

Elimination of Mandatory Retirement

In December 2006, the Premier's Council on Aging and Seniors' Issues presented a report to the British Columbia government entitled, "Aging Well in British Columbia" (the Report). The Report summary states:

"British Columbia's population is becoming significantly older, and the demographic and social changes that are beginning to affect our province will forever alter how our communities look and function. There are many more older people, we are living longer and we are more active and healthier than ever before. It is time for a new view of aging and of the role of older people in our province. The fact that older adults are a valuable and contributing part of our society hasn't been fully recognized. We must increase opportunities for older people to remain engaged with others in their communities, and continue to share their knowledge, experience and skills."

The key recommendation of the Report is to eliminate mandatory retirement in the province of British Columbia, thereby giving people 65 and older the option to keep working. Bill 31, *Human Rights Code (Mandatory Retirement Elimination) Amendment Act, 2007* implements this central recommendation. Bill 31 extends protection from age discrimination to those employees age 65 and over and will take effect on January 1, 2008.

A number of implications flow from the introduction of Bill 31, and districts will have to prepare for the coming changes. This bulletin is designed to provide information and guidance on some of the short-term emergent issues that will arise and to identify additional matters that may require your review.

Are mandatory retirement policies still legal and enforceable?

The amendments to the *Human Rights Code* (Bill 31) will not come into force until January 1, 2008. Therefore, those school districts that currently have a valid mandatory retirement policy may legally continue to enforce the policy until January 1, 2008.

The amendments to the *Human Rights Code* are not retroactive; therefore, districts will not be required to re-employ staff who retire before January 1, 2008.

What are the implications of allowing some or all employees to work past 65 prior to January 1, 2008?

Prior to allowing some employees to continue to work past age 65 before the change comes into effect, districts should consider the number of employees that are due to retire prior to January 1, 2008 and the impact of allowing only some of them to keep working; e.g., morale issues, the precedent that is set by granting exemptions to the mandatory retirement policy to only some employees, and possible challenges to such a practice. We recommend you contact your BCPSEA liaison before granting an exemption.

General

The government provided an eight month transition period to give employers an opportunity to plan for the change. It is therefore advisable to utilize this time to review collective agreements and policies to identify terms that will be contrary to the *Human Rights Code* once the change comes into effect. Collective agreement provisions concerning vacation or other entitlements that accrue with service should also be reviewed. Many such clauses may have been drafted with age 65 retirement in mind.

Districts should also take this time to consider other issues related to the elimination of mandatory retirement, such as accommodating older workers, bona fide occupational requirements, individualized testing, performance management and benefits issues.

Districts should also carefully consider their ability to prove that retirement at age 65 is a bona fide occupational requirement (BFOR) for some of the positions in the workplace; e.g., safety sensitive positions such as bus-drivers.

▪ **Benefit Plans**

How does the legislation affect employee benefits?

As with other provinces, the changes proposed by Bill 31 are not intended to impact the provision of benefits. The legislation will continue to permit age-based distinctions under employee insurance plans, including those that are self-funded by employers or provided by a third party (such as an insurance company).

Preparation for January 1, 2008 implementation

In the coming months, in preparation for the January 1, 2008 effective date, all school districts should undertake a review of their current benefit contracts, with the following considerations in mind:

1. **Current plan provisions:** The benefit contracts will outline the eligibility requirements for coverage as well as the age at which coverage terminates. We encourage you to review your contracts to ensure you understand the current coverage.
2. **Legal and financial implications:** Any amendment to a benefit contract requires a consideration of the legal and financial implications of such a change. With respect to legal implications, for unionized employees there may be collective agreement considerations, and for non-union employees there may be employment contract implications. With respect to financial implications, for all employee groups, while insurers may be willing to extend coverage past the age of 65, most benefit plans would see increased premium costs and experience as a result of such a change.
3. **Employee retention:** Do the district demographics make the continuation of benefits an important component of your workforce management plan?

BCPSEA will be working with districts, benefits consultants, and insurance carriers to determine best practices for benefit plans in the post-mandatory retirement reality.

- ***Workers Compensation Act***

Are employees older than 65 years of age eligible for workers' compensation coverage?

