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**Employment Equality
(Repeal of Retirement Age
Provisions) Regulations**

Agency Worker Regulations

**Maternity and Parental Leave
etc Regulations**


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Employment Equality (Repeal of Retirement Age Provisions) Regulations

Background

 Schedule 9, paragraph 8 of the Equality Act 2010 provides:

“It is not an age contravention to dismiss a relevant worker at or over the age of 65 if the reason for dismissal is retirement.”

 Retirement was also a potentially fair reason for dismissal under s98 ERA 1996, provided the process in s98ZA to s98ZF was complied with.

The Regulations

From 6 April 2011:

- KB Retirement as a non-discriminatory reason for dismissal disappears;
- KB The provisions allowing different treatment for candidates 6 months before the age of 65 disappear;
- KB Permissible to make different arrangements in the provision of insurance or financial services for employees at 65 or state pensionable age;
- KB Retirement as a potentially fair reason for dismissal disappears;
- KB The retirement procedures will be revoked;
- KB Transitional Provisions will be introduced; and
- KB After 6 April it will be age discrimination (see objective justification) and unfair to dismiss someone for reasons of age.

The Transitional Arrangements

In summary:




 Employees can be lawfully retired provided:

- a notice of intention to retirement is given by 5 April 2011; and
- the employee attained or will attain, the age of 65 by 20 September 2011;

 There is a dead stop of 5 January 2012 for an employee to exercise his or her right to request to work beyond retirement;

So where does this leave us?

There are 3 options:

-  Issue a notice of intention to retire before 5 April 2011;
-  Use the existing potentially fair reasons for dismissal under s98; or
-  Create an 'Employer Justified Retirement Age' (EJRA).

Objective Justification

- Unusually, age discrimination, both direct and indirect, can be justified.
- “objective justification” is defined as:

“A proportionate means of achieving a legitimate aim”

- The legitimate aims are generally held to be:
 - To create a defined career path;
 - To allow retirement with dignity;
 - To facilitate long term employment planning; and
 - The cost burden of employing an older workforce.
- The difficulty is finding a proportionate means of achieving the aim.
- An EJRA is a crude and often unfair means.

EJRA Option

Two quotes




 Government:

“It is not easy to demonstrate that a retirement age is objectively justified”.




 ACAS:

“The test of objective justification is not an easy one to pass and will be necessary to provide evidence if challenged”.


Some European case law...

-  In Wolf v Stadt Frankfurt AM Main [2010] the ECJ held that a rule restricting applications to join the fire service to those under 30 was justified, due to evidence showing few over 45s have the requisite physical stamina and a run-in period of 15 years was reasonable.
-  In Petersen v Berufungsausschuss [2010] the ECJ held a maximum age of 68 for dentists to be accredited to work in the German NHS was lawful, as the rule allowed the younger generation an opportunity to work.
-  In Rosenblatt v Oellerking [2011] the ECJ held that a compulsory retirement age of 65 was justified if it had been collectively negotiated with the union, the employee received a pension and the compulsory retirement age was widespread and established in the country.

Some UK case law...

-  In Martin v PGMCO (2010) a retirement age of 48 could not be justified for football referees. The mandatory retirement age was not proportionate to achieve the legitimate aim of ensuring high standard and creating a career path. It said there was no evidence that 48 was the magic number.
-  In Hampton v Lord Chancellor [2008] a retirement age of 65 for Recorders could not be justified.
-  In Baker v National Air Traffic Services (2009) an absolute age limit on trainee Air Traffic Controllers of 35 was not justifiable.

Warning

-  The potential liabilities, if the OJ fails, are unlimited and may include loss of earnings to the end of the employee's working life. An employee at or around retirement age is very unlikely to be able to mitigate their losses.

Agency Workers Regulations


The Basics


- ⓀⓅ The Agency Workers Regulations come into force on 1 October 2011.
- ⓀⓅ The Regulations will apply to agency workers who find temporary work through a temporary work agency.
- ⓀⓅ They will not apply to the genuinely self-employed, those employed directly by the end user or those who are employed on a managed service contract.
- ⓀⓅ “Umbrella companies” or other intermediaries will not, however avoid the scope of the Regulations.

Thus the AWR is intended to protect agency workers:




- ⓀⓅ Supplied to hirer via a temporary work agency;
- ⓀⓅ supplied to hirer via an intermediary (i.e. master/ neutral vendors and so called ‘umbrella’ companies)

General Principle of Equality

-  ‘Equal treatment’ for agency workers comparative to those recruited directly by the end user. There are however certain caveats and conditions:
 - There is a 12 week qualification period before the entitlement comes into effect;
 - ‘Equal treatment’ is limited to basic terms and conditions.

-  It is important to note that it is not possible for an agency worker to agree to contract out (i.e. disapply) the protection.

