



THE IMPACT OF THE AGE REGULATIONS ON
PENSION SCHEMES

Guidance on Employment Equality (Age) Regulations
2006 and their impact on occupational and personal
pension schemes

December 2006

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and their impact on occupational and personal pension schemes**

DTI/DWP December 2006

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The content of this document is designed to provide general information only. Whilst every effort has been made to ensure that the information provided is accurate, it does not constitute legal or other professional advice.

1. Introduction

This guide is intended to assist those who must apply the Employment Equality (Age) Regulations 2006¹ to pension schemes after 1 December 2006. This guide will be of relevance to employers and trustees or managers of pension schemes, as well as to members and prospective members of schemes.

The requirements in the Regulations that apply to other aspects of age discrimination in employment and vocational training came into force on 1 October 2006.

These Regulations implement in Great Britain the age strand of Directive 2000/78/EC (establishing a general framework for equal treatment in employment and vocational training). This Directive requires the Government to put in place laws prohibiting age discrimination in the workplace. The new requirements make it unlawful for pension schemes to discriminate against members or prospective members of a pension scheme. However, the Government recognises that many age related rules and practices are necessary for the proper operation of pension schemes. The Regulations, therefore, effectively exempt many age related rules practices, actions or decisions in relation to pension schemes.

The existence of an exemption in Schedule 2 to the Age Regulations does not necessarily mean the rule, practice, action or decision would, but for the exemption, be unlawful. However for those rules, practices, actions or decisions that discriminate on the basis of age and are not specifically exempted, employers, trustees or managers of schemes must consider whether they can objectively justify their ongoing use.

This guide explains how pension schemes may be affected by the Regulations, and provides examples of how schemes can make use of the exemptions. Case studies illustrate the impact of the Regulations on a range of pension schemes. This guide also suggests actions employers and trustees or managers should be taking to ensure they are compliant with the Regulations. All defined terms used throughout the guide are explained in the Glossary in Appendix 1.

For further information on how the Regulations affect employers in general, please refer to the Acas guidance (details in Appendix 2).²

¹ S.I. 2006/1031 as amended by as amended by the Employment Equality (Age) (Amendment) Regulations 2006 (S.I. 2006/2408) and the Employment Equality (Age) (Amendment No.2) Regulations 2006 (S.I. 2006/2931). See www.opsi.gov.uk.

² See www.acas.org.uk.

2. Summary of key aspects of the Regulations

From 1 December 2006:

- it is unlawful for trustees or managers of occupational pension schemes to discriminate against members or prospective members of a scheme on the basis of age where members are in the same circumstances or their circumstances are not materially different;
- it is unlawful for employers to discriminate (in relation to provision of pensions via an occupational pension scheme or making contributions to a personal pension scheme) on the basis of age (note that it has been unlawful for employers to discriminate in relation to all other matters from 1 October 2006);
- discrimination (direct or indirect) will only be lawful if one of the specific exemptions applies or if it can be "objectively justified". Objective justification and direct and indirect discrimination are explained in chapter 3. Specific exemptions are explained in chapter 6;
- pension benefits which accrued in relation to service prior to 1 December 2006 and benefit payable prior to 1 December 2006 will not be affected by the Regulations³;
- trustees or managers of occupational pension schemes will be obliged to disapply any discriminatory rules under their scheme and are also given power to amend any scheme rules which allow unlawful discrimination;
- workers⁴ who suffer unlawful discrimination on grounds of age in relation to pensions can bring a claim to an Employment Tribunal, or before the Pensions Ombudsman, against the trustees/managers and/or employer.

³ See regulation 11.

⁴ See Glossary for definition.

3 Main features of the Regulations in relation to pension schemes

This chapter explains direct and indirect discrimination and objective justification. It also explains which aspects of pension arrangements are covered by the Regulations and who is protected by them whom they protect.

Summary of key messages covered in this chapter

- Direct discrimination occurs when the trustees/managers or an employer treat a worker less favourably than other workers on the grounds of age and where workers circumstances are the same or not materially different.
- Indirect discrimination occurs when a rule, practice, action or decision which is apparently age-neutral is in fact disadvantaging workers of a particular age.
- Direct or indirect discrimination is allowed if it:
 - is covered by a specific exemption contained in Schedule 2 to the Regulations ; or
 - is "objectively justified" i.e. if it pursues a "legitimate aim" and is a "proportionate" means of achieving that aim.
- All aspects of occupational pension schemes are covered by the requirement not to discriminate unlawfully on the grounds of age.
- Only employer contributions to personal pension schemes (including access to employer contributions) are covered by the requirement not to discriminate unlawfully on grounds of age.
- Specific exemptions cover many pension practices, meaning that these practices do not need to be objectively justified.

Direct and indirect discrimination

Discrimination on the grounds of age can be direct or indirect. Direct discrimination⁵ occurs when the trustees/managers or an employer treat a worker less favourably than other workers on the grounds of age. Indirect discrimination⁶ occurs when a rule, practice, action or decision which is apparently age-neutral in fact disadvantages workers of a particular age. Discrimination will be unlawful if it is not covered by an exemption or not objectively justified.

Choosing a comparator

If a worker claims he has suffered from age discrimination, he will need to show that he has been treated worse than another worker who is in the same position as him except for age. If no such actual worker exists, the claimant can compare himself with a "hypothetical" comparator.

⁵ See Regulation 3(1)(a).

⁶ See regulation 3(1)(b).

Examples of the difference between direct and indirect discrimination

Direct discrimination The rules of a company's occupational pension scheme only offers death benefits to workers over 45. The circumstances of workers over 45 are the same as for those under 45. There is no specific exemption for this and will need to be objectively justified if it is continued. If it cannot be justified then it will be unlawful discrimination.

Indirect discrimination The rules of a company's occupational pension scheme only allow workers to join if their pensionable pay is more than £300 per week⁷. Within the company there are significantly fewer workers under the age of 40 with pensionable pay over £300 than workers over the age of 40 whose pay is above the threshold (where the relevant circumstances are the same or not materially different). There is no specific exemption for this, and this will need to be objectively justified, if this rule continues it amounts to unlawful indirect discrimination, as it results in workers under age 40 being treated worse than workers over age 40 who are in the same circumstances.

"Objective justification" test

The Directive allows direct or indirect discrimination if it is "objectively justified" i.e. if it pursues a "legitimate aim" and is a "proportionate" means of achieving that aim.⁸

Legitimate aims might include business needs, efficiency, reducing staff turnover or providing promotion opportunities to retain good people.

To be "proportionate", there must be a balance between the discriminatory effect of a measure and the importance of the aim being pursued. A measure may not be proportionate if an alternative exists that achieves the same aim as effectively but is less discriminatory.

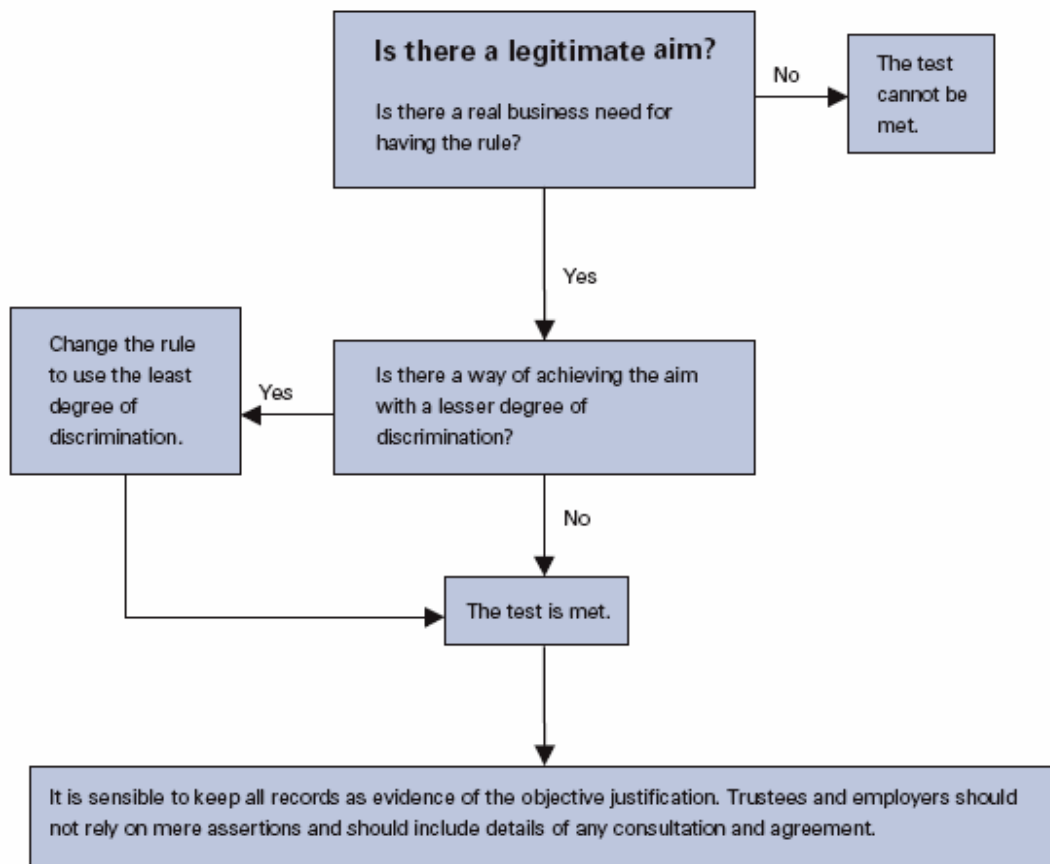
How can the test be met?

