

Communiqué



Mandatory Retirement to End in Ontario

On December 12, 2005 the Ontario legislation eliminating mandatory retirement received Royal Assent. From December 12, 2006, it will be unlawful to compel Ontario employees to retire.

This Communiqué will describe the impact of this legislation and will provide guidance to employers on how to deal with it. The Communiqué will be of interest to all employers with Ontario employees. For details on the legislation please refer to our [Communiqué dated June 10, 2005](#).

Impact on Notice, Pension and Benefits

As a result of this legislation, employers will not be able to dismiss employees that are age 65 or older (“older employees”) unless the employer has legal cause or age is a demonstrable occupational requirement of the position. Both instances require clear and convincing evidence, based on the particular circumstances of each individual. Absence of this evidence will necessitate working notice or compensation in lieu of notice.

Existing rules for participation in pension plans will not be affected by the elimination of mandatory retirement. Generally, older employees must be allowed to continue to accrue benefits in a pension plan until the end of the calendar year in which the employee reaches age 69.

Employers do not need to provide non-pension benefits to older employees. However, in the absence of adequate notice that this will be the employer’s policy, a failure to provide these benefits may be viewed as constructive dismissal of older employees.

No public workplace and safety insurance benefits will be provided for older employees as this legislation continues to restrict benefits to injured employees under age 65. Accidents suffered by older employees on the job will raise difficult legal issues.

Finally, employers will be under a duty to accommodate older employees. What this means is not clear but could involve modification of duties, ergonomic adaptation of the workplace or reassignment to another position, to cite but a few examples. Accommodation of older employees is not necessarily the same as accommodation of disabled employees.

Seven Things an Employer Should Do To Prepare

- Conduct demographic assessments of your work force to identify older employees in the next year and in the next 5 years.
- Adopt a workforce management strategy. If older employees need to be retained, consider adapting the requirements of the job to the older employee and introducing phased retirement programs and other measures to entice older employees to stay.
- Adopt a work assessment policy. If you have employees near retirement who are underperforming, document and discuss shortcomings now. Be prepared to fully justify dismissal of underperforming older employees.
- Communicate benefit policies. If you do not intend to provide non-pension benefits to the older employees, let them know now. Consider the consequences of failing to provide such benefits in light of issues raised in the preceding two bullet points.
- Determine the costs of employing older employees and check if insurers are willing to continue benefit programs, the availability of coverage and the related cost. Consider whether it is appropriate or legal to reduce benefit levels in light of any increased cost.
- Do not be misled by myths and preconceived notions. Older employees are not necessarily less productive and more expensive. For example, the continuation of defined benefit pension coverage is not generally more expensive for plan sponsors. Younger workers may indeed appreciate the mentoring of older employees.

- Tie compensation to performance, regardless of age. If pay is indeed a function of performance, reducing the compensation of older employees due to reduced performance will not likely be considered age discrimination.

Perform the above steps now. One year is not a long time. Investing the time now to deal with the abolition of mandatory retirement will pay dividends in short order.

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