Qualification Period


-  The agency workers must have worked in the same role with the hirer for 12 continuous calendar weeks (not necessarily with the same agency).
-  The period is measured in weeks not hours and continuity is broken when:
 - There is a break of six weeks, or more, during or between assignments in the same job; or
 - The agency workers commences a new or substantively different role.
-  Certified sickness absence and annual leave both pause the period of service. In the case of pregnancy related absence, maternity leave, adoption leave and paternity leave, the qualifying period is not paused.

Rights to information on vacant positions


 From day one the agency worker has:

- A right to be informed of vacant posts; and
- A right to access facilities e.g. Canteen or child-care

 Less favourable treatment regarding these facilities may be justified on objective grounds;


 E.g. the hirer is seeking to achieve a genuine business objective and the treatment is a necessary and appropriate way of achieving that objective.

Equality in Practice

 The AWR lists basic working and employment conditions that apply within the definition of 'equal treatment'. Essentially they are:




- Pay (but not bonuses related to long term incentivisation)
- Duration of working time
- Length of night work.
- Rest periods
- Rest breaks
- Annual leave

Maternity




 There is no requirement to pay maternity leave benefits to the agency worker. However, the following should be noted:

- Pregnant agency workers have a right to time off for ante-natal appointments
- Health & Safety duties apply for pregnant Agency workers or new mothers. This includes provision of reasonable alternative work, if required, or payment for the duration of the assignment if no alternative exists.


The Comparator

-  The agency worker will have to compare themselves with a directly-recruited comparator (whether real or hypothetical) at the hirer's organisation;
-  They will need to identify relevant terms and conditions that are ordinarily included in such a person's contract.
-  The comparator may be a worker or an employee.

Liability

-  Liability for 'equal treatment' lies with the agency.
-  However where the agency has taken reasonable steps to obtain relevant information, then liability for breach will lie with the hirer.
-  An Employment Tribunal may apportion blame. It is firmly the hirer's responsibility to provide access to facilities and job vacancies.

Enforcement Process

-  After completion of the qualifying period, an agency worker can submit a written request to their agency. Then:
- The agency has 28 days to provide this information;
 - After 30 days, if not received, the agency worker can request this directly from the hirer. The hirer has 28 days to respond;
 - If unresolved, the agency worker may bring an Employment Tribunal claim.

Obligations on Collective Consultation


Details of Agency Workers must be provided during:

- ▣ Collective redundancy;
- ▣ TUPE and other statutory consultations;
- ▣ Collective bargaining



Maternity and Parental Leave etc Regulations

APL and APP

When will the new rights come into force?






-  Although the relevant regulations came into force on 6 April 2010, the new right only applies in respect of babies due (or children placed for adoption) on or after 3 April 2011.

What is the new entitlement?

-  Currently, fathers are entitled to just two weeks paid statutory paternity leave.
-  This will be extended so that eligible employees will also be able to take up to 26 weeks additional paternity leave (**APL**) for the purpose of caring for a child under one.

Who is entitled to APL?


Additional paternity leave and pay may be available if :

-  The employee is the father of a child due on or after 3 April 2011
-  The wife, partner or civil partner is pregnant and due to give birth to a child on or after 3 April 2011
-  The partner receive notification that they are matched with a child for adoption on or after 3 April 2011
-  the wife, partner or civil partner is adopting a child from overseas and the child enters Great Britain on or after 3 April 2011
-  the child's mother is entitled to statutory maternity leave, maternity pay or allowance or statutory adoption leave or pay.



When can additional parental leave be taken?

- Ⓚ APL can only be taken once the mother of the child has returned to work so that a mother and father will not be able to take maternity leave and APL at the same time
- Ⓚ The earliest APL will be able to start is when the child is 20-weeks-old or when the child has been with its adoptive parents for 20 weeks
- Ⓚ APL must be taken before the child is 1yr old or before the adoptive child is with the family for 52 weeks
- Ⓚ The father must comply with the notice provisions




Does the leave have to be taken in one go?

-  Yes. The leave must be taken in multiples of complete weeks and the minimum period of leave which may be taken is two consecutive weeks and the maximum period is 26 weeks.

What are the eligibility criteria for statutory paternity pay?

-  Mothers are currently entitled to take up to 52 weeks maternity leave. Statutory maternity pay (SMP) is available during the first 39 weeks of this leave (assuming certain conditions are met).
-  A father will only be entitled to be paid at a flat rate that is equivalent to SMP (from April 2010 £124.88 a week) during APL if they take the leave during what would have been the mother's paid maternity leave period. Certain other eligibility requirements will also apply.

How will employers be required to administer the new right?

-  The system will rely heavily on self-certification by the parents as regards eligibility.
-  An employee wishing to take APL will have to give the required notice and various pieces of information to their employer including a declaration from the mother setting out their name, address and NI number and the date on which they intend to return from maternity leave.
-  The mother must also confirm that the employee proposing to take APL is the only person exercising the right to APL in respect of the child. An employer will then, if they wish, be able to request a copy of the child's birth certificate and the name and address of the mother's employer.

Questions?