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RETIREMENT AGE

Employment Newsletter

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As of January 1, 2008 “mandatory retirement” is no longer alive and well in B.C.

In fact B.C. employers who now try to force an employee to “retire” will face two potential legal claims:

- a potential claim of age discrimination under the B.C. *Human Rights Code*; and
- a claim for entitlement to severance pay for wrongful dismissal.

Claims Under the Human Rights Code The B.C. Human Rights Code prohibits employers from discriminating against employees based on their age. Prior to January 1, 2008 the B.C. Human Rights Code contained an exemption that allowed employers to in effect discriminate against employees who were 65 or older by having an age 65 mandatory retirement policy. Effective January 1, 2008, however the Human Rights Code was amended to remove the mandatory retirement exemption. Therefore as of January 1, 2008, asking any employee to retire at age 65, (or terminating an employee at age 65, simply because they have reached this threshold in their age) will be construed as discrimination based on age under the Human Rights Code, and could result in a claim against the employer for lost wages, damages for discrimination or even reinstatement to the employee’s former position.

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Severance Obligation for Wrongful Dismissal: An employer who dismisses an employee "without cause" and without notice will be faced with a potential claim for severance by the employee. Prior to 2008, the employer's obligation to pay severance could be avoided if the employer had a clear age 65 mandatory retirement policy. If an employer had an age 65 mandatory retirement policy, the employer could argue that the maximum duration of each employee's employment was only until they reached age 65, and that each employee therefore had notice of the fact that their employment would end on their 65th birthday. As a result, employers who had a clear age 65 mandatory retirement policy could avoid having to pay severance to employees who reached age 65 and were then forced to retire. As noted above, as of January 1, 2008 employers in B.C. can no longer maintain a mandatory age 65 retirement policy. This means that unless an employee voluntarily retires when they reach age 65, the employer is under an obligation to indefinitely continue the employee's employment past age 65. The employer can however dismiss the employee either before or after they reach age 65 (provided that the employer's decision is not based on the employee's age) either without cause (in which case severance will have to be paid) or in some cases for cause (if the employee's performance otherwise justifies a termination for cause). Dismissing a long serving employee who is near age 65 for "cause", will however be quite rare, and therefore most employers will have to deal with the employee's severance entitlement if a decision is made to dismiss the employee. The amount of severance which an employee is entitled to receive will depend on a number of factors. If there is a legally enforceable written employment agreement, then the employment agreement may contain a clause or formula that determines the amount of severance to which the employee is entitled. If there is no written employment agreement then the three key factors will be:

- the employee's age (with older employees being entitled to more severance);
- the employee's length of service (longer service will mean more severance); and
- the employee's position (senior employees will be entitled to more severance than junior employees).

The severance obligation for many employees near age 65 will often be at the high end of the range, given that these employees are often long serving employees in senior positions. People often refer to a rough rule of thumb which holds that management level employees are entitled to approximately one month of severance for each year of service. This "rule" however is also subject to a cap or "rough upper limit" for severance in B.C. of approximately 24 months. The 24 month severance entitlement would traditionally apply to employees who are at the top of their range in terms of age, length of service, and position. For example, a 67 year old executive level employee with 35 years service could be entitled to 24 months of severance. The employee's entitlement to severance can be satisfied in two ways:

- either it can be paid out (and there are then variations on how it can be paid: e.g. lump sum, salary continuance, etc.), or
- the employer can give the employee "working notice" of the employee's upcoming dismissal. For example, if based on the age, length of service and position factors an employee was determined to be entitled to 18 months of severance, then the employer could either:
- pay out 18 months' worth of salary and benefits to the employee; or
- give the employee 18 months advance notice that his or her employment will come to an end. If the employer elected the second option then, so long as the proper 18 months working notice was given and the employee's salary and benefits were continued at their normal level throughout the working notice period, the employer would be under no further obligation to pay out any severance at the end of the 18 month working notice period.

