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The impact of Age Regulations on Pension Schemes

Guidance

May 2006

The impact of Age Regulations on pension schemes

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

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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 examines how the new requirements under the Employment Equality (Age) Regulations (Northern Ireland) 2006 which come into operation on 1 October 2006, will affect workplace pensions.

The Age Regulations implement the age strand of Directive 2000/78 EC in Northern Ireland, establishing a general framework for equal treatment in employment and vocational training. This Directive meant that the Government was required to put in place laws prohibiting age discrimination in the workplace. The new requirements will make it unlawful for pension schemes to discriminate against members or prospective members of a pension scheme. However, it is recognised that many age related rules and practices are necessary for the proper operation of schemes. The Regulations will, therefore, effectively exempt most age related pension scheme rules and practices. For those rules not specifically exempted, employers must consider whether they can justify their ongoing use.

This guide explains the pensions aspects of the Regulations. The guide explains which pension arrangements will 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, and flowcharts provide an overview of the new requirements. The guide also suggests actions employers should start taking to ensure they will be compliant with the new Regulations when they come into operation. All defined terms used throughout the guide are explained in the Glossary in Appendix 1.

The Equality Commission for Northern Ireland will be producing guidance which will provide further information on how the Regulations will affect employers in general.

2 Summary of key aspects of the Regulations

From 1 October 2006:

- it will be unlawful for occupational pension schemes to discriminate against members or prospective members of a scheme on the basis of age;
- it will be unlawful for employers to discriminate (in relation to pensions and otherwise) on the basis of age;
- discrimination (direct or indirect) will only be lawful if one of the specific exemptions apply 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 accrued and discriminatory practices up to 1 October 2006 will not be affected by the Regulations;
- trustees will be obliged to disapply any discriminatory rules under their scheme; trustees are also given power to amend any scheme rules that conflict with the Regulations;
- workers¹ who suffer discrimination on grounds of age in relation to pensions can bring a claim to an Industrial Tribunal against the trustees and/or employer.

¹ 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 what aspects of pensions arrangements are covered by the Regulations and who is protected by them.

Summary of key messages covered in this chapter

- Direct discrimination occurs when the trustees or an employer treat a worker less favourably than other workers on the grounds of age.
- Indirect discrimination occurs when a criterion, provision or practice which is apparently age-neutral in fact disadvantages workers of a particular age.
- Direct or indirect discrimination is allowed if it 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 Regulations.
- Employer contributions to personal pension schemes are covered (but not other aspects of personal pensions).
- Specific exemptions cover many pensions 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 discrimination² occurs when the trustees or an employer treat a worker less favourably than other workers on the grounds of age. Indirect discrimination³ occurs when a criterion, provision or practice which is apparently age-neutral in fact disadvantages workers of a particular age.

² See Regulation 3(1)(a).

³ See Regulation 3(1)(b).

Case study – Examples of the difference between direct and indirect discrimination

Direct discrimination – A scheme pays a higher increase to pensioners at or above age 75 than to pensioners below this age. This is to compensate for the fact that these older pensioners have been worse affected than younger pensioners by increases in the cost of living since retirement. Unless objectively justified, this amounts to direct discrimination i.e. a pensioner aged 73 is treated less favourably than another pensioner aged 76.

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 week. 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. Unless this practice can be objectively justified, it will amount to indirect discrimination, as it results in workers under age 40 being treated worse than workers over age 40.

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.

