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RETIREMENT SAVING AND INCOME POLICY

Rethinking Age Cutoffs in Canada’s Long-Term Disability Insurance

by Joe Nunes

- 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, the paper calls on employers to proactively review plan designs to avoid discrimination claims and meet evolving worker needs. It also urges governments to provide clearer legislative guidance to balance fairness, affordability, and legal compliance in LTD program structures.

Introduction

Long-term disability (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. In contrast, various forms of “salary continuation” or short-term disability programs exist to support workers with income protection during shorter absences. In some cases, but not always, a short-term disability program will be designed to provide protection to workers during the waiting period for LTD insurance benefits.

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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. These exemptions do not include specific guidelines for calculating affordability and sustainability – it was generally understood that no justification was needed to terminate disability insurance at age 65. In addition, Canada’s insurance industry had little experience in offering income protection to workers over age 65 and was slow to offer coverage.

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 discontinuation 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* (the “*Charter*”). However, the courts have not definitively resolved this issue.

In *Talos v. Grand Erie District School Board (Talos)*, the Human Rights Tribunal of Ontario found that Ontario laws¹ 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*.² 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. While *Talos* explicitly did not apply to LTD insurance or pensions, it highlights the ongoing debate over potential discrimination in this area.³

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, as the plan was not considered “bona fide.”⁴ The decision noted that there was no evidence that extending coverage beyond age 65 was either unavailable or unaffordable. In that case, the arbitrator sent the parties back to negotiate a revised plan.

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

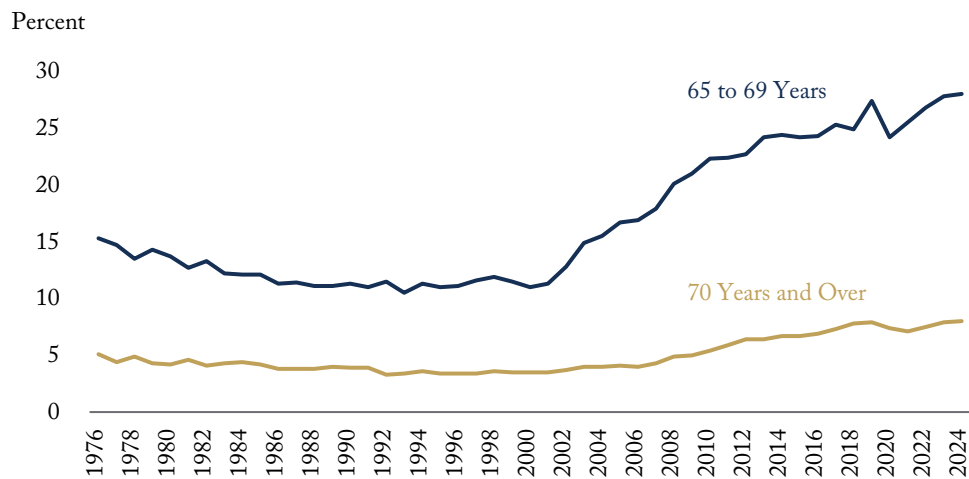
1 Regulation 286/01 under the *Employment Standards Act, 2000* (ESA), defines age for the purposes of protections in employment as between the ages of 18 and 65, and s. 25(2.1) of Ontario’s *Human Rights Code* permits age-related discrimination in the administration of employee benefits plans so long as they comply with the ESA.

2 *Talos v. Grand Erie District School Board*, 2018 HRTO 680 (CanLII), <<https://canlii.ca/t/hs410>>.

3 For a more robust review of *Talos* and other decisions, see Link and Nunes (2024).

4 *Okanagan College v. Okanagan College Faculty Association*, 2024 CanLII 88299 (BC LA), <<https://canlii.ca/t/k6w2z>>. The case stemmed from a 2013 grievance filed after the elimination of mandatory retirement in BC and culminated in a 2024 arbitration award directing the college to revise its plan to ensure access to LTD benefits for employees over 65.

Figure 1: Trends in Employment Rates for Older Workers by Age



Note: The employment rate measures the proportion of the population in the specified age group that is currently employed.

Source: Statistics Canada, Table 14-10-0327-01.

