

Bill 211 – The End of Mandatory Retirement

On December 12, 2005, the Ontario Government passed legislation to abolish mandatory retirement at age 65. The legislation will come into force December 12, 2006. This legislation amends how age is defined within the Ontario Human Rights Code. The previous definition of age was “18 or more and less than 65”. The new definition is “18 years or more”. This change will make mandatory retirement policies at age 65 discriminatory.

In a January 2006 Client Update, Hicks Morley Hamilton Stewart Storie LLP recommends that the following issues be considered in preparation for December 12, 2006:

- The first step in deciding how to respond to Bill 211 should involve considering the demographics of your current workforce, both as a whole and with respect to specific positions or groups of positions.

Given current demographic trends, many employers are already finding that retaining older workers and training and/or recruiting their replacements is a more immediate organizational imperative than facilitating retirement at age 65. Assessing your organizational needs in this respect will obviously be an important prerequisite to understanding how best to manage your older employees.

- A second important step in the planning process will be to gather together any contractual documentation relating to your workforce – such as written employment contracts, written employment policies and procedures, collective agreements, employee benefits plans (including any related insurance contracts), pension plan documentation and the like. This contractual documentation should be reviewed for compliance with the new legislation. As part of this review process, think proactively and creatively about what objectives you wish to achieve with respect to employees both approaching and beyond age 65 and how to go about pursuing those objectives.

- The end of mandatory retirement does not necessarily mean that an employer can no longer have a retirement policy with a normal retirement age of 65. Under the Pension Benefits Act (which has not been amended), employees still have a right to retire with a full-unreduced pension on their “normal retirement date”, which cannot be later than one year following their 65th birthday. The difference – and it is a significant one – is that the employer can no longer compel the employee to retire on this date.

However, if your organization has an interest in facilitating retirement at or near age 65, there are management strategies at your disposal to increase the likelihood that employees will continue to choose to retire at or near age 65. Retirement counseling can assist employees to better understand their financial readiness to retire and to prepare themselves for “life after retirement”. Flexible, non-traditional working arrangements, job-sharing, and other creative approaches can also be very useful in transitioning employees gradually towards voluntary retirement. You should consider the feasibility of these approaches – as well as any others that are suited to your organizational needs – as mechanisms for ongoing management of older workers.

- If your employees are unionized, you should consider seeking input from, and where appropriate, working with bargaining agents to formulate new approaches to retirement issues. Most unions recognize that many of their members still want to retire at age 65 (if not before), and that these retirements can benefit other members of the bargaining unit (who may, for example, be promoted to fill positions vacated through retirements). In several instances, unionized employers have been able to work creatively with bargaining agents to develop approaches which are suited to organizational needs and appropriately balance the interests of both older and younger workers.

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- In the past, some employers took a relaxed approach to managing performance issues or conduct issues involving employees approaching age 65. Henceforth, employers will need to manage any performance issues or conduct issues relating to older workers in the same way they manage performance issues or conduct issues relating to their younger colleagues. In unionized workplaces, this will include the obligation to establish “just cause” before imposing discipline or terminating the employment relationship. During the coming year, you should review your written policies (if any) and the application of those policies in practice to ensure you are managing older workers effectively. If not, you should review your approach and consider any amendments necessary to ensure the organization’s best interests are protected.
- In addition to reviewing your general approach to managing older workers, you should also review your strategy for managing specific employees. If you become aware of older workers who have not been, or are not being, managed effectively, you should address that situation as soon as possible so that your legal position will be protected in the future.

The general aging of the population, combined with the elimination of mandatory retirement, will mean that there will likely be a significant increase in the number of older workers in the Ontario workforce over the next few years. As a result, employers can expect a significant increase in the number of requests for accommodation of special needs related to age and age-related disability. It can be expected that there will also be an increase in complex accommodation issues, involving conditions which are not reversible or curable and which will involve ongoing deterioration over time. While the legal requirements applicable in accommodating older workers are no different than for their younger counterparts, the practical strategies and dynamics involved can be quite different. You should review your organization’s existing accommodation policies and procedures, and ensure they include appropriate mechanisms to deal with accommodation issues affecting older workers.

- You should also consider with care any provisions under pension and/or employee benefit plans, which are triggered at age 65 or beyond. While it appears that the Government has endeavored to preserve the status quo with respect to pension and employee benefit plans, the legal issues here are complex and the Government’s approach may not shield employers entirely from liability.

As a result, you should review any plans applicable to your employees and seek legal guidance with respect to ongoing reliance on any provisions which use age 65 (or any age over 65) as a decision-making criterion.

It will also be important to review your collective agreement language governing employee benefit coverage. Some language could be interpreted as requiring continuing coverage for employees working beyond age 65, even if the underlying plans and policies do not, and you may wish to address this issue in collective bargaining.

In the case of insured benefit plans, you may wish to consider exploring with your insurers whether they are prepared to continue coverage for employees over age 65 and, if so, at what cost.

- Once you have determined how employee benefit entitlements will be treated for employees who work beyond age 65, your approach should be communicated to employees. While there should be communication with all employees in this respect, you should take particular care in communicating with employees who are currently at or near age 65 and may be considering retirement before or shortly after December 12, 2006. Benefits coverage can be a very significant factor for employees in deciding whether to retire or continue working, and your intentions should be communicated as clearly as possible in order to minimize the risk of future legal challenges arising from any misunderstandings in this regard.

(Excerpted with permission from “The End of Mandatory Retirement: Will You Be Prepared on December 12, 2006”, a Hicks Morley Client Update posted January 2006 on www.hicksmorley.com)

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What Doesn't Change

- The Employment Standards Act, 2000, which allows employers to stop employee benefits at age 65
- Re-employment obligations after employee injury in the work place
- Workplace Safety and Insurance Act, 1997 – benefits under this Act still cease at age 65

Exceptions to The Legislation

Bona Fide Occupational Requirement:

There will be certain positions, for safety reasons, which may continue to require a mandatory retirement age. In these cases, the organization will need to establish that the retirement age is a "bona fide occupational requirement" (BFOR). In these specific cases the employer will need to establish:

- an age-based job requirement or qualification is a BFOR;
- the employee does not meet the job requirement or qualification; and/or
- the employee could not be accommodated without causing undue hardship to the employer.

The Human Rights Commission will be the authority that will determine if such a retirement plan meets these requirements. The Human Resources Professionals Association of Ontario in a recent publication noted, "It is an extremely difficult test to meet and is generally acceptable in safety sensitive jobs where there are legitimate concerns regarding the ability of older workers to perform the job."