Legislative update

British Columbia
Public School Employers'
Association

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Reference Guide:
The Elimination of Mandatory Retirement

On January 1, 2008, the amendments to the *Human Rights Code* (Code) will come into effect, and mandatory retirement in BC will be eliminated. Currently, "age" is defined in the Code as "an age of 19 years or more and less than 65 years." As of January 1, 2008, that definition will change to "an age of 19 years or more." Therefore, the protection from age discrimination will be extended to those 65 and over. Employees will therefore have the choice of whether to continue working past age 65.

The attached Reference Guide provides general information regarding the elimination of mandatory retirement in a question and answer format, addressing specific questions raised by school districts.

For more information or clarification regarding the matters raised in the Reference Guide, please contact your BCPSEA liaison.

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Reference Guide: The Elimination of Mandatory Retirement

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Reference Guide:
The Elimination of Mandatory Retirement

This guide provides general information regarding the elimination of mandatory retirement in a question and answer format, addressing specific questions raised by school districts.

A. General

1. When will mandatory retirement be abolished?

Bill 31, the *Human Rights Code (Elimination of Mandatory Retirement) Amendment Act, 2007* will come into force on January 1, 2008.

Bill 31 amends the definition of age in the *Human Rights Code* (Code) from:

"19 years or more and less than 65 years"
to:
"an age of 19 years or more"

This change extends the protection from age discrimination to those 65 and older.

2. Will the legislation be retroactive?

No. Former employers will not be required to re-employ staff who retire before the legislation comes into force.

3. Can individuals be forced to work past the age of 65?

Individuals will be able to choose to retire whenever they wish. The change is about allowing individuals to work past age 65 if they wish to do so.

4. Does this mean an employer has to accommodate age-related disabilities?
Mature employees will be subject to the same Code standard of accommodation as other employees.

5. Are any jobs exempted from this change?
Section 13(4) of the Code continues to exempt from discrimination a distinction based on age that is based on a bona fide occupational requirement ("BFOR"). This section of the Code was not amended by Bill 31.

B. Bona Fide Occupational Requirements

6. What is a bona fide occupational requirement (BFOR)?
A BFOR is an employment standard that makes distinctions on certain grounds, including age, but that is allowed under the Code because of the nature of the employment.

In order to establish that a requirement is a BFOR, the employer must establish:

- that it adopted the requirement for a purpose rationally connected to the performance of the job;
- that 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
- that 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.

This exception may permit mandatory retirement if an employer can show that the above test for a BFOR has been met. To show that a mandatory retirement policy or collective agreement provision is reasonably necessary, an employer must show that it is impossible to accommodate individual employees over 65 without imposing undue hardship upon the employer. Specifically, employers will have to show that it is impossible for anyone over the age of 65 to perform the work or, alternatively, it is impossible to engage in individualized testing without incurring undue hardship.

7. Does the *Charter of Rights and Freedoms* apply?

Section 15(1) of the *Charter of Rights and Freedoms* (Charter) provides for equality rights without discrimination based on a number of categories, including age. The BC Court of Appeal has held that school boards in BC are subject to the Charter. Therefore, school district employees are able to challenge mandatory retirement policies and contractual provisions based on the Charter. Bill 31 will provide another forum for appeal by employees. After January 1, 2008, they will be able to challenge mandatory retirement under the Code and under the Charter.

Section 1 of the Charter contains a defence to be used when violations of the Charter are alleged. Therefore, it is necessary to consider the section 1 defence under the Charter for the continuation of mandatory retirement in school districts.

The section 1 test under the Charter starts with the employer identifying pressing and substantial objectives for mandatory retirement. Examples of pressing and substantial objectives include:

- maintaining excellence by permitting renewal in a closed system of development;
- limiting growth of staff to preserve cohesive staff;
- budgetary resource limitations; and
- safe performance of duties in safety sensitive positions.

The test then requires that there is a rational connection between the policy and the objective and that there is minimal impairment of the Charter right. Courts have looked at such matters as:

- If the objective is safety, does the policy ensure that unsafe drivers are removed from the workplace?
- If the objective is excellence resulting from movement of workforce, is there a closed system of employment which thwarts that objective? Is there evidence of a bulge in the workforce?
- Does the policy result in movement of the workforce in a closed system?

Finally, employers will have to show that the negative effects of the policy are outweighed by its positive effects.

For the Charter section 1 analysis, safety in the workplace issues will have the greatest possibility of survival of mandatory retirement.

8. Can employers continue to have a mandatory retirement policy for certain employees?

A mandatory retirement policy for certain employees may continue to be enforceable provided the employer can justify the policy as a BFOR. The duty to accommodate is central to any BFOR defence. An employer cannot prove that mandatory retirement is a BFOR without also proving that it cannot accommodate older employees' continued employment through individual testing without undue hardship.

