

Mandatory Retirement: Why governments should quit banning it

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What's Inside

Government did not create mandatory retirement. It is not legislated. Not even the CPP requires people to stop working at age 65.

Mandatory retirement was created through bargaining between employees and employers because it is mutually beneficial. It allows employees to achieve job security and income predictability, and to engage in tax deferral and career planning while giving the employer cost predictability, succession planning and access to committed employees.

Banning mandatory retirement now will hurt new entrants into the workforce (lower income potential, fewer promotion opportunities). It will also penalize employers by stripping them of the benefits of mandatory retirement agreements after they have already paid out the costs, and it will allow many older workers continue to receive premium pay relative to productivity.

Mandatory retirement policies will adjust to the new demographic reality without government's assistance (55% of companies with current mandatory retirement schemes already plan on eliminating them in the near future). Governments should instead focus on the real barriers they have created that keep older workers out of the workforce. They need to eliminate:

- clawbacks of old age security, guaranteed income supplements and age related tax credits
- penalties for people who delay taking CPP
- requirements to “substantially cease working” in order to get early CPP
- the requirements to draw down registered retirement plans at the age of 71

Introduction

The debate on mandatory retirement is one of the most misunderstood discussions in labour and social policy. Mandatory retirement conjures up the image of a mean-spirited employer forcing a person to leave the workforce at age 65 simply because he or she is “too old.” The political appeal of banning mandatory retirement is understandable, especially given the growing population of “grey panthers” who understandably vote for policies that benefit them. But the political response deals only with the symptom (mandatory retirement) without asking why the practice occurs in the first place and whether banning it would have unintended consequences.

The importance of this issue will continue to grow, given a number of factors: Canada’s aging workforce; the reversal of the trend towards early retirement to a trend towards delayed retirement; the sustainability of public and private pensions; concerns over the sustainability of public and private pensions and the income adequacy of seniors; the potential disparate impact of mandatory retirement on particular groups, such as women and immigrants, who might not have had the opportunity to accumulate pensions and retirement savings; and a growing emphasis on age discrimination as a human rights issue.

Mandatory Retirement: Myths and Realities

One myth about mandatory retirement is that it is a policy imposed by employers or governments that requires older workers to retire at some pre-specified age, usually 65. That this myth is believed at the highest level is exhibited by the Ontario government’s April 30, 2003, Speech from the Throne, which announced the government’s intention to ban mandatory retirement: “[The government] will also introduce legislation to allow more seniors to remain active in the workforce — retiring at a time of their own choosing, not an arbitrarily *government appointed time*” [emphasis added].¹ As stated in the *Globe and Mail*, “The CPP [Canada Pension Plan] should be more flexible so that it *allows* people to stay

¹ Available at Web site:
<<http://hansardindex.ontla.on.ca/hansardeissue/37-4/1001.htm>>.

in the workforce past 65 if they want to and are able” [emphasis added, highlighting that the implication is that the CPP does not allow people to work past age 65] (Scofield 2004, A1).

In reality, there is no government-legislated or -appointed time to retire nor does the CPP require people to retire at age 65. But these are stirring images, with political appeal. In fact, mandatory retirement is an institutional work rule — part of a company’s personnel practice or collective agreement, voluntarily and mutually agreed upon in advance by a subset of employers and employees, invariably in return for the income security of a pension at the time of retirement. Mandatory retirement is private contracting on the part of reasonably well-informed agents, generally entered into by employees who work in “good jobs” and have considerable individual or collective bargaining power. When governments ban mandatory retirement, they effectively prohibit private parties from mutually agreeing to the practice.

Of course, governments ban other kinds of private contracting, such as prostitution or the use of child labour. Usually, however, private contracts are sanctioned and upheld by the law even though individuals might not have been fully informed and the contracts might inhibit individuals’ future flexibility and freedom. This is the case, for example, with marriage contracts and with mortgages that enable us to live in a house now in return for paying off a debt in the future. The relevant policy question then becomes: Under what circumstances should governments ban voluntary and mutually agreed-upon private contracting? And does mandatory retirement fall into the category of egregious practices? Some additional facts will help inform the answer.

