INSIGHTS

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Employment and Benefits After Age 65

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Will you still need me, Will you still cover me, When I'm 65?

My apologies to the Beatles. Workers in Ontario no longer have to retire at age 65 as of December 12, 2006. That's when a provincial edict abolishing mandatory retirement kicked in. It is now illegal to discriminate on the basis of age in matters of employment under the Ontario Human Rights Code. In short, employers will no longer be permitted to force people to retire at age 65.

Bill 211 amends the definition of 'age' in the Ontario Human Rights Code to prohibit age discrimination of employees 65 years or older. 'Age' was defined in the Code as "eighteen years or more and less than sixty-five years." Bill 211 removes the upper age limit. Thus, employers using age 65 (or any other age in excess of 18) as a factor in employment-related decision-making will be vulnerable to a claim of age discrimination, unless they can bring themselves within one of a handful of narrow exceptions set out in the Code.

That said, in enacting Bill 211, legislators did take steps to preserve the "status quo" with respect to pension plans and certain employee benefits. Bill 211 does not amend the legislative framework governing pension plans, and therefore the normal retirement age under the Pension Benefits Act (age 65) remains unchanged.

Unfortunately, for constituents of Insights, the treatment of (and implications for) employee benefit coverage is much more complex and uncertain.

The Code currently permits age-based distinctions in employee benefits, pensions, superannuation or group insurance plans or funds that comply with the Employment Standards Act, 2000 and Regulations 286/01 "Benefit Plans". The term 'age' is defined in the Benefit Plans regulation, for purposes of both the statute and the regulation, as "any age of 18 or more and less than 65 years". The government included provisions in Bill 211 that are designed to ensure that this definition of 'age' will continue to apply despite the change in the definition of 'age' under the Code.

The government has stated publicly that because of the age cap, any differential treatment in coverage that "complies with" the Employment Standards Act will not offend the Human Rights Code. In other words, differentiation in the benefits offered to employees on either side of age 65 may continue.

Nonetheless, recent jurisprudence causes some concern about the sustainability of such distinctions. The trepidation arises by reference to the Ontario Court of Appeal's decision of 2005 involving the Ontario Nurses Association and Mount Sinai Hospital. Finding it discriminatory, the Court of Appeal struck down the provisions of the Employment Standards Act which had relieved employers from an obligation to pay severance when an employee was terminated due to disability. The provincial government later amended this particular regulation.

It's certainly conceivable that the same thing could happen to age-based provisions affecting benefit coverage. Thus, there is a risk that the courts or other decision-makers will follow the same logic in the Mount Sinai decision and find that failing to offer existing levels of benefit coverage to those employees who continue to work beyond age 65 constitutes age discrimination contrary to the code.

With this risk in mind it would be prudent to evaluate the content, structure and feasibility of benefit plans currently offered. Since the mid-1970's, human rights decision makers have held that age-based distinctions can only be drawn where they are necessary to ensure an actuarially sound, viable and cost-effective benefit plan. In the case of insured employee benefits, the employer must establish that the age distinction reflects sound and accepted insurance practice and that there is no practical alternative to drawing a distinction based on age. This will be a very difficult test to meet.

The end of mandatory retirement raises many questions for workers and employers alike. Here are a few that were posed by Mercer Human Resources, along with their answers:

Q. *Do you foresee a large number of people refusing to retire at age 65?*

A. This hasn't been the case in other provinces, such as Quebec or Manitoba, where mandatory retirement

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Will you still cover me..., cont'd

ended in the 1980's. The average age of retirement in Ontario is 61-62, and that is consistent with the rest of the country.

Q. *Can an employer get an exemption from this law?*

A. If a company continues to impose mandatory retirement and is brought to the Human Rights Commission, the employer would need to prove that an age limit is a "bona fide occupational requirement" of the job.

