

The perils of investment advice

Advice accompanying employer-sponsored retirement and savings plans can be helpful to employees but employers can be liable for bad advice

By MARY PICARD

Investment advice on employee group RRSPs or defined contribution pension plans can be helpful for employees but employers should keep in mind there are legal risks in providing it.

Canadian courts have not yet dealt with lawsuits by employees dissatisfied with their company-sponsored retirement and savings plans, so there is little legal guidance on an employer's obligations when offering investment choices in a company plan. Employers know they must act prudently and in the best interests of their employees whenever they make benefit plans available. How does that apply to investment advice in retirement

and savings plans? The answer lies in voluntary guidelines issued by the Joint Forum of Financial Market Regulators.

CAP guidelines

The voluntary guidelines issued in May 2004 by the Joint Forum, an organization of pension, insurance and securities regulators across Canada, are commonly called the "Guidelines for Capital Accumulation Plans" (CAP guidelines) and can be found at www.capsa-acor.org. The CAP guidelines describe in plain language the actions employers should take when providing capital accumulation plans of any kind — group RRSPs, defined contribution pension plans, deferred profit sharing plans and unregistered savings plans. Although the CAP guidelines are not law, they have been widely accepted and implemented by service providers and employers across Canada.

Though the guidelines say an employer *may* select a service provider who will provide investment advice to employees, this is not recommended by regulators. However, the guidelines also say employers *should* provide "investment information and decision-making

tools to assist (employees) in making investment decisions in the plan." One of the first things an employer should consider is whether or not the service provider will provide "advice" as opposed to "information."

There is nothing inherently wrong with an employer allowing its service provider to give investment advice to employees. It can be very helpful to employees to providing answers to questions such as which investment funds to pick, using a bonus to pay down a mortgage or put it in the group RRSP, or whether to sell a fund or wait until the markets go up. Employers have a legal responsibility, however, for the answers given by their service providers.

The CAP guidelines indicate employers should establish criteria for the quality of the advice and use it to periodically review what the service provider is doing. The guidelines do not elaborate on what the criteria should be, but "because the primary relationship of a service provider who provides investment advice is with each (employee), it will not be possible or practical for the (employer) to directly review the quality of the advice being provided." The only specific suggestion is to consider whether there are any complaints against the investment advisors.

Tips for employers

In the absence of any detailed, practical advice in the CAP guidelines, and in the absence of any legislation or court pronouncements, an employer can consider the following suggestions to try to limit potential legal liability for investment advice to its employees by service providers:

- Make it clear in the contract with the service provider whether or not investment advice will be provided. If the service provider is reluctant to be clear about whether it makes investment advice available, refer to the description of

investment advice in the CAP guidelines.

- Ask the service provider to confirm in writing — preferably in the contract between the service provider and the employer — the investment advice will be good advice and the service provider will be legally responsible for any complaints about it. The employer should ensure it has the right to sue the service provider if the advice given to employees is not good.

- Ask the service provider to confirm in writing, at least annually, that there have been no complaints about any of the individuals who are giving investment advice to employees.

- Emphasize to employees they are responsible for making their own investment decisions. Encourage them to use the information and decision-making tools available within their company-sponsored retirement or savings plan. Tell them they should consider obtaining independent investment advice since the employer will not be responsible for the investment performance of the funds offered in the plan.

The CAP guidelines recommend any employer who makes investment advice available to employees should put some procedures in place to monitor that advice. If employers are not interested or able to do so, then they should not make advice available since there is no legal obligation to do so.

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