Employers will be challenged to prove that individually testing employees over a certain age or with certain physical or other conditions cannot be applied to assess their personal merits without undue hardship when attempting to prove that they must retire all employees at a particular age. An employer could prove that mandatory retirement is a BFOR in its workplace by proving that it is impossible to individually test for that capability without imposing undue hardship, either in the form of undue safety risks, costs, etc.

In previous cases, the Supreme Court of Canada[1] has found that in order to be a BFOR, a limitation such as a mandatory retirement age must:

- be imposed honestly and in good faith and in the sincerely held belief that such limitation is imposed in the interests of the adequate performance of the work involved with all reasonable dispatch, safety and economy, and not for ulterior or extraneous reasons aimed at objectives which could defeat the purpose of the Code; and
- be related in an objective sense to the performance of the employment concerned in that it is reasonably necessary to assure the efficient and economical performance of a job without endangering the employee, his fellow employees and the public.

The first part of the test is referred to as the subjective element, as it concerns the employer's motive in implementing the policy. The second

[1] *Ontario (Human Rights Commission) v. Etobicoke (Borough)*, [1982] 1 S.C.R. 202.

part of the test is referred to as the objective element. In order to satisfy the objective element, the employer must provide solid and objective evidence concerning the duties to be performed and the requirements of the job, the relationship between the aging process and the safe, efficient performance of those duties and the proven abilities or inabilities of employees past a certain age to reasonably meet the requirements even with accommodations. Statistical and medical evidence will be preferred over the impressions of those experienced in the field, and employers will not be able to rely on generalization or assumptions about the physical abilities of older workers.

The Supreme Court has noted that in cases where the employer's concern is largely economic or one of productivity, it may be difficult to demonstrate that mandatory retirement at a fixed age without regard to individual capacity may be validly imposed under the Code. In certain types of employment, particularly those affecting public safety (e.g., school bus drivers), employers may consider that the risk of unpredictable human failure may be such that an arbitrary retirement age may be justified as a BFOR.

Therefore, mandatory retirement policies for certain employees may be justified as a BFOR if the employer can show evidence satisfying the subjective and objective elements of the test set out above.

9. Specifically, can employers maintain or implement a mandatory retirement policy for bus drivers?

There are, potentially, arguments that can be made for mandatory retirement to continue for school bus drivers. There is available research on aging and driving performance for school bus drivers. The research identifies special issues regarding school bus operation. Factors have been identified that make school bus operation more demanding than operating a personal vehicle.

In a 1999 Alberta Human Rights and Citizenship Commission panel decision,[2] Dr. Patricia Waller was qualified as a witness to give opinion

[2] *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)

evidence as to the issues of evaluating the older driver and evaluating the older driver as a commercial driver. In her evidence and in her paper (which was introduced at the hearing), Dr. Waller identified seven principles that need to be recognized in determining the public policy issues regarding discrimination against bus drivers on the basis of age and the requirements for safety for children riding in school buses, including:

- it is not possible to identify on an individual basis which older drivers will have difficulty and which will not;
- in spite of the high level of safety of school bus transportation, the public demands a higher safety standard for the population involved. Society places a higher premium on the safety for children; and
- there are no known procedures for selecting which older drivers will have problems.

Dr. Waller concluded that the public policy issue is not whether older drivers are safe. All of the evidence indicates that they are less safe than other drivers, and their relative risk to crash will increase with increasing age. Drivers above age 65 are at a higher risk of being involved in a crash. The public policy issue is how much increased risk is acceptable for our children.

In that case, the panel concluded that the employer had met the test in establishing the necessary justification for the BFOR and found that the employer had established that:

- requiring an individual to be less than 65 years of age to be a school bus driver is reasonably necessary to assure the efficient and economical performance of the job without endangering the employee, his fellow employees and the general public;
- it is not possible to screen out school bus drivers over 65 years of age to remove the unsafe drivers; and
- requiring school bus drivers to be less than 65 years of age is reasonably necessary to eliminate the real risk of serious damage to the public.

In *MacDonald v. Regional Administrative School Unit No. 1,*[3] the Board of Inquiry accepted that the decision by the School Unit No. 1 not to continue

[3] (1992), 16 C.H.R.R. D/409 (P.E.I. Bd. Inq).

to employ a school bus driver over the age of 65 was a BFOR, and as such, did not contravene PEI's *Human Rights Act*. The Board of Inquiry held that the requirement that a school bus driver be less than 65 years of age was reasonably necessary to the efficient, economical and safe performance of the job as there was demonstrable evidence that drivers over age 65 pose a real safety risk to the public. The employer presented expert medical evidence indicating that, as a group, individuals over age 65 are more likely to have accidents, and that it is impossible to conduct individualized testing to determine which individuals are likely to suffer from health problems or create a risk. On the basis of the expert medical evidence presented, the Board of Inquiry accepted not only that requiring the bus driver to retire at age 65 was a BFOR, but also that it was not possible to individually test drivers over age 65 to screen out potentially dangerous drivers. Therefore, the employer's policy requiring retirement at age 65 was not discriminatory.

