New Legislation over Age Discrimination Compensation To Lead To More Formal Procedures In Director Dismissals

London September 12th 2006 …….Dismissed directors are likely to gain the most benefit from new employee age discrimination laws coming into force on October 1st, according to a recent survey of HR Directors, in-house lawyers and Board Directors at 60 of the UK's biggest businesses.

The new rules could also mean that companies will finally start putting directors through the same formal performance and dismissal procedures as other employees, documenting the true reasons for a director's departure, to help defend against expensive age discrimination claims.

The survey, by employment and partnership law firm, CM Murray, indicates that severance packages for exiting directors are likely to increase significantly, due to age discrimination claims especially where the Company has not followed statutory disciplinary and dismissal procedures, particularly for underperformance.

Over two thirds (67%) of respondents to the survey considered that there would be significant corporate governance concerns regarding negotiated director exit packages inflated by age discrimination compensation. They believed this would result in more "reward for failure" stories in the press.

Commenting on the results of the survey, Clare Murray, Partner of CM Murray said: "*Most directors tend to be in their 50s and to be replaced by younger executives, giving rise to potential age discrimination claims and substantial compensation claims right up to, and potentially beyond, retirement – certainly far more than their service agreements currently provide.*

"The combination of that huge potential exposure, plus the new heavy burden of proof on employers to prove that discrimination played no part at all in the decision to dismiss, means that prudent companies are likely to change the way they handle departing executives."

Every respondent to the survey believes that companies will have to take greater steps in future to protect themselves against age discrimination claims. Over three quarters (78%) believe that the new age discrimination rules will specifically effect the way businesses handle director dismissals, including that:

- Companies will need to plan and communicate more clearly and carefully before dismissing a director
- They will need to document the reasons for a director's departure and collate supporting evidence in advance of approaching a director about departure
- Companies will need to adopt an approach which was broadly consistent with that applied to other employees regardless of seniority, otherwise such inconsistency could in itself amount to age discrimination.

As a result 78% considered that they are likely to start applying the same formal performance management and dismissal procedures to directors as apply to other employees, signalling the possible decline of "cosy deals in conference rooms" for departing directors. This is despite the fact that over half (56%) of respondents considered that most companies would still prefer a quiet departure.

With the impending legislation companies are proactively seeking advice in this potential mine field in order to lesson their exposure to potential claims. On the other side individual directors facing possible dismissal have woken up to their new bargaining power.

Clare Murray adds: "For ***employers****, director dismissals are likely to become more formal and bureaucratic if they hope to defend age claims. Instead of quietly offering a package to an underperforming director,* *many companies are talking about documenting their reasons for dismissal in advance and where possible following formal performance and dismissal procedures prior to dismissal. Counter-intuitive to business, but absolutely necessary to have any realistic chance of defending age claims.*

*"For **directors**, whilst the new age rules could present them with significant potential compensation for age discrimination claims from October, the more such claims are raised and covered in the press, the more likely it is that employers will respond by implementing those formal dismissal procedures and documenting the true reasons for the director's departure. That could be damaging to what remains of the director's career."*

Other key finding:

- Respondents believe that the age discrimination rules are likely to make companies slower to remove failing directors for fear of claims.

- Some respondents considered that there will be cynical use of the age discrimination legislation by directors to seek an increase in exit packages.

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Notes to editors

New age discrimination rules will come into effect from 1st October, 2006. Compensation is based mainly on losses suffered by the employee, and is not subject to any maximum limit.

Directors are in practice not normally put through formal dismissal procedures as many businesses consider it inappropriate for their directors to be subjected to such procedures.

Currently an employer's failure to comply with the statutory disciplinary and dismissal procedures can result in a dismissed employee being awarded at least 10 per cent and up to an extra 50 per cent more compensation in the employment tribunals than they could otherwise have expected.

Corporate governance best practice is focused on reducing dismissed director compensation – not increasing it; the potentially significant increase in compensation arising from the combination of age discrimination legislation and the procedural failure is the direct antithesis of that approach.