Senior Employees & Retirement

QUESTION:

With mandatory retirement gone out the window, what policies are companies putting in place to protect themselves?

ANSWER:

That's a complicated question. Let me just say 2 things:

1. Mandatory retirement *is* actually still legal in some circumstances; and
2. As a practical matter, many employers have learned to appreciate the value of senior employees and are trying to *prevent them* from retiring.

EXPLANATION:

Ending mandatory retirement means employers can no longer force employees to retire at 65 or any other pre-designated age. But there are 2 important exceptions:

Mandatory Retirement Policy Is BFOR: Mandatory retirement can still be justified if the employer can show that not letting employees do a particular job when they reach a particular age is a bona fide occupational requirement (BFOR). But the employer must prove the mandatory retirement is a BFOR. Technically, according to the Canadian Supreme Court, the employer has to show that:

- The policy was adopted for a purpose rationally connected to performance of the job;
- It adopted the policy in an honest and good faith belief it was necessary to fulfill that legitimate work-related purpose; and
- The policy is in fact reasonably necessary to fulfill the legitimate work-related purpose and there's no less restrictive way to accomplish it.

Proving all this is extremely hard—but not impossible. **Example:** Mandatory retirement for firefighters at age 60 is a BFOR because of the physiological and cardiac risks to the 60-year-old body [*Espey v. London (City),* 2008 HRTO 41 (CanLII), Dec. 18, 2008].

Mandatory Retirement Policy Is BFPP: Mandatory retirement is also acceptable if it's adopted by a "bona fide pension plan" (BFPP). The BFPP exception recognizes that to provide for retirement income for a group of employees, the plan must be able to set

age-based rules governing vital matters like plan contributions and benefits accrual and payment. As explained by a Saskatchewan court, the BFPP rule “recognizes that, in some circumstances, discrimination on account of age will be necessary in order to create a viable and cost-effective plan because the cost of benefits to older workers are higher than for other workers” [*Saskatchewan (Human Rights Commission v. Saskatoon*].

From Mandatory to Phased Retirement

For many employers, using the BFOR or BFPP to justify mandatory retirement has become a moot point. That’s because they don’t want their senior employees to retire.

Tax changes have made it easier for companies to keep retirement age employees in the fold by allowing retirement-eligible employees to accrue and receive pension benefits at the same time (previously, the employee could do either one or the other). Arrangements where employees getting retirement benefits keep accruing pensionable service are called “phased retirement.”
Phased retirement requires modifying the terms of the pension plan; and employers don’t have to offer it if they don’t want to go to the trouble of changing their pension plans. But the fact that so many companies have chosen to go this route is testimony to how much attitudes toward senior workers have changed.

As the population grows older, skilled labour grows scarcer and recruitment and training grow more expensive, the tide will continue to turn decisively away from mandatory and in favour of phased retirement.

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