FTR Now

Implementation of Key Ontario Pension Reform Measures is Imminent

Date: May 9, 2012

On April 30, 2012 and May 3, 2012, the Ontario Ministry of Finance issued two separate draft regulations that propose changes to the general Regulation 909 under the Ontario *Pension Benefits Act* (the "PBA Regulations"). Together, these two draft regulations are referred to in this *FTR Now* as the "Draft Regulations."

As discussed in our March 29, 2012 *FTR Now*, the Draft Regulations follow the 2012 Ontario Budget in which the Government confirmed that it intends to proclaim certain past pension reform initiatives in force effective July 1, 2012, namely: the elimination of partial wind ups, immediate vesting of pension benefits and the extension of grow-in benefits.

While very detailed and lengthy, the Draft Regulations will give effect to some, but not all, of the Ontario *Pension Benefits Act* ("PBA") reform measures that were discussed in our *FTR Now* of May 19, 2010 and summarized in our *FTR Now* of January 14, 2011.

In the first part of this *FTR Now* we describe the changes to the PBA and the PBA Regulations that will likely be in effect on July 1, 2012 and will require action. **Employers that sponsor pension plans with Ontario members should take immediate action to ensure they are ready to implement changes to their administrative practices and procedures, communications and documentation starting July 1, 2012.**

In the second part of this *FTR Now*, we describe other notable aspects of the Draft Regulations and the related PBA provisions that are expected to be effective on July 1, 2012.

CHANGES REQUIRING ACTION EFFECTIVE JULY 1, 2012

1. Immediate Vesting and Locking-In

The PBA was previously amended to provide that all pension benefits accrued by Ontario members will immediately vest and be locked-in. It is anticipated that these provisions will be proclaimed into force effective July 1, 2012.

The Draft Regulations propose amendments to support the new PBA provisions. For example, the Draft Regulations remove all references to refunds of contributions on termination of employment prior to vesting and benefits not being vested upon certain events (e.g., plan wind up). The Draft Regulations also change the prescribed information that must be included in various member statements (i.e. annual statements, termination and death statements) in light of the fact that benefits will immediately vest ***and*** be locked-in.

2. New Thresholds for the Unlocking of Small Benefits

Upon a member's termination of employment or death, a plan may provide for the settlement of the member's benefit by way of a cash payment or unlocked transfer if the benefit is sufficiently small.

The PBA was previously amended to introduce higher small benefits thresholds. It is expected that these new thresholds will also be proclaimed into force on July 1, 2012.

Although defined benefit ("DB") and defined contribution ("DC") plans are not required to adopt the higher small benefit

thresholds, many plans contain the existing rule and employers will want to consider whether amendments to incorporate the new thresholds are appropriate. The higher thresholds may reduce the costs of administering small pensions, particularly in light of the new immediate vesting and locking-in rules.

The Draft Regulations include a few changes relating to small benefit payments/transfers. The Draft Regulations provide that small benefit transfers are exempted from the commuted value transfer restrictions. The Draft Regulations also introduce a simplified (condensed) termination statement for small benefit payments/transfers.

3. Expanded Grow-In Regime

Very generally, statutory “grow-in rights” give eligible plan members an entitlement to early retirement benefits (as set out in the terms of the plan) to which they are not otherwise entitled under the terms of the plan. Currently, statutory grow-in rights are provided to eligible members of a DB plan only in connection with a full or partial wind up of their pension plan. To be eligible, a member must be employed in Ontario and have 55 or more age and service “points” on the wind up date.

In conjunction with the elimination of partial wind ups, the PBA was previously amended to provide that grow-in rights will be triggered in a broader set of circumstances referred to as an “activating event.” The Ontario Budget confirmed that these new rules will be proclaimed into force July 1, 2012. The requirement that a member be employed in Ontario and have 55 or more age and service points on the relevant date will not change under the new regime. A full wind up of a pension plan will continue to trigger grow-in rights under the new rules (partial wind ups are being eliminated from the PBA and, as a result, will not be an activating event). Any involuntary without cause termination of employment will also be an activating event.

The amended PBA grow-in rights provisions permit the Government to prescribe regulations that include or exclude circumstances from being an activating event that trigger grow-in benefits. The second of the two Draft Regulations, released by the Ministry of Finance on May 3, 2012, prescribes these activating events.

