



THE END OF MANDATORY RETIREMENT: UNDERSTANDING THE CHANGES TO THE BC HUMAN RIGHTS CODE

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1. INTRODUCTION

On April 25, 2007, the British Columbia Provincial Government introduced Bill 31, the Human Rights Code (Mandatory Retirement Elimination) Amendment Act, 2007, which will take effect on January 1, 2008. This change reflects the demographic reality that the number of British Columbians over the age of 65 in the next 25 years will double, and means that British Columbia's position on mandatory retirement will fall in line with most of the other provinces in Canada.

While the changes to the Code will have some positive results for employers and the economy in general, there are however, some significant human resources implications and costs associated with the elimination of an employer's right to require employees to retire at age 65. The purpose of this paper is to explain the changes to the Code, implications of those changes to employers, and to offer some practical suggestions as to what companies should start thinking about in anticipation of January 1, 2008.

2. LEGISLATIVE FRAMEWORK

Currently, the Code prohibits age discrimination for individuals between the ages of 19 and 64. The amendment will extend that prohibition for individuals aged 65 or older. Practically, the amendment means that any public or private sector employers who currently require their employees to retire at age 65, will no longer be able to do so after January 1, 2008.

The legislation will not be retroactive so employers will not have to re-hire employees who are required to retire before the legislation comes into force. The specific amendments to the Code are set out in the appendix to this paper.

2.1 Discrimination in Employment - Section 13(1)

After January 1, 2008, employers will no longer be able to use age as a criteria for selection of prospective candidates (unless that discrimination is based upon a bone fide job requirement). However, employers must also avoid certain descriptions in their job advertisements to avoid the implication that they have a preference for younger employees. For example, adjectives such as "energetic" or "youthful" would imply that age would be a consideration in final selection of candidates. Further, when communicating decisions not to hire someone, employers should be cautious about using terms like "too experienced" or "over qualified" as these terms can be considered euphemisms for "too old".

2.2 Exceptions for Insurance and Pension Plans - Section 13(3)(b)

This section of the Code has been amended so that it continues to be acceptable for bona fide pension or insurance plans (whether provided by a third party insurer or through self insurance) to discriminate coverage or benefits on the basis of age. This is an important amendment because one would expect certain kinds of insurance (i.e. disability or life insurance) to be more costly for older employees. Employers therefore would be entitled to retain their existing plans, regardless of whether such plans contain exclusions or other age-based criteria.

2.3 Exceptions for Statutory Mandated Mandatory Retirement Schemes – Section 41

A new section of the Code has been introduced to allow statutorily mandated mandatory retirement, and age-related benefits such as the Workers Compensation Act to continue. Thus, where there is a statute or regulation attached to a statute which requires retirement at a certain age, those provisions will not be deemed in violation of the Code. Normally the Code takes precedence over other legislation however, this amendment allows the Province to continue to mandate retirement in select circumstances (i.e. Provincial Court Judges will still be required to retire at age 70). Also, Workers Compensation Benefits, which assume a retirement at age 65, will also be permitted.

It should be noted that Bill 31 will also repeal (effective January 1, 2008) the section in the Public Service Act which requires retirement at age 65. Thus, all public sector employees, will no longer be required to retire at age 65.

3. CONSEQUENCES OF ENDING MANDATORY RETIREMENT: “THE GOOD, THE BAD, AND THE UGLY”

3.1 Human Resources Planning

In British Columbia's hot economy, employers are having difficulty hiring enough employees to meet their needs. Consequently, the elimination of mandatory retirement can be viewed as a sensible response to that reality. Our current situation, particularly with the impending retirement of the baby boomer generation, it is anticipated that Canada will chronically short of employees.

In the late 1980s when our Supreme Court of Canada considered and upheld challenges to mandatory retirement, our economy was in a recession and many younger workers could not find jobs. In 1987 the Government of Canada lowered the age (from 65 to 60) by which employees could apply for benefits under the Canada Pension Plan, further encouraging employees to retire at an earlier age. Thus, the prevailing sentiment at the time was that mandatory retirement (a) gave more opportunities for younger workers to become employed, and (b) was consistent with societal expectations.

Certainly, where employees have acquired skills, knowledge and experience, and are otherwise able to perform the functions of their job, it makes no sense to force this group to retire at what many see as an artificial milestone. For this reason, a number of employers had already eliminated mandatory retirement.

On the negative side, where employers previously had some certainty regarding expected retirements of their employees, the elimination of mandatory retirement will result in significant uncertainty for managers tasked with human resource planning. No longer will employers know for certain when employees will retire, nor can they compel decisions on retirement dates.

