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LABOUR AND EMPLOYMENT LEGAL ALERT

Borden Ladner Gervais

ELIMINATION OF MANDATORY RETIREMENT FOR FEDERALLY REGULATED EMPLOYEES

On December 15, 2011, Bill C-13, An Act to implement certain provisions of the 2011 budget as updated on June 6, 2011 and other measures (*Keeping Canada's Economy and Jobs Growing Act*), received Royal Assent.

In addition to implementing a number of tax and related measures proposed in the 2011 budget, Bill C-13 also amends the *Canadian Human Rights Act* (CHRA) to eliminate mandatory retirement for federally regulated employees. Specifically, Bill C-13 repealed section 15(1)(c) of the CHRA which permitted mandatory retirement policies. The Bill also amends the *Canada Labour Code* to repeal a provision that denies employees the right to severance pay for involuntary termination if they are entitled to a pension.

The amendments to the CHRA and the *Canada Labour Code* come into force December 15, 2012.

IMPLICATIONS FOR EMPLOYERS AND PRACTICAL CONSIDERATIONS

The elimination of mandatory retirement means that, unless a federally regulated employer can prove that there is a *bona fide* occupational requirement ("BFOR"), it cannot terminate an individual's employment because of his or her age. Establishing a BFOR is not an easy task, as it is often very difficult for employers to show that accommodating a particular worker is impossible or that the accommodation would amount to undue hardship.

With respect to unionized employers, the amendments do not make any exceptions for unionized workplaces. Accordingly, once the amendments become law, mandatory retirement provisions in collective agreements will become unenforceable and employers will be required to show just cause for the dismissal of all bargaining unit employees, regardless of age. In effect, the amendments will supersede any collective agreement currently containing a compulsory retirement clause.

Any federal employer that currently has a mandatory retirement policy should carefully consider whether the policy is necessary. The employer should review the purposes of its program to determine whether a BFOR defence would be available. The employer should clearly outline the reasons the program is necessary considering the nature of its business. Alternative measures, such as increased monitoring or testing of older workers, should be considered to determine if there are "less intrusive" means to accomplish the objective.

It is worth noting that Bill C-13 does not prohibit the use of early retirement incentives as a method of workforce reduction. Accordingly, one alternative is to develop a *voluntary* retirement incentive. Since they do not require older workers to retire, voluntary retirement incentives do not attract the same human rights scrutiny as do mandatory retirement. The voluntary retirement incentive must be developed carefully, to ensure that it is sufficiently attractive to appeal to enough employees to achieve the employer's purpose, but is not so broad or attractive as to result in too many skilled and experienced workers leaving at one time.

With respect to pension and benefits, no amendments have been made to the *Canadian Human Rights Benefit Regulations*, which currently provide a number of exemptions relating to employees' participation in certain pension and benefits plans, and expressly exempt these pension and benefits plans from age discrimination claims. Having said that, it is important that employers carefully review their benefit policies to ensure that nothing in the eligibility criteria requires retirement at any particular age. While pension plans, in particular, often use age 65 as a "normal retirement age" for the purposes of valuation, nothing in the plan documents should translate the definition of "normal retirement age" into a requirement to retire at a specific age.

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