

## ONTARIO GOVERNMENT INTRODUCES LEGISLATION TO END MANDATORY RETIREMENT

*Bill 211, Ending Mandatory Retirement*  
*Statute Law Amendment Act, 2005*  
First Reading

On 8 June 2005 the Ontario government introduced legislation which seeks to end mandatory retirement. The law is currently at the First Reading stage.

The *Ending Mandatory Retirement Statute Law Amendment Act, 2005*, which is Bill 211,

- (a) amends the provincial *Human Rights Code* to recognize claims of age-based discrimination for employees aged 65 and over;
- (b) provides that age-based distinctions in the *Workplace Safety and Insurance Act, 1997* are exempt from the prohibition against age discrimination under the *Human Rights Code*; and
- (c) amends various other statutes which currently require that individuals retire at a set age.

If passed, the legislation would generally come into effect one year after it receives Royal Assent. The amendment to the *Workplace Safety and Insurance Act* would take effect immediately upon Royal Assent.

Bill 211 preserves the status quo with respect to benefit plans such as disability plans, life insurance plans or health benefits plans. The effect of this, however, is that while employees would be able to work after age 65, they may be excluded from coverage under various private benefit plans.

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Bill 211 does not make any changes that

- \* affect an employee's ability to retire before 65;
- \* affect access or entitlement to employer-sponsored pension plans; or
- \* affect entitlement to programs such as the Ontario Drug Benefit Program or Guaranteed Annual Income System which provide benefits at age 65.

## **AMENDMENTS TO THE *HUMAN RIGHTS CODE***

### **1. Amending the Definition of "Age"**

Currently, mandatory retirement is legal because, in the context of employment, the *Human Rights Code* only protects the right to be free from discrimination for individuals between age 18 and 64.

For the purposes of discrimination in employment, s. 10 of the *Code* currently defines "age" as meaning "an age that is eighteen years or more and less than sixty-five years".

Bill 211 proposes to amend s. 10(1) of the *Code* so that for all purposes, age is defined as "an age that is 18 years or more".

This amendment means that individuals aged 65 or older have the same right as others over age 18 to challenge age-based discrimination in the workplace.

### **2. Impact on Collective Agreements and Workplace Practices and Policies**

The significance of this change is that, one year after Bill 211 receives Royal Assent,

- \* collective agreement provisions that require mandatory retirement; or
- \* workplace policies or practices that require mandatory retirement

would no longer be enforceable unless the age-requirement could be proved to be a *bona fide* occupational requirement. Absent a *bona fide* occupational requirement, such provisions would be discriminatory.

### **3. Mandatory Retirement is Permissible where it is a *Bona Fide Occupational Requirement***

Even with Bill 211, however, it would still be possible for an employer to require an employee to retire at a set age, including at age 65 or earlier, where such a requirement is proved to be a *bona fide* occupational requirement. To establish this, the employer would need to prove that

- (a) an age-based requirement is rationally connected to the performance of the job;
- (b) the employer adopted the age-based requirement in an honest and good faith belief that it is necessary to fulfilling a legitimate work-related purpose; and
- (c) the age-based requirement is reasonably necessary to accomplish the legitimate work-related purpose and it is impossible to accommodate

individual employees without imposing undue hardship on the employer.

#### 4. Statutory Exemptions

Bill 211 makes further amendments to s. 24 of the *Code* to identify a number of situations in which legislation requiring retirement at a certain age will not be considered to infringe the right to equal treatment in employment. Bill 211 provides that the right to equal treatment with respect to employment is not infringed where:

- \* a judge or master is required to retire or cease to continue in office on reaching a specified age under the *Courts of Justice Act*;
- \* a case management master is required to retire on reaching a specified age under the *Courts of Justice Act*;
- \* the term of reappointment of a case management master expires on the case management master reaching a specified age under the *Courts of Justice Act*; or
- \* a justice of the peace is required to retire on reaching a specified age under the *Justices of the Peace Act*.

