

A close-up photograph of a light pink dress shirt collar. A silver, rectangular label is pinned to the inside of the collar. The label has the text "AGES 13-65+" printed in bold, black, sans-serif font. The shirt's fabric has a fine, woven texture. A single button is visible on the placket below the collar.

**AGES  
13-65+**

# **AGE DISCRIMINATION IN NORTHERN IRELAND**

**A Guide for Employers**

Equality Commission

FOR NORTHERN IRELAND

Employment Equality (Age) Regulations (Northern Ireland) 2006

This Guide was developed by the Equality Commission for Northern Ireland (“The Commission”) with assistance from Acas (Advisory, Conciliation and Arbitration Service). The Commission gratefully acknowledges the substantial contribution made by Acas to this publication.

On request, the Guide is available in a range of accessible formats from the Commission. If you would like a copy in an alternative format please contact us and state the format you require.

## The Equality Commission for Northern Ireland

The Commission is an independent public body established under the Northern Ireland Act 1998. The Commission has a general duty to keep equality legislation in Northern Ireland under review. The Commission promotes equality of opportunity and provides advice and guidance in relation to:

- age discrimination;
- disability discrimination;
- equal pay;
- religious belief or political opinion discrimination;
- race discrimination;
- sex discrimination;
- sexual orientation discrimination; and,
- the public sector equality duty (Section 75 of the Northern Ireland Act 1998), which includes the promotion of equality of opportunity between persons of different ages.

Equality Commission for Northern Ireland  
Equality House  
7-9 Shaftesbury Square  
Belfast BT2 7DP

Enquiry Line:	028 90 890 888
Telephone (switchboard):	028 90 500 600
Textphone:	028 90 500 589
Fax:	028 90 315 993
Email:	<a href="mailto:information@equalityni.org">information@equalityni.org</a>
Website:	<a href="http://www.equalityni.org">www.equalityni.org</a>

**The Guide provides general guidance only and should not be regarded as a complete or authoritative statement of the law. This Guide is not a Code of Practice and does not of itself impose legal obligations. Authoritative interpretation of the law is a matter for Industrial Tribunals and Courts.**

### **Note: This Guidance applies only to Northern Ireland**

The Employment Equality (Age) Regulations (Northern Ireland) 2006 (the “Regulations”) apply to all employers, training providers and institutions of further and higher education.

This Guidance explains the duties placed upon employers, vocational training providers and institutions of further and higher education (including universities).

The Guidance explains how the Regulations make it unlawful for employers, regardless of size, and all vocational training providers (including institutions of further and higher education), to discriminate against or harass employees (and former employees in certain circumstances) job seekers or and applicants, and all vocational trainees and students (and former trainees and students in certain circumstances) across all ages.

“When they were initially passed, the Age Regulations introduced a National Default Retirement Age and a set of special retirement procedures that, when properly followed, protected employers from claims of age discrimination and unfair dismissal if they dismissed employees aged 65 years or over on grounds of age. The original version of this guide, published in 2006, gave a lot of guidance about those retirement procedures. However, that guidance is no longer relevant as the procedures were later repealed in April 2011 by the Employment Equality (Repeal of Retirement Age Provisions) Regulations (NI) 2011.

This version of the guidance has been updated to take account of that major change in the law.”

The Regulations came into operation on 1<sup>st</sup> October 2006.

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## 1 Introduction

### The Employment Equality (Age) Regulations (Northern Ireland) 2006

- 1.1 The Employment Equality (Age) Regulations (Northern Ireland) 2006 (the “Regulations”) came into operation on 1st October 2006, making it unlawful for employers and others to discriminate on grounds of age in the areas of employment and occupation. The Regulations also cover vocational training and further and higher education.
- 1.2 The Regulations implement Northern Ireland’s obligations under **European Council Directive 2000/78/EC** also known as the Framework Employment Equality Directive 2000 (“the Framework Directive”) in relation to discrimination on the grounds of age. The Framework Directive establishes a general framework for equal treatment in the field of employment and occupation and vocational training.
- 1.3 **The Regulations prohibit age discrimination and harassment by:**
  - employers - including those who engage contract workers;
  - employment agencies;
  - persons who appoint office holders;
  - persons with statutory power to select employees for others;
  - trade organisations - including trade unions and professional organisations;
  - partnerships (in business/es);
  - barristers;
  - the Police Service of Northern Ireland and other police bodies;
  - trustees and managers of occupational pension schemes;
  - The Crown - which includes government departments and agencies;
  - career/training guidance providers who assist others in accessing work and training;
  - organisations which confer professional and trade qualifications;
  - vocational training providers; and,
  - institutions of further and higher education (including universities).

#### 1.4 **The Regulations grant protection against discrimination and harassment to:**

- job applicants/seekers - including those seeking appointment to or membership of the positions cited below;
- employees - including civil servants, police officers and former employees;
- self-employed workers;
- contract workers;
- persons using the services of employment agencies;
- office holders;
- partners (in business);
- barristers;
- members of occupational pension schemes;
- members of trade organisations;
- persons seeking and undergoing vocational training;
- persons seeking professional or trade qualifications; and,
- students, potential students and past students of institutions of further and higher education.

#### 1.5 The Regulations grant protection from discrimination and harassment to all of the above regardless of age.

#### 1.6 **The Regulations cover the areas of:**

- recruitment and selection;
- terms and conditions of employment;
- opportunities for promotions, transfers and training;
- working environment (conduct and harassment);
- access to (employment-related) benefits;
- the termination of employment such as dismissal and redundancy;
- post-employment and post-training situations such as the provision of references; and,
- admission to, and attendance at, institutions of further and higher education.

## Workers & employees

- 1.7 “Workers” often undertake roles similar to “employees” but unlike employees do not have “contracts of employment”. Workers may include office holders, police officers, barristers and partners in business.
- 1.8 A “contract of employment” means a contract of service or apprenticeship, whether express or implied, and (if it is express) whether oral or in writing. Just because a person does not have a contract of employment, this does not mean that they are not an employee.
- 1.9 **For the purposes of this Guide, the term “employee” is used to cover all workers.** However, the “Exception for the provision of certain benefits based on length of service” (see Chapter 3: “Exceptions & exemptions”) uses a narrower definition of worker.
- 1.10 The term “contract worker” is used to describe an individual employed by an employer (often known as an Agent) but who is supplied, under a contract, to another employer (often known as a Principal).

## Children & young people

- 1.11 For the purposes of this section “children and young people” are deemed to be persons who are not over the upper limit of compulsory school age.
- 1.12 In Northern Ireland, children and young people are entitled to a wide range of employment rights; although their employment is regulated by the law to a large degree.
- 1.13 The main law that regulates the employment of children is the Children (NI) Order 1995 (as amended). In general, this law provides that no child under the age of 13 years may engage in employment; although, there is an exception that permits children aged less than 13 years to participate in public performances in certain circumstances. This law also prohibits the employment of children in dangerous occupations and in street trading (including hawking, newspaper- or flower-selling). It also regulates the hours in which children may work; for example, a child may not work for more than 2 hours on a school day.

1.14 The Employment of Children Regulations (Northern Ireland) 1996 (as amended) further regulates the employment of children. These regulations impose restrictions on the numbers of hours in which children may work and, for example, provides that child workers are entitled to receive an uninterrupted 2 weeks holiday in the period 1 July to 31 August. The regulations also state that no child shall be employed in any occupation other than those specified below:

- Delivery of newspapers, milk, groceries, foodstuffs, flowers or drapery goods;
- Office work except in premises licensed for sale of intoxicating liquor, betting or gaming;
- Hotel and catering work except in the kitchen or portions of premises licensed for the sale of intoxicating liquor;
- Work as shop assistants excluding any premises licensed for the sale of intoxicating liquor, betting or gaming;
- Domestic work; and
- Light agricultural work or horticultural work for the parents of the child concerned.

1.15 The Children (Northern Ireland) Order 1995 (as amended) also states that a child who assists in a trade or occupation carried on for profit shall be deemed to be “employed” notwithstanding that the child receives no rewards for their labour.

1.16 The Employment of Children Regulations (Northern Ireland) 1996 (as amended) also require the employer of a child to obtain an “employment card” in respect of that child from the appropriate education and library board and to submit to inspections and other scrutiny from the board.

1.17 Employers must comply with the requirements of the Children (NI) Order or the Employment of Children Regulations (NI). When acting in pursuance of these provisions they have a statutory defence to any complaints of age discrimination brought under the Age Regulations. For example, if, because of the requirements of the Children (NI) Order, a newsagent refuses to employ a boy or girl aged 10 years who applies for a newspaper delivery job that refusal will not constitute an act of unlawful age discrimination.

1.18 Outside of these particular considerations, the Age Regulations apply to the employment of children in the same way as they apply to the employment of adults. For example, it is unlawful for employers to subject child workers to harassment on the grounds of age. Even if the employer is employing a child unlawfully; for example, in breach of the Children (NI) Order, an act of age discrimination or harassment against the child would still be unlawful under the Age Regulations. For example, it is likely that it would be unlawful for an employer to subject a child worker aged 10 years old to age harassment notwithstanding that the child is being employed unlawfully.

## **Goods, facilities and services**

1.19 The Regulations do not generally prohibit discrimination by those who provide goods, facilities and services to the public. However, those who provide employment-related services to the public, such as employment agencies, career guidance services, vocational training providers and institutions of further and higher education, including universities are prohibited from discriminating on the grounds of age.

## **Public authorities**

1.20 Public authorities, including government departments, local councils and institutions of further and higher education, who are designated under Section 75 of the Northern Ireland Act 1998 are already under a duty, when carrying out their functions, to have due regard to the need to promote equality of opportunity between persons of different ages. The new Regulations, which apply to all public and private sector employers, are different in that they grant individual rights to employees, job applicants and others who have been discriminated against on the grounds of age. In the operation of Section 75, public authorities need to ensure that they do not breach the Regulations. In applying the Regulations, public authorities have the additional responsibility of ensuring that they comply with the general duty under Section 75.

## A Guide for employers

- 1.21 The Regulations make it unlawful for employers and others to discriminate on grounds of age in the areas of employment and occupation; including vocational training. This Guide is primarily aimed at employers and gives general advice on the law and promoting good practice. However, employees and individuals can also obtain important information regarding their rights and responsibilities under the law from our accompanying Guide, “Age Discrimination in Northern Ireland: A Guide for Workers and Employees.”
- 1.22 Outlined below is a brief summary for employers and employees of their responsibilities under the law and of the provisions for employees who are about to retire. These issues are examined in further detail later in the Guide. The structure of the Guide is also detailed below.

### Employer and employee responsibilities

- 1.23 The Regulations generally prohibit employers, regardless of size, from subjecting job applicants and employees, including contract workers and former employees, to age discrimination and harassment.
- 1.24 Furthermore, the Regulations also make it clear that employers have specific legal responsibilities in relation to the actions of their employees or agents. This is sometimes known as “vicarious liability”. This means employers may be held responsible for any unlawful discriminatory acts by their employees or agents carried out in the course of their employment, whether or not they knew of the discriminatory acts or approved of them. Employers may be able to avoid being held liable for the discriminatory conduct of their employees or agents where they can demonstrate that they have taken such steps as were reasonably practicable to prevent the employees or agents from carrying out those discriminatory acts or harassment.
- 1.25 Individual employees should ensure that they do not discriminate either directly or indirectly against others on grounds of age. Individual employees who discriminate against, harass or victimise others can be held personally liable for their actions and be ordered to pay compensation.

- 1.26 For further advice on the legal responsibilities of employers and their employees, Please refer to Chapter 2: “Explaining the law” in this Guide

## This Guide

- 1.27 The Guide has a further seven chapters:

- 2: Explaining the law** outlines the main provisions of the Regulations;
- 3: Exception & exemptions** highlights a number of exceptions to the Regulations;
- 4: Retirement** investigates the specific issue of retirement, including the fair retirement procedure.
- 5: Good practice guidance** explains why it is important for employers and others to embrace the Regulations and puts forward proposals for good practice for employers in this area.
- 6: Making a complaint** outlines the rights of job applicants, employees, retiring employees, former employees, vocational trainees and students, including those applying for admission to training or courses at institutes of further and higher education; who believe that they have been discriminated against or harassed on grounds of age.
- 7: Further Information, advice & support** lists organisations which can be contacted for further information and advice in this area.
- 8: List of examples** catalogues all the examples used in this Guide.

- 1.28 The Guide also includes three annexes and a list of examples:

**Annex 1: Age Equality Action Plan** which is designed as a tool for to help employers think about, plan and develop their employment policies, practices and procedures in light of the Regulations;

**Annex 2: Frequently asked questions** which answers common questions raised by employers; and

- 1.29 Examples of how the Regulations are likely to work are given in boxes. They are simply intended to illustrate the principles and concepts used in the legislation and should be read in that light.

The examples should not be treated as complete or authoritative statements of the law. It is not possible to offer generalised solutions. Individual circumstances will always require individual solutions. Changes to specific circumstances in any of the examples given might well change the solution or outcome. While the examples refer to particular situations, they should be understood more widely as demonstrating how the law is likely to be applied generally.

## Further information

- 1.30 Further information on the law and good practice in promoting equality of opportunity with respect to age can be obtained by contacting the Equality Commission.
- 1.31 The Equality Commission provides a free and confidential information and advice service and produces advisory materials covering many aspects of Northern Ireland's equality framework. Information and publications are also available on the Commission's website ([www.equalityni.org](http://www.equalityni.org)). The Commission's library, based at Equality House in Belfast, is open to the general public by appointment, please contact our Enquiry Line on 028 90 890 898 or 028 90 500600
- 1.32 Information and advice can also be obtained by contacting organisations who work on age related issues. Details of these organisations can be found in Chapter 7: "Further information, advice & support".

## 2 Explaining the law

### Who do the Regulations apply to?

2.1 The Regulations prohibit discrimination in the areas of employment and occupation; including vocational training and further and higher education. This Guide is primarily aimed at employers. However, employees and individuals can also obtain information from this Guide. The duties placed upon organisations which confer professional and trade qualifications, training providers and institutions of further and higher education are not covered in detail in this Guide. An outline of the types of training providers covered by the Regulations is included in this chapter.

2.2 This chapter examines:

- Legal responsibilities of employers;
- Legal responsibilities of employees;
- Comparators; how comparison must be made between how one person is treated, or would be treated, compared to another, or how one group of persons is treated, or would be treated, compared to another group;
- Age discrimination, including definitions of direct and indirect discrimination;
- Age victimisation;
- Discrimination for failing to carry out an age discriminatory instruction;
- Age harassment
- Discrimination after a relevant relationship has come to an end; explains how the prohibition of discrimination does not end when an employee, trainee or student leaves an employer, vocational trainer or institution of further and higher education; and,
- Vocational training and further and higher education.

### Legal responsibilities of employers

2.3 The Regulations generally prohibit employers, regardless of size, from subjecting job applicants and employees, including contract

workers and former employees, to age discrimination and harassment.