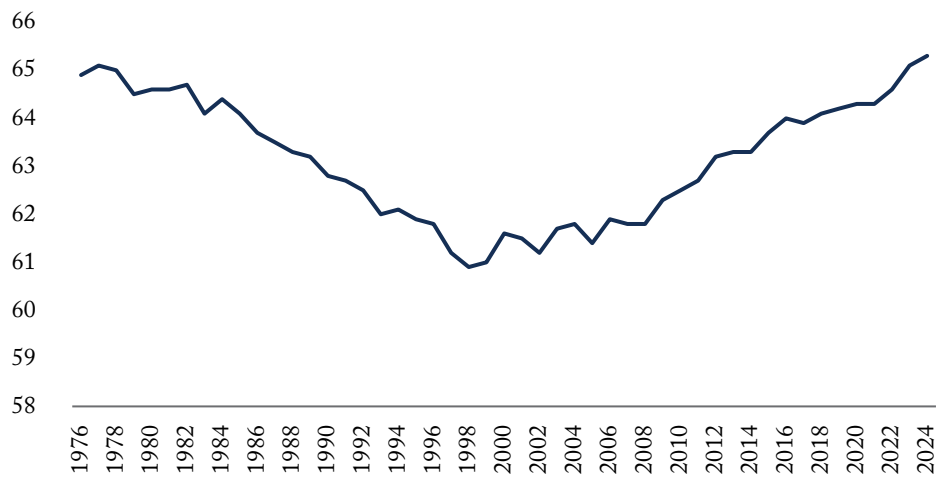
Increasing longevity and the decline of traditional employer-sponsored defined benefit pension plans in the private sector are leading more workers to remain in the workforce past age 65, whether out of financial necessity or personal choice.

This E-Brief argues that while 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. Tying benefit eligibility to age allows insurers to better manage risk and costs by reducing the likelihood of over-insuring older employees who may have a lower need for income protection compared to younger workers. Courts have also been clear that no discrimination occurs where an LTD plan provides for termination of benefits when a worker reaches normal pension age. Where that is not the case, under specific circumstances, a flexible approach – such as selectively extending coverage for those working past 65 – could better accommodate the changing demographics and preferences of workers and provide benefits which are more likely to be considered reasonable by the courts. This study suggests a balanced approach where employers consider the unique needs of their workforce, potentially extending benefits to employees who wish to work past 65.

Trends in Labour Market Activities of Older Workers

In recent decades, there has been a notable shift in the labour market participation of older workers. From the 1970s through to the 1990s, the employment rates of those aged 65 to 69 declined from 15.3 percent in 1976 to around 11 percent by the late 1990s (Figure 1). This decline was largely driven by public sector downsizing and strong pension systems that encouraged early retirement (Kieran 2001). Employment for those aged 70 and over remained low throughout this period.

Figure 2: Average Retirement Age



Source: Statistics Canada. Table 14-10-0060-01.

However, from the 2000s onward, labour market activity among older workers has experienced a significant reversal. Employment rates for those aged 65 to 69 have steadily increased, reaching 28 percent by 2024, while those aged 70 and over saw their employment rate rise to 8 percent. This shift reflects several factors, including the abolition of mandatory retirement, longer life expectancy, and the growing financial necessity for many to remain employed (Mahboubi and Zhang 2025).

These trends are closely linked to the rise in average retirement age. Alongside the changes in the labour market activities of older workers, the average retirement age has steadily increased, from a low of 60.9 years in 1998 to 65.3 years in 2024 (Figure 2). These developments reflect broader societal changes, with older Canadians staying in the workforce longer due to economic factors and personal choice. Updated policies, such as extended LTD coverage, could be helpful in supporting this ageing workforce.

The Design of LTD Insurance

Properly designed, insurance should provide an indemnity for actual losses by the policyholder without creating a windfall gain, which would be considered a moral hazard. In group insurance, an insurer will normally issue one policy to a policyholder on behalf of a group of insureds. Employer-sponsored LTD insurance is commonly provided in this format.

The amount of LTD coverage is usually designed to replace less than 100 percent of a worker's lost income (either pre- or post-tax) to account for reduced work-related expenses during disability and to incentivize a return to work.

