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Pension mistakes – who’s liable?

Consider the following ...

You are counsel to a private sector company with an Ontario-registered pension plan. Your company, and several of its senior management representatives, have been charged under the offence provisions of the Ontario Pension Benefits Act. They must appear before a justice of the peace, pursuant to provisions of the Ontario Provincial Offences Act. They could be fined several thousands of dollars, if found guilty. The charge is that the company failed to file on time the annual return regarding the pension plan. It’s always been the job of your company’s pension consultant to complete the annual return. For some reason it wasn’t filed on time, and reminder letters from the pension regulator were not treated seriously.

Could this happen? Yes. Could it be avoided? Perhaps. The purpose of this article is to point out that corporate liability for pension errors may be unavoidable, even when the error is made by a professional service provider.

Common pension plan errors

Employers hire professionals to run their pension plans. Investment managers, consultants, actuaries, record-keepers, trustees, insurance companies...there are usually two or more of these service providers involved.

Let’s look at some ordinary mistakes in pension administration. All of them are breaches of pension legislation:

- The amounts shown on employee pension statements are wrong; they overstate the actual amount payable on retirement, due to a calculation error such as an error in unitization of a fund, or error in calculating a defined benefit amount.
- A retiree is getting more from the pension plan than he should be, due to the same type of error.
- Part-timers are not included in the pension plan, even though there’s a statutory obligation to include them.
- Regulatory filings for the plan are late (annual returns, financial statements).
- The “PA” (pension adjustment) or “PSPA” (past service pension adjustment) numbers are reported incorrectly.

These types of mistakes are not remote possibilities. They're common. Who's liable for the consequences of these errors? Is it the investment manager, trustee or insurance company who erred in calculating unit values of a fund? Or is it the actuary who erred in calculating the amount of a defined benefit, PA or PSPA? Who's responsible for the late filings, when the reason for the filing was that the auditors weren't able to get timely information from the investment manager? Who's responsible for the fact that the HR department of the employer wasn't aware that part-timers should have been put in the pension plan?

The responsibility of administrators

For Ontario-registered pension plans, the administrator of the pension plan is responsible for all breaches of the pension legislation, regardless of who actually carries out the administration. "The administrator of a pension plan *shall ensure* that the pension plan and the pension fund are administered in accordance with this Act and the regulations." (See subsection 19(1) of the Pension Benefits Act, R.S.O. 1990, c.P.8; emphasis added.) The Ontario pension regulator has said, "Although specific activities of plan administration are often delegated to specialists, the named Administrator is ultimately accountable. Administrators are not relieved of their responsibilities by reason that duties are delegated to and performed by others." (Policy A300-150, Financial Services Commission of Ontario, October 1992)

For Quebec-registered pension plans, the liability usually falls on the pension committee that administers the plan. The Quebec pension legislation has some flexibility regarding the personal liability of the individual members of the administrator pension committee. For example, if the offence is a failure to comply with the investment requirements, the administrator (the members of the pension committee) will not necessarily be liable for the breach of the legislation, if they relied on a professional's advice (See section 180 of the Supplemental Pension Plans Act, R.S.Q., chapter R-15.1)

The applicable pension legislation should be checked to determine exactly what type of liability the administrator will incur.

Of course, the administrator may have a claim against the service providers who made the mistake, depending on the terms of the agreement between them. In addition, the service providers may owe the members of the pension plan an independent duty at common law to do their jobs correctly. The service providers may also be liable for breaches of statutes. For example, if a record-keeper, investment manager, trustee, etc., is an "agent" of the pension plan administrator under the Ontario pension legislation, they may have breached the legislation, if they failed to meet a prescribed (vague) standard of care set out in the legislation.

Who is the "administrator"?

Who is the "administrator" of a pension plan? One thing is certain: the administrator is *not* Mercer, or Towers Perrin, or Sun Life, or Fidelity, or Royal Trust, etc. Even though those professional service providers may carry out most or all of the administration of pension plan, they are not the administrator under pension legislation.

