

FTR Now

AMPing up Enforcement: Ontario's Pension Regulator Gets New Teeth

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Administrators beware: as of January 1, 2018, the Superintendent of Financial Services (Superintendent) will have the power to levy significant new administrative monetary penalties (AMPs) for certain violations of Ontario's *Pension Benefits Act* (PBA).

With a new regulation filed on September 15, 2017 (the AMPs Regulation), the related amendments to the PBA will come into force as of January 1, 2018. We briefly discussed the proposed AMP regime in our [2017 Ontario Budget FTR Now](#). This *FTR Now* describes the new AMP regime in more detail, in light of the new AMPs Regulation.

Current Regime

At present, contraventions of the PBA constitute regulatory offences for which offenders are liable upon conviction after trial to a fine of not more than \$100,000 for a first offence and not more than \$200,000 for each subsequent conviction. As the prosecution of regulatory offences requires extending due process rights to accused persons, the process is relatively time-consuming and expensive. Accordingly, prosecutions under the PBA have been rare.

More frequently, the Superintendent exercises the power to issue orders for compliance under the PBA. Section 87 of the PBA provides the Superintendent with the power to issue orders where the Superintendent is of the view that (i) a pension plan is not being administered in accordance with the PBA or the plan terms, (ii) the plan does not comply with the PBA, or (iii) the administrator or any other person is contravening the PBA. An order under section 87 of the PBA can require a person to take or refrain from taking any action in respect of the pension plan or pension fund. If the Superintendent issues a Notice of Intended Decision (NOID), the subject of the notice may request a hearing before the Financial Services Tribunal (FST).

New AMP Regime

By contrast, the new AMP regime, which does not replace the existing fine-based regime, provides the Superintendent with expansive authority to levy AMPs in specific circumstances, due to non-compliance with:

- prescribed PBA requirements,

- an order of the Superintendent, or
- obligations assumed by way of undertaking within the last five years.

The AMP Regulation introduces penalties for two tiers of violations. **General administrative penalties** are levied on more substantive violations of the PBA, non-compliance with orders of the Superintendent and obligations assumed by way of undertakings. The AMP Regulations specify other violations subject to the general administrative penalties, such as the duty to administer a pension plan in accordance with its terms, failure to provide prescribed notices in accordance with the PBA (e.g. adverse amendment notices, annual and biennial statements, termination or retirement statements) and failure to comply with funding or transfer related deadlines. **Summary administrative penalties** are levied on more procedural violations, such as late filing of audited financial statements, amendments to Statements of Investment Policies and Procedures, the Annual Information Return and actuarial valuation reports.

Both types of offences are subject to maximum penalty limits of \$10,000 against an individual and \$25,000 against a corporation or other legal entity. Amounts owing for an AMP are due on the date stated in the order requiring payment but will not be due earlier than within 30 days from the date of the order. If a hearing is requested by the recipient of the AMP order, the penalty, if determined to be payable, is also due within 30 days after the matter is conclusively dealt with, unless the order specifies a longer time period for payment. An AMP cannot be paid from the pension fund and must be paid by the person/entity found in non-compliance with the PBA.

General Administrative Penalties

When determining the amount of the general administrative penalty, the Superintendent is required to consider only the following factors:

1. Was the contravention intentional, reckless or negligent?
2. What was the harm or potential harm arising from the contravention?
3. Did the offender attempt to mitigate any loss or take remedial action?
4. Did the offender derive, directly or indirectly, an economic benefit from the contravention?
5. Does the offender have a history of any contraventions within the last five years?

General administrative penalties require the Superintendent to give notice of the intention to impose the AMP (through a NOID) to the person/entity allegedly in non-compliance. That party then has 15 days to request a hearing before the FST to challenge the proposed AMP. If no hearing is requested, the Superintendent may order the payment of the AMP. The PBA does not require the Superintendent to discuss the alleged violation of the PBA with the party before issuing the NOID. It would be expected that in practice, these discussions would occur in order for the Superintendent to make its determination that the party is in non-compliance according to the factors set out above.

Summary Administrative Penalties

The second tier of administrative penalties applies to summary administrative penalties for which the Superintendent must provide the alleged violator with a reasonable opportunity to make written submissions as to why the AMP should not be imposed before it is imposed. This tier of AMPs applies to more technical breaches of the PBA. After receiving the written submissions, the Superintendent may order payment of an AMP. The person/entity allegedly in non-compliance is granted a right of appeal to the FST within 15 days, following which payment is stayed until the final disposition of the matter. The amount of the AMP for summary administrative penalties will be either \$100 or \$200 per day, depending on the offence in question, subject to the maximum limits applicable to all AMPs.

Industry Response to the AMP Regime

The AMP Regulation was released in draft form earlier this year and attracted a great deal of commentary from interested stakeholders during a public consultation period. One concern that has been raised is that the regime fails to tailor the flat fee penalties to the size of the plan and its liabilities, resulting in a disproportionate impact on smaller plans. Another concern is the inability to pay the penalty from the pension fund, which creates several practical issues for plans administered by a board of trustees or a board of directors, who may be faced with personal liability if an AMP is levied.

The reality is that the presence of AMPs is common in regulated industries and the Superintendent already has authority to issue AMPs in other industries it regulates (e.g. the insurance industry). AMPs are regarded as a mid-spectrum enforcement tool to promote compliance short of prosecution and fines, which involve lengthy, unduly complex and costly legal procedures. The AMP regime is intended to provide a faster, more streamlined system for PBA enforcement than through the alternative fine-based prosecution system, while preserving the right to a hearing before the FST in disputed instances. The Superintendent's existing power to order administrators to take actions to comply with the PBA continues to exist, and can be used in conjunction with the imposition of an AMP.

The introduction of AMPs should not be viewed in isolation from broader changes to the regulation of pension benefits in Ontario, including the transition of the regulation of pensions from the Financial Services Commission of Ontario to the Financial Services Regulatory Authority (FSRA). We discuss the proposed new regulator in our [2017 Ontario Budget FTR Now](#). It is anticipated that the staffing and funding levels of the FSRA will permit enhanced enforcement of the PBA, in particular, through the use of AMPs.

Next Steps for Administrators

Once the AMP regime is in force, administrators can expect the Superintendent to use them to

enforce compliance with the PBA. Given that the new AMP regime comes into effect on January 1, 2018, now is the perfect time for administrators to engage in a pension plan administration and governance compliance check-up to ensure that the existing governance structure is effective at ensuring that regulatory obligations are met.

If you have any questions regarding the new AMP regime and its potential impact on the administration of your pension plan, please contact [Stephanie Kalinowski](#), [Natasha Monkman](#) or another member of our [Pension, Benefits and Executive Compensation practice group](#).

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