FTR Now

Ontario Government Announces Additional ORPP Design Details

Date: January 28, 2016

Editor's Note: Following publication of this communication, the Ontario government announced that the first wave of ORPP implementation will be delayed by one year to January 1, 2018. Please be sure to read our FTR Now of February 17, 2016 *for updated information on this significant development, or contact your regular Hicks Morley lawyer for details.*

On January 26, 2016, the Ontario government announced additional design details about the Ontario Retirement Pension Plan ("ORPP"), providing both new information as well as some much needed clarity on several outstanding issues. The announcement and a corresponding Technical Bulletin supplement the ORPP framework set out in the *Ontario Retirement Pension Plan Act, 2015* ("ORPP Act") and in previous announcements, which we described in our August 11, 2015 FTR Now.

Of particular interest to employers, the January 26th announcement and *Technical Bulletin* ("January 26 Update") provide additional details concerning employee eligibility, the scope of earnings that will be pensionable, the application of the "comparable workplace pension plan" exemption to multi-employer pension plans ("MEPPs"), the implications of waiting periods and voluntary contributions within employer provided registered pension plans and the ability for exempt Ontario employers to opt into the ORPP. Also described are the key parameters for the ORPP funding policy that will be established, which foreshadow the potential for benefit reductions and/or contribution rate increases to maintain the ORPP's funded status. We review these details and other information outlined in the January 26 Update of particular interest to employers in this *FTR Now*.

EMPLOYEE ELIGIBILITY

As we discussed in our August 11, 2015 *FTR Now*, the ORPP Act provides that the ORPP will be mandatory for eligible workers who are employed in Ontario, and that their employers will be required to collect and remit contributions for those workers. The ORPP Act and prior government announcements did not, however, identify the nature and scope of Ontario employment that will be subject to this requirement.

The January 26 Update clarifies that employees will be considered "**employed in Ontario**" and subject to potential ORPP coverage if they report to work at an employer's establishment in Ontario. The ORPP will also apply to employees who are not required to work at an employer's place of business but whose wages are paid from an Ontario-based employer (i.e. mobile employees and those who work from home). These rules parallel those governing the application of pension standards legislation to benefits of members who participate in multi-jurisdictional pension plans, and will be familiar to employers who administer such plans.

The January 26 Update also clarifies that **non-resident employees** who are employed in Ontario will be subject to ORPP participation to the extent that they have income above the minimum threshold of $3,500, and that is subject to Canadian and Ontario income tax. Non-resident employees who are exempt from tax under a tax treaty will be exempt from participation in the ORPP.

Finally, optional participation and exemptions will apply in the following situations and categories of employment:

- **First Nations** employers on reserves and their employees will not be required to participate in the ORPP, but will be permitted to opt-in. If an on-reserve employer chooses to opt-in to the ORPP, all of its on-reserve employees would be eligible – but not required – to participate. A participating First Nations employer or any of its participating employees could opt-out of the ORPP at any time.

- A **religious exemption** will be available for individuals who are employed as a member of a religious order, who have taken a vow of perpetual poverty and whose wages are paid to the religious order. There will also be an exemption for self-employed individuals who are members of a religious sect that oppose the acceptance of any public/private benefits and makes provisions for the support of dependent members. These exemptions mirror the exemptions under the C*anada Pension Plan*.
- **ORPP pensioners** who return to eligible employment will not be required to recommence ORPP participation but will be allowed to opt-in. The ORPP pension of any such individual who opts-in to ORPP participation will be suspended.
- **Employers who provide a comparable pension plan may opt-in to the ORPP**. As described in more detail below, employers who provide a comparable workplace pension plan are exempted from mandatory participation in the ORPP in respect of those employees who participate in the pension plan. However, those exempt employers are still able to opt-in to ORPP participation effective on or after January 1, 2020. That opt-in will apply to all of the employer's employees, and not just select subsets. Further, the full ORPP contribution rate will apply, even for employees participating in the comparable pension plan.

There has been some discussion concerning the possible extension of the ORPP to the self-employed as well as federally regulated employees, but at present there is no legislation or firm indication from the Ontario government that such individuals will be required or permitted to participate in the ORPP. Further, there is no indication that the Ontario government intends to extend optional ORPP participation to workers employed in other jurisdictions. We also note that, while the January 26 Update suggests that full- and part-time employment is subject to ORPP coverage, it is believed that this was not meant to imply an exclusion for temporary, casual or other categories of employment. The government may provide further input on these issues in future ORPP updates.

PENSIONABLE EARNINGS

It had previously been announced that the ORPP will have a basic exemption on earnings below $3,500, and that the maximum earnings threshold will be $90,000 (in 2017 dollars), indexed to the average growth of wages and salaries as outlined by Statistics Canada. The January 26 Update clarifies that earnings on which contributions and benefits are based will include **both cash and non-cash earnings, including amounts beyond base salary such as bonuses and commissions**. Though not stated expressly, this suggests that ORPP contributions will be based on taxable employment income which is reportable on an employee's T4 tax slip.

COMPARABLE PENSION PLAN EXEMPTION

In our August 11, 2015 *FTR Now* we set out key parameters concerning the comparable pension plan exemption and its application to defined benefit ("DB") pension plans, defined contribution ("DC") pension plans and hybrid pension plans, and the corresponding benefit/contribution formula requirements.

For the purpose of determining whether a DC formula satisfies the comparability test (i.e. a total contribution rate of 8%, with at least 4% contributed by the employer), the January 26 Update clarifies that **voluntary contributions are not to be included when evaluating whether the DC pension plan contribution rate threshold is met**. Similarly, it is expected that any employer contributions that are made as a match on employee voluntary contributions will also be excluded.

