

Update

Employment Law

November 21, 2006

Nearing the End of Mandatory Retirement

On December 12, 2006, Bill 211 comes into force effectively ending mandatory retirement. As you may be aware, the Minister of Labour introduced Bill 211, the *Ending Mandatory Retirement Statute Law Amendment Act, 2005* (“Act”) to the Legislative Assembly of Ontario on June 7, 2005. The legislation was proposed to end the practice of mandatory retirement in Ontario “while not undermining existing pension, benefit and early retirement rights”. It was designed to afford those who are 65 years of age and older the same opportunity to earn a living and contribute to society enjoyed by younger workers.

While the *Human Rights Code* currently permits age-based discrimination in employment with respect to employees who are under 18 or who are older than 65 years, the *Act* will amend the definition of “age” for the purposes of age discrimination under the *Code* to protect employees aged 65 or older from being forced to retire, except in those cases where an employer can justify the decision based on a *bona fide* occupational requirement (“BFOR”). Therefore, individual employment contracts, collective agreements and corporate policies with mandatory requirement provisions will no longer be enforceable as of December 12, 2006 unless such an age-based requirement is necessary for employees to meet this job requirement and the accommodation of employees over the age of 65 would cause the employer undue hardship.

Given that the *Act* will come into force on December 12 of this year, the following is a brief summary of the changes that will take place on that date for you to review so you can determine whether or not you have taken the necessary steps to ensure your current employment and benefit arrangements comply with the new legislation.

Termination of Employment

- Under the current *Employment Standards Act, 2000* (“ESA”), an employee whose employment is

terminated at age 65 as a result of a mandatory retirement policy or practice is not entitled to notice of termination or termination pay. Once Bill 211 takes effect, however, all eligible employees, regardless of age, will be entitled to receive notice of termination or pay in lieu of notice if their employment is terminated without cause. Further, certain employees over the age of 65 may also be entitled to severance packages in excess of *ESA* requirements where so required either by the common law or an employment contract.

- In a unionized workplace, where existing collective agreements contain mandatory retirement provisions, such provisions will no longer be enforceable once the *Act* comes into force.
- Although collective agreements will no longer be permitted to include provisions requiring mandatory retirement, except where mandatory retirement is permitted under the *Code* as a BFOR, unions and employers may still negotiate “voluntary” retirement packages with employees.

Employment Benefits

- The amendments to the *Code* will not affect an employee’s entitlement to benefits. The *ESA* currently permits an employer to discriminate on the basis of age in providing benefits to employees aged 18 to 64. As this provision will remain in place following the coming into force of the *Act*, life insurance, disability benefits and health and dental coverage need not be extended to employees aged 65 or older. Following December 12, 2006, it will therefore be important to provide employees with advance notice of any cessation of benefits coverage to reduce the risk of employee claims.
- Although the *ESA* provisions respecting benefits coverage will not change following the coming into force of the *Act*, an employer may still opt to continue benefits coverage for workers aged 65 and older should its insurance carrier offer such an option.
- Employees over the age of 65 will continue to be eligible for the *Ontario Drug Benefit Plan*, however, as coverage under the plan is not affected by a group benefit plan provided by an employer.

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Pension Benefits

- The amendments to the *Code* will not have an impact on pension benefits already earned, as the *Act* has no retroactive effect.
- After December 12, 2006, however, employees over the age of 65 may continue membership in pension plans and accrue benefits subject to service or contribution caps of the pension plan. The *Income Tax Act* also does not permit an employee to defer his or her retirement income attributable to pension plans beyond age 69. Therefore, although pensions can be postponed beyond age 65, they must be paid out at 69 years, and those who continue to be employed past age 69 would collect both a salary and a pension at the same time.
- The coming into force of the *Act* also does not affect an employee's entitlement to Canada Pension Plan (CPP) benefits at age 65. CPP, Old Age Security and Guaranteed Income Supplement are all administered by the federal government and any change in eligibility criteria would fall within the federal jurisdiction.

Workplace Safety and Insurance

- The aged-based provisions in the *Workplace Safety and Insurance Act, 1997* and its regulations and policies will continue to apply despite the coming into force of the *Act* and the amendments to the *Code*. Therefore, employees who are aged 63 years or younger at the time of their injury would still be entitled to loss of earnings (LOE) benefits until age 65. Employees aged 63 years or older at the time of injury will also continue to be eligible to receive LOE benefits for a maximum of two years.

The coming into force of the *Act* on December 12, 2006 requires certain changes be made within the workplace, including the revision of employment policies, collective agreements and benefits plans. Employers will now be required to accommodate age-related illnesses and disabilities. Given that these changes may give rise to a number of issues unique to your organization or workforce, we would be happy to assist you with any questions you might have.

For further information, contact:

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