Decisions will have to be made on a case by case basis. The following flowchart sets out a process to follow when considering objective justification. For further information on this test, please refer to the Acas guidance (details contained in Appendix 2).

⁷ Note there is an exemption for state scheme integration see paragraph 7(b)

⁸ See Regulation 3(1).

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The exemptions

Schedule 2 to the Regulations includes exemptions for a wide range of age-related rules, practices, actions and decisions in relation to occupational pension schemes and employer contributions to personal pension schemes. The Government considers these to be justified at a national level. If a rule, practice, action or decision is covered by an exemption, there is no need for it to be objectively justified. Where a rule, practice, action or decision is not covered by an exemption, employers can seek to objectively justify it in relation to their particular circumstances. The exemptions are explained in Chapter 6.

Who and what do the Regulations cover?

Occupational pension schemes

The Directive applies to pay and terms and conditions of employment. The Regulations cover all aspects of occupational pension schemes in so far as they apply to benefits accrued after 1 December 2006 by active, deferred and pensioner members. The Directive applies to all types of schemes for example:

- defined benefit arrangements;
- defined contribution arrangements;
- hybrid schemes;
- those stakeholder schemes which are categorised as occupational pension schemes;
- occupational pension schemes which are either registered or unregistered⁹ under HM Revenue & Customs legislation.¹⁰

Personal pension schemes

The Regulations and the Directive apply only to an employer's contributions to personal pension schemes which are made in respect of workers. This includes group personal pension schemes and stakeholder pension schemes which are categorised as a personal pension scheme.

Partnerships

How the Regulations apply will depend on the pension arrangement in place for partners:

- If partners make their own voluntary contributions to a personal pension, then this is not covered by the Regulations.
- If partners are required to pay a certain amount of their profits into a pension arrangement (which is not an "occupational pension scheme" for the purpose of the Regulations) and if the arrangements are age-based, the Regulations apply from 1 October 2006 and the arrangements need to be objectively justified from that date.
- If a partnership allows partners to join an occupational pension scheme set up for its employees, the Regulations apply to the partnership (in relation to partners who are not employees) from 1 October 2006. However, the scheme's trustees or managers can from 1 December 2006 make use of the exemptions for occupational pension schemes in relation to partners as well as employees.
- If a partnership makes payments to retired partners (usually such arrangements are referred to as "partnership annuities") any age-related practices need to be objectively justified by the partnership from 1 October 2006. The specific pension exemptions under the Regulations are not available to the partnership unless the arrangement is an occupational pension scheme for the purposes of the Regulations.

⁹ See Glossary for definition of registered and unregistered pension schemes.

¹⁰ See Finance Act 2004.

Other excluded matters

The following are examples of matters which are not covered by the Directive and which are therefore unaffected by the Regulations:

- state pensions;
- national insurance rebates awarded to contracted-out schemes;
- pension sharing arrangements on divorce;
- annuities purchased from insurance companies.

4 Powers of trustees and managers

This chapter explains the "non-discrimination" rule and the powers of trustees or managers to amend discriminatory scheme rules.

Summary of key messages covered in this chapter

- Occupational pension schemes will be treated as including a "non-discrimination" rule, which means that discriminatory rules under the scheme will automatically be disapplied.
- Trustees or managers will have the power (subject to employer consent in some cases) to change any age related rules to ensure they are compliant with the non-discrimination rule.
- Consultation is not required if changes are to comply with statutory requirements.

Non-discrimination rule

The Regulations treat occupational pension schemes as if they include a "non-discrimination" rule.¹¹ This rule requires trustees or managers to refrain from an act which is unlawful under regulation 11. After 1 December 2006 and prior to the amendment of the scheme rules benefits must be levelled up if that is the only way in which trustees or managers can give effect to regulation 11 without infringing the rules of the scheme.

Trustees or managers are also given the power to amend any rules of the scheme to ensure they comply with the non-discrimination rule.¹² Where changes to the scheme would require the employer's consent if made under the rules, the trustees or managers must ensure consent is obtained before using the amendment power under the Regulations.¹³

Discriminatory rules

If trustees or managers conclude that a rule is discriminatory in relation to members whose circumstances are materially the same (or their circumstances are not materially different) they must consider whether the rule is covered by any exemption. If it is not covered they have three options. They can:

- keep the rule and objectively justify it;
- amend the rule so that unlawful discrimination ceases; or
- remove the rule.

¹¹ See Schedule 2, paragraph 2(1) of the Regulations.

¹² See Schedule 2, paragraph 2(3).

¹³ See schedule 2, paragraph 2(4)(b).

Case study Trustees and the non discrimination rule

The trustees of the Maple Court Defined Benefit Pension Scheme check over their scheme rules to ensure all the age related rules and practices are covered under the exemptions. They come across a rule about a scheme benefit which is not covered under the exemptions. They do not think they can objectively justify the rule. Changing the rules under the scheme rules requires the consent of the employer.

Maple Court Company. The trustees have the following options:

Before 1 December 2006:

- if the employer consents, the trustees can use the powers under the scheme rules either to ensure that the more advantageous provision is given to the disadvantaged age group (i.e. "levelling up") or by equalising any benefits downwards (i.e. "levelling down"). This must be consistent with the scheme rules and any other legal obligations (e.g. subsisting rights provisions of the Pensions Act 1995 which protect rights to benefits which have already accrued¹⁴).

On or after 1 December 2006:

- if the employer consents, the trustees can use the powers under the scheme rules either to ensure that the more advantageous provision is given to the disadvantaged age group ("levelling up") or by equalising any benefits downwards ("levelling down"). This must be consistent with the scheme rules and any other legal obligations (e.g. subsisting rights provisions of the Pensions Act 1995 which protect rights to benefits which have already accrued);
- if the employer consents, the trustees can use the amendment power under the Regulations to level benefits up or down. The amendment can be backdated to any date on or after 1 December 2006, but levelling down cannot be made retrospectively i.e. it can only take place for service on and after the date the amendment comes into force¹⁵;
- the trustees can rely on the non-discrimination rule to override discriminatory provisions. In this case benefits relating to service on and after 1 December 2006 will be "levelled up".

If the employer does not agree to amend the scheme rules, the non-discrimination rule will automatically level up benefits accrued after 1 December 2006.

The pensions consultation regulations,¹⁶ which came into force on 6 April 2006, do not apply to changes made to the rules of schemes (be they to level up or down) to prevent unlawful age discrimination from arising.

¹⁴ See section 67 Pensions Act 1995.

¹⁵ Smith v Avdel [1995] ICR 596.

¹⁶ The Occupational and Personal Pension Schemes (Consultation by Employers and Miscellaneous Amendment) Regulations 2006 (S.I. 2006/349).

5 Claims in the Employment Tribunal and other complaints

This chapter explains how to bring a claim in the Employment Tribunal and other ways of complaining about unlawful age discrimination in relation to pensions.

Summary of key messages covered in this chapter

- Employment Tribunal complaints must be brought within three months of the act of discrimination complained about.
- Employment Tribunal claims can either be brought against the trustees/managers or the employer, depending on the circumstances.
- Complaints about an occupational pension scheme may also be made to the Pensions Ombudsman (complaints must usually be preceded by scheme's internal dispute resolution procedure). Complaints must be made within 3 years from the act of discrimination complained of.

Claims in the Employment Tribunal

Workers and pensioners can present a complaint to an Employment Tribunal if they believe they have been unlawfully discriminated against on the basis of their age. A member who leaves a scheme can also bring a complaint for any discrimination committed while he was a member or after he leaves. Complaints must be brought within three months of the act complained about ceasing to have effect. Anyone who wants to make a claim to the Employment Tribunal should not delay because they are pursuing their complaint via a different route e.g. via the internal dispute resolution procedure which applies to their occupational pension scheme or the Pensions Ombudsman.

The claim will be against the trustees if it relates to powers exercised by the trustees under the scheme rules. The employer will be treated as a party to any complaint brought against the trustees. Claims relating to conduct by the employer e.g. employer contributions to occupational or personal pension schemes, or "waiting periods" imposed by an employer before he allows workers to join an occupational pension scheme, must be brought against the employer.

What powers does an Employment Tribunal have?

Where an Employment Tribunal upholds an individual's complaint, it can make:

- a declaration of the rights of each party;
- a recommendation of how the respondent should tackle the discrimination;
- an order allowing the individual to join the scheme;
- an order allowing the individual to enjoy membership of the scheme without discrimination. Membership can be backdated to any date on or after the date on which the Regulations applied (but to receive benefits the member is likely to have to pay backdated contributions).