“Objective justification” test

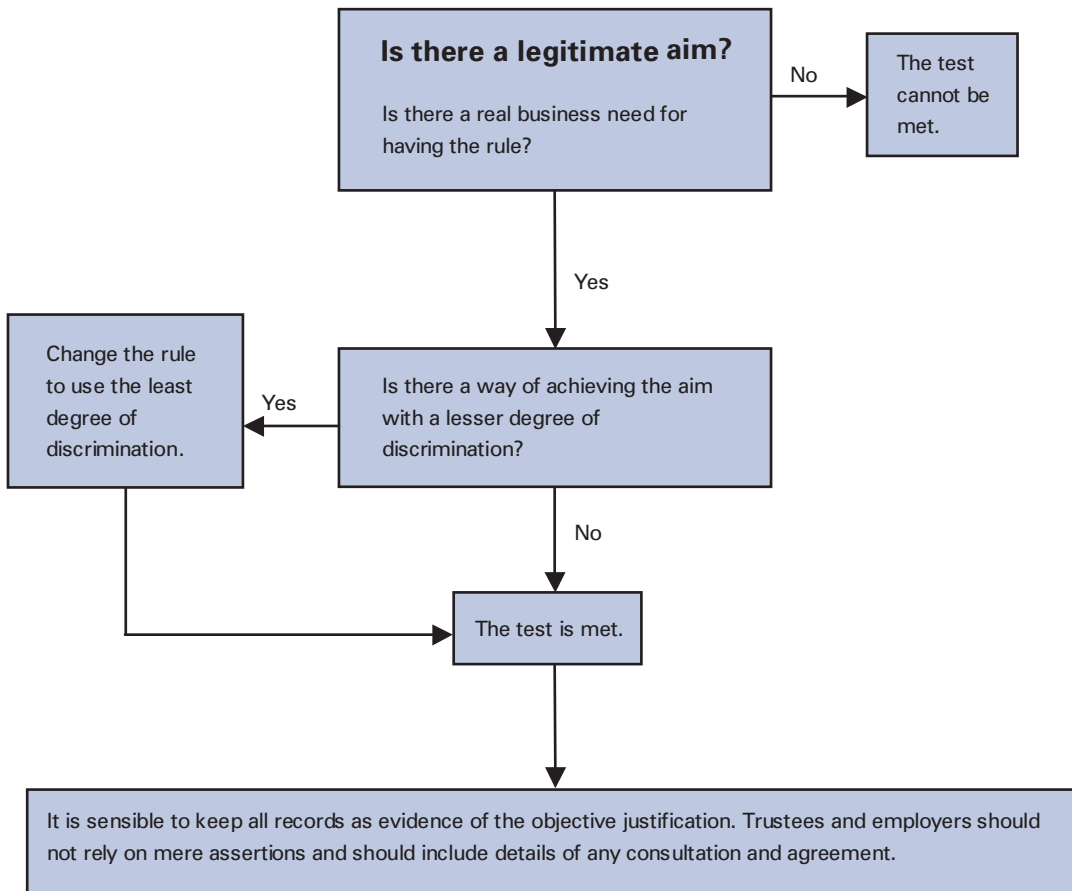
The Directive allows direct or indirect discrimination if it is “objectively justified” i.e. if it pursues a “legitimate aim” and is a “proportionate” means of achieving that aim.⁴ Legitimate aims might include business needs, efficiency, reducing staff turnover or providing promotion opportunities to 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 will not be proportionate if an alternative exists that 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.

⁴ See Regulation 3(1).

I



The exemptions

The Regulations include exemptions for a wide range of age-related rules and practices that typically exist in occupational pension schemes. The Government consider these to be justified at a national level. If a practice is covered by an exemption, there is no need for the practice to be objectively justified. Where rules are not covered by an exemption, employers can seek to objectively justify them in relation to their own particular circumstances. The exemptions are explained in Chapter 6.

Who and what do the Regulations cover?

The Directive applies to pay and terms and conditions of employment. Thus the Regulations cover all aspects of occupational pension schemes, including:

- defined benefits arrangements;
- money purchase arrangements;
- hybrid schemes;
- those stakeholder schemes which are categorised as occupational pension schemes;
- occupational pension schemes which are either registered or unregistered⁵ under HM Revenue & Customs legislation.⁶

Personal pension schemes

Employer contributions to personal pension schemes are also covered. Other aspects of personal pensions are not covered (because personal pensions are an arrangement between the worker and the personal pension provider and are not part of a worker's pay and conditions).

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, and if the arrangements are age-based, this will be caught by the Regulations and will need to be objectively justified.
- If a partnership allows partners to join an occupational pension scheme set up for its employees, the arrangement will be covered by the Regulations. However, the scheme can make use of the exemptions in relation to partners as well as employees.⁷
- If a partnership makes payments to retired partners (usually such arrangements are referred to as "partnership annuities") any age-related practices will need to be objectively justified. The specific pension exemptions under the Regulations will not be available.

⁵ See Glossary for definition of registered and unregistered pension schemes.

⁶ See Finance Act 2004.

⁷ This is because, in relation to pensions, the definition of "worker" (see Glossary) in the Regulations includes employees and partners.

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 by individuals.

4 Powers of trustees

This chapter explains the “non-discrimination” rule and the powers of trustees 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 will have the power to change any age-related rules to ensure they are compliant with the Regulations.

Non-discrimination rule

The Regulations treat occupational pension schemes as if they include a “non-discrimination” rule, which overrides any discriminatory provisions in the scheme rules.⁸

Trustees are also given the power to amend any rules of the scheme to ensure they comply with the Regulations.⁹ Where changes to the scheme would require the employer’s consent if made under the rules, the trustees must ensure consent is obtained before using the amendment power under the Regulations.¹⁰

Discriminatory rules

If trustees believe a rule is discriminatory and not covered by any of the specific exemptions, they have three options. They can:

- objectively justify the rule;
- amend the rule; or
- remove the rule.