Historically, LTD benefits typically ceased at age 65, aligning with the expectation that workers would retire by this age, voluntarily or otherwise, and no longer depend on employment income.⁵ Further, the lost income is theoretically replaced in part or entirely by eligibility for other government programs, such as the Old Age Security (OAS) program and provincial drug programs, such as Ontario's Drug Benefit Program, which start at age 65. Canada Pension Plan (CPP) disability benefits cease at age 65, and retirement benefits were originally designed to start at that age, which supported the overall regime of ending LTD benefits at 65. In 1984, the Canada Pension Plan was amended so that benefits could start as early as age 60 and be deferred to as late as age 70. These amendments were intended to recognize the varying needs of workers and to provide flexibility in choosing when to retire. While there has been a slight trend towards working past age 65, approximately 90 percent of CPP contributors start benefits by age 65, which continues to support the rationale for ending LTD benefits by that age.

Generally, the incidence of disability rises as workers age, which means that the cost of LTD insurance rises with age. However, in plans with age cutoffs, this cost escalation is mitigated for workers reaching age 65 since the maximum benefit period shrinks to the point where a worker would receive fewer than 12 months of payments if they developed a disability after age 64.

Actuarial Science and Age-Based Design

Link and Nunes (2024) – a paper co-authored by the author of this report – argue that if courts rule against using age to define when LTD benefits end, insurers would face significant challenges in designing appropriate coverage. The paper argues that without an age-based cutoff, benefit periods may not align with actual worker needs, and insurers may be forced to charge substantially higher premiums to cover risks that do not apply to most workers. In a nutshell, the report considers two alternatives to defining the duration of benefits without relying on age and presents their drawbacks.

In the first scenario, the paper examines the impact of paying benefits for a fixed period instead of a flexible period based on age. For example, a fixed benefit period of 20 years would leave a worker who becomes disabled at age 20 without income protection after age 40, while providing a worker who becomes disabled at age 60 with coverage until age 80. This example highlights how providing protection for a fixed period could significantly under- or overshoot reasonable expectations of the need for income protection.

In the second scenario, LTD benefits are assumed to continue for the duration of a worker's lifetime unless they recover. Under this approach, the cost of coverage for a 40-year-old would rise by an estimated 10 percent, while premiums for a 60-year-old would more than double. Doubling the cost of LTD insurance for 60-year-old workers – the majority of whom would never develop a disability – to provide lifetime income protection for a small number of workers is an ill-conceived design for insurance protection. The reason that the percentage cost increase is so much higher for the 60-year-old than the 40-year-old is due to the combined effect of a much lower probability of returning to work, along with a higher probability of living past age 65 and continuing to collect benefits.

5 Some may raise concerns that extending LTD coverage beyond age 65 could, in practice, function as a bridge to retirement. Workers experiencing age-related health declines might seek LTD benefits rather than retiring immediately – particularly if they can defer other income sources such as employer-sponsored pensions, CPP, or OAS. Where LTD benefits are tax-free (depending on premium structure), this may be financially advantageous. While these dynamics merit consideration in the design of post-65 LTD benefits, a full exploration is beyond the scope of this paper.

These examples demonstrate why using a worker's age becomes a crucial factor in the design of most forms of LTD insurance and justify an exemption from the prohibition under the *Charter* for discrimination on the basis of age. Disallowing the use of age entirely would either breach basic principles of insurance by under- or over-insuring workers with benefits payable for a fixed period, or would lead to excessive over-insurance for workers and prohibitive costs if benefits were payable for the remaining lifetime of a worker with a disability.

Talos and Proportionality

The very factors that make age central to the design of LTD insurance plans – such as cost and actuarial risk – must also be considered by courts and other adjudicators when assessing *Charter* claims. If a compelling case is made that removing an age cutoff would render LTD benefits prohibitively expensive, then the courts take those factors into account and weigh them against the severity of the harm caused by the age discrimination.

In some cases, they have already applied this kind of reasoning. For example, I served as an expert witness in a post-*Talos* labour arbitration, *Rayonier v. Unifor, Locals 256 and 89 (Rayonier)*,⁶ in which the laws permitting age cutoffs in an LTD insurance plan were upheld against a discrimination claim under the *Charter*.

This is because *Charter* discrimination cases such as *Talos* or *Rayonier* use an analytical framework to determine, first, whether the relevant law infringes upon a *Charter* right, and second, whether the infringement is justified due to its purpose and the balance of its positive impacts against its negative ones.