It is those considerations that will apply in the event a school district determines that retention of mandatory retirement for some employees such as school bus drivers is an important policy decision and one that it is desirous of defending and testing. Further, like the employers in the two cases cited above, districts will have to introduce scientific evidence based on medical or statistical studies that correlate age with ability to safely operate a school bus.

10. If a district has a mandatory retirement policy for all employees, a mandatory retirement provision in a collective agreement, or a longstanding practice of requiring employees to retire at age 65, what is the process for maintaining mandatory retirement for school bus drivers after January 1, 2008?

In order to maintain mandatory retirement for school bus drivers, those districts that currently have a mandatory retirement policy, a mandatory retirement provision in a collective agreement, or a longstanding practice of requiring employees to retire at age 65 would provide notice to employees that, effective January 1, 2008, the district will continue the policy, provision or practice for school bus drivers.

11. What are the risks associated with maintaining mandatory retirement at age 65 for school bus drivers after January 1, 2008?

If a district maintains mandatory retirement for school bus drivers after the amendments to the Code come into force, there is a risk of a grievance or

human rights complaint being filed by an individual employee who is forced to retire after January 1, 2008 or by a union on behalf of its members. The best case scenario would be that the policy is upheld by the arbitrator or Human Rights Tribunal ("Tribunal") as a BFOR. The worst case scenario would be that the arbitrator or Tribunal finds that such a policy is not a BFOR and is a violation of the Code. That said, given the public policy considerations and risks associated with allowing bus drivers to continue to drive over the age of 65, the district will be able to rely on the arbitrator or Tribunal's decision as the reason that it no longer has mandatory retirement for bus drivers. Further, if one or two districts are successful in upholding mandatory retirement of school bus drivers at age 65 as a BFOR, it may set a precedent for other districts (depending of course on the particular facts of each case) and may decrease the risk that such policies are challenged in other districts.

As stated above and providing that the expert evidence and research introduced in the cases cited is still current, there are good arguments that can be made that requiring the bus driver to retire at age 65 is a BFOR and also that it is not possible to individually test drivers over age 65 to screen out potentially dangerous drivers.

We are aware of one grievance being filed by a bus driver in BC alleging that a school district policy requiring retirement at age 65 is a violation of the Charter. However, the union withdrew the grievance on a "without prejudice" basis (NB: the district did not agree that the matter was withdrawn "without prejudice") and, therefore, there was no decision on the issue.

C. The Duty to Accommodate

12. How does the elimination of mandatory retirement affect an employer's obligations with respect to duty to accommodate?

Once the upper limit of age 65 is removed from the definition of age discrimination in the Code, the duty to accommodate will apply to all employees, including those who choose to continue working past age 65. The "duty to accommodate" refers to an employer's obligation to take all possible measures short of undue hardship to accommodate the particular needs of employees who are members of groups protected by the Code.

To meet the requirement of accommodation to the point of undue hardship, school districts will have to show that the employee is unable to meet a BFOR. To establish a BFOR, an employer must be able to demonstrate that the employee was unable to meet a requirement of the position and that the requirement in question meets the criteria, namely that it was adopted for a purpose rationally connected to the performance of the job; was adopted in an honest and good faith belief that it was necessary to achieve that work related purpose; and is reasonably necessary to accomplish that legitimate work related purpose. To show that a standard is reasonably necessary, it must be demonstrated that it is impossible to accommodate individual employees without imposing undue hardship on the employer.

The Supreme Court of Canada[4] has suggested that the following series of questions be asked in the course of investigating the various ways in which individual capabilities may be accommodated:

- Has the employer investigated alternative approaches that do not have a discriminatory effect, such as individual testing against a more individually sensitive standard?
- If alternative standards were investigated and found to be capable of fulfilling the employer's purpose, why were they not implemented?
- Is it necessary to have all employees meet the single standard for the employer to accomplish its legitimate purpose, or could standards reflective of group or individual differences and capabilities be established?

[4] *British Columbia (Public Service Employee Relations Commission) v. B.C.S.G.E.U.* (1999), 176 D.L.R. (4th) 1 (S.C.C.) ("Meiorin").

- Is there a way to do the job that is less discriminatory while still accomplishing the employer's legitimate purpose?
- Is the standard properly designed to ensure that the desired qualification is met without placing undue burden on those to whom the standard applies?
- Have other parties who are obliged to assist in the search for possible accommodation fulfilled their roles?

