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MANDATORY RETIREMENT TO BE OUTLAWED

On May 30, 2003, the Ontario Government introduced the *Mandatory Retirement Elimination Act, 2003* ("the 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* ("the *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 "age" as "eighteen years or more and less than sixty-five years." 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 "age" to mean "an age that is 18 years or more". 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 OF MANDATORY RETIREMENT 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.

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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 "age" 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 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 entitlements 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 age 69. As such, unless specifically addressed by legislation,

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RETIREMENT...

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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 the potential to be wide-spread and complex. As such, prudent employers should begin now to consider and prepare for the impact of this legislative change.

"WALLACE DAMAGES" EXTENDED TO ARBITRATION

In 1997, the Supreme Court of Canada introduced the novel proposition that the court may award an extra period of notice to a wrongfully dismissed employee if the court finds the employee was dismissed in a manner that was unfair or not in good faith. The Supreme Court decision was *Wallace v. United Grain Growers Ltd.* ("*Wallace*"), and the extra period of reasonable notice has come to be known as "Wallace Damages". Until recently, *Wallace* had not been applied outside the wrongful dismissal context. However, on July 4, 2003 British Columbia Arbitrator H. Allan Hope, Q.C. awarded a grievor the sum of four months' notice over and above full back pay and reinstatement. The additional four months' payment was described as Wallace Damages.

The *Wallace* decision is important both for what the Supreme Court found and for the largely contrary manner in which the case has been subsequently interpreted and applied. Although the Supreme Court held that a terminated employee could not seek damages over and above the traditional reasonable notice period by suing for "bad faith discharge" as a separate cause of action, the fallout from the *Wallace* case has, for all practical purposes, created such a category of damages.

THE MANNER OF DISMISSAL IS IMPORTANT

In *Wallace* the majority of the Supreme Court answered "no" to the question of whether a wrongfully dismissed employee could sue in tort or contract for "bad faith dismissal". Yet, on the particular facts of *Wallace*, the Court found that the manner in which Mr. Wallace had been terminated did adversely affect his ability to find new employment. As such the manner of dismissal could be connected to an increase in the notice period. In making this ruling the Supreme Court expanded the list of factors to consider when determining reasonable notice (*i.e.* age, length of service,

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DATE: Thursday, November 13, 2003, 7:30 a.m. – 9:00 a.m.
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Attire: Smart casual (at the request of the Woodbridge Golf & County Club, please no jeans or denim)

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seniority, job description, *etc.*) to include a new factor, "bad faith dismissal", in appropriate circumstances.

THE CONFUSION

Had the *Wallace* decision ended there, the confusion and controversy that has surrounded this case might not have ensued. Unfortunately the majority of the Supreme Court went on to hold that entitlement to the extra period of notice does not require as a precondition a connection between bad faith dismissal and the employee's ability to find new employment:

> "The Court of Appeal in the instant case recognized the relevance of manner of dismissal in the determination of the appropriate period of reasonable notice. ...[T]he court found that this factor could only be considered "where it impacts on the future employment prospects of the dismissed employee..." With respect, I believe that this is an overly restrictive view. In my opinion, the law must recognize a more expansive list of injuries which may flow from unfair treatment or bad faith in the manner of dismissal.... I recognize that bad faith conduct which affects employment prospects may be worthy of considerably more compensation than that which does not, but in both cases damage has resulted that should be compensable."

> "The decision also reflects a dramatic increase in the potential liability to which a unionized employer may be exposed in the arbitral context."

By extending the "period of reasonable notice" even in circumstances where there is no connection between the impugned employer conduct and the employee's ability to find new employment, it would appear the majority of the Supreme Court did indirectly what it had decided could not be done directly: enable an employee to claim damages for "bad faith dismissal". The Supreme Court simply cloaked this damage award under the guise of "reasonable notice".

INCONSISTENT APPLICATION

The Supreme Court's analysis in *Wallace* has been considered in countless wrongful dismissal cases. Not surprisingly, its application has been inconsistent and in some instances incorrect. For example, at least one court has held that the Wallace Damages component of reasonable notice is not subject to an employee's obligation to mitigate. However by doing this the court treated the "bad faith" factor differently than other reasonable notice factors and, more to the point, like "aggravated" or "punitive" damages.

EXTENSION TO ARBITRATION

The recent arbitral case in which Wallace Damages were awarded is *Health Employers Association of British Columbia on Behalf of the Salvation Army*

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DID YOU KNOW...?

The Supreme Court of Canada ruled on September 18, 2003 that even where a collective agreement states that probationary employees cannot grieve their termination <u>for any reason</u>, an arbitrator still has jurisdiction if there is a human rights issue involved.

Look for more details in the next issue of *Management Counsel*.

WALLACE...

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(Sunset Lodge) v. British Columbia Nurses' Union ("*Sunset Lodge*"). In this case, the grievor had been terminated and ultimately ordered reinstated with full compensation. However the parties were unable to agree upon the appropriate amount of compensation to which the grievor was entitled and a follow-up hearing was convened.

Among other things, the union argued that the manner of dismissal had been egregious and asked the Arbitrator to order additional pay under the head of Wallace Damages. Namely, the employer could offer no explanation for the dismissal, inexplicably refused to provide information necessary to enable the grievor to obtain a nursing license in another province, erroneously calculated the amount of compensation due to the grievor and maintained this position until the date of hearing, and failed to maintain a seniority list, as required by the collective agreement, making it difficult to calculate the shifts to which the grievor would have been entitled during his period of unemployment. The Arbitrator found that the manner in which the grievor had been terminated was so unfair as to fall within the *Wallace* guidelines and awarded an additional sum equal to four months' notice.

Sunset Lodge reflects yet another example of the *Wallace* decision being taken beyond where the Supreme Court intended it to go. In *Sunset Lodge* the employee was reinstated with full back pay. As such the concept of reasonable notice does not arise in this case because the grievor was neither required to find new employment, nor was he in any way less than financially 'whole'. The additional four months' payment was plain and simply a form of "aggravated or punitive" damages.

CLARITY NEEDED

Arbitrator Hope's decision is further evidence that the law is now clouded on this issue, making it more important than ever that employers pay close attention to their rights and obligations, recognized and potential. The decision also reflects a dramatic increase in the potential liability to which a unionized employer may be exposed in the arbitral context. For these reasons we believe it is important that this case, and others like it (and there will most certainly be others) be reviewed by the courts and perhaps the Supreme Court of Canada in an effort to bring clarity to the issue.

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