⁸ See Schedule 1, paragraph 2(1) of the Regulations.

⁹ See Schedule 1, paragraph 2(3).

¹⁰ See Schedule 1, 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 requires the consent of the employer, Maple Court Company. The trustees have the following options:

Before 1 October 2006:

- if the employer consents, the trustees can use the powers under the scheme 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 (Northern Ireland) Order 1995 – protecting rights to benefits which have already accrued¹¹).

On or after 1 October 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 (Northern Ireland Order) 1995 – protecting rights to benefits which have already accrued);
- 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 October 2006, but levelling down can only take place from the date the amendment comes into force;
- the trustees can rely on the non-discrimination rule to override discriminatory provisions. In this case benefits will be “levelled up”.

If the employer does not agree to amend the scheme rules, the result will be that benefits will be “levelled up” after 1 October 2006 as a result of the non-discrimination rule.

The new pensions consultation regulations,¹² which came into operation on 6 April 2006, do not apply to changes made to the rules of schemes to prevent unlawful age discrimination from arising.

¹¹ See Article 67 of the Pensions (Northern Ireland) Order 1995 (S.I. 1995/3213 (N.I. 22))

¹² The Occupational and Personal Pension Schemes (Consultation by Employers) Regulations (Northern Ireland) 2006 (S.R. 2006 No 48), which came into operation on 6 April 2006.

5 Claims in the Industrial Tribunal and other complaints

This chapter explains how to bring a claim in an Industrial tribunal and other ways of complaining about unlawful age discrimination in relation to pensions.

Summary of key messages covered in this chapter

- Industrial tribunal complaints must be brought within three months of the act of discrimination complained about.
- Industrial tribunal claims can either be brought against the trustees or the employer, depending on the circumstances.
- Complaints about an occupational pension scheme may also be made using the scheme's internal dispute resolution procedure, or subsequently, to the Pensions Ombudsman.

Making a claim to an Industrial Tribunal

Workers and pensioners can present a complaint to an Industrial tribunal if they believe they have been 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 normally be brought within three months of the act complained about ceasing to have effect. Anyone who wants to make a claim to an Industrial tribunal should not delay because they are pursuing their complaint via a different route e.g. via the internal dispute resolution procedure 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.¹³ 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.

¹³ See Schedule 1, paragraph 5.

What powers does an Industrial tribunal have?

Where an Industrial 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 1 October 2006, (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 Industrial tribunal).

Other ways of making a complaint

Individuals may also lodge a complaint through their occupational pension scheme's internal dispute resolution procedure. If the matter is not resolved in this way, individuals can bring a complaint in relation to the scheme to the Pensions Ombudsman (against either the trustees or the employer). Usually the Pensions Ombudsman will not investigate a complaint until the Pensions Advisory Service has been consulted. Complaints must normally be brought within three years of the act complained of. The Pensions Ombudsman will not consider a complaint if a claim has been made to the Industrial tribunal (unless the claim is discontinued). So anyone wishing to make a complaint in relation to a scheme will need to decide whether to refer it to the Industrial tribunal or to the Pensions Ombudsman.

Further advice

Individuals who think they are suffering from age discrimination may seek advice in relation to pensions from the Pensions Advisory Service. The Pensions Advisory Service cannot however help with claims to the Industrial tribunal, nor can it help if the Pensions Ombudsman has already investigated the complaint.

For further information on industrial tribunals, please visit www.employmenttribunalsni.co.uk or telephone 028 9052 7666.

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 1 apply to occupational pension schemes, and those at paragraphs 31 and 32 of Schedule 1 cover employer contributions to personal pension schemes.
- Employers may also be able to make use of the exemption for benefits based on length of service at Regulation 34.

How can the exemptions be used?

Trustees and employers 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**:

Section	Reference in Schedule 1 of the Regulations	Categories of exemptions
1	Paragraph 7	Admission to schemes
2	Paragraph 8	Use of age criteria in actuarial calculations
3	Paragraph 9	Contributions
4	Paragraph 10	Contributions under money purchase arrangements
5	Paragraph 11	Contributions under defined benefits arrangements
6	Paragraphs 12 – 18	Age related rules, practices, actions and decisions relating to benefit
7	Paragraphs 19 – 24	Other rules, practices, actions and decisions relating to benefit
8	Paragraph 25	Closure of schemes
9	Paragraphs 26 – 29	Other rules, practices, actions and decisions
10	Paragraph 30	Registered pension schemes ¹⁴

¹⁴ See Glossary for definition.

