
Age

Equality

FAQ



Age Equality FAQ

This FAQ document is split into three main sections

- A. Equality Legislation (questions 1 – 9)
- B. Age equality in employment, including FAQs 13 – 20 which are about the scrapping of default retirement age (questions 10 - 34)
- C. Taking action (questions 35-38)

A Equality Legislation

1. Q What legislation provides protection from discrimination on the grounds of age?

A The Equality Act 2010 incorporates the Employment Equality (Age) Regulations, apart for some residual provisions relating to retirement. The Act provides protection against direct and indirect discrimination, harassment and victimisation in employment and vocational training.

2. Q The Equality Act has come into force. How does this affect the Age Regulations introduced in 2006 which generally made age discrimination in employment unlawful?

A The Equality Act, replaces previous legislation such as the Employment Equality (Age) Regulations 2006.

3. Q Is age equality only for older employees?

A No. The age provisions of the Equality Act cover workers of all ages - young and older.

4. Q Does age equality legislation cover all workers?

A Yes it applies to all workers. It also covers related areas such as membership of trade organisations, the award of qualifications, the services of careers guidance organisations, employment agencies and vocational training providers, including further and higher education institutions.

The Act also covers anyone who applies to an organisation for work, or who already works for an organisation - whether they are directly employed, work under some other kind of contract, or are an agency worker.

Employers are also responsible for the behaviour, such as harassment, of employees towards individuals working for someone else but on their premises; for example someone from another organisation who is repairing equipment.

There is protection from such harassment and steps should be taken to deal with actual or potential situations of this kind.

5. Q I am a contract worker, not an employee, am I covered by the age provision of the Equality Act?

A Yes, contract workers are expressly included within the scope of the age provisions.

6. Q Must my employer have an age equality policy?

A No. However, an equality policy (whether age or general) is a useful way of demonstrating that discrimination is taken seriously and steps are in place to tackle it. A policy should set the minimum standard of behaviour expected from recruitment through to retirement. It also spells out what can be expected from the organisation. It may be used as an integral part of a grievance or disciplinary process.

7. Q What are the forms of discrimination and who does the age discrimination legislation cover?

A Age discrimination encompasses discrimination against people of **any** age if their less favourable treatment is based on their particular age.

Direct age discrimination

Occurs when person A treats person B less favourably than others because of that person's age, and uses this as a basis for prejudice against and unfair treatment of that person. This applies to both actual and perceived age.

Indirect age discrimination

Occurs when person A applies a provision, criterion or practice to person B that is applied equally to persons of a different age group but has the effect of putting people of the same age group as person B at a disadvantage and B is put at that disadvantage. The most usual example is that you must have a particular length of service or experience in an area before you can have a job or access to a particular benefit. Use of length of service or requirement for experience will need to be justified.

Victimisation

Person B has the right not to be treated less favourably than other people in the same circumstances because person B has done a 'protected act' such as bringing or giving evidence in proceedings under the Equality Act 2010, or making allegations related to the Act.

Harassment

Occurs when person A engages in unwanted conduct which may violate person B's dignity or create a negative environment for B on the grounds of B's age.

8. Q Is it lawful for employers to discriminate in favour of a person of a particular age or persons in a particular age group?

A Section 158 of the Equality Act 2010 allows a person (P) to take positive action in the following circumstances:

- where P reasonably thinks that persons of a particular age group suffer a disadvantage connected to that age group, P may take any action that is a proportionate means of enabling or encouraging persons to overcome or minimise that disadvantage;
- where P reasonably thinks that persons of a particular age group have needs that are different from the needs of persons not of

that age group, P may take any action that is a proportionate means of meeting those needs; or

- where P reasonably thinks that participation in an activity by persons of a particular age group is disproportionately low, P may take any action that is a proportionate means of enabling or encouraging persons in that age group to protected characteristic to participate in that activity.

Section 159 of the Equality Act 2010 allows an employer to treat an applicant or employee with a protected characteristic more favourably in connection with recruitment or promotion than someone without that characteristic who is as qualified for the role. In the context of age this means that employers can treat people of a particular age group more favourably than others, in limited circumstances only and provided that they meet specific conditions. The employer must reasonably think that people with the protected characteristic suffer a disadvantage or are under-represented in that particular activity. Taking the positive action must be a proportionate means of enabling or encouraging people to overcome the disadvantage or to take part in the activity. Employers must not have a policy of

treating a particular age group more favourably; they should decide whether or not to take positive action on a case-by-case basis.

