

Living without a default retirement age

Pensions aspects

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On the pensions side, key actions for businesses are to:

- recognise that although they interplay, decisions about workforce planning should lead and changes to pensions practices should follow
- consider the wider pensions context of significantly increased life expectancy, a rising state pension age, auto-enrolment in pension schemes from a date after October 2012 and the likelihood that, of necessity, people will become increasingly literate about pensions in future
- look at flexible retirement as an option that could be attractive and helpful to employees as well as to the business.

The abolition of the default retirement age (DRA) means that, in the longer term, employers are more likely to offer employees the option to draw their pension while continuing to work.

In the short term, the only change most occupational pension schemes will need to make is to allow continued accrual after the scheme's "normal retirement age" (NRA).

Abolition will have little impact on personal pension schemes.

Occupational pension schemes

So, what's the big picture?

Occupational pension schemes will continue to operate much as they do today, but with more members retiring under the scheme's rules on late retirement. Schemes that do not already offer "flexible retirement" are likely to receive more requests to allow members to draw pension without leaving their job.

Scheme rules will continue to say that all members are entitled to their pension at NRA, typically age 65. Existing rules that allow pension to be drawn before or after NRA will continue to operate. These options are normally subject to the consent of the trustees and/or the employer (because there can be cost implications).

In the past, late retirement rules generally said that pension would stop accruing at NRA and would be increased actuarially when eventually drawn to reflect the shorter time it would be paid. To comply with age equality law, members will now

normally need to have the option of continuing to contribute and accrue benefits instead. Employer contributions will continue for a member who makes this choice. Scheme rules will often need to be changed to include this option.

The existing exceptions for pensions from the age equality requirements will continue to apply. These help with late retirement but do not cover flexible retirement.

Occupational pension schemes (set up by the employer) can be defined benefit (DB), defined contribution (DC or money purchase) or a mix of the two.

Flexible retirement: what options are available if we want to offer it?

Here are some options a scheme could offer members:

- to draw some or all of their pension and to go on accruing more pension at the same time,
- to draw some or all of their pension but at the price of ceasing to accrue any more pension,
- in a DB scheme, to draw some or all of their pension but at the price of only being allowed to accrue more pension on a DC basis.

In most schemes the employer and the trustees will need to agree on any flexible retirement options. Rule changes will normally be required.

Flexible retirement: do we have to offer it?

This has been a live question since age equality law came into effect. More schemes are now asking it.

The answer is that it is not clear what, if any, flexible retirement options a scheme (a) must offer in order to remain compliant with age equality or (b) can offer and still remain compliant.

Our general advice is that as long as a scheme offers members an option that is not age discriminatory, the trustees and the employer are at low risk of discriminating on grounds of age whatever other options the scheme offers, or does not offer. Allowing members to continue to contribute and accrue benefits on the scheme's normal scale whatever their age (with employer contributions continuing) is a non-discriminatory option.

Flexible retirement: do you expect more schemes to allow it in future?

Yes, we do. In time we expect more members to ask about it

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and more employers to be interested in offering it to help manage staffing requirements. Allowing pension to be drawn might help some employees agree to stay on at reduced hours, for example.

If a member continues to accrue benefits after NRA, does the scheme have to continue providing life cover too?

In principle, withdrawing life cover at a particular age is age discrimination unless it can be objectively justified (which is likely to be difficult).

However, there is a new statutory exception from the age equality requirements that allows employers to end the provision of an insured benefit at the greater of age 65 and state pension age. This is helpful as far as it goes but:

- the exception is only available to the employer, not to the pension scheme trustees,
- it is only certain to apply where the benefit is insured with a third party. Where a scheme's trustees carry the risk themselves, the exception may well not apply, and
- ending cover at any other age (say 70) would still need to be objectively justified.

Where the exception does not apply, it might nonetheless help the employer or the trustees argue objective justification by analogy. Trustees, for example, would argue that if it is acceptable for an employer to withdraw cover at 65 or SPA, then it must be equally acceptable for trustees to do so. But this is untested and the UK courts have generally set a high bar for justification.

Do schemes have to communicate with members in the run up to NRA?

Yes. The trustees have statutory obligations to provide members with information as they approach NRA. Communication about DC benefits must start at least six months beforehand. With DB benefits it can start later. Employers need to allow for the trustees' timetable as they draw up their policies on workforce and succession planning.

Are there any particular issues for DC schemes?

Yes. Increased flexibility over when members draw their benefits raises investment questions for DC schemes:

- they will need to consider whether any lifestyle option remains suitable. This is an investment option that gradually reduces the member's exposure to risk as they approach retirement. If retirement age is unpredictable and capable of changing at short notice, it will be harder to time the move to less volatile investments. This is an issue for the trustees rather than the employer; and
- for members with large accounts the government is abolishing the requirement that an annuity be bought by age 75. Most DC schemes are likely to continue to require the purchase of an annuity but some might face pressure to allow income withdrawal instead. This would make the running of the scheme more complicated.

I'm confused. Employers can't impose a retirement age. Yet their pension schemes will go on issuing literature to members talking about a single "normal retirement age". Could schemes not set individual retirement ages instead?

Yes, it is confusing. But it would be hard for schemes not to have a single NRA. It is a cornerstone concept in a lot of pensions legislation; it is often used in the definition of members' statutory rights, for example. In practice, schemes have little choice but to follow the legislation.

There is a wider legal point here too. The legislation already works poorly in some respects because of its insistence on a single pension age. As members' choices and the variety of working patterns increase, there is a rising possibility that ill-fitting legislation will have unforeseen consequences.

Personal pension schemes

Who decides when an employee takes their benefits from a personal pension scheme?

This is a private matter for the employee to decide. The employer has no say even if it has contributed. This is also the position where the employer offers a "group personal pension scheme" badged with its own name.

Where an employment contract requires the employer to contribute to an employee's personal pension scheme, the obligation will remain in force until the contract comes to an end.

On the horizon

Everyone needs to keep the wider pensions context in mind.

- State pension age is rising. It will be 66 for both sexes by April 2020 (6 years earlier than originally planned) and the government is considering how to accelerate the timetable for rises beyond that. Schemes might want to look at increasing their NRA in response to this. Some are looking at linking their NRA to the state pension age, at least for future service benefits.
- Soon employers are going to have to enrol many of their employees automatically in a pension scheme and contribute for them. This will significantly increase the number of people with a workplace pension to think about as they approach retirement. An employer's size dictates when it must auto-enrol. Sample dates: the largest (120,000+ employees) from October 2012; 500-799 employees from November 2013; and less than 50 employees from dates between March 2014 and February 2016.
- Publicity around the rise in state pension age and auto-enrolment may increase pensions literacy generally and prompt members to press their employers and their schemes for more flexible retirement options.

If you would like more information, please get in touch with your usual contact in our pensions team or with Marcus Hellyer on 0117 902 7789 or at marcus.hellyer@burges-salmon.com.