Orders for compensation can be made, but not in respect of complaints about membership of a scheme (except in relation to injury to feelings or where there is a failure to comply with a recommendation previously made by the Employment Tribunal).

Other ways of making a complaint

Individuals may also lodge a complaint through their occupational pension scheme's internal dispute resolution procedure. Also a dispute can be discussed with the Pensions Advisory Service. It is an independent non-profit organisation that provides free information and guidance on any aspect of occupational or personal pension schemes. It offers practical and impartial advice to any member of the public who has a problem, complaint or dispute with his occupational or personal pension arrangement. If the matter is not resolved in this way, individuals can bring a complaint in relation to the scheme to the Pensions Ombudsman¹⁷ (against either the trustees/managers or the employer).

Complaints must normally be brought to the Pensions Ombudsman within three years of the act complained of. Usually the Pensions Ombudsman will not investigate a complaint until the Pensions Advisory Service has been consulted. The Pensions Ombudsman will not consider a complaint if a claim has been made to the Employment Tribunal (unless the claim is discontinued). So, anyone wishing to make a complaint in relation to a scheme will need at the outset to weigh up the advantages and disadvantages of making a complaint to the Employment Tribunal or to the Pensions Ombudsman and will need to decide which route to take.

For further information on the procedure in Employment Tribunals¹⁸ please refer to the Acas guidance (details in Appendix 2).

¹⁷ See Appendix 2 for contact details.

¹⁸ See Appendix 2 for contact details.

6 Making use of the exemptions

This chapter explains how the exemptions for pensions in the Regulations work.

Summary of key messages covered in this chapter

- The Regulations contain specific pensions exemptions categorised in the table below.
- The exemptions at paragraphs 7 to 30 of Schedule 2 apply to occupational pension schemes and those at paragraphs 31 to 36 of Schedule 2 cover employer contributions to personal pension schemes.
- Employers and trustees or managers may also be able to make use of paragraph 3A to restrict benefits based on length of service.

How can the exemptions be used?

Employers and trustees or managers can make use of paragraph 3A in relation to a service related practice in relation to an **occupational pension scheme** and employer contributions to a **personal pension scheme**.

Employers, trustees or managers can use the exemptions in paragraphs 7 to 30 in relation to any rules, practices, actions or decisions in respect of an **occupational pension scheme**.

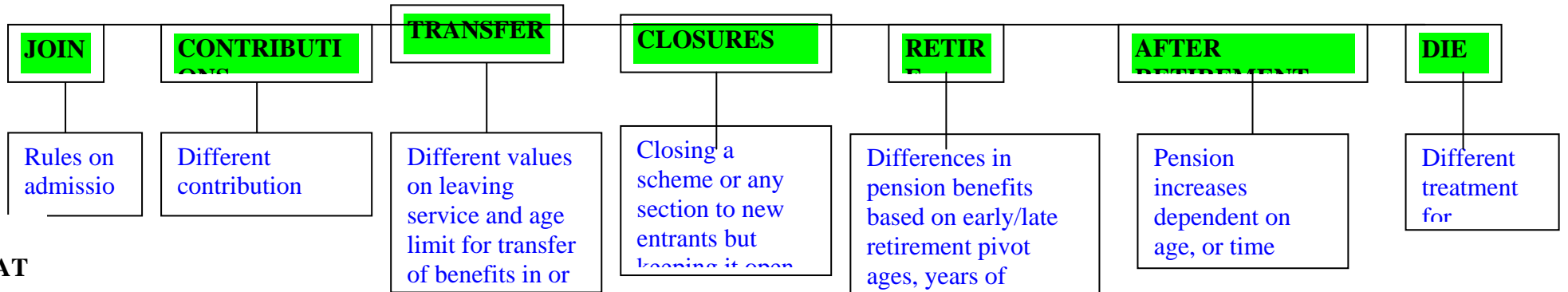
Employers can use the exemptions in paragraphs 31 to 36 in relation to any rules, practices, actions or decisions in respect of any payment of contributions to a **personal pension scheme**.

No.	Reference in Schedule 2 to Regulations	Categories of exemptions
1	Paragraph 3A	Length of service exemptions
2	Paragraph 7	Admission to schemes
3	Paragraph 8	Use of age criteria in actuarial calculations
4	Paragraph 9	Contributions - general
5	Paragraph 10	Contributions under defined contribution arrangements
6	Paragraphs 11 – 11A	Contributions under defined benefit arrangements
7	Paragraphs 12 – 18	Age related rules, practices, actions and decisions relating to benefit
8	Paragraphs 19 – 24	Other rules, practices, actions and decisions relating to benefit
9	Paragraphs 25 – 25A	Closure of schemes and sections
10	Paragraphs 26 – 29	Other rules, practices, actions and decisions
11	Paragraph 30	Registered pension schemes ¹⁹
12	Paragraphs 31 – 36	Contributions by employers to personal pension schemes

¹⁹ See Glossary for definition.

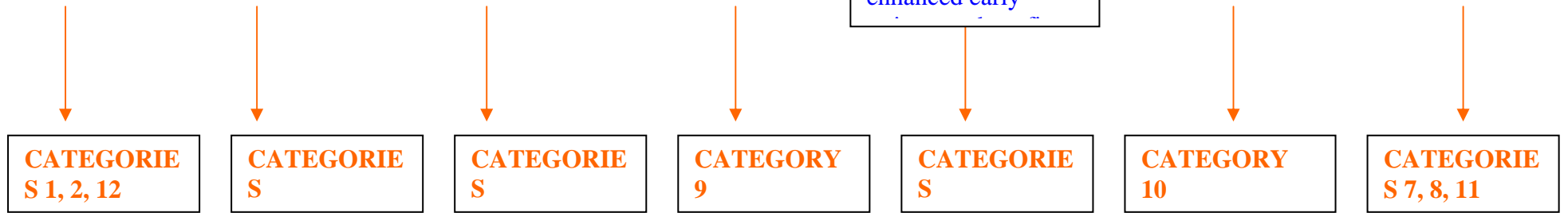
Broad overview of all exemptions

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TYPES OF DISCRIMINATION

POSSIBLE EXEMPTIONS TO LOOK AT



KEY TO EXEMPTIONS	
<u>No. Categories of exemptions</u>	<u>Regulations</u>
2. Admission to schemes	Paragraph 7
3. Use of age criteria in actuarial calculations	Paragraph 8
4. Contributions - general	Paragraph 9
5. Contributions under money purchase arrangements	Paragraph 10
6. Contributions under defined benefits arrangements	Paragraph 11 and 11A
7. Age related rules, practices, actions and decisions relating to benefit	Paragraphs 12 - 18
8. Other rules, practices, actions and decisions relating to benefit	Paragraph 19 - 24
9. Closure of schemes and sections	Paragraph 25 and 25
10. Other rules, practices, actions and decisions	Paragraph 26 - 29
11. Registered pension schemes	Paragraph 30

Examples under each exemption

Please bear in mind, not all instances of when an exemption will apply have been included in the following examples.

1. Benefits based on length of service

Reference in Regulations	What are the exemptions under this category?	Practical examples of how to make use of these exemptions
Paragraph 3A(1)	<ul style="list-style-type: none"> • Allowing workers with different lengths of service with an employer to be admitted to an occupational pension scheme after a certain period of employment. • Allowing members with different lengths of service with an employer to accrue different benefits or to be eligible for different benefits. • Payment of different contributions by an employer to a defined contribution occupational pension scheme or a personal pension scheme, where the contributions are paid in respect of members with different lengths of service with the employer. 	<ul style="list-style-type: none"> • An employer or the trustees or managers allow employees to join their scheme after 2 years employment. An individual who has been employed for 3 years has been a member of the scheme for 1 year while a member who has been employed for 4 years has been a member of the scheme for 2 years. Under the Regulations this practice can continue. • A scheme has a 2 year waiting period before employees may become members. After 2 years' pensionable service, members of the scheme become eligible for death in service benefits. As an individual who joins the scheme when he first becomes eligible will be entitled to death in service benefits after 4 years' service with the employer, the trustees or managers may rely on the exemption in paragraph 3A. • An employer or the trustees or managers allow employees to accrue defined contribution benefits on joining the scheme and allow accrual of defined benefit benefits after 3 years service with the employer. An individual with 2 years service with the employer accrues defined contribution benefits while an individual with 4 years service with the employer accrues defined benefit benefits. Under the Regulations this practice can continue. • An employer pays contributions to a defined contribution occupational pension scheme after 2 years employment. An individual has been in employment for 3 years so the employer has paid contributions

