

Managing an Aging Workforce

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Agenda

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 - ii. Steps to Take to Ensure Compliance
 - a. Have Written Age Discrimination and Harassment Policies
 - b. Do Not Reference Age in Job Postings/Job Advertisements
 - c. Do Not Address Age in the Job Interview Process
 - d. Beware of Targeting Older Employees in Staff Reductions
2. Best Policies and Practices to Addressing An Aging Workplace
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 - ii. Handling a Transition to New Hours/Position
 - iii. Addressing Retirement Plans

1) Understanding Age Discrimination Laws and Compliance Requirements

i) Human Rights Legislation

- Prior to December 12, 2006, the Ontario *Human Rights Code* (the “Code”) did not prohibit age discrimination in employment against persons aged 65 or older
- This was a result of the fact that at that time the term “age” in the *Code* was defined as referring to individuals between the ages of 18-65
- As a result, up to that date, policies requiring mandatory retirement at age 65 could not be challenged under the *Code*
- This is no longer the case
- With the passage in 2005 of the *Ending Mandatory Retirement Statute Law Amendment Act*, the definition of the term “age” in the *Code* was revised to refer only to individuals “18 years or older”
- As a result of this, it became a breach of the *Code* to discriminate against workers based on age

1) Understanding Age Discrimination Laws and Compliance Requirements

i) Human Rights Legislation

- Currently, the Human Rights legislations in all Provinces as well as federally broadly prohibit discrimination in employment based upon a person's age
- This applies to all aspects of the employment relationship including:
 - Hiring, promotions and training opportunities;
 - Compensation and job assignments; and
 - Termination and layoffs.

1) Understanding Age Discrimination Laws and Compliance Requirements

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- There are two areas in which age-based employment policies can still be permitted
- The first is under Section 25(2.1) of the *Code*
- Section 25(2.1) permits a benefit plan to differentiate between workers based on their age, without it being a breach of the *Code*
- It is for this reason that many benefit plans will terminate an individual's ability to participate in the Plan at age 65 or 70
- It has seemed odd to many commentators that Section 25(2.1) is in the *Code*, given the amendment to the definition of age.
- In fact, the Ontario Human Rights Tribunal in a 2019 decision, even specifically held that Section 25(2.1) of the *Code* breached Section 15(1) of the *Canadian Charter of Rights and Freedom* (which sets out the equality rights for all individuals)

1) Understanding Age Discrimination Laws and Compliance Requirements

i) Human Rights Legislation

- Notwithstanding this, the *Code* has not been amended and Section 25(2.1) is still in the *Code*
- As a result, the termination of an employee's benefit plan participation based on their age remains the norm

1) Understanding Age Discrimination Laws and Compliance Requirements

i) Human Rights Legislation

- The second exception is for occupations where an occupational requirement relating to an employee's age can be shown to be a Bona Fide Occupational Requirement ("BFOR")
- This has been found to be the case for certain safety-related occupations, such as for firefighters and pilots
- The Supreme Court of Canada in *Ontario v. Etobicoke* outlined the test for a BFOR as it relates to age discrimination
- In this case, the Claimant, who was a firefighter, was required to retire at age 60

1) Understanding Age Discrimination Laws and Compliance Requirements

i) Human Rights Legislation

- In its decision the Supreme Court set out a two-part test to in order to determine whether a mandatory retirement policy is justifiable:
 - **Subjective component:** the employer must establish that mandatory retirement was imposed honestly, in good faith, and in the belief that the imitation is in the interests of the adequate performance of the work, and not for ulterior or extraneous reasons aimed at objectives which could defeat the purpose of the Code
 - **Objective component:** the employer must establish that the retirement plan is reasonably necessary to assure the efficient and economical performance of the job without endangering the employee, his fellow employees and the general public

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- Based on safety concerns, the fire department's mandatory retirement policy was upheld
- There have been a number of more recent cases in which complainants have again tried to have mandatory retirement policies struck, but these have not been successful

1) Understanding Age Discrimination Laws and Compliance Requirements

i) Human Rights Legislation

- The financial risk to employers in being found to have violated the *Code* can be significantly greater than the normal cost to an employer of a without cause termination
- For instance, if the Ontario Human Rights Tribunal or a Court finds that an employer violated the *Code*, the notice periods which exist under the *Employment Standards Act, 2000* and at common law are not relevant as to the damages that the Tribunal or a Court can award

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- Rather, all of the following can be awarded:
 - Full back wages from the date of the termination of employment to the date of the decision;
 - General damages; and
 - An Order reinstating the employee.
- Given the length of time it can take for Human Rights Hearings to be heard, the risk of back wages can be significant
- For instance, in ***Banning v. KA Gas Variety Store***, an employer was found to have discriminated against an employee while based on her age during her employment
- It was also found that the employer terminated her employment based, at least in part, on her age

1) Understanding Age Discrimination Laws and Compliance Requirements

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- In addition to general damages, the complainant was awarded 3 years of back wages, which was much more than what the terminated employee's common law notice entitlement was at the time of termination