Employers can use the exemptions in paragraphs 31 and 32 in relation to any rules, practices, actions or decisions in respect of any payment of contributions to a **personal pension scheme**:

Section	Reference in Schedule 1 of the Regulations	Categories of exemptions
11	Paragraphs 31 – 32	Contributions by employers to personal pension schemes

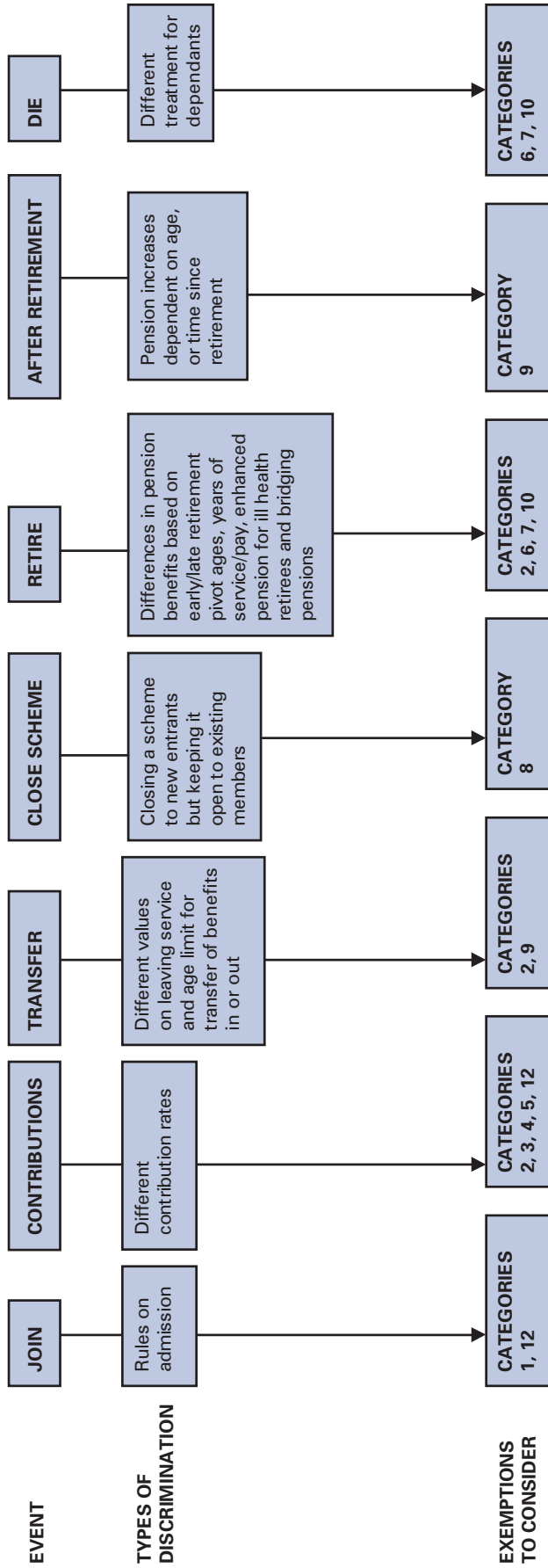
Employers (but not trustees) can use the exemptions in Regulation 34 in relation to some benefits awarded on the basis of **length of service**:

Section	Reference in Regulations	Categories of exemptions
12	Regulation 34	Exception for provision of certain benefits based on length of service

Schemes with separate sections

The exemptions can be used for schemes or for a section of a scheme, e.g. the exemption at paragraph 25 allows the closure of a scheme or a section of a scheme to new joiners.

Occupational pension schemes – broad overview of exemptions



KEY TO EXEMPTIONS	
Categories of exemptions	Regulations
1 Admission to schemes	Paragraph 7
2 Use of age criteria in actuarial calculations	Paragraph 8
3 Contributions to schemes	Paragraph 9
4 Contributions under money purchase	Paragraph 10
5 Contributions under defined benefits	Paragraph 11
6 Age related provisions relating to benefits	Paragraphs 12 - 18
7 Other provisions relating to benefits	Paragraphs 19 - 24
8 Closure of schemes	Paragraph 25
9 Other provisions	Paragraphs 26 - 29
10 Registered pension schemes	Paragraph 30
12 Benefits based on length of service	Regulation 32

NOTE: Category 11 of the exemptions (paragraphs 31 - 32) concerning contributions by employers to personal pension schemes does not apply here

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. 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 scheme which only allows employees to join provided they are at least age 25 and not older than age 60. Under the Regulations this practice can continue.
Paragraph 7(b)	Setting a minimum level of pensionable pay for admission to a scheme, provided the minimum is not above the lower earnings limit. ¹⁵	A company can prevent employees who earn below the lower earnings limit from joining a scheme (for 2006/07 this is the equivalent of £4,368 per annum).

