



EMPLOYMENT, PENSIONS AND EMPLOYEE BENEFITS

Age and retirement

by **Íde O'Neill**

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The qualification age for drawing a State pension increased from 65 to 66 years of age in January 2014. It was set to be further increased to 67 years of age in January 2021, but the Irish Government has deferred such increase and the Pensions Commission was established to consider changes to the State pension age, among other issues. The Pensions Commission intends to report to the Government by 30 June 2021.

An aging workforce

An increasing State pension age, coupled with the rising cost of living, has resulted in a growing number of employees in Ireland seeking to work past the traditional retirement age of 65. While an ageing workforce certainly brings with it the benefits of knowledge and experience, it can also raise issues for employers.

Retirement age in Ireland

There is no national compulsory retirement age in Ireland. While some public servants are subject to a statutory retirement age (such as Gardaí and firefighters), generally retirement ages are provided for in contracts of employment, company policies and/or by way of custom and practice.

Mandatory retirement ages are permitted under Irish law provided they can be objectively and reasonably justified by a legitimate aim, and the means of achieving that aim are appropriate and necessary.

Issues for employers to watch out for when dealing with requests for longer working

Employee requests to remain in employment past a contractual mandatory retirement age are often dealt with by employers in an ad hoc manner. Employers may not realise that if they permit a number of employees to continue working past a mandatory retirement age, it can significantly dilute the justification for the mandatory retirement age. While employers need to carefully consider each request for longer working on its own merit, they should also be mindful that a decision to allow one or more employees to work past a mandatory retirement age may result in other employees working in similar areas asserting an entitlement to work beyond the retirement age.

Issues can also arise if employees who request longer working are permitted to remain in employment under their current contracts. For example, many contracts of employment contain clauses providing for an employee's entitlement to specified benefits during their employment, such as a death in service benefit or illness protection. If an employee is permitted to remain in employment over age 65 on their current terms, the employee would retain the entitlement to such benefits, but the small print of the policy terms may provide that the benefit is only available to employees of 65 years of age and under. In those circumstances an employer could be faced with a potential claim for the amount which would have been payable under the death in service or illness protection policy. If an employer grants a request to work longer, it is vital that they consider the contractual framework, including any provisions relating to benefits.

A failure to specifically provide for retirement in employment contracts and policies can also cause

problems. Some employers neglect to provide for a retirement age in their contracts of employment or policies and later seek to rely on references to the normal retirement age under an occupational pension scheme or other relevant pension arrangement in order to argue that the employee knew, or ought to have known, that their employment was subject to a mandatory retirement age. This approach can be challenged by employees and should be avoided by employers by dealing with the issue of retirement age in their contracts of employment and policies, unless the employer does not wish to have a retirement age within its workforce.

How should employers deal with requests to work past a mandatory retirement age?

1. Employers should carefully assess how they wish to deal with the issue of retirement and ensure that any retirement age is provided for in contracts of employment and policies. Even where a retirement age is provided for by an employer, however, it can still be challenged by employees. As such, in setting a mandatory retirement age, it is key that employers carefully consider whether it can be objectively and reasonably justified by a legitimate aim, and whether the means of achieving that aim are appropriate and necessary. The Workplace Relations Commission's statutory code of practice (Industrial Relations Act 1990 (Code of Practice on Longer Working) (Declaration) Order 2017), which was published in 2017 (Code of Practice on Longer Working) contains useful examples of what constitutes a legitimate aim.
2. Ideally employers would have a policy in place that sets out how, when and to whom requests for longer working should be made, together with details on how such requests will be dealt with. This will give the employer time to consider any requests and a step plan to follow to ensure that all requests are dealt with in a uniform manner. The Code of Practice on Longer Working contains useful guidance for employers on how to deal with requests to work longer.
3. Employers should consider offering access to pre-retirement courses and/or offering flexible working arrangements to assist employees in transitioning towards retirement.
4. Employers will need to carefully and consistently consider each request to work longer on its own merits taking into account matters such as the retirement policy, whether the retirement can be justified on a legitimate and objective basis, whether the employee is fit to continue in their current role and/or whether an alternative role or part-time hours would be more suitable or agreeable. Once a decision is made, it is advisable to document the reason for the decision, noting that it was based on the individual facts and does not apply universally.
5. Should an employer agree to grant a request for longer working, it should consider offering a fixed-term contract. Employers need to be mindful, however, that offering a fixed-term contract to a person over the compulsory retirement age must be objectively and reasonably justified by a legitimate aim and the means of achieving that aim must be appropriate and necessary. The Irish Human Rights and Equality Commission's guidelines on Retirement and Fixed-Term Contracts contain useful guidance for employers in this regard. Care should also be taken that the contract of employment specifically deals with employee benefits, clearly setting out what benefits continue to apply and providing that such benefits are subject to the terms of any applicable policy.
6. While employers need to be mindful not to discriminate against employees because of their age, care should be taken that employees that remain in employment past the age of 65 are still fit to perform their duties, particularly in physically demanding or safety critical roles.

Given the likely increase in requests for longer working, employers should ensure that they are well prepared in advance to reduce the risk of HR headaches, disgruntled employees and/or claims.

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