

A Discussion of Mandatory Retirement for School Bus Drivers

On January 1, 2008, Bill 31, the *Human Rights Code (Elimination of Mandatory Retirement) Amendment Act, 2007* came into force. The effect of Bill 31 was to extend protection from age discrimination to all those aged 19 years or more without any limit such as the previous age of 65 years.

Consequently, a school district may no longer rely on a mandatory retirement policy that requires a school bus driver who has reached the age of 65 years to retire.

It is significant to recognize that some districts currently employ, or have employed, school bus drivers age 65 or older. This has arisen out of necessity (no one under the age of 65 available or willing to drive the school bus) or the absence of a mandatory retirement policy.

It should also be noted that the discussion and arguments presented here are applicable to school bus drivers and may not be transferable to other occupations. The position of school bus driver differs from other occupations in that it may be categorized as a "safety sensitive" position.

A safety sensitive position is generally defined as:

A position in which job performance requires the employee to be alert, to be physically coordinated, and to exercise good judgment, with a significant involvement in the school or school district's operations where impaired job performance could affect the health, safety or security of students, the employee, other employees, other persons, property, or the environment

The Rationale

- ***Why should an employer force school bus drivers to retire?***

School bus drivers are the couriers of our most precious cargo...children.

The research literature confirms conventional knowledge about the effects of aging on cognitive, perceptual, and motor abilities. These are elements that are required and relied upon while driving a school bus.

In addition, research has established that age-related changes in vision make it more difficult for older adults to accommodate to darkness, recognize objects under low-light conditions, recover from glare, and search their environment. From a physiological perspective, virtually all behavior slows with age, with performance decrements being more pronounced as task complexity and cognitive demands increase. On the cognitive side, making decisions becomes more difficult, as

does changing a course of action once a commitment has been made. While few studies link cognitive declines specifically to driving abilities, it is clear that these kinds of changes in abilities could pose problems for drivers who experience them.

Further, older persons have a greater statistical probability of suffering a medical incident related to a condition of which they are unaware. As a result, an older driver has a greater statistical probability of suffering a medical incident while driving, compared to a younger driver. As a school bus driver is a safety-sensitive position, when a medical incident occurs it may compromise the safety of the passengers, other drivers, and other people in general.

▪ ***Licensing Requirements in British Columbia***

In order to assess what steps would be required to draft and implement a mandatory retirement policy for bus drivers predicated on bona fide occupational requirements, it is necessary to review the regulatory regime that is currently in place.

To drive a school bus in British Columbia, a driver must possess either a class 2 or a class 4 unrestricted drivers' license.

To obtain a class 2 or class 4 unrestricted drivers' license, a driver must pass both a pre-trip inspection test and a road test. During the on-road part of the road test the driver must demonstrate their ability in several basic skill areas, including, but not limited to:

- starting and stopping
- shifting gears.

All Class 2 and 4 drivers are required to submit a Driver's Medical Examination Report on a routine schedule as set out in the National Safety Code. A Driver's Medical Examination Report form must be completed by a physician at ages:

- 25, 30, 35, 40 and 45
- 48, 51, 54, 57, 60 and 63
- Every year upon reaching the age of 66

The Driver's Medical Examination Report is submitted to ICBC and used to establish the physical and medical fitness of a driver to drive a commercial vehicle, including a school bus.

As defined by ICBC, medical fitness requires good physical and medical condition. It also requires minimum vision standards and hearing testing if a driver suffers from a hearing impairment. It should be noted that commercial drivers must meet a higher vision standard than regular passenger vehicle licence drivers.

In a Driver's Medical Examination Report, commercial drivers must disclose:

- medical conditions that may affect their fitness and ability to hold a commercial driver's licence
- any prescription medications
- any known medical conditions

and complete a declaration form regarding medical conditions.

Certain medical conditions that may prohibit a driver from getting a commercial licence include, but are not limited to:

- epilepsy
- brain hemorrhage
- Parkinson's disease
- multiple sclerosis
- certain heart conditions
- high blood pressure
- certain diabetic conditions
- obesity.

Further, those with an amputation or any disability that may hamper their ability to drive, such as:

- inability to rotate their head
- paralysis of any limb
- disabling rheumatism
- arthritis

may not qualify for a commercial licence.

