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# End of Mandatory Retirement...Don't bring out those golf clubs just yet!

**M**andatory Retirement in Ontario ended December 12, 2006, resulting in uncertainty for both employers and employees.

In December of 2005, the Ontario government passed legislation, The Ending Mandatory Retirement Statute Law Amendment Act, 2005, ending mandatory retirement effective December 12, 2006. As a result, employers will now be prohibited from forcing employees to retire at the age of 65 if the employee does not wish to retire at that time. The new legislation amends the Ontario Human Rights Code (the "Code"), as well as other statutes related to mandatory retirement, to remove the upper age exemption and protect individuals aged 65 and over from age discrimination in the workplace. Consequently, mandatory retirement will become a form of age discrimination and thus, be illegal.

Prior to the enactment of this legislation, an employer was allowed to terminate an employee who had reached the age of 65 without violating the Code as long as notice or payment in lieu of notice was provided to the employee. As the Code defined the "age" of workers as over 18 and under 65, employers were able to devise and implement mandatory retirement policies as long as the retirement age was a least 65 and such practices were not deemed to be discriminatory.

The ending of mandatory retirement has far-reaching implications for both employers and employees. From an employer's perspective, the new changes mean that an employer can only terminate an older employee on the grounds of inadequate performance or else risk violating the Code on the grounds of age discrimination, unless the employer can justify the forced retirement as a "bona fide occupational requirement" (an employment requirement or qualification necessary due to the nature of the employment) in accordance with the Code. Any mandatory retirement policy must be justified on "bona fide occupation requirement" grounds to be legal. When terminating an older employee, the onus rests on the employer to establish that age was not a determining factor. If employers are not careful, they are in danger of being inundated with human rights complaints from elderly employees.

One of the goals of eliminating mandatory retirement is to afford employees the freedom to choose when to retire based on their personal circumstances and priorities, allowing employees to work longer if they so desire. Now employees will be entitled to remain at work past the age of 65 providing they remain capable of performing their job. Employers, who are already legally obligated to accommodate elderly employees up to the point of undue hardship, may be required to re-train employees, have their skills upgraded, institute flex hours and provide other forms of accommodation to elderly employees. In the event that an employee chooses to work past the age of 65 and is subsequently dismissed by their employer without cause, their entitlement to notice may be much higher than in the past, when it was expected that employees would retire from the workplace at age 65. The overriding purpose of reasonable notice is to provide the employee with sufficient time to find comparable employment and to ensure that the employee remains in the same financial position they would have been in had they been allowed to continue working over the reasonable notice period. As it will likely be very difficult for an elderly employee to find comparable employment, notice periods may very well be increased beyond the existing informal limit of 24 months, perhaps up to 30 months or greater, to reflect this reality. This will result in even higher costs to employers.

To avoid the pitfalls associated with the end of mandatory retirement, employers should encourage early retirement through the use of incentive packages. Implementation of fixed-term contracts or contracts containing termination clauses must be spread across all age groups and should not target older employees otherwise the contract may be void for discriminatory reasons. If an employer is concerned about an older employee's performance, such concerns should be well documented and progressive discipline properly implemented prior to termination. Accommodation of elderly employees must be fully exhausted unless the employer can establish the existence of a bona fide occupational requirement, which may permit mandatory retirement in certain circumstances. **MB**

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