

## Abolition of the default retirement age – incentive plans and insured benefits

The UK default retirement age provisions were abolished with effect from 6 April 2011. In previous alerts on this topic, we have commented on the transitional provisions and options available to employers in the post default retirement age (DRA) world. Our recent breakfast briefing considered these issues in detail and also looked at two other areas of interest – the impact on incentive schemes and insured benefits provided by employers. These latter areas have received less public attention but, nevertheless, they raise some challenging issues for employers.

### INCENTIVE SCHEMES

It is common for plan rules governing employee share schemes and other long term incentive arrangements to allow early vesting or exercise upon retirement, although the way in which retirement is defined, or the circumstances of retirement which qualify for advantageous treatment, vary. Employers should check the terms of their retirement leaver provisions to make sure that they still operate as intended following the removal of the DRA, and any consequent changes made to employees' terms and conditions.

Where the leaver provisions allow favourable terms for those retiring on or after a particular age, this can constitute age discrimination against those who wish to retire at a younger age under the age discrimination regulations (introduced in 2006). However, if these more favourable terms can be objectively justified they will not be unlawful.

We consider below the impact of the removal of the DRA on different types of retirement provisions in incentive plans.

- **Early vesting is allowed on retiring at or after the age at which the employee is obliged to retire under their employment contract** (subject to any provisions allowing them to request to remain employed) - If the employer decides not to keep

a compulsory retirement age as a result of the abolition of the DRA, then such provisions should be amended to ensure they still have meaning.

- **Early vesting is allowed on retiring at or after an age specified in the plan rules** (commonly age 65) - This will not on the face of it need amending. However, if the employer has decided to cease to require employees to retire at that age (as a result of the abolition of the DRA), consideration should be given to whether there is still sufficient justification to continue this provision, to prevent the leaver provision being unlawful discrimination.
- **Early vesting is allowed on retiring at “normal retirement age”** or similar wording - This would not necessarily need to be changed, as this phrase would still have a meaning. However, if the employer removes its retirement age it may become more and more difficult to determine what the normal retirement age is, so it may be sensible to consider an amendment. Again, consideration should be given to whether there is still sufficient justification to prevent the leaver provision being unlawful discrimination.
- **Early vesting is allowed on retirement, but no age is specified** - This will not require amendment.

In relation to share plans which are approved by HMRC, which variously allow or require special treatment on retiring at a specified age, the following is a brief summary of the position.

- **Share Incentive Plans (SIPs)** - These have a specified retirement age – this should not need to be amended as a result of the removal of the DRA – although schemes may need to be amended if, unusually, they make separate reference to a company retirement age or the DRA.
- **SAYE share option schemes** – These are required by legislation to say that exercise is permitted:

- following retirement at (but not after) the “specified age” – this should not require amendment; and
- following retirement at any age at which the option holder is “bound to retire in accordance with the terms of the option holder’s terms of employment” – this may no longer have any meaning, but at the moment cannot be removed, as it is a requirement of the SAYE legislation. Some companies amended their SAYE schemes by including a definition of “bound to retire” which was compliant with the original default retirement age provisions. If so, it may be advisable for clarity to remove this definition.
- **Company Share Option Plans (CSOPs)** - These will usually have a specified retirement age – this should not need to be amended as a result of the removal of the DRA – although schemes may need to be amended if they make separate reference to a company retirement age or the DRA.

If a company has selected specified ages for approved plans which is above the minimum allowed by the legislation (50 for SIPs, 60 for SAYE schemes and 55 for CSOPs) there is an argument that this may increase the risks of an age discrimination claim. If the specified age was aligned with a company retirement age, and that retirement age is now abandoned, this may make it more difficult to justify having an age higher than the minimum. In these circumstances consideration could be given to reducing the specified age.

If an employer decides to amend the retirement provisions in its plan rules, care will need to be taken to ensure that the amended rules comply with UK age discrimination legislation. In addition, any approvals required by the plan rules will need to be sought – shareholder and/or award holder approval may be required, and for approved plans (CSOPs, SIPs and SAYE schemes) HMRC approval will be required.

## IMPACT ON INSURED BENEFITS

Although the DRA has been abolished, the Government has introduced an exemption in relation to an employer’s provision of insured benefits or related financial services (for example, medical insurance, life assurance and permanent health insurance).

Under this exemption, employers will be able to cease the provision of such benefits at 65. Therefore, employees above 65 would not be able to claim age discrimination if their employer does not provide these benefits to them. However, the exemption does not cover a situation where an employer provides a benefit to employees which is capped at any other age than 65. For example, if an employer provides a benefit to age 67, a 68 year old employee could bring a claim for age discrimination.

If you currently provide these benefits to employees above 65 but now want to restrict these at 65 or make other changes to the benefit, you should consider how to manage this (detrimental) change, including reviewing employee terms and conditions, and the terms of the insured benefit. We recommend obtaining advice should you want to make such a change.

If you have any questions about any of the issues raised in this legal update, please contact your normal Employment contact or:

### **Andrew Stanger**

Partner  
astanger@mayerbrown.com  
+44 20 3130 3934

### **Bernadette Daley**

Partner  
bdaley@mayerbrown.com  
+44 20 3130 3667

### **Purvis Ghani**

Associate  
pghani@mayerbrown.com  
+44 20 3130 3689

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