



Legal Corner

By
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Mandatory retirement to be outlawed

On May 30, 2003, the Ontario government introduced the Mandatory Retirement Elimination Act, 2003 (MREA), aimed at eliminating blanket mandatory retirement policies. Should this or similar legislation become law, all mandatory retirement policies (with exceptions noted below) will be in violation of the Ontario Human Rights Code.

This means that an employer who wishes to terminate an employee age 65 or over will have to justify its decision to terminate the employee based on the same criteria that would apply to younger employees. An exception is where age is a reasonable bona fide occupational qualification. However, to establish a bona fide occupational requirement an employer must establish, among other things, that it cannot accommodate the individual employee over 65 without enduring undue hardship.

Currently, the Code does not protect workers who are 65 years or older from discrimination in employment on the basis of age. To the contrary, the Code permits this form of age discrimination in employment by defining age¹ as eighteen years or more and less than sixty-five years.¹ This means that Ontario employers can legally require retirement at age 65 and many workplace policies and collective agreements specifically include mandatory retirement provisions.

The MREA will redefine the term age¹ to mean an age that is 18 years or more.¹ As a consequence, workplace policies, plans or collective agreement provisions that discriminate against employees 65 years or over, including mandatory retirement policies will violate the Code.

Elimination is inevitable

Although the MREA received first reading, it was not passed prior to the call of the October 2nd provincial election. New legislation will therefore have to be introduced when the Ontario legislature resumes sitting.

Yet, the elimination of mandatory retirement in Ontario is inevitable. Both the Progressive Conservative Party of Ontario and Liberal Party of Ontario have publicly endorsed the elimination of mandatory retirement in their respective election platforms. As well, the Ontario Human Rights Commission has strongly criticized mandatory retirement as discriminatory and similar policies have been challenged in other Canadian jurisdictions.

Effect on employers

Practically speaking, for both unionized and non-unionized workplaces every collective agreement, workplace policy and plan that contemplates mandatory retirement should be revisited now and where appropriate amended to adapt to the elimination of mandatory retirement if and when the Act becomes law.

Unionized workplaces

Many collective agreements contain a mandatory retirement provision. As such, the prohibition on mandatory retirement will be phased in over time. According to the MREA, the Code's new definition of age¹ will not apply to collective agreements in force as of May 29, 2003. However, it will apply to a collective agreement negotiated or extended after May 29, 2003.

Non-unionized workplaces

There is no phase-in provision regarding individual
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Elimination will have far-reaching impact

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employment contracts or workplace policies. Should the MREA or similar legislation become law, mandatory retirement provisions will be in violation of the Code as of the date of enactment.

Cost

Elimination of mandatory retirement may significantly affect the design and cost of administering workplace benefit plans, succession planning, reasonable notice entitlement and the duty to accommodate, to name but a few important issues.

For example, the Income Tax Act (Canada) prevents a member of a pension plan, RRSP, RRIF, etc., from deferring receipt

of retirement income from these plans beyond the end of the year in which the member attains the age of 69.

As such, unless specifically addressed by legislation, those who continue to be employed at age 69 will collect a salary and a pension at the same time.

Employers may also want to review pension plans provisions which, for example, do not allow employees hired on or after age 65 to enroll in a pension plan.

It will also be necessary to consider the impact of the MREA or similar legislation on insured benefit plans, including long-term

disability plans which typically cease benefit payments at age 65, life insurance and prescription drug benefits.

An employer's duty to accommodate may also be expanded where an employer is required to accommodate an aging workforce in ways not previously contemplated.

As you can see, the effect on employers of the elimination of mandatory retirement has potential to be widespread and complex.

As such, prudent employers should begin now to consider and prepare for the impact of this legislative change.

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