		<p>in respect of him for 1 year. Another individual has been in employment for 4 years so the employer has paid contributions in respect of him for 2 years. Under the Regulations this practice can continue.</p>
<p>Paragraph 3A(2)</p>	<p>Benefits based on having service which exceeds 5 years. This must fulfil a business need of the employer, for example:</p> <ul style="list-style-type: none"> • by encouraging loyalty or motivation of some or all worker, or • by rewarding experience of some or all workers. <p>Where the trustees or managers are responsible for the difference in treatment (e.g. by applying a scheme rule) which results from the way in which a length of service criterion works, they must ensure that it can be justified. It is up to the employer to provide them with justification but the trustees or managers must ask for confirmation. Once they do so they can rely on the confirmation. The employer must respond to any such request within a reasonable time.</p> <p>Where an employer is responsible for any difference in treatment which results from the way in which a length of service criterion works he must ensure that the difference can be justified on the basis that it reasonably appears to him that it fulfils a business need of his undertaking (for example by encouraging the loyalty or motivation, or rewarding the experience of some or all of his workers).</p>	<ul style="list-style-type: none"> • An employer or the trustees or managers allow workers to join a defined benefit arrangement after 5 years employment. An individual with 7 years service with an employer has been a member of his defined benefit arrangement for 2 years while an individual with 8 years service has been a member for 3 years. Under the Regulations this practice can continue provided the employer shows it fulfils a business need. • An employer pays contributions of 2% to a defined contribution occupational pension scheme after 2 years employment and 6% after 5 years employment. An individual has been employed for 8 years and has had the benefit of the higher contribution rate for 3 years while another individual has been employed for 9 years and has had the benefit of the higher contribution rate for 4 years. Under the Regulations this practice can continue provided the employer shows that it fulfils a business need.

2. Admission to schemes

Reference in Regulations	What are the exemptions under this category?	Practical examples of how to make use of these exemptions
Paragraph 7(a)	Setting a minimum or a maximum age for admission to a scheme, including setting different ages for different groups or categories of worker.	A company operates a defined benefit arrangement which only allows workers to join provided they are at least age 35 and not older than age 60. It also operates a defined contribution scheme which has no admission age. Under the Regulations these practices can continue.
Paragraph 7(b)	Setting a minimum level of pensionable pay for admission to a scheme. Workers who earn less than certain amounts can be refused admission to a scheme provided that the minimum amount of earnings does not exceed 1.5 times the LEL or another amount calculated to more or less reflect the state pension (either the basic state pension or both the basic state pension and the state second pension).	A scheme only admits workers to earn more than 1.2 times LEL.

3. The use of age criteria in actuarial calculations

Reference in Regulations	What are the exemptions under this category?	Practical examples of how to make use of these exemptions
Paragraph 8	<p>The exemptions under this category are not limited to the examples given under paragraphs 8(a) – 8(c).</p> <p>Any other use of age criteria in making actuarial calculations in relation to a scheme is exempted.</p>	

Paragraph 8(a)	<p>The use of age criteria in any actuarial calculation, for example, where:</p> <ul style="list-style-type: none"> • any age related benefit is reduced because it starts before any early retirement pivot age²⁰; or • any age related benefit is enhanced because it starts after late retirement pivot age²¹. 	<p>A scheme allows members to retire from age 60 (the early retirement pivot age) on a full pension. However, there is an option for a member to retire before this age. This will be subject to an actuarial reduction of 3% for each year. The actuarial reduction is calculated according to how many years the member is from age 60. Under the Regulations this practice can continue provided that the actuary confirms that the reduction is actuarial (see paragraph 12 also).</p>
Paragraph 8(b)	Calculating member or employer contributions to a scheme.	<p>The rules of a defined contribution arrangement provide for the rate of employer contributions to differ according to the age of a member. The rate is determined by an actuary, with the aim of producing equal or more nearly equal pensions for workers of different ages with the same salary and length of service. Under the Regulations this practice can continue.</p>
Paragraph 8(c)	Calculating any age related benefit commuted in exchange for the payment of any lump sum age related benefit.	<p>A scheme uses (actuarially determined) lower conversion rates for older members when calculating by how much a pension should be reduced when a lump sum benefit is taken. Under the Regulations this practice can continue.</p>
		<p><u>Further examples:</u></p> <p>The actuarial calculation of the amount of benefits a member must surrender if they wish to exchange benefits for an additional dependant's pension. Also, the amount of additional dependant's pension a member can "buy" in exchange for a given amount of pension surrendered. Under the Regulations this practice can continue.</p> <p>Defined benefit transfer values may also be exempt if the calculation is an actuarial calculation.</p>

²⁰ See Glossary for definition.

²¹ See Glossary for definition.

4. Contributions - General

Reference in Regulations	What are the exemptions under this category?	Practical examples of how to make use of these exemptions
Paragraph 9	Differences in the rate of contributions payable by a member or the employer, where this is attributable to differences in the pensionable pay of members or different accrual rates (covered in paragraph 19A).	<p>Scheme rules can set different contribution rates for workers with different rates of pensionable pay. Scheme rules can specify pensionable pay e.g. it can be pay above LEL, pay below a particular level etc.</p> <p>Scheme rules can set different contribution rates for workers with different accrual rates (i.e. where there is targeted accrual to which paragraph 19A applies).</p>

5. Contributions under defined contribution arrangements

Reference in Regulations	What are the exemptions under this category?	Practical examples of how to make use of these exemptions
Paragraph 10(a)	<p>Age bands for employer or member contributions are exempt where the aim of the bands is that members in comparable situations will have the same resulting benefit (e.g. payable at retirement or termination of service) in respect of comparable aggregate periods of pensionable service.</p> <p>Age bands for employer or member contributions are also exempt where the aim is that the resulting benefit payable (e.g. at retirement or termination of service) to members in comparable situations will be "more nearly equal" in respect of comparable periods of pensionable service.</p>	<p>A company operates a defined contribution arrangement where the contributions payable by the employer or member are age related according to a number of age bands. Under the Regulations this practice can continue.</p> <p>There are no restrictions on the number of bands allowed within a scheme, as long as this is intended to provide an equal or more nearly equal outcome.</p> <p>The term "more nearly equal" means that the resulting benefits do not have to be exactly equal but that there can be a margin of difference between them.</p>
Paragraph 10(b)	Equal rates of member or employer contributions irrespective of the age of a member.	A scheme sets a fixed rate of employer or member contributions for all regardless of the age of members and benefits payable at retirement. Under the Regulations this practice can continue.
Paragraph 10(c)	Employers limit their contributions or member contributions by reference to a maximum level of	An employer can operate a defined contribution arrangement where the contributions payable are limited to a portion of pay capped by reference to a

	pensionable pay.	maximum level e.g. limiting the amount of pay used, when calculating a pension contribution, to for example an earnings cap calculated in a similar manner to the permitted maximum under the old tax regime (£105,600 in 2005/06). Under the Regulations this practice can continue.
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6. Contributions under defined benefit arrangements

Reference in Regulations	What are the exemptions under this category?	Practical examples of how to make use of these exemptions
Paragraph 11	<p>Different rates of member or employer contributions according to the age of members, to the extent that:</p> <ul style="list-style-type: none"> • each year of pensionable service entitles members in a comparable situation to accrue a right to defined benefit benefits based on the same fraction of pensionable pay; and • the aim in setting different rates is to reflect the increasing cost of providing defined benefit benefits in respect of members as they get older. 	<p>A company runs a defined benefit arrangement where workers contributions are based on the ages of members. Older members pay higher contributions (compared to younger members) to reflect the fact that it costs the arrangement more to provide benefits to older members. The accrual rate is the same for all ages. Under the Regulations this practice can continue.</p>
Paragraph 11A	<p>Any limitation on employer or member contributions where the limit is by reference to a maximum level of pensionable pay. This only applies to a defined benefit arrangement.</p>	<p>A member is required to pay 6% of his pensionable pay as a contribution to a defined benefit arrangement. His pensionable pay cannot exceed £105,600. Member A's salary is £115,000 so contributions will only be paid on £105,600 of his salary. Under the Regulations this practice can continue.</p>

7. Age related rules, practices, actions and decisions relating to benefit

Reference in Regulations	What are the exemptions under this category?	Practical examples of how to make use of these exemptions
Paragraph 12	<p>A minimum age for entitlement to a particular age related benefit e.g. early retirement, taking some benefits early etc. Where the minimum age is before the early retirement pivot age relevant to the</p>	<p>A member takes a particular age related benefit early. The early retirement pivot age is 63. The member can retire early from age 55 if an employer consents and he can retire early from age 60 without consent. If he retires at either 55 or 60 the benefit is actuarially reduced to reflect retirement before the early</p>