- 2.4 The Regulations prohibit discrimination and harassment on the grounds of age in all aspects of the employment relationship, such as:
- recruitment and selection;
  - terms and conditions of employment;
  - working environment (conduct and harassment);
  - opportunities for promotions, transfers and training;
  - access to (employment-related) benefits;
  - termination of employment - such as dismissal and redundancy; and,
  - post-employment situations - such as the provision of references.
- 2.5 Employers are always responsible for their own discriminatory acts. An employer is directly responsible where he/she discriminates or harasses one of his/her own employees, job applicants, contract workers or former employees.
- 2.6 Employers have specific legal responsibilities in relation to the actions of their employees (often referred to as 'vicarious liability'). The Regulations state that employers have responsibility for any age discriminatory acts of their employees carried out in the course of their employment, whether or not they knew of the discriminatory acts or approved of them.
- 2.7 Employers may, in certain circumstances, be held responsible for the discriminatory actions of employees even though they occur outside the workplace or outside normal working hours. Employers may, for example, be held liable for the actions of employees who discriminate or harass work colleagues at work related social events. In addition, employers can be held legally responsible for the actions of employees who discriminate on grounds of age, not just against other employees, but also against agency staff.
- 2.8 The Regulations also make it clear that employers can be liable for the discriminatory acts of their agents if the agent acts with the employer's express or implied authority.

- 2.9 Lastly, in certain limited circumstances, employers can be held responsible for a failure to prevent discriminatory actions, such as acts of harassment, carried out by customers or clients against their employees.

### **Employers' defences**

- 2.10 Employers cannot generally avoid responsibility for their own discriminatory actions. However, they may be able to avoid being held liable for the discriminatory conduct of their employees where they can demonstrate that they have taken such steps as were reasonably practicable to prevent the employees from carrying out those discriminatory acts or harassment. It is, therefore, essential for employers to consider all reasonably practicable steps which are available. The kinds of reasonably practicable steps which employers may take are described in Chapter 5: "Good practice guidance".

### **Legal responsibilities of employees**

- 2.11 Like employers, individual employees should ensure that they do not discriminate or harass others on grounds of age. In the event of a complaint to an Industrial Tribunal, individual employees who carried out age discriminatory conduct may be held personally liable or jointly liable with the employer for their actions and be ordered to pay all or part of any compensation that the Industrial Tribunal may award to the complainant, including costs.

### **Comparators**

- 2.12 Discrimination is generally deemed to occur where one person is treated less favourably than other persons, or is placed at a disadvantage compared to other persons. Therefore, comparison must be made between how one person is treated, or would be treated, compared to another, or how one group of persons is treated, or would be treated, compared to another group. These persons or groups are usually known as comparators.
- 2.13 It is usually quite easy to distinguish the essential characteristics of the different comparators. For example, in a sex

discrimination case, the comparators will be a man and a woman. However, in an age discrimination case, the range of potential comparators is potentially very wide. There are no minimum or maximum age levels below or above which the Regulations do not apply. Comparators may also be hypothetical persons as the Regulations allow for the consideration of both actual comparators or would be comparators.

2.14 Finally, the comparison must relate to circumstances which are the same or not materially different. Therefore, the particular circumstances of each case will assist in determining the age characteristics of the appropriate comparator.

## Age discrimination

2.15 Discrimination on grounds of age can include:

- Direct discrimination;
- Indirect discrimination;
- Victimisation;
- Harassment;
- Unfair treatment arising from a failure to carry out an age-discriminatory instruction.

### Direct discrimination

2.16 Direct age discrimination occurs where, on the grounds of a person's age (or, perceived age), an employer, without objective justification, treats that person less favourably than he treats, or would treat, other persons in circumstances that are the same, or not materially different.

2.17 In a small number of circumstances, direct age discrimination may be permitted where an employer can demonstrate that his or her actions are lawfully justified, or objectively justified.

2.18 Objective justification is described in further detail in the following examples and in Chapter 3: "Exceptions & exemptions". Employers are strongly recommended to examine this section to understand objective justification. This chapter also explains some discriminatory activities which can be lawfully justified as exceptions to the Regulations.

## **Example 1 Direct age discrimination I**

Stephen is aged 50 years. He applies for a job as a clerk. The employer notes that Stephen has all the skills and competences required to do the job. However, the employer also notes that all the clerical staff who currently work in his office are aged 18 to 25 years. The employer assumes that Stephen may not “fit in” with the other employees because of the differences in their ages. For this reason, the employer decides not to offer the job to Stephen and he appoints another applicant who is aged 21 years.

Stephen has been treated less favourably than the appointee on the grounds of his age. The treatment is based on a biased and stereotypical assumption that an older employee will be unable to “fit in” with younger employees. Therefore, this treatment is likely to amount to direct age discrimination.

## **Example 2 Direct age discrimination II**

Rachael is aged 35 years but appears to be aged in her early 20s. She applies for a managerial job. The information provided by Rachael in her application form and at the interview indicates that she has all the skills and competences required to do the job. Despite knowing Rachael’s real age, the employer makes an assumption, based on her perceived age, that Rachael lacks the degree of gravitas and maturity that the employer expects managerial staff to have. For this reason, the employer decides not to offer the job to Rachael.

Rachael has been treated less favourably than she would otherwise have been treated had she looked older. This treatment was on the grounds of her perceived age. The treatment is based on a biased and stereotypical conclusion drawn from appearances only and is therefore likely to amount to direct age discrimination.

## **Example 3 Direct age discrimination III**

Harry has worked as a Production Operative in Jones & Company for 35 years. His general health and fitness are good and he would be happy to continue working for several more years as he enjoys the work. However, the firm operates a compulsory retirement age of 65 years for all of its Production Operatives. The firm has informed Harry that it intends to retire him at the end of this month because he has now reached that age.

When an employer operates a policy of having a compulsory retirement age for its employees, regardless of whether it is set at 55 or 60 or 65 or at any other age, it is a policy that is based on age and it treats the employees who reach that age less favourably than those who are younger. It is an example of direct age discrimination and will be unlawful unless it can be objectively justified, a topic that is discussed in Chapter 3.

### Example 4 Direct age discrimination IV

Mary applies to work as a Production Operative in Jones & Company, the same firm as in example 3 that operates a compulsory retirement age of 65 years. Mary's application is rejected on the ground that she is 64 years old and within 12 months of the firm's compulsory retirement age. This too is an example of direct age discrimination and will be unlawful unless it can be objectively justified, a topic that is discussed in Chapter 3.

### Indirect discrimination

- 2.19 This occurs where an individual is put at a particular disadvantage compared to other persons because an employer without objective justification, applies a provision, criterion or practice which, although it was applied to all persons equally, puts persons of the same age group as the individual at a particular disadvantage compared to other persons.
- 2.20 In a small number of circumstances indirect age discrimination may be permitted where an employer can demonstrate that the provisions, criteria or practices are lawfully justified, or objectively justified. Objective justification is described in further detail in the following example and in Chapter 3: "Exceptions & exemptions" of this Guide. This chapter also explains some discriminatory activities which can be lawfully justified as exceptions to the Regulations.

### Example 5 Indirect age discrimination

Brian is aged 25 years. He is a solicitor with 2 years' post-qualification experience (PQE). He applies for the job of assistant solicitor with a firm of solicitors. His application is rejected because the firm is seeking to appoint a person who has at least 5 years' post-qualification experience. The criterion is applied to all applicants for the job but, given the length of time that it takes to gain the qualifications and experience necessary to meet this minimum standard, it is unlikely that any persons aged less than 28 years can satisfy it.

Both Brian and persons of his age group (solicitors aged less than 28 years) have, as a result of the application of this minimum experience requirement, been placed at a particular disadvantage compared to other persons (solicitors aged 28 years and over).

On the basis of the information given here, it cannot be said with certainty that applying this criterion amounts to indirect discrimination, but it is potentially so. It is possible that the firm has a lawful, objective justification for setting the 5 years' post-qualification experience criterion (perhaps on the basis of particular business needs). On the other hand, while an Industrial Tribunal may accept that the firm can lawfully justify asking for some level of post-qualification experience (for example, 1, 2 or 3 years), it may consider that there is no justification for seeking higher levels. It could be argued that the less technical or specialised a job is, the harder it will become for an employer to lawfully justify asking for some level of post-qualification experience.

On the basis of the information given here, it cannot be said with certainty that applying this criterion amounts to indirect discrimination, but it is potentially so. It is possible that the firm has a lawful, objective justification for setting the 5 years' post-qualification experience criterion (perhaps on the basis of particular business needs). On the other hand, while an Industrial Tribunal may accept that the firm can lawfully justify asking for some level of post-qualification experience (for example, 1, 2 or 3 years), it may consider that there is no justification for seeking higher levels. It could be argued that the less technical or specialised a job is, the harder it will become for an employer to lawfully justify asking for some level of post-qualification experience.

## Age victimisation

- 2.21 This occurs where an employer treats a person less favourably than he treats, or would treat, other persons and does so by reason that the person has, in good faith, made (or intends to make) a complaint or allegation under the Regulations, or has assisted (or intends to assist) another person to make such a complaint or allegation. It is not necessary for the victim to have previously made a complaint or allegation to an Industrial Tribunal; for example, he/she is protected if he/she made a complaint in the course of an internal grievance. Please refer to Chapter 6: "Making a complaint" in this Guide.
- 2.22 Treatment that amounts to victimisation is not capable of being objectively justified.

### Example 4 Age victimisation

A year ago Catherine lodged an age discrimination complaint against her employer in an Industrial Tribunal. A work colleague, Abigail, gave evidence on Catherine's behalf at the Tribunal hearing.

Two months ago, Abigail applied for a promotion but her application was rejected even though she has all the necessary skills and experience. The actual reason for the rejection is that the employer is retaliating against Abigail for having assisted Catherine in her age discrimination complaint.

This treatment amounts to discrimination by way of victimisation and is not capable of being justified.

2.23 Protection against victimisation does not apply to individuals who make allegations of discrimination which are false and not made in good faith.

## **Discrimination for failing to carry out an age discriminatory instruction**

2.24 This occurs where an employer treats a person less favourably than he treats, or would treat, other persons and does so by reason that the person has failed to carry out (in whole or in part) an instruction (or has complained about receiving an instruction) to do an act which is unlawful under the Regulations.

2.25 Treatment that amounts to this form of discrimination can not be objectively justified.

### **Example 5 Discrimination for failing to carry out an age discriminatory instruction**

A company has run into business difficulties and must reduce its workforce by making compulsory redundancies. The company has an agreed redundancy selection procedure which is based on a number of objective job-related criteria.

However, the Managing Director instructs the Personnel Manager to select for redundancy all employees aged 50 years and above without reference to the agreed procedure.

This instruction is likely to result in direct age discrimination against those employees who are aged 50 years and above. The Personnel Manager notes this and refuses to carry out the instruction. As a result he is dismissed from his employment.

This treatment amounts to discrimination for failing to carry out an age discriminatory instruction and can not be justified.

## **Age harassment**

2.26 Age harassment occurs where, on grounds of age, a person is subjected to unwanted conduct which has the purpose or effect of violating his or her dignity, or which creates an intimidating, hostile, degrading, humiliating or offensive environment for him or her.

2.27 Harassment can occur when someone close to the person is the subject of the behaviour. For example, when someone is teased because their personal partner is considerably older or younger.

2.28 Harassment can take many forms;

- physical conduct such as serious assault,
- verbal conduct such as jokes, banter, insults, innuendos, nicknames, teasing, name calling or songs and
- written conduct such as graffiti, posters, pictures, e-mails.

2.29 Harassment may include conduct which is:

- condescending;
- deprecating;
- bullying behaviour; or,
- unfairly criticising another's work performance.

2.30 An Industrial Tribunal or County Court will take into account how the conduct in question was perceived by the person alleging harassment. The unwanted conduct in question shall be regarded as having the effect on a person subject to it only if, having regard to all the circumstances, including the perceptions of the person, it should reasonably be considered as having the effect of violating his or her dignity, or which creates an intimidating, hostile, degrading, humiliating or offensive environment for him or her. Therefore, the following two points should be considered:

- A single act, if sufficiently serious, can constitute harassment.
- Harassment can still be unlawful even though the person harassing another did not intend to cause offence or did not specifically direct the offensive conduct at the person alleging harassment.

### **Example 6 Age harassment I**

A young manager feels undermined by an older employee who habitually makes sniping comments such as “you are wet behind the ears” and “you are straight out of the pram”. The manager considers this unwanted conduct to be degrading and offensive.

This conduct is harassment on the grounds of age.

## Example 7 Age harassment II

Paul and John, who are both aged 55 years, work in a team whose other members are aged less than 30 years. The younger team members habitually tease Paul and John about their ages by calling them “old fogies” and “Grandas”. They even do this in front of the company’s customers. They believe that they are engaging in “good-natured banter”. Paul does not mind the teasing and he laughs along with it. However, John is offended by the comments, particularly when they are made in front of customers, and although he has made his feelings clear to his younger colleagues, they continue to tease him.

The conduct towards John is harassment on the grounds of age.

John reported the teasing to his employer. However, his employer failed to take such steps as were reasonably practicable to prevent the employees from carrying out the harassment. The employer may therefore be held liable for the actions of the employees.

- 2.31 The reader is strongly recommended to examine the “Harassment & bullying” section in Chapter 5: “Good practice guidance”. Employers can also obtain information on this subject in the Equality Commission and Labour Relations Agency joint publication “Harassment & Bullying in the Workplace” available by contacting the aforementioned organisations or by visiting their websites.

## **Discrimination after a relevant relationship has come to an end**

- 2.32 Treating a person less favourably or harassing an individual on grounds of age after a ‘relevant relationship’ has ended can also be unlawful. The act of discrimination must arise out of and be closely linked to the former relationship.
- 2.33 The provision of references, either written or verbal, is covered by the legislation. For example:
- on grounds of age, an employer refusing to provide a former employee with a reference; or,
  - giving a former employee an adverse reference on grounds of age.

### Example 8 Discrimination after a relevant relationship has come to an end

Sinead was a manager for a large clothing retailer. Grainne, an ex-employee of the large clothing store, had applied for a job with a hardware store. The Personnel Officer from a hardware store asked Sinead for a reference regarding Grainne.

Sinead said that she could not recommend Grainne. Sinead's reason was that Grainne was not accepted by the other members of staff. Sinead believed the reason for this was that the other members of staff perceived Grainne as 'too young and inexperienced'.

This is direct discrimination on the grounds of age.

## Vocational training

2.34 On the grounds of age, it is unlawful for any training provider to discriminate against someone who is seeking or undergoing training;

- in the arrangements they make for the purpose of determining to whom they should offer training;
- in the terms on which the training provider affords them access to any training;
- by refusing or deliberately not affording them such access;
- by terminating their training; or
- by subjecting them to any other detriment during their training.

2.35 It is also unlawful for the training provider to subject a person seeking or undergoing training to harassment on the grounds of age.

