FTR Now

CPP Deductions on Disability Payments: New Guidance from the Federal Court of Appeal

Date: February 11, 2010

On January 28, 2010, the Federal Court of Appeal rendered its decision in *Toronto Transit Commission v. Minister of National Revenue* ("*TTC*"), which will be of interest to employers who provide long term disability ("LTD") benefits to their employees through self-funded or administrative services only ("ASO") arrangements. According to the Court's decision in *TTC*, Canada Pension Plan ("CPP") contributions are not required on LTD payments made under an ASO plan, even if it is determined that Employment Insurance ("EI") premiums must be made. This FTR Now considers the implications of the TTC decision.

The *TTC* case concerns an appeal of the assessment of the Minister of National Revenue that monthly ASO disability payments paid to two Toronto Transit Commission ("Transit Commission") employees constituted remuneration for pensionable employment and thus were subject to an employer's CPP contribution pursuant to subsection 9(1) of the CPP.

At the Tax Court of Canada, the Transit Commission took the position that the definition of employment under the CPP requires the performance of services and as no services were performed by the disabled employees, the LTD payments were not pensionable. In its analysis of this argument, the Tax Court considered two cases in which the Federal Court of Appeal had concluded that EI premiums are required on LTD benefits paid through ASO arrangements, where the employer bears the financial liability for the benefits and controls eligibility for payments. The Tax Court of Canada concluded that a similar analysis was applicable to the deduction of CPP contributions and held that CPP contributions are required to be deducted and remitted from LTD payments made from the Transit Commission's ASO plan.

The TTC appealed this decision to the Federal Court of Appeal.

Federal Court of Appeal Decision

The Federal Court of Appeal considered the relevant language of the CPP and held that LTD payments made under an ASO plan are not pensionable earnings because the payments are not remuneration from pensionable employment.

The Federal Court of Appeal concluded that a payment has to be made in exchange **for the actual performance of service under a contract of employment** for it to constitute pensionable earnings, and there is no performance of services in the case of an employee who is in receipt of LTD payments. In contrast, EI premiums are required in respect of insurable earnings, which are earnings that are received "in respect of" employment. The words "in respect of" have been consistently interpreted as being rather broad and, in this context, requiring a connection only to the status of being employed.

As a result, the Federal Court of Appeal held that the Transit Commission was not required to deduct CPP contributions from the LTD payments made under its ASO arrangement as the employees were not performing services during their period of disability. As further support for this conclusion, the Court found that the definition of "employment" under the CPP requires the performance of services and not just the state or position of being employed under a contract of service. This can be distinguished from the definition of "employment" in other statutes such as the *Income Tax Act* or the *Employment Insurance Act*, which refer to the status of simply being employed.

Implications

Unless the Federal Court of Appeal decision is successfully appealed, the *TTC* case provides strong support for the position that CPP contributions are not required to be deducted and remitted on LTD payments made under an ASO plan, even if it is determined that EI premiums must be made. As of the date of publication, leave to appeal to the Supreme Court of Canada had not been sought.

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