

AVOIDING AGE DISCRIMINATION IN JOB ADVERTS AND RECRUITMENT

**- what employers, recruitment
consultancies and advertising
agencies need to know**

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One of the most influential pieces of legislation introduced in 30 years - the Employment Equality (Age) Regulations 2006 - come into force on 1 October 2006.

What protection will they offer?

They provide employees, applicants, contract and agency workers, business partners and others with protection against discrimination, harassment and victimisation, either on the basis of their actual age, or the age they appear to be. The regulations provide similar protection to the other discrimination laws, including uncapped financial damages. But they also have a number of features that employers and agencies will not have experienced previously.

What's new about the age laws specifically?

1. Objective justification by employers

The new regulations allow employers to “objectively justify” age discrimination. They will be able to defend claims on the basis that the discrimination was a proportionate method of achieving a legitimate business purpose. It remains to be seen how this will be interpreted by employment tribunals, but certainly a relatively high standard of “objective justification” will be required.

2. Recruitment consultancies

All employers, including recruitment consultants, will be covered by the regulations. But there are also specific rules relating to “employment agencies” that are likely to apply to recruitment consultancies. These make it unlawful for agencies to discriminate against jobseekers on the grounds of age:

- (a) in the terms on which the agency offers to provide any of its services;
- (b) by refusing or deliberately not providing any of its services; or
- (c) in the way it provides any of its services.

This gives jobseekers a stand-alone right to bring a claim against an agency where they can show the agency has discriminated against them – for example, by turning them away or by not including them in their shortlisting of candidates for employers on the grounds of their age.

The age regulations create a “double jeopardy” for recruitment consultancies. Not only can agencies be the subject of claims on their own account, they will also be held liable if they discriminate on the instructions of a client.

For example, if a secretarial recruitment consultancy were asked by a client to provide an older secretary to give gravitas to a secretarial pool made up of younger secretaries, this would almost certainly be considered discriminatory.

Equally, a request for a younger secretary who might suit the image of the particular client would also be discriminatory. A recruitment consultancy that recruited on the basis of these instructions would almost certainly be held liable for damages.

The only way an agency can avoid liability where it has acted on a client's discriminatory instructions is to show that:

- (a) it relied on a statement made by its client that the client was lawfully entitled to refuse employment on an ostensibly discriminatory basis; and
- (b) it was reasonable for the agency to rely on that statement.

Employment tribunals will decide what is “reasonable” in these circumstances. They are likely to apply a relatively stringent test, which may involve agencies having to test the reasons given by a client – something that may be difficult in practice. Also, this defence only applies to offers of employment, not the terms of the engagement.

3. Clients

Agencies are likely to face additional interference from their clients in the way they operate their businesses. Clients will be strictly liable for any acts of discrimination by the employment agencies they use. This is going to cause great concern, and it's likely that employers will want to shift some of the compliance burden on to agencies.

This could manifest itself in two ways. Employers may want to:

(a) see what policies agencies have in place to prevent discrimination (ie, equal opportunities, retirement policies, etc); and

(b) insert contractual provisions in the terms of business they have with agencies that prohibit absolutely any discrimination by the agency in the selection of candidates. Clients can then seek recompense from their recruitment consultancy if a candidate sues them.

4. Recruitment advertising agencies

It would appear at first glance that advertising agencies, unlike employment agencies, will not be liable for discriminatory recruitment adverts under the age regulations. However, advertisers may be liable as an agent of the employer.

An employer is strictly liable for any discriminatory acts of its agent, irrespective of whether the employer has taken steps to prevent the agency from discriminating. So, as with recruitment agencies, clients may seek contractual indemnities from their advertising agencies in relation to any age discrimination by the agencies when performing their obligations for those clients.

With this in mind, it would be sensible for advertising agencies to highlight any concerns they have over words or images in clients' campaigns that might be age-specific, or that convey an age ideal. Where issues arise, agencies should enter into a dialogue with clients to find out what the client is seeking to achieve, and whether the business requirement for a particular style of advert could be objectively justified. If necessary, agencies should take legal advice.

In the future, advertising campaigns may need to be checked for age discrimination compliance in the same way that newspapers have their articles libel-read for potential liability. In the meantime, agencies need to be careful about their use of words such as "young", "energetic", "mature" or "dynamic", or giving age-specific messages.

Recruitment checklist

Businesses should look at the following areas:-

Advertisements	Agencies should check the recruitment literature they use for themselves and clients. Check the terms of job advertisements, job descriptions and person specifications, specifically for language that could be construed as age-related. For example, avoid specifying a minimum or maximum length of experience where this cannot be argued as strictly necessary.
Pictures	Consider whether any pictures used create an image that would exclude or alienate certain age groups.
Client/agency Instructions	Check written communications to ensure they do not convey discriminatory instructions. Agencies that receive instructions from a client that could be discriminatory should obtain the client's justification for the instruction in writing, and follow up with further questions if the explanation is not compelling.
Qualifications	Check whether qualifications specified in job adverts or person specifications disadvantage any particular age group and, if so, consider alternative ways of asking for that experience.
Application forms	Requests for dates of birth, or current age, should be removed from application forms and included in separate equality/diversity monitoring forms. Requesting details of education or employment may lead to assumptions based on age, so recruiters should consider whether they are really necessary.
Photos	Does the client or recruitment agency require photos with completed applications forms? If so, consider what purpose these serve and whether their use is objectively justifiable.

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