

EXPLANATORY MEMORANDUM TO
THE EMPLOYMENT EQUALITY (REPEAL OF RETIREMENT AGE
PROVISIONS) REGULATIONS 2011

2011 No. [XXXX]

1. This explanatory memorandum has been prepared by the Department for Business, Innovation and Skills and is laid before Parliament by Command of Her Majesty.

This memorandum contains information for the Joint Committee on Statutory Instruments.

2. **Purpose of the instrument**

2.1 The instrument repeals the legislation which currently permits an employer to terminate the employment of an employee who reaches age 65 without that being deemed unfair dismissal or unlawful age discrimination, provided that the employer follows a statutory notification procedure. The 2011 Regulations abolish this notification procedure as well as the current right of employees to request to work beyond age 65. The repeals are subject to transitional arrangements in relation to retirements occurring between 6 April 2011 and 30 September 2011. The instrument also repeals the notification procedure that relates to dismissals based on retirement ages below the age of 65 where that retirement age is justified as being proportionate and in pursuit of a legitimate aim. Here there is a transitional period such that notifications remain valid if given before 6 April 2011.

2.2 The 2011 Regulations introduce an exception to age discrimination legislation for group insurance benefits provided by employers for their employees (e.g. income protection, ill-health benefits and life assurance) by making it lawful for insurance providers to cease providing cover for employees at age 65 or over. The minimum age for withdrawing benefits will increase in line with increases to state pension age. Group insurance schemes fall within article 6.2 of Directive 2000/78 EC as they constitute ‘occupational social security schemes’.

3. **Matters of special interest to the Joint Committee on Statutory Instruments**

3.1 None.

4. **Legislative Context**

4.1 The Regulations are made under section 2(2) of the European Communities Act 1972 as the relevant legislative provisions relating to age discrimination in the workplace are derived from the EU Equality Directive (Directive 2000/78/EC on establishing a general framework for equal treatment in employment and occupation).

5. Territorial Extent and Application

5.1 This instrument applies to Great Britain.

6. European Convention on Human Rights

Edward Davey MP, the Minister for Employment Relations, Consumer and Postal Affairs, has made the following statement regarding Human Rights:

In my view, the provisions of the Employment Equality (Repeal of Retirement Age Provisions) Regulations 2011 are compatible with the Convention rights.

7. Policy background

7.1 The Government's Coalition Agreement stated that the default retirement age would be phased out. A commitment to do so quickly from April 2011 was made in the June 2010 Budget. Against the background of an ageing society, there are benefits to employees, who will be able to choose to work for longer if they wish; for business and the economy in general from increased labour supply; and for the State in terms of increased tax receipts.

7.2 There has been considerable public interest in the Government's decision to phase out the default retirement age with, for example, over 600 responses to the public consultation and widespread coverage in the press.

8. Consultation outcome

8.1 The Department for Business, Innovation and Skills published a consultation document jointly with the Department for Work and Pensions on 29 July 2010. The consultation closed on 21 October 2010. Over 600 responses were received: about 41 per cent from individuals, about 32 per cent from businesses and their representative organisations and the remainder from trade unions, Government agencies, charities, legal representatives and others. BIS also had the assistance of a standing stakeholder engagement group, which included employers' organisations representing both large and small employers, trade unions, interest groups and human resources bodies.

8.2 The Government's formal response to the consultation can be found at <http://www.bis.gov.uk/assets/biscore/employment-matters/docs/p/11-536-phasing-out-default-retirement-age-government-response.pdf> A small majority of

respondents were in favour of the proposal to abolish the administrative arrangements (e.g. the notification of retirement procedure) associated with the default retirement age, and there was an even split of views on whether the proposed transitional arrangements for phasing out the default retirement age were acceptable. There was a small majority who preferred a code of practice over guidance on the issue of managing without a default retirement age, but the Government has decided that guidance is the better way forward because a code of practice would not in fact offer the degree of legal certainty that its proponents believed it would; and guidance will be less prescriptive. The Government has accepted an argument of the insurance industry and others about group risk insured benefits (including medical expenses and income protection) provided by employers for their employees. The Government believes there is a serious risk of such benefits being reduced or withdrawn in the absence of the cut-off point currently provided by the DRA. The Government has recognised that this would be an undesirable unintended consequence, and the 2011 Regulations accordingly introduce an exception from age discrimination legislation which will allow group risk insured benefits to be withdrawn from employees at age 65 or over (with the minimum age increasing in line with increases to state pension age).