Failure to submit the Medical Examination Form may result in cancellation of the driver's licence. As a licensing authority, ICBC has the right to ask a driver for this information and receive the information in order to grant the privilege of a driver's license. In many cases, an employer cannot ask the same questions.

Current Options for School District Employers: Can We... or Can't We?

The short answer is yes and no.

Mandatory retirement for a specific group of employees with specific requirements may be permitted if an employer can show that a bona fide occupational requirement (BFOR) is not being or has not been met by the employee. In this case, the BFOR may require an individual to be less than a certain age. The age need not be 65. It must be set at an age where the evidence supports the proposition that in the interests of safety, a school bus driver should no longer be allowed to drive a school bus.

In order to establish a BFOR, the employer must provide evidence that:

- it adopted the requirement for a purpose rationally connected to the performance of the job
- it adopted the requirement in an honest and good faith belief that it was necessary to the fulfillment of that legitimate work related purpose, and
- the requirement is reasonably necessary to the accomplishment of that legitimate work-related purpose. It must be demonstrated that it is impossible to accommodate individual employees without imposing undue hardship on the employer.

In the 1999 *Gordon Ensign* decision¹ of the Alberta Human Rights and Citizenship Commission panel, the Commission determined that, in the interests of safety and because of the absence of any reliable

¹ *Gordon Ensign v. Board of Trustees of Clearview Regional School Division #24; Dennis Hanrahan and Ray Lavalley v. Leroy Larson, Superintendent of Schools and Northern Gateway Regional S.D. #10 Edmonton* (Feb.19, 1999; Lori G. Andreachuk, Panel Chair)

science or technology which would determine the overall fitness of an individual, it was a BFOR to be less than a certain age to be a school bus driver. In this particular case, the age set for mandatory retirement had been in the early 60s.

This decision was largely premised on the qualified opinion evidence given by Dr. Patricia Waller. Dr. Waller stated that:

- The National Institute on Occupational Safety & Health, in their data on traumatic occupational fatalities, shows a significant rise after the age 65 in rates of traumatic occupational death for older workers.
- However, older drivers who qualify to drive school buses are not representative of all older drivers. First, there is self-selection and second, they are not as representative of older drivers in general as are middle aged drivers.

Following this example, and relying on the evidence therein, one may be able to make a case for mandatory retirement of school bus drivers.

Notwithstanding the foregoing, the primary basis of this decision was the absence of a reliable method of identifying the overall fitness of individuals. Thus, age could be used as a legitimate requirement. Nine years have passed since that decision and it is not clear whether the same arguments and evidence could be upheld considering all of the advances in medical science and testing since that time.

Further, an employer would also have to demonstrate that the testing and medical review carried out by the licensing authority (ICBC) is not sufficient and/or reliable as a method of screening school bus drivers.

To prove that the ICBC testing and medical requirements are insufficient and unreliable to assess the physical and medical fitness of school bus drivers will require significant research and professional opinions to establish the age for mandatory retirement. The employer will be required to present detailed evidence concerning the duties to be performed, the conditions existing in the workplace, and the relationship between age and the ability to carry out duties safely. Statistical evidence of the relationship has become increasingly important in establishing a BFOR. But even where statistical evidence is presented which can establish a relationship between age and ability to perform the duties of the position safely, employers must still establish that individual testing could not address the risk.

▪ ***Environmental Scan: What are Other Employers Doing?***

Our research indicates that Coast Mountain Bus Company does not have, and does not intend to establish, a mandatory retirement policy for their drivers. They have advised that they intend to rely solely on the testing, physical, and medical requirements established by the licensing authority (ICBC) as previously described.

Conversely, Greyhound Canada Transportation continues to use a mandatory retirement policy that forces drivers to retire at age 65. It is important to recognize that Greyhound is a federally regulated company and does not fall under provincial human rights legislation. At the federal level, it is not a discriminatory practice under the *Canadian Human Rights Act* to terminate an individual's employment because that individual has reached the normal age of retirement for employees working in similar positions. Therefore, in those circumstances, as stated in the *Act*, mandatory retirement is permitted.

