FTR Quarterly

FTR Quarterly – Issue 7

Date: November 2, 2017

In This Issue

Featured Articles

Extended EI Benefits – Top 3 Ways Your Workplace Could be Affected

By: Alyson Frankie and Henry Dinsdale

A number of recent changes to the *Employment Insurance Act* (EI Act) will provide employees with certain new Employment Insurance (EI) benefits and the ability to receive maternity and parental EI benefits over a longer period of time. The legislation implementing the 2017 Federal Budget, Bill C-44, the *Budget Implementation Act, 2017, No. 1* (Bill C-44) received Royal Assent on June 22, 2017, and relevant provisions amending the EI Act will come into force on December 3, 2017.

Changes to corresponding leaves of absence under the *Canada Labour Code* (the Code) were also made by Bill C-44, which will also come into force on December 3, 2017. We are further anticipating changes to the statutory leaves provided under the Ontario *Employment Standards Act, 2000* (ESA) based on proposed changes to Bill 148, the *Fair Workplace, Better Jobs Act, 2017* (Bill 148) made by the Standing Committee on Finance and Economic Affairs.

Personnel Planning

The pending changes to the EI Act will provide employees taking pregnancy leave and parental leave with more flexibility, both in terms of when they can start their EI benefits and for how long they can receive the benefits.

Currently, the maternity EI benefit period can begin as early as 8 weeks before a woman's due date. Once the changes to the EI Act are in force, the EI maternity benefit period can begin as early as 12 weeks before her due date. The one-week waiting period continues to apply, and the number of weeks of paid maternity EI benefits remains at 15.

A new benefit option will also be available for parental benefits under the EI Act. In addition to the current option to receive maternity EI benefits for up to 15 weeks and parental EI benefits for 35 weeks, parents will also have the option to extend the period of time over which they receive parental EI benefits. The extended benefit allows a parent to elect to receive parental EI benefits at a reduced rate over for 61 weeks instead of at the regular EI rate for 35 weeks, for a combined total of 76 weeks of maternity and parental EI benefits.

For federally regulated employers, corresponding changes to maternity and parental leaves will also come into force under the Code. Proposed amendments to the ESA would similarly extend parental leaves for provincially regulated employees in Ontario, for a combined pregnancy and parental leave total of 78 weeks. The existing ESA provisions already provide that a

woman can commence pregnancy leave up to 17 weeks before her due date.

Employers will need to take these new options into account when planning and managing workforce needs.

Managing Top-Up Plans

The changes to the EI Act may also have a significant impact on top-up plans. Depending on the language in the top-up plan, employers may automatically experience significant increased costs associated with their top-up plans if they are left unamended in the face of the new legislation.

Under the new extended parental leave option for EI benefits, employees can elect to receive 33% of weekly insurable earnings instead of 55% of weekly insurable earnings. Employer top-up plans that subsidize the difference between EI benefits and a target replacement percentage of an employee's average weekly wages may be faced with paying a higher subsidy than intended.

Employers should review their top-up plans in the context of the new legislation to determine whether is appropriate to amend their plans to account for this new option. Possible amendments could limit the top-up to 45% of an employee's average weekly wages or provide an option to receive the top-up over a longer period of time, at a reduced rate.

Updating Collective Agreements, Policies and Administrative Practices

In addition to the changes discussed above, some EI benefits will be expanded to a broader range of individuals and new benefits will be available.

Amendments to the EI Act will expand eligibility for EI benefits for employees on leaves of absence to care for a critically ill or injured child. Parents will have the option of sharing the 35 weeks of benefits with other family members. The corresponding 37 week unpaid leave provided under the Code will also be amended to include family members for federally regulated employees. The ESA already provides a 37 week unpaid leave to care for or support a critically ill child and there are currently no proposals to extend eligibility beyond the child's parents.

The amendments also provide for a new 17 week unpaid leave of absence to care for an adult family member recovering from a critical illness or injury under the *Code*. A new, corresponding EI benefit will also be available for 15 weeks during an adult caregiving leave. There is an existing 8 week unpaid family caregiver leave under the ESA to care for or support a family member with a serious medical condition, but no changes have been proposed to the length of this leave to match the changes to the EI Act. For more information on the proposed changes to ESA leaves, see our *FTR Now*, Big Changes to Bill 148 after Committee Review.

The regulations to the EI Act have not yet been amended to add the new adult caregiver benefit to the list of benefits covered by the top-up rules, which currently include only maternity, parental, compassionate care and parents of a critically ill child benefits. If it is added, employers who offer a top-up plan for compassionate care leave or to care for a critically ill child may wish to consider whether to expand supplementary benefits to employees taking the adult caregiving leave.

For employers with unionized employees, the changes to the EI Act and corresponding statutory leave provisions could present challenges where top-up provisions are enshrined in the language of a collective agreement. Employers entering collective bargaining should be sure to carefully review the relevant collective agreement language to determine whether amendments to the language should be sought in light of the new legislation.

