

The End of Mandatory Retirement



Or...Problems With An Aging Workforce

by Tara R. Britnell

HAMILTON DUNCAN ARMSTRONG + STEWART LAW CORPORATION
Business + Litigation Lawyers

1450 Station Tower Gateway, 13401 108th Avenue, Surrey, BC V3T 5T3
t (604) 581-4677 f (604) 581-5947 White Rock (604) 536-1076

www.HDAS.com

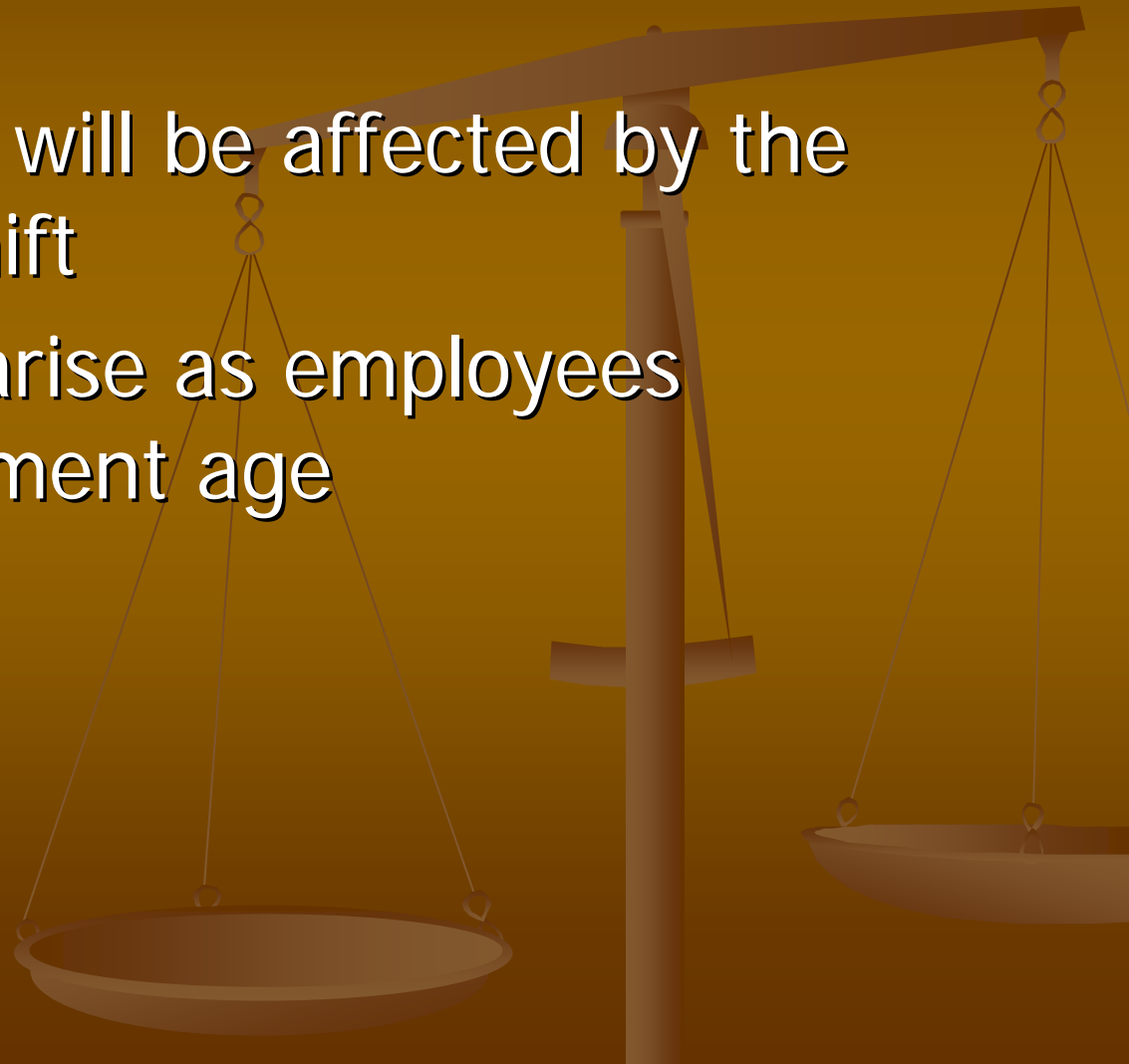
What is mandatory retirement?

