Providing Choice: A Consultation Paper On Ending Mandatory Retirement

This submission is made on behalf of Watson Wyatt Worldwide, a global consulting firm focused on human capital and financial management with more than 6,300 associates in 89 offices around the world. We specialize in employee benefits, technology solutions and human capital strategies. In Canada, Watson Wyatt serves clients from offices located in the Western (Calgary and Vancouver), Central (Toronto and Kitchener) and Eastern (Montreal) regions.

We support the Ontario government’s commitment to end mandatory retirement and give Ontario workers the right to choose whether they want to retire early, at age 65 or later. However, without extensive public consultation, we would not support changes to private pension legislation or government programs that would increase the normal retirement date (NRD) when plan members can receive an unreduced pension beyond age 65. In this submission we highlight a number of issues related to ending mandatory retirement that should be considered, particularly with respect to pension and benefits programs.

While individual employers and employees may have to deal with problems arising as a result of the elimination of mandatory retirement, we believe the overall impact of ending mandatory retirement on organizations is likely to be small. Statistics Canada data reveals that even where employees are not required to stop working at age 65, they typically choose to leave earlier. For example, median retirement ages in 2002 were as follows:

<table>
<thead>
<tr>
<th>Region</th>
<th>Age</th>
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<tbody>
<tr>
<td>Canada</td>
<td>60.6</td>
</tr>
<tr>
<td>Québec</td>
<td>59.8</td>
</tr>
<tr>
<td>Ontario</td>
<td>60.8</td>
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<tr>
<td>Manitoba</td>
<td>61.2</td>
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Furthermore, a myriad of reports extending back to the 1987 Report of the Ontario Task force on Mandatory Retirement have extensively documented the experience of Manitoba, New Brunswick, Québec and the United States with particular reference to New York, California and Michigan. The common theme in all of these studies is that eliminating mandatory retirement has had little, if any, negative impact on the economy and labour markets.

Questions are addressed below in the same order as they appear in the consultation paper. Responses to the queries in “Part C: Employment Issues” and “Part D: Pensions and Benefits” focus on our primary areas of expertise, and therefore are the most detailed. In other cases we either respond briefly on an anecdotal basis or choose not to comment.
A: Economic Impacts

1. How do you think ending mandatory retirement would affect Ontario’s economy, productivity or competitiveness? Would it make Ontario more or less attractive to investment?

We believe that expanding the potential workforce available to employers by allowing experienced people to work beyond age 65 would improve Ontario’s competitiveness and make the province more attractive to investment. Allowing seniors to continue working would not only permit individuals to remain with their current employers, it would allow them to pursue new career or business options later in life.

However, to ensure an older workforce remains productive, many employers may have to learn how to better understand and respond to the training needs and learning styles of older workers.

2. What is the potential impact of ending mandatory retirement on volunteer and non-profit organizations?

Based on the experience in other Canadian jurisdictions, we believe that the number of people who choose to work beyond age 65 will be small. Therefore, it is likely that the pool of active seniors interested in helping to staff volunteer organizations will not be significantly eroded.

3. Which other sectors of the economy would be particularly affected? How?

No comment.

4. How would ending mandatory retirement affect the personal finances of individuals and their families?

Employees may choose to work beyond age 65 for a number of reasons. Some people prefer to stay with their current employers or pursue new employment opportunities because they enjoy working and want to remain active. However, many short-service employees, including women who left the workforce to raise children, do not have sufficient savings to retire comfortably. Being able to work longer will significantly improve the personal finances of these people and their families.

B: Labour Market Issues

5. How do you think ending mandatory retirement may affect decisions by workers about staying at work or beginning work in Ontario?

No further comment.
6. **What is the potential impact on young workers or newly trained workers seeking to enter the workforce?**

It is difficult to quantify the impact. In some cases, opportunities for entry-level positions or upward mobility for young workers may be impacted if older workers stay longer. However, since it is unlikely that many people will want to work beyond age 65, availability of entry-level positions is unlikely to be significantly affected.

