focus on Pensions

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Inadequate Employee Communications: The Pitfalls

Employers must ensure that their communication with employees regarding employee benefits is clear and comprehensive. At no time is this issue more important than when an employee is being terminated, since issues concerning notice and entitlement to compensation and benefits can often be uncertain.

The potential for employer liability when communicating employee benefits has been repeatedly exposed through Canadian court challenges. Cases such as *Allison* v. *Noranda Inc*. provide clear signals that care should be taken when communicating benefits to employees on termination. In this case, the plaintiff Mr. Allison was terminated from employment without cause at the age of 53. At the time of his termination, Mr. Allison was given two severance pay options. The first was immediate termination coupled with a lump sum severance payment. The second was continued employment over a 16 month notice period, without the obligation to report to work, and with severance pay being paid to Mr. Allison over the 16 month period. Under both options the severance amount remained constant but the choice of option impacted greatly on Mr. Allison's pension entitlement. With the lump sum option, Mr. Allison would receive a monthly pension of $302. With the continued employment option, Mr. Allison's monthly pension would jump to $887. The difference in monthly amounts is explained by the fact that under the continued employment option, Mr. Allison would have reached the age of 55, at which point he would have been entitled to a far more favourable early retirement pension benefit. If terminated prior to age 55, this enhanced benefit was not available.

Although Mr. Allison was given a letter by Noranda which described the two severance options, Noranda did not specifically draw the pension implications to Mr. Allison's attention. Noranda did, however, suggest to Mr. Allison that he seek independent advice prior to making his decision. Mr. Allison obtained advice from a sales representative of a life insurance company that sold mutual funds. Mr. Allison was advised by this individual that "it made no difference which option he elected" and that "he might as well elect the lump sum payment and invest the monies in mutual funds". Mr. Allison eventually chose the lump sum option and signed a release indicating that he had read the letter that described the two severance options. However, on retirement, Mr. Allison sued Noranda for negligent misrepresentation, alleging that Noranda failed to reveal the material differences between the pension benefits payable under the two severance options. In finding in favour of Mr. Allison, the Court stated the following:

> "Surely, an employer is under an obligation to make sufficient disclosure to enable an employee to make an informed decision in cases where the employer asks an employee to make an election with respect to separation pay options that impact significantly on pension benefits. I say this because pension information is of a specialized nature and, in the present case, within the control of Noranda as administrator of the pension scheme."

The *Noranda* decision is consistent with the recent trend of the courts to find in favour of employees in instances where the pension plan administrator or the employer did not, in the court's view, provide sufficient or accurate information to employees about their benefits, options or the implications of such options. It also suggests that telling employees to seek independent advice and obtaining releases from employees, when the employer has not provided sufficient or accurate information, will not necessarily protect the employer from liability.

Partial Wind-ups: An Update

In Quebec, employee downsizings no longer trigger partial wind-ups of registered pension plans. That is due to the "Bill 102" changes that came into effect last year.

Sponsors of Ontario-registered pension plans are not so fortunate. Whenever there is a location closure, or a significant reduction in the number of members of a registered pension plan, the Ontario partial wind-up rules may apply. Terminating employees are entitled to 100% vesting on the partial wind-up. If the pension plan has early retirement defined benefits, some members may be entitled to an enhanced benefit referred to as the "grow in" benefit. No benefits can be paid out of the plan until the Ontario pension regulator has approved of the "partial wind-up report" that must be submitted by the plan sponsor. (In some cases prior approval for some benefit payouts can be obtained.)

The following are a couple of developments of interest to Ontario plan sponsors who face partial wind-ups.

First, the partial wind-up process has been simplified in Ontario, for DC (defined contribution) plans. If the pension plan has only DC benefits (as opposed to defined benefits, or a mixture of both), then plan sponsors can use a "standardized wind-up report" which is a relatively short form. Plan sponsors may be able to complete the form without legal or consulting assistance. The Ontario pension regulator says that the wind-up approval process will be expedited, with the use of this new form. You can find it on the regulator's website (www.fsco.gov.on.ca).