- Created by an employment policy
- Has never been the law



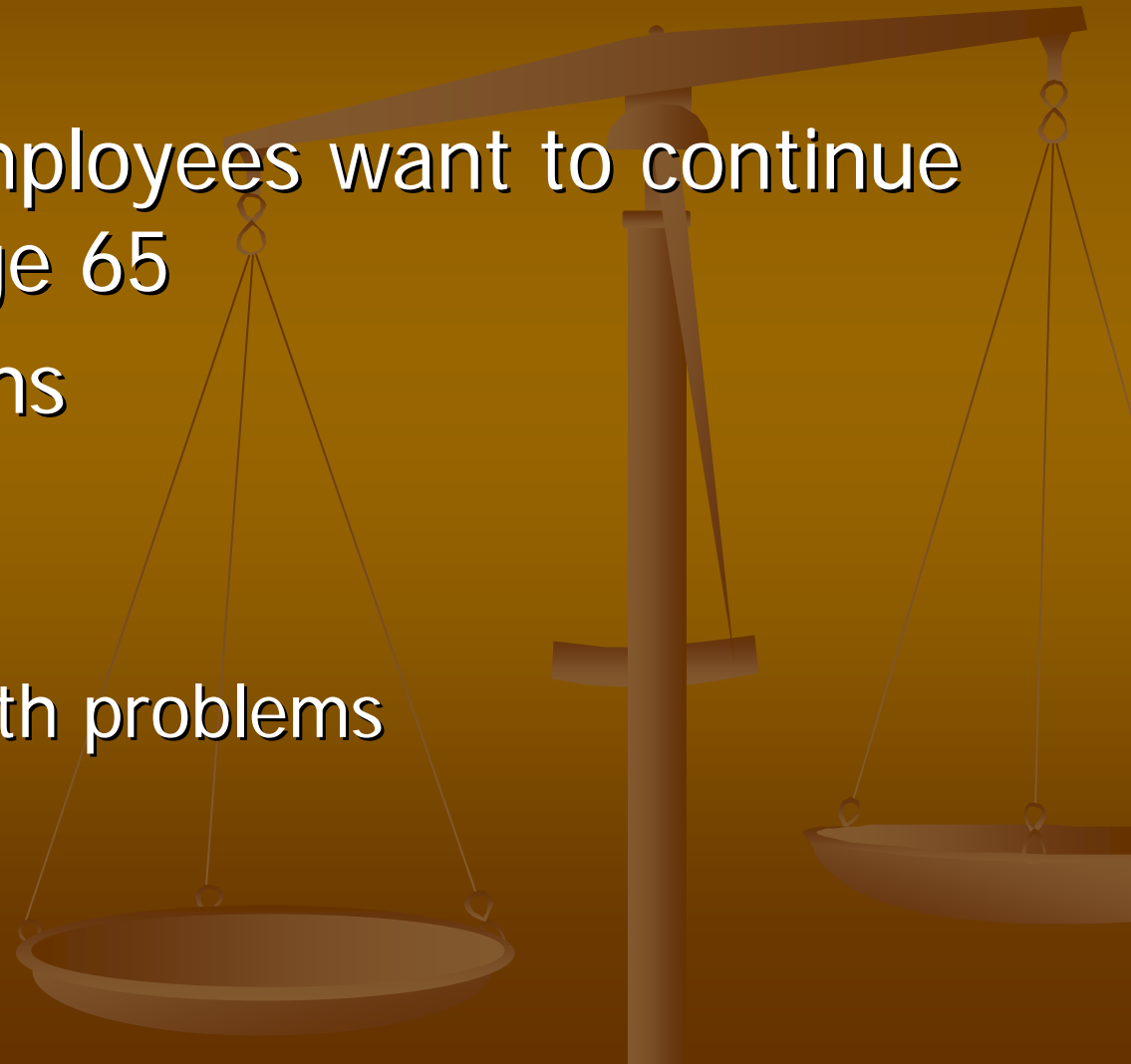
An aging workforce

- Every employer will be affected by the demographic shift
- Certain pitfalls arise as employees approach retirement age