7. **Would ending mandatory retirement help deal with skills shortages in jobs like nursing, teaching or skilled trades?**

Many nurses and elementary/secondary school teachers “burn out” at young ages and want to retire at the earliest possible date. Therefore, we believe that ending mandatory retirement is not likely to help with skills shortages in these professions. Where skilled trades required considerable physical strength in the past, equipment may now be lighter, easier to use or computerized. As a result, some workers in these trades may be physically able to work longer, and choose to do so once mandatory retirement is eliminated. Nevertheless, since the number of people who will delay retirement beyond age 65 is likely to be small, there should be little impact on predicted skills shortages in various sectors.

8. **What issues, if any, would be raised about promotions or career progression opportunities if mandatory retirement is ended? How could these issues be addressed?**

Professionals and other knowledge workers can frequently continue to make major contributions beyond age 65 and wish to do so. For example, university professors often would prefer to teach and conduct research beyond their NRD. As a result there has been considerable litigation by university professors who have until now unsuccessfully maintained that age caps in human rights statutes constitute discrimination. Furthermore, in a number of jurisdictions where mandatory retirement has been eliminated, open ended or time-limited exceptions have been made for university professors.

Although Manitoba does not permit mandatory retirement, statutes governing individual universities provide that the university and a union or bargaining agent representing the academic, managerial or professional staff of the university may enter into a collective agreement that imposes or has the effect of imposing a mandatory retirement age of 65 or over on that staff (e.g., *The University of Manitoba Act*, s. 61.1(2)).

The legislation also states that the requirement to retire at the age specified in the collective agreement is deemed to be a *bona fide* and reasonable employment and occupational requirement for the purposes of the discrimination in employment under the *Manitoba Human Rights Code*. We are not aware of the extent to which mandatory retirement clauses currently exist in collective agreements which govern staff of Manitoba universities.
The impact that delayed retirement could have on succession planning and workforce renewal in universities was recognized in 1986 when the United States Congress passed legislation amending the Age Discrimination in Employment Act (ADEA) of 1967 to prohibit mandatory retirement on the basis of age for almost all workers. The amendments included an exemption, which terminated at the end of 1993, permitting mandatory retirement for any employee who is serving under a contract of unlimited tenure at an institution of higher education and who has attained 70 years of age (ADEA, 1986, s. 12(d)).

In granting this exemption, the United States Congress took a middle position between those who wished to extend full protection against age discrimination to faculty and those who feared that postponed faculty retirements would prevent colleges and universities from hiring new faculty, who are traditionally a source of new ideas. The need for new faculty, and the new ideas they bring, is a particular concern of research universities.

The Ontario Confederation of University Faculty Associations (OCUFA), which has a long-standing policy position against mandatory retirement, will be making a submission opposing a similar phase-in period in Ontario. Fact sheets posted on the OCUFA website note that the last two Ontario governments have indicated their desire to eliminate the practice of forced retirement and as a result, university administrators have known for some time that legislation to that end is inevitable. Furthermore, it is suggested that since the introduction of Bill 68, An Act to Eliminate Mandatory Retirement (Bill 68) by the Conservative government in 2003, every collective agreement negotiated by faculty and university administrators has included an agreement re-opener or new-retirement language to deal with impending legislative changes to mandatory retirement.

We are not aware of what position individual Ontario universities, or colleges and universities as a whole will be taking with respect to the proposal to eliminate mandatory retirement. However, one university administrator we contacted suggested that, with baby boomers poised to retire in droves in the next decade, a shortage of PhDs is expected. Therefore, rather than supporting the status quo, post-secondary educational institutions are likely to be interested in finding ways to retain older workers longer.

9. What impact, if any, would ending mandatory retirement have on training programs and policies?

Some older workers may currently not be offered training because it is expected that they will soon leave the workforce and their training cost will not be recouped. In other cases, the capacity of individuals to learn later in life may be questioned. If mandatory retirement is eliminated, a cultural change will be necessary in many environments to provide uniform access to training for employees of all ages. In addition, training techniques may have to be adapted to recognize different learning styles of seniors.
C: Employment Issues

10. Would mandatory retirement have an impact on terms and conditions of employment in non-unionized workplaces?

This would depend on whether the employer has a formal policy of mandatory retirement at a designated age, or if individual employees have entered into employment contracts which provide that employment ends at a specific age. In these circumstances, once mandatory retirement is no longer permissible, employer policies and the fixed termination date in employment contracts would no longer be valid.

Other terms and conditions of employment including pension and benefits plans are discussed in Part D below.