2. 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(a)	Any age related benefit: <ul style="list-style-type: none"> ■ reduced because it starts before any early retirement pivot age;¹⁶ or ■ enhanced because it starts after late retirement pivot age.¹⁷ 	A scheme allows members to take retirement from age 60 on a full pension. However, there is an option for a member to take early retirement before this age. This will be subject to an actuarial reduction. The actuarial reduction is calculated according to how many years the member is from age 60. Under the Regulations this practice can continue.
Paragraph 8(b)	Calculating member or employer contributions to a scheme.	The rules of a money purchase 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 pensions for workers of different ages with the same salary and length of service. Under the Regulations this practice can continue.

¹⁵ See Glossary for definition.

¹⁶ See Glossary for definition.

¹⁷ See Glossary for definition.

Reference in Regulations	What are the exemptions under this category?	Practical examples of how to make use of these exemptions
Paragraph 8(c)	Calculating any age-related benefit commuted in exchange for the payment of any lump sum age-related benefit.	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

3. Contributions

Reference in Regulations	What are the exemptions under this category?	Practical examples of how to make use of these exemptions
Paragraph 9	Differences in contributions payable by a member or the employer, where this is attributable to differences in the pensionable pay of members.	Scheme rules can set different contribution rates for workers with different rates of pay.

18 Commutation factors are used to determine the amount of pension which needs to be foregone in order to provide a lump sum benefit.

4. Contributions under money purchase arrangements

Reference in Regulations	What are the exemptions under this category?	Practical examples of how to make use of these exemptions
Paragraph 10(a)	Different rates of member or employer contributions according to the age of members, provided the aim is to make more equal the amount of benefit that members of different ages in comparable situations are entitled to.	A company operates a money purchase arrangement where the contributions payable by the employer are age-related according to a number of age bands. This practice is exempted where the age-related contributions are intended to provide (more or less) comparable target pensions at retirement, by setting higher contributions for older workers. Under the Regulations, this practice can continue.
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 and member contributions for all, regardless of the age of members. Under the Regulations, this practice can continue.

5. Contributions under defined benefits arrangements

Reference in Regulations	What are the exemptions under this category?	Practical examples of how to make use of these exemptions
Paragraph 11	Different rates of member or employer contributions according to the age of members, to the extent that: <ul style="list-style-type: none"> ■ each year of pensionable service entitles members in a comparable situation to accrue a right to defined 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 benefits in respect of members as they get older. 	A company runs a defined benefits arrangement, where employee contributions are based on the ages of members. Older members of the scheme pay higher contributions (compared to younger members) to reflect the fact that it costs the scheme more to provide benefits to older members. The accrual rate is the same for all ages. Under the Regulations this practice can continue.

6. 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 to become entitled to payment of age-related benefits.</p> <p>Provided that for any age-related benefit paid under defined benefits arrangement before early retirement pivot age:¹⁹</p> <ul style="list-style-type: none"> ■ the benefit must be actuarially reduced for early payment; and ■ the member must not be credited with additional years of pensionable service. 	<p>An occupational pension scheme provides that benefits can be taken on early retirement from age 50. This is exempted, as long as the benefits are not “enhanced” (i.e. the benefits must be actuarially reduced and the early retiree must not be credited with “additional years” of service). Minimum ages for “enhanced” early retirement benefits will need to be objectively justified (but see transitional exemption under paragraph 13).</p>
Paragraph 13	<p>For existing and prospective members of a defined benefit scheme as at 1 October 2006, a minimum age above which benefit can be paid to early retirees:</p> <ul style="list-style-type: none"> ■ without actuarial reduction; and/or ■ with the member being credited with additional periods of pensionable service. 	<p>Under a defined benefit scheme, existing members who retire early, e.g. on redundancy, may leave on an “early retirement” package. This will allow them to receive the pension that they would have received if they had continued working until the age at which workers normally retire. In other words, the pension will not be actuarially reduced for early payment (and the member may be credited with “additional years of service”). Such arrangements can continue for existing and prospective members but not for new joiners.</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.</p>	<p>A scheme sets ages from which members have the right to be paid full scheme retirement benefits without actuarial reduction. Under the Regulations, this practice can continue.</p> <p>It will also be possible to set different ages for different groups to take their benefits, e.g. an earlier age for senior executives and a later one for the rest of the workforce.</p>

¹⁹ See Glossary for definition.

