



New Age Pensions

Age discrimination in pension schemes: the final regulations

The final regulations on age discrimination and pensions are more sympathetic to business as usual than the original version. New exceptions allow a lot of established practices to continue. But there are no exceptions for some important rules in occupational schemes, and some of the exceptions come with devil in their detail. See our table.

Then we look at the other safe ground: is there any discrimination in the first place? If there is, can it be objectively justified?

OCCUPATIONAL PENSION SCHEMES

No exception

- **Watershed age when the in-service benefit package (DB or DC) stops or changes** – generally, schemes need to offer full in-service benefits (accrual and death benefits) to members who stay in service after NRD.
- **Flexible retirement i.e. drawing pension while working** – it is unclear whether it is age-discriminatory to offer – or not to offer – flexible retirement. Also whether a scheme that does offer it can stop accrual. [The Department of Work and Pensions is considering issuing specific new guidance on this awkward topic.](#)
- **Benefit options generally** – say a scheme offers a choice between a non-discriminatory course of action and some age-related options. E.g. after NRD, a choice between continued accrual, a postponed pension increased actuarially, and an immediate pension with no further accrual. Can the taker of one option compare herself to someone who has taken another? Arguably not (because they have each chosen different circumstances). There is no clear answer, but we think this is a promising line of argument.
- **Age by which members must take their benefits** – the exception for rules necessary to safeguard tax privileges does not go far enough to cover this.
- **DB scheme reduces early pension more for a deferred than for an active** – but arguably there is no discrimination, the different treatment hinging on status rather than age.
- **Enhanced early pension other than on ill-health and redundancy** – there is an exception but it is confined to active and prospective members on 1 December 2006.

Exception with significant conditions attached

- **Min. / max. age for joining** – the exception is restricted to schemes that do not offer “life cover only” membership, or do so in narrowly defined circumstances.
- **Factors that are not actuarial** – several exceptions depend on factors being “actuarial”. Trustees should review any long-since fixed figures.
- **When a child’s pension stops** – the only exception is for a pension that stops when the child reaches age 23.
- **Benefits based on prospective service** – there are exceptions on early retirement for redundancy and ill-health. Also on death. Prospective service can generally be a fixed number of years, or to “normal pension age”. This is usually taken to mean the earliest age at which a member can receive an unreduced pension as of right, and may not be the same as NRD. For ill-health and death benefits, prospective service can be some or all of the period to NPA. In what might or might not be a drafting slip, it has to be the whole period on redundancy. “Redundancy” has the same meaning as in employment law. Some schemes use a wider concept, so will need to rethink if they want to use the exception.
- **Targeted pensions, say 2/3rds at 65** – the exception depends on all members in a comparable situation having the same target.

- **Age-related DC contributions** – the exception requires contribution rates that are aimed at a broad equality of benefit. It is unclear how many age bands a scheme needs in order to pass the test.
- **Closing a scheme to new joiners** – a scheme is unlikely to count as closed if the employer retains a discretion to admit members. If a scheme wants to use the exception and there is doubt whether it is closed, it should do a clarifying rule amendment.
- **Closing a section of a scheme to new joiners** – a “section”

is group of members who joined before, on or after a given date for particular benefits, or as result of a transfer. Arguably, a rule amendment changing future benefits for new joiners closes an existing section in many cases. But having a standing rule to close sections is likely to be safer. This is an important but tricky exception.

- **Rules designed to safeguard the tax privileges of a registered scheme** – the exception is narrow: it requires a rule to be “necessary” to securing favourable tax treatment.

Exception with light conditions attached, or none

- **Waiting period to join** – the employer must show a business need for a qualifying period > 5 years service.
- **Service-related DB benefits / DC contributions** – ditto. Note that what counts for working out the 5 years is service, not *pensionable* service.
- **Minimum pensionable pay to join** – the exception allows various thresholds.
- **Deductions from pensionable pay** – the exception caters for a number of deductibles.
- **Same DC contributions regardless of age**
- **Ages when early and late retirement adjustments begin**
- **Different consent requirements for early retirement at different ages**
- **Earnings caps, whether the old statutory one or scheme specific**
- **Age-related actuarial factors**
- **Bridging pensions**
- **Death benefit guarantee** – e.g. 5 years
- **Reduction for young survivor**
- **Limiting benefits to a proportion or multiple of pay** – this allows a large part of the old Inland Revenue limits to continue to apply.
- **Limiting benefits with a maximum length of pensionable service**

LIFE COVER ONLY SCHEMES

In a change from the original version, the employer and the trustees of a life cover only scheme are both subject to the final

regulations. A limited range of exceptions is available. The main issue for schemes is likely to be continued cover after NRD.

PERSONAL PENSION SCHEMES

No exception

- **Minimum pay requirement to join**
- **Employer’s contributions stop after a maximum number of years**

Exception available

- **Waiting period to join**
- **Minimum age for employer’s contributions to start**
- **Age-related employer contributions** – the broad aim needs to be equality of benefit. In what looks like an oversight, the test is not the same as in a DC occupational scheme.
- **Service-related employer contributions** – the employer
- **Same employer contributions regardless of age**
- **Different rates of employer contributions at different levels of pay**
- **Cap on pay for contributions**

has to show a business need if the service condition > 5 years.

