Heenan Blaikie LLP

Pensions & Benefits

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Pension *Pulse*

PENSIONS & BENEFITS E-BLAST

Ontario Pension Reform Bill 236 Given Royal Assent: Time to Act for Plan Sponsors and Administrators

Phase one of the reforms to Ontario's Pension Benefits Act, Bill 236, received Royal Assent last month. The time has therefore arrived for pension plan sponsors and administrators to start planning for implementation of the changes. This includes sponsors and administrators of Ontario-registered pension plans and sponsors and administrators of pension plans registered in other jurisdictions in Canada that have members in Ontario.

The most significant changes introduced in Bill 236 were summarized in our Pension Pulse dated December 11, 2009. There have not been many changes to the Bill since it was first introduced. We have summarized the main features of the Bill again below and have added some practical commentary around steps that employers should take or decisions that should be made in implementing the changes introduced by the Bill.

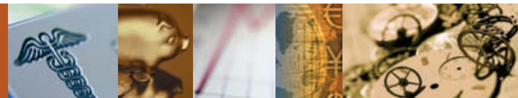
All of the changes below will come into effect on a date or dates to be proclaimed.

Immediate Vesting of Benefits

Pension benefits will be immediately vested instead of vested after two years of participation in a pension plan. This will add to the administrative burden and cost for employers, particularly for those in which employee turnover is high.

One way to mitigate the impact of immediate vesting is to extend the eligibility period to the maximum of two years. Another is to exclude participation in the plan for certain defined classes of employees. This latter change would have to comply with the administrative policies of the Financial Services Commission of Ontario (FSCO) regarding eligible classes of employees.

Employers whose pension plans cover employees in more than one jurisdiction should consider whether adopting the strictest standard of immediate vesting for all jurisdictions makes sense. Having one vesting provision for all members of the plan would be less administratively burdensome but could be more costly. Quebec pension legislation has included immediate vesting for a number of years. This seems to be the direction in which pension reform is heading.



Expansion of Grow-in Benefits

If a pension plan has subsidized early retirement provisions, any member who has not yet qualified for the benefits but who has at least 55 age-plus-service points upon termination of employment will be entitled to grow into those benefits. The value of the grow-in, which can be substantial, will be included in the member's lump sum commuted value. Under the pre-reform legislation, grow-in rights were available only in the event of a partial or full wind-up of a pension plan. This has been a significant cost associated with partial wind-ups. Under Bill 236 this cost is being expanded.

This provision will be effective for terminations of employment on or after July 1, 2012. This permits some time for employers and their actuaries to assess the cost of the provision. The cost will impact current service costs as reflected in going-concern valuation reports. Currently the cost of the grow-in rules are reflected only in solvency valuations, because they are limited to wind-up scenarios.

Depending upon the significance of the cost to an employer and the richness of any early retirement subsidies subject to the grow-in, employers may want to examine the viability of reducing or eliminating the subsidies. The subsidies, once removed from a pension plan could be reintroduced in targeted early retirement windows. Care would have to be taken with any such amendment to avoid the unintended reduction of accrued benefits.

The grow-in rules will not apply to terminations of employment for what is being described as "cause". Specifically, the Bill states that the grow-in does not apply if a termination of employment is the result of:

> *"wilful misconduct, disobedience or wilful neglect of duty by the member that is not trivial and has not been condoned by the employer".*

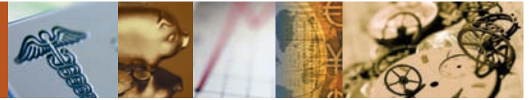
This may be quite different from cause at common law, depending upon the circumstances. For example, a termination of employment may well result from "disobedience" that is "not trivial" and fall far short of cause at common law. As a result, we can foresee the Superintendent and the Financial Services Tribunal being asked to make decision on matters of employment law.

Removal of Partial Wind-Ups

In connection with the expansion of grow-in rights to virtually all terminations of employment, as described above, partial wind-ups will be removed from the legislation on a date to be proclaimed. This is consistent with Quebec's pension legislation. For pending partial wind-ups, administrators will not be required to purchase annuities for members affected by a partial wind-up. Special provisions will also apply in respect of the uncommon scenario of distributing surplus assets.

Increase to Small Benefit Limit

The threshold for cash payments of small benefits is being increased. The pre-reform limit on cash payments is for pensions payable upon the normal retirement date that are less than 2% of the Year's



Maximum Pensionable Earnings (YMPE) under the Canada Pension Plan ($47,200 in 2010). This is being increased to 4% of the YMPE. Plus another threshold is being introduced that is based upon the lump sum commuted value of a pension. If the commuted value of a member's pension is less than 20% of the YMPE, it may be cashed out.

