FTR Now

2010 Ontario Pension Reform Round-Up

Date: January 14, 2011

Bill 120, *Securing Pensions Benefits Now and for the Future Act, 2010*, received Royal Assent on December 8, 2010. Bill 120 was one of four separate bills passed by the Ontario legislature in 2010 which included amendments to the Ontario *Pension Benefits Act* ("*PBA*"). Without a doubt, 2010 marks the most significant overhaul of Ontario's pension system in over 20 years. Many of the new *PBA* provisions are not yet in force and require supporting regulations. Regulations are expected to be released in 2011 although the government has not announced anticipated release or effective dates.

In this *FTR Now* we provide an overview of the 2010 amendments to the *PBA*, along with specific commentary on aspects of Bill 120 which are now in effect.

BILL 236 – *PENSION BENEFITS AMENDMENT ACT, 2010*

Phase one of Ontario's pension reform stemming from the 2008 Report of the Ontario Expert Commission on Pensions was passed in May 2010 when Bill 236, *Pension Benefits Amendment Act, 2010*, received Royal Assent.

Bill 236 made extensive changes to the *PBA*, including: the introduction of immediate vesting and locking-in; increased small benefit unlocking thresholds; the elimination of partial plan wind-ups and the extension of grow-in benefits for most involuntary employee terminations occurring after July 1, 2012; the introduction of phased retirement; rules allowing for streamlined asset transfers and plan mergers; new surplus sharing rules; increased disclosure and access to information for plan members and retirees; and expanded oversight powers of the Superintendent of Financial Services (the "Superintendent").

While some provisions of Bill 236 became law on Royal Assent, many provisions will not come into force until a future date to be proclaimed by the Lieutenant Governor. For a detailed analysis of Bill 236 and a road-map for plan sponsors and administrators, please reference our December 15, 2009 *FTR Now* and our May 19, 2010 *FTR Now*.

BILL 120 – *SECURING PENSION BENEFITS NOW AND FOR THE FUTURE ACT, 2010*

Phase two of Ontario's pension reform was passed and given Royal Assent in December 2010. As reported in our October 29, 2010 *FTR Now*, the reforms contained in Bill 120 encompass a range of significant pension issues, including: the introduction of a framework for "target benefits" and "optional benefits"; changes to funding rules; changes to surplus entitlement and withdrawal rules for both wound up plans and continuing plans; reductions to the scope of Pension Benefits Guarantee Fund coverage for new pension plans and new benefit improvements; and further expanded oversight and enforcement powers of the Superintendent.

Similar to Bill 236, many of the provisions of Bill 120 will come into force on a future date to be proclaimed by the Lieutenant Governor. However, Bill 120 contains key changes that are now in force, namely, new provisions regarding: (1) the payment of fees and expenses from plans, (2) employer reimbursements from a plan in specific circumstances, and (3) plan surplus entitlement and withdrawals. These provisions are discussed in detail below.

(1) **Payment of Fees and Expenses**

Bill 120 introduced a new *PBA* provision regarding administration expenses – section 22.1. Under section 22.1, a plan administrator is entitled to receive payments from the pension fund for reasonable fees and expenses relating to the administration of the pension plan, as well as the administration and investment of the pension fund. In addition, the *PBA* now expressly permits the administrator to pay – out of the pension fund – reasonable fees and expenses to a third party service provider and/or an employer, as distinct from payments of fees and expenses to the administrator. However, no payment of fees and expenses is permitted to the administrator, third parties or employer if the payment is prohibited "or the payment of such fees and expenses is otherwise provided for" under the documents that create or support the plan or pension fund , the *PBA* or regulations.

New section 22.1 appears to be an attempt to codify the Supreme Court of Canada's decision in *Nolan v. Kerry (Canada) Inc.* ("*Kerry*") and expressly permits a plan administrator's expenses and those of its agents to be paid from the pension fund unless prohibited by the plan documents or the *PBA*. However, it is unclear whether the phrase limiting payments from a pension fund if the "…payment of the fees and expenses is otherwise provided for" is intended to be a further restriction beyond that contemplated by the *Kerry* decision. The Financial Services Commission of Ontario ("FSCO") has not yet issued policies or further guidance on this new language.

These new statutory provisions reinforce the need to review or revisit current and historical plan documentation in respect of your existing practice of charging fees and expenses to the pension fund.

(2) **Application for a Refund of Employer Overpayments**

Sections 78(4) and (5) of the *PBA* previously allowed an employer to receive a refund of an overpayment made to a pension fund. These provisions were repealed and replaced with section 62.1 of the *PBA*. Section 62.1 authorizes an employer reimbursement from the pension fund where an employer either:

(a) pays an amount in respect of the pension plan that should have been paid out of the pension fund; or

(b) makes an overpayment into the pension fund.

However, reimbursement to the employer from the pension fund is not permitted unless the plan administrator has received the prior consent of the Superintendent.

The deadline for applying for a reimbursement has been extended. Under the prior rules, the application for reimbursement had to be made within the same fiscal year in which the overpayment or payment occurred. This was problematic as many overpayments were discovered after the end of the fiscal year in which they were made. Section 62.1 extends the deadline for applying for reimbursement to the later of:

(a) 24 months after the date on which the employer made the payment or overpayment; and

(b) six months after the date on which the administrator, acting reasonably, becomes aware of the payment or overpayment.