2.36 Under the Regulations, the term 'training' stands for:

- all types and all levels of training which would help fit a person for any employment;
- vocational guidance;

- facilities for training;
- practical work experience provided by an employer to a person whom the employer does not employ; and,
- any assessment related to the award of any professional or trade qualification.

2.37 A 'training provider' is any person or organisation which provides, or makes arrangements for, the provision of training. This does not include:

- an employer in relation to training for persons employed by them;
- a governing body of an institution of further and higher education; and,
- a proprietor of a school in relation to registered pupils.

2.38 Therefore, training providers may include:

- employers;
- further and higher education institutions (including universities);
- private sector training bodies;
- public sector training bodies;
- voluntary sector training bodies; and,
- providers of adult education programmes.

2.39 Training providers can not set age limits for entry to training unless they can objectively justify them or rely on an exception or exemption.

## **Institutions of further and higher education, including universities.**

2.40 The Regulations prohibit age discrimination by the governing bodies of institutions of further and higher education including universities;

- in the terms on which they offer to admit a person as a student; and,
- by refusing or deliberately not accepting an application for a person's admission as a student.

2.41 When a person is a student of an institution of further and higher education, it is unlawful for the institution to discriminate on the grounds of age:

- in the way it affords a person access to any benefits;
- by refusing or deliberately not affording a person access to them; or
- by excluding the person from the establishment or subjecting that person to any other detriment.

2.42 It is unlawful for an institution of further and higher education to harass a person who is a student at that establishment, or a person who has applied for admission to that establishment, on the grounds of age.

## Qualifications bodies

2.43 It is unlawful for a qualifications body to discriminate against a person on the ground of age:

- in the terms on which it is prepared to confer (including the renewal or extension of) a professional or trade qualification on them;
- by refusing or deliberately not granting any application by them for such a qualification; or,
- by withdrawing such a qualification from them or varying the terms on which they hold it.

2.44 It is also unlawful for a qualifications body, in relation to a professional or trade qualification conferred by it, to subject to harassment a person who holds or applies for such a qualification.

2.45 A 'qualifications body' means any authority or body which can confer a professional or trade qualification, but does not include a proprietor of a school or the governing body of an institution of further and higher education.

2.46 A 'professional or trade qualification' means any authorisation, qualification, recognition, registration, enrolment, approval or certification which is needed for, or facilitates engagement in, a particular profession or trade. A 'profession' means any vocation or occupation, and a 'trade' means any business.

### Objective justification

- 3.1 Direct and indirect discrimination may be permitted where an employer can demonstrate that his/her actions or provisions, criteria or practices are **objectively justified**.
- 3.2 Employers will need to provide strong evidence to support any claim of objective justification. Assertion alone will not be sufficient and each case must be considered on its individual merits.
- 3.3 Employers must remember that it will be difficult to meet these requirements as the general principle remains that different treatment on grounds of age will be unlawful and different treatment on grounds of age will only be possible exceptionally and only for good reasons.
- 3.4 Objective justification cannot be used as a defence for victimisation and harassment or discrimination for failing to carry out an age discriminatory instruction.
- 3.5 To establish a defence of objective justification, an employer must demonstrate that any treatment which may result in direct age discrimination, or that the application of any provision, criterion or practice which may result in indirect age discrimination are a **proportionate means of achieving a legitimate aim**.

### What is a legitimate aim?

- 3.6 A wide variety of aims may be considered legitimate (see next paragraph for some examples) but in all cases a declared aim must be one that is relevant and applicable to an employer's business and must be one that he/she is genuinely trying to pursue. However, there are also some stricter rules for situations of direct discrimination compared to ones of indirect discrimination.

Case law has noted that when justifying an act of direct age discrimination (such as a compulsory retirement age or a maximum recruitment age), an employer must have an aim that corresponds to the social policies of the State. That rule differs from that which applies in cases of indirect age discrimination, where a legitimate aim need not be a social policy aim but could be a purely private aim that is relevant only to the employer's own business, such as reducing his/her costs or improving his competitiveness/her. Also, on the subject of costs, case law also indicates some reluctance by the employment tribunals to accept the saving of costs as a legitimate aim unless it is accompanied by other aims.

3.7 Case law has indicated that the following are examples of social policy-related legitimate aims that are especially relevant for justifying acts of direct age discrimination; although they may also be used in cases of indirect age discrimination too, where relevant

- promoting access to employment for younger people;
- to enable the efficient planning of the departure and recruitment of staff;
- sharing out employment opportunities fairly between the generations;
- ensuring a mix of generations of staff so as to promote the exchange of experience and new ideas;
- rewarding experience;
- cushioning the blow for long serving employees who may find it hard to find new employment if dismissed;
- facilitating the participation of older workers in the workforce;
- avoiding the need to dismiss employees on the ground that they are no longer capable of doing the job which may be humiliating for the employee concerned;
- avoiding disputes about the employee's fitness for work over a certain age.

Other aims that may be deemed to be legitimate include-

- the promotion of health and safety;
- ensuring employees are adequately qualified or experienced to perform the work;
- fixing a maximum age for recruitment by requiring a reasonable period in employment before retirement.

- 3.8 In the event that an individual complains of discrimination, it will be for an employer to convince an Industrial Tribunal that the treatment was objectively justified as a proportionate means of achieving a legitimate aim. It will ultimately be for the Industrial Tribunal to determine whether the employer's aim was legitimate.
- 3.9 In practice, the test of objective justification is not an easy one and it will be necessary to provide evidence if challenged; assertions alone will not be enough.

### What is proportionate?

- 3.10 The particular means adopted by an employer to achieve a legitimate aim must be proportionate to the aim in question.
- 3.11 This means that:
- the decisions or provisions which an employer makes or the criteria or practices which are applied must actually contribute to the pursuit of the legitimate aim. For example, if the employer uses an age-related practice in order to promote health and safety (the legitimate aim), then the employer should have evidence which shows that the practice actually promotes health and safety;
  - the importance and benefits of the legitimate aim should be weighed up against the discriminatory effects. For example, a discriminatory criterion which helps to protect employees' safety is more likely to be regarded as proportionate than one which results in a marginal improvement in production efficiency; and,
  - the employer should not discriminate more than necessary. For example, where a legitimate aim can be achieved equally as well by a measure that has a substantial discriminatory effect and one that has a lesser discriminatory effect, or none at all, the latter should be used.

#### Example 9 Objective justification

Sarah is employed as a bus driver. She works for a tour company to drive tourists on trips around Northern Ireland. When she reaches the age of 65 years, the firm terminates her employment. The reason given is that Sarah must be insured to drive the bus but that the employer's regular insurance provider refuses to insure Sarah because of her age. The insurance firm refuses to insure bus drivers who are 65 years or over.

The employer's aim here, i.e. ensuring that its bus drivers are properly insured to carry-out their work, as motoring law requires, is certainly a legitimate aim. But the more important question is whether it is reasonably necessary for the employer in pursuing that aim to dismiss Sarah from her job? Is the dismissal a proportionate means of achieving that aim?

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In the event of a complaint of age discrimination, an industrial tribunal can be expected to enquire about the efforts made by the employer to find an alternative insurance provider; one who would be prepared to insure Sarah, even at the cost of charging higher premiums. The tribunal would also expect to hear an explanation as to why the employer would be unable to pay higher premiums, if such are charged. (And, as noted previously, employment tribunals tend to show some reluctance in accepting the saving of costs as sufficient justification for acts of discrimination). Finally, a tribunal would also expect to hear about the efforts made by the employer to find suitable employment for Sarah as an alternative to dismissing her.

If the employer makes no efforts to investigate and consider these matters before dismissing Sarah, then the dismissal is unlikely to be justified and is likely to be unlawful. Equally, any investigations and considerations that are done should be genuine and open-minded and not mere “tick-boxing” exercises. To be justified, the dismissal needs to be shown to be something that was reasonably necessary.

## Other exceptions & exemptions

- 3.12 The Regulations allow for some discriminatory activities to be lawful. These activities are either due to a genuine occupational requirement or fall within statutory exceptions to the legislation.
- 3.13 If any age-related treatment, provisions, criteria or practices satisfy the conditions set for these exceptions, they will be lawful without the need for objective justification.
- 3.14 Employers should seek legal advice before taking any action in the belief that an exception may apply.
- 3.15 The exceptions to the Regulations are for:
  - positive action;
  - genuine occupational requirements;
  - the armed forces;
  - acts under statutory authority;
  - national security;
  - the provision of benefits based on length of service;
  - the National Minimum Wage;
  - the provision of enhanced redundancy payments;
  - the payment of life assurance cover to retired workers.

## Positive action

- 3.16 The Regulations only permit two types of positive action to be taken by employers. These are:
- affording persons of a particular age or age group access to facilities for training which would help to fit them for particular work;
  - encouraging persons of a particular age or age group to take advantage of opportunities for doing particular work.
- 3.17 The Regulations state that these two types of lawful positive action may only be taken where, in regard to the work in question, it reasonably appears to the employer that taking the action will prevent or compensate for disadvantages linked to age suffered by persons of the targeted age or age group.
- 3.18 As long as the conditions for taking positive action are satisfied, the employer will not, in addition, have to lawfully justify his taking of that action (by showing that it is a proportionate means of achieving a legitimate aim).
- 3.19 It should be noted that lawful positive action of this nature (i.e. provision of training or encouragement to apply for work) is not the same as positive discrimination whereby an employer treats people in one age group more favourably than those in another when filling actual jobs; e.g. reserving job vacancies for people in a particular age group, or simply appointing a person because he/she is of a certain age. Positive discrimination of that kind may only be done if the employer can lawfully justify taking such action.
- 3.20 Employers should seek advice from the Commission, and/or seek independent legal advice, before taking any positive action measure.

## Genuine occupational requirements

- 3.21 In exceptional circumstances, age-related treatment, provisions, criteria or practices may be lawful where, having regard to the nature of the employment or the context in which it is carried out, possessing a characteristic related to age is a genuine and

- 3.22 An employer may only use a GOR to justify age discrimination in respect of recruitment arrangements and decisions; decisions regarding promotion, transfer or training; and decisions regarding dismissal from employment. An employer may not use a GOR to justify differences in pay, terms and conditions of employment or access to benefits.
- 3.23 An employer may only apply a GOR where it is proportionate to do so. This is similar to the “proportionate means” requirement that was discussed in the previous section.
- 3.24 Employers should seek advice from the Commission, and/or seek independent legal advice, before taking any action in the belief that GOR may apply.

### **Example 10 Genuine occupational requirements**

A film company which is making a film of Oliver Twist may lawfully apply a genuine occupational requirement to hire a young boy to play Oliver and an adult man to play Fagin.

However, it may not be proportionate to apply a genuine occupational requirement that requires the adult actor to be aged over 50 years if, for example, any adult male actor (or alternatively, any actor aged over 40 years) could play the role with as much Credibility.

### **Armed forces**

- 3.25 The Regulations do not apply to service in the Army, Navy or Air Force.

### **Statutory authority**

- 3.26 Age criteria are widely used in legislation, notably in the area of qualifying for various licences. Where this is the case the employer must follow the criteria laid down by statute and will not be contravening the Regulations by doing so.

### **National security**

- 3.27 The Regulations do not render unlawful any justifiable act that is done for the purpose of safeguarding national security, or protecting public safety or public order.

## Exemptions based on length of service

- 3.28 In many cases, employers apply certain length of service criteria before awarding benefits, such as increased holiday entitlements. Without the exception contained in the Regulations, the application of such criteria could amount to indirect age discrimination because some age groups are more likely to satisfy the length of service criteria than others.
- 3.29 The exemption provides that benefits (such as extra contractual holiday entitlement) may lawfully be awarded to workers using the criterion of length-of-service without the need for any special justification, except in one situation. That situation occurs where benefits are based on length-of-service and where employees with more than 5 years service are not receiving those benefits when employees with longer service are.

For example, if an employer awards an extra 3 days annual leave entitlement to employees with 10 years continuous service but to no one else, employees with less than 5 years service have no legal right to complain about this, but employees with more than 5 years service do. If challenged, the policy would not be unlawful so long as the employer can justify it on the basis that it reasonably appears to him that the way in which he is using the length-of-service criterion fulfils a business need (for example, by encouraging the loyalty or motivation, or rewarding the experience, of some or all of his staff. Conversely, if, instead, the extra annual leave entitlement was given to all employees when or before they attain 5 years continuous service, the exception makes the policy lawful without the need for any special justification.

## National Minimum Wage

- 3.30 The Age Regulations do not alter the provisions of the National Minimum Wage Act 1998 and its associated regulations. An exception to the Age Regulations permits employers to pay their employees the national minimum wage at the relevant going rates for their respective ages in accordance with the age bands set out in the National Minimum Wage legislation.

## Provision of enhanced redundancy payments

- 3.31 The statutory redundancy scheme will not substantially change (except in respect of the years worked when an employee was under 18 or over 64). Both the statutory authority exemption and the exception for the provision of enhanced redundancy payments to employees make it clear that, even though statutory redundancy payments are calculated using age-related criteria, such payments are lawful.
- 3.32 The exemption linked to statutory redundancy payments is for an employer who wants to make more generous redundancy payments than under the statutory scheme. It allows the employer to use one of the methods specified, based on the statutory redundancy scheme, to calculate the amount of redundancy payment. An employer can use a different method of their own to calculate the amount of redundancy payment, but if it is based on length of service and if an employee brings a discrimination claim under the Regulations, the employer will have to objectively justify it in so far as age discrimination arises (This is because the exception for pay and benefits based on length of service does not apply to redundancy payments).
- 3.33 The exemption specifically allows the employer to do one or both of the following:
- raise or remove the maximum amount of a week's pay so that a higher amount of pay is used in the calculation, and/or
  - multiply the amount allowed for each year of employment by a figure of more than one.
- 3.34 The employer may again multiply the total by a figure of more than one.
- 3.35 The exemption also allows an employer to make enhanced redundancy payment to an employee who has taken voluntary redundancy, and an employee with less than two years' continuous employment. In such cases, where no statutory redundancy payment is required, an employer may make a payment equivalent to the statutory minimum payment, or if they so wish, an enhanced payment as above.

## Life assurance cover

The exception allows an employer to make arrangements for, or to afford access to, the provision of insurance or a related financial service to or in respect of an employee for a period ending when the employee attains whichever is the greater of the age of 65 years and the state pensionable age. The exception also allows an employer to make arrangements for, or to afford access to, the provision of insurance or a related financial service to or in respect of only employees as have not attained whichever is the greater of the age of 65 years and the state pensionable age.