9. Q What is a protected characteristic?

A The EHRC say that where age is referred to as a protected characteristic, it refers to a person belonging to a particular age (e.g. 32 year olds) or range of ages (e.g. 18 - 30 year olds).

10. Q Does the legislation cover flexible retirement?

A No, not specifically. However this is widely recognised as good practice and as such could be used as a benchmark in tribunals.

B. Age equality in employment

11. Q Are there any exemptions from age equality provisions?

A Exemptions to the Equality Act 2010 are provided for occupational requirements (previously referred to as genuine

occupational requirements), having regard to the nature of the job or the context in which it is carried out, provided it is a proportionate means of achieving a legitimate aim. Examples of occupational requirements in employment relating to age are few - the most common is for acting jobs where authenticity is required.

12. Q Is it possible for an employer to justify age discrimination?

A Under the Equality Act 2010 it is possible for an employer to justify direct and indirect age discrimination if the treatment or provision in question is a proportionate means of achieving a legitimate aim.

The test for justification is an objective, which means that an employer is required to show that the treatment or provision corresponds to a real business need, and is appropriate, balanced and necessary to achieve a valid goal.

The EHRC provide an example. They identify that some employers have policies that link pay and benefits to an employee's length of service, such as additional holiday entitlement for long-serving employees. This may indirectly

discriminate against younger people who are less likely to have been employed for that length of time, but in most circumstances it is seen as being a proportionate way of encouraging staff loyalty.

13. Q Previously my employer has taken a last in, first out approach to cutting jobs. Do the age provisions in the Equality Act mean that they have to take a different approach?

A Yes, they will have to take a different approach – unless your employers were able to objectively justify maintaining their previous approach to selection for redundancies.

The problem with using a so-called LIFO (last in, first out) approach is that it tends to indirectly discriminate against younger employees, because, by definition, they are likely to have fewer years service in the organisation. Conversely, a so-called FIFO approach (first in, first out) indirectly discriminates against older workers who will tend to have been in the organisation for longer.

Any redundancy selection process which relies on either the age

of the employee or the length of their service is going to be difficult for an employer to justify if it is challenged.

14. Q Can employers ask for a candidate's date of birth on an application form?

A Yes. But asking for age related information on an application form could allow discrimination to take place. ACAS recommends that employers remove the date of birth/age from the main application form and include it in a diversity monitoring form to be retained by HR/personnel.

15. Q If all chronological information is removed from application forms will this conflict with recruitment requirements for jobs with children or vulnerable adults?

A Requesting dates of employment, education and any gaps in employment in an application form may be justifiable on the grounds that it is a proportionate means of achieving the legitimate aim of ensuring appropriate and safe appointments are made to particular jobs. For whatever job there is a need to some extent to assess qualifications, experience, etc.

16. Q How can we ensure that recruitment and selection procedures do not discriminate on the grounds of age?

A The legislation applies to applicants and employees so selection procedures must be age neutral.

- Phrases that describe an age such as 'mature' or 'young' should be avoided, unless justified, as should those that refer to number of years experience.
- Seeking and encouraging applicants from under-represented age groups is lawful but should be stated in advertising. Applicants from all age groups must be treated fairly throughout the selection process.

17. Q Can medical assessments be required prior to agreeing employment of older people for very physical jobs?

A No. One of the key principles behind the age discrimination legislation is that you should not make assumptions about a person's capability based on their age. Under the Equality Act 2010 health information relating to recruitment or promotion can only be sought in very limited circumstances that do not depend on the age of the individual (e.g. in case reasonable adjustments are needed for interviewees to participate in interviews)

18. Q Is it unlawful to include a preferred age range in a job advertisement?

A The Equality Act 2010 prohibits age discrimination in recruitment and employment unless the particular discriminatory treatment can be justified. Although it is not unlawful per se to include a preferential age range in a job advertisement, it is advisable for employers not to specify age limits or age ranges as these could be interpreted as an unjustifiable intention to discriminate.

19. Q Can an employer stipulate an age limit for a job?

A The use of upper or lower age limits in recruitment is unlawful under the Equality Act 2010, unless the age requirement can be objectively justified as a proportionate means of achieving a legitimate aim.

20. Q Is it permissible for an employer to stipulate in a job advert that candidates must be 'recent graduates'?

A Older applicants are less likely to be able to comply with the requirement to be a recent graduate, although they may still have the requisite skills and knowledge for the job.