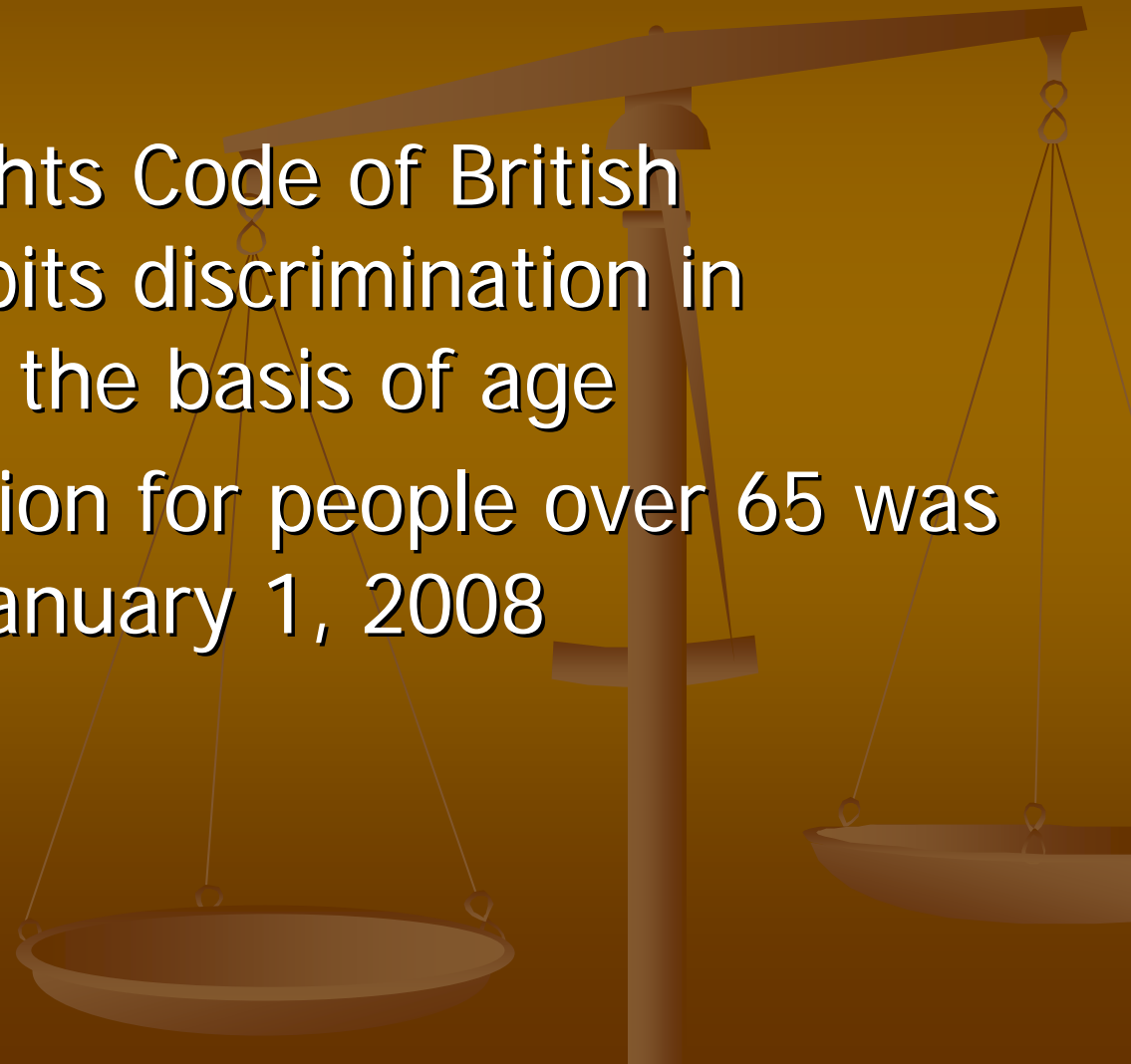
Impact of demographic shift

- 11 – 18% of employees want to continue working past age 65
- Possible concerns
 - Burn out
 - Declining skills
 - Increasing health problems