The Extent of Mandatory Retirement

Until the recent bans on mandatory retirement in Ontario and British Columbia, about half the Canadian workforce held a job that involved mandatory retirement, typically at age 65 when private employer-sponsored pensions and public pensions “normally” come available.² Of those who

² See Gunderson and Pesando (1988, 33); Gomez, Gunderson, and Luchak (2002, and references cited therein); and Hewitt Associates (2003).

had retired from jobs with mandatory retirement, approximately 12 to 20 percent reported that they had done so because of the mandatory retirement policy. Of those who had retired because of mandatory retirement, about 6 to 20 percent said they had done so involuntarily, since they would like to have continued working. This suggests that one-third of between 1 percent (that is, $0.5 \times 0.12 \times 0.06$) and 2 percent ($0.5 \times 0.20 \times 0.20$) of the workforce is involuntarily constrained by mandatory retirement (see Gunderson 2004, 2). Although these rough calculations are meant to be illustrative, there is general agreement that only small numbers are involuntarily constrained by mandatory retirement and would like to continue working.

Importantly, jobs subject to mandatory retirement tend to be “good jobs” characterized by higher wages, long-term stable employment relationships, often with the protection of a collective agreement or a formal personnel policy, and invariably accompanied by an employer-sponsored occupation pension plan to sustain a reasonable level of income upon retirement.³ They are commonly negotiated by powerful unions as part of employees’ retirement packages. Mandatory retirement is not an oppressive policy imposed by mean-spirited employers on disadvantaged employees with no individual or collective bargaining power. Such “bad jobs” tend not to be covered by a collective agreement or a formal personnel policy and do not have mandatory retirement or pensions.

The Legal Status of Mandatory Retirement in Canada

The legal status of mandatory retirement in Canada is complex,⁴ but in general it is determined by each jurisdiction’s human rights code. While such codes ban age discrimination, they generally have a cap at age 65, beyond which the code does not apply. This cap is commonly in place so that mandatory retirement cannot be contested as constituting age discrimination, effectively allowing mandatory retirement — an interpretation upheld in a trilogy of

³ See Gunderson and Pesando (1988); Pesando and Gunderson (1988); and Gomez, Gunderson, and Luchak (2002).

⁴ See Zinn and Brethour (1999); Gunderson (2003); Gillin and Klassen (2005); Gunderson and Hyatt (2005); and Ontario Human Rights Commission (2000, 2001).

Supreme Court of Canada decisions in 1990. The Court ruled that mandatory retirement was demonstrably justified in a free and democratic society because its social benefits as a practice exceeded its social costs, even if it infringed on the rights of some older workers. As Zinn and Brethour note, in commenting on the 1990 *McKinney v. University of Guelph* case:

In concluding that the age limits as set out were reasonable limits under s.1 of the Charter, the Supreme Court of Canada indicated that the objectives of government in passing this section [the age limits beyond which the human rights code did not apply] were pressing and substantial. The objectives (the preservation of integrity of pension plans and to foster the prospects of younger workers by establishing an age maximum) were held to be rationally connected to the restriction and minimally impaired the equality rights of older workers. (1999, 33)

As a result of subsequent legal decisions, employees must be informed effectively about the existence of mandatory retirement and must have explicitly accepted it as a condition of employment. As well, the determination of social benefits versus social costs can now be made on a case-by-case basis. In all jurisdictions, including those where it is banned, it is always the case that mandatory retirement at a specific age can be required if it is a bona fide occupational requirement of the job, especially for reasons of public safety — as with airline pilots, police, and firefighters.

The problem with having an age cap in the human rights code to accommodate mandatory retirement is that it effectively means that persons beyond the age of 65 do not have the normal protection of the human rights code against age discrimination. Recognizing this, some jurisdictions effectively have removed the age cap (which would seem to ban mandatory retirement), while exempting bona fide pension and retirement plans (which effectively allows mandatory retirement since it is invariably accompanied by a pension or retirement plan). Other jurisdictions — Manitoba, Ontario, British Columbia — have removed the age cap in their human rights codes and have not exempted retirement or pension plans.

