KOSKIE MINSKY

JUSTICE MATTERS

Pension and Benefits

This is a summary of Pension and Employee Benefits matters of interest.

Ontario brings in Administrative Monetary Penalties for Breaches of the Pension Benefits Act

The regulatory environment applicable to pension plan administrators will shift in 2018, with the Superintendent of Financial Services gaining the power to impose monetary penalties for breaches of the *Pension Benefits Act ("PBA").* On January 1 new provisions of the *PBA* come into force, which, along with a new Regulation on Administrative Penalties, create a legislative scheme allowing the Superintendent of Financial Services to impose such penalties in certain circumstances. Penalties can be imposed against boards of trustees, their members and other administrators, and the fines cannot be paid with funds from the pension fund.

In addition to enhancing the enforcement powers of the Superintendent, the purpose of administrative penalties is stated in s. 108.1(2) of the PBA as follows:

1. To promote compliance with the requirements established under this Act.
2. To prevent a person from deriving, directly or indirectly, any economic benefit as a result of contravening or failing to comply with a requirement established under this Act.

The legislation divides administrative penalties into two types: general and summary. General administrative penalties are reserved for more serious breaches of the PBA and the Regulations, whereas Summary penalties relate to more minor infractions. The Superintendent may impose a general penalty where they are satisfied that a person is contravening or not complying with a provision of the PBA, Regulations, or an administrative order or undertaking.

For example, a general penalty may be imposed if the employer or administrator fails to give appropriate notice of a wind up or violates the statutory limitations on asset transfers between pension plans.

Along with the amendments to the PBA, a The Administrative Penalties Regulation prescribes a list of considerations the Superintendent must take into account in determining the amount of a general administrative penalty under section 3(2):

1. The degree to which the contravention or failure was intentional, reckless or negligent.
2. The extent of the harm or potential harm to others resulting from the contravention or failure.
3. The extent to which the person who is contravening or not complying with or who has contravened or failed to comply with a provision tried to mitigate any loss or to take other remedial action.
4. The extent to which the person who is contravening or not complying with or who has contravened or failed to comply with a provision derived or reasonably might have expected to derive, directly or indirectly, any economic benefit from the contravention or failure.
5. Any other contraventions of or failures to comply with a requirement established under the Act or with the pension benefits legislation of a designated jurisdiction during the preceding five years by the person

Summary administrative penalties are reserved for more minor infractions, as compared to general penalties. Summary penalties have prescribed daily penalty amounts in the new Regulation. For example, a violation of section 13(1) of the Regulation, which requires an administrator to submit a report within 90 days after the establishment of a new pension plan, carries a prescribed daily penalty of $200 up to the maximum amount under the PBA.

The maximum amounts for penalties are set by the new section 108.4 of the PBA: $25,000 for a person other than an individual, and $10,000 for an individual. Penalties must be paid within 30 days of receiving the order, unless the order specifies a longer period.

The person on whom the penalty is imposed may request a hearing, but the process differs slightly between general and summary penalties. For a general penalty the Superintendent must provide notice of an intended decision, and the person may request a hearing in writing within 15 days. For a summary penalty, the Superintendent will simply issue the order and the person may appeal the order to the Financial Services Tribunal within 15 days.

The new administrative penalty regime is another tool in the regulator's toolbox, and hopefully will lead to greater compliance across the industry. Some concerns exist with respect to trustees of multi-employer pension plans, who have a limited role in day-to-day administration of their plans but who are nevertheless exposed to personal liability for regulatory breaches. Given this heightened risk of personal liability, and that the fines cannot be paid from money in the pension fund and are generally not covered by standard insurance policies applicable to trustees, it may be prudent for trustees to seek indemnification agreements from the parties that have appointed them.

Federal Government Confirms that Employee Discounts will Remain Non-Taxable

In recent days, the policy and interpretation choices made by the Canada Revenue Agency ("CRA") have taken a rare step into the public discourse. At issue are employee discounts enjoyed by retail workers. While tax issues are often widely discussed, it is normally in relation to legislative changes being considered by the Federal Government rather than policy choices made by the CRA. The recent furor arises from a short-lived change to the CRA's policy position with respect to employee discounts in a document known as "Income Tax Folio S2-F3-C2". The change would have seen the value of employee discounts counted as income for the largely low-income workers that benefit from such programs.

