

Retirement Age Clauses - can they be relied on?

Many GP and other business partnership agreements usually contain a clause requiring a partner to retire at a certain age, often 65. The Employment Equality (Age) Regulations 2006 ("Regulations") outlaw unjustified age discrimination in relation to employees but these regulations also apply to partners. While the Regulations provide that setting retirement ages of 65 or above for employees will not be discriminatory (provided a proper procedure is followed), there is no such exception for partners unless the provision can be objectively justified; any dispute over the matter would be dealt with by the Employment Tribunal.

The Regulations also provide that it is unlawful for a firm to discriminate against a partner in the way it affords access, by that partner, to any benefits or by deliberately not affording such access; by expelling them from the partnership; or by subjecting them to any other detriment.

The Regulations confirm that direct age discrimination - the requirement for someone to retire at a set age - will not be unlawful if it can be objectively justified and that treatment is a proportionate means of achieving a legitimate aim. Therefore, to rely on a clause requiring a partner to retire upon reaching a set age, the other partners seeking to rely on the clause will need to show that the clause is objectively justified. What amounts to objective justification is governed by case law and the types of matters that have been accepted as objective justification include the following:

- For GP practices, retaining junior associates by being able to offer them the opportunity of partnership after a reasonable period
- Facilitating partnership and workforce planning with realistic



expectations as to when partnership vacancies would arise

However, even if the aims are regarded as legitimate and justified, then the requirement to compulsorily retire at a certain age must be a proportionate means of achieving those aims. There are more situations that have not been accepted as objective justification and you are recommended to obtain legal advice if seeking to rely on age related retirement clauses.

The crucial requirement will be for the partners to produce evidence that the retirement age was carefully considered and the reasons (the objective justification) for seeking to impose it; such considerations could relate to past experience, or that of similarly placed practices. In any event, it would be a good idea to document the reasons and to draw these to an incoming partner's attention when they sign up to the partnership agreement. The Tribunal has also identified that some evidence undermines a partnership's argument for setting a compulsory retirement age - for example where partners could be retained in the partnership over the retirement age by agreement, so you will need to be clear about the reasons for including such a clause and the effect of other clauses on that intention.

Who will cover the cost of GP Revalidation Training

Further to Local Medical Councils being told to expect high rates of practices having at least one GP who does not pass revalidation first time, the national director of the NHS Revalidation Support Team, Dr Conlon, has suggested that practices might need to consider provisions within their partnership agreements to cover who is financially liable if a partner has to take time out to retrain. Dr Conlon has warned that GPs may have to fund some retraining themselves if it extends beyond any study leave provision in their contracts.

Partnerships need to consider this issue and agree what should happen if a partner should fail; for example, would the partner remain entitled to a share of the profits while retraining? Any agreed provisions can be incorporated in a partnership agreement with a simple Deed of Amendment.

BIRKETT LONG LLP
 COLCHESTER OFFICE: ESSEX HOUSE
 42 CROUCH STREET
 COLCHESTER CO3 3HH
 T 01206 217300

CHELMSFORD OFFICE: NUMBER ONE
 LEGG STREET
 CHELMSFORD CM1 1JS
 T 01245 453800

E HEALTHCARELAW@BIRKETTLONG.CO.UK
 WWW.BIRKETTLONG.CO.UK



Care Homes subject to Human Rights Act 1998

Measures introduced by the Health and Social Care Act 2008 resulted in the Human Rights Act applying to care homes that provide accommodation for residents under local authority contracts.

Well run care homes are unlikely to be greatly impacted by the Act, however they will want to ensure that they are aware of their obligations to ensure compliance, particularly where decisions that are to be made could be regarded as controversial. The risk is that however good a provider's service, a resident may use the act to challenge decisions made about their care and poor quality services may become subject to a claim for damages for breaches of their human rights.

It would be good practice for providers to inform themselves and their staff of relevant rights under the Convention such as: Article 2 - Right to Life; Article 3 - Inhuman or Degrading Treatment; Article 5 - Deprivation of Liberty;

Article 8 - Right of Respect to Family Life, Home and Correspondence; Article 9 - Freedom of Thought, Conscience and Religion and Article 14 - Freedom from Discrimination in Respect of Convention Rights. Considering these human rights in advance of making decisions will put providers in a far better position in dealing with any challenge to decisions made. Particular areas where care home operators will need to take more care are:

- **Terminating a resident's placement**
Previously, termination of placements would have been a matter of contract, but the Human Rights Act will mean that full consultation and assessment procedures will need to be undertaken in deciding to terminate.
- **Visiting restrictions**
A care home seeking to restrict visiting by difficult relatives, whose visits impact on the resident or other residents or staff, should only do so after considering the impact of such a decision in relation to the Human Rights Act.

Compliance with Data Security Standards to become Contractual

The safety of NHS patient records could be bolstered by including provisions requiring compliance with standards for security of records through contractual means. Due to a series of high profile security breaches, NHS management has reiterated that GP practices are legally responsible for holding data securely, a requirement of the Data Protection Act 1998, but that they are looking at the national contract and considering how best to secure compliance with appropriate standards through contractual means. It should be noted that a breach of a contractual provision could result in the imposition of financial penalties and ultimately allow for a contract to be terminated.

The Care Quality Commission (CQC)

1 April 2009, saw the arrival of a new regulator for health and adult social care services in England, the CQC. The CQC will perform the functions previously carried out by the Healthcare Commission, the Commission for Social Care Inspection and the Mental Health Act Commission, all of which were dissolved on its inception.

In addition to the existing powers granted by the Care Standards Act 2000 (imposing, removing or varying conditions on registration; prosecuting for specified offences and cancelling registration) there are 3 new powers: issuing warning notices, issuing financial penalty notices and suspending registration of an organisation, which will be effective against private and voluntary health and social care providers in April 2010 when the Act creating the CQC comes fully into force.

Birkett Long LLP is regulated by the Solicitors Regulation Authority
Birkett Long LLP is authorised and regulated by the Financial Services Authority

Whilst every care and attention has been taken to ensure the accuracy of this publication, the information is intended for general guidance only. Reference should be made to the appropriate adviser on any specific matters.
© Birkett Long LLP 2009. We hope you find this newsletter of interest, but if you would prefer not to receive it or wish to receive a copy via email, please contact the Business Development and Marketing Team on 01206 217605.

Reference: NEWS/HEALTHCARE04/2009

BIRKETT LONG LLP

COLCHESTER OFFICE:
ESSEX HOUSE
42 CROUCH STREET
COLCHESTER CO3 3HH

CHELMSFORD OFFICE:
NUMBER ONE
LEGG STREET
CHELMSFORD CM1 1JS

T 01206 217300

T 01245 453800

E HEALTHCARELAW@BIRKETTLONG.CO.UK
WWW.BIRKETTLONG.CO.UK