This exception applies to so-called “group risk insurance benefits” of the kind that employers are not legally obliged to provide to their employees; e.g. insured benefits, such as income protection, life assurance, death-in-service benefits, sickness and accident insurance and private medical cover. It does not apply to other types of insurance, like third-party motor insurance or employers’ liability insurance, that employers may be legally obliged to obtain to enable those

## 4 Retirement

- 4
- 4.1 When they were initially passed, the Age Regulations introduced a National Default Retirement Age (“NDRA”) of 65 years and a set of special retirement procedures (i.e. “the duty to consider working beyond retirement” procedures) that, when properly followed, protected employers from claims of age discrimination and unfair dismissal if they dismissed employees aged 65 years or over on grounds of age. In effect, employers did not have to justify the decisions they made to retire on grounds of age employees who were at or over that age. Chapter 4 and Annex 3 of the original version of this guide, published in 2006, gave detailed guidance about those retirement procedures.
  - 4.2 However, those provisions were repealed entirely in April 2011.
  - 4.3 Since then, employers may no longer avoid having to justify the decisions they might make to retire on grounds of age employees who are aged 65 years or over; or who are over any other age for that matter; e.g. 55, 60, 65, 70, etc.. Aggrieved employees now have the right to go an industrial tribunal to complain of age discrimination and/or unfair dismissal.
  - 4.4 The implications of this are that employers now have a choice – they may:
    - (a) allow their employees to continue to work beyond the age of 65 (or, whatever the employer’s normal retirement age previously was) until such time as-
      - their employees choose to voluntarily resign, or they die in service; or
      - the employers are compelled to dismiss the employees on grounds of incapacity, misconduct, or redundancy [i.e. the usual kinds of grounds that might justify the dismissal of any employee regardless of their age], or
    - (b) operate a compulsory retirement age for all of employees, or for a particular group of employees. But, if this is done, the employer will be required to objectively justify the retirement age policy. If the policy cannot be justified, it will be unlawful.
  - 4.5 The principles for justifying retirement ages are the same as those that apply in all other cases of direct age discrimination. Further information on that subject is given in Chapter 3.

- 4.6 When retiring an employee on grounds of age, employers will also, in addition to having to justify the policy, be obliged to follow a fair dismissal procedure. There no longer exists, however, a special procedure for use only in retirement cases. Instead, employers must follow the same minimum procedure that applies in all other cases to which the statutory disciplinary and dismissal procedure applies. This is the procedure outlined in the *Employment (NI) Order 2003 and in Section 1 of the Labour Relations Agency's Code of Practice on Disciplinary and Grievance Procedures (April 2011)*. Employers should refer to the latter for further information. An employer who fails to follow this procedure, where applicable, risks having a finding of automatic unfair dismissal being made against them. Employees to whom the procedure applies also have a statutory right to be accompanied at meetings dealing with their dismissal.

## 5 Good practice guidance

### Business case

- 5.1 There is a sound business case for adopting good practice measures in order to ensure that job applicants and employees are not discriminated against on grounds of age, or indeed, on any of the grounds protected under the equality legislation.
- 5.2 By adopting an inclusive approach in relation to recruitment and selection practices and procedures, employers widen their recruitment base and thereby attract a wider range of applicants. In addition, an employer that is, and is seen to be, proactive in promoting equality of opportunity is likely to enhance its image in the eyes of its employees, clients, customers and job applicants. This in turn could result in business benefits such as reduced staff turnover, more individuals seeking employment in the organisation and increased business opportunity.
- 5.3 In contrast, a failure to promote equality of opportunity can have serious repercussions both for employers and employees. Unfair treatment and harassment in the workplace can cause staff to resign or take sick leave due to anxiety and stress. In addition to the effect that this can have on individual employees, it can also impact on overall staff productivity and morale.
- 5.4 Discriminatory practices can have cost implications in terms of staff time and, if brought to a tribunal, the cost of defending the case and possibly paying compensation. In addition, if staff resign or are on sick leave, there can be cost implications in terms of recruiting or training new staff or as a result of lower productivity levels.

### Good practice measures

- 5.5 The sections below outline good practice recommendations for employers in the following areas:
  - Equality policies, practices and procedures;
  - Recruitment, selection and promotion;
  - Harassment and bullying;
  - Monitoring and review;

- Positive action; and,
- Other policies, processes and procedures.

5.6 It is important to stress at the outset that adopting best practice measures is not simply about avoiding discrimination. The best practice measures outlined below are designed to help employers adopt a proactive rather than a reactive approach to promoting equality of opportunity in the workplace. The practical guidance aims to help employers recognise and promote diversity and to integrate equality into all of their working policies and practices.

### Small/medium sized employers

5.7 It is accepted that small to medium sized employers may have to adapt some of the good practice measures outlined below in light of their own individual circumstances. However, any adaptations made should be fully consistent with this Guide's general intentions and be in full conformity with the Regulations.

### Commitment from management

- 5.8 Employers should remember that the successful implementation of the following good practice measures requires the commitment of management, particularly senior management. Management must by words and actions demonstrate their commitment to eradicating unlawful discrimination and fully integrating equality of opportunity into the workplace. Adequate resources, in terms of staff, time, funding etc, must also be allocated.
- 5.9 The general good practice recommendations set out below seek to outline some of the practicable steps employers can take to promote equality of opportunity and prevent discrimination in the workplace. They are designed to help employers create a good and harmonious working environment in which all employees are treated with dignity and respect regardless of their age. They aim to assist employers develop an environment in which employees understand in clear terms what behaviour is and is not acceptable. They also give guidance on how employers can build an environment in which individuals can raise complaints of discrimination without fear of victimisation, and in which individuals can be confident that their complaints of discrimination will be treated seriously and dealt with effectively.

## Equality policies, practices & procedures

5.10 There are key equality policies, practices and procedures which it is recommended that employers and training providers put in place in order to promote equality of opportunity in the workplace and to help prevent discrimination on grounds of age, as well as the other grounds protected by the equality legislation.

5.11 It is recommended that employers should:

### 5.12 Implement an equal opportunities policy

- Develop and implement a clear, comprehensive, effective and accessible equal opportunities policy which specifically covers the area of age, or
- Check that their existing policy covers the ground of age.
- The policy should set out the employer's commitment to the promotion of equality of opportunity in the workplace and make it clear to employees that discrimination on grounds of age is unlawful and will not be tolerated in the workplace.

The Commission recommends that employers base their policy on the Commission's "Model Equal Opportunities Policy". A printed copy of this document can be obtained by contacting the Commission or may be downloaded from the Commission's website.

### 5.13 Implement a harassment policy and procedure

- Have a clear, comprehensive, effective and accessible harassment policy and procedure which covers complaints of harassment on grounds of age. By implementing a harassment policy and procedure, employers outline to their employees and others how they can raise complaints of harassment and how these complaints will be dealt with.

The Commission recommends that employers base their policy on the Commission's "Model Harassment Policy and Procedure". A printed copy of this document can be obtained by contacting the Commission or may be downloaded from the Commission's website.

### 5.14 Consult on policies

- Consult with the appropriate recognised trade union(s), employee representatives or the workforce when drawing up and implementing an equal opportunities policy and harassment policy and procedure.
- When consulting with their workforce, employers are strongly recommended to consult with all employees. If an employer only consults with their full-time workers they could be considered as treating part-time workers, many of whom may be children and young people, less favourably than full-time workers.

### 5.15 Communicate policies etc.

- Effectively communicate their equal opportunities policy, harassment policy and procedure, and all other policies or procedures they may have relating to equal opportunities, to all employees, contractors and agency staff. Particular efforts should be made to inform part-time workers; many of whom are children and young people. This can be done, for example, through staff briefings, contracts of employment, staff handbooks, notice boards, circulars, written notifications to individual employees, equal opportunities training, induction training, management training, training manuals etc.
- Take all available opportunities, especially when recruiting new staff, to ensure that equal opportunities policies, practices and procedures are widely known. No one should be in any doubt about their employer's policy and practice.
- Ensure that equal opportunities policies and procedures are accessible to all employees, particularly children and young employees, disabled employees and/or employees from a minority ethnic background. They should be accessible as regards their format, content and implementation.
- Make it clear to agents, for example recruitment consultants, what is required of them with regard to their duties and responsibilities under the Regulations and the extent of their authority.
- Note their commitment to equality of opportunity, including on the grounds of age, in relevant publications (e.g., company reports) and particularly in job advertisements.
- Make their commitment known to all job applicants.

## 5.16 Provide training

- Provide training and guidance to all employees in order to ensure that they understand their responsibilities under the Regulations, other equality legislation and the organisation's equal opportunities policies and procedures. Employers should make every effort to ensure that training is accessible to all staff; including children and young people, those with disabilities and those from minority ethnic groups.
- It is particularly important that training and guidance is given to all managers, supervisors, personnel and other employees who have key roles in relation to implementing equality of opportunity in the workplace.
- Ensure that all training and guidance is regular, relevant and up-to date.

## 5.17 Allocate responsibility

- Allocate overall responsibility for their equal opportunities policies, practices and procedures to a member of senior management.
- Incorporate responsibility for ensuring compliance with their equal opportunities and harassment policies and procedures into the job descriptions of all employees.
- Set, as part of the appraisal process, objectives for personnel staff and those with managerial responsibilities in relation to how they have contributed to the implementation of their employer's equal opportunities policies and procedures.
- Incorporate equal opportunities into business plans and strategies, performance management systems and the corporate planning process.

## 5.18 Deal effectively with complaints

- Deal effectively with all complaints of discrimination, including those on grounds of age.
- Ensure that complaints are dealt with promptly, seriously, sympathetically, confidentially and effectively. By dealing with complaints in this way, employers are reinforcing the message to their employees that they are committed to:
- promoting equality of opportunity in the workplace; and,

- consider complaints of discrimination a serious matter.
- Take all reasonably practicable steps to ensure that individuals who do raise complaints are not victimised because of their complaints.

### 5.19 Check disciplinary rules

- Check disciplinary rules and/or procedures to ensure that unlawful discrimination is regarded as misconduct and could lead to disciplinary proceedings.
- Take appropriate action in relation to employees who discriminate contrary to the Regulations.

## Recruitment, selection & promotion

5.20 Employers that already ensure that recruitment is carried out in a systematic and objective manner and use sound selection and promotion arrangements are likely to have to implement fewer changes as a result of the Regulations. However, as outlined in the good practice recommendations below, there are certain recruitment and selection issues which arise in relation to the area of age.

5.21 Employers must now ensure that employees do not treat job applicants less favourably because of their **actual or perceived age**. They must also ensure that criteria, practices or procedures used during the recruitment and selection process do not, without justification, place individuals of a certain age at a particular disadvantage. The Regulations apply both to promotions in an organisation as well as external recruitment exercises.

5.22 There are some rare exceptions when there is an objective justification for an age requirement or age is a genuine occupational requirement. For further information, please refer to Chapter 3: “Exceptions & exemptions” in this Guide.

5.23 Training is vital in helping people to avoid making stereotypical judgements either about older or younger workers. All those who select applicants for employment or make other decision on promotion, pay and other employment-related benefits should receive training on age discrimination.

## Job description and personnel specification

5.24 A job description outlines the duties required of a particular post-holder. A personnel specification gives the skills, knowledge and experience required to carry out these duties. When drafting/reviewing job descriptions and personnel specifications, employers should avoid references, however oblique, to age in both the job description and the personnel specification. For example, avoid asking for 'so many years' experience unless the requirement can be objectively justified. This may rule out younger people who have the skills required but have not had the opportunity to demonstrate them over an extended period. A jobseeker could challenge any time-requirement and this may have to be justified in objective terms.

### Example 13 Job description and personnel specification

A local driving school has been advertising for instructors who must be qualified and have a minimum of 10 years' driving experience. Effectively this would prevent people under 27 applying for this job and could therefore be discriminatory. The school would need to justify this 10 year experience criterion if challenged by a jobseeker under 27 especially as only 4 years' experience is formally required to qualify as a driving instructor.

5.25 Educational and vocational qualifications have changed and developed over the years. Employers will need to make sure that specified qualifications do not disadvantage people of different ages. Employers should consider whether

- the qualifications are really necessary
- are still current or
- if there are other ways of specifying the skill level they require

5.26 If an employer needs to be specific about qualifications, they must be sure they can justify their need in objective terms. An employer should make it clear that they will consider equivalent or similar level alternative qualifications, and must be in a position to evaluate such equivalent qualifications.

## Advertising

5.27 It is recommended that employers:

- write job advertisements using information in the job description and personnel specification (see below);
- should not expressly or implicitly indicate that the post is more suitable for people of a particular age, by:
  - avoiding language that might imply that they would prefer someone of a certain age, such as 'mature', 'young' or 'energetic'; and
  - avoiding hidden messages that may be present in any promotional literature, particularly visual images.
- in the rare situations where it is genuinely necessary for the job to be carried out by persons of a particular age group (i.e. the employer intends to rely on a genuine occupational requirement), the advertisement should clearly say so.
- advertise all vacancies as widely as possible, as different newspapers and magazines are usually aimed at different markets. For example, it is highly unlikely that advertising in a magazine aimed at older readers will attract a range of younger candidates;
- use, when appropriate, the lawful positive action measures designed to encourage people of a particular age to apply for particular work (see below);
- make their commitment to equality of opportunity known to all job applicants; and,
- check that advertisements or information to applicants include an equal opportunities statement which refers to age.

### Example 14 Advertising

A local clothing manufacturer operates a recruitment and promotion policy whereby all new posts are advertised externally; there are no internal company trawls offering promotion. The company decided to place advertisements in a local fashion and lifestyle magazine aimed at young people.

The placement of this advertisement only in a magazine aimed at young people may indirectly discriminate against older people because they are less likely to subscribe to the magazine and

therefore less likely to find out about the vacancy. This action could also be used as evidence by an older complainant as indicating that the employer was seeking to recruit a young person.

## Graduates

### 5.28 Employers should:

- avoid using the term ‘graduates’, as it is often interpreted by job seekers as an employer wanting someone in their early twenties;
- make it clear that they are interested in the attainment of a given qualification and not the age of the applicant;
- avoid limiting recruitment to university “milk rounds” only. This practice may be indirect age discrimination, as it severely restricts the chances of someone over, let’s say 25 years, applying for their vacancies. If challenged, an employer would need to objectively justify this practice; and,
- use “milk round” programmes as an enhancement of broader recruitment strategies to capture the widest range of applicants of differing ages.

### Example 15 Graduates

A local engineering company is looking for a new personnel officer and asks for applicants to be graduates and hold the Chartered Institute of Personnel & Development (CIPD) qualification. As many more people attend university today than say 25 years ago, there is a lower chance that older personnel officers will be university graduates even though holding the CIPD qualification and having considerable practical experience. This graduate requirement might be indirect age discrimination if the employer is unable to objectively justify it. As the CIPD qualification was formerly the IPM qualification, an employer should also be aware of equivalency in exams and professional qualifications.

## Application form

5.29 Asking for age related information on an application form, although it is not inherently unlawful, could lead to occurrences of age discrimination, particularly if the need for the information

cannot be objectively justified. Therefore, after drafting or reviewing job descriptions and personal specifications employers should also review or redraft their application forms. Employers should consider taking the following steps:

- removing the date of birth or age question from the section of the application form that will be considered by the members of the selection panel.
- placing questions about date of birth or age within a separate or detachable “personal information” section of the form that will be retained for administrative purposes only by the personnel department, or on a separate or equal opportunities monitoring form; and,
- reviewing questions on application forms about educational and employment history to ensure that they do not seek unnecessary information from which the ages of applicants may be inferred.

