

Providing Employee Benefits After Age 65

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The end of mandatory retirement has come and gone, but that hasn't put an end to the issues relating to employment after retirement age.

Although the Ontario Government has amended the *Human Rights Code* to eliminate mandatory retirement, the *Code* continues to permit age-based distinctions in employee benefits plans, provided that the plans comply with the *Employment Standards Act* and its regulations. Since the *ESA* regulations continue to define age as “18 years or more and less than 65 years,” the protections of the *ESA*, and hence the *Code*, cease to apply at age 65.

This appears to preserve the status quo, meaning employers are not legally required to provide benefits to employees age 65 or older. But despite the provisions of the Human Rights Code, employers with collective agreements have experienced a number of challenges relating to these benefits.

Wording of Collective Agreements is Key

In unionized workplaces, unions have initiated grievances when employers discontinue benefits coverage for employees at age 65. The general argument is that the employer is failing to provide the benefits promised in the collective agreement.

When the collective agreement specifically states that benefits stop at age 65, an employer will have a strong argument that insurance policies ceasing coverage at that age comply with the obligations in the collective agreement. When the collective agreement states that “all employees” will be covered under a certain plan, a policy that stops coverage at age 65 risks being found to violate the collective agreement. Arbitrators generally find that “all employees” means all employees regardless of age or any other distinction.

Recent Decision Extends Benefits

A recent example of a successful challenge to an employer's post age-65 benefits policy is the decision in *City of London and CUPE*. In that decision, Arbitrator Gregory Brandt upheld the union's grievance regarding the denial of benefits to workers past age 65.

The union conceded that the long-term disability plan was compliant with the collective agreement, as the collective agreement specified that coverage would end at age 65. For all other health and insurance plans, the union argued that the city could not purchase insurance coverage for those under age 65 without providing coverage to those over age 65 because the collective agreement requires that *all employees* be entitled to certain benefits.

Arbitrator Brandt found that where the collective agreement promised the benefits to “all employees”, this meant all employees regardless of age. Arbitrator Brandt found that it was quite possible for employers to have been in compliance with their collective agreements on the eve of December 12, 2006 (when Bill 211—a bill to end mandatory retirement in Ontario—came into force), and in violation the very next day.

Bargaining For Benefits

Grievances are not the only route being used by unions to extend benefits coverage beyond age 65. Many union locals are now seeking this coverage at the bargaining table. For employers, this can mean facing

demands for expensive benefits coverage or being asked to provide benefits coverage not provided by insurers.

Some employers are resisting the demands. CUPE justified its seven-week strike in Kawartha Lakes this winter on the employer's refusal to agree to full post-age-65 benefits for employees. After the strike, CUPE was not successful in obtaining full post-age-65 benefits. Other employers are prepared to provide some benefits, such as extended health coverage, but not others, such as long-term disability coverage. Still other parties have developed alternative approaches to the issue, such as agreeing to pay a straight cash amount approximating the cost of post-age-65 benefits.

Going Forward in the Post-Mandatory Retirement World

In the end, full or partial restrictions on benefits after age 65 may go the way of mandatory retirement itself. There are two potential reasons for this:

- **Charter challenge.** There are some concerns that the exception in the *Human Rights Code* may be open to a challenge on the grounds that it's an infringement of the *Charter of Rights and Freedoms*. The *ESA* regulations that are the basis of the *Human Rights Code* exception are extremely narrow and have historically been used to permit age-based distinctions in limited circumstances only.
- **Labour market pressures.** As the baby boom generation moves towards retirement, and employers face a shrinking labour pool, employers may be forced to provide post-age-65 benefits to attract and retain the workers they need.

Whether these events come to pass remains to be seen. In the meantime, with potential legal challenges based on current employment and labour contracts, employers should review their benefits policies to determine what distinctions are made at age 65. Employers should also review employment contracts and policies to determine whether they require the provision of benefits to all employees, regardless of age. Finally, employers may want to explore the possibility of coverage beyond age 65. In this latter regard, a number of insurers have begun making at least some benefits available for employees over this age.

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