Employers in between bargaining cycles should proactively assess how their collective agreement language will be impacted by the changes to the legislation and determine whether it would be prudent to approach their trade union in advance of December 3, 2017 to address any interpretation or application concerns.

Additional information on these changes is available in our previous publications:

- Federal Post – Fifth Edition, Federal Budget 2017
- New and Longer EI Benefits Are Coming
- Big Changes to Bill 148 after Committee Review

Reminder: Reduced EI Waiting Period

Before these changes were introduced, the EI waiting period was reduced from two weeks to one week effective January 1, 2017. The EI Regulations were amended to allow for a four-year transition period that ends on January 3, 2021. However, employers should review their supplemental unemployment benefit plans, top-up plans and short- and long-term disability plans to determine whether changes are necessary. More information on these changes is available in our prior publications here and here.

FTRQ&A – Chronic Mental Stress

By: Jodi Gallagher Healy

Following legislative reforms to the workplace safety and insurance regime in Ontario to address the issue of chronic mental stress, the Workplace Safety and Insurance Board (WSIB) recently released a new policy on adjudicating these types of claims. We asked London partner Jodi Gallagher Healy to anticipate questions employers will have about the potential impact of the new WSIB policy on workplaces.

What is changing about how the WSIB deals with chronic mental stress claims?

As of January 1, 2018, certain types of workplace chronic mental stress claims will be compensable under Ontario's *Workplace Safety and Insurance Act, 1997.* Currently, only traumatic workplace mental stress is compensable for WSIB purposes. The WSIB plans to have a dedicated intake team to address chronic mental stress claims once the new area of entitlement comes into effect.

What led to this change?

In 2014, the Workplace Safety and Insurance Appeals Tribunal (WSIAT) found the exclusion of workplace chronic mental stress injuries from entitlement was unconstitutional. The Ontario Legislature passed Bill 127, which amended the legislation to allow benefits to be granted for chronic mental stress injuries arising out of or in the course of employment. The WSIB conducted a consultation in the Summer of 2017 on a draft policy that will be used to adjudicate claims. A revised chronic mental stress policy was released mid-October 2017 that took into account some of the feedback provided by stakeholders. It will go into effect as of January 1, 2018.

What types of situations will fall under the new chronic mental stress policy?

The WSIB's policy states that workers will be able to obtain entitlement if a substantial workplace stressor is the predominant cause of an appropriately diagnosed mental stress injury such as acute stress disorder, post-traumatic stress disorder (PTSD) or an anxiety or depressive disorder. The policy explains that "substantial" workplace stressor means stressors that are excessive in comparison to normal pressures/tensions experienced by workers in similar circumstances. However, claims will not be denied simply because all workers in an occupation are exposed to high stress levels. Consistent exposure to a high level of routine stress over time may qualify as a substantial workplace stressor under the policy. The scope and meaning of these concepts will undoubtedly be the subject of extensive litigation.

The WSIB's policy states that there is still no entitlement for chronic mental stress caused by the employer's decisions or actions that are part of the employment function such as discipline, changes in working hours, demotions or termination of employment. Interpersonal conflicts in the workplace will not generally warrant entitlement unless the conflict amounts to workplace harassment or results in egregious or abusive conduct.

Will this change impact all workplaces in Ontario?

This change impacts all workplaces that fall under mandatory WSIB coverage or have obtained optional coverage from the WSIB.

How does this change impact current chronic mental stress claims?

The new policy only applies to chronic mental stress injuries that occur on January 1, 2018 or later. Chronic mental stress claims that arose prior to that date will continue to be denied by the WSIB at the Operational and Appeals Branch levels. To be granted entitlement for chronic mental stress injuries that occur prior to January 1, 2018, a worker will likely need to appeal their case to the WSIAT and make the same arguments raised in the earlier litigation – that excluding chronic mental stress workplace injuries from entitlement is unconstitutional.

Will employers' WSIB rates be affected?

The WSIB advised stakeholders that they incorporated the costs for chronic mental stress claims in setting premiums for 2018, with some cost control measures in place. The WSIB's method of estimating the increased cost to the system by considering the number of traumatic mental stress and PTSD claims over the last 10 years is highly problematic as those provisions apply only in very narrow circumstances. The scope, frequency and cost of chronic mental stress claims will likely be much broader so I'm concerned that this new area of entitlement will be much more costly than the WSIB anticipates. Implementing this new policy as of January 1, 2018 is particularly problematic because the 2018 injury year (along with claims experience in 2013-2017) will impact employers' premiums under the new WSIB rate framework that is scheduled to be implemented as of January 1, 2020.

What can employers do now to prepare for this change?

To prepare for these changes, employers should:

- Assess sources of chronic workplace stress and implement measures to minimize those stressors.
- Consider developing cognitive/psychological demands analyses for key roles that are exposed to high routine stress.
- Ensure effective systems and processes are in place to investigate and remedy workplace harassment and other workplace stressors.
- Ensure that those responsible for WSIB claims management understand the new policy and its interplay with other policies and programs, such as private disability insurance, attendance management programs, and the WSIB's pre-existing conditions policy. Seek advice where needed.
- Think creatively about possible suitable modified work in chronic mental stress claim situations to minimize loss of earnings benefit exposure. Loss of earnings can be a very costly part of claims, particularly stress claims.

