

THE END OF MANDATORY RETIREMENT

On December 12, 2006 the Ontario Government abolished mandatory retirement at age 65. Prior to that date, an employee forced to retire at 65 could not challenge that action under the Human Rights Code.

As of the passing of the amendment to the Code, employees over the age of 65 can choose to remain at work. Many employers are surprised to discover the willingness of employees to continue working. The end of mandatory retirement has provided a great opportunity for employers to capitalize on the experience of older employees. At the same time it has presented some key considerations and questions for developing and maintaining employment policy.

Employers can make the decision to continue or not continue a person past age 65 based on performance of the individual. This is where it is critical for employers to have in place a system of regular performance appraisals that objectively measure performance of an individual. In fact this is just good organizational practice. However, to introduce an appraisal or review solely for the employee who wishes to stay past 65 would be discriminatory and attract the attention of the Human Rights Commission.

Can you deny a request of a 65 year old employee to stay on? If you have a mandatory retirement program that can demonstrate that the mandatory retirement age is a bona fide occupational requirement, you may be able to defend your refusal to employ past 65. To meet the Code requirements of bona fide occupational requirement, the employer must:

- show that the requirement was adopted for a purpose or goal that is rationally connected to the function being performed
- the requirement was adopted in good faith, in the belief that it is necessary for the fulfillment of the purpose or goal
- the requirement is reasonably necessary to accomplish its purpose or goal, in the sense that it is impossible to accommodate the employee request without undue hardship

What is undue hardship? There are three considerations for assessing undue hardship:

- cost
- outside sources of funding, if any, and
- health and safety concerns

There are many positives that arise from the continued employment of an individual that is 65. First, the retention of knowledge and organizational history cannot be understated. Second, the retention of this employee reduces the cost of turnover and training. Third, the retention can lead to an effective mentoring of other employees and successfully contribute to an orderly succession plan.

To ensure the organization benefits from employees over 65 who wish to stay on while maintaining solid employment policies, it will need to:

- Have the necessary non-discriminatory tools (e.g., performance appraisal related to job needs, training opportunities for employees regardless of age, supervisory/management training)
- Be consistent in the application of your performance management system
- Maintain current and accurate job descriptions

In the end keeping the best employees can mean looking beyond age 65.

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