

**Age Discrimination Guidance to Partnerships and LLPs**  
**Michael Archer, October 2006**

**Introduction**

This note concerns the Employment Equality (Age) Regulations 2006 (the “Regulations”) which came into force on 1 October 2006 and received a great deal of publicity in the press, but this mainly limited itself to the position of Employers and their Employees. What may not have been appreciated by professional firms who are practising as Partnerships or LLPs is that the Regulations affect Partners and Members too.

**How does age discrimination affect partnerships and LLPs?**

The most obvious area is in relation to the retirement date. Often Partnership Agreements have a compulsory retirement date but now there is the potential for Partners to say that they do not want to retire, but wish to stay on. This, and other provisions commonly found within Partnership/LLP Agreements, will need to be justified or they will not be enforced and if they are enforced against a Partner who objects, the firm may find itself subject to a discrimination claim brought by the disgruntled Partner in an Employment Tribunal for compensation or reinstatement.

Many firms that we have spoken to already have greeted such a prospect with outrage, particularly as these provisions may well have been in Partnership Agreements signed by Partners for decades and from which they have benefited in the past when earlier Partners had been asked to retire. Appropriate objections were made during the consultation stage but the Government did not heed them.

As members of The Association of Partnership Practitioners, a select group of professional advisers to partnerships, we have been monitoring the progress of the consultation and the Regulations but now that the Regulations have come into force, Partnerships need to prepare their response to them. Many of our colleagues advising professional practices are suggesting radical changes – a complete pruning of Partnership/LLP Agreements, changing long-standing partnership arrangements and “ethos”, throwing out traditional “lock-step” profit share arrangements, introducing firm-wide Partners’ performance appraisals, reviewing succession plans and Partner recruitment.

It is fair to say that the larger the firm, the more likely it is that the regulations will affect the firm. But for smaller firms, making such radical changes will put at risk something more important about the firm – partnership cohesion.

We believe that the partnership relationship is different from that of Employer and Employee and that the tribunal considering a potential discrimination claim should be more willing to accept the arguments for justification of a potentially discriminatory contractual provision or practice. We cannot, of course, be certain about this because we will need to wait until decisions have been made by the Employment Tribunal which give more clues as to how these issues will be applied in the partnership context.

However, there is one message that we believe needs to be made very clearly. That is that firms may believe that they can justify any potentially discriminatory provision in their Partnership/LLP agreement when the time comes, but such an approach is likely to lack credibility unless the Partners have had an opportunity to consider what the reasons were for having the provision in their Partnership agreement which was potentially discriminatory. Firms, therefore, need to prepare themselves now by discussing, agreeing and recording the justification arguments that they will want to raise later, should an issue be made, so as to convince a tribunal that the firm has a defence. We would then suggest that this is formalised in an “Age Equality Policy” document which addresses the reasons for each of the potentially discriminatory provisions found within the firm’s Partnership/LLP agreement.

Provisions affected may include the following:

- A provision requiring a Partner to reduce their profit share or retire at/or after passing a given age.
- A provision entitling a Partner to receive greater benefits from the firm after a given period of continuous service. E.g., sabbaticals, goodwill payments, voting rights etc.
- A provision requiring profit shares to be determined by the length of time served, such as where the profit share ratios reach a maximum share only after serving minimum qualification period.
- A provision requiring any individual within the firm to serve a minimum period of time before being appointed a Partner.

### **What grounds might provide justification?**

Firms will need to show the provision in question is a “Proportionate means of achieving a legitimate aim”. There are therefore two elements to this. One is the “legitimate aim”. The tribunal would not seek to question the merits of the business reasons for including the provision in the Partnership/LLP agreement. Succession planning is likely to be frequently cited as one reason. Firms will need to say what that succession plan entails. If it is simply (to choose a far-fetched example) to replace older Partners with younger Partners so as to give a younger “feel” to the firm, this is not likely to be a legitimate aim. This is where you are likely to need some legal assistance to guide your deliberations.

There is also the element of “proportionality”. This issue involves a weighing-up of the affect on the Partner and the affect on the firm of having, or not having, the provision, custom or practice in question. This involves firms having to demonstrate that they have considered alternatives.

The regulations deal specifically with Partnerships (under regulation 17) and a number of the provisions affecting employees are not applicable to Partners. For example, a firm could not just choose a much later retirement date. The Regulations make clear that no retirement date can be specified for a Partner without it being at risk of being discriminatory.

Our advice to most firms that already have a retirement date in their Partnership Agreement is that they should not remove it altogether (assuming there was a good reason for including it in the agreement in the first place) because otherwise, if the firm felt that it was in the firm’s interest that a Partner retired, they would have to use their right of expulsion in the Agreement (assuming that such a right existed) and it would be more difficult to justify the use of expulsion for reasons of succession planning.

However, discrimination may affect Partners whatever their age and indeed, it may be the case that one provision favouring a younger Partner discriminates against an older Partner, and vice versa.

Finally, those firms who had Partners who have retired and become Consultants will need to note that the Regulations also affect Consultants where they have entered into an individual Agreement for personal service. Here again, any compulsory retirement age (whatever age, unless the Consultant is an employee) is potentially discriminatory unless it can be objectively justified.

### **How can Beale and Company help you?**

We can help in the following ways:

- Reviewing Partnership and LLP Agreements and other Partnership arrangements and customs to identify the potentially discriminatory issues.

- Assisting you with the preparation of your Partners Meeting Agenda in order that Partners can discuss and agree the justification for any potentially discriminatory provisions and drafting the equality policy that results from this.
- We can also guide your deliberations by attending your Partners meeting, if so desired.

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