### **Example 16 Application form**

A voluntary organisation is seeking to employ a project officer. In the light of the Regulations, the organisation reviews and amends the job description and personnel specifications for the post. After this review the organisation feels that it can objectively justify requiring the post-holder to be qualified to degree level and to have 3 years’ relevant work experience. One particular impact of these apparently justifiable criteria is that all eligible applicants will generally be aged in their mid-20s or over. So, in drafting an appropriate application form for the post it will not be possible to avoid seeking at least some information from which the minimum age of applicants can be inferred. To proceed, the organisation drafts a new application form that contains three sections:

- Personal Information
- Equal Opportunities Monitoring Form
- Competency Application Form

The separate and detachable Personal Information section seeks to elicit personal information; such as name, address, national insurance number, that is needed for administrative purposes.

The separate and detachable Equal Opportunities Monitoring section is used to collect information for monitoring purposes only.

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A question about date of birth or age is placed on either the Personal Information section or the Equal Opportunities section or both, but it is omitted from the Competency Application Form. The Competency Application Form (“CAF”) is the only section seen by the selection panel for shortlisting and interviewing purposes. This is drafted in a way that does not ask direct questions about the chronology of educational or employment history (e.g. it does not ask applicants to list the relevant dates of current and former employment). Instead, the CAF sets out the key competencies for the job, as based on the personnel specification. The applicants are then asked to demonstrate in their answers how they meet each of the key competencies. It is only this information that will be used for shortlisting purposes.

In answering the key competency questions, the applicants may incidentally provide information from which their ages, or age ranges, may be inferred with varying degrees of accuracy. However, the organisation may now be in a better position to demonstrate that it made its selection decision on the basis of information that was directly relevant to the key competencies and this will decrease the possibility of an inference being drawn that it based its decision on age grounds.

## Shortlisting

5.30 Where practicable, the shortlisting panel should consist of at least two members, each of whom has received training in equal opportunities, who are familiar with the employer’s equal opportunities policies, and are familiar with current equality legislation and guidance, including the Age Regulations and this Guide.

5.31 The panel should assess applicants against shortlisting criteria that are the same as the essential and desirable job criteria described in the job description and personnel specification.

## Interviewing

5.32 When interviewing, employers should:

- ensure where practicable that the shortlisting and interview panel contain the same members;
- avoid asking questions related to age. For example, “how would you feel about managing older or younger people?”;

- avoid throwaway comments such as “you’re a bit young for a post of this responsibility” or “don’t you think someone like you should be looking for something with more responsibility”;
- ensure that panel members do not make stereotypical assumptions in relation to an applicant’s actual or perceived age. Assumptions or decisions should not be made about whether or not an applicant will “fit into” the existing workplace environment; and,
- focus on the applicant’s competence and, where more than one applicant demonstrates the required competence, the applicant who is more competent or offers the best skill mix should be appointed.

5.33 Post interview, employers should check decisions for any bias. In all instances, employers should record their decisions and retain these records; ideally for 12 months from the date of the interviews.

## Promotion

5.34 Employers should review their promotion procedures to ensure that there are no barriers to any particular age groups, that vacancies are suitable for all age groups, and that everyone is encouraged to participate.

5.35 In selecting personnel for promotion purposes, employers are strongly recommended to:

- advertise widely throughout their organisation all promotion opportunities - these should be conducted in a fair and consistent manner with all procedures being reviewed regularly;
- draft or review job descriptions and personnel specifications for positions available for promotion in the same manner as for positions that would be advertised externally;
- take care when using internal trawls especially if there is an existing imbalance in the workforce;
- avoid the operation of informal mechanisms for promotion;
- train those making the selection on the avoidance of age discrimination in any promotion assessment;
- develop systems to monitor and identify problem areas (see below); and,

- consider positive action training courses (see below).

## Working with contract workers and employment agencies

- 5.36 The Regulations prohibit employers from discriminating against or harassing contract workers. Employers should ensure that their equal opportunities and harassment policies apply to any contract workers that they engage. The policies should not only protect contract workers, but should also inform them that they are required to comply with the terms of the policies too.
- 5.37 Employers should require any employment agencies whose employees and services they use to undertake to comply with the employer's equal opportunities and harassment policies in their dealings with the employer and their staff.
- 5.38 The Regulations prohibit employment agencies from discriminating against or harassing their service-users or prospective service-users. Employment agencies should develop their own equal opportunities and harassment policies. Employers should ensure any employment agency they engage are made aware that the employer expects the agency to comply with the Age Regulations and this Guide.
- 5.39 Employers should not instruct employment agencies to subject any person to age discrimination or harassment; and if any such instructions are given, employment agencies should not accept them.
- 5.40 There is only one situation in which employment agencies can avoid liability for implementing a discriminatory instruction from an employer. This occurs where the employer may rely on a genuine occupational requirement ("GOR") defence in order to lawfully refuse to offer employment to an individual on the grounds of age. In this situation the employment agency can avoid liability for accepting the employer's instruction if it can show that it relied on a statement from the employer that its actions were not unlawful by virtue of the GOR defence and, that it was reasonable for the agency to rely on that statement.
- 5.41 An employer who knowingly or recklessly makes a false statement to an employment agency about these matters commits an offence. Consequently, to protect their own position, it would be advisable for employment agencies to obtain the relevant instructions and assurances of lawfulness in writing.

## References

- 5.42 Employers who seek references in respect of job applicants as part of the recruitment process should do so in a non-discriminatory way. For example, employers should not, without an objective justification, seek references for applicants of a given age or age group, whilst omitting to seek references for applicants of other ages or age groups. It is good practice for an employer to supply referees with copies of the relevant job description and personnel specification, and to ask specific questions which seek to elicit information about an applicant's ability to carry out the particular requirements of the job.
- 5.43 Employers, including managers and supervisors, who supply references, both formal and informal, should do so in a non-discriminatory way. Employers should not refuse to provide references for employees or former employees on the grounds of their age, or as an act of victimisation. Neither should employers, on discriminatory grounds, provide employees or former employees with detrimental references. Employers should ensure that references are not influenced by personal prejudices relating to an individual's actual or perceived age, or to the fact that the individual may previously have made an age discrimination complaint against the employer.

## Harassment & bullying

- 5.44 Every individual member of staff has the right to be treated fairly and with dignity and respect. Harassment occurs when someone engages in unwanted conduct on the grounds of age which has the purpose or effect of violating someone else's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment.
- 5.45 If the purpose of the conduct is to harass a fellow worker, that will be unlawful harassment in its own right. However, the intention of the perpetrator will not always determine whether a particular type of conduct is harassment. The effect it has on the recipient may also amount to harassment even where the perpetrator did not intend to cause any offence, or did not specifically direct the offensive conduct at the person alleging harassment.

- 5.46 People can become targets of harassment because of their age or the age of a person close to them (for example, their personal partner). Harassment could take the form of:
- inappropriate comments - for example, by suggesting someone is too old ('over the hill') or too young ('wet behind the ears');
  - offensive jokes; and,
  - exclusion from informal groups such as social events.

## Bullying

5.47 Bullying is just as unacceptable as any other form of harassment.

5.48 At present, there is no specific legislation which deals with bullying at work, unlike other forms of harassment, such as sexual, sexual orientation, sectarian, disability, and racial harassment, which are embraced by anti-discrimination legislation. In the individual contract of employment, it is implied that employees have the right to work in a reasonably suitable environment.

5.49 Victims of bullying may obtain remedies in the Civil Court, the Industrial Tribunals and perhaps in the Criminal Court:

In common law

- Employers are bound to provide a safe system of work. This includes an environment free from bullying. If they fail to do so, and, as a result, an employee suffers foreseeable harm, that employee is entitled to claim damages in the civil court.

Constructive dismissal

- An employee who has been forced to leave their job because of bullying may be able to claim that this amounts to constructive dismissal, subject to the qualifying periods. An employer who has used bullying tactics to dismiss an employee may therefore have to defend a claim at an Industrial Tribunal.

The Management of Health and Safety at Work Regulations (NI) 2000

- Employers are required to ensure that risks to the health and safety of employees are properly and adequately assessed

and appropriate protective and preventive action is taken. This duty of care extends to the mental as well as the physical well-being of the employee.

### Criminal liability

- Violence towards a colleague or customer constitutes a breach of contract and may attract criminal proceedings. As well as the bully, the organisation may also be legally liable.

### The Protection from Harassment (Northern Ireland) Order 1997:

- It is a criminal offence and a civil breach of duty to pursue a course of conduct which amounts to the harassment of another person. This Order also creates the indictable criminal offence of putting people in fear of violence. The employee may proceed to the civil courts to obtain damages or an injunction against the bully or to the criminal courts for a prosecution.

5.50 Employers are strongly recommended to seek advice from the Labour Relations Agency regarding bullying in the workplace. Furthermore, the reader may wish to refer to the joint Equality Commission and Labour Relations Agency publication “Harassment & Bullying in the Workplace.”

## Promoting a good and harmonious working environment

5.51 Employers should promote in a proactive, and not just a reactive manner, a good and harmonious working environment, in which all employees are treated with dignity and respect irrespective of their age. If a good and harmonious working environment is not being provided and maintained, employers should take appropriate steps to address the situation.

5.52 Employers should ensure anti-harassment policies cover age. An employer may have a stand alone policy or one that is part of a wider equal opportunities policy.

5.53 Employees should be informed that they should not harass, or otherwise unlawfully discriminate against, other employees or agency staff on grounds of age, during or outside normal working hours or inside or outside the workplace.

## Dealing with harassment

- 5.54 When investigating alleged incidents of harassment, employers should be aware that, for a variety of reasons, individuals may be reluctant to bring a complaint of discrimination on grounds of age. As is the situation with other discrimination complaints, an individual may be concerned that his or her complaint will not be taken seriously or that he/she will be victimised if a complaint is brought. Very young people may also be more reluctant to complain as they may be new to an organisation or feel constrained in doing so as a result of their young age. It is therefore vital that, if a complaint is made, the complaint is not trivialised and is dealt with in a confidential manner.
- 5.55 In order to provide support, advice and assistance to people who believe they have been discriminated against, it is preferable for an employer, where reasonably practicable, to have a designated adviser/s to whom the individual can speak to in confidence. Designated advisers should receive appropriate training in order to enable them to carry out their roles effectively.
- 5.56 Employers are strongly advised to take action in relation to discriminatory acts which they become aware of, or ought to be aware of, even in the absence of a complaint or in circumstances where an individual is reluctant to name individual harassers. In addition, an employer is also strongly advised to take action if a complaint is raised in a general manner through an employee's trade union or other employee representatives, other staff or managers.
- 5.57 Tackling harassment in a situation where an employee will not make a formal complaint or where an alleged harasser can not be identified, poses particular problems for an employer. It is therefore in the interests of the employer to develop a strong, transparent and trusted harassment policy in which all staff and others have faith, so that they are more likely to make use of it with confidence.
- 5.58 Further information on dealing with complaints of harassment either formally or informally can be obtained from the Equality Commission or by referring to the Commission's "Model Harassment Policy and Procedure" and joint publication with the LRA "Harassment & bullying in the Workplace."

## Dealing with discriminatory actions by employees, clients or customers

- 5.59 There is a responsibility on employers to ensure that it's employees, clients or customers do not harass other employees because of their age, actual or perceived or as a result of their association with other of different ages. An employer cannot either refuse to employ an individual or dismiss an individual because its workforce, customers or clientele refuse to accept that individual on grounds of age. The prejudices of other employees, clients or customers cannot excuse unlawful discriminatory action.
- 5.60 Employees, clients or customers who refuse to work with or deal with an employee on grounds of age should be informed in clear terms that their actions are discriminatory and are unacceptable in the workplace. Measures should be taken to reinforce the employer's equal opportunities and harassment policies and disciplinary action should be taken as appropriate.

## Monitoring & review

- 5.61 Employers who have 11 or more full-time employees are required under the fair employment and treatment legislation to register with the Equality Commission. They are also required to monitor the community background and sex of their employees and applicants and to submit annual monitoring reports in respect of this data to the Commission. They are also required to use this data to carry out periodic reviews of the composition of their workforces and of their employment policies and practices.
- 5.62 In relation to the other statutory equality grounds (i.e. age, race, disability, sexual orientation), the Commission recommends that each employer should develop a policy on equal opportunities monitoring that applies to one or more or all of these categories.
- 5.63 The policy should describe the employer's rationale for monitoring and outline the employer's commitments or intentions regarding should also:
- the collection of statistical data relating to its workforce with regard to one or more of the statutory equality categories,

which may include age;

- collection of qualitative data, such as staff surveys, about the provision of equal opportunities with regard to one or more of the statutory equality categories, which may include age; and,
- conduct of periodic reviews of the provision of equality of opportunity in the workplace with regard to one or more of the statutory equality categories, which may include age.

5.64 The development of, and effective monitoring through, an equal opportunities policy may give employers valuable insights into how people view their work and their employer, help the employer create a positive working environment and assist in the promotion of equality of opportunity and fair participation for applicants and appointees.

5.65 Most employers will probably already have information that shows the ages of its employees. To understand the workforce, it is essential that employers analyse this information to get an age profile of the workforce. Age profiles may help employers decide whether there is a need to:

- plan for a retirement peak or
- take positive action measures to rectify any obvious imbalance in the age profile of the workforce.

5.66 Employers can also use this profile to check that their entire workforce is getting access to training and other facilities.

5.67 Employers may lawfully discriminate against job applicants and employees on the grounds of age if the treatment can be objectively justified as a proportionate means of achieving a legitimate aim. Please refer to Chapter 3: “Exceptions & exemptions” for more information on objective justification. It is essential that employers develop an equal opportunities policy, implement robust monitoring and always use the evidence garnered from their monitoring in all decision making. It is recommended that employers should not merely rely on old working practices, or ‘gut feelings’, as these may be based on unfounded assumptions and stereotypes.

5.68 Decisions based upon sound statistical evidence is more likely to persuade an Industrial Tribunal that an employer has taken care

in making decisions based upon the real needs of the organisation.

## Positive action

5.69 The Regulations allow employers and trade organisations to take positive action measures in certain circumstances. Positive action measures are measures which employers and trade organisations can lawfully take to prevent or compensate for disadvantages linked to age. Employers can take certain measures which specifically target employees and/or applicants on grounds of age.

5.70 The Regulations stipulate that positive action measures can only be taken by employers, these measures are:

- designed to afford persons of a particular age or age group access to facilities for training which would help fit them for particular work; or,
- aimed at encouraging persons of a particular age or age group to take advantage of opportunities for doing particular work.

5.71 For example, in addition to advertising widely, an employer might place advertisements where they are more likely to be seen by people in a disadvantaged group. On the other hand they might limit access to a computer training course to those over 60 because this group may have had less exposure to such training in the past.

