Intelligence MEMOS

From: Joe Nunes

To: Canadian Insurance Watchers

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Re: MORE FLEXIBILITY, PLEASE, FOR SENIORS' LTD COVERAGE

As more Canadians work past age 65 – due to longer life expectancy, the end of mandatory retirement, and the need or desire to keep working – rigid age cutoffs for long-term disability (LTD) insurance, typically set at 65, may be legally vulnerable.

Although courts have upheld some age-based terminations of LTD coverage when linked to pension eligibility, employers should proactively review plan designs to avoid discrimination claims and meet evolving worker needs, as I argue in my recent C.D. Howe Institute E-brief. At the same time, governments need to provide clearer legislative guidance to balance fairness, affordability, and legal compliance in LTD program structures.

LTD insurance provides income protection to workers and is a critical form of insurance most often delivered through an employer-sponsored group insurance plan. LTD insurance pays benefits after a waiting period, such as 90 or 180 days of disability, and is intended to protect against the loss of income due to significant accidents and illness.

Before the abolition of mandatory retirement, which allowed employers to require retirement no later than age 65, employment laws offered limited protections for workers over age 65. Laws have since changed in all Canadian jurisdictions, and mandatory retirement policies are no longer permitted except in some rare circumstances, such as for judges or if objectively justifiable.

However, after the elimination of mandatory retirement, employment laws in most jurisdictions continued to allow exemptions to human rights protections for age discrimination against employees over age 65 in the rules of group insurance and other benefit programs, such as LTD insurance.

In recent years, tribunals and commissions have reaffirmed employers' decisions to discontinue LTD insurance for workers over age 65. At the same time, arbitrators and human rights commissions have permitted workers to raise challenges to the ending of LTD insurance and other benefits at age 65, arguing that such policies may conflict with the prohibition against age-related discrimination contained in s. 15(1) of Canada's Charter of Rights and Freedoms. However, the courts have not definitively resolved this issue.

In Talos v. Grand Erie District School Board, the Human Rights Tribunal of Ontario found that Ontario laws allowing employers to terminate extended health, drug, and life insurance benefits at age 65 amounted to age-based discrimination under the Charter.

The tribunal further held that this discrimination could not be justified as a reasonable limit under s. 1 of the Charter. The Tribunal relied on expert actuarial evidence to determine that the supposed purpose of the exception – the disproportionate financial burden of older employees on benefits plans – was largely offset by the increased government coverage for drug and health benefits for people over age 65 and did not justify the permitted discrimination.

In the more recent case of Okanagan College, the arbitrator ruled that ending LTD coverage at age 65 was not acceptable under the Human Rights Code of British Columbia and noted there was no evidence that extending coverage beyond age 65 was either unavailable or unaffordable.

This issue is becoming increasingly relevant, as over the past 50 years, the life expectancy of Canada's population has increased by approximately 10 years, rising from around 70 years in the 1970s to more than 80 years today.

Increasing longevity and the decline of traditional employer-sponsored defined benefit pension plans in the private sector are leading more workers to remain in the workforce past age 65, whether out of financial necessity or personal choice.

Some form of age cutoff remains necessary in LTD insurance to manage costs and maintain program sustainability, a rigid one-size-fits-all policy risks age discrimination challenges and may fall short of meeting the diverse needs of today's workforce.

Ensuring workers have access to income protection through LTD insurance is in their best interest and also benefits employers and taxpayers. With no LTD coverage, workers unable to continue working due to injury or illness would become reliant on non-contractual employer-based assistance or government social programs.

A more flexible approach, such as extending LTD coverage for 24 months to workers who develop a disability after age 63, would strike a balance between providing protection for older workers and managing rising costs. For some groups, benefits may need to extend beyond 65, while for others, the current framework may suffice.

A clearer legislative framework would be valuable to employers. Governments that have overly broad exceptions should provide guidance on plan structures or the necessary level of income protection for workers over 65 to help ensure compliance with laws on age discrimination, which might be necessary for LTD insurance to continue to be viable. In the absence of such clarity, employers and employees should proactively review LTD insurance plans to ensure they align with the needs of a changing workforce while balancing cost and coverage effectively.

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