Reference in Regulations	What are the exemptions under this category?	Practical examples of how to make use of these exemptions
Paragraph 15	<p>Enhancing any age related benefit where a member retires before any early retirement pivot age on ill health grounds.</p> <p>This is in cases where the enhancement is calculated according to the years of pensionable service the member would have completed if he had continued to work until an age specified in the scheme rules.</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 he would have received if he had worked 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 16	<p>Exemption for schemes which provide male members with a bridging pension.</p>	<p>A bridging pension is paid to retired men aged 60–64 to compensate for the fact that they do not yet qualify for the basic state pension. Men over 65 cannot complain under the Regulations that they no longer qualify for such a pension.</p>
Paragraph 17	<p>On a member’s death, the reduction of any pension paid to a dependant where the dependant is more than a specified number of years younger than the member.</p>	<p>A scheme provides that where a dependant spouse is more than ten years younger than the member, the spouse’s pension is reduced. Under the Regulations, a spouse cannot complain about this practice.</p>
Paragraph 18	<p>For pensioner members who have retired on ill health grounds before early retirement pivot age, discontinuing any life assurance cover from:</p> <ul style="list-style-type: none"> ■ age 65; or ■ the normal retirement age which applied to the member. 	<p>A company provides life cover to ill health retirees which ceases at age 65. Ill health retirees over 65 cannot complain under the Regulations that they are no longer provided with life assurance cover.</p>

7. 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	Rules which provide that members' (or survivors') entitlement to benefits under a defined benefits arrangement may be calculated by referring to the number of years of pensionable service a member has completed. (This is provided members in comparable situations accrue rights to benefits based on the same fraction of pensionable pay.)	A defined benefits scheme can provide a higher pension to a member with 20 years of pensionable service than to one with only 10 years of service, where pensions are based on accrual of e.g. 1/60th of final salary for each year of pensionable service. This exemption does not cover arrangements where accrual rates increase after a certain number of years of service e.g. from 1/60th to 1/40th.
Paragraph 20	Differences in pensionable pay over time of different members.	A scheme provides for members who retire at normal retirement date to receive a pension equivalent to 1/60th of final pensionable salary for each complete year of pensionable service. Two members are retiring after both being in pensionable service for 10 years each. 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 versus 10/60ths x 25).
Paragraph 21	Imposition of a maximum number of years of service when calculating benefits.	A scheme will be able to cease benefits accruing after a stated period of service. So maximum benefits can for example, be limited to a maximum of 40 years service.
Paragraph 22	Completion of a minimum period of two years of qualifying service. ²⁰	A scheme will be able to continue to operate a vesting period of up to two years.
Paragraph 23	Imposition of a minimum level of pensionable pay used to calculate benefits (provided that the minimum level of pensionable pay is not above the lower earnings limit.)	A scheme will be able to decide to only provide benefits for members provided their pensionable pay is above the lower earnings limit (for 2006/07 this is the equivalent of £4,368 per annum).
Paragraph 24	A maximum level of pensionable pay used when calculating benefits.	A scheme 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 ²¹ for 2005/06 was £105,600 and for 2006/07 it will be £108,600.)

²⁰ "Qualifying service" has the meaning given by Section 67(7) of the Pensions Schemes (Northern Ireland) Act 1993 (c. 49)

²¹ See Glossary for definition.

8. Closure of schemes

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 benefits 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.

9. 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.	A scheme rule 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 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.
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 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.
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.

10. 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	Anything done in order for a scheme to secure tax relief or prevent any charge to tax (except for rules relating to setting a minimum age for receiving benefits – but for minimum ages see paragraphs 12 and 13).	A scheme may provide that a pension payable to any dependant children on death-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).

11. 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	Different rates of employer contributions according to the ages of workers, where the aim is to make more equal the amount of benefit that members of different ages in comparable situations are entitled to.	This exemption for personal pension schemes (such as group personal pension schemes) mirrors that for occupational pension schemes. See exemption at paragraph 10 for an example.
Paragraph 32	Any difference in the rate of contributions for different workers, where this is due to any difference in pensionable pay.	A company pays employer contributions of 6% of pay to workers who earn £30,000 or more per annum, and contribution of 5% to workers who earn less than £30,000. The difference in the employer contribution rate is exempted.

12. 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
Regulation 34(1)	Benefits awarded by an employer based on a length of service requirement of up to 5 years, e.g. waiting periods, contributions.	<p>An employer only allows workers to join an occupational pension scheme after four years service. This will be permitted under Regulation 32.</p> <p>Note: trustees cannot rely on this exemption. So they will need to objectively justify any scheme rules which indirectly discriminate against younger members by favouring members with long service.</p>
Regulation 34(2)	<p>Benefits based on a length of service requirement which exceeds 5 years. The requirement must fulfil a business need:</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>A company increases employer contributions after an employee has been with the company for 10 years. If an employer can show the reason for the difference in contributions is to fulfil a business need, this practice is exempted.</p> <p>Please see note in box above.</p>

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.
- 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, and amending the provision, or removing it.