#### 5. Pension or Group Insurance Plans

Section 25(2) of the *Human Rights Code* presently provides that the right to equal treatment in employment is not infringed on the basis of age and other

grounds where the superannuation or pension plan or fund or contract of group insurance complies with provisions in the *Employment Standards Act 2000* and regulations. The effect of this is that these benefits plans can make distinctions based on age and other grounds where this is permitted under the *ESA 2000* and Ontario Regulation 286/01.

Bill 211 preserves this status quo by clarifying that s. 25(2) applies whether or not the definition of “age” and other grounds under the *ESA 2000* or regulations have the same meaning as under the *Code*. Under the *ESA* regulation age is defined as more than 18 and less than 65.

The significance is that while under Bill 211 employees will be permitted to continue to work past age 64, they may be excluded from benefits coverage after age 64. In a FAQ sheet on its website, the Ministry of Labour has taken the position that under Bill 211 “the provision of benefits to workers aged 65 and older would continue to be at the employer’s discretion.”

#### **EXEMPTION FOR WORKPLACE SAFETY AND INSURANCE ACT, 1997**

Bill 211 proposes to add a section to the *Workplace Safety and Insurance Act, 1997* which would also preserve the age-based distinctions that currently exist under that legislation. Bill 211 proposes to add a new s. 2.1 to the *WSIA* as follows:

**2.1** (1) A provision of this Act or the regulations under it, or a decision or policy made under this Act or the regulations under it, that requires or

authorizes a distinction because of age applies despite sections 1 and 5 of the *Human Rights Code*.

(2) Subsection (1) applies with necessary modifications to any predecessor to this Act or the regulations under it, or any decision or policy made under such an Act or regulation.

(3) Subsections (1) and (2) apply even if the facts in respect of which the requirement or distinction is made occurred before the day on which this section comes into force.

The significance of this proposed change is that

- \* injured workers aged 63 or more at the time of injury would still receive loss of earning benefits for up to two years only;
- \* workers who are injured before age 63 would still cease to receive loss of earning benefits when they reach age 65; and
- \* an employer's obligation to re-employ an injured worker would still end at age 65.

## **AMENDMENTS TO OTHER LEGISLATION**

Bill 211 also amends various other statutes that currently impose mandatory retirement at a specified age. In all of these situations, the amendments eliminate mandatory

retirement.

### **1. Coroners Act**

The *Coroners Act* currently provides that a coroner ceases to hold office, (a) upon attaining the age of seventy years; or (b) upon ceasing to be a legally qualified medical practitioner.

Section 3(2) of this Act is amended to provide that

“A coroner ceases to hold office on ceasing to be a legally qualified medical practitioner.”

### **2. Election Act**

Under the *Election Act*, s. 7(10)(a) currently provides that Cabinet can remove from office any returning officer who has attained the age of 65. Bill 211 would repeal this section.

### **3. Health Protection and Promotion Act**

Section 65 of the *Health Protection and Promotion Act* currently imposes mandatory requirement by providing as follows:

65. (1) Every medical officer of health and every associate medical officer of health of a board of health shall retire at the end of the month in which he or she attains the age of sixty-five years.

(2) A board of health, with the approval of the Minister, may reappoint the medical officer of health or associate medical officer of health, as the case may be, for a

period not exceeding one year at a time until the end of the month in which the medical officer of health or associate medical officer of health attains the age of seventy years.

until the end of the month in which he or she attains the age of seventy years.”

Bill 211 would repeal this section.

Bill 211 would repeal s. 65 of that *Act* in its entirety.

#### **4. *Ombudsman Act***

Section 4(2) of the *Ombudsman Act* currently provides that the Ombudsman shall retire upon attaining the age of sixty-five years but, where the Ombudsman attains the age of sixty-five years before having served five years in office, he or she shall retire upon serving five years in office.

Bill 211 would repeal this provision and other references to it in the *Act*.

#### **5. *Public Service Act***

Section 17 of the *Public Service Act* currently provides for mandatory retirement in the following terms:

“Every civil servant shall retire at the end of the month in which he or she attains the age of sixty-five years, but, where in the opinion of the Commission special circumstances exist and where the person’s deputy minister so requests in writing, the person may be reappointed by the Lieutenant Governor in Council for a period not exceeding one year at a time