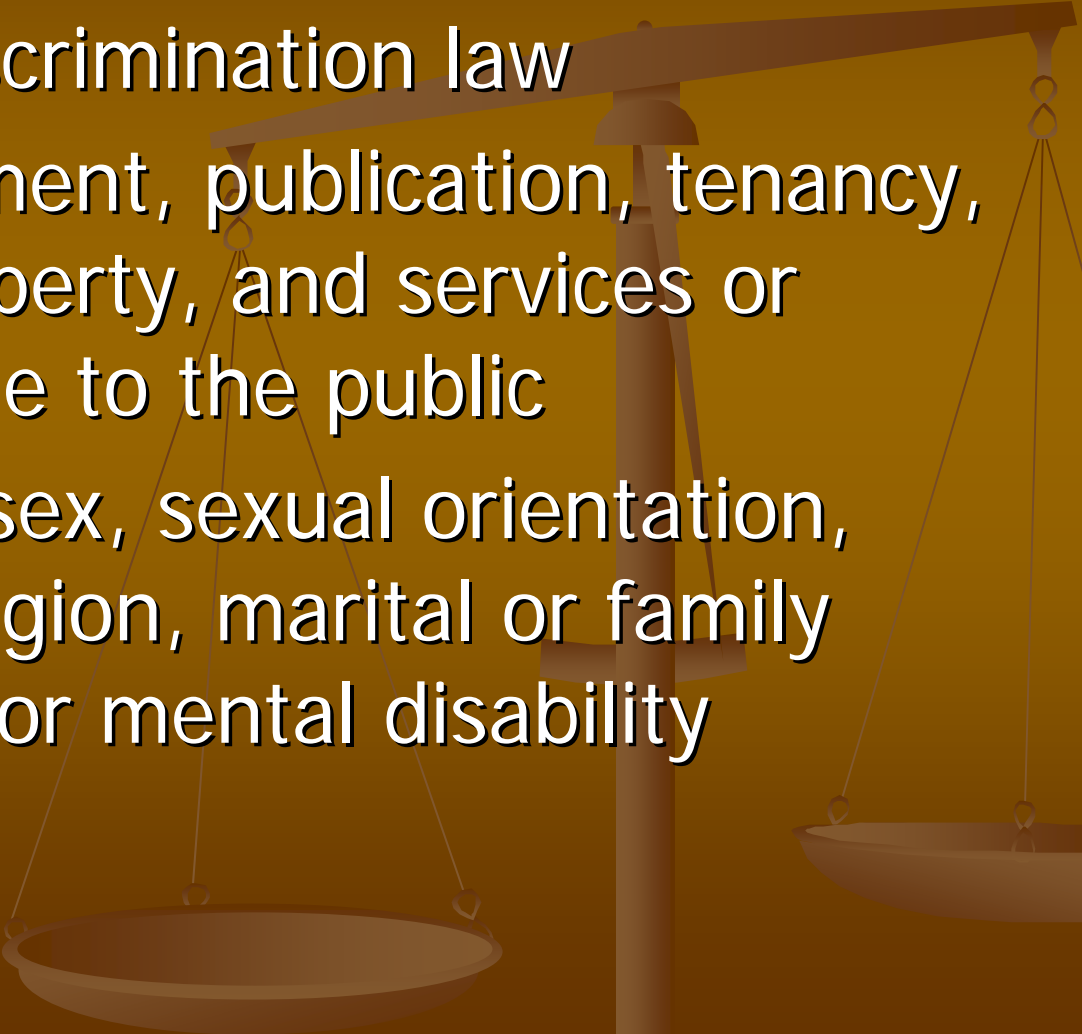


The legal problem: Discrimination

- The Human Rights Code of British Columbia prohibits discrimination in employment on the basis of age
- Previous exception for people over 65 was eliminated on January 1, 2008



Human Rights Code

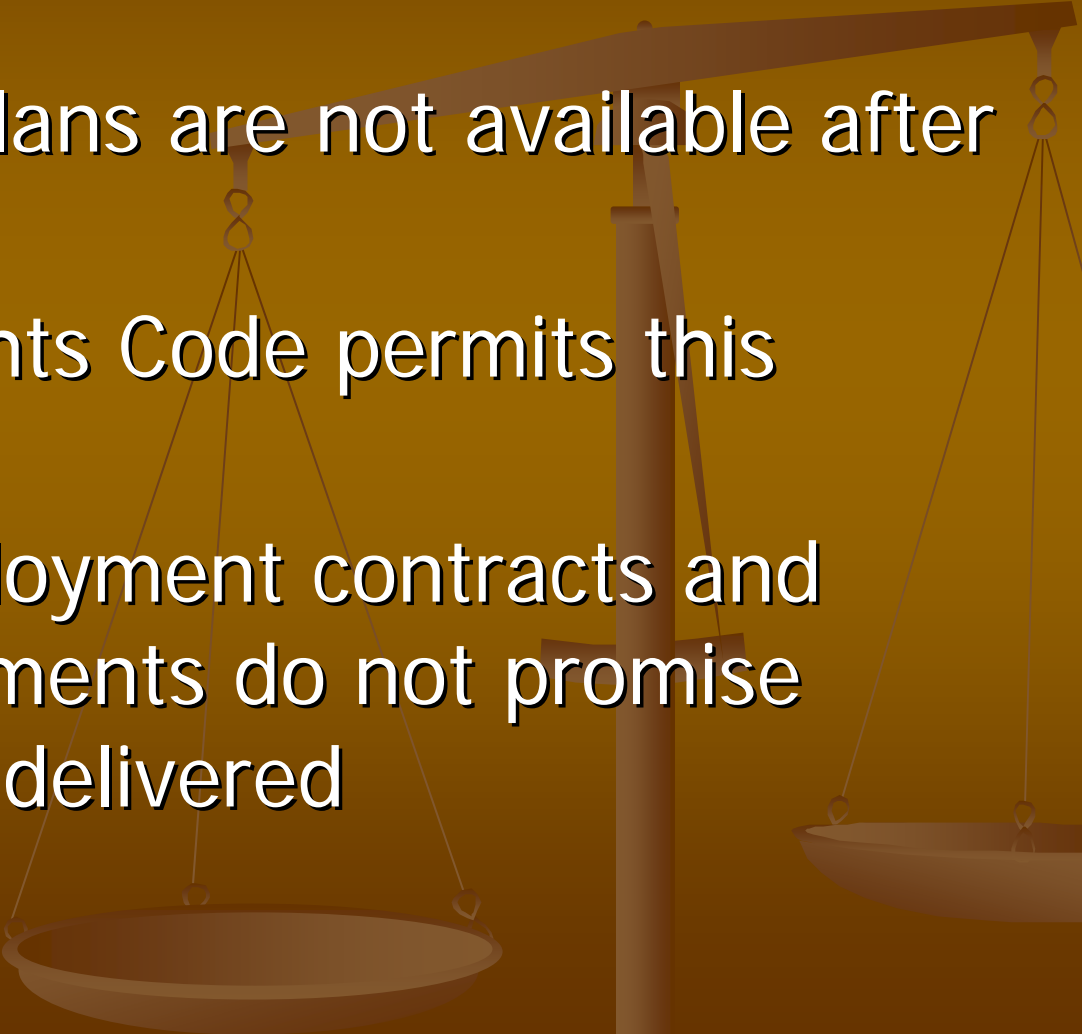
- Is B.C.'s anti-discrimination law
 - Areas: employment, publication, tenancy, purchase of property, and services or facilities available to the public
 - Grounds: age, sex, sexual orientation, race, colour, religion, marital or family status, physical or mental disability
- 

