



Managing an Aging Workforce

Elimination of Mandatory Retirement

Every Canadian jurisdiction, with the exception of New Brunswick¹, has now eliminated the ability of employers to force employees to retire at the age of 65. Doing so now constitutes a human rights violation based on the prohibited ground of age.

That said, mandatory retirement at the age of 65 is permitted where it is a bona fide occupational requirement, which may be established in typically unique circumstances as follows:

1. The general purpose of the requirement has to have a rational connection to the performance of the job;
2. The measure has to have been adopted in a good faith belief that it was necessary to the fulfillment of that legitimate work-related purpose; and
3. The standard must be reasonably necessary to the accomplishment of that work-related purpose.

The final part of the test requires the employer to show that individual accommodation is not possible, which includes demonstrating that no reliable method of evaluation has been created or that it would constitute undue hardship to conduct such an assessment.

Disability Management

- An employer has a duty to accommodate an employee that suffers from a "disability" up to the point of undue hardship
- Disability is defined very broadly in human rights legislation and, in most cases, will include traditional age-based medical conditions such as high blood pressure and diabetes
- Accommodation must be considered from an individual basis and will not be the same for all employees in every situation
- Accommodation is a multi-party inquiry – there is a duty placed on the employer, the employee, and the union where the employee is subject to a Collective Agreement
- Accommodation can include many different forms of assistance such as time away from work, modified work hours, special training or tools, and modified work spaces
- An employer's duty to accommodate is typically invoked in the following circumstances:

¹The province of New Brunswick still permits mandatory retirement to be stipulated in a "bona fide" pension plan—i.e. affecting a large proportion of the province's workforce. In 2008, the Supreme Court of Canada decided in *New Brunswick (Human Rights Commission) v. Potash Corporation of Saskatchewan Inc.* ("Potash") to allow a mandatory retirement policy based on provisions of the employer's pension plan. The New Brunswick Human Rights Act has a unique provision that allows termination of employment "because of the terms of any bona fide retirement or pension plan". In the potash case, the Supreme Court of Canada held that mandatory retirement was allowed so long as it was part of a legitimate or genuine retirement or pension plan (i.e., not a "sham").

- When the mature worker raises the need for accommodation (i.e. once sufficient medical information is obtained by the employer from the mature worker's physician); or
- When the need for accommodation becomes evident to the employer.

Disability Management - Medical Information

- An employer is entitled to and is encouraged to obtain information from the mature workers' treating physician
- The information the employer is entitled to obtain is limited to the mature worker's prognosis including any limitations and an anticipated return to work date
- An employer is not entitled to information regarding the mature worker's diagnosis

Disability Management - Employer Obligations

- An employer IS required to:
 - Seek out information when odd behaviour is present
 - Accommodate a mature worker with a disability up to the point of undue hardship
 - Accommodate a mature worker once he/she returns to work with medical clearance
 - Consider whether there are existing jobs that can be modified to facilitate the mature worker's ability to continue working
- An employer is NOT required to:
 - Assign the mature worker non-productive tasks
 - Yield to a non-cooperative mature worker that refuses to participate in his/her own accommodation
- An employer MAY be required to:
 - Bundle various duties to create a productive position within the business that accommodates the mature worker's disability

Disability Management - Undue Hardship

- Undue hardship is the legal point at which the employer's obligation to accommodate an employee's disability ceases
- Numerous factors will be considered in the evaluation of undue hardship:
 - Financial costs
 - Size and resources of the employer
 - Disruption of operations /Collective Agreement
 - Morale problems of other employees brought about by accommodation
 - Substantial interference with rights of other individuals or groups
 - Interchangeability of work force and facilities
 - Health and safety concerns
- The size of an employer's operation may influence the assessment of whether a given financial cost is "undue"

Best Practices for Managing the Aging Workforce

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1. Recruitment
 - a. Eliminate anything in the recruitment and selection process that may favour younger workers
 - b. Amend application forms so an applicant is not required to disclose his/her age
 - c. Avoid questions during interviewing that relate to age
 - d. Pre-employment medical testing, where a BFOR exists and where permissible, only after a conditional offer of employment has been made
 - e. Avoid assumptions and stereotypes relating to ability
 - f. References to age should not be made at any time
2. Performance Management
 - a. Performance issues should be documented and addressed
 - b. Ideally, formal performance reviews should be conducted for all employees – where this is not a past practice, either do it for all employees or not at all
 - c. Train managers on how to manage performance for all workers
 - d. Offer retraining where possible and practical
 - e. Measure performance against accurate job descriptions and key duties
 - f. Manage attendance and disability matters promptly
 - g. Performance management should all be documented
3. Progressive Discipline
 - a. Where available, progressive discipline programs should be followed
 - b. Apply progressive discipline to all workers
 - c. Do not allow mature workers to slip through the cracks
 - d. Clear expectations for improvement should be set out in any accommodation
 - e. Consider whether the issue warrants discipline or accommodation
 - f. Document progressive discipline issues
4. Benefits
 - a. Needs of the mature worker may differ from younger employees – offering benefits that address a wide range of support or alternatively allow for flexibility may be best
 - b. Health needs, care-giving needs and related changes may be sudden
 - c. Attractive benefits may motivate mature workers to remain longer
5. Knowledge Transfer
 - a. It is critical to ensure that the knowledge and expertise does not leave with these employees
 - b. Consider the following:
 - i. Mentoring
 - ii. Coaching
 - iii. Job shadowing
 - iv. Consultation
6. Terminations/Layoff
 - a. Terminations must be wholly unrelated to age

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- b. Reduced performance rarely amounts to just cause
- c. Employment agreements limiting notice obligations should be utilized
- d. Without a valid termination/layoff provision, be prepared to provide reasonable notice at common law which will be greater due to age
- e. Document performance issues prior to termination

7. Retirement Strategies

- a. General Considerations
 - i. Use formal and informal performance discussions to talk about on-going work and retirement options, along with skill development
 - ii. Create an atmosphere where employees are encouraged to initiate discussions with their manager about continuing to work or retiring
 - iii. Communicate with employees about their ability to work longer but not expected to work indefinitely
- b. Consider Early Retirement Packages
 - i. Make early retirement package options available to all employees – they must be non-discriminatory
 - ii. Offer some combination of retirement allowance, pension supplements, or additional service time to activate full pension entitlement
 - iii. Offer continued medical benefit coverage, if available
 - iv. Retirement counseling
- c. Bona Fide Occupational Requirement
 - i. Impose mandatory retirement due to a BFOR
 - ii. High standard
- d. Offer Flexible Work Arrangement
 - i. Reduction in hours and/or duties with employee's agreement
 - ii. Agree on a transition plan out of the Company
 - iii. Consultant role or project-based work
- e. Voluntary Retirement
 - i. Some employees will want to retire at 'normal' retirement age even if one is not set