	<p>benefit in question the benefit must be actuarially reduced and cannot be enhanced (by crediting with additional pensionable service or benefits).</p> <p>A minimum age may be subject to consent of any person (e.g. trustees etc) and there can be different minimum ages for different groups or categories.</p>	<p>retirement pivot age of 63 (enhancements of the benefit cannot be made). Under the Regulations this practice can continue.</p> <p>A member could have an early retirement pivot age of 60 for the first 10 years of his pensionable service and an early retirement pivot age of 65 for the second 10 years of his pensionable service. Actuarial reductions for early payment will reflect that the age related benefits accrued in respect of each period of pensionable service have different early retirement pivot ages.</p>
Paragraph 13	<p>Note: paragraph 12 will not apply where paragraph 13 applies.</p> <p>A minimum age for payment of a particular age related benefit or a minimum age for entitlement to a particular age related benefit where on 1 December 2006 an active or prospective member is entitled to benefits at one or both of those ages.</p> <p>When the member reaches that minimum age he may take his benefit early (i.e. before the early retirement pivot age which applies to the benefit).</p> <p>Payment of benefits at a minimum age may be subject to consent of any person (e.g. trustees). Benefits paid at a minimum age can be enhanced in one or more the ways set out in paragraph 13 e.g. crediting the member with prospective pensionable service, giving generous early payment reduction factors or no early payment reduction.</p> <p>There can be different minimum ages for different groups and categories of members.</p>	<p>On 1 December 2006 a scheme allows certain active and prospective members to take enhanced early retirement from age 55 with consent and from age 60 without consent. The normal pension age is 65. When the member reaches age 55 he can take enhanced early retirement any time provided that the employer consents. The enhanced pension is calculated by treating the member as if he had remained in service until normal pension age and continued to accrue benefits to that age. When he reaches age 60 he can take enhanced early retirement as of right (and an enhanced pension will be calculated in the same way). Under the Regulations this practice can continue.</p>
Paragraph	Note: paragraph 12 will not	A group of members joins scheme B as

13A	<p>apply where paragraph 13A applies.</p> <p>The provisions in paragraph 13 may continue to apply to any member who joins a subsequent scheme following a block transfer (a transfer of one or more person's accrued rights from one scheme to another) or a TUPE transfer or where the subsequent scheme promises to provide the same early retirement benefits.</p>	<p>a result of a block transfer of their accrued rights from scheme A. A group of members join scheme B as a result of a TUPE²² transfer from scheme A. Some of the members transferred in each case were entitled to early retirement benefits which were covered by paragraph 13. Those members will be able to keep those rights even though they joined scheme B after 1 December 2006.</p> <p>A group of members join scheme B as part of a public service outsourcing arrangement and some were entitled to early retirement benefits covered by paragraph 13. Those members will be able to keep those rights provided that scheme B is willing to provide them as part of the benefits offered (although scheme B does not need to offer all other benefits offered by the previous scheme).</p> <p>Note: The exemption does not cover groups of members who join for future service where they do not transfer their past service benefits unless they have transferred to their new employer under TUPE.</p>
Paragraph 13B	<p>Note: Paragraph 12 does not apply where paragraph 13B applies.</p> <p>A minimum age for payment of a particular age related benefit or a minimum age for entitlement to a particular age related benefit when a member retires on the grounds of redundancy. A minimum age will be an age before the early retirement pivot age which applies to the particular age related benefit.</p> <p>Payment of benefits from a minimum age may be subject to consent of any person (e.g. trustees). When any benefits are paid early following redundancy they may be enhanced in one or more of the ways set out paragraph 13B e.g.</p>	<p>A scheme allows members who are dismissed by reason of redundancy to take enhanced early retirement benefits after age 55 provided the employer consents. The enhancement may be generous early payment reduction factors, no early payment reduction or the provision of additional service credits. Under the Regulations this practice can continue.</p>

²² See Glossary

	<p>crediting the member with prospective pensionable service, giving generous early payment reduction factors or no early payment reduction.</p> <p>There can be different minimum ages for different groups or categories of members.</p> <p>For the purpose of this paragraph "redundancy" means being dismissed by reason of redundancy for the purposes of the Employment Rights Act 1996.</p>	
Paragraph 14	<p>Having an early retirement pivot age or a late retirement pivot age, including setting different ages for different groups or categories of member and in particular deferred members.</p>	<p>A scheme sets ages for entitlement to retirement benefits i.e. age from which benefits are paid without actuarial reduction or with an enhancement. Under the Regulations this practice can continue.</p> <p>It will also be possible to set different ages for different groups and categories to take their benefits, e.g. an earlier age for senior executives and a later one for the rest of the workforce.</p>
Paragraph 15	<p>Note: paragraph 12 will not apply where paragraph 15 applies.</p> <p>A minimum age for all members or different groups or categories of members to be entitled on the grounds of ill health to early payment of or entitlement to a particular age related benefit. Enhancement of the benefit may be made in any of the ways set out in paragraph 15 e.g. crediting the member with prospective pensionable service, giving generous early payment reduction factors or no early payment reduction.</p> <p>Payment may be made with or without consent.</p>	<p>A scheme allows members to retire early on the grounds of ill health provided they are over 30 and the employer consents.</p> <p>The requirement to be over age 30 is permitted under the Regulations as it is the minimum age for entitlement to ill health benefits.</p> <p>Two workers in the same scheme both take ill health retirement. One is aged 52 and the other is aged 42. Both have worked for the company for the same length of time and earned the same salary. Each receives the pension that they would have received if they had worked to age 60 (i.e. they are credited with prospective years of pensionable service up to age 60). The older worker could potentially complain that he has suffered discrimination because his pension has not been "enhanced" as much as the younger worker's pension. This exemption prevents the older worker bringing such a claim.</p>

Paragraph 15A(1)	Calculation of any death benefit payable to a dependant where the benefit includes a calculation by reference to prospective service the member would have completed but for dying in service or by reference to a fixed number of years of prospective service.	Member A dies at 55 and member B dies at 59. Both of their dependants receive death benefits calculated as if the members had worked until 60 (normal pension age). A potential claim for discrimination could be made because member B's dependant would receive a smaller enhancement benefit than member A's dependant. This exemption prevents the dependant of member B bringing such a claim.
Paragraph 15A (2) and (3)	Payment of a death benefit to a dependant where the member was in receipt of a pension guaranteed for a particular period. Alternatively where the member dies on or after normal pension age but before commencement of pension and is treated as having retired immediately prior to death with entitlement to a pension guaranteed for a particular period.	Two members are in receipt of a pension which is guaranteed for 5 years. Member D dies aged 70 in the second year and member C dies age 60 in the fourth year. Member C's dependant is paid a benefit which represents the pension he would have received if he had lived for the remaining year. Member D's dependant is also paid a benefit but by reference to the remaining 3 years member D would have received a pension but for dying. Member C's dependant cannot make a claim of indirect discrimination on the basis that a smaller benefit was paid because member C was younger.
Paragraph 15A(4)	Where a member was a deferred member, payment of different death benefits to dependants depending on whether the member died before or after normal pension age.	Member E dies at age 60 (where normal pension age ²³ is 65) when he is a deferred member while member F dies at 66 when he is a deferred member. Member E's dependant gets a smaller death benefit than member F's dependant. This exemption prevents the dependant of member E bringing a claim that this is age discrimination.
Paragraph 16	Exemption for schemes which provide members with a bridging pension.	A bridging pension is paid to a male or female pensioner member during the period when he or she is not yet entitled to the state retirement pension. Under the Regulations this practice can continue.
Paragraph 17	On a member's death, the actuarial reduction of any	A scheme provides that where a widow, widower or surviving civil partner is

²³ This is normal pension age within the meaning of the Pension Schemes Act 1993. See Glossary.

	pension paid to a dependant where the dependant is more than a specified number of years younger than the member.	more than ten years younger than the member the pension paid is actuarially reduced e.g. 2% per year that the survivor is more than 10 years younger than the member. A widow, widower or surviving civil partner cannot successfully complain about this practice.
Paragraph 18	For pensioner members who have retired on ill health grounds discontinuing any life assurance cover from the normal retirement age which applied to the member. If there is no normal retirement age discontinuing any life assurance cover from age 65.	A member retires at 58 on the grounds of ill health but continues to receive life cover until his normal retirement age of 60. Under the Regulations this practice can continue.

8. Other rules, practices, actions and decisions relating to benefit

Reference in Regulations	What are the exemptions under this category?	Practical examples of how to make use of these exemptions
Paragraph 19	Any differences between benefits paid to members in comparable situations or differences in benefits paid to their survivors where the differences are attributable to their different lengths of pensionable service (but where the rate of accrual for each year of service was the same for each member).	A scheme provides a higher pension to a member with 20 years of pensionable service than to one with only 10 years service where pensions are based on accrual of e.g. 1/60 th of final salary for each year of pensionable service. Under the Regulations this practice can continue. This exemption does not cover arrangements where accrual rates increase after a certain number of years of service e.g. from 1/60 th to 1/40 th .
Paragraphs 19A and 19B	Different accrual rates for age related benefits for members in comparable situations where the aim is to provide at normal pension age a pension equal to the same fraction or multiple of pensionable pay. Different death benefits for members in comparable situations where the aim is to provide a death benefit equal to the same fraction or multiple of pensionable pay at normal pension age.	A defined benefit arrangement may have certain members who have different accrual rates, where the aim is to provide at normal pension age equal target pensions (irrespective of length of service). Different contribution rates may be required of older members as they may have less time to accrue the target pension. The target pension may be capped. Under the Regulations this practice can continue.

