



Evans, Philp LLP
Barristers and Solicitors

Breakfast Series: The End of Mandatory Retirement

November 28, 2006



ENDING MANDATORY RETIREMENT STATUTE LAW AMENDMENT ACT, 2005 (the “Act”)

- The *Act* includes changes to several statutes, which changes become effective December 12, 2006
- The most significant change is made to the *Human Rights Code*

DEFINITION OF “AGE” IN *HUMAN RIGHTS CODE* PRIOR TO DECEMBER 12, 2006

- s. 10(1) – “*age*” means an age that is 18 yrs or more, except in subsection 5(1) [i.e. equal treatment in employment] where “*age*” means an age that is 18 years or more and less than 65 yrs

DEFINITION OF “AGE” IN THE *CODE* EFFECTIVE DECEMBER 12, 2006

- s. 10(1) – “age” means an age that is 18 years or more

WHAT DOES THIS CHANGED DEFINITION OF “AGE” MEAN FOR EMPLOYERS?

- **mandatory** retirement at age 65 will no longer be permissible **unless** the particular employer can establish that it is a *bona fide occupational requirement* (**BFOR**)

WHAT DOES THE *CODE* SAY ABOUT BFOR'S?

s.24(1)(b)-the right to equal treatment in employment is not infringed where there is discrimination on the basis of age, sex, record of offenses or marital status provided the age, etc. of the person is a ***reasonable*** and ***bona fide*** qualification because of the nature of the employment

THE SUPREME COURT OF CANADA ON BFOR'S

The Court has stated that three requirements must be satisfied by the employer in order to establish a BFOR:

1. the employer must show that it adopted the requirement (e.g. mandatory retirement) **for a purpose that is rationally connected** to the performance of the job

THE SUPREME COURT OF CANADA ON BFOR'S, CONT'D

2. The employer must show that it adopted the requirement **in good faith in the honest belief that it is necessary** for the fulfillment of that work-related purpose; and
3. The employer must show that the requirement is **reasonably necessary** to the accomplishment of that work-related purpose in the sense that the employer cannot accommodate persons with that characteristic without **undue hardship**

RETIREMENT PLANS ON AND AFTER DECEMBER 12, 2006

- **Mandatory** retirement under collective agreements as well as non-union plans becomes unenforceable on December 12, 2006 – i.e. the parties **cannot** contract out of the amended *Code*

RETIREMENT PLANS ON AND AFTER DECEMBER 12, 2006, CONT'D

- All other aspects of retirement plans remain in effect and are enforceable by employees
- Will benefits provisions in collective agreements become applicable to workers 65 and over, despite wording and/or intent of collective agreement or of *ESA* provisions allowing age differentiation?

RETIREMENT PLANS ON AND AFTER DECEMBER 12, 2006, CONT'D

- Voluntary retirement plans are acceptable provided they are truly voluntary and non-coercive
- Early retirement incentives also likely still acceptable, again provided they are truly voluntary

PERFORMANCE MANAGEMENT AND THE OLDER WORKER

- Employers may be less inclined to allow older workers to “*play out the string*”
- Where performance an issue, effective performance management required – i.e. assessing & documenting performance with appropriate consequences
- Performance mgmt programs must be fair and equitable across entire employee group – i.e. can't target older employees

PERFORMANCE MANAGEMENT AND THE OLDER WORKER, CONT'D

- Disabilities interfering with performance must be accommodated to the point of undue hardship;
- accommodation of age-related disabilities likely to become more important

PERFORMANCE MANAGEMENT AND THE OLDER WORKER, CONT'D

- What is reasonable notice of termination for older, long term employee who is terminated on a without cause basis after age 65?
- Employment contracts with upper limits on notice and severance likely to become more important

WORKERS' COMPENSATION AND THE OLDER WORKER

- age-based distinctions found in the *Workplace Safety and Insurance Act* (“*WSIA*”), its regulations and its policies are exempt from the changes under the *Act*

WORKERS' COMPENSATION AND THE OLDER WORKER, CONT'D

WSIA,s.43(1) remains unchanged – i.e. loss of earnings payments will **continue until earliest of:**

- a) day on which the loss ceases;
- b) day on which worker reaches 65 (if less than 63 when injured); and
- c) 2 yrs after date of injury if 63 or older when injured

WORKERS' COMPENSATION AND THE OLDER WORKER, CONT'D

WSIA, s. 41(7) remains unchanged – i.e. an employer is obligated to re-employ an injured worker **until earliest of:**

- a) 2nd anniversary of date of injury;
- b) 1 yr after worker medically able to resume pre-injury job; and
- c) date worker reaches age 65

WORKERS' COMPENSATION AND THE OLDER WORKER, CONT'D

WSIA, s. 40 – the duty of the worker and the employer to co-operate in the early and safe return to work of the worker remains unchanged (i.e. no age limitation)

- will LMR's for older workers become more common?