Second, the "surplus" issue on partial wind-ups is still unresolved. Many plan sponsors and industry groups believe that the Ontario pension legislation does not require surplus to be dealt with on a partial wind-up. The Ontario pension regulator disagrees. The appeal of the Ontario Divisional Court's decision of *Monsanto Canada Inc.* v. *Superintendent of Financial Services* was argued before the Ontario Court of Appeal on April 30, 2002. The outcome of that case may resolve the issue. It's possible that legislative changes may also address it. Meanwhile, the Ontario pension regulator is taking the position that partial wind-up reports must "identify the surplus related to the part of the pension plan being wound up". The regulator also says that if the surplus is not being distributed to the terminating members as part of the partial wind-up, the plan sponsor must not use it for contribution holidays or expenses. The regulator wants plan sponsors to ensure that the surplus remains available for distribution to the terminating members, pending the outcome of the *Monsanto* case. We may not have a decision from the Court of Appeal for several months. Meanwhile, Ontario plan sponsors of DB plans should get professional advice if they think they may be facing a partial wind-up.

Sale of Business – Ontario Notice Requirements (Pension)

The Court of Appeal of Ontario in the decision of *Hinds* v. *the Superintendent of Financial Services, Colgate-Palmolive Canada and Bristol-Myers Squibb Canada Inc.* considered and confirmed the rules on giving notice under the *Pension Benefits Act* (Ontario) ("PBA") and the practice of the Superintendent for approving a transfer of assets and liabilities from one registered pension plan to another upon a sale of business.

In this case, Bristol-Myers Squibb ("BMS") sold its Javex business to Colgate-Palmolive ("CP") and as part of the transaction, assets and liabilities were to be transferred from a BMS pension plan to a CP pension plan. After a lengthy period of consideration, the Superintendent approved the transfer. In support of the process, BMS had filed a plan amendment and actuarial justification for the amount being transferred. Notice of the BMS application was not provided to CP plan participants or pensioners as there was no requirement under the PBA to do so. CP made a separate application to amend its plan to accept the transfer and the Superintendent approved that application.

The Superintendent approved the amount to be transferred from the BMS plan based on the actuarial methods and assumptions as filed by BMS. However, different actuarial assumptions were used for the CP plan so that the liabilities for the transferred Javex employees were set at a higher amount in the CP plan than the amount transferred from the BMS plan. This apparent shortfall was entirely attributable to the difference in actuarial assumptions.

Mr. Hinds and other CP pensioners brought an application to the Ontario Divisional Court to set aside the Superintendent's approval of the transfer from the BMS plan and for an order stating that they were entitled to notice of the transfer application by BMS and entitled to have an opportunity to make submissions with respect to that application. The Divisional Court held that they were not entitled to such notice or right to be heard. The Court confirmed that the PBA required the Superintendent to consider the BMS application in the context of its impact on the BMS plan and its participants. The interests of the persons entitled to benefits under the CP plan were to be considered separately in conjunction with the application by CP for the amendment of its plan and approval of the actuarial report with respect to funding for that plan. If there was an entitlement to notice and a right to be heard for the CP pensioners, it was in conjunction with the CP application, not the BMS application. This decision of the Divisional Court was upheld by the Court of Appeal.

This decision is important because, in these circumstances, the Court was not prepared to find an obligation to provide notice and an opportunity to be heard based on natural justice arguments when the legislation was found to require adequate notice and the opportunity to be heard in the appropriate circumstances. Fraser Milner Casgrain LLP acted for BMS in this matter.

Ontario Introduces Draft Privacy Legislation

In February of this year, the Ontario government released draft privacy legislation for comment.

The deadline for submitting comments on the draft legislation was March 31. The Ontario government has indicated that its goal is to have privacy legislation in place by January 1, 2004. If the legislation is not in place by that date provincial organizations will have to comply with the federal *Personal Information Protection and Electronic Documents Act* (the "federal legislation"), which came into effect on January 1, 2001.