Unless there is an objectively justifiable reason for seeking recent graduates, there is a risk of committing indirect age discrimination in making this stipulation.

21. Q Can employers continue to specify a minimum number of years' service in job advertisements?

A Instead of specifying years of experience or service, which is time-based so potentially indirectly age discriminatory, employers should specify the type, breadth or level of experience needed for the particular job and the skills and competencies required.

22. Q Can employers still request applicants' work and education history, with dates, on their application forms?

A Yes. There is nothing in the age discrimination provisions of the Equality Act 2010 that expressly prevents employers from asking job applicants for such information.

23. Q What is the default retirement age?

A Implemented in 2006, the Default Retirement Age (DRA) meant that employers could force their employees to retire at the age of 65. Employees could request to stay on after this age but employers could refuse these requests if they wished to.

24. Q I have heard that the default retirement age of 65 is being scrapped in October 2011. As I will be 65 in 2011 will this affect me?

A The default retirement age (DRA) of 65 will be abolished on 1 October 2011. From 6 April 2011 employers are no longer be able to use the DRA to maintain a compulsory retirement policy for their workforce at age 65 or above. However, the old rules still apply if an employer has served notice of the intention to retire an employee before 6 April.

Here are some examples of how the rules will apply. It is taken from the Government's consultation document: *Phasing out the Default Retirement Age* .

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.

25. Q I have heard that there is now no default retirement age. Do I have to work on beyond 65 or will I be able to retire when I feel like it?

A You have a right to retire when you want to. The legislation is not about forcing you to work longer. It is about choice.

26. Q I have heard that the state pension age is going up. Will I have to work beyond the age of 65?

A Central to the Pensions Bill are proposals to raise the state pension age to 68 by 2050. It will go up gradually, to 66 between 2024 and 2026, to 67 between 2034 and 2036, and to 68 between 2044 and 2046.

The state pension is separate from your own pension. If you are a member of a company scheme, for example, you will not necessarily have to work until the state pension age. You could still be able to draw your pension at 65.

27. Q Why was the default retirement age scrapped? What position does UCU hold about the ending of default retirement age?

A The Government recognised that individual choice of when to retire is of the utmost importance and it is counterproductive to restrict the work that people can do by an arbitrary measure such as age.

UCU had supported campaigns for the abolition of the Default Retirement Age

28. Q What are the transitional arrangements leading up to the end of default retirement age?

A The transitional arrangements apply from 6 April 2011 until the end of the DRA, and are largely a continuation of the processes that existed previously. Although employers can no longer issue new notices during this period, if they acted before 6 April they can still force an employee to retire providing he or she turns 65 on or before 30 September 2011. The employee could have been given a retirement notice of between six and twelve months.

The employer must still follow the process laid down in the 2006 Age Regulations. If they have not acted correctly and the notice is rescinded on appeal, the employer will then not be able to issue a new retirement notice.

Similarly, the employee can still request to stay on. This can either be a request to stay indefinitely or request an extension of up to six months. Employers will still be obliged to consider the request but do not have to give a reason if they choose to reject it.

Because of these arrangements, it may mean that the final forced retirement will not take place until the end of September 2012. For example, an employee was given twelve months notice on 30 March 2011 but he/she wanted to continue working. Instead of the request to stay on indefinitely being granted, a compromise of a further six month extension was agreed with his/her employer. Therefore, the employee was forcibly retired on 30 September 2012.

To reiterate an important point, the employee must have turned 65 on or before 30 September 2011 for any of this to apply. No-one who turns 65 after this date can be forcibly retired.

29. Q Will the ending of default retirement age mean that it is harder for young people to get jobs?

A AgeUK say that there is not a shred of evidence this will actually happen and that most economists agree that the job market doesn't work on a one-in, one-out basis. When more people are in work, people have more money to spend, and this creates more jobs. Age UK highlights that past initiatives to create jobs for young people by inviting people to retire early did not work. In 10 years, half the British population will be over 50 and

the number of young people entering the workforce is already beginning to decline, so there will be fewer people chasing promotions in future. Many older employees reaching their 60s choose to change jobs, downsize or go part time. Today's employers want to recruit the best person for the job, irrespective of their age.