The identity of the administrator depends on how the pension plan has been set up, and where it's registered. For Ontario-registered pension plans, the administrator is most often the employer. It could also be, in Ontario, a pension committee, or a board, agency or commission under special legislation. If the pension benefits are fully guaranteed, it could be an insurance company. In the case of certain types of multi-employer pension plans (where there's more than one participating employer, and they're unrelated), the administrator could be a board of trustees.

For Quebec-registered pension plans, the administrator must be a committee of individuals, with specific categories of representatives. It's permitted to have employer representatives dominate a Quebec pension committee. Quebec pension committees regularly delegate most of their responsibilities to other persons. It's common for Quebec pension committees to delegate most responsibilities of administration to the employer who established the pension plan.

You should check at least two sources to find out who the administrator of your company's pension plan is: the text of the pension plan, and the annual return filed with the pension regulators. If the administrator is described differently in those two sources, there's a problem.

Personal liability of directors, officers, officials and agents

Directors, officers, officials and agents of a company that is an administrator can be personally liable for breaches of pension legislation if they failed to put the proper governance procedures in place. For Ontario-registered pension plans, the statutory penalty provisions are dramatic:

“Every director, officer, official or agent of a corporation ... is guilty of an offence if the person,

- (a) causes, authorizes, permits, acquiesces or participates in the commission of an offence ...; or
- (b) *fails to take all reasonable care* in the circumstances to prevent the corporation ... from committing an offence.” (subsection 110(2); emphasis added)

“Every person who is guilty of an offence under this Act is liable on conviction to a fine of not more than \$100,000 for the first conviction and not more than \$200,000 for each subsequent conviction.” (subsection 110(1))

There is also a specific provision in the Ontario legislation that requires the administrator of a pension plan to supervise its agents:

“An administrator who employs an agent shall personally select the agent and be satisfied of the agent's suitability to perform the act for which the agent is employed, and the administrator shall carry out such supervision of the agent as is prudent and reasonable.” (subsection 21(7))

The Ontario pension regulator (Financial Services Commission of Ontario) began to institute charges under the offence provisions of the Pension Benefits Act a few years ago. More than a dozen companies were shocked to be summoned to court to answer charges relating to the failure to file pension forms on time. A handful of the companies were large, sophisticated companies, with reputable pension advisors. The outcome of the charges is most often a conviction and fine of a few thousand dollars. More damaging, however, is the internal embarrassment at having to deal with a provincial offence relating to a mundane pension administration function that's usually thought to be the responsibility of consultants.

No matter how full-service and professional your company's pension service provider is, there is no way to eliminate potential liability for pension errors, if your company is the "administrator". Your company can try to avoid it, with good pension governance.

Pension governance guidelines

As described above, a director, officer or "official" of a company that is the administrator of an Ontario-registered pension plan will be personally liable for statutory penalties if an error is made in pension administration, and if the prosecutor shows that the individual failed to take "all reasonable care" to prevent the offence. There's no statutory, regulatory or judicial advice as to what "all reasonable care" means. Never mind Enron and Sarbanes-Oxley; this alone should prompt senior management to ensure that proper pension plan monitoring and reporting is in place. Ideally, the board of directors should be given annual or semi-annual assurances as to the good governance of the pension plan.

There's no shortage of pension consultants and lawyers who can advise on pension governance structures. For companies that administer pension plans, a starting point is a publication of the Canadian Association of Pension Supervisory Authorities ("CAPSA"). Members of CAPSA are pension regulators from across the country. Last summer CAPSA released draft governance guidelines and a self-assessment questionnaire for use by pension plan administrators. The guidelines are now being "road tested" to determine whether additional questions should be added to the self-assessment questionnaire. The guidelines are at the CAPSA website: www.capsa-acor.org/capsa-newhome.nsf/.

Other regulatory pronouncements on pension governances can be found on the website for the Quebec pension regulator (www.rrq.gouv.qc.ca), the federal pension regulator (www.osfi-bsif.gc.ca/eng/pensions/index.asp) and the Ontario pension regulator (www.fscsco.gov.on.ca).

Don't let your company's senior management think they're at no risk of liability for mistakes made by the professionals who take care of the pension plan.