By way of background, Income Tax Folio's are documents representing CRA's interpretation of topics under the federal *Income Tax Act* and are generally drafted for, and relied on by, income tax professionals. Certain area of tax policy, such as the taxation of employee benefits provided by a health and welfare trust, are entirely guided by CRA interpretation under these Folios, as opposed to the tax legislation itself. The CRA is currently in the process of replacing existing Interpretation Bulletins with updated Income Tax Folios.

The recent change stated that the fair market value of an employee discount would now be considered a taxable benefit for employees, representing a significant change from the CRA's previous position on these discounts.

In this context the recent controversy arose. The CRA's recent Income Tax Folio on Benefits and Allowances Received from Employment replaced and cancelled the prior Interpretation Bulletin IT-470R Employees' Fringe Benefits. In the prior Bulletin, the CRA's position had been that employee discounts were not taxable absent "an extraordinary arrangement with a particular employee or a select group of employees" or "an arrangement by which an employee is permitted to purchase merchandise…for less than the employer's cost."

Unexpectedly, the new Folio indicated that the CRA would now be taxing these benefits such that "[t]he value of the [taxable] benefit [would be] equal to the fair market value of the merchandise purchased, less the amount paid by the employee." – i.e if a $100 item was purchased for $90 due to an employee discount program, $10 of income would be imputed to the employee who made the purchase. The CRA also indicated that no amount would be included in income "if the discount [was] also available to the general public or to specific public groups."

This change proved understandably upsetting to the large number workers who receive and rely on employee discounts, and particularly concerning to the often low-wage and precarious workers in the retail and food-service industries, where employee discounts can represent a key aspect of compensation, sometimes off-setting the cost of clothing, food, or other budgetary items. Counting such discounts as taxable effectively lowers the wages of many already at the fringes of low-wage and precarious work, including two million retail industry employees.

The Folio has been on CRA's website for a number of months. However, once public awareness of the change set in, backlash was swift across traditional and social media. The CRA's change in policy appeared to be a surprise to the Federal Government. CBC news reported on October 11 that it had received a statement from Revenue Minister Diane Lebouthillier's spokespersons regarding the Folio that "[t]his document was not approved by the Minister and we are deeply disappointed that the agency posted something that has been misinterpreted like this…The agency issued a guidance document that does not reflect our government's intentions and the Minister of national revenue has instructed officials to clarify the wording." The Folio has now been removed from CRA's website with a statement that it is "currently under review."

Prime Minister Trudeau took to twitter to state "Let me be blunt: we are not going to tax anyone's employee discounts. Minister @DiLebouthillier has asked the CRA to fix this."

While the Government's clarification and direction to CRA is welcome, the incident perhaps highlights some more significant concerns with respect to tax policy for vulnerable workers. The Government has generally committed to closing loopholes and tax credits. While some of these reforms, such as curtailing benefits available to small business corporations and incorporated professionals, have been controversial, they clearly fall within the Government's broader policy framework promoting tax fairness.

What is more concerning is an apparent blind-spot from CRA and the Government towards the effect of tax policy on vulnerable workers. The CRA's recent mis-step echoes the news from earlier this year that the Liberal Government had been considering amendments to require that employer provided health and dental benefits be considered taxable benefits (**see our past blog post on this issue**). These changes would have added to the tax burden on employees, with a disproportionate effect on low-wage and vulnerable workers.

In light of these controversies, it is important to keep in mind that small changes in tax policy can have significant and perhaps disproportionate effect on average workers who rely on tax credits in planning their finances and are not seeking mechanisms for tax avoidance. Policy responses should keep in mind that what may appear to be an "unfair credit" for a well-compensated employee, may make the difference between providing access to dental care, clothing or other essentials for more vulnerable employees who need it most.

Additionally, tax assistance incentives promoting, for example, health care and medical benefits often serve a public purpose such as mitigating the costs to our overburdened public health care system. The answer to any inequity that might exist between workers who have workplace benefit plans and those who do not is to promote expanding private benefit plan coverage for the "have-nots," not to raise tax revenues from workers and good employers who provide these benefits – and therefore turn more workers into "have-nots".

These controversies show that tax policy need to be more proactive, and less reactive, in addressing the needs of the growing segment of vulnerable and precarious workers in Canada. It is unfortunate that the discussion of key tax policy issues facing many workers is playing out on Twitter and Facebook, It would be preferable if this controversy could open a dialogue to a considered policy response addressing the needs and issues of these workers within the context of the Income Tax Act and CRA Policy.