11. Would ending mandatory retirement affect the negotiation or operation of collective agreements in unionized workplaces?

Transitional provisions dealing with mandatory retirement dates in collective agreements were included in Bill 68, which died on the order paper when an election was called. Similar provisions should be incorporated into the new bill to deal with possible problems arising out of the terms of existing collective agreements in unionized workplaces.

In both unionized and non-unionized environments there will be situations where requiring a group of employees to retire by a specific date may be justified as a result of a bona fide occupational requirement (BFOR). However, the courts have interpreted BFORs quite strictly, and could require organizations to assess the capability of individuals against appropriate standards as opposed to prescribing across the board mandatory retirement at a specific age.

12. Would there be any costs to employers in either unionized or non-unionized workplaces? If so, what would they be and how would they arise?

A logical corollary of eliminating mandatory retirement could be that if employees over 65 are terminated, employers will be liable for termination pay as prescribed by the Employment Standards Act, 2000 (ESA) or pay in lieu of notice under the common law of wrongful dismissal. While this could involve significant amounts in individual cases, the overall impact will likely be low since few employees will elect to work beyond age 65.

13. Would there be any costs to unions?

No further comments.
14. What impact would ending mandatory retirement have on human resources practices, procedures and policies?

Typically organizations have some form of performance management system which results in annual or more frequent evaluations of employees for the purposes of raises, bonuses, promotion and other forms of career development. It may be that the process is less rigorous in some cases with respect to workers close to retirement age, as they are currently required to retire by a specific date which is not too far in the future. Performance management systems and practices will have to be designed and implemented more effectively to ensure that older workers are evaluated meaningfully, so there is a defensible, factual basis for terminating less productive older workers without incurring high damage awards for wrongful dismissal.

Furthermore, it should be recognized that more rigorous performance management systems adopted to deal with the elimination of mandatory retirement could also impact the tenure of employees several years younger. For example, if the productivity of someone who is 63 or 64 has dropped, he/she may be terminated even before age 65.

D: Pensions and Benefits

Employer-sponsored or Private Plans

15. What would be the impact of ending mandatory retirement on pension plans? Would different pension plans be impacted differently?

Concerns have been expressed by organized labour and other groups that eliminating mandatory retirement could be a prelude to government changes to Old Age Security (OAS) and the Canada/Québec Pension Plan increasing the NRD beyond age 65. We believe that individuals should have the choice to work beyond age 65 if they wish to do so. Furthermore, without extensive public consultation, we do not support across the board changes to the NRD in legislation governing public or private pension plans that would create financial roadblocks for people who want to retire earlier.

The Ontario Pension Benefits Act (OPBA) specifies that the NRD cannot be later than one year after the plan member attains age 65. Ending mandatory retirement will mean that members of both defined contribution (DC) and defined benefit (DB) pension plans who work after age 65 must be permitted to accrue benefits beyond their NRD subject to any service or age and service caps on accrual in the plan text. As a result, pension plan texts that do not already permit employees working beyond their NRD to accrue additional benefits will have to be amended.
While we support the elimination of mandatory retirement, we strongly believe that the enacting legislation must permit pension plans to include a NRD when members may first be entitled to an unreduced pension. In addition, as permitted in Québec, differentiations based on age should be acceptable where the differentiation is reasonable and based on actuarial risk factors.

In Québec, the following presumption in section 20.1 of the Québec Charter of Human Rights & Freedoms (the Québec Charter) allows plan sponsors to distinguish as to age in the areas of pension, life insurance and LTD coverage

“20.1. Presumption

In an insurance or pension contract, a social benefits plan, a retirement, pension or insurance plan, or a public pension or public insurance plan, a distinction, exclusion or preference based on age, sex or civil status is deemed non-discriminatory where the use thereof is warranted and the basis therefore is a risk determination factor based on actuarial data.”

In the case of DC pension plans, both employers and employees will have to continue making required contributions. Additional DC contributions will clearly be a new expense for employers. Similarly, employees (in contributory plans) and employers will have to continue contributing to DB pension plans in accordance with the actuary’s report. Depending on DB plan designs and valuation assumptions, actuarial gains may emerge due to individuals deferring retirement beyond age 65. In many cases, such actuarial gains could be used to reduce the required employer contributions otherwise required.