9. Guidance

9.1 Guidance has been published by both Acas (“The Retirement Process and the Removal of the Default Retirement Age”) and Business Link (“Managing without a Fixed Retirement Age”). In addition, BIS’s standing stakeholder engagement group includes a number of large “multiplier” organisations such as the CBI and the TUC which have advised their memberships of the new regulatory position.

10. Impact

10.1 The impact on business, charities or voluntary bodies is one of overall net benefit.

Removing the default retirement age is judged to have a net benefit to business, including wider labour supply benefits, of around £60 million a year from year 2. In year 1, there is a net cost of £15 million, but overall benefits in year 1 are estimated at £169 million, of which individuals benefit by £105m through increased earnings and the Exchequer is estimated to benefit by £79m (mainly from increased tax receipts).

10.2 The impact on the public sector is positive overall, including increased tax receipts which are expected to rise to over £120m per annum over the period covered by the impact assessment. The public sector will face transitional costs as an employer and the use of compulsory retirement is more common in the public sector (46% of establishments) than in the private sector (30%).

10.3 An Impact Assessment is attached to this memorandum and will be published alongside the Explanatory Memorandum on www.legislation.gov.uk.

11. Regulating small business

11.1 The legislation applies to small business. There is no legal basis for an exception from the legislation for small businesses.

11.2 To minimise the impact of the requirements on firms employing up to 20 people, the approach taken is to publish guidance for employers on how to manage their workforce without a default retirement age. This approach is intended to apply to employers of all sizes, including small business, and includes practical examples.

11.3 The basis for the final decision on what action to take to assist small business is the evidence in the Impact Assessment which shows that small businesses are less likely than large ones to currently use a compulsory retirement age: they are therefore less likely to be affected by the phasing out of the default retirement age. Consultation also showed that small businesses (and their representatives) were more likely to favour guidance in dealing with the removal of the DRA as opposed to a statutory code of practice, which was viewed as too prescriptive an option.

12. Monitoring & review

12.1 The Department has devised a Post-Implementation Review Plan. The phasing out of the default retirement age will be reviewed in 5 year's time in the context of the broader aims of domestic legislation prohibiting discrimination on the grounds of age. We will also undertake interim monitoring and, where appropriate, evaluation as the policy is implemented to ensure timely feedback to policymakers.

12.2 The overriding objective is to provide greater opportunities for people to participate in the labour market at 65 and beyond and to remove unnecessary costs, and especially the administrative burden on employers of the current retirement procedure. The review will examine specific impacts on employers and employees and any unintended consequences arising from the policy objective. This will include the impact on performance management systems and levels of dismissal disputes (via Employment Tribunal claims), the extent that compulsory retirement ages continue to be used (where these can be objectively justified by an employer) and other barriers restricting individuals from working longer. Other consequential effects, both positive and negative for employers and employees will be examined including the positive benefits of retaining skilled staff and changes in attitudes and perceived discrimination levels in the workplace and in the labour market.

12.3 The 2nd Survey of Employers' Policies, Practices and Preferences Relating to Age (SEPPP2) provided a baseline of employers operating with a compulsory retirement age in 2009/10 and other age-based practices. In addition, the Fair Treatment at Work Survey 2008 measured perceived discrimination in the workplace and age groups affected. Data on aspirations to work beyond the age of 65 were measured by the British Social Attitudes Survey 2008/09.

13. Contact

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