Further clarity has also been provided as to how the comparable plan exemption will be applied to pension plans with different levels of benefits and/or contribution formulas based on distinct membership classes (based on years of service, job title, wage type or other objective distinctions respecting the nature and/or terms of employment). Specifically, **the comparability test will be applied to each member class** to determine whether, based on the benefits and/or contributions, the class participates in a comparable pension plan and is therefore exempt from participation in the ORPP. For purposes of this evaluation, each membership class must be clearly identifiable according to the terms of the pension plan or by a collective bargaining agreement. The employer will only be exempt from participating in the ORPP in respect of those members of the pension plan for whom the benefit formula or contribution passes the comparability test and, conversely, the

employer will be required to participate in the ORPP and make contributions for any members of their pension plan in respect of whom, as a class, the benefit formula or contribution rate (as applicable) does not meet the comparability test.

The application of the comparable pension plan exemption to MEPPs had been uncertain. However, the January 26 Update clarifies that the **comparability of MEPPs will be assessed on an employer-by-employer basis, according to participating membership classes and the applicable collective bargaining or employee agreements**. Further, employers will have the option to have the comparability test applied using either the DB or DC contribution threshold. Employers will therefore need to consider the potential ORPP implications of possible future MEPP benefits and/or contribution rate changes, particularly reductions in current benefit levels or contribution rates.

For employees required to serve a waiting period prior to participating in an employer's comparable pension plan, the January 26 Update confirmed that such employees will be required to participate in the ORPP during that waiting period. Both the employee and employer will be required to make contributions to the ORPP during the waiting period.

Going forward, some employers may wish to establish new pension plans, or redesign existing arrangements so as to qualify for the comparable pension plan exemption prior to (or after) your applicable ORPP implementation date. While there are different ways in which this might be accomplished, it is important that you consider and plan for applicable employment and labour issues and risks prior to implementing changes affecting employment rights and/or benefits.

ORPP FUNDING POLICY AND POTENTIAL FOR CONTRIBUTION RATE INCREASES

The January 26 Update indicates that the ORPP is designed for benefits to be sustainable over the next 100 years. A funding policy has been established to support the sustainability of the ORPP. The funding policy contemplates that adjustments to contributions and/or benefits may necessary to compensate for the underfunding of the ORPP. A Chief Actuary will be appointed who will be responsible for performing actuarial valuations of the ORPP. The funding policy specifies the manner in which the funded status of the ORPP will be determined.

In the event of a funding shortfall, the board of directors of the ORPP Administration Corporation ("AC") have some discretion to implement certain remedial measures, including reductions to benefit indexation (discussed below) up to a certain limit. If the funding shortfall is not remedied by these actions, the AC will be authorized to increase contribution rates by up to 0.2% (the combined employer and employee contribution rate is presently set at 3.8%).

It is unclear whether contribution increases of up to 0.2% could be applied to members and employers separately, or in the aggregate. In other words, it is unclear whether the combined employer and employee contribution rate could be increased to 4.0% or 4.2%. Either way, employers required to participate in the ORPP should account for potential future increases to ORPP contributions.

In the event of a more significant funding shortfall, recommendations would be made to government on which actions are needed to return ORPP funding to sustainability. To ensure that the ORPP is meeting its intended objectives, the ORPP will be reviewed five years after full implementation and subsequently every 10 years.

If a proposed change to the ORPP is not the direct result of a funding policy adjustment and would substantially impact member benefits, consent of a least 60% of all ORPP members will be required to implement that change.

ADDITIONAL BENEFIT DESIGN AND CONTRIBUTION DETAILS

The January 26 Update confirms that the ORPP is intended to provide plan members with a 15% income replacement rate after they contribute to the plan over 40 years. The January 26 Update also provides the following information about a number of other ORPP benefits and contribution related design details:

- the maximum period during which a plan member could contribute will be limited to 52 years;
- the benefits payable to an ORPP member will be based on the individual's average earnings while participating in the ORPP;
- employees will be permitted to opt-in to making contributions and to accrue benefits during certain absences protected by the*Employment Standards Act, 2000* (Ontario) and the *Workplace Safety and Insurance Act, 1997* (Ontario), and employers will be required to continue making employer contributions in respect of such opt-in employees;
- benefits will be paid starting in 2022, and prior to 2022 only members who retire on or after attaining age 70 will receive a benefit in the form of a repayment of the contributions that they made;
- actuarially adjusted benefits will be available to members as early as 60 and as late as 71;
- prior to retirement, benefits will be indexed according to the average growth of wages and salaries as outlined by Statistics Canada;
- following retirement, benefits will be indexed according to the Consumer Price Index to account for inflation;
- certain death benefits, similar to the death benefits required under the *Pension Benefits Act* (Ontario), will be payable to a surviving spouse, beneficiary or estate of an ORPP member;
- ORPP benefits will be excluded from the valuation of family assets, and rules relating to equalization of pensions would be similar to those in place under the *Canada Pension Plan*; and
- ORPP benefits will be payable in lump sum if a member's pension entitlement on retirement is less than $480 per year (in 2017 dollars, indexed to the Consumer Price Index), or in the event of shortened life expectancy of two years or less due to terminal illness.

FOR MORE INFORMATION

Our Pension, Benefits and Executive Compensation practice group continues to monitor developments relating to the ORPP. If you have any questions, please contact Natasha D. Monkman at 416-864-7302 or any member of our practice group.