1) Understanding Age Discrimination Laws and Compliance Requirements

i) Human Rights Legislation

- As mentioned, when a Tribunal or Court finds that an employer has violated the *Code*, then, in addition to back wages, general damages will also be awarded
- With respect to this, the quantum of general damages awarded under the *Code* for age discrimination in employment has been increasing in recent years
- Currently, damage awards of between \$20,000.00 - \$30,000.00 are becoming common
- For instance, in ***MacKinnon v. Seltech Plastics Ltd.***, the Tribunal found that the Company had wanted to replace a 65-year-old employee who had 35 years tenure with a less experienced employee, who would be lower paid

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- It was found that in an effort to attempt to get the complainant to quit, MacKinnon was subjected to an unusually heavy workload, was held to unreasonably high work standards and was yelled at and harassed by his foreman
- This led to the Tribunal awarding general damages of \$27,000.00
- In *Tenthorey v. IMS Incorporated*, an employee was subjected to derogatory and discriminatory comments from her boss during the course of her employment
- For instance, the boss would make comments regarding what the employee would look like in 10 years
- Also, the termination letter stated that the complainant's employment was being terminated because she was too senior and had too much experience
- As a result, in addition to awarding back wages, the complainant was awarded \$25,000.00 in general damages

1) Understanding Age Discrimination Laws and Compliance Requirements

i) Human Rights Legislation

- These decisions can be compared to earlier decisions such as *Knox-Heldman v. 1818224 Ontario Limited* where the complainant was awarded \$15,000.00 in general damages in an age discrimination case with comparable facts to MacKinnon and Tentorey

1) Understanding Age Discrimination Laws and Compliance Requirements

ii) Steps to Take to Ensure Compliance

- In order to avoid age discrimination complaints employers should be mindful of the following:
 - Have written policies prohibiting discrimination and harassment based on age;
 - Do not include references to age in job posts/job advertisements;
 - Do not address age in job interviews; and
 - Do not disproportionately include older employees in staff reductions.

1) Understanding Age Discrimination Laws and Compliance Requirements

ii) Steps to Take to Ensure Compliance

a) Have Written Age Discrimination and Harassment Policies

- Employers should be mindful to include prohibitions against discrimination and harassment based on age in the workplace policies they create
- Training should be provided to employees to prevent against ageism existing in a workplace
- A clear complaint and investigation process should be established to address any age discrimination or harassment complaints

1) Understanding Age Discrimination Laws and Compliance Requirements

ii) Steps to Take to Ensure Compliance

b) Do Not Reference Age in Job Postings/Job Advertisements

- Requiring employees to be a certain age or within a range of ages to do a job is a direct form of age discrimination, unless there is a minimum or maximum age requirement for the position
- In *Vallee v. Fairweather Ltd.*, the employer had a student summer hiring program
- The program, however, was only open to full-time students between 18-24
- As a result, a 26-year-old full-time student was told she could not apply for the position
- The student brought a Human Rights complaint
- The Tribunal held that the age criteria amounted to discrimination based on age

1) Understanding Age Discrimination Laws and Compliance Requirements

ii) Steps to Take to Ensure Compliance

b) Do Not Reference Age in Job Postings/Job Advertisements

- Not only is it prohibited to state a preference for or against particular ages or age groups, when hiring employees, employers need to also be mindful not to include more subtle descriptions which may be seen as discriminating against older workers
- In particular, employers should not send out clues or hints which could be seen as the employer trying to communicate a preference for younger employees
- For instance, using phrases like “recent college graduate”, “fresh”, “energetic” and “young company” can be seen as indicating that older workers need not apply

1) Understanding Age Discrimination Laws and Compliance Requirements

ii) Steps to Take to Ensure Compliance

c) Do Not Address Age in the Job Interview Process

- In addition to not including age references in job postings and advertisements, employers should also not inquire about or reference an applicant's age during the interview process
- If an employer does this and if an older applicant is not successful in obtaining the job, they can use their age as a basis to bring a Human Rights complaint
- For instance, in *Reiss v. CCH Canadian Limited*, a job applicant had received an email from the employer's agent indicating that the employer was looking for someone who was more junior in their experience
- The applicant brought a Human Rights complaint alleging that the statement in the email had the effect of discouraging him from following up on the position and that the email was evidence of age discrimination

1) Understanding Age Discrimination Laws and Compliance Requirements

ii) Steps to Take to Ensure Compliance

c) Do Not Address Age in the Job Interview Process

- The Tribunal agreed and awarded the applicant \$5,000.00 in general damages for discrimination based on age

1) Understanding Age Discrimination Laws and Compliance Requirements

ii) Steps to Take to Ensure Compliance

d) Beware of Targeting Older Employees in Staff Reductions

- There can be a tendency for employers to disproportionately include older workers when larger staff reductions are taking place
- This can be the case given the fact that older employees with more tenure tend to earn higher salaries than employees with less tenure and they often times add to a Company's benefit plan costs
- This can expose an employer to Human Rights liabilities if it is found that an employee's age was one of the factors that led to the employee being included in the staff reductions
- For instance, the Newfoundland Human Rights Commission found that an employer had engaged in age discrimination when it included an employee in a downsizing in part based on the fact that the employee was eligible to receive his Company pension