Given this uncertainty, employers will be looking at incentives such as retirement planning seminars to encourage employees to think about and make decisions regarding planned retirement dates, and to assist employers in planning their human resources requirements. Employers who want to actively encourage retirement of their older work force (perhaps for safety or productivity reasons) will want to also consider incentives to encourage retirement such as phased in retirement, financial bonuses, and offering certain benefits or other perquisites conditional on retirement. On the other hand, there will be employers who want to encourage employees not to retire, and they will be looking at incentives to encourage retention. Practically, many employers will find they have employees in both categories, and so it would be useful for employers to step back, and consider the range of benefits, work accommodations etc. they are willing to provide for each circumstance, in advance of dealing with specific employees.

3.2 Increased Costs

Despite the Province's assertion that Bill 31 and the elimination of mandatory retirement will not result in increased costs to employers, in our view, there are some areas where increased costs are inevitable.

First, normally our compensation schemes reward service with increases in pay for longer service. Even if the employer awards across the board salary increases, over time, the result will be that longer service employees will still earn more than newly hired employees hired into the same position. Thus, employers' most expensive employees will be their older employees. In some cases this will be an appropriate reflection of the increased skills, experience and service of that employee. In other cases however, these costs will not necessarily relate any more to the actual position or productivity of the employee; where previously employers could count on hiring less expensive (junior) employees to replace employees who had reached the age of 65, employers will likely now have an increased number of employees in the higher wage bracket.

Second, employers can expect to have increased costs associated with illness and disability. Many employees will suffer from age related health problems, and the resulting absences from work will mean that productivity will go down, or replacement workers will be required. In each instance, the result will be increased costs to the employer.

Third, employers were already required to accommodate their employees' disabilities to the point of undue hardship. However because many employees suffer from increased physical illness or restrictions as they age, it can be expected that employee requests for accommodation will increase as average age of the employer's work force increases. For this reason, employers may want to take a more pro-active role in encouraging all aspects of wellness, especially fitness and healthy diet, the two leading contributors to good health and disease prevention.

Fourth, any additional employees required to cover increased part time workers will also result in additional training, benefit, space and equipment costs. Some of these costs can be minimized by adjustment of work hours (allowing for staggered shifts to re-use space and equipment), but additional training, salary and benefit costs are inevitable.

Finally, while Bill 31 permits continued discrimination for bone fide benefit insurance plans, employers will want to consider the practical issue of whether or not it is in their best interests to have two tier benefit plans. Certainly, one would argue that of all employees, the senior employees are most deserving and in need of continuation of insurance or other benefits. Employers will want to ask their benefit providers what the cost of extending benefits to post-65 employees will be. If the costs are prohibitive, rather than denying benefits to that group, employers may wish to consider reducing the level of benefits (and thereby lowering their costs) so that they may extend coverage of benefits to all employees, no matter what their age.

3.3 Managing Employee Performance

It is common for employers faced with under performing employees to simply put up with the performance problems if the employer knows that employee will be retiring soon. Since employees will no longer be required to retire after January 1, 2008 it will become important to manage performance proactively. For employers with established performance review processes, this may not be a problem, but for employers without such processes in place, they will want to consider implementing one. Consequently, employers should ensure that you have performance review policies, which are transparent and applicable to all employees.

Employers should always be alert to the possibility that some performance problems may be based on a disability or illness (which triggers legal obligations on the employer to accommodate the employee to the point of undue hardship). This will be even more important when dealing with older employees who have performance problems; it should go without saying that employers will not be able to institute performance management measures or criteria only on their older employees.

Where physical health and strength are an important to ensuring safe work places, employers should already have ensured that their requirements are truly related to the various jobs, that such requirements are established by objective means, and there are objective ways to measure individual capabilities. With an increased average age, again, requests for accommodation will increase. It may be more cost effective for employers to take steps to encourage physical health and strength, than to accommodate that may arise.

Our workplaces have undergone significant technological change in the past couple of decades and there is no reason that the pace of change will slow down. Older employees often complain of the difficulty they have learning and adjusting to technology changes. In some cases, employees will not be able to cope with the changes; in other cases, the training methods will need to be modified to accommodate this group of employees. Employers will be expected to “accommodate” reasonable age based limitations on performance (e.g. adapting to new technologies), provided employers can do so without undue hardship.