Action plan

- 1 Check what pension arrangements are in place (include registered, unregistered, GPPs etc.)
- 2 Check to see if the schemes are covered by the Regulations.
- 3 For each scheme, check for age-related rules or practices:
 - Trust Deed and Rules
 - Scheme Booklet
 - Member announcements
 - Discretionary practices
- 4 Check contracts of employment for any age-related rules or practices (e.g. in relation to membership/contributions).
- 5 Revisit for possible indirectly age discriminatory 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 discrimination.

8 Q&A and Case Studies

This chapter explains the practical implementation of the Regulations through Q&As and case studies.²²

Questions and Answers

- Q. Now the default retirement age is 65, what happens if someone wants to retire and take pension below this age?**
- A. A member who retires before 65, is able to draw a pension if the rules of the scheme allow this. Schemes will only benefit from tax advantages if they do not normally allow payment of benefits before age 50 (increasing to age 55 from 2010).
- Q. The normal retirement date under my scheme is currently age 60. Do I have to change this?**
- A. 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.
- Q. Can I close a pension scheme to new joiners but allow existing members to continue to accrue benefits in the “closed” scheme?**
- A. Yes. The exemption at paragraph 25 allows this.

²² All references to “paragraph” refer to paragraphs under Schedule 1 of the Regulations.

Q. What if I close one section of a scheme to new joiners?

A. Schemes which are divided into two or more sections are treated as separate schemes, for the purposes of the Regulations,²³ so this practice is also covered by paragraph 25.

Q. My company 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?

A. There is no specific exemption for this practice under the Regulations. The length of service condition may be indirectly discriminatory and will need to be objectively justified.

Q. I am a director of a private company and am receiving income through an unsecured pension.²⁴ I am not happy that capital cannot be paid out of this on death after age 75. Surely this must be age discrimination despite the HM Revenue & Customs requirement?

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

Q. 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?

A. 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, unless objectively justified.

Q. Under my defined benefits scheme, 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?

A. This should not fall foul of the Regulations because the difference in treatment is based on status, not age. However, check that there is no indirect discrimination involved. Any indirect discrimination will need to be objectively justified.

²³ See Schedule 1, paragraph 1(7).

²⁴ Previously referred to as "income drawdown" under the old tax regime before 6 April 2006.

- Q. 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?**
- A. By setting up GPP arrangements your company is probably obtaining preferential rates which workers could not obtain through individual personal pension arrangements. The GPP therefore represents an employee benefit. If workers under 21 cannot join the GPP, they are at a disadvantage. As there is not an exemption for minimum entry age to a GPP, you should consider extending entry to the scheme to younger workers, impose a minimum service requirement as an alternative or look at objective justification.
- Q. Under my defined contribution (DC) occupational 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?**
- A. This arrangement discriminates against younger workers. There is an exemption for age related contributions to money purchase schemes (see paragraph 10) but only where the aim is to produce equal pensions for members of different ages. It seems unlikely that the arrangements above would fall under this exemption, so would need to be objectively justified.
- Q. 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 October 2006, can we continue requiring an individual to stop working for us before taking pension?**
- A. This may amount to indirect age discrimination. No exemption is available. So continuation of the current practice would need to be objectively justified.
- Q. What happens if someone takes a pension at, say, age 60 and carries on working under the new flexible tax rules²⁵ to age 65? If so, can we stop accruals from age 60 when the pension starts if they make such an election?**
- A. A rule which stops members who are already drawing a pension from continuing to accrue benefits may be indirectly discriminatory. For instance, if proportionately more 55 year old members than, say, 64 year old members, would like to continue to work, accrue benefits and draw a pension, rather than having to make a choice between drawing a pension and accruing benefits, then the rule disadvantages 55 year olds compared with the 64 year olds and will be indirectly discriminatory, unless it can be objectively justified.

²⁵ See Finance Act 2004.

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

A. If a member brings a successful claim under the Regulations for any discriminatory practice, any award made will be on the basis of “levelled up” benefits, until such time as the trustees bring into force a new scheme rule “levelling down” the benefit in question.

Q. If my scheme rules need to be amended to remove a discriminatory practice, do I need to go through the new two-month statutory consultation process²⁶ for changes to pension arrangements?

A. If the rule amendment is being made to comply with the Regulations, it will be exempt from the statutory consultation process.

Q. 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?

A. The larger the number of bands, the easier it will be to demonstrate that the aim of the bands is to equalise benefits and that you therefore meet the requirements of paragraph 10.

Q. 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 pension or paid as cash into the monthly pay packet. The amounts increase with age bands. Are there any issues here?

A. 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.

Q. 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?

A. No. Paragraph 13 allows schemes to retain such provisions for those employees who are members or prospective members of the scheme on 1 October 2006. But such a practice will need to be objectively justified for new joiners.