30. Q Will employers have to keep over-65s who are under-performing?

A Since retirement will no longer be a statutory reason for dismissal and the fairness of retirement dismissals will no longer be governed by the statutory provisions which precluded unfair dismissal claims for retirement, employers will have to show that the dismissal of an older worker is for one of the five statutory reasons (capability, conduct, redundancy, statutory bar or some other substantial reason) and that a fair procedure was followed.

31. Q Can an employer enforce their own default retirement age?

A If a fixed retirement age is to be retained, it would have to be justified, on an objective basis, including what the retirement

age would be and whether it would be organisation-wide or used for particular positions. To justify a compulsory retirement age, it must be demonstrated that it is a proportionate means of achieving a legitimate aim.

An aim could be “legitimate” if it relates to, for example:

- economic factors such as the needs of and the efficiency of running a business;
- the health, welfare and safety of the individual (including protection of young people or older workers); or
- the particular training requirements of the job.

The sole aim of saving money by getting rid of older workers (who might, for example, be paid more than a younger worker for doing the same job) is not by itself a legitimate aim. But if an employer aims to provide employment prospects for young people and seeks to encourage them by offering out good promotion prospects, that is consistent with social policy and therefore could be justifiable (depending on the circumstances).

32. Q I was told I was turned down for the job because the company wouldn't get pay back on the training they would have to give me before I retired. I am not even 60, so is that lawful?

A This is a difficult area because it relies on what might be considered a reasonable pay-back period on any training you might require. At the moment we don't have any case law we can refer to. But if we are talking about a few days' weeks' or even months' training and you are still several years away from the company's retirement age, then this would be a difficult justification for any employer to advance; given that there is no guarantee that any employee will remain in employment long enough for an employer to get 'pay-back' on training. If you are given such a reason, you should take advice as you may have a claim.

Such a justification for an employer is likely to be easier if the training you require would take several years to complete and the employer is funding it.

33. Q I am 60 years of age. Can my employer reduce my full time job to part time hours?

A If your contract stipulates that you will work a specified number of hours per week then your employer cannot, lawfully, unilaterally change the terms of your employment to reduce your working hours.

34. Q I am 61 and at the interview I was told that if I got the job I was applying for, I'd be too old to join the pension scheme. Is this correct?

A Yes, within certain criteria employers can still use age as a factor when it comes to their occupational pension schemes. There is a fairly general set of exemptions which apply to company pension schemes within the age provisions of the Equality Act. Minimum and maximum ages of entry into a company's pension scheme are amongst the exemptions – which also include age-related contributions.

35. Q I am 63 and recently my boss has suggested that my hours should be reduced on the basis that I look tired. I have not said that I do feel tired. Is this lawful?

A If your employer makes any such change to your terms of employment, and it is only taken in respect of your age, this may

be directly discriminatory. Your employer must be able to justify the discrimination as a proportionate means of achieving a legitimate aim. Whilst a legitimate aim could, potentially, include protecting your health, it is unlikely that protecting you from being perceived to be tired would qualify.

36. Q I will be 65 in 2 years time and I want to apply for a promotion. Does the end of default retirement age affect my chances?

A As default retirement age is ended after 6th October 2011 you will not necessarily have to retire at all so age alone should not prohibit you from going for that promotion.

C. Taking action

37. Q What should my employer be doing to advance age equality?

A Advancing equality is one of the three core requirements within the Equality Act 2010 and applies to all protected characteristics including age. Your employer should be taking

steps to create an organisational culture that is positive about age diversity. The employer should also be taking steps to ensure that age discrimination is prevented, this might include raising awareness the benefits of an age diverse workplace.

38. Q Should the employer be taking positive action to promote age equality and diversity?

A The law allows employers to introduce positive action measures where they can demonstrate that employees of a particular age are at a career disadvantage or are underrepresented in the organisation.

39. Q Is the employer liable for any acts of age discrimination carried out by its employees?

A Section 109 of the Equality Act 2010 means that employers are directly liable for any acts of discrimination on grounds of age in respect of recruitment, employment and dismissal and, in some circumstances, discrimination after employment has ended.

Employers will also be liable for employees who discriminate in these circumstances in the course of their employment; unless

they can show that they took reasonable steps to prevent the discrimination.

40. Q What resources are available to support development of age equality in the post school education workplace?

A The Acas website provides useful information on the Equality Act: what has stayed the same, what has changed, the rights that have been extended and what has been strengthened.

TAEN <http://taen.org.uk/>

AgeUK <http://www.ageuk.org.uk/>

UCU age equality resources

<http://www.ucu.org.uk/index.cfm?articleid=2307>