The first step in dealing with a request for accommodation from an older employee is to ensure the employee's personal needs, and what would be required to meet those needs, are understood. If the issue is an age-related disability such as heart disease, the employer will typically need a medical report from the employee's treating physician setting out the specific job related restrictions and limitations so that the employer can explore possible accommodations.

In each case, the employer will be required to perform an individualized assessment of the employee's specific limitations or needs that arise from a prohibited ground of discrimination and determine how those limitations or restrictions may be accommodated.

If the employee is in a bargaining unit, the union should be included in each step of the search for a reasonable accommodation.

13. When has an employer reached the point of undue hardship?

Whether an accommodation will cause undue hardship is, of course, the central question in any case. The Supreme Court of Canada[5] has stated that the factors to be considered in determining undue hardship, not all inclusive, are:

- Interchangeability of the workforce and facilities;
- The extent of the disruption of a collective agreement;
- The effects on the rights of other employees;
- The effect on the morale of other employees;
- Costs to the employer of the proposed accommodation (including impact on efficiency, wage increases and other direct financial costs to be incurred); and

[5] *Central Alberta Dairy Pool v. Alberta*, [1990] 2 S.C.R. 489.

- The impact on the safety of the individual, other employees or the general public.

The older cases on duty to accommodate suggest that when an employee is no longer capable of performing the essential duties of his or her existing position, there is no longer an obligation to accommodate. However, the balance of recent jurisprudence suggests that an employer must consider possible relocation of an employee from one position to another (even outside the bargaining unit) as a valid and required accommodation. This means that an employee who is no longer able to perform the duties of his or her current position may have a right to be placed in a different position. For example, a bus driver who is no longer able to drive a bus after age 65 may need to be accommodated in a custodial position (provided, of course, the employee has the necessary qualifications and the accommodation does not cause undue hardship on the employer).

It is also well established that employers must provide permanent accommodations where necessary, subject only to the limit of undue hardship.

The process of accommodation will not change with elimination of mandatory retirement. However, the increased numbers of older employees in workplaces will likely increase the volume of accommodation requests for employers. Employers will need to respond to these requests in a flexible, individualized way, such as modifying work hours, workplaces, job requirements and work equipment, reducing or eliminating duties, or moving an employee to a different position. Older employees may also require ongoing accommodations that are changed or adjusted over time (before the point of undue hardship is reached) as many age-related health issues are regressive or gradual and permanent.

14. What will the duty to accommodate due to age require from employers?
The current case law deals primarily with medical and religious accommodation, although there are some accommodation cases for other protected categories under the Human Rights legislation. The jurisprudence provides great assistance in determining "undue hardship" when there are medical and religious accommodation requests. It is unknown at this time how arbitrators or Human Rights Tribunals will approach the concept of undue hardship as it relates to the protected

category of age. It may be that the analysis continues to concentrate on medical conditions as opposed to conditions that relate solely to aging. On the other hand, a distinction may be made between the duty to accommodate for medical reasons and the duty to accommodate for age.

Applying the test of undue hardship to age for teachers may result in teachers requesting and being entitled to "easier" assignments, for example, no split classes, no special needs students or at least no behavioural students, and no courses such as physical education. Recent jurisprudence does state that there may be a need to exempt an employee from performing one or more tasks that normally would be performed in that employee's job. For support staff, the duty to accommodate based on age may result in claims for choice of better shifts such as day shift as opposed to evenings or afternoon shifts. It will be necessary, if such claims are put forward, to show some connection between the aging process and the need to accommodate for the employee to receive preferable working conditions.

The comments in this section are also subject to the employee possessing the necessary qualifications and the usual analysis under undue hardship, which takes into account matters such as staff morale, other provisions in the collective agreement, availability of work, etc.

D. Termination of Employment

15. Can employers still terminate the employment of an older non-union (excluded) employee?

Yes, provided that the decision to terminate is not based in whole or in part on the employee's age. As of January 1, 2008, an employment-related decision based on age (including age 65 or older) will constitute discrimination under the Code. Therefore, if a school district wishes to terminate the employment of an older employee, the school district must be able to demonstrate a non-age related reason for termination. In order to avoid claims of age discrimination, districts should ensure that no part of the decision to terminate older employees is based on age.

Employers in BC are not currently required to provide excluded employees with common law reasonable notice of termination or pay in lieu thereof when terminating employment pursuant to a properly established

mandatory retirement policy. After January 1, 2008, employers will be required to terminate all employees for cause or provide employees terminated without cause with the required notice or pay in lieu of notice, regardless of age.

For employees not covered by a collective agreement, employers will have to comply with contractual termination obligations. If an employment contract specifies the amount of severance, the employer must comply with that obligation. If there is no such specific provision in the employment contract, employers must provide reasonable notice in accordance with the common law (subject to the *Public Sector Employers Act* Employment Termination Standards Regulation).

