

The End of Mandatory Retirement: Challenges and Opportunities for Employers

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Without much fanfare, the end of mandatory retirement in Ontario took effect on December 12, 2006. For employers, this change represents a new challenge when dealing with older workers, particularly since it is now much more difficult, if not impossible, to force older workers to leave the workplace at a preset age.

One of the results of Bill 211, the “Ending Mandatory Retirement Statute Law and Amendment Act, 2005” is that an employee can no longer be forced to retire at age 65. The definition of age under the *Ontario Human Rights Code* was changed so that there is no longer an upper age limit of 65. Therefore, age cannot be the determining factor as to when employment should come to an end.

An employer can still have a mandatory retirement plan with a defined age. However, the employer must prove that the age in the plan is a bona fide occupational requirement (BFOR). The test for a BFOR is onerous, and can be described as follows:

1. The employer adopts the fixed age job requirement for a purpose “rationally connected” to the performance of the job;
2. The requirement is imposed honestly, in good faith, and with a sincere belief that such a limitation is necessary for a legitimate work-related purpose;
3. The requirement must be necessary on an objective basis for carrying out the work; and,
4. It is not possible to accommodate the individual employee without imposing undue hardship on the employer.

Basically, this means that it is necessary to take an individualized approach to retirement. It will be very difficult, if not impossible, to satisfy this test on the basis of age alone. The abilities of each employee will have to be taken into account in making a decision. An important consideration will be whether an employee can meet the demands of the job. Obviously, it will be very difficult to establish that age alone defines an employee’s ability to perform the requirements of the job. Where an employee is experiencing difficulties in meeting these demands, an employer will still have an overall obligation to accommodate that employee to the point of undue hardship. In other words, mandatory retirement is effectively gone.

Does this mean that an employer cannot terminate an older employee? Of course an employer can still terminate. All that this change means is that an employer cannot arbitrarily impose a contractual term that requires an employee to leave at age 65. However, an employer will still be able to terminate an older employee, either for just cause or with notice or pay in lieu of notice (ie. by providing a package).

As a practical matter, in the event of a termination, this change now means that an older employee over the age of 65 will be able to file a Human Rights Complaint, alleging discrimination on the basis of age. For this reason, it will be important for employers to properly manage performance. This is always a good idea, but it is even more important now as a result of this change, as the employee personnel file will be an important element of the defence to a complaint.

For this reason, it should become company practice to keep detailed and accurate performance records on every employee. These records will have to be relied upon when making a decision as to whether an employee can continue in their job. In addition, performance reviews should be conducted regularly or at least on an annual or semi-annual basis.

An employee that is terminated must be provided with termination notice or pay in lieu thereof, in the absence of just cause. The *Employment Standards Act* of Ontario defines minimum notice and severance pay. However, it does not end there. Under the common law, an employee is also entitled to notice or pay in lieu of notice. Since age is a key factor in the common law assessment of how much notice an employee receives, the decision to terminate an older employee can be quite costly. An older employee can argue that it will take them much longer to find comparable employment, relative to a younger employee. In addition to Human Rights complaints, an older employee may also commence a civil action for wrongful dismissal if he or she is not offered a proper termination package.

An employment contract that defines the termination notice period can be used by employers to limit common law entitlements. The request to have an employee sign a contract can be made when an employee receives their initial offer of employment with the company, upon a promotion, or upon receiving additional consideration such as a bonus. Now more than ever, using employment contracts to limit termination liability makes sense.

In regards to benefits, it is at the employer's discretion to continue providing benefits to employees over the age of 65. The recent changes did not impact this part of the law. Currently, as before, the *Employment Standards Act* does not require an employer to continue benefits after the age of 65. However, employers should be aware that claims of alleged discrimination could occur. Due to this risk, an employer may want to continue benefits to employees over the age of 65 – subject to the costs associated with this. The insurance industry is currently dealing with the implications of an older work force, and more products may be made available.

Overall, older employees bring experience and know-how to the employment relationship. But employers also face increased liability. Simple changes to the approaches taken with all employees will help to reduce potential problems, thereby changing the challenge of an aging workforce into a real opportunity.

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