

Group Briefing
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Compulsory Retirement and Requests to Remain at Work: WRC Code of Practice on Longer Working

BACKGROUND:

On 2 January 2018 the Workplace Relations Commission published its Code of Practice on Longer Working¹.

The Code attempts to bring some clarity to the dilemma faced by employers operating traditional retirement ages between 60 and 65 and the growing demand for later retirement. This dilemma is further emphasised in some cases by the income gap created by the pushing out of the state pension age to 66, to 67 in 2021 and 68 in 2028. The introduction of the obligation to objectively justify retirement ages and fixed-term contracts given to employees retained in employment after reaching normal retirement age² adding to the complexity of the issue for employers.

The Code does not purport to solve all issues related to its subject matter and it does not provide unequivocal or absolute answers for employers. Decisions in respect of organisation-wide retirement ages and/or individual employees will still require careful consideration, case by case. However, it is hoped the Code will provide employers with guidance as to how to

¹ Industrial Relations Act 1990 (Code of Practice on Longer Working) (Declaration) Order 2017, SI 600/2017.

² Section 34(4) of the Employment Equality Acts 1998 to 2015 as amended by the Equality (Miscellaneous Provisions) Act 2015.

approach this sometimes delicate issue and some form of protection if the steps taken are compliant with the Code.

While not legally binding, it should be expected that the Code will be cited as persuasive in age related employment disputes and reflective of what is considered best practice for employers and employees.

The Code broadly addresses four areas:

- » The utilisation of the skills and experiences of older workers;
- » the objective justification of retirement ages;
- » practical retirement arrangements; and
- » dealing with requests from employees to work longer.

1. Utilising the skills and experiences of older workers

The Code recommends that the positive management of older workers requires employers to explore how best to maximise the experience and skills of those older workers, to the benefit of the business.

The Code suggests the following be considered:

- » Management training (at all levels) on age diversity and its benefits.

- » Encouragement of the sharing of knowledge and experience, using the skill and experiences of older workers.
- » Exploring flexible working patterns.
- » Reviewing policies and procedures for age bias.
- » Encouraging a culture that recognises the needs for relevant training and development across all ages.

2. Objective Justification of Retirement Ages

The Code acknowledges that retirement ages in the public sector are generally encompassed in legislation and in contract (express or implied) in the private sector.

Given the legislative requirement to objectively justify retirement and also fixed-term contracts issued after retirement by reference to a legitimate aim, and for the means of achieving that aim to be appropriate and necessary, the Code identifies some legitimate aims for an employer. These are:

- » Intergenerational fairness (allowing younger workers to progress);
- » motivation and dynamism through the increased prospect of promotion;
- » health and safety (generally in what are termed “safety critical”

occupations);

- » creation of a balanced age structure in the workforce;
- » personal and professional dignity (avoiding capability issues with older employees); or
- » succession planning.

3. *Practical retirement arrangements*

The Code sets out what it considers to be some standard retirement arrangements as guidance to employers dealing with an employee approaching retirement.

These recommended steps are as follows:

- » Raising and discussing retirement with employees is reasonable where there is no express contractual retirement age.
- » Good information and guidance enables employees to make informed decisions in planning for retirement. Supports such as pre-retirement courses, flexible/part-time working and counselling could be considered.
- » Clear information on how retirement procedures work should be provided – at recruitment and regularly throughout an employee’s career.
- » Employees should be advised of their upcoming retirement within six to 12 months of their retirement date.

While the initial notification might be in writing, it should be followed by a face to face meeting to address:

- » Clarity on the retirement date and possible issues arising.
- » Exploration of measures that might support the retirement (e.g. flexible working, alternative roles).
- » Transitional arrangements for the specific role.
- » Assistance with guidance and information.

4. *Dealing with requests from employees to work longer*

Requests from an employee to work longer should be considered carefully.

The Code suggests that individual

employees question themselves as to whether they are confident they can continue to perform the role to the required standard, if flexible working would be feasible, if alternative roles could be considered, the length of any extension being sought and that any pension or contractual implications be assessed.

Employers are encouraged to consider: the grounds for accepting or rejecting the request (by reference to the need for objective justification), the objective criteria applicable to the request, what any future arrangements might look like (e.g. a fixed-term contract) and the feasibility of flexible working.

The Code sets out recommended steps as follows:

- » The employee makes a written request to remain no less than three month prior to retirement.
- » A meeting is held so the employee can outline the case for remaining in employment, which the employer considers.
- » The employer communicates its decision in writing, as early as practicable following the meeting.
- » If the employer decides to offer a fixed-term contract, the duration must be specified as must the legal grounds underpinning the new contract.
- » The Code recommends employers confirm that any decision made relates solely to the case made by the employee in question and is not of universal application.
- » If the decision is to refuse the request, the grounds for the decision must be set out and communicated in a meeting. It is intended that this will help the employee understand why the request has not been granted, engender confidence that the request was given serious consideration and that the decision made is supported by good grounds.

The Code confirms an employee can be accompanied to these meetings by a work colleague or union representative.

COMMENTARY

The Code is welcome for bringing some clarity to this area for employers. The Code empowers employers to approach employees nearing retirement and to engage on the topic and related issues whereas before, concerns over allegations of discrimination, etc. may have hindered such discussions.

The Code emphasises the need for employers to have a clearly thought out process for engaging with employees who are approaching retirement and also to address requests for longer working – much of which can be addressed in an appropriate and comprehensive retirement policy.

Employers will need to consider the information and supports provided to employees throughout their careers in connection with retirement planning.

KEY QUESTIONS

1. Do you provide diversity training (incl. age)?
2. Do you have a retirement policy? Existing policies should be reviewed in light of the Code.
3. Have you a process in place to engage with employees in the 6 to 12 months prior to retirement?
4. Are you equipped to deal with requests for longer working, flexible working and alternative roles?
5. Have you considered retirement planning supports?
6. Are you familiar with your organisation’s objective grounds justifying retirement or fixed-term contracts entered post normal retirement?
7. Have you reviewed internal policies for age bias?

AUTHORS



CIAN BEECHER
PARTNER

+353 1 920 1193
cian.beecher@arthurcox.com



SHANE MCCARTHY
ASSOCIATE

+353 1 920 1263
shane.mccarthy@arthurcox.com

AILBHE MOLONEY
TRAINEE

+353 1 920 1313
ailbhe.moloney@arthurcox.com

KEY CONTACTS

For further information please speak to your usual Arthur Cox contact or any member of the team:



SEAMUS GIVEN
HEAD OF EMPLOYMENT GROUP

+353 1 920 1210
seamus.given@arthurcox.com



KEVIN LANGFORD
PARTNER

+353 1 920 1226
kevin.langford@arthurcox.com



CIAN BEECHER
PARTNER

+353 1 920 1193
cian.beecher@arthurcox.com



LOUISE O'BYRNE
PARTNER

+353 1 920 1185
louise.o'byrne@arthurcox.com

arthurcox.com

Dublin

+353 1 920 1000
dublin@arthurcox.com

Belfast

+44 28 9023 0007
belfast@arthurcox.com

London

+44 207 832 0200
london@arthurcox.com

New York

+1 212 782 3294
newyork@arthurcox.com

Silicon Valley

+1 650 943 2330
siliconvalley@arthurcox.com