The *Workers Compensation Act's* definition of a worker does not put an age limit on workers' compensation coverage. Therefore, if a worker is injured while working, whether it is at age of 25 or 70, and the injury is found to have arisen out of and in the course of employment, then the worker will be covered by WorkSafeBC.

Section 23.1 of the *Workers Compensation Act* currently states wage-loss benefits be paid up to age 65, unless WorkSafeBC is satisfied that the worker intended to retire past the age of 65. If the worker is younger than 63 years of age on the date of the injury, the worker will receive the benefit until either the age of 65, or until the worker's intended retirement date. If the worker is older than 63 years of age on the date of the injury, the worker will receive the benefit for two years after the date of the injury, or until the worker's intended retirement date. In essence, if the worker intends to retire at age 70, he would continue to receive benefits until the age of 70. WorkSafeBC can establish a retirement date after the age of 65 if they are satisfied that the worker would have retired after the age of 65 if the worker had not been injured.

Current policy states that evidence of the worker's intention to work past the age of 65 is required in order for compensation to be continued. Examples of the types of evidence that may support a worker's statement that he or she intended to work past age 65, and to establish the date of retirement, include the following (as taken directly from Policy #35.30 of the *Rehabilitation Services and Claims Manual* Volume 2):

- names of the employer or employers the worker intended to work for after age 64, a description of the type of employment the worker was going to perform, and the expected duration of employment
- information from the identified employer or employers to confirm that he or she intended to employ the worker after the worker reached age 65 and that employment was available
- information provided from the worker's pre-injury employer, union or professional association to confirm the normal retirement age for workers in the same pre-injury occupation
- information from the pre-injury employer about whether the worker was covered under a pension plan provided by the employer, and the terms of that plan information from the pre-injury employer or union on whether there was a collective agreement in place setting out the normal retirement age.

The sections of the *Workers Compensation Act* that apply to disability benefits were written based on the premise that the age of retirement is 65 years of age. With the implementation of Bill 31, we anticipate a change to WorkSafeBC compensation policies in the future, in particular in the area where WorkSafeBC is to determine the intended date of retirement and how long benefits should be paid to the worker.

Employees Not Covered by a Collective Agreement

- **Review employment contracts and employment-related policies**
Exempt staff employment contracts and employment-related policies and procedures should be reviewed to ensure compliance with the legislation (e.g., many principal/vice principal template employment contracts contain provision for retirement at the end of the school year in which the principal/vice principal turns age 65).
- **Review vacation entitlement schedules**
Sliding scales of annual vacation entitlement based on years of service should be reviewed to ensure that available vacation does not exceed the maximum amount of vacation the employer intended to provide.
- **Consider current termination provisions**
When terminating without cause, employers need to be aware that the notice provided to older exempt employees may need to be lengthier than the notice provided to their younger counterparts (the maximum notice available to exempt employees in the BC public sector is 18 months). Age is one of the criteria considered by the courts when assessing appropriate notice or pay in lieu of notice — the courts presume that there are fewer re-employment prospects for older employees. Also be aware that age 65 is not a “cap” for assessing length of notice — the employee may argue that s/he would have worked past age 65.
- **Review performance management plans and processes**
It will be critical to have an effective plan and process in place that is operational and consistently applied. For example, if the employer is concerned about an employee’s deteriorating job performance and wishes to consider termination for cause, job performance will have to have been carefully documented on an ongoing basis in order to support the employer’s position and minimize the risk of an age discrimination claim.
- During the process of recruiting exempt staff, ensure that any notes made during or after the interview process don’t contain any potentially age-related comments, either express or implied.
- When undertaking a structural reorganization of exempt staff positions, don’t appear to be “downsizing” positions on the basis of the incumbent’s age.

Legislative Change Collective Agreement Provisions

The Provincial Collective Agreement (PCA) between BCPSEA and the BCTF provides for a negotiation and, if necessary, arbitration process to address legislative changes which render any part of the collective agreement null and void or substantially alters the operation or effect of any of its provisions. This is contained in PCA Article A.8. BCPSEA is currently determining whether the use of Article A.8 is required in response to Bill 31.

With respect to support staff, 13 of the 69 collective agreements provide for a similar process. Districts with such a provision in the collective agreement should examine their collective agreement language to determine whether to engage in the process provided therein.

For Further Information

Should you have further questions regarding the impact of Bill 31 or require assistance, please contact your BCPSEA liaison.