Where you might experience an employment problem

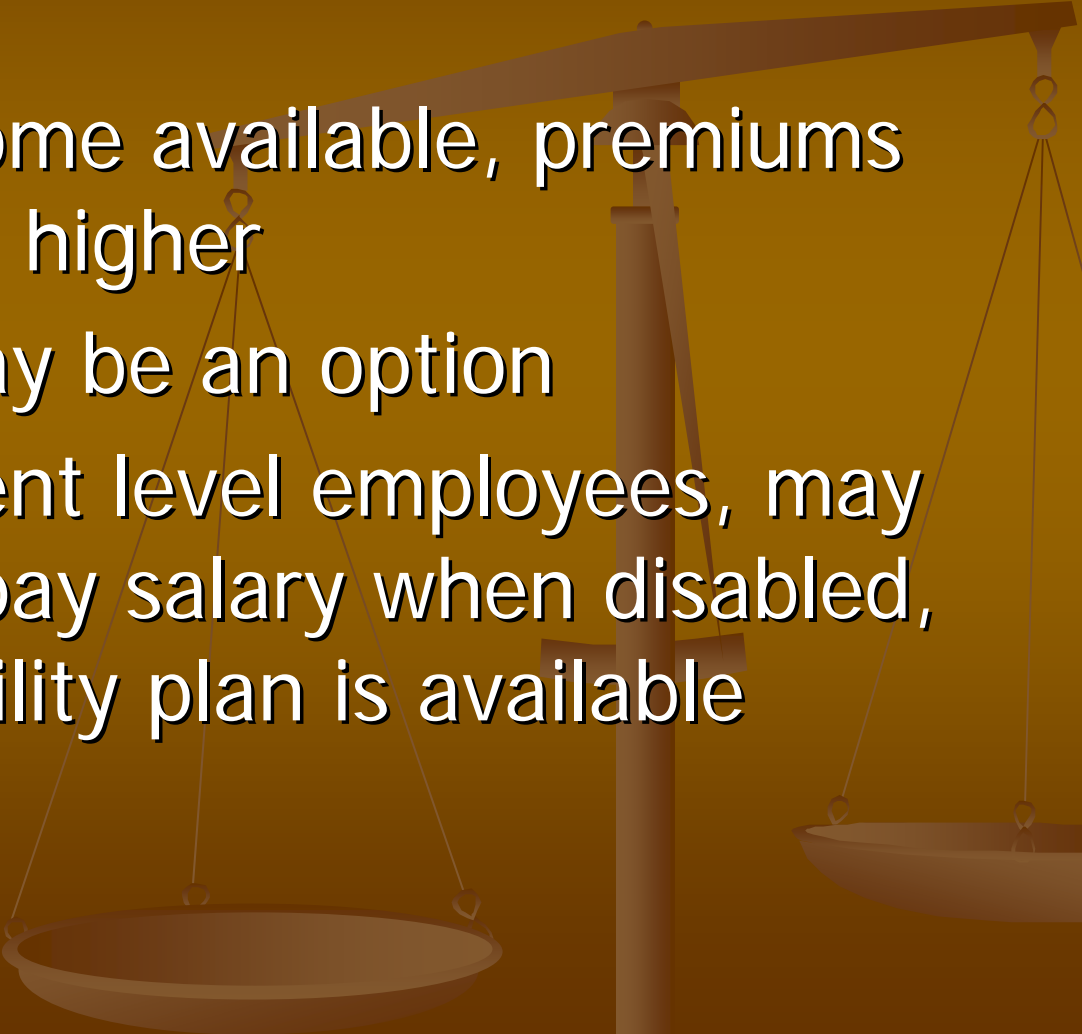
- Benefits
- Collective Agreements
- Termination
- Accommodation when age is a disability
- Voluntary early retirement packages