The stated intent of the federal legislation is to establish "rules to govern the collection, use and disclosure of personal information in a manner that recognizes the right of privacy of individuals with respect to their personal information and the need of organizations to collect, use or disclose personal information for purposes that a reasonable person would consider appropriate in the circumstances."

Basically, the federal legislation applies to personal information about customers or employees that is collected, used or disclosed by federally regulated private sector businesses in the course of commercial activities and also applies to information sold across provincial and territorial boundaries.

As of January 1, 2002, personal health information collected, used or disclosed by the federally regulated businesses is also covered. The federal legislation will also apply to provincially regulated private sector businesses as of January 1, 2004 unless the provinces establish substantially similar legislation. Quebec has already established privacy legislation.

Employers and administrators must begin to think about the personal information they hold and how it is used. It is important to note that both the federal legislation and the draft Ontario legislation apply to information that has already been collected. Each time personal information is received or disclosed, employers and administrators must consider whether the information is subject to privacy legislation, whether an individual's consent is required and whether appropriate measures have been put in place to ensure the protection of that information.

For more information and to view the consultation draft, go to the following website:

http://www.cbs.gov.on.ca/mcbs/english/56HK6V.htm

Update on Legislative Changes

Here are some recent legislative changes across the country which may be of interest to pension plan administrators.

FEDERAL

On February 21, 2002, Bill S-3 *An Act to amend the Pension Benefits Standards Act, 1985 and the Office of the Superintendent of Financial Institutions Act* came into force and amended the *Pension Benefits Standards Regulations, 1985* (the "amended Regulations"). Of particular importance to our federally regulated clients is the additional information that must appear in annual statements provided to members on or after February 21, 2002 including:

- a statement setting out the right to access pension plan documents and related financial and actuarial documents establishing and supporting the pension plan;
- where the solvency ratio for the pension plan is less than one, the annual member statement must:
  1. disclose the value and description of the solvency ratio;
  2. describe the measures implemented to bring the plan into a fully funded position; and
  3. describe the impact on benefits in the event that the pension plan is terminated while not fully funded;
- a statement that the pension plan is fully funded on a solvency basis, if applicable.

Previously, plan members had the right under the *Pension Benefits Standards Act, 1985* to view certain regulatory information filed with the Office of the Superintendent of Financial Institutions. This right to view regulatory information was not however expressly set out in the

annual statement to plan members. Under the amended Regulations, the annual statement must include a statement setting out the plan member's information rights to access certain pension plan documents. These documents now include the statement of investment policies and procedures.

Other highlights under the amended Regulations include the following:

- the Superintendent now has the discretion to request information relating to pension plan operating expenses paid from the pension fund or direct or indirect compensation paid from the pension fund to persons rendering services to the pension plan;
- the Superintendent may request plan administrators to disclose any information that the *Handbook of the Canadian Institute of Chartered Accountants* requires to be set out in a financial statement of a pension plan.

QUEBEC

On November 29, 2000, the Quebec government adopted Bill 102, *An Act to amend the Supplemental Pension Plans Act and other legislative provisions* ("Bill 102") (see *Focus on Pensions*, February 2001), with most provisions coming into force on January 1, 2001.

On March 6, 2002, the regulation amending the Quebec Regulation Respecting Supplemental Pension Plans was published in the *Gazette Officielle du Quebec*. The regulation implements many aspects of Bill 102 and outlines, among other items:

- new rules for pension plan terminations and surplus allocation;
- procedures for establishing the additional benefit for employees whose active membership ceases more than 10 years prior to normal retirement age;
- revised content requirements for actuarial reports and member statements; and
- new rules in respect of the division of benefits on marriage breakdown.

Please contact Christian Létourneau or any other member of our Quebec office if you have any questions about Bill 102 or the regulation.

