

## Labour and Employment Law Bulletin

December 2006

### Mandatory Retirement

On December 12, 2006, legislation that ends mandatory retirement came into force in the province of Ontario.

#### The Code

Previously, the Ontario Human Rights Code (the “*Code*”) did not protect employees aged 65 and over from discrimination in employment on the basis of age. As a result, employers were entitled to implement mandatory retirement policies which require employees to retire at age 65.

#### The Proposed Legislation

Employers are no longer entitled to require employees to retire at age 65. Accordingly, agreements between employers and employees or mandatory retirement human resource policies that stipulate mandatory retirement at age 65 are no longer enforceable.

Collective agreements are not exempt from the prohibition on mandatory retirement. As a result, collective agreements will not legally contain mandatory retirement provisions and employees in unionized environments cannot be forced to retire because of age.

However, the legislation will maintain the status quo with respect to disability plans, life insurance plans, and health benefit plans. The government has announced it will not require companies to extend health, disability and life insurance coverage to employees over the age of 65.

Accordingly, the provision of benefits to workers age 65 or older continued to be available at the employer’s discretion.

The new legislation is not retroactive, and therefore, employees who were forced to retire before the legislation becomes law will not be entitled to get their jobs back.

#### Bona Fide Occupational Requirement

Employers are no longer able to terminate an employee’s employment merely because that employee has reached a certain age. The exception to this is if the age can be shown to be a *bona fide* occupational requirement.

A *bona fide* occupational requirement is an employment requirement that is discriminatory on grounds such as disability or age, but that is allowed under the *Code* because of the nature of the employment. If the employer wants to establish that mandatory retirement at age 65 is a *bona fide* occupational requirement, it must establish:

- that the employer adopted the requirement (mandatory retirement at age 65) for a purpose rationally connected to the performance of the job;
- that the employer adopted the requirement in an honest and good faith belief that it was necessary to the fulfillment of that legitimate work-related purpose; and
- that the requirement is reasonably necessary to the accomplishment of that legitimate work-related purpose. It must be demonstrated that it is not possible to accommodate individual employees without imposing undue hardship on the employer.

These exceptions may permit mandatory retirement, for example, in the police and fire fighter sectors.

If an employer cannot establish a *bona fide* occupational requirement, it will still be able to dismiss an older worker for reasons other than the employee reached a certain age, such as for cause or as a result of corporate restructuring.

#### Notice of Termination of Employment

The Employment Standards Act, 2000 (“ESA”) currently provides that an individual 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 pay in lieu thereof. With the elimination of mandatory retirement, all eligible employees, regardless of age, would be entitled to receive notice of termination or pay in lieu of notice when their employment is ended by the employer. Severance pay is also generally owed, although these are some exceptional provisions where an employee retires and

receives an actuarially unreduced pension benefit. We will be following cases in this area very closely.

We also anticipate that by terminating the employment of employees over the age of 65 an employer may be sued for damages for wrongful dismissal, and the amounts awarded to employees for wrongful dismissal are usually much higher than the ESA minimums for notice, or pay in lieu of notice.

## Other Employment-Related Statutes

It should also be noted that the duty to accommodate obligations under the *Code* will remain the same. Older workers would not be subject to a lower standard of accommodation than other protected groups.

Under the Workplace Safety & Insurance Act, 1997 (“WSIA”) workers are still covered for on-the-job injuries past age 65, but they will be eligible for just two years of loss of income payments from the Workplace Safety &

Insurance Board, unlike younger workers who are eligible for payments until age 65.

The WSIA currently provides that an employer’s obligation to re-employ after an employee is injured at work ends at age 65. Because the WSIA would be exempt from the prohibition on age discrimination, this provision would continue to apply.

Company pension plans will carry on as usual under the new legislation. Ontario’s current Pension Benefit Act does not prevent an employee from working past the normal retirement age of 65 and continue to accrue benefits and receive the pension when he or she retires.

The Canada Pension Plan is also unaffected by the legislation. An employee can apply to receive the basic federal pension at 65 and keep working (but no longer pay into the CPP).

## Pallett Valo LLP Labour & Employment Law Group

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We provide support to management in drafting employment contracts and company policies, collective bargaining, collective agreement administration and grievance arbitration. We work for a diverse range of employers in the private and public sectors, and have specialized expertise in the construction industry.

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Rev.01/08