Private Members' Bills Seek to Amend Insolvency Legislation to Better Protect Pensioners and Employees

On October 17th, MP Marilène Gill of the Bloc Québécois introduced Bill C-372, a private member's bill which would amend the *Bankruptcy and Insolvency Act* (BIA) and the *Companies Creditors' Arrangement Act* (CCAA). The Bill would provide for priority status for claims in respect of underfunded pension plans as well as for claims arising as a result of an employer ceasing its participation in a group insurance plan.

Private member's bills are bills that are not introduced by a member of the Cabinet. Such bills frequently do not become law.

In introducing the Bill at First Reading, Ms. Gill noted that "This bill seeks to correct the injustice faced by retired workers whose pension plans and group insurance plans are not protected when their company goes bankrupt or undergoes restructuring."

Issues surrounding the priority of pension and group benefit entitlements have been front and centre in public debates around insolvency legislation for close to a decade. For many years, most legal battles over pension entitlements focused on whether it was the employer or the members who should enjoy the surplus that had accumulated in the pension plan. As economic conditions shifted and interest rates shrunk to historic lows, the focus shifted from fights over surplus to disputes over who should bear the cost of underfunded pension plans. High-profile insolvencies such as **Nortel**, **U.S. Steel Canada** and **Sears** have kept the issue in the public consciousness. The **Wabush**/Bloom Lake CCAA proceeding has seen major cuts to the pensions and benefits of retirees in Ms. Gill's constituency and may have been part of the reason for the Bill's introduction.

Bill C-372 is the first private member's bill in this session of parliament to address this issue but it may not be the last. In September, the NDP announced that Hamilton MP Scott Duvall, a former steelworker, would introduce a similar private member's bill this fall. At the press conference announcing the planned bill, Duval, the NDP's pension critic, specifically referenced the Sears CCAA proceeding and has been **reported** as stating that the company's decision to suspend monthly pension and benefit contributions is "the most ruthless, gutless, and unethical thing I have ever seen".

It is difficult to predict whether these Bills will ever become law. Each of the provinces have already attempted to create a similar priority for pension contributions in the "deemed trust" provisions of their pension benefits standards legislation. While the specific nature of the deemed trust varies across the provinces, the basic premise is that certain amounts owing to a pension plan are deemed to be held in trust and do not form part of the estate of an insolvent employer. Unfortunately for pensioners and employees, the courts have been reluctant to give full effect to these provisions. It is hoped that these private members' bills may make reliance on provincial deemed trusts unnecessary and ensure that pensions that are earned over a lifetime of work will actually be delivered.

Omnibus Provincial Budget (Bill 177) Takes Aim at Pension Reform

Bill 177, the *Stronger, Fairer Ontario Act (Budget Measures)* (the "Act"), was introduced to the Ontario Provincial Parliament for first reading on November 14, 2017. Schedule 33 of the Act provides changes to the *Pension Benefits Act* (the "PBA"), which will have broad implications for pension regulation in Ontario. While sweeping changes have been announced, the exact parameters of many of those changes were left to be dealt with in regulations which have not been released yet.

Changes to PBGF Benefits

Some of the most significant changes from Schedule 33 relate to enhancing and broadening the Pension Benefit Guarantee Fund (the "PBGF"). The amendments eliminate certain age and years of service requirements which had affected eligibility and coverage, as well as increase the amount of monthly benefit protection from $1,000 to $1,500. The enhanced PBGF protections will only apply to plans that are wound up after the amendments come into force.

Updated Target Benefit Provisions

Section 39.2 of the PBA was passed previously and is intended to govern target benefit plans, but it has yet to go into force. With Schedule 33, that section is receiving an overhaul. First of all, the definition of what constitutes a target benefit plan has been updated to include the following criteria:

- The pension plan is a multi-employer pension plan ("MEPP").
- The documents that create and support the pension plan identify the benefit provided as a target benefit.
- If the pension plan was not initially registered as providing target benefits, the benefit, if accrued, was converted to a target benefit in accordance with section 81.0.2.
- The reduction the administrator is authorized to make under the plan is not prohibited by any

applicable pension legislation of a designated jurisdiction, except as provided by the regulation.

Further, a plan will not be able to provide both defined and target benefits, "except as otherwise prescribed by regulation". This exception remains unclear as these regulations have not been created or released.