Recently, a school district announced that its trustees voted in favour of retaining its mandatory retirement policy for school bus drivers. No school bus drivers in the district will turn 65 this year but one will turn 65 in 2009.

- ***The Provincial Perspective — Recognizing and Respecting Diverse Approaches***

A mandatory retirement policy introduced across all districts would create a number of challenges.

First, some districts have never had a mandatory retirement policy. This has resulted in some current workers being 65 years or older. The introduction of a mandatory retirement policy where one has not previously existed will also create resistance.

Second, some districts currently employ and/or rely on the services of workers 65 years or older. As a result, these districts may be challenged in labour markets where there are no school bus drivers willing or able to work who are less than 65 years of age.

Next Steps

Although there may be labour market pressures for even the most safety-sensitive positions, a school district may wish to implement or maintain a mandatory retirement policy because they believe one should be implemented as the most likely means by which to ensure bus drivers do not pose an unnecessary safety risk to students.

There are two courses of action available should a district choose to implement a mandatory retirement policy for bus drivers.

There is also a third option available to school districts. Although this option does not strictly fall in the category of mandatory retirement, it allows a district to assess the competency and safety of a school bus driver and allow them to remove bus drivers from service who do not meet minimum requirements.

- **Option 1**

A district can implement and apply the bus driver mandatory retirement policy. If the policy is challenged by a bus driver, then, as discussed above, the district would be required to provide detailed evidence concerning the duties to be performed, the conditions existing in the workplace, and the relationship between age and the ability to carry out duties safely. It is highly likely — and CUPE has sent a letter alluding to the fact — that should a district implement a mandatory retirement policy, regardless of the position, it will be challenged by the union.

The advantage of this option is that a district can implement and apply the policy with little investment or effort compared to a more targeted approach such as individual testing. The policy will continue to be effective as long as it is not challenged. That said, it is almost certain that it will be challenged.

The disadvantage is that should the policy be challenged, there is no guarantee that the current medical and statistical evidence adduced during research will support the mandatory retirement policy.

- **Option 2**

This option is essentially the reverse of option 1. In this case, a district would retain experts to provide detailed evidence concerning the duties to be performed, the conditions existing in the workplace, and the relationship between age and the ability to carry out duties safely.

After obtaining the results of the research, a decision would be made as to whether the evidence supported the bus driver mandatory retirement policy. If it did not, then it would be difficult to defend a challenge to a mandatory retirement policy if implemented.

Conversely, if the evidence supported the implementation, then it would provide the foundation for any challenge that may arise.

The advantage of this option is that the research will have been conducted and an informed decision on the viability and defensibility of the policy can be made.

The disadvantage of this option is that it requires a significant initial investment and the results of the research are not known.

This is where BCPSEA, as a provincial organization, can work with districts throughout the province.

- **Option 3**

Option 3 differs from the previous two options in that the goal of the policy is not to implement and enforce a mandatory retirement policy, but to develop and implement a testing regime for school bus drivers. The testing regime would allow employers to assess a worker's fitness, competency and safety. Should the worker not meet the minimum requirements set out by the employer, irrespective of age, the worker would be required to discontinue driving a school bus.

For this policy to be effective and defensible, the testing regime must test the core occupational requirements of a school bus driver.

This approach has only been successful with safety sensitive positions. In this case, it is an easy proposition to support that a school bus driver is a safety-sensitive position with serious implications for children, other drivers, and other people in general.

The difficulty lies in developing a testing regime that legitimately and accurately tests and identifies, with an acceptable level of certainty, those school bus drivers who create an increased risk when driving a school bus.

BCPSEA Support

This is a very significant issue province-wide. Consequently, BCPSEA will provide districts with support should they wish to implement a mandatory retirement policy or a testing policy.

We will also work with individuals or groups wishing to pursue a collective and consistent approach to support them in the implementation of a mandatory retirement or testing policy.

Keep in Touch

We would like to hear from you. What are your thoughts and comments and, specifically, what are your answers to the following questions:

- Are you considering mandatory retirement for school bus drivers?
- If so, which of the three options presented above do you prefer?
- If you prefer none of those listed, what is your likely course of action?

For more information and discussion on this issue or health and safety issues in general, please contact Mark Grabas at 604.730.4509 or markg@bcpssea.bc.ca.