Pension Plan Funding Reform: At the Precipice

By: Natasha Monkman

Following substantial consultations in 2016, the Ontario government recently announced proposed changes to the funding

rules applicable to Ontario single employer defined benefit pension plans (SEPPs) and target benefit multi-employer pension plans (MEPPs). Critical details regarding these changes are expected to be included in eagerly awaited amendments to the *Pension Benefits Act* (PBA) and the PBA regulations this Fall. While we are still waiting on these final details, the proposed changes represent a significant shift in the pension funding landscape for employers sponsoring SEPPs. Some of the companion proposals will also affect employers who provide defined contribution (DC) pension plans.

Pension Plan Funding Reforms

Currently, Ontario employers that sponsor DB SEPPs must fund the normal cost of the pension benefits accruing under their plan each year, as well as any going concern deficiency and any solvency deficiency.

Both going concern and solvency funding are determined through regular actuarial valuations. The going concern valuation examines a pension plan as if the plan were to continue indefinitely. The solvency valuation examines the funded status of the pension plan as if it were to wind up on the date of the valuation and all liabilities became due.

In an extended low long-term interest environment, the solvency funding requirements have resulted in volatile and unpredictable cash funding requirements that have proven to be onerous for employers and are likely a significant factor in the decision of many employers to switch to DC plans. As a result, employers have called for changes to the pension plan funding rules to make SEPPS more sustainable. The government heeded those calls by reviewing the pension funding rules in 2016 and moving towards the changes that have now been proposed.

The following chart compares the current funding rules with the proposed rules for both SEPPs and MEPPs:

Current	Proposed
Fund to 100% Fund deficit over 15 years New funding schedule each valuation	Fund additional cushion Fund deficit over 10 years Consolidate deficits
Fund to 100% Fund deficit over 5 years	Fund to 85% Fund deficit over 5 years No funding at or above 85%

Current	Proposed
Fund to 100% (through fixed contributions) Fund deficit over 12 years	Fund additional cushion (through fixed contributions) Fund deficit over 15 years
Large MEPPs exempt on temporary basis	Target benefit MEPPs permanently exempt

The new solvency funding rules will eliminate solvency funding for most pension plans (95% of Ontario SEPPs are funded at or above 85%). The most significant unknown detail of the new funding regime is the level of the cushion that must be funded (also known as a Provision for Adverse Deviation, or PfAD). Until this detail is released, employers cannot project the financial impact of the changes on their funding costs.

Significant Complementary Reforms

The proposed funding changes are the focus of most employers. However, there are several proposed complementary

changes that will accompany the funding reforms that employers should note.

1. New requirement to establish funding policy and governance policy. The PBA does not currently require employers and administrators to have funding policies or governance policies. This new rule will require all employers and pension plan administrators to establish and maintain funding policies and governance policies, which are anticipated to be required to have minimum prescribed content. It appears that the government intends for the governance policy requirement to apply to all pension plans, including DC plans.
2. Administrator discharge for annuity buy-outs. In recent years, there has been increased discussion of the benefits of de-risking DB plans through annuity purchases on behalf of deferred or retired members. Under the PBA, however, the administrator remains liable for the bought-out benefits, causing many administrators to avoid this approach. The government has indicated that it will amend the PBA to discharge administrators from liability where annuity buy-outs are completed (presumably if prescribed conditions are satisfied).
3. Restrictions on benefit improvement and contribution holidays. As a *quid pro quo* for easing the solvency funding requirements, the government will implement restrictions on benefit improvements when a DB plan is underfunded and establish restrictions on when contribution holidays may be taken by employers. The benefit improvement rules, in particular, will need to be factored in by employers negotiating benefit improvements with bargaining agents, as accelerated funding of such changes will likely be required.
4. Enhanced Pension Benefits Guarantee Fund (PBGF) coverage. The PBGF, which is unique to Ontario, currently insures DB pension plan benefits up to the first $1,000 per month. The government has indicated that coverage will increase up to the first $1,500 per month. Employers pay PBGF premiums, which are expected to increase as a result of the enhanced coverage.
5. Benefits under MEPPs. The government indicated that there will be specific reforms relating to the rules applicable to MEPPs for benefits available on termination and for the reduction of benefits when the plan is underfunded. No details have been provided regarding the extent of these reforms.

More information coming soon

Most of the outstanding details regarding the funding and related reforms will soon be available and employers should review the new rules as soon as possible to fully understand what this means for their pension plan.

In the meantime, for SEPPs with actuarial valuations coming due prior to September 2018, the government has introduced additional temporary solvency funding relief that should be considered (deferring new solvency funding payments for up to two years).

Our Hicks Morley Pension, Benefits and Executive Compensation lawyers are available to assist employers considering this relief and to prepare the related notices to members if such relief is taken. We will also continue to monitor and report on all developments regarding the proposed funding reforms.

Featured Lawyer

Stephanie J. Kalinowski