With immediate vesting of benefits, many pension plans will experience a higher frequency of lump sum cash payments. Administrative systems will have to be modified to account for the new limits.

Phased Retirement Introduced

Under the reform Bill, sponsors of defined benefit plans may amend their plans to include phased retirement provisions. This would enable eligible members who are nearing retirement to continue working while receiving a pension and also to continue earning pension benefits. The provisions can be made available to members who are at least age 60 (but less than the normal retirement date), or age 55 and entitled to an unreduced pension, whose hours of work are reduced and who enter into a written agreement with the employer.

If an employer wants to provide for phased retirement, its pension plan will have to be amended. Phased retirement could be a useful workforce planning tool. The provisions could be included in a pension plan as a permanent feature, applicable to anyone who meets the eligibility requirements. Or, the provisions could be included temporarily in the context of early retirement window provisions. In any event, a member will not be entitled to take advantage of phased retirement without a pension plan providing for it and without a written agreement with the employer.

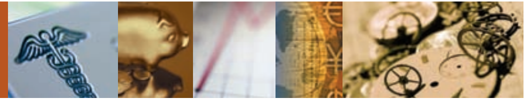
Pensions and Corporate Transactions

In the purchase and sale of businesses where the seller and buyer have pension plans, the parties may agree to a transfer of pension assets and liabilities from one pension plan to another. Obtaining regulatory approval for such pension transfers has been problematic and time consuming. The Bill contains a few provisions that should assist with the completion of these transactions.

Firstly, there is a transition provision applicable to corporate transactions that occurred prior to the date the relevant sections of the Bill are proclaimed in force. This enables asset transfers to be carried out that may have been held up by the regulator or that may not have been previously agreed to by the parties. This transition provision will only be effective until June 30, 2015.

Another provision enables transfers of assets and liabilities generally by way of agreement between a seller and buyer. The agreements may, but do not have to, require consent of plan members. The consent of the Superintendent will be required. The Bill lists a number of criteria for such consent. The commuted value of the benefits under the successor pension plan must not be less than under the predecessor plan. If the predecessor plan has surplus assets, any asset transfer must include a proportionate amount of surplus.

Lastly, there are provisions that are intended to facilitate pension plan mergers and divisions.



Pensions and Corporate Restructuring

The Bill empowers the Superintendent to approve agreements in restructuring proceedings under the *Companies Creditors Arrangement Act* or under the *Bankruptcy and Insolvency Act*.

Surplus Sharing

Under the Bill, surplus payments to a plan sponsor upon pension plan wind-up will be permitted, even where the pension plan documents do not provide for it, if the plan sponsor enters into a surplus sharing agreement with the plan members, retired members and beneficiaries.

Notification of Plan Amendments

Currently, advance notification to plan members of pension plan amendments is not required. In the case of any amendments that may have an adverse impact on plan members, notification is required and the registration of such amendments by the Superintendent will not be effective before 45 days have elapsed. Under the Bill, prior notification will be required for all amendments. There will be certain limited prescribed circumstances in which prior notification will not be required.

Electronic Communication with Plan Members

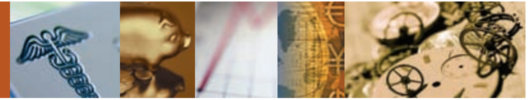
Under pre-reform legislation, paper communication is required for pension plan member statements. There is no explicit authority for electronic communication. The Bill specifies that notices, statements and other communications may be done electronically, in compliance with the *Electronic Commerce Act,* 2000. Member consent will be required.

Records Retention

The Bill introduces records retention requirements. The details of the requirements will be outlined in regulations. This has been lacking generally in pension legislation across Canada and has been a problematic aspect of pension plan administration and of service provider agreements where administrative functions are outsourced. The regulations should provide some clarity on this and the new requirements should be built into pension governance guidelines and provider agreements.

Next Steps

While the proclamation dates of the provisions of the Bill have not yet been announced, now is a good time for employers to start planning for these changes and to initiate discussions with external advisors and within pension committees. Between now and the proclamation dates, employers should plan and budget for actuarial analyses, employee communications, administrative systems changes, plan amendments and regulatory filings. Plus, this is the first phase of Ontario's reforms. More is yet to come.■



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As a member of our firm's Labour and Employment group, Mark handles all aspects of pensions and benefits law, including governance, regulatory compliance, collective bargaining, litigation, due diligence, mergers and acquisitions, financing agreements, bankruptcy and insolvency, and the tax aspects of compensation, pensions and benefits.

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