Benefits

- Many benefits plans are not available after age 65
 - The Human Rights Code permits this discrimination
 - Check that employment contracts and collective agreements do not promise what cannot be delivered
- 

The future of benefits

- If products become available, premiums will no doubt be higher
 - Flex benefits may be an option
 - With management level employees, may have a duty to pay salary when disabled, even if no disability plan is available
- 

Termination



3 options:

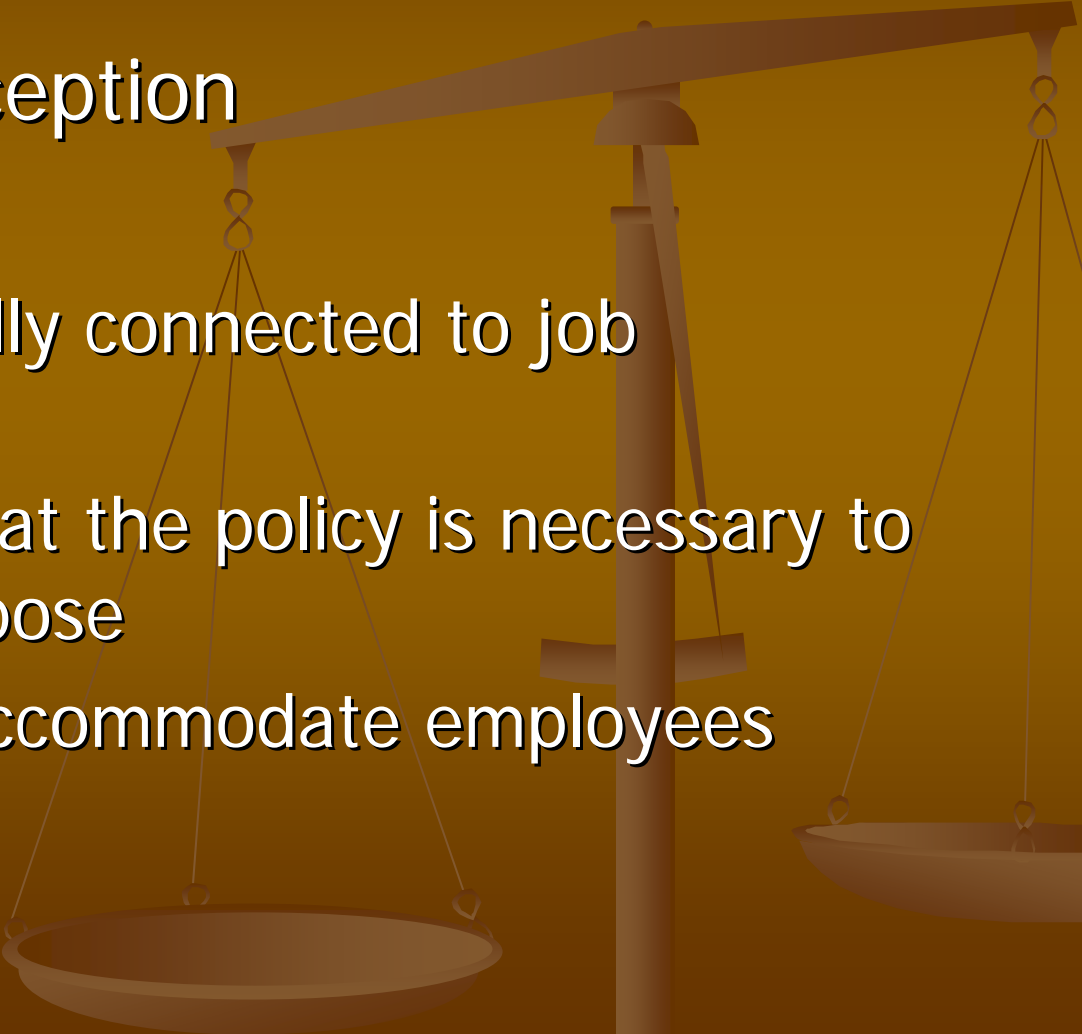
1. Notice, or payment in lieu of notice
 - Will be expensive
2. Just Cause
 - Very difficult to prove
3. Termination clause in an employment agreement
 - Won't work in a union context