With respect to circumstances to be ***included*** as an activating event, the Draft Regulation allows a member who has received notice of termination of employment by the employer to end the employment relationship early without forfeiting his or her grow-in benefits. It provides that where a member has received notice of termination, he/she could end the employment relationship up to 60 days early and still have his/her termination considered to be an “activating event.” Such a situation may arise where, for example, in connection with his/her termination of employment, an employee is given working notice or a period of salary continuation and the employee obtains alternate employment during the notice or salary continuation period.

The Draft Regulation sets out three proposed circumstances that would be ***excluded*** from being an activating event. The exclusions are as follows:

- the termination of a member who is an employee who was hired either for a fixed term or to complete a specific task upon completion of the task;
- the member who is placed on a temporary lay-off, as defined in subsection 56(2) of the *Employment Standards Act, 2000* (the “ESA”); or
- the termination of a member who is a “construction employee,” as defined in Reg. 285/01 under the ESA.

The exclusion of terminated construction employees from the PBA’s expanded grow-in regime would appear to be intended to address the challenge of applying grow-in rights to a sector where the intermittent nature of work can trigger frequent layoffs/terminations. Employers in industries that face similar challenges may wish to make submissions to the Ministry of Finance in favour of a similar exemption.

In addition, the amended PBA ***excludes*** “for cause” terminations from being an activating event. These are terminations for wilful misconduct, disobedience or wilful neglect of duty by the member that is not trivial and has not been condoned by the employer.

The expansion of grow-in rights to all involuntary without cause terminations of Ontario members with 55 points on and after July 1, 2012 raises significant issues for employers to consider in employee termination situations. Employers will need to review current termination practices and policies as well as their particular pension plan provisions and consider whether changes are warranted in light of additional statutory pension enhancements.

4. JSPP/MEPP Election to Opt Out of Grow-In

The PBA was previously amended to permit employers (or their representatives) and members (or the representative of the members) of jointly sponsored pension plans ("JSPPs") and the administrators of multi-employer pension plans ("MEPPs") to opt out of providing grow-in rights to their plan members under the new regime, and to rescind such an election.

The Draft Regulation sets out details regarding the mechanics of the election/rescission process. It proposes that existing JSPPs and MEPPs will have until July 1, 2013 to opt out of the new grow-in rights provisions. Newly-established MEPPs and JSPPs would be able to file an opt-out election within one year of the date the MEPP is registered or the JSPP is certified.

The opt-out election must contain the name and registration number of the plan, contact information of the administrator and the effective date of the election, which can be no earlier than the date it is filed. Members, persons eligible to join the plan, trade unions and advisory committees, if any, must be provided with notice of the election in the specified manner and within specified time frames. Similar content and disclosure requirements will apply to rescission of an election to opt out.

The election to opt out of the PBA grow-in rights provisions cannot take effect retroactively. Therefore, JSPPs and MEPPs who wish to opt out will need to review the Draft Regulation carefully to ensure they are in a position to file their election on or prior to July 1, 2012 to avoid being caught by the expanded grow-in rights provisions.

OTHER AMENDMENTS TO THE PBA REGULATIONS

In addition to the foregoing, the Draft Regulations make extensive changes to the PBA Regulations which support a number of other PBA reform initiatives. It is anticipated that these changes will be effective July 1, 2012 coincident with the changes noted above.

1. "Retired Member" Provisions

As recommended in the 2008 *Report of the Ontario Expert Commission on Pensions*, the PBA was previously amended to add a separate "retired member" definition and limit the definition of a "former member" to include only deferred vested members. Various provisions of the PBA that historically referred to former members were also amended to add references to retired members. These PBA changes are not yet in force. The Draft Regulations make similar (conforming) changes to the PBA Regulations.

The Draft Regulations do not prescribe different disclosure requirements for retired members as contemplated in the Expert Commission's *Report* and prior changes to the PBA (e.g., annual retired member statements). It is expected that enhanced retired member disclosure will be forthcoming in future regulations.

2. Regulation Supporting the new Surplus Withdrawal Regime

The PBA was previously amended to introduce new surplus rules. Under the new regime, which became effective December 9, 2010, an employer can access surplus in one of three ways: (i) if the documents that support and create a plan provide for payment of surplus to the employer; (ii) if a written agreement between the employer and at least two-thirds (2/3) of members and an appropriate percentage of former members, retired members and other persons entitled to payments under the plan provide for payment of surplus to the employer; or (iii) through an arbitration award.

The Draft Regulations remove the historical provisions of the PBA Regulations supporting the prior surplus distribution regime that are no longer applicable. In support of the new surplus withdrawal regime, the Draft Regulations revise the information that must be included in wind up notices and notices of a surplus withdrawal application.