(Quebec has banned mandatory retirement through labour standards legislation.) The federal government has also eliminated mandatory retirement for its civil servants, but this is an option that any employer could follow — it was not done by legislative fiat.

Reasons for Using Mandatory Retirement as a Work Rule

The expected effect of banning mandatory retirement will depend upon why it exists in the first place. Since mandatory retirement policies prevail between employers and employees who have a degree of individual or collective bargaining power, they must exist for some purpose, such as to open up job and promotion opportunities for youths, to facilitate succession planning on the part of employers and retirement planning on the part of employees, to facilitate periodic and retrospective monitoring of older employees, and to facilitate deferred compensation.⁵ Unions especially have negotiated mandatory retirement policies to open up job and promotion opportunities for youths. Employers might also want such options to renew their workforce and have a balance of workers of different ages. Although a job held by an older worker need not be a job that is unavailable to a younger worker at the level of the economy as a whole, it can be so at the level of the individual workplace.

Mandatory retirement can also facilitate succession planning by employers since it gives them a reasonable estimate of when an individual will retire from the company. Employers can then plan for a replacement in advance of the event and better manage disability and other costs that increase with the age of their workforce. The same applies to employees, who can engage in retirement planning — often by saving in an employer-sponsored pension plan — if they know when they will retire. In fact, unions are concerned that, if mandatory retirement is banned, both private and public pension plans might dissipate if individuals perceive that they can go on working. As Gomez, Gunderson, and Luchak state,

banning mandatory retirement may have important implications for pension plans. Such plans may be regarded as less necessary as a quid pro quo for mandatory retirement or to provide income support, since individuals are now able to continue working, if mandatory retirement were banned. This has often been a concern of labour and trade unions – that banning mandatory retirement would make it easier to reduce or eliminate pensions, since persons could more easily continue working. (2002, 411)

Mandatory retirement reduces the need constantly to monitor and evaluate older employees and to dismiss or downgrade poor performers or adjust their wages downward. With a fixed and known retirement date, employers are more likely to accommodate those whose performance is declining and allow them to continue working if they are not far from retirement; work-teams would also be more likely to accommodate such workers. In the absence of mandatory retirement, however, employers are more likely to dismiss or downgrade those whose performance is declining since they do not know for how long they might have to accommodate such employees. As well, anticipating the possibility of claims of unjust dismissal if they fire such employees, employers are more likely to feel the need to monitor and evaluate their performance constantly. Employers are also reluctant to grant normal wage increases to such employees if the increases are interpreted as a sign of adequate performance if an unjust dismissal claim ensues. Moreover, if there is no mandatory retirement, the use of individual buyouts is more common to encourage people to leave, although this can create a perverse incentive for employees to reduce their performance to elicit a more generous buyout, with the amount of the buyout approximating the difference between the employees' expected future wage and performance.

Mandatory retirement can also facilitate deferred compensation systems, whereby employees are underpaid relative to their productivity when they first work for the company in return for being overpaid by a corresponding amount relative to their productivity when older (see Lazear 1979). Mandatory retirement provides a termination date to such an arrangement, otherwise it could not exist because the overpayment

⁵ See Gunderson (1983); Gunderson and Pesando (1980, 1988); Gomez, Gunderson, and Luchak (2002); and Gunderson and Hyatt (2005).

period could continue indefinitely. Deferred compensation can come in such forms as seniority-based wage increases or pension benefit accruals that can be substantial for older workers in an organization.

For employers, deferred compensation can foster employee loyalty and commitment to the firm and reduce unwanted turnover. In such circumstances, employers are also more likely to provide training to their employees if they are less likely to leave. Deferred compensation creates positive work incentive effects, since employees do not want to risk being dismissed or laid off and losing their deferred compensation. Poor performers are also less likely to apply to firms that pay deferred compensation since their performance will be revealed over time.