ONTARIO

The Financial Services Commission of Ontario recently released a new policy that sets out the obligations of pension plan administrators dealing with the pension benefits of a member on a pregnancy, parental or emergency leave. Employers will likely want to change their pre-leave paperwork to deal with these obligations. (Policy Number B100-206, effective May 1, 2002)

It has long been the case that the *Employment Standards Act* (Ontario) ("ESA") requires employers to continue the accrual of pension benefits (and other benefits) during pregnancy, parental and emergency leaves. If the pension plan is non-contributory (i.e. there are only employer contributions to the plan), then the employer simply continues to accrue pension benefits for the employee on leave. If the pension plan is contributory (i.e. employees are required to make employee contributions), the employer's contributions must continue to be made during such leave *unless the plan member provides written notice to the employer that the member does not intend to make his or her contributions*. There is no guidance in the ESA or the *Pension Benefits Act* (Ontario) as to how an employer should deal with the situation where the departing employee fails to give the employer written notice as to whether she or he wants to continue making employee contributions during the leave period. On a strict reading of the ESA, it appears that the employer must continue making employer contributions during the leave period, even if the employee fails to make the corresponding employee contributions.

The new policy of the Ontario pension regulator requires plan administrators to ensure that their pension plan text is clear as to how and when an employee on a pregnancy, parental or emergency leave can make her or his employee contributions. The regulator has contemplated that employees will likely make their contributions on a basis different from the employees who are on payroll. The new policy states that for pension plans that are contributory, it is important that the plan text specify the manner in which a plan member's contributions are to be made during the leave (this assumes the plan member does not elect to stop making contributions to the plan during the leave). The policy also states the following: "The plan administrator should provide sufficient information for members to make informed decisions about pregnancy, parental or emergency leave. This information might include scenarios which clearly illustrate the possible results of continuing or not continuing to participate in the plan during the term of the leave. The administrator should also provide information about the method for making contributions during the leave."

We advise employers who administer contributory pension plans to review their procedures for employees departing on pregnancy, parental or emergency leave. This new policy makes it clear that departing employees must receive specific information about the repercussions of continuing or ceasing pension accrual during their leave. It also requires plan administrators to have specific language in their plan

texts as to what arrangements can be made by absent employees to make employee contributions, in view of the fact that employee contributions by payroll may not be relevant.

Employers should also be mindful of the *Income Tax Act* (Canada) rules and restrictions on the accrual of pension benefits during leaves.

ALBERTA

With the adoption of the Revised Statutes of Alberta in January 2002, the *Employment Pension Plans Act*, RSA 2000, Ch. E-8 (the "New Act") replaced the *Employment Pension Plans Act*, Ch. E-10.05. Although no substantial revisions to the legislation were made, all section numbers in the New Act were changed. Therefore, section numbers cited in the *Employment Pension Plans Regulation* A.R. #35/2000 (the "Regulation") no longer correspond to the legislation. Until an amendment Regulation is adopted, users of the Regulation should review the Concordance for Revised Statute, found at: http://www.finance.gov.ab.ca/publications/pensions/index.html#EPPA (Employment Pension Plans Act) Updates.

MANITOBA

Bill 41, *An Act to Comply with the Supreme Court of Canada Decision in M v. H* (the "Bill") received Royal Assent and came into force in January 2002. The Bill amends certain sections in *The Pension Benefits Act* (Manitoba) pertaining to common-law relationships such that spousal obligations and benefits now extend to same-sex partners.

SASKATCHEWAN

The Pension Benefits Regulations, 1993 (the "Regulations") were amended by *The Pension Benefits Amendment Regulations, 2002* effective April 1, 2002. The amendments give retirees greater control over managing their retirement savings by allowing the transfer of locked-in assets to a Registered Retirement Income Fund (RRIF) that complies with Section 29.1 of the Regulations. Other changes include the following: there is no maximum withdrawal limit under the RRIF; a consent form must be signed by the spouse before money may be transferred to a RRIF; a spouse may waive his or her designated beneficiary status under a RRIF; and financial institutions are no longer required to file specimen documents with the Pension Benefits Branch when they wish to market a LIRA or RRIF that will accept locked-in money subject to *The Pension Benefits Act, 1992*.

NEWFOUNDLAND

The *Same Sex Amendment Act* received Royal Assent on December 13, 2001. It amends the *Pension Benefits Act, 1997* to extend the same rights to same-sex cohabiting partners that it does to opposite-sex cohabiting partners.

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