We expect that the overall impact of any increased costs for post NRD DB or DC plan contributions on employers will be minimal. Few people will want to delay retirement beyond age 65 and if they do so, in most cases, they will not stay on for more than two or three years.

It is interesting to consider how Québec and Manitoba have dealt with the impact of mandatory retirement on pension plans.

The Québec Supplemental Pension Plans Act prescribes that if an employee postpones retirement, the benefits accrued to the NRD must be revalorized or actuarially adjusted to the date of actual retirement. However, the plan does not have to provide further accruals for employees after the NRD. Nevertheless, if the employee chooses to continue making contributions to either a DB or DC plan, at retirement he/she will receive an additional defined contribution benefit that can be purchased with these contributions plus interest.

In 2003, the Québec government issued a paper entitled “Adapting the Pension Plan to Québec’s New Realities”. Due to long-term concerns about labour market shortages, the paper proposes a number of changes to the Québec Pension Plan (QPP) that would remove disincentives for working longer, including:
- allowing workers age 60 or more to collect a QPP pension while working;
- simplifying the QPP pension benefit formula by calculating pensions based upon lifetime indexed earnings;
- allowing workers collecting a QPP pension to make contributions to increase their pensions; and
- increasing the actuarial adjustment factor for post-65 retirements from 0.5 percent per month to 0.7 percent per month.

In the Employee Benefit Plan Guidelines on their Web site, the Manitoba Human Rights Commission (MHRC) recognizes that existing income tax laws (requiring that pensions begin to be paid by December 31 of the year of attainment of age 71 at the time of publishing; now age 69) remove the tax advantage of registered pension contributions for employees age 69 and over, so there is essentially no real financial benefit for these employees to contribute to a pension plan. Therefore, they do not view it as unreasonable discrimination for employers to refuse to permit the active accrual of benefits of employees age 69 and over in a pension plan.

While we are not aware of any litigation which has challenged this practice, it is conceivable that in future employee(s) working beyond age 69 could argue they should receive some form of equivalent compensation in lieu of contributions to a retirement savings plan.

16. What would be the impact of ending mandatory retirement on other benefit plans including dental, drug, supplementary health, life insurance plans or disability plans sponsored by employers or privately purchased?

While some organizations currently provide post-retirement health and dental plans, the majority do not. Therefore, elimination of mandatory retirement could mean an increase in related cost for these employers. However, since seniors are covered by the Ontario Drug Benefit Plan (ODB Plan), drug costs for employees working beyond age 65 could be lower than for younger active employees. This assumes of course that the ODB Plan is not modified to make the employer first payer or otherwise shift costs to employers.

Employers typically provide group life insurance to employees up to age 65 although there is no legal requirement to do so. Where post-retirement life insurance is provided by an employer, the coverage is frequently reduced to a small lump sum such as $10,000. If employers were required to provide the same level of life insurance coverage for working seniors as for other active employees, life insurance contracts would have to be renegotiated and higher premium costs for the whole group would likely result. Again, the magnitude of the increase may not be great if experience shows that few employees elect to work beyond age 65.

Where short term disability (STD) benefits are insured and the insurance policy only covers employees up to age 65, insurance contracts would have to be renegotiated to
cover older employees and to provide for the cost sharing related to the additional coverage. There could be some impact on premiums if the insurance company believes that there will be a higher number of more extended claims for seniors.

Long term disability (LTD) plans could be even more problematic. At the present time LTD benefits are payable to age 65, which is the NRD for private pension plans and government benefits. If eliminating LTD resulted in open-ended liability for employers with no cut-off date, costs for one or more claims could be prohibitive. Furthermore, since the income-replacement ratios under LTD plans may be higher than the pension benefit an individual has accrued, the incidence of LTD claims could increase dramatically.

The practice in both Québec and Manitoba is to permit reducing or eliminating LTD and life insurance (survivor benefits) at age 65 for different reasons.

**Employee Benefit Plan Guidelines** published on the MHRC Web site note the following:

“….universal Old Age Security benefits become payable at age 65, [so] the Commission believes that the termination of long-term disability benefits at age 65 in these circumstances would not constitute unreasonable discrimination.