5.72 Positive action on age can help employers attract people from all age groups in the local community. Before taking any of the above positive action measures, employers must reasonably consider that the measures will, in relation to employees or applicants, prevent or compensate for disadvantage linked to age. An employer must:

- believe that employees or applicants have suffered a disadvantage linked to age (this may be obtained through the employer's monitoring and review processes); and then,
- reasonably consider that their permitted positive action measure compensates for that disadvantage - such as, for the under-representation of persons of a particular age or age group.

## Example 17 Positive action

Using information gathered through its workforce monitoring processes, Green & Company, an information technology business, has noted that its workforce has a relatively young age profile. This is mainly due to a disproportionately small number of employees in its software development department who are aged over 50 years. Furthermore, the company has noted that it receives relatively few applications for work in the software development department from persons in that age group. The reason for this seems to be that persons in that age group are less likely to have the relevant computer-related technical qualifications and experience necessary for the work in question.

The company believes that by providing, and advertising, positive action training it can compensate for a particular disadvantage (i.e. lack of technical qualifications and experience) suffered by persons in the over 50s age group. Consequently, the company decides to develop 'transfer' and 'pre-employment' training programmes that are open only to persons of this age group. The courses are, respectively, open to either existing employees wishing to transfer into the software development department or to those seeking new employment with the company.

The company believes that the programme will lead to an increase in the numbers of persons from this age group applying for work in its software development department, and that it will enable graduates of the programme to be better able to compete with younger applicants in the recruitment exercises.

Green & Company includes welcoming statements in its internal and external advertisements for the 'transfer' and 'pre-employment' training schemes. The welcoming statement states that "Green & Company are committed to equality of opportunity in employment and welcomes applications regardless of age, community background, disability, gender, marital or civil partnership status, political opinion, race, sexual orientation, or whether or not they have dependants. The company specifically welcomes applications from persons who are aged over 50 years who are currently under-represented amongst our software development department staff. All applications will be considered strictly on the basis of merit."

## Other policies, processes & procedures

5.73 An employer also needs to review how it handles issues like:

- training;
- performance appraisal;
- dismissal & redundancy;
- sickness absence;
- leave and holidays;
- discipline and grievances;
- staff transfers;
- flexible working;
- use of computers; and,
- individual space requirements (ergonomic policies).

5.74 The Guide gives a general guidance on three of the issues cited above. If an employer requires general or specific guidance on any of the issue listed above, they should contact either the Equality Commission or the Labour Relations Agency.

5.75 Exceptions regarding pay and benefits can be found in Chapter 3: “Exceptions & exemptions” of this Guide.

### Awareness training for age

5.76 An employer should inform all employees about the company’s policy on age discrimination and train those who make decisions that affect others. Training should involve awareness-raising on how to prevent the stereotyping of both younger and older workers. Training should apply not only to those who recruit and select but also to those involved in day-to-day decisions about work allocation, performance appraisal, etc. Supervisors and managers also need training in recognising and dealing with harassment and bullying.

### Further training and development

5.77 Job-related training should be available to all employees regardless of age. Employers should monitor the training to make sure no particular age group is missing out. Employers should review the style and location of training to ensure that:

- there are no barriers to any particular age group participating;
- it is suitable for people of all ages; and
- everyone is encouraged to participate.

5.78 For example, an employer using computer based training should not assume that everyone will be fully competent in using a personal computer.

## Performance appraisal

5.79 If an employer operates a performance appraisal system they should ensure that it is working fairly and without bias. Many people have preconceptions about age and these can influence the judgements we make about people. If these preconceptions appear in performance appraisals through the use of inappropriate comments such as “does well despite their age” or “shows remarkable maturity for their age,” they will undermine the whole basis of a fair appraisal system. Such comments could also lead to further discrimination when decisions about promotion or work allocation are being made.

5.80 A fair and transparent appraisal system will become increasingly important when the changes to the retirement age are introduced as planned retirement linked to capabilities will be an increasingly important issue for employers. However, young people in the early stages of their career also need to be assessed on their actual performance unclouded by any preconceptions about their age.

### Example 18 Performance appraisal

Mark and John were two candidates who had done equally well in the interview for promotion in Smith & Company. Mark was 25 years of age whereas John was 45. The selectors decided to review previous performance appraisals to try to draw a fair distinction between them.

On John’s previous performance appraisal the selectors read: “Despite his many years with Smith & Company, John remains capable and enthusiastic” and “John does very well at work considering his age”. On Mark’s previous performance appraisal, there were no such comments. On the basis of these reports, the selectors decided that Mark was the best candidate and he was offered the promotion instead of John.

All the performance appraisal reports upon which this promotion decision was made were written prior to October 2006. The reports contained discriminatory comments about John on the grounds of his age, but the actual writing of the reports did not amount to unlawful age discrimination as they were written prior to the Age Regulations coming into force in October 2006. However, to write similar reports after October 2006 might be unlawful.

This promotion decision was made after October 2006. Therefore, it did amount to unlawful age discrimination as it was based on age discriminatory material. It is irrelevant that the material was created before October 2006.

- 5.81 Employers need to be particularly careful not to treat, without objective justification, some employees less favourably (or more favourably) than others in setting objectives or measuring performance. The practice of “coasting down” to retirement whereby shortfalls in performance are not addressed in a worker a few years off retirement but are in a younger worker are age discriminatory.
- 5.82 It is good practice to treat all employees the same with regard to performance expectation, supportive coaching and training unless any differences in treatment which are related to age can be objectively justified.
- 5.83 Remember, the above does not exempt an employer from their duty to make reasonable adjustments for disabled employees under the Disability Discrimination Act.

## Dismissal & redundancy

- 5.84 The Regulations prohibit age discrimination against employees in relation to dismissal from employment.
- 5.85 Many different circumstances may induce an employer to dismiss an employee (e.g. misconduct, incapability), but in two particular circumstances there may be a greater danger of age discrimination occurring; these are where dismissals occur on the grounds of age retirement and redundancy.
- 5.86 Retirement is considered separately in Chapter 4: “Retirement” of this Guide.

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- 5.87 When considering redundancy, employers will need to ensure that selection criteria, provisions and practices are free of age discrimination.
- 5.88 Employers should take particular care when using length of service as a redundancy selection criterion. Such a criterion is potentially age discriminatory; all the more so if it is used as the sole selection criterion (i.e. Last In, First Out (“LIFO”)), because it may disproportionately benefit older employees, who are likely to be the longest-serving employees.
- 5.89 An employer will have to objectively justify its use of a selection criterion which disproportionately benefits employees of one age group compared to another. Employers should note that it is likely to be very difficult to justify the use of length of service (or, LIFO) where it is the sole selection criterion, because, on its own, that criterion may not be a proportionate means of selecting employees for redundancy (although that objective is likely to be a legitimate aim).
- 5.90 However, if a particular selection criterion (including length of service) is used in conjunction with several other selection criteria, then the potential age discriminatory impact (if any) of each criterion will be diminished. Other selection criteria might include performance appraisal scores, conduct, attendance, time-keeping, etc. Furthermore, an employer is likely to find it easier to objectively justify a particular selection criterion where it is used in conjunction with other selection criteria. This is because it is more likely that it will be deemed to be a proportionate means of achieving a legitimate aim in this context than where it is used as the sole selection criterion.

## 6 Making a complaint

- 6.1 Job applicants and employees have a right under the Regulations not to be discriminated against on grounds of age when seeking employment, during the course of their employment and/or, in certain circumstances, after they have left employment.
- 6.2 For more information on discrimination after leaving employment see the previous sections on “Discrimination after a relevant relationship has come to an end” and “References” in Chapters 2 and 5 “Explaining the law” and “Good practice guidance” respectively. Further information can also be found in the section “After the relevant relationship has come to an end” in this chapter.
- 6.3 Employees have a right to work in an environment free from harassment, in which they are treated with dignity and respect and in which they can raise complaints of less favourable treatment without being victimised.
- 6.4 All persons undertaking vocational training have a right not to be discriminated against or harassed on the grounds of age when seeking or undergoing training. Students, and those undertaking vocational training at institutions of further and higher education, also have a right not to be discriminated against or harassed on the grounds of age when seeking or undergoing education and training, and/or, in certain circumstances, after they have left training.

### Complaint and Resolution

- 6.5 The remainder of this chapter examines different employer/employee situations. It examines what employers and employees need to know, and do, to make a complaint and to find resolution. The areas examined are with respect to:
  - job applicants;
  - employees;
  - retirement; and,
  - after a relevant relationship has come to an end.

## Job applicants

- 6.6 Job applicants who believe that they have not been shortlisted for, or appointed to, a post on grounds of their age can, in the first instance, contact the employer and seek an explanation as to why they were not shortlisted/appointed.
- 6.7 At this stage, an employer is not legally obliged to provide that information. However, it is strongly advised that employers respond positively to such a request, because providing a clear non-discriminatory explanation for the shortlisting or appointment decision can avoid legal action.
- 6.8 If a job applicant is not satisfied with the reasons given by the employer, or in the absence of any explanation, the job applicant can, subject to time limits, lodge a discrimination complaint with an Industrial Tribunal. It is the Industrial Tribunal which decides whether or not unlawful discrimination has taken place.
- 6.9 Job applicants are not legally required to contact the employer first before lodging a complaint with an Industrial Tribunal. However, provided there is sufficient time to seek information, and it is otherwise appropriate, an early explanation from the employer may resolve the situation.

## Employees

- 6.10 Employees who believe that they have been harassed at work, not promoted or otherwise treated less favourably on grounds of age also have the right to complain about their treatment.
- 6.11 Where possible, employers and employees should attempt to sort problems out informally. In the first instance, employees should raise their complaint internally, either through their managers, supervisors or personnel staff, to enable their employer to deal with the matter.
- 6.12 Employees who are trade union members may also wish to raise the matter with their trade union; trade unions can be and often are the first point of contact for those experiencing discrimination.

- 6.13 The recommended internal procedures to follow when dealing with disputes between employers and their employees are described in *Section 2 of the Labour Relations Agency's Code of Practice of Disciplinary and Grievance Procedures (April 2011)*. Although it is not compulsory to follow the Section 2 procedures before a formal complaint is lodged in an industrial tribunal; there can still be some adverse consequences for employers or employees who fail to do so. It is strongly recommended, therefore, that employers and employees alike do follow it.
- 6.14 Complaints of discrimination in employment under The Employment Equality(Age) Regulations (Northern Ireland) 2006 must be made within 3 months of the date of the act complained of.
- 6.15 Complainants, and any witnesses, have a right not to be victimised for raising a grievance or complaining to an Industrial Tribunal under these Regulations provided the complaint was made in good faith.
- 6.16 When an employee is considering taking legal action, the Commission strongly recommends that employers seek independent legal advice.

## **Changes to redundancy & unfair dismissal legislation**

- 6.17 The current upper (65 years) and lower (18 years) age limits for redundancy pay rights have been removed. Age limits in respect of statutory sick pay, maternity and paternity pay have also been removed.
- 6.18 There is no longer an upper age limit on unfair dismissal claims. The statutory redundancy payments scheme has been adjusted to remove age limits.

## **After a relevant relationship has come to an end**

- 6.19 If a former employee is treated less favourably or harassed on the grounds of age after a relevant relationship has come to an end, they can make a complaint of discrimination or harassment to a County Court.

## Vocational training

- 6.20 If a person who is seeking or undergoing vocational training, other than at an institution of further and higher education, is discriminated against or harassed on grounds of age by a training provider they may make a complaint of discrimination or harassment to an Industrial Tribunal.
- 6.21 A former trainee who is subjected to discrimination or harassment is also protected under certain circumstances. They can make a complaint to the County Court.

## Institutions of further and higher education

- 6.22 A student or prospective student at an institution of further and higher education has a right not to be discriminated against or harassed on the grounds of age when applying for or during training. In Northern Ireland, institutions of further and higher education include universities (and colleges of education, also known as teacher training colleges), and all colleges and institutes of further and higher education.
- 6.23 If a student or prospective student wishes to make a complaint of the discrimination or harassment on the grounds of age, they must lodge the complaint with a County Court.
- 6.24 A former student who is subjected to discrimination or harassment is also protected under certain circumstances. They can make a complaint to the County Court.

## Time limits for lodging a complaint

### Industrial Tribunal time limits

- 6.25 There are very strict time limits for lodging a complaint of discrimination on grounds of age with an Industrial Tribunal. In most cases, complaints relating to discrimination in employment should be made to an **Industrial Tribunal** within **three months** of the date of the alleged act of discrimination. The Industrial Tribunal can extend the time limits in exceptional cases, but simply not knowing that there were deadlines is usually an insufficient reason for extending the deadlines.

## County Court time limits

- 6.26 Complaints against institutions of further and higher education must be made to **the County Court**.
- 6.27 Complaints regarding acts of discrimination or harassment on the grounds of age after a relevant relationship has come to an end (i.e. discrimination or harassment by a former employer of a former employee, such as refusal to provide a reference on the grounds of age) must be made to a **County Court**.
- 6.28 All complaints to a County Court must be lodged within **six months** of the date of the act of discrimination. The County Court may extend the time limits in exceptional cases.

## Help & advice

- 6.29 Individuals who believe that they have been discriminated against on grounds of age should seek advice as soon as possible.
- 6.30 Individuals who believe they have been discriminated against on grounds of age can contact the Equality Commission for free and confidential information and advice. Individuals, for example, can obtain advice on their rights under the Regulations or on how to lodge a discrimination complaint with an Industrial Tribunal. In certain circumstances, the Equality Commission may provide legal representation to individuals who believe they have been discriminated against contrary to the Regulations.
- 6.31 Individuals who are trade union members may also be able to receive advice and assistance in this area from their trade unions.
- 6.32 Individuals who lodge complaints of discrimination on grounds of their age with an Industrial Tribunal, can avail of a free conciliation service provided by the Labour Relations Agency. This service is designed to assist both parties to a complaint to reach a resolution of the dispute. Further information on this service can be obtained from the Labour Relations Agency (see contact details in Chapter 7: “Further information, advice & support”).

For further advice and information, the following organisations can be contacted. This is not an exhaustive list.

### **Equality Commission for Northern Ireland**

Equality House  
7-9 Shaftesbury Square  
Belfast  
BT2 7DP

Enquiry Line: 028 90 890 888  
Telephone (Switchboard): 028 90 500 600  
Textphone: 028 90 500 589  
Fax: 028 90 248 687  
Email: [information@equalityni.org](mailto:information@equalityni.org)  
Website: [www.equalityni.org](http://www.equalityni.org)

The Equality Commission provides a range of information and advisory services for employers, employees and the general public.

Further information can be found on the Equality Commission's website at [www.equalityni.org](http://www.equalityni.org).