WORKERS' COMPENSATION AND THE OLDER WORKER, CONT'D

- will the continuation of age-based restrictions under the *WSIA*, its regulations and its policies survive challenges under the *Charter of Rights*?

EMPLOYEE BENEFITS

- Age-Based Distinctions in Benefits Plans
- The Legislation on December 12, 2006

AGE-BASED DISTINCTIONS IN BENEFITS PLANS

- The Legislation on December 12, 2006
 - Government intends age-based distinctions in benefits plans to remain
 - Examples: *Employment Standards Act, 2000* (the “ESA”); *Human Rights Code*

AGE-BASED DISTINCTIONS IN BENEFITS PLANS, CONT'D

- The Legislation on December 12, 2006
 - *ESA*, Regulation 286/01: Benefit Plans
 - Definition of “age” remains 18 to 65

AGE-BASED DISTINCTIONS IN BENEFITS PLANS, CONT'D

- The Legislation on December 12, 2006
 - *Human Rights Code* – Changes to s. 25, employee benefits and pension plans
 - No age discrimination where compliance with *ESA*

AGE-BASED DISTINCTIONS IN BENEFITS PLANS, CONT'D

- The Legislation on December 12, 2006
 - Summary: government intended to end mandatory retirement; government did not intend to end age-based discrimination in benefit plans

IF AGE-BASED DISTINCTIONS ARE LEGAL, WHAT ARE THE CONCERNS?

- The Legislation may be *challenged*
- The Legislation may be *changed*

IF AGE-BASED DISTINCTIONS ARE LEGAL, WHAT ARE THE CONCERNS?, CONT'D

- The Legislation may be *challenged*
 - Legislative intent to maintain *status quo* in benefits plans unlikely to prevent grievances, human rights complaints, *Charter* challenges

IF AGE-BASED DISTINCTIONS ARE LEGAL, WHAT ARE THE CONCERNS?, CONT'D

- Court challenges
 - Legislation may be declared unconstitutional
 - Potential constructive dismissal claims
 - Provide advance notice to employees if benefits to cease at age 65

IF AGE-BASED DISTINCTIONS ARE LEGAL, WHAT ARE THE CONCERNS?

- Grievances
 - Potential for arbitration awards extending benefits to older workers based on collective agreement language
 - Who provides benefits?
 - Our experience with the *Ontario Health Premium*

IF AGE-BASED DISTINCTIONS ARE LEGAL, WHAT ARE THE CONCERNS?, CONT'D

- Human Rights Complaints
 - *“The Commission has concern about the way the benefit issue was dealt with by the legislation”*
 - Expect benefits for older employees to be focus of courts, tribunals and Commission in coming years

IF AGE-BASED DISTINCTIONS ARE LEGAL, WHAT ARE THE CONCERNS?, CONT'D

- Additional Concerns
 - A New Factor: Mental Distress Damages
 - *Fidler v. Sun Life Assurance Co. of Canada*

IF AGE-BASED DISTINCTIONS ARE LEGAL, WHAT ARE THE CONCERNS?, CONT'D

- The Legislation may be *changed*
 - Changes to the *Ontario Drug Benefit Program* (ODP)
 - Changes to other legislation?

GOOD NEWS: IS THERE ANY?

- Communication with employees regarding retirement plans is still legal
- Voluntary retirement plans and incentives are still legal
- Mandatory retirement policies may be possible if BFOR exists

GOOD NEWS: IS THERE ANY?, CONT'D

- Many employees will still retire at age 65
- Tax implications may motivate retirements
- Some level of government-funded benefits for older employees will remain

GOOD NEWS: IS THERE ANY?, CONT'D

- Older employees as mentors
- Older employees as a protection against skills shortages

WHAT SHOULD EMPLOYERS DO NOW?

- Review demographics of your workplace
- Update policies, pension and benefits plans, group insurance plans, employment contracts to delete references to mandatory retirement

WHAT SHOULD EMPLOYERS DO NOW?, CONT'D

- Review employer obligations under collective agreements, employment contracts, insurance contracts
- Perform cost/benefit analysis to assess implications of extending benefits to older employees

WHAT SHOULD EMPLOYERS DO NOW?, CONT'D

- Speak with your insurers
- Seek legal advice with respect to contracts, retirement policies and communications with employees

EVANS PHILP LLP BREAKFAST SEMINARS CONTINUE IN 2007

- Dates:
 - January 31, March 27, May 29
- Topics:
 - Workplace Privacy, Duty to Accommodate, TBD
- Please join us!