Employers must also be prepared to provide older non-union employees with lengthier periods of reasonable notice than they might provide to younger employees. Age is one of the factors that courts assess when determining the appropriate notice period for an employee dismissed without cause, typically granting longer notice to older employees whom the court presumes will have fewer opportunities for re-employment.

16. Can employers terminate the employment of an older employee who is covered by a collective agreement?

As stated above, as of January 1, 2008, an employment-related decision based on age (including age 65 or older) will constitute discrimination under the Code. Therefore, employers will be required to terminate all bargaining unit employees for cause, regardless of age. Therefore, if a school district wishes to terminate the employment of an older bargaining unit employee, the school district must be able to demonstrate a non-age related reason for termination. In order to avoid claims of age discrimination, districts should ensure that no part of the decision to terminate an older employee is based on age.

17. How can employers justify termination for non-age related reasons?

More and more, it will be essential for employers to be able to demonstrate specific work-related requirements in order to justify transfers, demotions, altered work allocation and termination. If an employer cannot point to objective evidence of a non-age related reason for a change to an employee's work conditions, it may risk a human rights complaint.

Employers must be able to demonstrate specific work-related requirements to support employment-related decisions, such as terminating or disciplining an employee (unionized or excluded) for cause. The best way to provide objective evidence of a non-age related basis for termination or other discipline is to set and maintain consistent policies, enforced by regular and fair performance evaluations. The results of evaluations should be provided to the employee, and the employee should be given an appropriate warning or notice if their employment is in jeopardy.

E. Performance Evaluation

18. Can employers implement a performance-based evaluation system for employees over the age of 65?

No. Treating employees differently on the basis of age will likely result in a complaint of age discrimination. Therefore, school districts will not be able to implement special performance evaluation systems that begin at a certain threshold age. The best practices approach is to conduct regular evaluations for all employees, and to implement additional testing or evaluations only if there are problems with legitimate work-related requirements.

For teachers, collective agreement language is in place in each district to deal with performance appraisals. For support staff, districts may need to implement processes and procedures if none are currently in place. The setting of standards is the most important aspect of the policy. Districts will also need to review their contract language to ensure that there are no impediments to a performance evaluation system.

A performance evaluation system should include the following elements:

- establishment and maintenance of consistent and standard policies;
- maintenance of detailed evaluation records;
- communication of results to employee;
- warning to employee if employment is in jeopardy; and
- record of inadequacies and accomplishments.

Putting together regular performance appraisals for all employees will provide districts with the evidence to deal with employees who are not meeting the standards of the job as they progress in age.

If districts decide to implement a new performance evaluation system in response to the amendments to the Code, and the system indirectly targets older employees (although the system applies to all employees), the district may be open to complaints of age discrimination. Should a district want to implement a new, or revise an existing, performance evaluation system, it should ensure that the system applies equally to all employees, is consistently applied for all ages of employees, and does not directly or indirectly target older employees.

19. What will employers have to do to avoid a human rights complaint when terminating an employee over the age of 65 on the basis of poor performance?

The best protection for employers will be to set and maintain consistent and standard policies applicable to all employees, and to carefully document employee job performance to ensure that decisions based on poor performance are defensible. It will be helpful to maintain detailed records of performance for all employees, setting out both accomplishments and inadequacies. It will also be important to communicate the results of performance appraisals to employees and to warn them that if required standards are not met, their employment may be in jeopardy.

A performance based system of evaluation will be an objective basis for employers to make decisions when an older employee chooses not to retire despite ongoing performance issues.

20. Can employers require testing at a specific age for all employees within a certain employee group?

In order to introduce a policy that requires testing at a specific age for all existing employees within a certain employee group, an employer must be able to justify the testing requirements as a BFOR.

Requiring fitness testing for employees based on their age would constitute prima facie discrimination under the Code. Such a policy could be upheld only if the employer is able to demonstrate that any other approach to evaluation of fitness would constitute undue hardship. For example, the

test of undue hardship might be met if the employee works in a safety sensitive position (e.g., bus drivers) and if there is scientific evidence that performance declines demonstrably at a particular age. In that case, the employer would argue that failure to test employees who are at or over the identified age would constitute an unacceptable safety risk.

It is not discriminatory to require evaluation of an employee's fitness if there are performance concerns that reasonably give rise to questions about the employee's physical or mental fitness to perform the job.

21. If a district has never had a mandatory retirement policy, can the district still take the position that an employee over the age of 65 needs to retire if an assessment shows incompetence or an inability to meet the core requirements of his/her job? Or is retraining required to assist in workplace accommodation?

If an individual assessment shows that an employee is incompetent or unable to meet the core requirements of his/her job, the district may be in a position to terminate the employee for cause. The district would not be requiring the employee to "retire," but rather, would be terminating the employee's employment.

