so,

- be able to put forward a strong business justification,
- show that the age-based action does not have negative side effects which outweigh the benefit (i.e. is proportionate to the aim), and
- show that there is no easier alternative way to solve the problem without being discriminatory.

The law does not define the scope of possible legitimate aims or name examples. There are no limits to the circumstances which an employer could suggest as a legitimate aim. A number of examples were widely canvassed in the course of the preparation of the legislation.

Some of these arose from an Article of the EU *Equal Treatment Directive 2000* which listed a number of possible exemptions for age (which did not apply to the other grounds in the directive such as disability and race).

However, they were not included in the Age Regulations in the UK, in part because defining them clearly proved difficult. All are discussed in the course of these Guides, in particular in Guide 3 *Recruitment*.

An example of the relationship between a legitimate aim and proportional impact was addressed recently in the European Court of Justice – the German Government introduced a scheme for short-term contracts for over-52s as an incentive to employers to recruit them. This created a system of less secure employment terms for over-52s compared to under-52s with the legitimate aim of improving employment opportunities for older workers.

But, because it created less good employment terms for one age group compared to another, it was held to have a disproportionate discriminatory impact. Other cases are pending in European courts which may influence what happens in the UK.

Genuine occupational requirements

See Guide 3 *Recruitment*.

Positive action

This is an exemption for action to correct for under-representation of an age group in the workforce or training. The test for demonstrating that corrective action is needed is less rigorous than in the case of some other discrimination legislation. There is a link with one of the potential legitimate business aim for employers - workforce planning (see Guide 3 *Recruitment* and Guide 4 *The Workplace*).

National Minimum Wage

This is an example of a public policy exemption. If it is challenged the case will revolve around the reasons the Government have given for the policy. In the first instance a challenge still has to come from an individual to an employer applying the policy, rather than to the Government.

The three National Minimum Wage bands are 16-17, 18-21 and 22+. They may be challenged and the issue is whether the aim

(encouragement of continued education of people aged 16 to 21) is outweighed by the consequences of having a clear case of an age-based employment practice. The age threshold of 22 looks more open to challenge than the threshold of 18.

Length of service pay and benefits

See Guide 4 *The Workplace*.

Government funding of adult training

See Guide 5 *Training*.

Enhanced redundancy pay

See Guide 6 *Redundancy*.

Retirement procedures and fixed retirement ages

See Guide 7 *Retirement*

Occupational pensions

See Guide 8 *Pensions*

Social security systems

Welfare and social security systems often have age criteria embedded in their design and administration.

These schemes are excluded from the Age Regulations. The definitions of what are included in Welfare and Social Security schemes has not been explored in detail.

The presumption is that Welfare to Work programmes such as New Deals based on an age group could only be justified as Positive Action for an under-represented group.

Statutory exemptions for existing UK laws

This means that Government or employers can take age-based actions justified by an existing UK law which takes precedence over the Age Regulations. How this will work in practice is not very clear at present. It is likely that some issues will have to be settled by case law.

In principle, Government has done a trawl of all existing law to remove age-based practices which could not be justified. Many of the obvious examples that remain (age thresholds for when you can drive, vote or how you are treated in the Criminal Justice system) would appear to have a limited relationship with employment and training.

The most significant area may be law on **Health and Safety** and its effect on the workplace. Some age-based employment practices, including ages for recruitment, promotion, training, retirement and redundancy are widely thought to relate to the requirements of Health and Safety law. In practice this is more true for young people (defined as aged 16-18) rather than for workers in mid and later working life.

There is no general guidance from Government on the health risks of employing older people. In contrast there is a 2002 Health and Safety Executive Circular about the application of the *Management of Health and Safety at Work Regulations 1999* to young people and a briefing HSG165, *Young people at work - a guide for employers*. These documents could well form the basis for a case for exemption of people aged 18 and under, for example, in recruitment.

There may be Health and Safety factors which are significant for older people, but it should not be taken for granted that they can be handled by a general presumption about the health and safety risks of one age cohort compared to another. The diversity of health within any one age group is likely to be greater than the average difference between age groups.

National security and the Armed Forces

Action in the interests of national security is excluded.

TAEN's Guides

Along with other non-governmental organisations, TAEN participated in over five years of discussions and preparations with the UK Government and others on the transposition of the EU's *Equal Treatment Directive 2000* (on which the Age Regulations are based) into UK law.

TAEN's Guides to the Regulations divide them into a series of manageable, separate chunks. There is overlap between the topics. In some cases this is dealt with by repetition in more than one guide. In other cases there is cross reference from one guide to another.

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