Evidence (see Loewenstein and Sicherman 1991) suggests that employees often prefer deferred compensation for many of the same reasons as employers do: the need for periodic, rather than constant, monitoring and evaluation; the development of longer-term employment relationships; the opportunity to obtain additional training; and the likelihood of higher compensation because of the positive effects on performance and productivity. Employees might also prefer the security of an ever-rising wage profile, especially in the form of pension benefit accruals.

The existence of deferred compensation also highlights why older workers might want such a system throughout their career (by voting with their feet to get such good jobs with pension benefits) and then vote or pressure politically to have mandatory retirement banned as they approach the mandatory retirement age. If mandatory retirement were banned, such workers could continue to receive wages in excess of their productivity. Eventually, deferred compensation systems would dissipate because they would no longer be sustainable without mandatory retirement.

Since both employers and employees — in a relationship where the parties are well-informed and have reasonable collective or individual bargaining power — have good reasons to agree mutually to deferred compensation systems and mandatory retirement, why should governments wish to prohibit such arrangements?

The Effects of Banning Mandatory Retirement

Banning mandatory retirement — forbidding it to fulfill the mutually agreed functions it serves — is expected to reduce job and promotion opportunities for younger persons, if not in the economy as a whole, then certainly in organizations where older workers continue to be employed. It should also make succession planning on the part of employers more difficult and disability and age-related fringe benefits more costly and uncertain, and eventually rarer. In the absence of mandatory retirement, individual employees might be less prepared for retirement, and public and private pensions might dissipate. Monitoring and evaluating older employees could become more stringent, and dismissals inevitably would occur. Deferred compensation systems could dissipate along with their positive features — reduced turnover, enhanced training and productivity, enhanced lifetime wages, and longer-term employment relationships.

There is, however, very little empirical evidence on whether legislative bans on mandatory retirement have had the expected effects. This likely reflects a combination of factors: so many other changes are occurring at the same time that mandatory retirement is banned; employers might have anticipated the ban and made many of the adjustments in advance; they might try to use other policies as substitutes for mandatory retirement; and the adjustments after the ban might be occurring very slowly, so that the effect becomes impossible to disentangle from other changes that are occurring. Another factor might be that bans do not affect many workers since most wanted to retire in any case. The limited empirical evidence in Canada suggests that only small numbers continued to work where mandatory retirement has been banned (Reid 1988; Shannon and Grierson 2004).

Despite the lack of direct evidence of the expected effects of banning mandatory retirement, there is some suggestive indirect evidence. For example, employers are paying more attention to managing their pension costs and fringe benefit costs associated with an aging workforce. Policy debate is also occurring around the issue of raising the age of entitlement to public pensions. Long-tenured “lifetime” jobs are becoming less common. The extent

to which these can be attributed to the actual or anticipated banning of mandatory retirement is an open question.

Policy Implications

There is little reason for governments to override mandatory retirement, a mutually agreed-upon contractual arrangement. As a work rule, mandatory retirement can have effects that are mutually beneficial for *both* parties, and it tends to prevail in “good jobs” as part of a formal personnel practice and/or collective agreement. That strong unions commonly negotiate mandatory retirement for their members highlights that it is not an oppressive policy imposed by mean-spirited employers on vulnerable workers. Governments might reasonably require additional safeguards, such as ensuring that potential employees are well informed of the practice. Governments also might reasonably close the “loophole” that allows mandatory retirement through an age cap in human rights codes, effectively denying the normal protection of those codes to workers beyond age 65. This goal could be accomplished simply by removing the age cap but exempting bona fide pension and retirement plans.

It is ironic that, while provincial governments are moving toward increasing bans on mandatory retirement, they are also imposing barriers to the continuing labour force participation of older workers.⁶ Such barriers include:

- age caps in the human rights codes of some jurisdictions, which deny older workers protection against age discrimination;
- clawbacks in the Old Age Security system and in Guaranteed Income Supplements that reduce the incentive to work;
- the requirement to “substantially cease working” to be in receipt of early CPP benefits;
- penalties for those who delay receipt of CPP benefits until age 70 and especially beyond;
- the requirement to draw down on registered retirement savings plans beginning at age 71;

- clawbacks on the tax credit for persons ages 65 and older; and
- income tax provisions that prohibit an individual from accruing benefits in a defined benefit pension plan and drawing from that plan at the same time.

