

## THE NEW AGE OF RETIREMENT

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The British Columbia *Human Rights Code* (the "Code") prevents discrimination on multiple grounds in the workplace. Although the Code has always prevented age discrimination, previously, it defined age to exclude those persons younger than 19 and those 65 or older. The Code also protected certain legitimate pension, retirement, and insurance plans. The limitation on the protections against age discrimination and the additional protections in the Code permitted mandatory retirement policies. As of January 1, 2008, however the provisions were changed. The age provision prohibiting discrimination now only excludes those persons under the age of 19. The changes do not apply to any federally regulated employers who are governed by the *Canadian Human Rights Act*.

### WHAT HAPPENS TO MY RETIREMENT POLICY?

The key change to understand is that "mandatory" retirement is now prohibited by the Code. Retirement programs or incentives in the workplace can however be maintained. An employer has a right to maintain a program and even have incentives as long it remains up to the employee whether to take advantage of this program or not and no employee over 19 is penalized in any way for not participating.

### WHAT ABOUT THOSE WHO HAVE ALREADY RETIRED?

This change is not retroactive which means that an employer would not have to rehire those persons who retired under a mandatory retirement policy that existed before January 1, 2008.

### ARE THERE ANY CONSEQUENCES FOR EMPLOYERS OF THIS RETIREMENT POLICY CHANGE?

There are at least three potential consequences to the changes.

1. *The need to monitor and document job performance:*

Previously if an employee was underperforming as he or she approached retirement an employer often "hung in there" waiting for their mandatory retirement policy to kick in. Now that this is no longer an option it will be more important for an employer to properly document poor job performance. Typically this is done through evaluations and written warnings that failure to improve could lead to termination. The employer can also give consideration to providing an appropriate severance package. The courts in a wrongful dismissal action take into account multiple factors in assessing whether proper severance pay in lieu of notice was paid on termination including: an employee's age, years of service, the responsibility of the position, the availability of comparable employment, the employee's education or training and awards in comparable positions. Employees 65 and older have often worked for the same employer for many years and advanced to a responsible position. Even if the position does not entail a managerial or other senior role it is still possible that the combination of years of service, age and the employee's prospects in the job market will warrant a larger severance package. Shorter term employees could also be entitled to greater severance than their younger co-workers as the courts may feel the employee has a lower prospect of obtaining alternate employment than a younger person. If an employer chooses to offer a severance package then proper structuring of severance pay is always important to try and avoid wrongful dismissal claims.

2. The need to justify exceptions as a "bona fide occupational requirement":

If an employer has legitimate concerns a particular position can not be performed by anyone after age 65 then there is potential for a challenge to this policy at the Human Rights Tribunal. A mandatory policy implemented because age is legitimately connected to the ability to perform the job, and is honestly believed to be necessary, may be upheld but only in very special circumstances. To have such a company wide policy the employer will need to be able to prove this is a "bona fide occupational requirement" (a "BFOR"). This means the employer will most likely need empirical evidence from medical or other testing experts showing a legitimate likelihood that people over a certain age will experience an inability to perform the job duties. To show that the employer can't be required to test every single employee to make sure the requirement is a "BFOR" and not an unjust prohibition against a position, the employer will also need to be able to show that it would be an "undue hardship" – which is a legal test of an impact on a business – to justify the blanket requirement as opposed to a procedure that assesses each employee individually. The employer will also likely have to show that it would be an "undue hardship" on the business to move these employees to other positions within the company. Part or flex time arrangements may be one way to allow an employee to meet job demands while allowing younger employees to benefit from their co-worker's experience which can benefit the employer as well as their older and younger employees.

3. The need to educate your workforce about age discrimination:

Employers need to be on guard to ensure their conduct or that of their employees does not attract age discrimination claims. Pressure to accept early retirement or suggestions that not retiring could lead to job loss as well as remarks about a person's age - especially in the context of their ability to do their job - could lead to claims being made against the employer. Even comments about "fresh" "young" employees being appropriate for a position could be problematic. Insensitive conduct can also have other consequences. Terminating any employee always needs to be handled sensitively to avoid extra damages being awarded by a court. When terminating older employees caution must be taken to avoid any comments about age or performance associated with age as this could be enough to attract extra damages for employees in a wrongful dismissal claim.

### ADDRESSING THE CHANGE

Be aware of these issues and make sure your business is in compliance with the Code. If you need assistance structuring an employee program, addressing the termination of an employee, or addressing discrimination complaints please consult the RBS Employment Law Group.

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