However, if there is a reasonable expectation that the employee will recover from the disability and be expected to be able to return to work, his or her status should not change because of the attainment of age 65. In these circumstances it seems evident that the termination of disability benefits on the basis of age alone would constitute a contravention of the Code.

….In recognition that income plans for survivors serve much the same purpose as other income replacement plans such as long-term disability plans, the Commission does not consider it discriminatory to cease benefit payments payable to the survivor at age 65 years.”

In Québec, plan sponsors that reduce or eliminate life insurance and LTD coverage after age 65 rely on the previously noted presumption in section 20.1 of the Québec Charter.

We are not aware whether the practice in Manitoba and Québec with respect to reducing or eliminating LTD and/or life insurance for employees working beyond age 65 has been tested in the courts.

Benefits regulations in Ontario also include a limited exception to subsection 44(1) of the ESA, which prohibits differentiation in benefits plans based on age:
**ESA Benefits Reg 2001/7:** life insurance plans: “a differentiation made on an actuarial basis because of an employee’s age and in order to provide equal benefits under the plan, in an employer’s contributions to a life insurance plan”

**ESA Benefits Reg 2001/8:**

(a) a differentiation made on an actuarial basis because of an employee’s age or sex, in the rate of contributions of an employee to a voluntary employee-pay-all or long-term disability benefit plan; and

(b) a differentiation made on an actuarial basis because of an employee’s age or sex and in order to provide equal benefits under the plan, in the rate of contributions of an employee in a short- or long-term disability benefit plan.

However, the exclusionary language in the *ESA Benefit Regulations* appears to be much more limited than section 20.1 of the Quebec Charter. Therefore, if it is the government’s intention to protect benefit plan sponsors from anti-discrimination provisions in certain circumstances, the *ESA Benefits Regulations* will likely have to be re-written.

17. *Are there any actions the government should take to address the potential impact on pension or benefits plans?*

We believe that the following provisions should be reflected in legislation or regulations governing pension and benefits plans:

- Enacting legislation should allow for age-related distinctions based on accepted actuarial risk factors.
- All registered pension plans should continue to have a NRD as defined in the OPBA.
- The NRD should continue to be not later than one year after than plan member attains age 65. The NRD is typically the first date at which an employee is entitled to receive an unreduced retirement benefit from the plan.
- Employees working beyond age 65 should be permitted to accrue retirement benefits in either Defined Benefit Plans, Defined Contribution Plans or Group Registered Retirement Savings Plans providing that in plans where employee contributions are required, the employee agrees to continue to make the required payments.
- Accruals, employee and employer contributions should end no later than age 69 (or such other age as may be prescribed by the ITA and Regulations as being the age at which plan members must begin to receive a pension under a registered pension plan.)
- Employers should be permitted to continue the current practice which is to reduce or eliminate life insurance at age 65.
- Employers should be permitted to continue the current practice which allows STD and LTD payments to end at age 65.
• In the event that employers are required to provide the same group and healthcare plans to employees both before and after age 65, modifications to employer/employee cost-sharing arrangements should be permitted.

18. Should pension or benefits plans be able to differentiate between workers older and younger than age 65 or be unavailable to older workers? If so, which ones and why?

See the response to Questions 16 & 17 above. We reiterate the fact that distinctions in pension and benefits plans based on age should be permitted based on accepted actuarial risk factors.

19. Should some flexibility be built into pension or benefits plans for workers 65 years and older if they choose to continue to work?

Currently, only Québec allows for partial payments of pensions beyond age 65 for employees continuing to work, but without further accrual. On the other hand, current pension standards legislation in Alberta and Québec provides for phased retirement. Active members who are within 10 years of normal retirement age and who agree with their employers to participate in a working-time reduction program are entitled for each year covered by the agreement to draw an "early benefit" in the form of a lump sum and subsequently receive their normal retirement pension actuarially reduced to reflect payment of the early benefit. Consequently, if the NRA is 60, an early benefit can be paid to members as young as age 50.

The early benefit equals the lowest of:

• 70 percent of the reduction in remuneration, resulting from the reduced working time during the year,

• 40 percent of the Maximum Pensionable Earnings (MPE) under the QPP or the Year’s Maximum Pensionable Earnings (YMPE) under the Canada Pension Plan (CPP) (2004 - $40,500), or

• The commuted value of the member's benefit.