“DB” and “DC” stand for defined benefit and defined contribution. This list does not mention all the rules that could engage the regulations, nor all the exceptions.

Safe ground without the exceptions

Schemes will often look to the exceptions first, and rightly. But, analytically, they are the final refuge. There is no need to consider whether any of them applies if the employer and the trustees can:

- show that the reason for different treatment is not age but, for example, status. Then there is no discrimination, and no need for an exception or justification.

A complainant has to point to a comparator who is in circumstances that are substantially the same as their own. "Circumstances" might include status. A sample status could be "being a senior manager". Being a deferred member might be another. Whether this argument succeeds will depend on exactly what the difference in treatment is. Comparators can be hypothetical.

- show that the practice is objectively justified as a proportionate means of pursuing a legitimate aim. Examples of legitimate aims might be providing for need when earning stops and rewarding loyalty. To be proportionate a practice must contribute to achieving the aim and there must be a balance between the importance of the aim and the discriminatory effect of the measure. Generally speaking, the practice needs to

Next steps

Employers and trustees need to work together to audit their scheme(s) for discrimination. Counsel of perfection is immediately to remove age-related rules that are not clearly excused in one of the ways described – exception, "no discrimination", or justification. But the uncertainty over the latter two in particular makes this almost impossible in practice. So employers and trustees need to prioritise. Here is a possible framework.

- **Top priority – amend as soon as possible**

Top priority are rules that (a) will definitely undergo unwanted levelling up unless the scheme acts, or (b) carry an unacceptably high risk of same. Amend these as soon as possible to level down for the future. For example, a defined benefit accrual rate that steps up at a certain age, and age-related defined contribution rates not covered by the exception (see above).

- **Priority two – wait and see**

Second come rules that a scheme wants to continue in the future and on which it is content to run the risk of levelling up backdated to 1 December 2006. These will generally be

be the least discriminatory means of achieving the aim. It seems that cost can play a part – but only a part – in justification. Generally speaking, it is unlikely to be easy to show objective justification.

Direct as well as indirect age discrimination can be objectively justified. "Direct" means different treatment specifically because of a person's age. "Indirect" refers to an apparently age-neutral rule that works to the detriment of one or more age groups in practice.

Other strands of discrimination law suggest that justification is not a one-off exercise: historic reasons for different treatment (sometimes called "red circling") could pass the test today, but fail in future. Considerations include the length of time since the circle was drawn and whether it is good employment practice to continue it. Schemes should keep justification under regular review.

Evidence will be crucial. Employers and trustees should keep a full and contemporaneous record as they review their aims and how their practices achieve them with minimum discrimination.

things that the scheme believes, on substantial grounds, are excused in one of the ways described. The argument is that, at worst, waiting delays the inevitable without aggravating it. Depending on the balance between different risks – e.g. employee relations, financial and legal – there could be fine judgments about whether to count a particular issue as priority one or two.

- **Priority three – take it easy**

Third priority are rules that a scheme strongly believes to be excepted, non-discriminatory, or justified. With some, it might be a consideration that the cost and administrative inconvenience of levelling up retrospectively later will be minimal.

For priorities two and three, schemes should build their arguments for the view they take e.g. how a rule is objectively justified.

Employers should be prepared for their trustees to take a more cautious view than they do because of the statutory non-discrimination rule.

Non-discrimination rule

The regulations insert a non-discrimination rule into all occupational pension schemes from 1 December. It overrides the rest of the rules and requires the trustees to refrain from discriminating on grounds of age. If a scheme discriminates, the rule levels benefits upwards to the more generous scale.

Employers should not underestimate the force of this rule, or the pressure that it puts on trustees. In practice it means they need their trustees' agreement over their approach to age discrimination.

Levelling up and down

If a scheme wants to, it can level future service benefits downwards, but only with effect from the date it makes the

amendments. Benefits earned between 1 December and the date of the amendments have to be levelled up.

Enforcing the regulations

Employment tribunals have jurisdiction over the regulations. But members and others can take pensions issues to the Pensions Ombudsman under his normal jurisdiction too. The most likely sanction from an employment tribunal is an order allowing

membership without discrimination (which can be backdated). But in the case of a pensioner, the likely remedy is a sum of money equal to what (s)he has lost through discrimination.

Consultation

Larger employers that want to make materially detrimental changes to future service pension benefits must normally consult active members (which takes about two months). But it seems

this does not apply to changes made to comply with the age discrimination regulations.

And finally

The pensions regulations apply to benefits earned from 1 December 2006. Pensions apart, the regulations have applied since 1 October 2006.

Any age group – young or old – can suffer discrimination. Consider the full range.

Unlike the original regulations, the final version puts the employer and the trustees in essentially the same position. This is welcome.

There is no exception for small schemes. But the resources of an employer or scheme could play a part in objective justification.

Watch out for other discriminations: something that is not age discriminatory could be indirect sex discrimination, for example.

In addition to employees, the regulations also cover office-holders, some self-employed people, contract workers and temporary staff. Partnerships can be affected too. Scheme sponsors and trustees need to consider a wide range of people.

30 January 2007

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Important: This brief and general note does not attempt to cover the subject(s) it raises comprehensively or with complete accuracy. It does not give you advice and you should not act on what it says. You should take specific legal advice on how the law applies in the particular circumstances you are facing.

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