Moreover, in *Air Canada Pilots Association v. Air Canada (Air Canada)*,⁷ the Federal Court held that cutting off disability benefits when the member reached a “normal pensionable age under the pension plan” did not constitute age discrimination. Although the effect was similar to an age cutoff, the determining factor – eligibility for a pension – was not considered inherently age-related or discriminatory.

Even where a straightforward age cutoff, which is common to most LTD insurance plans, fails the first step and is determined to be *prima facie* discriminatory, as was the case in *Rayonier*, courts then consider the second step – the necessity of purpose and proportionality of impact.

For instance, in *Rayonier*, unlike in *Air Canada*, the plan included an explicit age-based cutoff. However, similar to *Air Canada*, employees became eligible to receive their pension at that cutoff, ensuring they continued to receive income replacement. Combined with the burden extended benefits would impose on the employer, this led to the failure of the *Charter* challenge. Factors like this are essential in considering whether harm has been reduced to a level that the courts would be able to accept.

These cases highlight that proportionality and purpose are central to the adjudication of age discrimination claims in LTD insurance. When the harm is mitigated – for example, by the availability of pensions – courts may be more inclined to uphold age-based limitations as constitutionally permissible.

6 *Rayonier v. Unifor, Locals 256 and 89*, 2022 CanLII 75226 (ON LA), <<https://canlii.ca/t/jrjqr>>.

7 *Air Canada Pilots Association v. Air Canada*, 2023 FC 138 (CanLII) <<https://canlii.ca/t/jv762>>.

Balancing Costs and Benefits

While cases like *Air Canada* and *Rayonier* clarify that LTD benefits can be terminated at normal pension age, they do not suggest that plan designers should avoid exploring ways to offer broader or extended LTD coverage beyond age 65 – especially when the plan is not integrated with a pension. In fact, the principle of harm reduction encourages employers and plan designers to consider whether age 65 is the most appropriate cutoff for ceasing benefits for every workforce and act to adjust the terms of their plans where practicable.

Challenges of Coverage Beyond 65

In group insurance, two principles are added to those supporting individual insurance. First, group insurance is designed, by necessity, to meet the needs of most workers most of the time, recognizing that it may not perfectly suit every individual. The more homogeneous the group of workers, the easier it becomes to meet everyone's needs. Second, the viability of group insurance is based on all workers participating, reducing the risk of adverse selection compared to individual insurance, where only those likely to be at risk of loss tend to purchase insurance. Because of these factors, group insurance will most likely be less costly than individual insurance over a working career for the same level of coverage, which makes employer-sponsored programs so advantageous.

Unfortunately, as more workers continue working beyond age 65, it is not as simple as deciding whether LTD insurance coverage should continue for all workers until age 67 or age 70 – nor is it obvious how long benefits should continue after 65. Every workforce is different, and since enhanced coverage or greater income protection comes at a cost, plan design must carefully balance costs and benefits to meet the specific requirements of the group. While some workers continue in employment past age 65 to earn income, other workers continue on for the enjoyment of work, and income protection no longer needs to be addressed.

Increased cost of coverage will be borne by workers directly in employee-pay programs, with decisions being made on how to fairly distribute those costs among younger and older workers. Where insurance premiums are employer-paid, in theory, workers may pay for these increased costs through concessions in other areas of compensation. As a result, it is important to ensure that any redesign of LTD insurance coverage represents the needs of the specific workforce in question.

Insurance companies are already responding to employer requests to provide extended coverage to workers over age 65. However, such coverage is not automatic and is most likely to be found in larger employers where there is both a higher level of attention to workforce needs and larger numbers of workers needing extended coverage – allowing costs to be spread more effectively.

Options for Program Design

Several options exist for extending coverage. Courts have already held that an LTD insurance plan that bridges to a pension plan is a viable option. But what about employers who cannot offer pension benefits to their employees? For them, a range of possibilities exists, of which three are highlighted here. Any changes to an LTD program should apply only to active employees – not those already receiving disability benefits. Altering benefits for current recipients would unfairly shift costs to today's workers, whose past premiums did not fund those earlier claims.