The ITA and Regulations do not allow an employee to both collect and accrue a pension at the same time. However, lump-sum payments from a pension plan are permitted since they are not considered to be a pension. With regard to a phased-retirement program offered to nurses in the province of New Brunswick, the Registered Plans Directorate of the Canada Revenue Agency has stated that administratively it will allow annual withdrawals from a pension plan to be paid out to nurses taking phased retirement in equal monthly amounts.
The take-up rate for this form of phased retirement in Québec and Alberta have been very low. This can in part be attributed to the fact that lump-sum partial pensions are capped at 40 percent of the YMPE, and because collecting a partial pension will significantly erode the pension benefit payable when the member completely retires.

However, alternative phased retirement models and flexible work arrangements may appeal to both employers and employees of all ages. We encourage the Ontario government to join other provincial governments, the Federal Department of Finance and employee groups in both removing legal obstacles and developing new, creative approaches to keeping older people in the workforce longer.

In all cases, considerable employer autonomy should be retained so that offering flexible working arrangements is facilitated, but not obligatory. In other words, employers should not be forced to modify jobs or offer part-time options for older workers or any other group of employees.

Furthermore, it should be noted that federal payroll tax rates (CPP/QPP and EI) for people on lower salaries may result in a disincentive for some employers to offer part-time work. Currently, if two part-time employees each earn $40,000, CPP/QPP and Employment Insurance premiums must be remitted on $80,000. However, in the case of one full-time incumbent, employer contributions are based on only the first $40,000.

**Workplace Insurance System**

20. *What impact would ending mandatory retirement have on the workplace insurance system? Are there any actions that the government should take to address these impacts?*

Ontario should examine how abolishing mandatory retirement has been dealt with in respect of the workers’ compensation (WC) systems in Manitoba and Quebec. If WC benefits have to be paid beyond age 65, there could be a significant cost increase to the Workforce Safety and Insurance Board (WSIB). Similarly, an obligation to re-hire after age 65 could be unreasonably onerous.

21. *Should the workplace insurance system be able to differentiate between workers older and younger than age 65 or be unavailable to older workers? (e.g., should the re-employment obligation continue to end when the worker reaches 65?)*

Depending on the results of research into the impact of eliminating mandatory retirement on the WC systems in Manitoba and Quebec, we believe that the following provisions included in Bill 68 should be retained in the new bill to be tabled by the government to end mandatory retirement:

“Provisions of the *Workplace Safety and Insurance Act, 1997* that provide age-based benefits to injured workers will continue to apply.”
E: Social and Human Rights Issues

22. What societal pressures or benefits may result from ending mandatory retirement?

No comment.

23. If people choose to continue to work longer, are there certain workplace characteristics, conditions, policies or practices that need to be re-considered? If so, which ones and how should they be changed?

No comment.

24. What would the impact be of ending mandatory retirement on vulnerable groups? What action should be taken to address these impacts?

No comment.

25. What impact would ending mandatory retirement have on families?

No comment.

26. What impact would ending mandatory retirement have on the right of individuals to benefits provided under municipal, provincial or federal social benefits and assistance programs and policies.

Typically, people who earn in excess of a specified amount are not eligible for social assistance. Benefits under these programs generally end at age 65 when individuals are eligible for OAS, the Guaranteed Income Supplement (GIS) and other government-sponsored retirement benefits. In order to remain consistent with previous submissions above, we believe that this practice should continue. We also do not support raising the NRD in private- or government-sponsored retirement programs without extensive public consultation.

27. What educational/informational initiatives would be appropriate to prepare the community for change? Who should deliver these initiatives and to whom should they be targeted?

A change in mind set and company culture will be necessary in many cases. An educational program developed and delivered by the Ontario Human Rights Commission plus representatives of any other government department or agency affected such as the Financial Services Commission of Ontario and the Employment Standards Commission would be appropriate.
F: Occupational and Sector Specific Issues

28. What would be the impact of ending mandatory retirement on occupational sectors such as colleges and universities, fire, police, education and health?

See answers to Questions 8 and 11. No further comments.

29. Are there occupations or sectors that may need an exception or special treatment? Which ones and why? What type of special treatment would they need?

No comment.

30. What actions may be required to help some occupations or sectors adjust to a removal of mandatory retirement?

No comment.