Termination risk



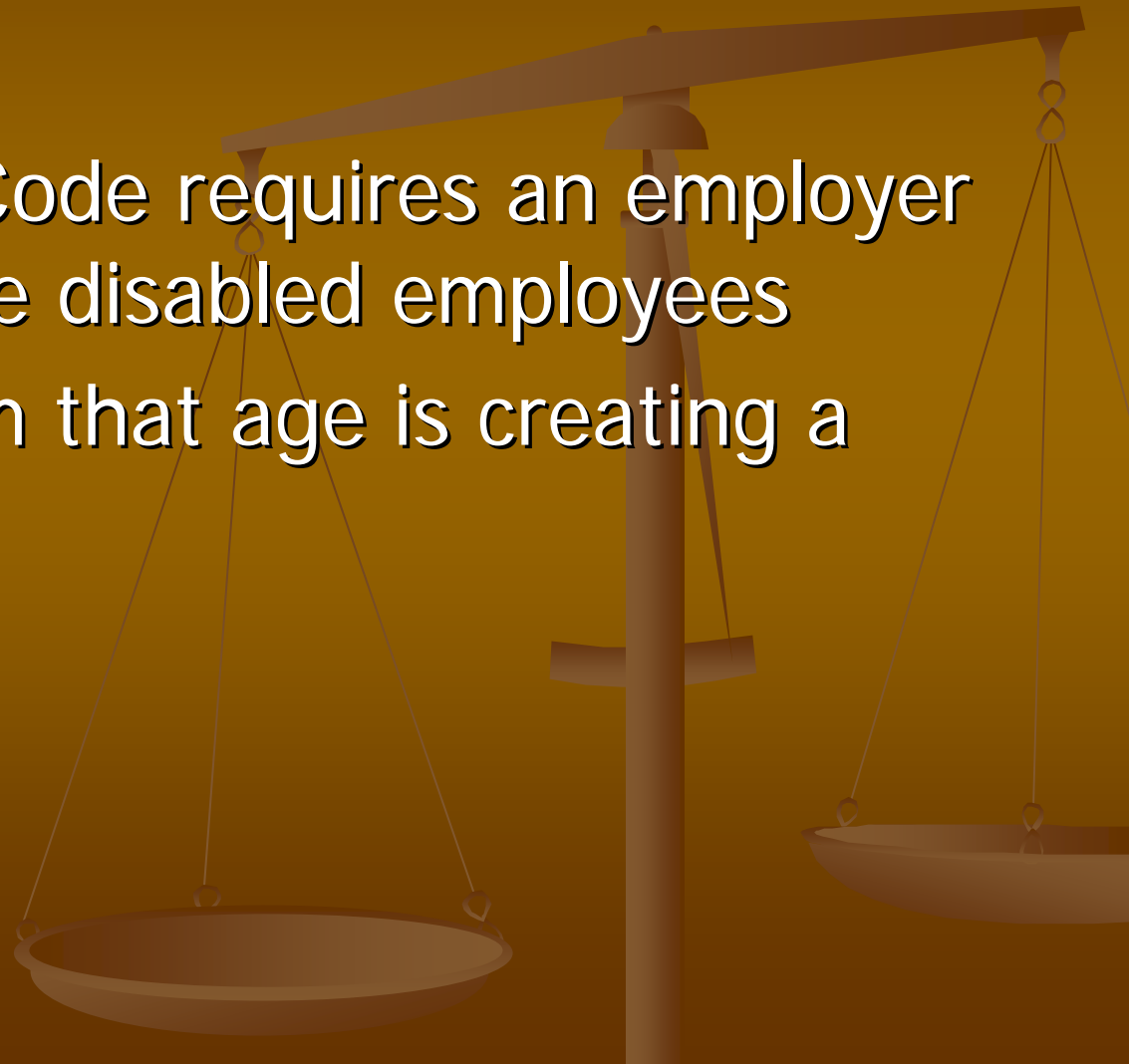
- Claim for age discrimination, or bad faith dismissal
- Best practice: Document treatment of all employees so you can prove there's no basis for claim
 - Regular performance evaluations are key

Loophole: Bona Fide Occupational Requirements


- Very narrow exception
 - Requirements:
 - Policy is rationally connected to job performance
 - Honest belief that the policy is necessary to accomplish purpose
 - Impossible to accommodate employees
- 

