

# A question of timing



Solicitor  
**David  
Regan**  
offers advice

to nursery managers  
on the phasing out  
of the default  
retirement age...

**T**he question of how to deal with older members of staff, particularly those who have worked for a business for a long time, is a difficult one for managers in any business. Until recently, employers had to follow a fairly strict retirement process which penalised them for failing to comply, but which did allow them to choose to retire an employee without the employee having any say in the matter. As of 6th April 2011, however, this process began to fall away and, from 1st October 2011, it will be age discrimination to dismiss someone by reason of retirement.

## What does this mean for employers?

Notices of intended retirement can now only be issued for employees who are 65 or over (or will attain the company's default retirement age, if different from 65) on or before 30th September 2011, and the notice of intended retirement date for that employee had to have been issued no later than 5th April 2011. The notice given can be up to 12 months, so can take effect up to 5th April 2012. Employees can then make a further request to carry on working provided that this is submitted no later than 4th January 2012. If a new retirement date is set as a result of this request, it must expire no later than six months following the previous intended retirement date if it is not to be discriminatory under s.13 of the Equality Act 2010 (although the defence of objective justification will still apply).

## Alternatives to the default retirement age

**1** **Speak to the employee 'off the record'**  
Whilst this option is tempting, trying to speak with an employee 'off the record' is fraught with difficulty. In brief, simply saying "This conversation is 'off the record', or 'without prejudice', does not mean that the employee cannot use the conversation against the employer. Therefore, an employee

could argue that these discussions are an attempt to force them out on the grounds of their age, and consequently sue for age discrimination.

## 2 **Speak to the employee 'on the record'**

The best time to do this is during annual appraisals, or at regular meetings. Indeed, it may make sense for employers to discuss future plans with all employees at appraisal time, as this will give the employer a better idea of who is looking for advancement, who is happy within their role, who is considering retiring, and plan accordingly.

## 3 **Keep a close eye on performance**

Many employers are concerned that the change in law means that they will be stuck with staff members who cannot perform and who cannot be retired. This is not the case. In fact, under the new law, employers will have to keep a closer eye on who is performing well, and manage all employees' performance equally, regardless of age or length of service.

## 4 **Set a corporate 'normal retiring age'**

Contrary to popular belief, employers will still be able to set a 'normal retiring age' for employees. Although this will be age discrimination, this will be justifiable if the decision can be shown to be a proportionate means of achieving a legitimate aim (e.g. enabling retention of younger employees, ensuring continued competence and having an age-balanced workforce).

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## Changes to retirement

The key changes to the law on retirement are as follows:

- Notices of intended retirement date can no longer be issued, as of 6th April 2011.
- The default retirement age was abolished with effect from 6th April 2011, although compulsory retirement will still be permitted in certain circumstances until 5th April 2012.
- Employees will be able to request to carry on working using the current statutory procedure until 4th January 2012.
- Any extensions as a result of such requests must be less than six months and therefore must expire on 5th October 2012 at the latest.