4. STRATEGIES TO MANAGE HUMAN RESOURCES AFTER MANDATORY RETIREMENT ABOLISHED

The delays in the implementation Bill 31 was intended to allow employers more time to consider and implement strategies to deal with the consequences of the end of mandatory retirement, noted above. We strongly encourage all employers to consider the impact of the pending changes in the law in advance and to develop necessary strategies to deal with such impacts.

Some examples of such strategies may include:

- Ensure that you have performance review policies which are transparent and applicable to all employees, not just older employees.
- Obtain information from benefit carriers as to expected cost of benefit plans if benefits extended to employees aged 65 or older, so as to consider whether employer can afford to extend all benefit plans to these employees, if there are to be different benefits packages offered to employees over 65, or if the benefit plans will have to be scaled back (if it is determined the employer wishes to offer harmonized employee benefits).
- Review employer provided benefit plans to determine if any benefits automatically terminate at age 65. Then, depending on whether or not the employer has decided to continue the benefits or not, the employer can ensure that employees are given ample advance notice of any terminations or changes to the plans.
- Review employer retirement plans for any age-related rules related to contributions and drawing of pension, again to determine whether any changes are necessary or possible. Changes to the income tax act are expected to facilitate the ability of employees to draw pensions (like Canada Pension and Old Age Pension) at the same time they are earning salary from their employment, or to continue to make contributions to other retirement plans.
- Consider incentives such as retirement planning seminars to encourage employees to plan for their retirement, thereby enabling them to make decisions regarding planned retirement dates.
- Consider incentives to encourage retirement such as phased in retirement, financial bonuses, and maintaining certain benefits or other perquisites after retirement.
- If your company is subject to one or more collective agreements, review the provisions of such agreements in light of these proposed changes (remembering that no one may contract out of any of the provisions of the Code).

5. CONCLUSION

The delay in implementation of Bill 31 was designed to allow employers some time to consider and implement strategies to deal with the consequences of the end of mandatory retirement. Despite the positive benefits of this legislation, there are also some serious cost and management implications. Accordingly, employers are urged to use the time left remaining before implementation, to do so.

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Appendix I

Human Rights Code [RSBC 1996] CHAPTER 210

Definitions

1 In this Code:

"age" means an age of 19 years or more ~~and less than 65 years~~;

Discrimination in accommodation, service and facility

8 (1) A person must not, without a bona fide and reasonable justification,

(a) deny to a person or class of persons any accommodation, service or facility customarily available to the public, or

(b) discriminate against a person or class of persons regarding any accommodation, service or facility customarily available to the public

because of the race, colour, ancestry, place of origin, religion, marital status, family status, physical or mental disability, sex, ~~or~~ sexual orientation or age of that person or class of persons.

(2) A person does not contravene this section by discriminating

(a) on the basis of sex, if the discrimination relates to the maintenance of public decency or to the determination of premiums or benefits under contracts of life or health insurance, or

(b) on the basis of physical or mental disability or age, if the discrimination relates to the determination of premiums or benefits under contracts of life or health insurance.

Discrimination in employment

13 (1) A person must not

(a) refuse to employ or refuse to continue to employ a person, or

(b) discriminate against a person regarding employment or any term or condition of employment

because of the race, colour, ancestry, place of origin, political belief, religion, marital status, family status, physical or mental disability, sex, sexual orientation or age of that person or because that person has been convicted of a criminal or summary conviction offence that is unrelated to the employment or to the intended employment of that person.

(2) An employment agency must not refuse to refer a person for employment for any reason mentioned in subsection (1).

(3) Subsection (1) does not apply

(a) as it relates to age, to a bona fide scheme based on seniority, or

(b) as it relates to marital status, physical or mental disability, sex or age, to the operation of a bona fide retirement, superannuation or pension plan or to a bona fide group or employee insurance plan, **whether or not the plan is the subject of a contract of insurance between an insurer and an employer.**

(4) Subsections (1) and (2) do not apply with respect to a refusal, limitation, specification or preference based on a bona fide occupational requirement.

Exemptions

41 (1) If a charitable, philanthropic, educational, fraternal, religious or social organization or corporation that is not operated for profit has as a primary purpose the promotion of the interests and welfare of an identifiable group or class of persons characterized by a physical or mental disability or by a common race, religion, age, sex, marital status, political belief, colour, ancestry or place of origin, that organization or corporation must not be considered to be contravening this Code because it is granting a preference to members of the identifiable group or class of persons.

(2) **Nothing in this Code prohibits a distinction on the basis of age if that distinction is permitted or required by any Act or regulation.**