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Mandatory Retirement / Questions & Answers

Q: Can an employer avoid the obligation to pay out severance by giving an employee written working notice of termination when the employee reaches age 65?

A: Yes, provided that the working notice is sufficiently long, and that the employee's compensation and benefits are continued unchanged for the working notice period. This approach will however **only** deal with the severance liability. It will **not** address the potential liability for a claim of age discrimination under the B.C. *Human Rights Code*. Whether or not there is a breach of the *Human Rights Code* will depend on the reason why the working notice is being given. For example, if the employer has a policy that all employees on reaching age 65, will be given working notice of termination, then this is really no different than having an age 67 "mandatory retirement" policy, and would therefore be vulnerable to a claim of age discrimination under the B.C. *Human Rights Code*.

Q: Could the employer and employee on reaching age 65 simply enter into a new employment contract for a fixed term (say two years) or a contract with a severance clause or formula that limits the employer's liability for severance pay?

A: Yes, provided that the original employment has first been validly terminated by giving the appropriate working notice. At the end of the working notice the employer and employee could then enter into a new contract of employment with either a fixed term, or with a predetermined severance formula. To be legally enforceable, such a new contract should be in writing and it should clearly recite the prior circumstances: i.e. the fact that the employee was given working notice, and that their original employment term was therefore terminated and that the employer is released from all liability for severance under the original agreement. If the new contact is for a fixed term (e.g. 6 months or 12 months, with a renewal clause), then the employer will have to be very careful to renew the contract (in writing) at the end of each fixed term or renewal term. If this is not done with precision, then the employer and employee will slip back into an unwritten employment contract of indefinite duration, and the employee's severance will then again be determined in accordance with the applicable "common law" factors based on their entire service with the employer.

Q: Can an employee reject working notice?

A: Provided that an employer has given a reasonable period of working notice, and provided that all of the employee's wages and benefits are continued and unchanged during the working notice period, an employee does not have the option of rejecting an employer's working notice. A period of working notice provided by an employer therefore does not have to be formally "accepted" by the employee. The employer is entitled to unilaterally provide the working notice to the employee as a means of terminating an employment relationship, and the only recourse that the employee may have against the employer would be if either:

- the working notice was not sufficiently long enough given the age / length of service / position factors; or
- the employer changes other terms of the employee's employment during the working notice period: (e.g. if the employer reduced the employee's compensation or benefits during the working notice period, or if the employer demoted the employee to a lower position).

Note however that the above analysis is limited to the employer's ***severance*** liability. The employee may have further recourse against the employer under the *Human Rights Code*, if the employee can show that the reason for giving the working notice was related to the employee's age.

Q: Could working notice given to an employee who is approaching retirement age still be considered discriminatory?

A: Yes, it would be considered discriminatory under the *Human Rights Code* if the employee can show that the reason for giving the working notice was related to the employee's age. This would be the case (if as noted above) the employer had a fixed policy of giving every employee working notice of termination on reaching a certain age threshold. Even if there was no such "policy", it might also be shown to be age discrimination, if the employer gave working notice to an older employee, and then subsequently filled the same position with a much younger employee. The best way to avoid these kind of claims would be for the employer and employee to reach a mutually acceptable agreement regarding the employee's retirement. Such an agreement should then include a full release of the employer from liability for both severance and any Human Rights claims. To negotiate such an agreement and release will however require the employee's full cooperation and will therefore in most cases require that the employer pay out at least some portion of the employee's severance.

Q: Can an employer avoid a potential age discrimination claim by simply giving notice of termination at age 63 (or any age other than 65)?

A: There is nothing to stop an employer from giving notice of termination at age 63 (or at any other age). However, with the amendments to the *Human Rights Code* in 2008, there is no longer any real significance to the age 65 threshold. Under the current *Human Rights Code* any discrimination based on age is in violation of the Code, and therefore it does not matter whether the age for giving the notice is set at age 60, 63, 65, 68, 70 or any other age for that matter. What will be relevant is whether the reason for giving the working notice was based on, or related to, the employee's age.

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