

# AGE DISCRIMINATION

## FREQUENTLY ASKED QUESTIONS

*On Sunday 1 October 2006 the Employment Equality (Age) Regulations came into force. Discrimination in the workplace on the grounds of age is now unlawful. This will mark a significant culture change in our working environment, as discrimination on the grounds of age has not become culturally unacceptable in the same way as other forms of discrimination now are. It is vital that employers and those, such as employment businesses and agencies, become aware of the preconceptions they will inevitably have on the question of age so that they do not translate those into unlawfully discriminatory decisions.*

*For the first time under any discrimination legislation however, both direct and indirect discrimination, will be lawful if it can be objectively justified. This is not an invitation to discriminate provided you can produce an argument that the discrimination is justified. It will in fact be extremely difficult to establish that individual instances of discrimination are objectively justified. However the defence does recognise that the characteristics of age discrimination are, in some areas, distinct from other forms of discrimination.*

### **Q. Can we still ask for a candidate's Date of Birth on our application form?**

**A.** Asking for a date of birth on your application form is not age discrimination. The problem is that if there is no objective justification for asking for this information then an unsuccessful candidate may infer that this information was used to discriminate against them. In our view the need to ask for date of birth for payroll records or even to identify candidates with the same or similar names on your database would be justification for asking such information. It is good practice to inform candidates as to the reason why you are asking for such information first.

The Conduct Regulations require that agencies record the date of birth of work seekers under the age of 22, so you should ask for dates where workers are under 22 years.

### **Q. Can we give Clients a candidate's Date of Birth on a CV or on request?**

**A.** Again it will only be relevant if there is an objective reason for asking for such information. We recommend that you do not pass on such information to the client unless there is good reason such as there may be minimum legal age limits, for instance, in respect of HGV driving.

**Q. Can we ask for or provide the client with a candidate's employment or education dates?**

A. It will not be discrimination to ask for such details or to pass them onto a client. However unless there is an objective reason why this information is necessary it may lead a candidate to believe that it is being used to weed out candidates on grounds of age. The reason usually given for asking for this information is to check for any gaps in employment for reasons such as illness or a jail sentence. This information can usually be obtained by asking direct questions such as "Do you have any unspent criminal convictions?" or "Have you had any periods when you have not worked through illness or otherwise for longer than one month? If so please give details"

**Q. Can we, for example ask for 15 years experience in the telecoms industry when we advertise for candidates?**

A. The new age discrimination laws mean that recruiters and employers will need to focus on the skills, abilities and qualifications required for the job rather than purely years of experience. Therefore, it is much better to avoid stating a required period of experience if at all possible. Even if it is felt necessary to make such a requirement, the period should be kept as short as possible. In this example, it is our view that to ask for 15 years experience would be indirectly discriminatory towards younger workers, and in most cases could form the basis of a claim against you.

**Q. Who is liable if the agency is taken to a tribunal over age discrimination for the actions of a recruitment consultant, the individual or the said agency?**

A. Under the new age discrimination regulations both the employee and the employer can be liable for the actions of an employee amounting to discrimination.

**Q. What should I do if I receive a request from a client that I believe to be discriminatory?**

A. Ask the client to alter their instructions. Provided you do not discriminate in your selection process then you would not be liable if the client did so. But you must not assist discriminatory selection.

It is unlawful to give an age discriminatory instruction. Were the client to treat you less favourably for not following their instruction then this would also be discriminatory. It is a criminal offence to intentionally falsely state that a job is subject to a Genuine Occupational Reason for discriminating on age, For example, claiming insurance is not available for drivers under 25 when this is not true.

**Q. What is the maximum fine for those who unlawfully discriminate on age?**

A. Candidates who feel they are the victim of age discrimination should first raise a grievance with their employer. However if the complaint cannot be resolved then a claim should be brought in the employment tribunal within three months. There is no cap on compensation, which may be awarded. For unfair dismissal relating to retirement procedures not being followed the maximum amount of compensation that a tribunal may award is £58,400.

**Q. What is the position with regard to candidates that we place abroad or discriminatory instructions that we receive from clients based abroad (including where the candidates are also based abroad)?**

**A.** If you are operating your business from the UK and attracting UK and EU applicants the law will apply to the recruitment process. However if recruitment is being handled outside the EU for jobs outside the EU then the laws of the local jurisdiction in which the business operates or the job is based will apply.

**Q. Insurance companies not bound by the age discrimination regulations: a problem for employers?**

**A.** The issue of insurance cover for employees and workers has exercised many employers and recruiters, because insurance companies are not bound by the provisions of the age regulations. The cost of insurance for workers in certain sectors and age groups can often therefore be prohibitively high. Furthermore, case law on justification in other areas of discrimination law shows that employers cannot rely on considerations of cost alone when justifying indirect discrimination. This suggests that the cost of insurance premiums alone will not be an acceptable consideration when seeking to objectively justify a refusal to recruit a worker of a certain age or age group. However the judgment in the case of *Cross v British Airways plc*, in which the question of the justification of indirect sex discrimination was considered, throws a ray of light onto this question. It states that although cost alone is not sufficient justification, it may be able to be put into the balance together with other justification for the discrimination.

Many agencies and employment businesses in the REC Drivers Sector Group have expressed concern about insurance premiums that make the cost of insurance for younger drivers prohibitively high. The question has often arisen therefore whether this would be sufficient justification for decisions not to recruit drivers of a certain age group. These questions will inevitably arise in other areas of the employment market as well. It would not be sufficient justification on its own but as the judgment in *Cross v British Airways* shows, there may be a case for arguing that taken together with other factors, the cost of insurance could be considered as part of the objective justification. This point will inevitably become the subject of case law in due course and until it does, these questions will unfortunately remain open but members should perhaps be encouraged that there is room for manoeuvre in the relationship between insurance premium rates and the age discrimination laws.