

## November 2010 in this issue

A monthly “best practices” alert for multinationals confronting the challenges of the global workplace.

### This Month’s Challenge

Mandatory retirement is sometimes prohibited, sometimes permitted, and sometimes required.

### Best Practices Tip of the Month

There is no getting around it. Multinational employers have to know the local law.

## Tip of the Month

### Mandatory Retirement Continues To Bedevil Global Employers

With a few narrow exceptions, the Age Discrimination in Employment Act outlawed mandatory retirement for American employees many years ago. Elsewhere, however, the rules are not so clear. Recent decisions in several jurisdictions demonstrate that the issue still is largely unsettled.

#### European Union

The most significant recent decision came from the European Court of Justice in October of this year, in a case referred from a German labor court, *Rosenblatt v. Oellerking Gebäudereinigungsges, mbH*, interpreting the antidiscrimination provisions of European Council Directive 2000/78/EC. This Directive generally prohibits age discrimination in employment, but expressly acknowledges that “differences in treatment on grounds of age” are permissible if “they are objectively and reasonably justified by a legitimate aim, including legitimate employment policy, labour market and vocational training objectives, and if the means of achieving that aim are appropriate and necessary.”

The case involved the mandatory retirement of Gisela Rosenblatt, who was forced to retire at age 65 from her part-time job as a cleaner with a commercial cleaning firm – after 39 years on the job – due to the mandatory retirement provision in the collective agreement governing the cleaning industry. The German government offered a number of justifications for the law, which the court ultimately found persuasive:

- > Such clauses have been widely used in Germany for decades;
- > Mandatory retirement makes it easier for young workers to find work, “which is otherwise difficult at a time of chronic unemployment”;
- > The older workers are adequately protected by the receipt of a pension to replace the lost income, and, in any event, “most of them wish to stop working as soon as they are able to retire”;
- > Mandatory retirement must be embodied in an individual or collective agreement; employers cannot unilaterally impose retirement on employees;
- > Mandatory retirement spares older employees the embarrassment of being told that their performance is no longer satisfactory; and
- > Affected employees remain eligible to obtain other employment, which cannot be denied on the basis of age.

Certainly, these justifications would carry no weight in an American court applying U.S. law, and it remains to be seen whether European courts will insist that all these factors must be present to permit mandatory retirement.

### **Canada**

Similar arguments about the preservation of work opportunities for younger workers and the avoidance of embarrassment for older workers were advanced before the Canadian Human Rights Tribunal, in *Vilven v. Air Canada*, a case involving the mandatory retirement of Air Canada pilots. Although the Canadian Human Rights Act expressly states that it is not a discriminatory practice to terminate an individual's employment "because that individual has reached the normal age of retirement for employees working in positions similar to the position of that individual," this provision was held to be inconsistent with the broad sweep of the Canadian Charter of Rights and Freedoms, which permits discrimination only to the extent of "such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society."

In sharp contrast to the decision of the European Court, the Canadian Tribunal held that the long-standing collectively bargained imposition of mandatory retirement could not be justified. Although international commercial air carrier regulations restrict the ability of pilots to fly past age 60, the Tribunal found the evidence of undue hardship on the airline, by the need to adjust domestic and international work schedules to maintain compliance with these restrictions, insufficient to preserve the mandatory retirement rule.

### **Ireland**

The Republic of Ireland recently entered the fray with two decisions by the Employment Appeals Tribunal, both involving security guards who worked past the normal retirement age of 65 specified in their individual and collective employment contracts. In both cases, the Tribunal decided that the mandatory retirement age specified in the employees' contracts of employment was inapplicable, and the dismissal or constructive dismissal of the employees was therefore improper. The Tribunal was careful to point out, however, that these rulings were limited to their particular facts – in one case because the employee had worked for five years past the designated retirement age without objection, and in the other because the employee had not been given sufficient notice that a mandatory retirement age had been added to his contract. The decisions were not to be understood as negating the retirement clauses in other employees' contracts.

The conclusion for multinational employers is that one size definitely does not fit all countries. Each jurisdiction's requirements must be understood to avoid violating local prescriptions and prohibitions.

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