	<p>Such differences in accrual rates or of death benefits are permitted even though the member leaves the scheme before normal pension age or dies before that age.</p> <p>The age related benefit or death benefit can be limited by references to a fraction or multiple of pensionable pay and a minimum period of pensionable service.</p>	
Paragraph 20	<p>Differences in age related benefit or death benefits payable to or in respect of members in comparable situations where the differences are attributable to the differences in member's pensionable pay.</p>	<p>A scheme provides for members a pension equivalent to 1/60th of final pensionable salary for each complete year of pensionable service. Two members retire after 10 years pensionable service. Member A is on a final pensionable salary of £40,000 and member B is on £25,000. It will not be discriminatory for member "A" to receive a higher pension than member "B" (i.e. 10/60ths x £40,000 versus 10/60ths x £25,000).</p>
Paragraph 21	<p>Imposition of a maximum number of years of pensionable service when calculating benefits.</p> <p>Imposing a limit on benefits calculated by reference to a fraction or multiple of pensionable pay.</p>	<p>A member could cease accrual of benefits after a stated period of service. Maximum benefits could for example be limited to a maximum of 40 years pensionable service.</p> <p>A member's pension could be limited to say 2/3rds of his pensionable pay.</p>
Paragraph 22	<p>Payment of age related benefit or death benefit only where a member is entitled to short service benefit under section 71 of the Pension Schemes Act 1993.</p>	<p>A scheme will be able to continue to operate a vesting period of 2 years. (Under the Pension Schemes Act 1993 a vesting period is the period during which a member does not have a right to a deferred pension or death benefit).</p>
Paragraph 23	<p>When calculating age related benefit or death benefit to exclude certain amounts from pensionable pay for example excluding from pensionable pay an amount which does not exceed 1.5 times LEL or does not exceed an amount calculated to more or less reflect the state retirement pension (either the basic state pension or both the basic state pension and the state second pension).</p>	<p>When calculating the pension payable at retirement a scheme excludes from pensionable pay 1.2 times LEL. Under the Regulations this practice can continue.</p>

Paragraph 23A	Having a higher accrual rate for earnings over the upper earnings limit (to reflect the state second pension).	Reflecting the state second pension in a contracted-in integrated scheme. Under the Regulations this practice can continue.
Paragraph 24	Limiting benefits as a result of limiting the amount of pensionable pay used when calculating benefits. This may apply to all members or a group or category of members or those who joined or became eligible to join on, after or before a particular date.	Schemes will be able to continue to restrict benefits payable to its members by reference to a maximum level of pensionable pay specified in the scheme rules. (For example, the earnings cap ²⁴ for 2005/06 was £105,600 and for 2006/07 it will be £108,600.)

9. Closure of schemes and sections

Reference in Regulations	What are the exemptions under this category?	Practical examples of how to make use of these exemptions
Paragraph 25	Closure of a scheme, from a particular date, to workers who have not already joined the scheme.	A company can close its defined benefit arrangement to new joiners but continue to allow existing members to remain in the scheme for future accrual (or for a deferred pension). The company may decide to offer alternative pension arrangements to new joiners (but is not obliged to do so).
Paragraph 25A	Closure of a section of a scheme, from a particular date, to workers who have not already joined it.	<p>A company runs a scheme which offers benefits to some members which accrue on a defined benefit basis and to other members which accrue on a defined contribution basis.</p> <p>The defined benefit package offered to workers was amended from time to time so that workers who joined the scheme before 1989 accrued benefits on the basis of 1/30ths. Under paragraph 25A this group can be treated as a section. Workers who joined the scheme after 1989 accrued benefits based on 1/60th. Under paragraph 25A this group can be treated as a section. In 2000 the normal pension age was increased from 60 to 65 for workers who joined the scheme after that date. Under paragraph 25A this group can be treated as a section.</p> <p>The Employer has discretion to allow new members to join any of the</p>

²⁴ See Glossary for definition.

		<p>above sections but decides on 1 December 2006 to close all of the above sections so that no new members can join them. Existing members will continue to accrue benefits as before. Under the Regulations these members can continue to accrue benefits and the closure of the sections will come within the exemption in paragraph 25A.</p> <p>After 1 December 2006 the employer offers new workers defined contribution benefits under the scheme. Under the Regulations this practice can continue. A member who is accruing defined contribution benefits cannot successfully claim he should be accruing benefits on a defined benefit basis.</p>
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10. Other rules, practices, actions and decisions

Reference in Regulations	What are the exemptions under this category?	Practical examples of how to make use of these exemptions
Paragraph 26	Increases to pensions in payment made to members over age 55 but not to members below that age.	Scheme rules can provide that no annual pension increase or a lower increase will be paid to early retirees until they reach age 55.
Paragraph 27	Any difference in the rate of increase of pensions in payment for members of different ages, where the purpose is to maintain or more nearly maintain the relative value of members' pensions.	A scheme may pay a higher increase to pensioners at or above a certain age (e.g. 75) if those older pensioners have been worse affected than younger pensioners by increases in the cost of living since their retirement. Under the Regulations this practice can continue.
Paragraph 28	Any difference in the rate of increase of pensions in payment for members whose pensions have been in payment for different lengths of time, where the purpose is to maintain or more nearly maintain the relative value of members' pensions.	A scheme could decide to pay a higher pensions increase to pensioners who retired over 10 years ago than to more recent retirees. This would be in order to allow less recent retirees to catch up with the increases in the cost of living since their retirement. Under the Regulations this practice can continue.
Paragraph 29	Applying an age limit for transferring a member's accrued rights into or out of the scheme (provided that any age limit is not more than one year before normal pension age).	A scheme with a normal pension age of 65 will be able to specify in its rules that it will not allow transfers to be paid out of the scheme or accepted by the scheme after age 64. Under the Regulations this practice can continue.

11. Registered pension schemes

Reference in Regulations	What are the exemptions under this category?	Practical examples of how to make use of these exemptions
Paragraph 30	Any rule, practice, action or decision in relation to a pension scheme (which is a registered pension scheme ²⁵) in so far as is necessary to secure any tax relief or exemption or prevent any tax charge arising under the Finance Act 2004.	A scheme may provide that a pension payable to any dependant children after death of the member in service ceases at age 23. Under the Regulations, older members will not be able to complain that they are likely to be disadvantaged by this rule (i.e. if their children are less likely to be under age 23).

12 – Contributions by employers to personal pension schemes

Reference in Regulations	What are the exemptions under this category?	Practical examples of how to make use of these exemptions
Paragraph 31	<p>Age bands for employer contributions are exempt where the aim of the bands is that workers in comparable situations will have the same resulting benefit (e.g. payable at retirement or termination of service).</p> <p>Age bands for employer contributions are also exempt where the aim is that the resulting benefit payable (e.g. at retirement or termination of service) to workers in comparable situations will be “more nearly equal”. The term “more nearly equal” means that the resulting benefits do not have to be exactly equal but that there can be a margin of difference between them.</p>	This exemption for personal pension schemes (including group personal pension schemes) is intended to be the same as that for occupational pension schemes. See exemption at paragraph 10 for an example.
Paragraph 32	Any difference in the rate of employer contributions to a personal pension scheme in respect of different workers, where this is due to any differences in their pay.	A company pays employer contributions of 6% of pay to workers who earn £30,000 or more per annum and contributions of 5% to workers who earn less than £30,000 per annum. The difference in the employer contribution rate is exempted.
Paragraph 33	A limit on contributions by an employer by reference	An employer could, for example, restrict contributions to 5% of pay but up to a

²⁵ See Glossary

	to a maximum level of pay.	maximum of say £105,600.
Paragraph 34	A minimum age for commencement of payment of contributions by an employer.	An employer could, for example, only pay contributions in respect of a worker if he is over age 20.
Paragraph 35	Different minimum ages in respect of different groups or categories of workers for commencement of payment of contributions by an employer.	An employer could for example decide to only pay contributions in respect of workers in one group once they reach age 25 and pay contributions in respect of another group of workers once they reach age 30.
Paragraph 36	Equal rates of employer contributions irrespective of the age of a worker.	An employer can set a fixed rate of contributions in respect of all workers regardless of the age of the worker or benefits payable at retirement.

7 Actions to be taken

This chapter explains the actions that need to be taken in relation to the Regulations.

Summary of key messages covered in this chapter

- Employers will need to work together with the trustees or managers.
- Review the scheme documentation to identify all age-related rules and practices.
- Check all age related rules and practices against the exemptions.
- If no exemption is available, choose between objective justification, amending the provision, or removing it.