If the reason that the employee is incompetent or unable to meet the core requirements of his/her job is related to a prohibited ground of discrimination (e.g., a physical or mental disability or age), the district may be able to terminate the employee if it can show that he/she cannot be accommodated without imposing undue hardship on the district. If the employee is in a bargaining unit, the union should be included in each step of the search for a reasonable accommodation.

The issue of whether retraining is required will depend on the particular facts. For example, if the individual cannot perform his/her job because of a physical or mental disability and retraining would not impose undue hardship on the district, the district may have to consider retraining when considering possible accommodations for the employee.

F. Teachers on Call (TOC)

22. Can a district have separate TOC lists for retired teachers?

There are some districts that have separate TOC lists for retired teachers. To date, there are human rights complaints outstanding in two of those districts. In order to be successful in these two cases, the districts will have to convince the Tribunal that the practice is not discriminatory as the distinction is not based on a prohibited ground; i.e., the distinction is based on the status of the employee as retired and receiving a pension rather than their age. If the Tribunal does not accept that argument, the districts will have to prove that a separate TOC list for retired teachers is a BFOR. This issue has not been decided at the Tribunal or at arbitration and, therefore, it is difficult to predict the likelihood of success. However, for those districts that have a longstanding policy of separate TOC lists for retired teachers based on bona fide concerns about succession planning and maintaining excellence by permitting renewal in a closed system of development, there may be reasonable arguments that could be made to justify the two lists as a BFOR.

That said, the establishment of a separate TOC list for retired teachers may not be upheld if such a policy is introduced for the first time in a district in response to the changes to the Code.

23. Can districts have a policy that provides that a teacher cannot be placed on the TOC list after a certain age or refuse to hire retired teachers?

It is discriminatory to have an employment policy that is based on age. Therefore, districts cannot have a policy that prevents individuals over a certain age from being placed on the TOC list or a policy that prevents the hiring of retired teachers. Such a policy would violate the Code unless the employer can establish the policy as a BFOR. This issue has not been tested before the Tribunal or an arbitrator. However, it will likely be difficult to establish such a policy as a BFOR.

Once a retired teacher is on the TOC list, there are a number of cases that say a district needs "just cause" to remove a teacher from the list. It is a lesser test than for a continuing teacher, but there still must be some reason for removing the teacher.

G. Normal Retirement Age

24. Can an employer still define a "normal retirement age"?

Yes. Provided it is voluntary for the employee, having a normal retirement age of 65 is a good way for an employer to address the issue of retirement with employees and may enhance the employer's ability to address succession planning and other workplace issues.

The following is sample language for a retirement policy that defines a normal retirement age:

a. Introduction
b. The Teachers' Pension Plan Rules and the Municipal Pension Plan Rules provide that the normal retirement age of employees of the school district is age 65.
c. Policy
    1. The Board of Education recognizes age 65 as the normal retirement age for employees of the school district ("Normal Retirement Age").
    2. Employees must provide notice of retirement in accordance with the notice requirements of the applicable collective agreement or contract.
    3. This policy does not prevent employees from retiring before they are 65 or prevent employees from working beyond the Normal Retirement Age.
    4. An employee who decides to work beyond the Normal Retirement Age will continue to perform the full scope of their duties and responsibilities.

Employers can combine the definition of normal retirement age with other management strategies designed to facilitate voluntary retirement, such as flexible working arrangements or gradual transition to retirement.

For those districts that need to encourage employees to remain at work after age 65, the focus will be on retention and succession planning. Various strategies can be developed to recruit and retain experienced older workers, such as modifying hours of work to allow for part-time, flex-time or job sharing.

Districts must ensure that the content of a policy that defines normal retirement age and any management strategies developed to encourage voluntary retirement or encourage employees to remain at work, are in compliance with the collective agreements and should not include matters that a union will allege constitutes bargaining directly with employees.

25. If a support staff collective agreement specifies a normal retirement age of 65 and also provides for a retirement benefit based on years of service (in that clause age 65 is referenced), would the district have to accrue the retirement benefit beyond age 65? When the retirement benefit provision was negotiated, mandatory retirement was allowed.

As this clause was drafted with age 65 retirement in mind, there may be an argument that the parties had a mutual understanding that the retirement benefit would not accrue beyond age 65 because, under the collective agreement mandatory retirement provision, no employee had an expectation of employment past age 65. (For the purposes of this paper, we are assuming that retirement at age 65 in the district was mandatory.)

In January 1, 2002, the provincial government reduced the coverage for paramedical services under the Medical Services Plan (MSP) Supplementary Benefits Program. In response, a number of insurers indicated that they would charge increased premiums to cover the paramedical benefits previously covered by MSP. As a result, some employers decided to keep their insurance unchanged and instead left it to employees to cover the cost of those benefits.