Multi-employer pension plans wishing to convert provided benefits to target benefits will receive greater scrutiny under s. 81.0.2. It should be noted that jointly-sponsored pension plans such as OMERS and HOOPP would not qualify for conversion under this section. The new conversion options will only apply to traditional, collectively bargained MEPPs – i.e. those where all contributions are provided for in a collective agreement and benefits can be reduced at any time. This section will require notice to all stakeholders, consultations with affected trade unions, and consent of the Superintendent, prior to conversion. The new provisions set out the specific criteria on which the Superintendent's consent will be given, including proper notice, consultation with stakeholders, and compliance with the criteria for conversion in the statute. Upon completion of conversion, this section notes that the cancellation of special payments for plans in deficit is acceptable, as long as it is in compliance with regulations yet to be created. Further, in addition to the general requirements set out under s. 39.2, this section stipulates that a defined contribution plan cannot be converted to a target benefit plan, and it requires that all benefits be converted to target benefits (reinforcing the inability to have both defined and target benefits under one plan). Despite these rules for converting a MEPP into target benefit plans, it should be noted that Ontario MEPPs have, in most senses, been providing target benefits for decades.

New Requirements for Funding and Governance Policies

Section 10 of the PBA will be amended to require that the documents that create and support a pension plan include funding and governance policies for the plan. This will have a retroactive effect and may require amendments to previously formed plan documents, in order to bring them into compliance with the act.

Missing Beneficiaries Registry

Section 30.2 will be added to the PBA, requiring the Superintendent create an electronic registry for missing beneficiaries of plans. This will facilitate beneficiaries in locating entitlements by creating one central source of data.

Statutory Discharge for Annuities

Section 43.1 has been added to provide a statutory discharge to an administrator who purchases a "pension, deferred pension or ancillary benefit from an insurance company". This means that an administrator who purchases, among other things, an annuity for a beneficiary will now be discharged from liability for the benefit that is being annuitized. A noted exception of this discharge is when there is a surplus on wind up, where annuitized members will remain entitled to any surplus that is paid to members on wind up.

New Definitions for PfAD and Other Funding Provisions

Schedule 33 also contains certain changes to solvency funding requirements, including replacing "solvency funding" with the term "reduced solvency funding". The definition of "reduced solvency funding" as well as many of the other changes has been left to regulations. What we do know is that a new definition will be added to the PBA for "provision for adverse deviations" or PfADs. A PfAD is a requirement for additional funding. This PfAD will be used to limit contribution holidays and surplus payments to employers, under ss. 55.1 and 79(1) respectively. Further, as solvency funding becomes less stringent, the purpose of requiring plans to maintain a PfAD is to provide a means for added benefit security without requiring full exposure to the costs of funding all pension plans on a solvency basis.

Clarification for MEPPs on Wind Up

A new exemption is created under s. 75(2.1) for employer payments on the wind up of a multi-employer pension plan to which a collective bargaining agreement applies. This provides clarification that an employer will not be responsible for the wind up deficit beyond the normal contributions that it owes to the plan.

New Requirements for Specified Beneficiaries

The bill will also increase the rights of the specified beneficiaries of a retired member as separate and apart from the retired member. It will give them the right to receive a statement about the pension plan or variable benefit account and to transfer their benefits from that plan or account. It will also allow the specified beneficiary to designate its own beneficiary for any death benefit payable.

The New Regulator

In addition to all of the above, the Act will increase the opportunities for pension regulation to occur in spaces outside of the governing legislation. Schedule 33 provides rule-making authority to the new pension regulator, the Financial Services Regulatory Authority of Ontario ("FSRA"), as well as regulation-making authority to the Lieutenant Govern in Council. Schedule 16 increases the breadth of stakeholders to which the Financial Services Regulatory Authority Applies, and Schedule 17 amends the PBA to bring it within the authority of the Financial Services Tribunal Act. The goal will be to promote the good administration of pension plans and safeguard pension benefits and beneficiaries. The FSRA will have the authority to make rules related to timing for registering a plan and filing an annual return, as well as the information required to be made available for various stakeholders. In addition, the FSRA will be able to set fees payable by plans, but it will not be able to impose penalties. All rules will be subject to approval of the Minister of Finance, after being posted on the FSRA's website for 90 days to elicit commentary from interested persons.

As the Act was only introduced for first reading this week, it will be subject to further debate and revisions as it passes through committee, second reading, and third reading.

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