Action plan

- 1 Check what pension arrangements are in place (include registered, unregistered, GPPs, life assurance only etc)
- 2 Check to see if the schemes are covered by the Regulations
- 3 For each scheme, check for age related rules or practices and whether affected members are in the same circumstances or their circumstances are not materially different:
 - Trust Deed and Rules
 - Scheme Booklet
 - Member announcements
 - Discretionary practices
- 4 Check contracts of employment for any age related rules or practices (e.g. re membership/contributions)
- 5 Revisit for possible indirect unlawful age discrimination practice
- 6 List all such practices and test against exemptions (where applicable)
- 7 For any remaining practices, consider objective justification
- 8 Otherwise amend (or cease) the rules or practices to remove unlawful discrimination

8 Q&A and Case Studies

This chapter explains the practical implementation of the Regulations through Q&A s and case studies.

References to “paragraphs” are to paragraphs in Schedule 2 to the Regulations.

Questions and Answers

Q1. Now the default retirement age is 65, what happens if someone wants to retire and take pension below this age?

A1. A member who retires before 65 is able to draw a pension if the rules of the scheme allow this. Only registered pension schemes which allow payment after the age of 50 (increasing, subject to transitional arrangements, to 55 from 2010) will benefit from tax advantages.

Q2. The normal retirement date under my scheme is currently age 60. Do I have to change this?

A2. The term "normal retirement date" is a phrase used by most pension schemes, as it was historically used under previous Inland Revenue requirements typically

(a) to set funding levels; and

(b) to set the date when deferred pensions automatically come into payment.

While schemes may continue to use this term for the purposes suggested above, employers will need to objectively justify retiring workers before age 65.

Q3. Can I close a pension scheme to new joiners but allow existing members to continue to accrue benefits in the "closed" scheme?

A3. Yes. The exemption at paragraph 25 allows this.

Q4. What if I close one section of a scheme to new joiners but allow existing members to continue to accrue benefits in that section?

A4. There is a specific exemption for closing a section of a scheme to new joiners from a particular date. A 'section' is essentially described as any group of members who joined a scheme:

- on a particular date on the basis that particular benefits will be provided or particular contributions will be paid by an employer;
- after a particular date on the basis that particular benefits will be provided or particular contributions will be paid by an employer;
- before a particular date on the basis that particular benefits will be provided or particular contributions will be paid by an employer;
- as a result of a block transfer (transfer of more than one persons accrued rights from one scheme to another); or
- as a result of a TUPE transfer.

For example this enables a scheme with one or more closed sections offering final salary benefits to continue to offer such benefits to existing members. If the scheme also provided defined contribution benefits it could continue to offer them to existing members and new members.

For example if a scheme which currently provides final salary benefits wants to offer career averaged benefits to new joiners, it can treat the members entitled to final salary

benefits as being in one or more sections which are closed to new members. It could use the remaining part of the scheme to offer new joiners career averaged benefits.

Q5. My company's occupational pension scheme aims to provide a pension of 2/3rds of final salary to all executives who have completed 20 years service. Is this acceptable under the Regulations?

A5. There is an exemption in paragraph 19A which will, for example, permit schemes to provide a pension equal to two thirds of final salary at normal pension age. It will be possible for schemes to cap benefits and impose a minimum service requirement such as 20 years.

Q6. I am a director of a private company and am receiving income through an unsecured pension under a registered pension scheme.²⁶ I am not happy that capital cannot be paid out of this on death after age 75. Surely this must be unlawful age discrimination despite the HM Revenue & Customs requirement?

A6. No. Paragraph 30 exempts HM Revenue & Customs rules such as this.

Q7. I am a trustee of a defined contribution (DC) occupational pension scheme. The scheme invests contributions via an insurance company, whose charging structure depends on age. Is this discriminatory?

A7. Although the insurance company is not covered by the Regulations, if age-related charges are passed on to the member (e.g. because the insurer subtracts age-related charges from each member's contract), this will constitute unlawful discrimination by the trustees or managers, unless objectively justified.

Q8. Under my defined benefit arrangement, deferred members who take pensions early have their pension reduced by a different amount to those members in active service who take early retirement. Are there any issues here?

A8. It is unlikely that this will fall foul of the Regulations because the difference in treatment is based on status. If any active and deferred members are in circumstances that are the same or not materially different, any indirect discrimination will need to be objectively justified. In any case paragraph 12 exempts different minimum ages for early payment of benefits to different categories of members such as deferred members and as a result different actuarial reductions made for early payment to active and deferred members.

Q9. My company has set up group personal pension (GPP) arrangements for workers. The GPP which the company uses has an entry age of 21. Is this a problem?

A9. No. There is an exemption in paragraph 34 for commencement of payment of contributions to a personal pension scheme by an employer in respect of a worker. There is an exemption in paragraph 35 for commencement of payment of contributions at different ages for different groups or categories of workers.

Q10. Under my defined contribution (DC) occupational pension scheme and personal pension scheme, I have matched contributions for employees dependent on ages. From age 25 to age 45 there is a match of 1:1 and from age 45 there is a match of 2:1. Will this be discriminatory?

A10. This arrangement discriminates against younger workers but it may not be unlawful discrimination if it comes within an exemption. There is an exemption for member and employer age related contributions to defined contribution schemes (see paragraph 10(a)) and age related employer contributions to personal pension schemes (see paragraph 31). These exemptions only apply where the aim is to produce equal or

²⁶ Previously referred to as 'income drawdown' under the old tax regime before 6 April 2006.

“more nearly equal” benefits at retirement or leaving service for members of different ages who are otherwise in comparable situations. You should take advice as to whether the arrangement can either be covered by paragraph 10(a)/paragraph 31 or can be objectively justified.

Q11. Under the pre-April 2006 tax rules, we were not allowed to provide a pension to members who continued to work for us. From 6 April 2006, HM Revenue & Customs no longer impose this condition but our rules will continue to reflect this old requirement. Beyond 1 December 2006, can we continue requiring an individual to stop working for us before taking pension?

A11. There are no exemptions which apply to this and trustees or managers and employers should take advice as to whether their proposals as regards flexible retirement could amount to indirect age discrimination and if so whether they can be objectively justified. A pension paid while a person is in employment could be an age related benefit paid on reaching a particular age.

Q12. What happens if I have a discriminatory practice which is not eliminated by 1 December 2006?

A12. If a member brings a successful claim under the Regulations for any unlawful discriminatory practice, any award made will be on the basis of "levelled up" benefits, until such time as the trustees or managers bring into force a new scheme rule "levelling down" the benefit in question. Any amendment of the scheme rules cannot retrospectively level down benefits.

Q13. If my scheme rules need to be amended to remove a discriminatory practice, do I need to go through the new 60 day statutory consultation process²⁷ for changes to pension arrangements?

A13. If the rule amendment is being made to comply with the Regulations (whether to level up or down), it will be exempt from the statutory consultation process.

Q14. My defined contribution (DC) occupational scheme provides for contributions to increase according to 5 age bands. Am I right in assuming this will be acceptable?

A14. The scheme should take advice as to whether the bands can either be covered by the exemption in paragraph 10(a) (resulting pensions either equal or “more nearly equal”) or can be objectively justified.

Q15. What does the “more nearly equal” test mean for DC schemes and personal pension schemes?

A15. This exempts different age related rates of contributions to schemes provided that the aim is to make more nearly equal the age related benefits payable at, for example, retirement. This permits the comparison of the benefit accrued over the full period of pensionable service until retirement e.g. comparing the benefits of member A between age 31 (when he joined the scheme) and normal retirement age and of member B between age 32 (when he joined the scheme) and normal retirement age, where the aim is to ensure a more nearly equal outcome is achieved. For example, a Company operates a defined contribution arrangement which provides age related contributions of 4% for those under 40 years old, 5% for those over 40 years old and are advised that in the circumstances of their scheme these age bands meet the test. (Note two age bands may not always meet the test as it would depend on the scheme and the circumstances. It is not the number of bands which matters so much but the outcome aimed at).

²⁷ The Occupational and Personal Pension Schemes (Consultation by Employers and Miscellaneous Amendment) Regulations 2006 (S.I. 2006/349), which came into force on 6 April 2006.

Q16. Under my company's flexible benefits arrangement, employees can opt for a certain amount of employer payment (above a minimum level) to go either into the defined contribution arrangement or paid as cash into the monthly pay packet. The amounts increase with age bands. Are there any issues here?

A16. Since employer contributions under your scheme are age-related, older members who opt for the minimum level of contributions will receive more cash back than younger members who opt for the minimum level of contributions. Although there is an exemption for age-related contributions to pension schemes, this does not cover money which is paid to employees instead of contributions. This practice will need to be objectively justified.

Q17. There are special early retirement provisions in place for my members, where once they reach a minimum age (e.g. on redundancy) they can receive enhanced early retirement benefits without any actuarial reduction. Will these have to be changed to comply with the Regulations?

A17. Not necessarily. Payment of enhanced early retirement benefits are allowed on a redundancy (paragraph 13B) or ill health retirement (paragraph 15) or in respect of active or prospective members who on 1 December 2006 had an entitlement to enhanced early retirement benefits from a minimum age (paragraph 13). Enhanced early retirement benefits can be paid in any other circumstances if they are objectively justified by the scheme.

Q18. My scheme provides death-in-service benefits only. Is this covered by the exemptions?