There were a number of arbitration decisions on this issue. At arbitration, employers argued that the benefits provisions in collective agreements had been negotiated based on a common understanding that the insurance policies obtained by the employer would cover only those benefits costs in excess of the levels of coverage then in place under MSP. This argument was not accepted by arbitrators. Arbitrators looked at what was promised in the collective agreement and, depending on the nature of that promise, held that the employer must either increase its insurance coverage (and pay the extra costs) or provide payment for the benefits directly.

Therefore, depending on the language of the retirement benefit provision and the nature of the promise made, there is a risk that an arbitrator will not consider the common understanding that no employees expected to work

past age 65 at the time the provision was negotiated and will consider only what was promised in the collective agreement.

It is necessary to carefully review your collective agreement language to determine the nature of the promises made in the agreement.

H. The *Workers Compensation Act*

26. How does Bill 31 affect age-related benefits in the *Workers Compensation Act*?

Bill 31 adds a new subsection to section 41 of the Code that allows statutorily mandated retirement schemes, as well as other statutory schemes with age-related benefits such as the *Workers Compensation Act*, to continue without contravening the Code.

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 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 provides that wage-loss benefits may only be paid until a worker is 65, unless the board is satisfied that the worker would have retired at a later date, in which case the worker can be paid to that date. If a worker was 63 years or older at the time of injury, benefits may be paid to the later of two years past the date of injury, or the date the board determines the worker would have retired. Current policy states that evidence of the worker's intention to work past age 65 is required in order for compensation to be continued.

Where a collective agreement provides for WCB top-up by the employer (many of the support staff collective agreements do provide for such top-up), districts must review the language of the agreement to determine whether there is a risk that it will be liable for the employee's full salary if WCB benefits cease at age 65.

I. Benefits

27. How do the amendments affect pension plans?

Existing pension rights are protected. Bona fide retirement, superannuation or pension plans will continue to be able to make distinctions on the basis of age, as they do now. Allowing this exemption is necessary to ensure the ongoing operation of these pension plans. It includes the ability to make distinctions in pension plans, such as specifying early and normal retirement ages, which benefit employees.

28. How does the legislation affect employee benefits?

The legislation will continue to permit age-based distinctions under bona fide group or employee insurance plans, including those that are self-funded by employers or provided by a third party. As is the case in other jurisdictions, age-based distinctions can be made only under insurance-based benefit plans.

29. Can an employer amend its employee benefit plans in response to the elimination of mandatory retirement?

Generally, no. The Code has always allowed, and continues to allow, age-based differences in employee benefit plans. However, the employee benefit plan containing those age-based differences must be a "bona fide" group or employee insurance plan (including self-insurance plans).

The test for a bona fide employee benefit plan is:

- whether the plan was adopted honestly in the interests of sound and accepted business practices, and not for the purpose of defeating rights protected by the Code;
- the distinction is based on sound and accepted insurance industry practice; and
- there is no practical alternative.

A change to the employee benefit plans, as a response to the elimination of mandatory retirement, may not, in and of itself, meet the "bona fide" test.

If you would like to explore amending the employee benefit plans, contact BCPSEA for advice and direction.

30. Does the elimination of mandatory retirement change current age-based differences in the employee benefit plans?

Generally, no. The Code has always allowed, and continues to allow, age-based differences in employee benefit plans.

Age-based differences are currently found in life insurance contracts, where the amount of coverage provided may be reduced as the employee gets older. This is known as an 'age reduction'.

It is expected that long-term disability plans will be permitted to continue providing coverage up to age 65 only.

31. What might happen to employee benefit plans if the insurance industry changes its practices as a result of the elimination of mandatory retirement?

The requirement to meet the "bona fide" benefit plan test includes the plan being grounded in sound and accepted insurance industry practice.

BCPSEA will monitor and have ongoing dialogue with our benefits consultant and insurance companies with respect to any changes to insurance industry practices, and will advise or and assist districts with any such changes.

32. If a collective agreement provides for the termination or reduction of coverage for certain benefits at age 65, are these provisions enforceable as of January 1, 2008?

Bill 31 does not provide an exception for age-related distinctions or mandatory retirement provisions in collective agreements. Therefore, employers will not be entitled to enforce collective agreement provisions that provide for the termination or reduction of coverage for certain benefits at age 65. However, as stated above, the Code has always allowed, and continues to allow, age-based differences in employee benefit plans. Therefore, even if the collective agreement provisions are not enforceable, an employer may still be able to rely on age-based differences in benefit plans, provided the plan is a bona fide insurance plan.

33. Can an employer have different (i.e., lower) benefits coverage for employees over age 65?

If a requirement that employees pay either additional premiums for coverage post-65 or obtain reduced coverage would constitute a significant departure from the terms of the collective agreement, the unions would likely resist such a proposal and such an agreement would likely be challenged under the Code. In order to defend such a practice, an employer would have to show that the differential treatment of employees post-65 is part of a bona fide employee benefit plan.

