

In This Issue:

January 2011

In what may be the continuation of a trend to expand U.S.-style nondiscrimination law overseas – just as U.S. laws prohibiting sex discrimination and harassment have led to major reforms overseas – the United Kingdom has announced that mandatory retirement on the basis of age will soon be eliminated. Specifically, the age 65 Default Retirement Age – the age at which employers can force employees to retire – will be abolished on October 1, 2011, with phasing in beginning in April. New regulations setting out this change in law and the transitional provisions will come into force on April 6, 2011.

The United Kingdom Abolishes its Default Retirement Age

By Philip Berkowitz and Anita Vadgama

In the United States, the prohibitions against mandatory retirement based on age imposed by the Age Discrimination in Employment Act (ADEA) have been in effect since 1967. The ADEA initially forbade mandatory retirement on the basis of age unless the employee was over age 65. The law was amended in 1978 to raise the cap to age 70; and, in 1987, ADEA's age cap was eliminated entirely (but for a limited exemption for certain narrowly defined high-level executives).

Many U.S. employers are surprised to learn that laws prohibiting mandatory retirement on the basis of age generally are unique to the United States. In virtually every other country, mandatory retirement on the basis of age remains legal.

But in what may be the continuation of a trend to expand U.S.-style nondiscrimination law overseas – just as U.S. laws prohibiting sex discrimination and harassment have led to major reforms overseas – the United Kingdom has announced that mandatory retirement on the basis of age will soon be eliminated. Specifically, the age 65 Default Retirement Age – the age at which employers can force employees to retire – will be abolished on October 1, 2011, with phasing in beginning in April. New regulations setting out this change in law and the transitional provisions will come into force on April 6, 2011.

UK law (like the laws of most Western European countries) currently permits employers to forcibly retire, on six months' prior notice, any employee who turns 65. This law had been vigorously opposed by many advocacy and lobby groups. Age Concern, a charity that promotes the interests of seniors, had filed suit in the European Court of Justice (ECJ), asserting that the Default Retirement Age was incompatible with Article 2 of the EU Equal Treatment Framework Directive.¹ That Directive holds that "indirect discrimination" (what is known in the United States as disparate impact discrimination) occurs where an employer imposes a provision, criterion or practice that places a person of a certain age at a disadvantage, unless the employer can objectively justify the practice by a "legitimate aim."

The ECJ had ruled that UK courts must determine whether the Default Retirement Age

was capable of being justified as a proportionate means of achieving a legitimate aim, and remanded the case back to the UK courts, which ruled that the Default Retirement Age was not unlawful.²

This ruling resulted in the UK government reassessing whether the Default Retirement Age was an appropriate barrier to employment in the current economic climate, and it has now concluded that, rather than the use of a mandatory retirement age, the dismissal of older workers should be managed by discussion or by formal performance management procedures.

Some employer advocacy groups had raised concerns that eliminating mandatory retirement would lead to potential workforce difficulties, including: complicating the succession planning process; creating a perception that would negatively impact on younger workers; leading to an increase in age discrimination claims; and increasing dismissals using performance and capability procedures. But the UK government has disagreed.

The new law provides that beginning October 1, 2011, no employee can be compulsorily retired by an employer because they have reached the age of 65 unless his/her retirement can be “objectively justified.” To that end, an employer will have to show that: (1) it has a legitimate aim when compulsorily retiring an employee at 65; and (2) compulsory retirement is a proportionate means of achieving the legitimate aim. What amounts to a legitimate aim will be a question for the UK courts to answer in any subsequent litigation. The last day employees can be compulsorily retired using the Default Retirement Age is September 30, 2011, so the last day to provide six months’ notice required by the Default Retirement Age provisions is March 30, 2011. Employers can still use the Default Retirement Age after March 30 and before April 6, but if they do they must use “short notice provisions,” under which an employee can claim up to eight weeks’ wages as compensation.

An exemption for group risk-insured benefits will be introduced, as a result of concerns that employers would stop offering such benefits if it became too expensive to pay premiums due to an ageing workforce. Thus, in broad terms, it will not be unlawful to discriminate on the grounds of age when providing these benefits. To assist employers, the Advisory, Conciliation and Arbitration Service (ACAS) has released guidance for employers on the new retirement procedures.³

Just as has been the case in the United States, UK employers will need to review their succession planning, and take steps to ensure that performance and capability procedures deal with employees fairly and consistently regardless of age. While these types of challenges seemed quite formidable for U.S. employers when the ADEA was first implemented, they have now become a part of the U.S. employment culture. It is likely that the experience of U.S. employers in adapting to these changes will prove invaluable to our colleagues in the UK.

Philip Berkowitz is a Shareholder in Littler Mendelson’s New York City office, and Anita Vadgama, an attorney in the Boston office, is a licensed solicitor in the UK. If you would like further information, please contact your Littler attorney at 1.888.Littler, info@littler.com, Mr. Berkowitz at pberkowitz@littler.com, or Ms. Vadgama at avadgama@littler.com.

¹ Available at <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:32000L0078:en:HTML>.

² *Age UK, R (on the application of) v. Attorney General* [2009] EWHC 2336 (Admin) (25 September 2009).

³ Available at <http://www.acas.org.uk/index.aspx?articleid=3203>.