The first option is a relatively straightforward design change: extending disability coverage and benefit payments to age 67. This change would provide slightly longer protection for workers over age 65 while terminating benefits at an age when most workers are expected to retire. However, while premiums for a 40-year-

old worker would see only a slight increase, premiums for a 60-year-old worker could rise by approximately 25 percent (Link and Nunes 2024). This significant cost increase in premiums highlights the importance of ensuring such extended coverage is desired by workers as a group.

A slightly more complex approach is to adjust the benefit formula, reducing the percentage of income replaced for workers with a disability as they age. This approach is intended to “flatten the curve” of increasing costs. The strategy behind this approach is to provide a greater duration of coverage at older ages rather than a shorter cutoff. However, this approach means that should an older worker who is not yet eligible for other forms of income replacement develop a disability, the LTD insurance benefit may be inadequate relative to pre-disability earnings until they turn 65. In addition, such a design would require identifying the ages at which the phase-out should commence and be complete. Should such a design be pursued, clear communication with workers regarding the reduced coverage will be critical to ensure that workers understand the reduced level of income protection provided at older ages.

A third approach would guarantee a minimum of 24 months of benefits for workers who develop a disability after age 63. This design ensures income protection during the transition from disability to a reasonable retirement age while limiting costs to 24 months of income protection. The cost of this modification would be borne exclusively by workers over age 63. While LTD benefits are only payable while the worker meets the plan’s definition of total disability – and are therefore not guaranteed – some may raise concerns that this approach could be open to misuse, particularly given the complexity of chronic conditions at older ages. These risks highlight the need for thoughtful plan design and oversight. Nonetheless, employers and governments should consider how LTD design can better reflect evolving work and retirement patterns. It may still be necessary to cap benefits at age 70, as Canadian insurers may not yet be prepared or able to offer coverage beyond this age.

None of these approaches wholly addresses the possibility that a plan could be considered to discriminate based on age – all of these options use age-related considerations in determining entitlement to benefits. But all of them purport to improve the circumstances of older employees within the bounds of what is reasonably achievable. Furthermore, the range of options allows for a plan to be tailored to a particular workforce for their collective benefit. In any group, there will be differences of opinion on what coverages are optimal, and it is up to employers and employees to work together to determine the best program design that balances cost and protection.

Public Policy Implications

Ensuring that workers have access to income protection through LTD insurance is not only in the best interest of workers but also benefits employers and taxpayers in general. In the absence of LTD coverage, workers who are unable to continue working due to injury or illness would become reliant on non-contractual employer-based assistance or government-sponsored social programs. Such reliance could be uncertain and insufficient relative to the lost income.

While employers and employees should collaborate to update the design of LTD insurance programs to best suit their workforce, clear laws that guide the design of LTD insurance programs stand to benefit both parties. Without such clarity, employers may struggle to ensure that their plans comply with legal standards, and workers and employers alike may face unnecessary costs in litigating program design. A more defined legislative framework would streamline the process and avoid inconsistencies.

Nonetheless, until there is clear guidance from legislators or the courts, employers should take a proactive approach to reviewing their LTD program design. Where additional income support after age 65 is recognized as a need, various plan design changes may be appropriate.

In many cases, the option to provide LTD coverage to workers aged 63 to 70 – with benefits lasting up to 24 months unless the person recovers or dies – may be an effective compromise. This approach balances protection for older workers with the increasing costs associated with providing coverage for this demographic. It also reflects the reasonable expectation that most workers will not work forever, and if they do, they will not need meaningful income protection over their extended working life.

Conclusion

As the workforce ages and an increasing number of workers remain employed past age 65, age-based distinctions in the design of an LTD insurance program remain broadly appropriate. However, a fixed age cutoff of 65 for benefits may no longer be appropriate for all workforces or legally defensible, notably where the cutoff is not linked to pension eligibility. To ensure that LTD programs meet the evolving needs of workers, employers must tailor coverage based on the specific demographics of their workforce.

A more flexible approach for LTD plans not designed to be integrated with pension eligibility, 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. The particular needs of a given workforce should always be considered, and regardless of the specific design chosen, employers and insurance providers must collaborate to ensure that the plan is both financially sustainable and responsive to workers' needs.

A clearer legislative framework would be valuable to employers. Governments with 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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Joe Nunes is Co-founder and Executive Chairman of Actuarial Solutions Inc.

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