34. If a district's collective agreement provides extended health benefits (EHB) and dental to retirement or termination and the EHB and dental policies specify coverage to age 65, what takes precedence? What are the district's options/actions?

In this case, there may be a gap between the benefits promised by the district in the collective agreement and the benefits actually available under the EHB and dental policies provided by the insurer. The question of whether the district has a collective agreement obligation to continue benefits coverage for employees over age 65 will depend on the language of the agreement and the promise made by the district.

Therefore, it is necessary to determine the nature of the promise made by the district (i.e., whether it has a contractual obligation to provide benefits) by reviewing the collective agreement language in question. If the collective agreement language is such that the district promised specific benefits for employees, with definitions and monetary levels and eligibility criteria set out in the collective agreement and little or no reference to the insurance policy, it may be liable for the difference between what is promised in the collective agreement and what is provided by the insurer.

However, the collective agreement language may be such that the district promised simply that it would pay the premiums for an insurance policy providing certain levels of benefits. In this situation, as long as the insurance policy provides for the promised level of benefits, and the terms of the policy are standard for the industry, issues of eligibility (including age) would be between the employee and the insurer.

If it appears there is an obligation under a collective agreement to continue benefits past age 65, districts may have two options: (1) increase coverage

with the insurer; or (2) reduce the extent of the collective agreement promise with the union.

If you need specific advice regarding your collective agreement obligations, contact BCPSEA for assistance and direction.

35. Are employers required to continue to provide benefit coverage to excluded employees aged 65 and over?

The concerns raised in #34 above are similar to those that arise in relation to individual contracts of employment. Therefore, employers must first determine what has been promised to the employee in the contract of employment. A close review of the specific terms and conditions of the excluded employee's contract of employment is required to determine the nature of the employer's obligation to provide benefit coverage.

A requirement on the employer to provide a standard plan would probably not require continuation of coverage for employees not eligible under the standard plan. However, a general obligation to provide a specified level of benefits may effectively make the employer self-insured for employees over age 65.

Employers must then determine whether its existing insurance arrangements will fulfill the employer's promise after January 1, 2008.

If the employer has an obligation to continue benefit coverage past age 65, the employer may consult with its insurer to determine whether coverage can be extended past age 65, and if so, the costs of such coverage.

If coverage cannot be extended past age 65 or is prohibitively expensive, the employer may consider renegotiating the employment contract with the employee and sign a new or amended valid contract. This option has some potential challenges and, therefore, employers should obtain legal advice on how to ensure a new contract is valid. Employers may also consider unilaterally changing the benefit provisions of the contract by providing sufficient notice of the change to the employee. The amount of notice required will depend on the terms of the contract and will be equivalent to what would be required to terminate employment.

If there is a clear contractual requirement to continue benefit coverage beyond age 65, and this coverage ceases at age 65, an employer may be at risk of an action for constructive dismissal by the employee. The definition of constructive dismissal states that where an employer makes a unilateral change to the essential (fundamental) terms of an employee's contract of employment without reasonable notice, the employee may treat the contract at an end and sue for wrongful dismissal. A unilateral change to an employee's key benefits coverage may amount to a fundamental change to the contract of employment.

For more specific advice regarding your contractual obligations to excluded employees, contact BCPSEA for assistance and direction.

J. Recommended Actions for Benefits Issues

36. Review all benefit plans (EHB, Dental, Life, LTD, AD&D) to determine termination of coverage provisions for each employee group (teachers, support, exempt including principals/vice principals).
It is important to note that each school district has their own individual benefit plan and unique provisions contained therein, regardless of participation in the PEBT for support staff or the BCPSEA Buying Group for the other employee groups. The exceptions are the PEBT LTD Program, the BCTF SIP Plan, which are common among all school districts, and common to some school districts, exempt and principal/vice principal LTD plans.

37. Upon review of all benefit plans, determine whether any provision of the respective plans requires further review and/or revision.
Considerations for this review include:

a. Do the benefit plans meet the district's recruitment and retention and workforce planning objectives?

b. Are there certain provisions that expose the school district to potential increased cost or liability?

Please see #30 for further information on this issue.

38. **Determine whether any documentation and/or communication materials, with respect to employee benefits, require revision as a result of the elimination of mandatory retirement.**
    Such documentation may include Board Policy, employee handbooks and website content.

39. **Determine how best to communicate benefit termination of coverage provisions to employees.**
    As a best practice, school districts should consider sending a communication to all employees advising them of the elimination of mandatory retirement effective January 1, 2008.

    That communication should outline the benefit termination of coverage provisions specific to each employee group. It should be sent to all employees, not just those approaching the previous mandatory retirement age of 65.

Questions

For more information or clarification regarding these matters, please contact your BCPSEA liaison.