²⁶ The Occupational and Personal Pension Schemes (Consultation by Employers) Regulations (Northern Ireland) 2006 (S.R. 2006 No. 48), which came into operation on 6 April 2006.

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

A. Most schemes within Northern Ireland that offer death-in-service only benefits will not qualify as occupational pension schemes under Department for Social Development legislation, so the exemptions in Schedule 1 will generally not be available in respect of such schemes.

Q. Under our occupational pension scheme employer consent is required by an individual who wants to draw a pension below age 60, but consent is not required for individuals who want to take their pension from age 60. Can this approach survive?

A. It can only survive if objectively justified.

Case studies

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

The Apple Tree Company provides a defined benefits 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 of 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 of service under the scheme. If he does accrue the maximum number of years of service under the scheme, he would no longer be able to accrue benefits. In this situation, the Company is under no obligation to provide John with another pension arrangement under which he can accrue benefits.

Case study – Nursery schemes

Rainbow plc has an occupational pension scheme that consists of a defined contribution section and defined benefits section. Employees can be admitted to the defined contribution section from age 25 and on reaching age 45 are given the option of joining the defined benefits section.

This is commonly known as a “hybrid scheme” and will be able to continue under the Regulations through the use of the exemption allowing minimum ages for admission to a scheme (see paragraph 7(a)). For schemes divided into two or more sections, each section is treated for the purposes of the Regulations as if it is a separate scheme, so the practice is once again exempted.

Case study – Age related contributions

Blueberry Company operates a money purchase occupational pension scheme. The Company takes actuarial advice and as a result decides to pay contributions in accordance with 10 age-related bands which increase with age. The actuary has confirmed that (in broad terms) these contributions, set as a percentage of pensionable pay, should produce the same amount of benefit for all the different age bands. Does it matter that the contributions for different age groups are different?

This should fall within the exemption at paragraph 10, because the aim in setting age-related contributions is to equalise the benefit which members of different ages will receive.

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 the time 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 how much pension 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 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 a pension (except in cases of ill health) without it being reduced for early payment.
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 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.
Late retirement pivot age	An age set in scheme rules, above which a member can take a pension which is actuarially enhanced for late payment.
Lower earnings limit (LEL)	The minimum amount someone must earn before they have to pay national insurance.
Member	Any active member, deferred member or pensioner member.

Money purchase arrangement	A pension arrangement under which benefits are determined by the investment returns on contributions.
Non-discrimination rule	Under the Regulations, occupational pension schemes are treated as including a rule requiring trustees not to unlawfully discriminate on age grounds.
Normal pension age (NPA)	The earliest age, under a scheme that a member can normally draw pension benefits.
Nursery scheme	This is an arrangement where, for example, a hybrid defined contribution/defined benefits scheme allows employees to join the defined contributions section at age 20. It then allows them to join the defined benefits section only at age 45. The defined contributions section is the nursery scheme.
Occupational pension scheme	This is typically an arrangement set up by or for an employer (or group of employers) to provide pension benefits for their employees.
Objective justification	Direct or indirect discrimination will be objectively justified if it pursues a “legitimate aim” and is a “proportionate” means of achieving that aim.
Pensionable age	The age at which individuals start to receive the basic state pension and the state second pension.
Pensionable pay	The part of a member’s pay which scheme rules specify is to be used to work out a member’s benefits and contributions.
Pensionable service	The period of employment taken into account when calculating pension benefits or contributions.
Pensioner member	An individual who is currently entitled to payment of a pension or other benefits from an occupational pension scheme, and who is not an active member of the scheme.
Personal pension scheme	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.

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Prospective member	An individual who under the terms of his employment or the rules of an occupational pension scheme can join the scheme either immediately or if he continues in employment for a sufficient period of time.
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 (Northern Ireland) 2006.
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.
Unregistered pension scheme	A scheme which is not a “registered pension scheme”.
Worker	Under the Regulations, in relation to pensions, “worker” includes employees and partners.

Office of the First Minister and Deputy First Minister

Castle Buildings
Stormont
Belfast BT4 3SR
Telephone: 028 90 523194
www.ofmdfmi.gov.uk

The Equality Commission for Northern Ireland

Equality House
7-9 Shaftsbury Square
Belfast BT2 7DP
Telephone 028 90 500600
www.equalityni.org

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

Office of Industrial Tribunals and the Fair Employment Tribunal

Long Bridge House
20-24 Waring Street
Belfast BT1 2EB
Telephone 028 9032 7666
www.employmenttribunalsni.co.uk

Labour Relations Agency

2-8 Gordon Street
Belfast BT1 2LG
Telephone: 028 9032 1442
www.lra.org.uk



First published April 2006.
Department of Trade and Industry. <http://www.dti.gov.uk/>
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