2)i) Strategic Employers: Handling Attendance and Health Issues

- Some age well, with little or no health issues until they are ready to retire
- For other employees though, as they get older, their health issues can slowly or quickly mount
- When issues arise regarding an employee's attendance, an employer must tread carefully to avoid any claims of discrimination or harassment
- For example, an employer cannot discipline an employee for taking off many days due to an ongoing health issue
- To address employee attendance there are three steps that an employer may wish to take
- First, all employers should ensure that they have in place a clear policy regarding how absences are to be reported and addressed
- If an employee does not comply with this policy, the employee can then be disciplined
- Second, if there are specific concerns about an employee's attendance, a temporary, varied attendance policy (e.g. instead of requesting supporting documents from the employee if absent for more than 3 days, supporting documentation could be requested if absent for more than 2 days)

2)i) Strategic Employers: Handling Attendance and Health Issues

- Third, if an employee has frequent and unpredictable attendance issues, the employee may need to be unilaterally placed on an approved leave of absence
- The leave of absence will normally be unpaid, unless the brokerage provides paid sick/personal days or provides short-term disability coverage
- The employee will then remain on the leave of absence until they believe they are ready to return to work and then provides a medical questionnaire prior to returning to work
- The medical questionnaire should confirm that they can consistently return to work and whether any reasonable accommodation is required
- After reviewing the medical questionnaire, the employer should engage in further discussions with the employee, including potentially requiring the employee to attend an independent medical examination and implementing a written accommodation plan

2)i) Strategic Employers: Handling Attendance and Health Issues

- Review sample medical questionnaire

2)ii) Strategic Employers: Handling a Transition to New Hours/Position

- Many long-term employees want or need to adjust their work arrangements as they approach retirement
- Employers can support these transitions while protecting the organization from legal risk
- Any reduction in hours, duties, or position must be voluntary
- If an employer unilaterally imposes such a change, the employee may claim they have been constructively dismissed (i.e. effectively fired)
- The safest approach is to engage the employee in an open discussion about their preferences and options, rather than directing a change
- Once an agreement is reached, the change should be confirmed in writing
- A short memo or letter should outline that the employee has voluntarily agreed to the change, specify the new role or hours, confirm any corresponding change in compensation, and state that all other terms of employment remain the same
- The memo should be executed by the employee

2)ii) Strategic Employers: Handling a Transition to New Hours/Position

- Review sample transition memo

2)ii) Strategic Employers: Handling a Transition to New Hours/Position

- A reduction in hours or pay will naturally reduce the employee's overall compensation, which can also have the effect of reducing their future termination entitlements
- Since termination entitlements are often calculated based on current income, a lower ongoing rate of pay can be advantageous to the employer if the relationship ends later

2)iii) Strategic Employers: Addressing Retirement Plans

- Sometimes an employee will advise that they are retiring, things will go smoothly, and there is limited need to paper the end of their employment
- Sometimes though, especially for long-standing integral employees, there is more needed
- For some employees, although they want to retire right away, they will hold out until they are presented with a separation package
- For these employees, the best route is to casually approach them about a potential package and to then confirm the terms in writing
- It should be noted that the package provided can be less than the statutory entitlements as the employee is choosing to leave, as opposed to being fired

2)iii) Strategic Employers: Addressing Retirement Plans

- For other employees, they are looking to retire in 2 – 3 years and you need to plan accordingly
- By entering into a mutual planned separation package, you gain a fixed retirement date and certainty of transition planning
- In turn, the employee receives a defined package or incentive for providing notice and assisting with knowledge transfer
- These arrangements reduce operational uncertainty and allow the employer to manage staffing, training, and succession more effectively

2)iii) Strategic Employers: Addressing Retirement Plans

- When discussing their potential retirement, it is important to avoid using the word “retirement” or reference to the employee’s age
- Instead, to avoid any allegation of discrimination, it is best to discuss the matter on broad terms like “next chapter”
- It is also important to be aware that an employer cannot rely on resignation statements as binding commitments, unless there is an executed mutual separation package
- Until an employee’s resignation has actually taken effect or they have signed a mutual separation package, they are entitled to withdraw or postpone it

2)iii) Strategic Employers: Addressing Retirement Plans

- Every mutual separation or retirement arrangement should:
 - Confirm that the employee has voluntarily chosen to end their employment
 - Set out the retirement date, any financial package, and the scope of ongoing support or transition duties
 - Confirm that the employee has received independent legal advice or had the opportunity to do so
 - Should be conditional on a Full and Final Release, which includes non-disparagement provision, a confidentiality provision, etc.

Managing your HR Issues

Wilson Vukelich LLP can help ensure that your employment and labour law matters are handled effectively and efficiently, and in a manner that is reflective of new legal developments and obligations. If you have any questions or require further information, please contact:

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