Other useful publications relevant to age discrimination are available from the Equality Commission include:

- Age Discrimination in Northern Ireland: A Guide for Workers and Employees
- Harassment & Bullying in the Workplace
- Model Equal Opportunities Policy
- Model Harassment Policy and Procedure

### **Other statutory organisations**

#### **Labour Relations Agency (LRA)**

Head Office  
2-8 Gordon Street  
Belfast  
BT1 2LG

Telephone 02890 321442  
Textphone: 02890 238411  
Fax: 02890 330827  
Email: [info@lra.org.uk](mailto:info@lra.org.uk)  
Website: [www.lra.org.uk](http://www.lra.org.uk)

Or at:

Regional Office  
1-3 Guildhall Street  
Londonderry  
Co. Londonderry  
BT48 6BJ

Telephone           02871 269639  
Fax:                 02871 267729  
Email:               info@lra.org.uk

**Northern Ireland Commissioner for Children and Young People (NICCY)**

Equality House  
7-9 Shaftesbury Square  
Belfast  
BT2 7DP

Telephone:         028 9031 1616  
Email:              info@niccy.org  
Website:           www.niccy.org

**Commissioner for Older People for Northern Ireland (COPNI)**

Equality House  
7-9 Shaftesbury Square  
Belfast  
BT2 7DP

Tel. no: 028 90 890 892  
Email: info@copni.org  
Website: www.copni.org

## Annex 1: Age equality action plan

### Are you ready?

The purpose of Annex 1 is to provide information and general guidance for new and existing employers on the Age Regulations. This annex is designed to help employers think about, plan and develop their employment policies and procedures in light of the Age Regulations.

To begin the process employers need to ask themselves a number of important questions. For each question in the list below, is an associated “Priority Action Area”. Employers should assess the questions and action areas to see if they can develop and/or improve their policies, practices and procedures.

1. Do you have an **Equal Opportunities Policy** that covers all of the statutory equality grounds including age? Is it visibly supported by your Board and Chief Executive?

**What is your answer?**

**Yes / No**

2. Are all your managers and staff aware of what behaviour could be perceived as harassment on the grounds of age? Do you have **Harassment Policies and Procedures**?

**What is your answer?**

**Yes / No**

3. Is age ever used as a factor in **staff recruitment and selection**, or training and development?

**What is your answer?**

**Yes / No**

If yes, can it be objectively justified?

**What is your answer?**

**Yes / No**

4. Have you examined all of your other **employment policies, processes and practices** to ensure that they are not age discriminatory?

**What is your answer?**

**Yes / No**

5. Have you **consulted** with trade unions or workplace representatives on new and amended policies in the organisation?

**What is your answer?**

**Yes / No**

6. Have you considered the benefits of **monitoring** the ages and age profiles of employees and applicants? Have you looked at the age profile of job applicants in recent recruitment exercises and compared it with your workforce's age profile? Are you missing any potential talent?

**What is your answer?**

**Yes / No**

7. Do you provide **training** to all employees to recognise, avoid and challenge age discrimination and harassment?

**What is your answer?**

**Yes / No**

8. Do you have an **action plan** to ensure that you are compliant with the Age Regulations?

**What is your answer?**

**Yes / No**

There is a sound business case for adopting good practice and procedures in order to ensure that employees and job applicants are not discriminated against on grounds of age, or any of the other grounds protected under the equality legislation. It is important to remember that discriminatory practices can have cost implications in terms of staff time, cost of defending a case (if brought to an Industrial Tribunal) and possibly compensation. There are additional cost implications for staff in terms of recruiting, training, and productivity.

Employers should be proactive rather than reactive in their approach to equality in the workplace by reviewing and monitoring policies, practices and procedures and by putting in place an action plan as soon as possible.

Successful implementation of an action plan and review of policies, practices and procedures on age will require:

- commitment from senior management both by words and actions demonstrating their commitment to eradicating unlawful discrimination in the workplace; and,
- allocation of adequate resources, in terms of staff, time and funding.

## Priority action areas

### 1. Equal opportunities policy

If an employer has an equal opportunities policy, it is their first step in demonstrating that they treat discrimination seriously and that they have steps in place to tackle it. The policy should set the minimum standard of behaviour expected of all employees from recruitment to retirement. It also spells out what employees can expect from the organisation. It gives them confidence that they will be treated with dignity and respect, and may be used as an integral part of a grievance or disciplinary process if necessary.

Employers should:

- develop and implement an Equal Opportunities Policy that covers all of the statutory equality grounds, including age; or,
- revise and extend any existing Equal Opportunities Policy to cover the age ground.

Referring to the Equality Commission’s Model Equal Opportunities Policy “It is our policy to provide employment equality to all, irrespective of:”

- disability;
- marital or civil partnership status;
- having or not having dependants;
- race (including colour, nationality, ethnic or national origins, being an Irish Traveller);
- religious belief or political opinion;
- gender, including gender reassignment); and,
- sexual orientation.

It is unlawful for an employer to discriminate against or harass employees or job applicants on any of these grounds.

Any equal opportunities policy adopted by an organisation should be reviewed on a regular basis (at least annually) in consultation with recognised trade unions or other employee representatives and any action taken as necessary. Further information on the equal opportunity policy refer to Chapter 7: “Good practice guidance”.

A Model Equal Opportunities Policy is available from the Equality Commission. It can be downloaded from the Commission’s website at; [www.equalityni.org](http://www.equalityni.org) or requested as a hard copy using the contact details in Chapter 7: “Further information, advice & support” of this Guide.

## 2. Harassment policy and procedure

As part of an employer’s commitment to equality of opportunity, it should aim to promote a good and harmonious working environment where every employee is treated with respect and dignity. All employers should ensure that their **Harassment Policies and Procedures** are updated to prohibit harassment on the grounds of age, and to warn employees that it is not only unacceptable to discriminate, harass or victimise someone on the grounds of age, but it is also unlawful. An employer should ensure the policy and procedure is regularly communicated to all staff and that new staff are always made aware of it.

Harassment is now clearly defined in anti-discrimination legislation (religious belief and political opinion, race, disability, sex, sexual orientation and age) as “unwanted conduct which has the purpose or effect of violating a person’s dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for that person.” This can include unwelcome physical, verbal or non-verbal conduct. Harassment on the grounds of age could include offensive jokes and inappropriate comments such as ‘over the hill’ or ‘wet behind the ears’.

A Model Harassment Policy is available from the Equality Commission. It can also be downloaded from the Commission’s website at [www.equalityni.org](http://www.equalityni.org) or requested in hard copy using the contact details in Chapter 7: “Further information, advice & support” of this Guide.

## Complaints of discrimination or harassment

Individuals in an organisation should know what to do if they believe they have been discriminated against or harassed, or if they believe

someone else is being discriminated against or harassed. Information about the procedure for bringing an internal and/or external complaint should be included in both the Equal Opportunities Policy and the Harassment Policy and Procedures.

Further information on harassment policies and handling complaints can be found in Chapter 5: “Good practice guidance” and Chapter 6: “Making a complaint” , and in the joint publication by the Equality Commission and Labour Relations Agency on “Harassment and bullying in the workplace”

### **3. Review of recruitment and selection procedures, including promotion.**

Employers that operate systematic and objective recruitment and sound selection and promotion arrangements are likely to have to implement fewer changes as a result of the Regulations. However there are certain recruitment and selection issues that arise in relation to age. Employers should review their recruitment and selection procedures to ensure that they remove the potential for direct and indirect discrimination on grounds of age.

Employers must ensure that applicants are not discriminated against, without objective justification, because of their actual or perceived ages. To obtain information on objective justification, please refer to Chapter 3 “Exceptions & exemptions” in this Guide.

Areas of action could include:

- Reviewing the design of **application forms** to remove questions about date of birth or age, or other unnecessary or unjustified questions about time periods or dates, from those parts of the forms that will be considered by the selection panel. For example, this information could be placed on a separate detachable part of the form, or on an equal opportunities monitoring form. This good practice measure may help to protect the employer from inferences of discrimination.

- Removing provisions and criteria in **job descriptions** and **personnel specifications** that might directly or indirectly discriminate against applicants on the grounds of age. For example, length of service criteria - unless these can be objectively justified.
- Removing ageist language from **job adverts** (such as 'mature', 'young', or 'energetic'); try to avoid stereotyping and focus on the needs of the job. Think about hidden messages that may be present in any promotional literature particularly pictures.
- Looking at where you **advertise** and how you advertise to ensure you reach the whole labour market. For example, avoid limiting recruitment to graduates or to university 'milk rounds'.
- Checking all your **job advertisements** to ensure that the Equal Opportunities Statement includes a reference to age.
- Eliminating any **selection criteria** for shortlisting and interview that might directly or indirectly discriminate against applicants on the grounds of age, unless these can be objectively justified.
- Giving appropriate training on age discrimination to any member of staff involved in the interviewing and selection process. This is to ensure that no panel members ask inappropriate questions on age or make stereotypical assumptions.
- Reviewing the Organisations **promotion procedures** to ensure that there are no barriers to any particular age group, that vacancies are suitable for all ages, and that everyone is encouraged to participate.

Further information is available in Chapter 5: "Good practice guidance".

#### 4. **Other Employment policies, processes and procedures**

In addition to the above, all employment policies and procedures (both informal and formal) should be reviewed in order to identify any arrangements which may discriminate against employees on grounds of age.

It should be noted that, under Section 75 of the Northern Ireland Act 1998, all public authorities in carrying out their functions in Northern

Ireland are required to have due regard to the need to promote equality of opportunity across nine equality grounds, including age.

Employers should ask the following:

- (1) What is the policy and what are its aims and objectives?
- (2) Are all methods used for assessing the impact of the policy, and the methods used to implement it effective, or could other means be adopted that are more effective? What are the impacts on persons from particular age groups?
- (3) Are there any adverse outcomes from the policy and the methods used to implement it, on grounds of age? For example, are employees in a particular age group disadvantaged compared to others, and, if so, is it objectively justifiable for this to continue? Reference should be made to Chapter 3: “Exceptions & exemptions” in this Guide.
- (4) Can you adopt measures to amend policies or consider alternative policies so as to mitigate any adverse impacts?
- (5) Have you consulted with unions or workplace representatives on the amendments to policy? (see Priority action area 6 on Consulting on policies).
- (6) Have you informed employees of any changes via information briefings or training? Any new or amended policies/procedures should be issued to all employees including full and part timers, permanent, casual and seasonal staff.

Employers will need to consider what impact the Regulations will have on all their employment policies, practices and procedures. Examples of some important policies that will need to be reviewed are listed below. It should be noted that this is not an exhaustive list. Further information is available in the main body of this Guide.

- **Performance appraisal** - perceptions about age and work can undermine the whole basis of a fair appraisal system. All employees should be assessed on their actual performance without any preconceptions regarding age.
- **Retirement policy** (see Chapter 4)

- **Equal opportunities and harassment policies and procedures** (please see Priority Action Area 1 of this annex)
- **Benefits based on length of service** - Employers should review how they use length of service as a criterion for awarding benefits. For more details see Chapter 3: “Exceptions & exemptions”.  
Note: length of service does not necessarily mean continuous service.
- **Redundancy policy** - Employers should review how they use length of service as a criterion in their redundancy selection procedures. Such a criterion has potential to be indirectly discriminatory on the grounds of age. For more details see Chapter 5: “Good practice guidance” .

## 5. Consult on policies

All amended and new policies should be agreed with any recognised trade unions in the workplace or workplace representatives.

Once the policies have been agreed they should be communicated.

- Make sure all employees (i.e full-time, part-time, seasonal, casual and permanent staff) are aware through training, notice boards, circulars, contracts of employment, etc.  
Note: Employees include all full-time, part-time, seasonal, casual and permanent staff
- Take all available opportunities especially when recruiting staff to tell them of the changes and implications of the age regulations.
- Make sure that the policies are available in accessible formats for disabled and/or minority ethnic minorities.

## 6. Monitoring

All employers who are registered with the Commission are required to monitor the community background and sex of their employees and job applicants. The Regulations do not impose a duty on employers to monitor the ages of job applicants and employees. However, all employers in Northern Ireland should have an equal opportunities policy which describes their intentions regarding the monitoring and review of all the statutory equality grounds, including age.

Development of effective monitoring through an equal opportunities policy may give employers valuable insights into their workforce; help create a positive working environment and how the public view their organisation.

### Monitoring of Employees

An employer will probably have information that shows the ages of their employees. For example, dates of birth from personnel and payroll records. Other useful sources for collection of monitoring information on age could include attitude surveys and exit interviews which can give valuable insights into the workforce.

By monitoring the ages of their workforce employers will be able to establish age profiles that will enable them to:

- identify any problems to see if there is a need for any remedial action. For example, do they need to plan for a retirement peak or take action to rectify any obvious imbalances in the age bands?
- check that all age groups in the entire workforce are getting fair access to training and other facilities

- gather evidence that might be needed to enable them to objectively justify the treatment of individuals, or the impact of policies, criteria or practices in the event that an employee or job applicant makes a complaint of age discrimination to an Industrial Tribunal.

The use of age bands for reference may assist employers to monitor the age equality impacts of their policies and practices. An example of age bands is suggested, it should be noted that these age bands are only guidance for employers

13-15, 16-17, 18-21, 22-30 31-40, 41-50, 51-60, 61-65, 65+

It would be useful to keep age data on are:

- Promotion Employers who are registered with the Commission should be already collecting information on the religious composition and sex of promotees for their Article 55 Reviews and their annual Monitoring Returns.
- Those applying for training, and those who have received training. The organisation should have established a process for collecting such information for their Article 55 review which could be adapted to include age.
- Those involved in disciplinary and grievance procedures.
- Equal opportunities related grievances and complaints of harassment.
- Leavers from the organisation: Information on the religious composition and sex of leavers is already collected for their Article 55 Review and the annual Monitoring Returns and could be adapted to include information on age

The Commission's "A Step by Step Guide to Monitoring" is a guide for employers on the monitoring process that they must comply with under the Fair Employment legislation. It contains useful proformas for collating information in relation to monitoring. These could be adapted for the collection of information on age. The publication is available from the Commission or can be downloaded from the website [www.equalityni.org](http://www.equalityni.org)

## Monitoring of Applicants

To carry out applicant monitoring the Commission recommends that the 'date of birth' question should be removed from the application form and placed on the separate Equal Opportunities Monitoring Form (see Priority Action Area 3 on action for recruitment and selection). For detailed information on monitoring and specific advice contact the Commission either by telephone or via the website.

By monitoring applicants for age an employer will be able to:

- Check that their recruitment and selection procedures are not adversely affecting any age group.
- Confirm that any selection criteria used do not have a discriminatory effect.
- Gather evidence that might be needed to enable them to objectively justify the treatment of individuals, or their policies, criteria or practices in the event that a job applicant makes a complaint of age discrimination to an Industrial Tribunal.
- Take remedial or positive action if required.

For more information on the 'objective justification' of age discrimination, please refer to Chapter 3: "Exceptions & exemptions".

## 7. Training and awareness

No matter what the size of the organisation, employers need to agree and implement a strategy to ensure that all staff are made aware of age discrimination issues, and of any changes to employment policies and practices that are made for compliance with the Regulations.