While the extended timelines for reimbursement applications are a welcome change, they are still tight. Any plan administrator who discovers a payment error should make an application to the Superintendent for a refund without delay in order to fit within the six month deadline.

(3) **New Rules for Payment of Surplus to an Employer**

The provisions of the *PBA* have been changed to clarify the rules regarding the payment of surplus to an employer in three circumstances: a continuing plan; a full plan wind up; and a partial wind up. The new provisions enacted by Bill 120 change many of the rules as amended by Bill 236.

Under the new surplus rules now in force, surplus can only be paid to the employer if one of the following two conditions is satisfied:

(a) the employer demonstrates that it is entitled to the surplus under the terms of the pension plan (which involves a review of all current and historical documents relating to the plan and the pension fund), or

(b) a written agreement that allows surplus to be paid to the employer (which requires the agreement of at least two-thirds of the plan members and an appropriate number of former members and other persons entitled to payments under the plan).

While not yet in force, new section 77.12 of the *PBA* also provides that if the allocation of surplus is not addressed within a set period of time (to be determined by the regulations) following the partial or full wind up of a pension plan, the Superintendent has the authority to determine whether an arbitrator ought to be appointed to resolve the issue.

FSCO has indicated that, until it issues a formal surplus refund policy, the Superintendent considers the agreement of two-thirds of the total number of former members and other persons entitled to payments under the plan to be “appropriate”.

If an employer has already filed a surplus refund application with FSCO, it is recommended that legal advice be obtained regarding the impact of the new surplus rules on the application. FSCO has recently confirmed that it will review all existing applications taking into account the new requirements under Bill 120.

OTHER *PBA* AMENDMENTS

In additional to Bill 236 and Bill 120, Ontario pension law has also been changed in 2010 by the passing of Bill 135, *Helping Ontario Families and Managing Responsibly Act, 2010*, Bill 16, *Creating the Foundation for Jobs and Growth Act, 2010*, and Ontario Regulations 367/10 and 342/10.

Bill 135 received Royal Assent on December 8, 2010. A provision of this Bill contains an amendment to the *PBA* portability rules that changes the standard options required to be given to pension plan members for terminations occurring after June 30, 2011.

Bill 16, *Creating the Foundation for Jobs and Growth Act, 2010*, received Royal Assent on May 18, 2010. Bill 16 contains amendments to the *PBA* which will permit the Ontario government to enter into agreements with other designated jurisdictions regarding the governance and regulation of multi-jurisdictional pension plans (“MJPPs”). By way of further explanation, the Canadian Association for Pension Supervisory Authorities (“CAPSA”) (an association comprising members of all of the pension regulatory authorities across Canada) recently finalized the Proposed Agreement Respecting Multi-Jurisdictional Pension Plans (the “Proposed Agreement”), which aims to provide a clearer, more detailed framework for the administration and regulation of MJPPs. If adopted by all the Canadian jurisdictions, the Proposed Agreement will replace the current Memorandum of Reciprocal Agreement, which was originally signed in 1968, as well as other bilateral federal-provincial agreements with respect to the regulation of MJPPs. The Bill 16 changes to the *PBA* will allow the Ontario government to enter into the Proposed Agreement regarding the regulation of MJPPs. The Bill 16 amendments are supported by a new general pension regulation, O. Reg. 342/10, which came into force on October 1, 2010.

Finally, Ontario Regulation 367/10, relating to solvency funding relief for two specified university pension plans, came into effect on September 16, 2010.

In addition to the general pension reform discussed above, the *PBA* was also amended by Bill 133, *Family Statute Law Amendment Act, 2009*, which received Royal Assent on May 14, 2009. The amendments provide a new framework regarding the division of pensions on marriage breakdown. These provisions are not yet in force, as they are dependent on highly technical regulations that we anticipate will be released in early 2011.

Our final point is simply a reminder in relation to the *PBA* regulations relating to life income funds (LIF) and other retirement vehicles that were passed in 2009. Many of the new provisions came into effect in 2010 and on January 1, 2011. Of particular note, the new provisions allow former pension plan members who transfer amounts into a LIF to unlock up to 50% of their holdings within 60 days of the initial transfer. These provisions may make portability transfers to LIFs and locked-in retirement accounts more appealing to terminating pension plan members.

WHERE DO WE GO FROM HERE …

The 2010 reform initiatives mean that pension plan sponsors and administrators for plans with Ontario members will need to acquaint themselves with the new rules, and then take steps to change plan texts, administrative practices, member communications and forms over the coming months. The precise timing as to when specific actions must be taken will be a function of: (1) the date upon which the Lieutenant Governor proclaims the remaining provisions of Bills 236, 120 and 133 into force. (2) the adoption of supporting regulations, and (3) regulatory policy. Many questions about the scope and application of Bill 236 and Bill 120 cannot be answered until supporting regulations are adopted. We will keep you apprised of further developments on these fronts as they unfold in 2011.

To discuss how Bill 120, Bill 236, or any of these legislative changes affect your business and your pension plan, please contact any member of our Pension & Benefits Group.

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