Q. *What if an aging worker has a health problem that reduces their ability to do the job?*

A. Under the law, an employer has a 'reasonable duty to accommodate' a disability, up to the point of undue hardship for the business. What is reasonable will be decided on a case-by-case basis. What is reasonable for a large corporation may not necessarily be reasonable for a very small company.

Q. *What happens in case of injury to an older worker?*

A. The Workplace Safety and Insurance Act will cover workers over the age of 63 with benefits for up to two years. But after that, the worker's compensation benefits end and the employee would have to either go back to work or retire.

Q. *How do I get rid of an employee who is 65 and not performing well, but won't retire?*

A. This is why having performance evaluations that are fairly and consistently applied to everyone in the workplace is important. It is possible to dismiss someone for poor performance, but the employer can get into trouble if it seems that he or she is unfairly targeting older employees.

Q. *As a 65 year-old, can I continue working and collect my Canada Pension Plan, Old Age Security benefits and workplace pension?*

A. Yes, for the Canada Pension Plan, but maybe no for the workplace pension, depending on the rules of the pension plan. This situation is complicated by tax issues. There are exemptions if you are not working. Also, the Old Age Security benefit is clawed back if you make too much money. So workers will need to examine whether it makes sense financially for them to keep working.

Q. *I work for an employer that provides health, drug and dental benefits. If I continue working after 65, does the employer still have to cover me?*

A. No, according to the experts. This is one thing that didn't change. It is possible for an employer to provide benefits to people under the age of 65 and not to workers over 65, but as I said earlier, Ontario will likely move to amend this. Prescription drugs are covered by the Otnario Drug Benefit Plan, even if an employee is working, however Ontario is also considering to amend this practice.

Q. *What should employers do now?*

A. Review all workplace documents, from employee handbooks to union contracts and pension and benefit plans to clean up the language to conform to the law. If you don't have a performance-evaluation system or haven't applied it consistently, it's time to fix that. Consult with your professional advisors. Assess your workplace needs. Assess how many employees you have who will reach 65 in the next few years and how many of them are likely to stay.

The Beatles summed it up well: "Will you still need me, will you still feed me, when I'm 64?"

Until next time…

Did You Know?

Effective january 1, 2007, the Employment Insurance Maximum Insurable Earnings will increase to $40,000. The Maximum Weekly EI Benefit payable for 2007 will be $423 ($769 x .55) = $423.

In a July 14, 2006 technical Interpretation, CRA notes that when a sole proprietor implements a Cost-Plus Plan, it must provide coverage for at least one employee other than the sole proprietor. Otherwise, it is NOT the nature of insurance as the proprietor has not undertaken to indemnify another person.

In a July 29, 2005 Tax Court of Canada case, the taxpayer purchased 'over-the-counter' medications, as advised by his doctor, for throat cancer. These expenditures were denied as a medical expense because they were not 'recorded by a pharmacist'. The Court noted that there are laws throughout Canada that describe the records that a pharmacist is required to keep. Medications purchased off the shelf do NOT meet these requirements.

The April 2006 *Canadian Benefits Bulletin* reported a federal government consultation on the expansion of eligibility criteria for the EI Compassional Care program. This program provides a temporary absence from work without suffering income or job losss, to EI eligible workers, to provide care or support to a person who is at significant risk of death within 26 weeks. The requirements to qualify for the Compassionate Care Benefit are the same as for EI sickness, maternity and parental benefits:

- 600 hours of insurable employment in the qualifying period in the 52 weeks prior to the start of the claim, and
- an interruption of earnings or a reduction of more than 40 per cent in normal weekly earning.

Effective June 15, 2006, the criteria for eligibility will include those providing care to a sibling, grandparent, grandchild, in-law, aunt, uncle, niece, nephew, foster parent, ward, guardian, or a gravely ill person who considers the claimant to be like a family member. This expands the criteria from those caring for a parent, child or spouse, including common-law and same-sex couples living conjugally for at least a year.