As part of an employer's Equal Opportunities Policy (see Priority Action Area 1), there should be a commitment to provide appropriate equality training and guidance to all managers and employees. This would include updating staff on a regular basis. Staff need to be made aware of the implications of the age discrimination legislation and training and awareness will help reduce discrimination, harassment, and victimisation in an organisation and may help to limit liability if a complaint is made. The risk of not carrying out training is large compensation costs (potentially unlimited) and damage to your organisation's business reputation.

Any training and awareness programmes for staff should include:

- (1) Information about the Age Regulations and their implications;
- (2) An outline of the definitions of age discrimination and harassment;
- (3) Information about any amendments to company policies and procedures that are made in compliance with the Age Regulations.

Training should not be confined to just employees involved in the recruitment and selection process but to all managers, supervisors and all employees.

The Equality Commission as part of its annual training programme runs seminars on equality legislation (which are free of charge), including the Age Regulations. The Commission also carries out in-company training for employers. For further information please contact the Commission.

## **8. The organisation's action plan**

The implementation of any action plan should be the responsibility of senior management.

To make the plan successful the following should be carried out:

- agree who has overall responsibility for the action plan and timescales to be involved;
- agree the various areas to be covered by the plan, and responsibility for each area;
- agree timescales for the review of each area, and priorities;
- agree who should be involved and consulted on in the review of the areas concerned. For example, managers, personnel, trade unions, work councils and stakeholders etc;
- agree a strategy for training and awareness to ensure that all staff are made aware of age discrimination issues and notified of any changes/new policies to employment practices;
- launch the plan with support of senior management; and,
- allow for feedback from employees and address concerns.

As part of any action plan to tackle age discrimination, employers need to ensure that not only does the review cover their employment policies and procedures but also a review of any company literature for age bias. Employers should take the opportunity to look at how their organisation might be perceived by younger and older employees.

An organisation's Age Action Plan could include the following areas:

1. Commitment: Senior management would communicate the organisation's commitment to employees;
2. Equal opportunities and harassment policies;
3. Training and awareness for all staff;
4. Employment policies and practices;
5. Service related benefits and arrangements;
6. Recruitment policies and procedures;
7. Retirement policy;
8. Monitoring;
9. Review: Constantly review new and amended policies to ensure that equality of opportunity on grounds of age is provided.
10. Action: If inequality on grounds of age is identified, then take action to remedy the situation.

## Annex 2: Frequently asked questions

### Questions and Answers

1. To whom do the Regulations apply?
2. Do the Regulations cover all workers?
3. Do the Regulations cover all applicants for employment?
4. As a business partner, am I covered by the Regulations?
5. What is prohibited by the Regulations?
6. Do I need to update my harassment policy?
7. No one in my organisation has ever complained of discrimination or harassment so I don't need to do anything new, do I?
8. Do I need to amend my equal opportunities policy?
9. Do I need to amend any other workplace policies?
10. Can I ask for a candidate's date of birth on the application form?
11. Am I responsible for what an employment agency does?
12. Can I still place age limits and ranges on job advertisements?
13. Can I still use targeted recruitment campaigns?
14. Do I need to carry out monitoring on grounds of age?
15. Retirement: Has the government set a retirement age?
16. What is objective justification?
17. Our employees' pay and benefits vary according to their length of service. Can we still continue with this policy?
18. Do the Regulations affect National Minimum Wage?
19. Are occupational pension schemes covered by the Regulations?
20. Can I take positive action to promote diversity?

## **1. To whom do the Regulations apply?**

The Regulations apply to employers regardless of size, and prohibit discrimination and harassment in the areas of employment, occupation and vocational training.

The Regulations primarily apply to the field of employment and occupation and generally do not prohibit discrimination by those who provide goods, facilities and services to the public (with the exception of those who provide employment-related services to the public such as employment agencies, vocational training providers and institutions of further and higher education).

## **2. Do these Regulations cover all workers?**

The Regulations apply to all workers, including job seekers, former employees, contract workers, civil servants, office holders, police, barristers and partners in a business. They also cover related areas such as membership of trade organisations such as trade unions or a professional body, the award of qualifications, the services of careers guidance organisations, employment agencies and vocational training providers, including further and higher education institutions which includes universities.

The Regulations grant protection from discrimination and harassment to all of the above regardless of age.

The Regulations apply to anyone who works for an organisation, whether they are directly employed, work under contract, or are employed through an agency. They also cover workers regardless of length of service, whether full-time, part-time, temporary, casual, seasonal or permanent.

Regarding younger employees, it should be remembered that there is no official lower age limit on the legislation.

### **3. Do these Regulations cover all applicants for employment?**

The Regulations cover anyone who applies to an organisation for Work. There are also rules covering the employment of children and young people. For more information on this issue please refer to the “Children & young people” section in Chapter 1: the “Introduction” of this Guide. For specific guidance, it is recommended that employers seek independent legal advice.

### **4. As a business partner, am I covered by the Regulations?**

Yes, partnerships will need to objectively justify their decisions on age issues including retirement. It would be sensible for partners to have clear records of these decisions at partnership meetings to show they meet business objectives, are properly considered and reviewed regularly. Like employers, partners in a firm are prohibited from discriminating and harassing each other or prospective partners. They also will be required to lawfully justify decisions or provisions criteria and practices that might otherwise cause acts of direct or indirect discrimination.

### **5. What is prohibited by the Regulations?**

The Regulations prohibit direct and indirect discrimination, discrimination by way of victimisation, harassment and for failing to carry out a discriminatory instruction.

### **6. Do I need to update my harassment policy?**

Employers should ensure that their Harassment Policies and Procedures are updated to include age. A model policy and procedure

is available from the Commission either as hard copy or from the web site; [www.equalityni.org](http://www.equalityni.org) . Further information is also available in Chapters 2 and 5: “Explaining the law” and “Good practice guidance” respectively, and also in Annex 1: “Age equality action plan” of this Guide.

Employees should not harass or otherwise unlawfully discriminate against other employees or agency staff on grounds of age, during or outside normal working hours, on inside or outside the workplace. Employees are sometimes harassed by third parties, such as customers or clients. Where possible you should protect your employees from such harassment and take steps to deal with actual or potential situations of this kind. This will enhance your reputation as a good employer and make the organisation a welcoming and safe place to work.

Make sure all employees are aware (through training, notice boards, circulars, contracts of employment, etc) that it is not only unacceptable to discriminate, harass or victimise someone on the grounds of age, it is also unlawful.

Individuals should know what to do if they believe they have been discriminated against or harassed, or if they believe someone else is being discriminated against or harassed. In the first instance any complaints of harassment should be dealt with through the organisation’s harassment procedure as detailed in the Harassment Policy and Procedure.

## **7. No one in my organisation has ever complained of discrimination or harassment so I don’t need to do anything new, do I?**

People do not always feel able or confident enough to complain, particularly if the harasser is a manager or senior executive. Sometimes they will simply resign. One way to find out is to undertake exit interviews when people leave and to ask them if they have ever felt harassed, bullied or discriminated against in the workplace. If it is possible, exit interviews should be undertaken by

someone out of the individual's line of management, for instance a personnel officer.

All employers should ensure they have a harassment policy and procedure to deal with any complaints of harassment that might arise. Often harassment can take place without management being aware of it. Make sure all your employees understand that harassment means any unwanted behaviour that makes someone feel intimidated, degraded, humiliated or offended.

Take all possible steps to make sure employees understand that they and their management teams will not tolerate such behaviour and that they will deal with whoever is causing the problem. Please refer to the previous question for details on harassment policies and procedures.

## **8. Do I need to amend my equal opportunities policy?**

Yes an equal opportunities policy is the best way of demonstrating that you take discrimination seriously and have steps in place to tackle it. The policy should set the minimum standard of behaviour expected of all employees from recruitment right through to retirement. It also spells out what employees can expect from the organisation. It gives employees confidence that they will be treated with dignity and respect, and may be used as an integral part of a grievance or disciplinary process if necessary.

Ensure your policy incorporates all forms of unlawful discrimination and the policy will provide employment equality to all, irrespective of gender, including gender reassignment; marital or civil partnership status; having or not having dependants; race (including colour, nationality, ethnic or national origins, being an Irish Traveller); disability; religious belief or political opinion, sexual orientation, age. The categories listed are as per the Equality Commissions model policy which is available from the Equality Commission either to download from [www.equalityni.org](http://www.equalityni.org) or as hard copy on request. For more information on equal opportunities policies please see Chapter 5: "Good practice guidance" and "Annex 1; "Age Equality Action Plan".

## **9. Do I need to amend any other workplace policies?**

Review all policies where age may potentially be a factor such as your policies for recruitment, reward, retirement and redundancy.

For further information on reviewing policies please contact the Labour Relations Agency and the main body of this Guide.

Give serious consideration to the benefits of flexible working. All eligible employees, including older employees, have a statutory right to request flexible working and you have a duty to consider such requests.

## Recruitment and Selection Issues

### 10. Can I ask for a candidate's date of birth on the application form?

Yes, you can continue to ask for date of birth. However asking for age-related information on an application form could allow discrimination to take place. We recommend removing the date of birth/age from the main application form and include it in your monitoring form to be retained by human resources/personnel.

Review your application forms to ensure that you are not asking for unnecessary information about periods and dates, such as work history dates. As an employer you should consider why such information is needed and who will see it. Application forms should be structured around skills, abilities and experiences required to fit job competencies.

### 11. Am I responsible for what an employment agency does?

If you use a recruitment agency you need to be sure the agency acts appropriately and in accordance with your company's equality and diversity policies. As an employer you should give written instructions to the agency. If you use any criteria with age restrictions (see question 12), it would have to be objectively justified by you, the employer, if challenged.

## 12. Can I still place age limits and ranges on job advertisements?

Having an age or age range as a requirement for a job will constitute age discrimination unless it is justified. It may be permissible on a number of grounds:

- (a) Objectively justifiable direct discrimination where to set such criterion is a proportionate means of achieving a legitimate aim.
- (b) Genuine Occupational Requirements (GOR) for the holder to be of a particular age.
- (c) Exception for acts done in order to comply with a requirement of any statutory provision. If statutory requirements set such an age limit in regard to any employment or occupation, then it is a defence for an employer to adhere to it.

For further information on the above please refer to Chapter 3: “Exceptions & exemptions” in this Guide.

## 13. Can I still use targeted recruitment campaigns?

Limiting recruitment campaigns to say ‘graduates’ either in advertisements or to the university ‘milk rounds’ may constitute indirect discrimination on grounds of age as it severely restricts the chances of someone over, let’s say 25 years, applying for your vacancies. Organisations which state that they do not have an upper age limit on graduate recruitment and take steps to advertise their vacancies outside the ‘milk’ round will be in a stronger situation.

You should aim to make any recruitment process as age neutral as possible; i.e. ensure that language used in recruitment advertisements and documentation doesn’t imply that you are seeking people of a particular age.

## Other Issues

### 14. Do we have to carry out monitoring on grounds of age?

The Regulations do not impose a duty on employers to monitor the ages of job applicants and employees. However all employers should have an equal opportunities policy incorporating their commitment to monitoring and review of all statutory equality grounds including age. By monitoring the ages of your employees and establishing an age profile of the workforce you will be able to plan for retirement peaks, take positive action to rectify any age imbalances in your workforce, and check that all employees are gaining access to training and other facilities.

Regarding the monitoring of applicants this will allow employers to check that their recruitment procedures, particularly selection criteria, are not adversely affecting any age group. For further information on the monitoring process please refer to the “Good Practice Guidance” in Chapter 5 of this Guide or contact the Equality Commission.

### 15. Retirement: Has the government set a retirement age?

When they were initially passed, the Age Regulations introduced a National Default Retirement Age (“NDRA”) of 65 years and a set of special retirement procedures (i.e. “the duty to consider working beyond retirement” procedures) that, when properly followed, protected employers from claims of age discrimination and unfair dismissal if they dismissed employees aged 65 years or over on grounds of age. In effect, employers did not have to justify the decisions they made to retire on grounds of age employees who were at or over that age.

However, those provisions were repealed in April 2011. The implications of this change for employers are explained in more detail in Chapter 4 of this guide.

### 16. What is objective justification?

Employers may treat people differently on the grounds of their age if they have an objective justification.

The test of objective justification means employers will have to show that what it has done is a proportionate means of achieving a legitimate aim. Some examples of a legitimate aim may include training requirements of the job, reasonable period of employment

show that the aim is valid and ultimately up to the tribunals to decide what constitutes a legitimate aim. For further information, see Chapter 3: “Exceptions & exemptions”.

### **17. Our employees’ pay and benefits vary according to their length of service. Can we still continue with this policy?**

Any benefit that accrues when length of service is ‘5 years or less’ will be exempt and can continue. For benefits that accrue when length of service exceeds 5 years, employers have to show that it reasonably appears to them that it fulfils a business need to award the benefit on the basis of the relevant length of service criterion. A “business need” may include encouraging the loyalty or motivation, or rewarding the experience, of some or all employees.

### **18. Do the Regulations affect the National Minimum Wage?**

The National Minimum Wage is specifically exempt from the scope of the Regulations. Employers can continue to use exactly the same age bands to pay at or above the National Minimum Wage rates.

### **19. Are occupational pension schemes covered by the Regulations?**

As pensions are linked to age the Regulations deal with potential discrimination via a series of exemptions which allow for pension schemes to work as they do at present. The general aim is to leave private pension arrangements as little disturbed as possible.

Further information about how the Age Regulations apply to occupational pension schemes can be found in a guide on that subject published by the Office of the First and Deputy First Minister. It is available to download from the latter’s website at [www.ofmdfmi.gov.uk/ageregulations.pdf](http://www.ofmdfmi.gov.uk/ageregulations.pdf)

### **20. Can I take positive action to promote age diversity?**

Your business could benefit from employing people of different ages and the Regulations allow employers to introduce certain positive action measures to prevent or compensate for disadvantage linked to age. The only measures that can be used by employers are:

- giving access to training facilities to people of a particular age or age group to help fit them for particular work; and,
- aimed at encouraging persons of a particular age (or age group) to take advantage of opportunities for doing particular work.

In most cases the employer must show that the action is aimed at addressing a specific disadvantage experienced by people of a certain age. It is also recommended that any employer considering undertaking positive action measures should discuss this with the Equality Commission to ensure the proposed action is appropriate.

**Equality Commission**

**FOR NORTHERN IRELAND**

# How can we help?

The Equality Commission for Northern Ireland can give advice and information on the Employment Equality (Age) Regulations (Northern Ireland) 2006. Information is also available on our website.

For further information, please contact us at:

Equality Commission for Northern Ireland  
Equality House  
7-9 Shaftesbury Square  
Belfast  
BT2 7DP

Enquiry line: 029 90 890 888 (General enquiries)  
Telephone: 028 90 500 600 (Switchboard)  
Textphone: 028 90 500 589  
Fax: 028 90 248 687  
Email: [information@equalityni.org](mailto:information@equalityni.org)  
Website: [www.equalityni.org](http://www.equalityni.org)