Accommodation

- Human Rights Code requires an employer to accommodate disabled employees
- Possible to claim that age is creating a disability

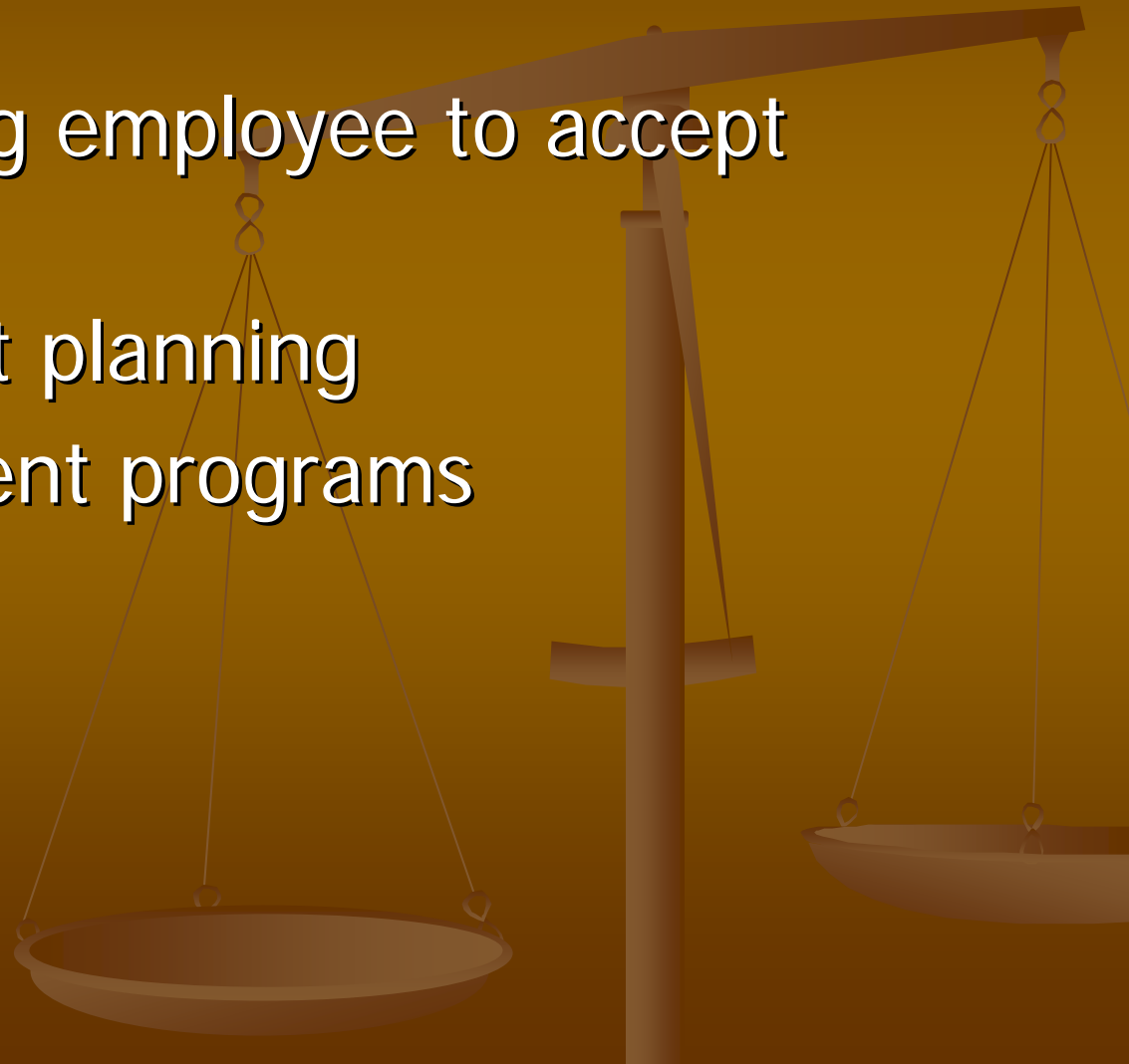


Accommodation - Best Practices

- Flexible work arrangements
 - Compressed work weeks
 - Flex-time
 - Working from home
 - Part-time arrangements
 - Job sharing
 - Short term contracts for retired employees
- 

Voluntary Early Retirement Packages

- Avoid pressuring employee to accept package
- Offer retirement planning
- Phased retirement programs



Conclusion

- An aging workforce is unavoidable
 - Most employment problems are the same as with younger employees, but they may arise more frequently, and carry a higher price tag
 - The big difference is the risk of age discrimination
- 