

International HR Best Practices

Tip of the Month

MARCH 09

A monthly “best practices” alert for multinationals confronting the challenges of the global workplace

This Month's Challenge

Mandatory retirement, long prohibited in the U.S., is still very much alive in Europe. A recent decision from the European Court of Justice affirms that these practices can continue, if justified by local social policy concerns.

Best Practice Tip of the Month

Some countries prohibit mandatory retirement, some countries permit it, and some countries require it. Knowing the rules in the places where you do business is a must for a multinational.



European Court of Justice Declines To Outlaw Mandatory Retirement

It has long been established in the U.S. that mandatory retirement is prohibited by the federal Age Discrimination in Employment Act, subject to a limited exception for certain highly paid employees in executive and high policymaking positions. Mandatory retirement remains commonplace (though not universal) in Europe, sanctioned in some countries by national legislation and through labor-management agreements. Since November 2000, however, a European Council directive (Directive 2000/78, the “Equal Treatment Directive”) has prohibited age discrimination in employment. In a much-anticipated ruling on the legality of the endorsement of mandatory retirement policies under the UK’s age discrimination law, the European Court of Justice held that mandatory retirement might be justified by legitimate social policy concerns, but left it up to the national courts to determine whether sufficient justification had been established. Employers in Europe, therefore, still cannot be certain whether they will be permitted to retain their mandatory retirement policies.

The European Court of Justice decision, issued on March 5, 2009, in a case formally titled *The Queen on the application of: The Incorporated Trustees of the National Council on Ageing (Age Concern England) v. Secretary of State for Business, Enterprise and Regulatory Reform* (No. C-388/07), and known informally as the Heyday Case, came about as a challenge by an advocacy organization for older workers against the UK regulations intended to transpose the EC Directive on age discrimination into national law. The UK regulations prohibit both direct and indirect discrimination in employment – what Americans would call disparate treatment and disparate impact discrimination – but contain an express exception for “the dismissal of a person . . . at or over the age of 65 where the reason for the dismissal is retirement.” The regulations also authorize an employer to refuse to hire an applicant who is at or near mandatory retirement age.

The specific issue for the ECJ was whether this provision of the UK law could be squared with the language of the discrimination directive. European Council directives are not themselves national laws within the EU’s member states; each state must “transpose” the directive into its own legal system. In this case, the discrimination directive specifies that

“Member States may provide that differences of treatment on grounds of age shall not constitute discrimination, if, within the context of national law, they are objectively and reasonably justified by a legitimate aim, including legitimate employment policy, labour market and vocational training objectives, and if the means of achieving that aim are appropriate and necessary.”

Although mandatory retirement is not specifically enumerated in the Equal Treatment Directive as an example of an exception to the prohibition of discrimination that can be justified by “legitimate employment policy, labour market and vocational training objectives,” the Court held that the UK law could pass muster under this exception. Moreover, the Court held that it was for the national court (the court in the UK), to determine whether the law in question was enacted in pursuit of a legitimate objective – even if the law itself did not specify the purpose it was seeking to achieve. Likewise, it was left to the national court to decide whether the resort to mandatory retirement to achieve the law’s legitimate objective (for example, to increase employment and advancement opportunities for younger workers) was “appropriate and necessary.”

The *Heyday* decision was foreshadowed by the Court’s October 2007 decision in *Palacios de la Villa v. Cortifiel Servicios SA*, which upheld a provision in Spanish law authorizing the use of mandatory retirement ages in collective bargaining agreements for the purpose of relieving unemployment and promoting better access to employment for younger workers.

For multinational employers with UK operations, this recent decision still leaves a them in a bit of a muddle. The case now goes back to the UK courts to determine the social policy objectives served by the legal authorization of mandatory retirement, and the suitability of mandatory retirement to meet those objectives. Elsewhere in Europe, the employer needs to study the laws and collective bargaining agreements applicable to each jurisdiction and facility to determine whether a mandatory retirement age is permissible, required, or prohibited. As in many international matters, one size still does not fit all.

International Labor and Employment Law Practice Group

Proskauer Rose LLP's International Labor and Employment Law Practice Group counsels companies doing business globally in connection with the employment issues they face in their workplaces around the world.

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