Before governments introduce restrictive legislative initiatives, they should first determine if there are disincentives to the continuing labour force participation of older workers. If they find such barriers, they should then determine if the barriers are the unintended by-products of other government policies or regulations, as is the case with mandatory retirement, and remove them.

It has been argued that banning mandatory retirement would allow older workers to continue working and help fill the skill shortages that are emerging as the large baby boom cohort begins to retire. However, this argument ignores the fact that the parties can agree voluntarily to eliminate the practice if its usefulness changes over time, or to enter into more flexible arrangements whereby, for example, the employer hires back retirees on contract as circumstances warrant. The private parties themselves are in the best position to determine the tradeoffs and to change their arrangements accordingly. If mandatory retirement is an inefficient practice, it should dissipate on its own. Some evidence suggests that this is already happening: a Conference Board of Canada survey indicates that 55 percent of Canadian companies that have a mandatory retirement policy intend to eliminate it in the near future (2005, 11).

Unfortunately, the political appeal of banning mandatory retirement, especially the appeal to an aging workforce that will receive “windfall” gains from the continuation of deferred compensation, is likely to dominate the economic rationale for allowing the private parties in these circumstances to negotiate their own mutually beneficial workplace practices. Governments should resist such calls and instead remove the age caps in their human rights codes, while exempting bona fide pension plans. This would allow private parties to agree to mandatory retirement as long as it was accompanied by the protection of a pension plan, which is invariably the case. Such a move would strike a balance between allowing private contracting in labour relations and ensuring that older workers have a degree of protection in retirement.

⁶ See Baker, Gruber, and Milligan (2003, 2004); ACPM (2000); Canada (2001); Shillington (2003); Gunderson (2004, 2007); Milligan and Schirle (2006, 2008); and Fougère et al. (2007).

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The AIMS Labour Market Series

Market mechanisms should be considered innocent until proven guilty — perhaps more so in labour markets than in other markets. All too often, however, the response to a negative labour market outcome is to try to “fix” the problem by imposing a law or regulation on the *symptom*: if wages are low, legislate a minimum; if older workers are required by company policy to retire, ban mandatory retirement; if striking workers are replaced by other workers, ban strike replacements. Although labour laws and regulations can be politically expedient in the short run by giving the appearance that action is being taken, in the long run they can be a recipe for disaster by shifting the focus to the symptom and away from the underlying *cause*. Worse, they can have unintended consequences, perhaps even harming the very people they were intended to help or protecting already-advantaged and well-organized interest groups.

Labour markets have characteristics that make them not only distinct from other markets, but also a target for regulation and institutional protection. There are grounds for this, but there are also dangers. Many of the differences between labour markets and other markets are ones of degree, not quantum differences in kind. Moreover, the regulations and institutions that are designed to mitigate market mechanisms also have their imperfections. Thus, when a negative labour market outcome presents itself, governments should take a certain sequence of decision-making steps (see Gunderson 2002):

- Determine if artificial barriers are inhibiting labour market forces themselves from dealing with the negative outcome; if that is the case, determine if the barriers are the unintended by-products of other government policies or regulations that can be altered to remove them.
- Determine if *well-defined* market failures are inhibiting market forces themselves from dealing with the negative outcome.
- Even if there are such failures, consider which is better: an imperfect market-based solution or an imperfect government-regulated solution, and bearing in mind that public intervention might well displace private activity in the area.
- If there is a role for public policy, determine how best to implement it, recognizing that public *financing* need not mean public *provision*, and that governments will face many of the same problems as market participants if markets fail.

In this AIMS Commentary Series, Morley Gunderson examines four public policy issues relating to labour markets; Mandatory Retirement, Minimum Wage, Payroll Taxes, and Replacement Workers.

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