3. Individual Pension Plans

In 2011 the Federal Government amended the *Income Tax Regulations* ("ITR") to close perceived loopholes and limit tax deferral opportunities associated with individual pension plans ("IPPs").

The Draft Regulations revise the PBA Regulations for harmonization with the ITR changes.

4. Superintendent Power to Wind Up a Closed Plan

Currently, the PBA permits the Superintendent of Financial Services (the "Superintendent") to order a plan wind up in certain circumstances, for example, where all or substantially all of the members cease to be employed by the employer.

The Draft Regulations set out additional (new) circumstances which will permit the Superintendent to order a full plan wind up:

- where a plan has no active members (i.e. it has only deferred vested members, retired members and non-member beneficiaries); or
- if members of a pension plan no longer accrue pension benefits or ancillary benefits under the plan and the plan is closed to new members.

The Ministry of Finance's stated aim is to ensure the security of members' benefits in these circumstances. That said, the proposed wind up power would apply whether a plan is in deficit or in surplus and could have adverse effects for employers in either case. Where a closed plan is in deficit, a wind up order would crystallize the wind up liability and accelerate the employer's obligation to fund the deficit. Where a closed plan is in surplus, a wind up order would trigger disposition of the surplus. In addition, a wind up of a closed plan could increase plan liabilities by triggering member grow-in and portability rights.

Employers will want to pay special attention to these new provisions when considering the closure of a DB pension plan and/or the suspension of future pension accruals. Employers may also want to consider whether steps can be taken with respect to legacy plans to avoid triggering these new wind up provisions.

5. Miscellaneous

Currently, when an amendment to a pension plan reduces or increases contributions or creates or changes a going concern unfunded liability or solvency deficiency, an administrator is required to file an actuarial report or cost certificate with the Superintendent. The Draft Regulations contain an important provision which specifies that no actuarial report or cost certificate will be required as a result of an amendment to a pension plan that is required by law. This will eliminate the need for an administrator to file an actuarial report or cost certificate in conjunction with immediate vesting and other statutory imposed changes.

The Draft Regulations update the rules governing the crediting of interest on member contributions. In the Draft Regulations the substantive requirements are largely unchanged, but the current PBA Regulations have been redrafted to include (presumably for clarity) separate provisions for DB and DC benefit formulas.

The Draft Regulations include new provisions which support the new PBA requirement that members, spouses and beneficiaries must be given transfer options in respect of lump sum amounts payable from a plan (e.g., small benefit

payments, excess contributions). In this regard, the Draft Regulations include new requirements for the content of termination statements that relate to the new transfer options. The Draft Regulations also specify that a member, spouse or beneficiary who is eligible to transfer a non locked-in payment from a plan must make their election within 90 days of receiving a statement from the administrator notifying the member, spouse or beneficiary of the entitlement. The administrator will then have 60 days to complete the transfer.

Many of the changes in the Draft Regulations are of a “housekeeping” nature. The Draft Regulations remove all provisions relating to “qualifying plans” from the PBA Regulations. (The qualifying plan provisions were introduced in the early 1990s and allowed a few very large plans to be exempt from the solvency funding requirements provided that certain specified criteria were met. As no plans continue to be eligible for the qualifying plan rules, these historical provisions were removed from the PBA Regulations in their entirety.) Similarly, the historical funding rules which are no longer applicable have been removed from the PBA Regulations. The Draft Regulations also update the references to the section of the Standards of Practice of the Actuarial Standards Board to be applied when calculating members’ commuted values.

WHAT IS NOT IN THE DRAFT REGULATIONS?

The Draft Regulations do not include companion Regulations for all of the prior PBA amendments. Notably, the Draft Regulations:

- do not contain any amendments to the PBA Regulations to support the new asset transfer rules (including provisions to address “split pensions”);
- are silent with respect to solvency funding relief (including the use of letters of credit) and the measures announced in the Ontario Budget aimed at providing additional flexibility for employers.

Further regulations to support these measures, and additional features of the ongoing pension reform (e.g., the enhanced disclosure for plan amendments and annual statements for former members), are expected throughout 2012.

EMPLOYER FEEDBACK

Comments on the Draft Regulations may be submitted to the Ministry of Finance by June 1, 2012.

Information on the Draft Regulations and how you can provide comments can be obtained here and here. If you have any questions regarding the changes outlined above or if we can assist you in providing feedback to the Ministry of Finance on the Draft Regulations, please contact any member of our Pension & Benefits Group.

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