A18. Death-in-service benefit only schemes are treated as occupational pension schemes for the purpose of the definition of occupational pension scheme in section 150(5) of the Finance Act 2004. This definition applies to the requirement in regulation 11 not to unlawfully discriminate on grounds of age and to certain exemptions (see paragraph 1(3) for a full list). For example the exemptions relating to closure of schemes and sections (paragraphs 25 and 25A) apply as do the exemptions for death-in-service benefits (paragraph 15A).

Case study – Continuing to work after normal retirement age of 65

The Apple Tree Company provides a defined benefit occupational pension scheme for all its members. The scheme currently has a rule which states that the maximum age limit for accruing benefits is age 65. The Company have agreed that John Smith, a member of the scheme, can continue working after age 65. John argues he should continue to accrue benefits.

There is no exemption for schemes to have an age at which benefits must cease to accrue. So the Company will either need to objectively justify the rule, amend the rule or remove it. The Company may decide to replace the rule with a new rule which provides that benefits cease to accrue after a certain number of years service (using the exemption at paragraph 21). Therefore, John may carry on as an active member of the scheme provided he has not accrued the maximum number of years' service under the scheme. If he does accrue the maximum number of years' service under the scheme, he would no longer be able to accrue benefits.

Case Study – Sections

The Bloomer Company has a number of groups of members identified by date of joining who are entitled to different types of benefits. The employer has decided to retain these different groups, therefore honouring its commitments made to employees on joining.

On each occasion they have created a new benefit category and therefore have 3 defined benefit categories and 1 defined contribution category. They decide that, for administrative simplicity, they will not set up new schemes for each category of member but close 3 parts of the scheme and therefore create 3 closed sections (existing members continue to accrue benefits in these closed sections). The remaining open part of the scheme admits new employees and takes advantage of any relevant exemptions.

Case study – Age related contributions

Blueberry Company operates a occupational pension scheme. The Company takes actuarial advice and as a result decides to pay contributions in accordance with 3 age-related bands which increase with age.

Does it matter that the contributions for different age groups are different?

The actuary confirmed that (in the circumstances of the scheme) these contributions set as a percentage of pensionable pay should meet the "more nearly equal" test in paragraph 10(a).

Glossary

Appendix 1

Accrued rights	The pension benefits that have built up for a member at any point in time.
Active member	A member of an occupational pension scheme who is building up pension benefits.
Age related benefit	A benefit provided from an occupational pension scheme to a member when or after he retires, takes early retirement, reaches a particular age or when employment ends.
Annuity	When an individual retires, a pension scheme can make a single payment, usually to an insurance company. This company will then make regular payments to the member.
Bridging pension	A pension which a member of a pension scheme may receive between the time he retires and on or after when he reaches state pension age.
Deferred member	A member of an occupational pension scheme (other than an active or pensioner member) who has left a scheme, but will start to receive benefits at a date specified in the scheme rules.
Defined benefit arrangement	An arrangement whereby the rules of the scheme determine the benefit a member will receive. The most common type of defined benefit scheme is a final salary scheme.
Defined contribution scheme	See definition of "money purchase arrangement". Also referred to as a "DC" arrangement.
Directive	EC Directive 2000/78/EC.
Direct discrimination	Direct discrimination occurs when trustees/managers or an employer treat an employee less favourably on the grounds of age.
Early retirement pivot age	The earliest age at which a worker can draw an age related benefit (e.g. pension on retirement) without the consent of any person and without it being reduced for early payment. This age will be set out in the scheme rules or may be otherwise determined e.g. custom and practice. Any special provision for early payment

from a particular age without reduction should be disregarded e.g. early payment on the grounds of ill health, redundancy etc.

Earnings cap

This was a term used under the pre 6 April 2006 Inland Revenue regime for pensions. It referred to the limit on the amount of a member's earnings which was used to work out the limits on contributions and benefits under an approved pension scheme. Transitional arrangements mean that the term is still used.

Group personal pension (GPP)

Under a GPP, a number of employees at a company can join a personal pension scheme with the same pension provider. Each member will have a separate policy with the pension provider, but contributions are collected together and these may be on preferential terms.

HM Revenue & Customs

Also referred to as "HMRC" formerly the Inland Revenue.

Hybrid scheme

An occupational pension scheme which, for example, provides some benefits accrued on a defined benefit basis and some on a defined contribution basis. Under such a scheme, benefits may be calculated as the better of two alternatives, e.g. as between a final salary and a money purchase basis.

Indirect discrimination

When an apparently age-neutral criterion, provision or practice in fact disadvantages workers of a particular age.

Integrated contracted-in scheme

A scheme which is not contracted-out of the additional pension element (known since 2002 as the state second pension) of the state retirement pension scheme and offers members benefits which accrue on a basis which reflect state retirement pension.

Late retirement pivot age

An age set in scheme rules (or otherwise determined), above which a member can take a pension which may be actuarially enhanced for late payment.

Lower earnings limit (LEL)

The minimum amount someone must earn before they have to pay national insurance contributions.

Member

Any active member, deferred member or pensioner member.

Money purchase arrangement	<p>A pension arrangement under which an individual's benefits are determined by reference to:</p> <ul style="list-style-type: none"> • contributions paid by or in respect of him into the arrangement, and • increases in contributions which are determined by an amount based on the investment returns on contributions.
Non-discrimination rule	<p>Under the Regulations, occupational pension schemes are treated as including a rule requiring trustees or managers not to unlawfully discriminate on age grounds.</p>
Normal pension age (NPA)	<p>The earliest age, under a scheme that a member can normally draw pension benefits on his retirement disregarding any scheme rule making special provision as to early retirement on the grounds of ill health or otherwise.</p>
Occupational pension scheme	<p>This is typically an arrangement set up by or for an employer (or group of employers) to provide benefits for their employees and/or in respect of their employees on leaving service on death or retirement.</p>
Objective justification	<p>Direct or indirect discrimination will be objectively justified if it pursues a "legitimate aim" and is a "proportionate" means of achieving that aim.</p>
Pensionable pay	<p>The part of a member's pay which scheme rules specify is to be used to work out a member's benefits and/or contributions.</p>
Pensionable service	<p>The period of employment taken into account when calculating pension benefits or other benefits.</p>
Pensioner member	<p>An individual who is currently entitled to payment of a pension or other benefits from an occupational pension scheme.</p>
Personal pension scheme	<p>This is typically a contract between a worker and a pension provider, rather than a scheme set up by an employer. Some employers pay contributions on behalf of workers to personal pension schemes.</p>
Prospective member	<p>An individual who under the terms of his employment or the rules of an</p>

	occupational pension scheme can join the scheme:
	<ul style="list-style-type: none"> • immediately, • if he continues in employment for a sufficient period of time, or • if a specified person consents.
Registered pension scheme	<p>A pension scheme is a registered pension scheme, either through:</p> <ul style="list-style-type: none"> • being registered by HM Revenue & Customs, or • being an approved pension scheme on 5 April 2006 and thus acquiring registered status automatically. <p>The Finance Act 2004 confers favourable tax treatment on such schemes.</p> <p>Note: The term "registered" replaces the term "approved" which was used before 6 April 2006.</p>
Regulations	The Employment Equality (Age) Regulations 2006 (S.I. 2006/1031) as amended by the Employment Equality (Age) (Amendment) Regulations 2006 (S.I. 2006/2408) and the Employment Equality (Age) (Amendment No.2) Regulations 2006 (S.I. 2006/2931).
Stakeholder scheme	Most employers that do not offer workers an occupational pension scheme or a personal pension scheme to which they contribute must nominate a stakeholder scheme. A stakeholder scheme may be an occupational or a personal pension scheme.
TUPE	The Transfer of Undertakings (Protection of Employment) Regulations 2006.
Unregistered pension scheme	A scheme which is not a "registered pension scheme".
Upper earnings limit	The maximum amount of earnings on which national insurance contributions are payable by employees.
Worker	Under the Regulations, in relation to pensions, "worker" includes employees.

Useful contacts

Appendix 2

Department of Trade and Industry (DTI)

1 Victoria Street
London SW1H 0ET
Switchboard: 020 7215 5000
www.dti.gov.uk

Acas (Advisory, Conciliation and Arbitration Service)

Brandon House
180 Borough High Street
London SE1 1LW
Helpline: 0845 7474747
www.acas.org.uk

Department for Work and Pensions (DWP)

Room 112
The Adelphi
1-11 John Adam Street
London WC2N 6HT
Telephone: 020 7712 2171
www.dwp.gov.uk

The Pensions Advisory Service

11 Belgrave Road
London SW1V 1RB
Helpline: 0845 601 2923
www.opas.org.uk

Pensions Ombudsman

11 Belgrave Road
London SW1V 1RB
Telephone: 020 7834 9144
www.pensions-ombudsman.org.uk

Employment Tribunals

Customer Services team
Employment Tribunals Service
3rd Floor Alexandra House
14-22 The Parsonage
Manchester M3 2JA
Telephone: 0845 795 9775
www.employmenttribunals.gov.uk

