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Times, They are a Changing in the Pension & Benefits World

January 28 and 29, 2014

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A Plan Sponsor's Guide to the Pension Universe: 2014 and Beyond

Elizabeth Brown
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Back to Basics

- The private pension system (workplace pension plans) are designed to provide retirement income to employees
- Cost of providing pensions is of upmost importance to employers: Managing risk is also key
- There are two core metrics:
    1. monies going into the pension fund
    2. amounts paid from the pension fund

The Two Ends of the Spectrum

Traditional DB Pension Plan

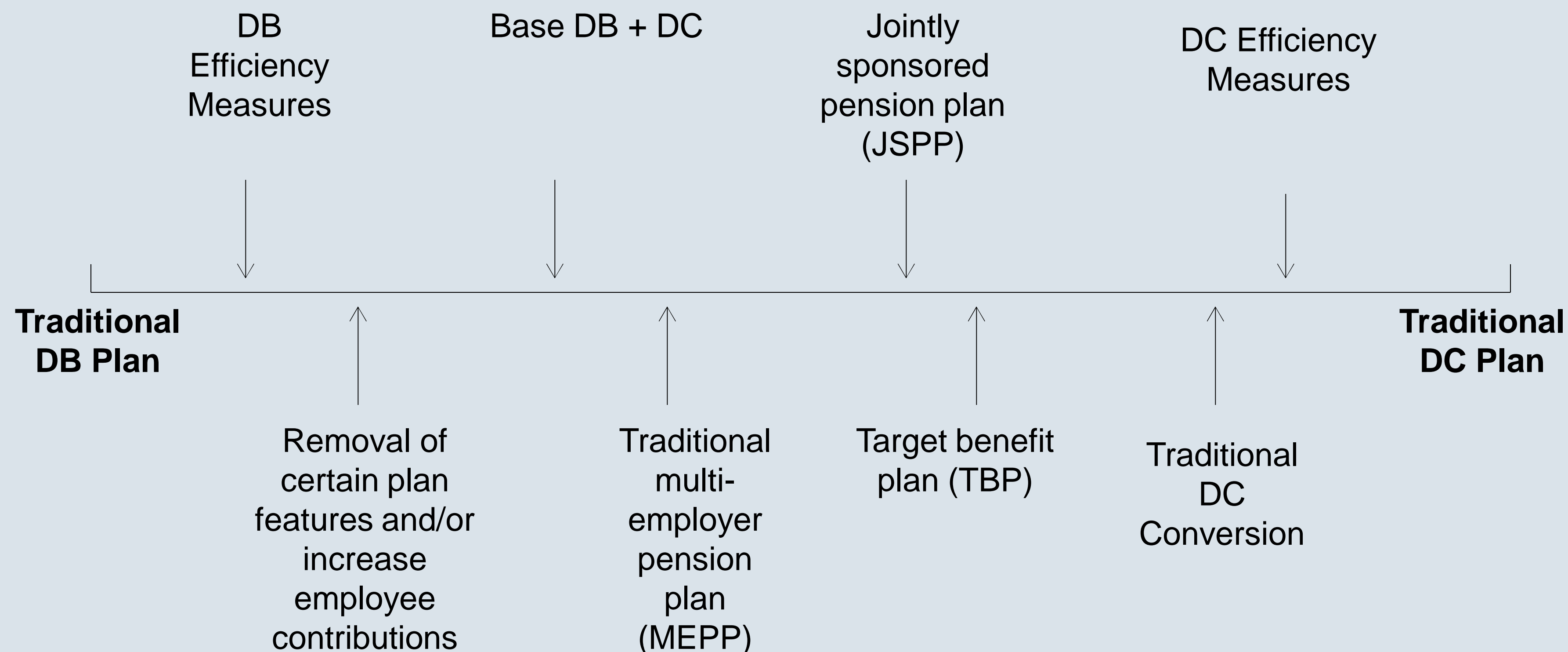
- benefits payable to members are Fixed
- employer funding obligation is Variable

DC Pension Plan

- employer contribution rate is Fixed
- benefits payable to members are Variable

➢ Reform measures and new plan designs are largely aimed at making current DB and DC models more efficient or finding a middle ground between the DB and DC extremes

The Universe



The Traditional DB Plan

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DB "Efficiency Measures"

- Pooling of assets (bcIMC, AIMCO, Caisse in Ontario, the Morneau Report)
- Plan mergers and consolidation of administration in Ontario: Hydro plans and University plans

"Stripping" the DB Promise

- Removal of early retirement subsidies
- The *ROM* decision adopts a narrow interpretation of accrued benefits which allows employers to cap accrued benefits
- Reduce DB benefit formula on a going forward basis
- Removal of guaranteed indexing (*CAMI* proceedings)
- Increase employee contribution rates

Base DB + DC

- "Base" traditional DB benefit formula – little or no ancillaries
- Top-up DC component (employer or employee paid)
- Awarded in *Air Canada* arbitration
- Top-up DC flex contributions (employee paid)

Conclusions

- In all 3 cases, traditional DB design remains
- The employer funding obligation remains

  Variable: High Employer Risk

Traditional MEPPs

Key features:

- historically-established within an industry and for employees of the same union
- employer contribution rate Fixed under the terms of a collective agreement (e.g., $ amount/hours worked)
- benefit formula Fixed

Traditional MEPPs (Cont.)

- BUT where contributions are not sufficient to provide benefits under the plan, action must be taken
- accrued benefits can be reduced, including benefits in pay to retirees (Quebec is an exception)
- thus, practically, the benefit formula is not Fixed and although employer contribution rates are Fixed in the collective agreement, there is tremendous pressure to increase employer contribution rates when a plan is underfunded

JSPPs

JSPPs

Key features:

- contributory DB benefits only
- members are required to contribute to deficits
- joint sponsors determine governance (wide range of possible structures)
- accrued benefits can only be reduced on plan termination
- generally exempt from solvency funding
- benefit and contribution levels Variable prospectively according to plan experience

JSPPs

- Extensive public sector experience in Ontario: Teachers, OMERS, HOOPP, OPSEU Plan
- Detailed statutory framework developing
- Little experience to date with single employer JSPPs
- Practically, member involvement governance is the trade-off for shared funding risk
- "JSPP Plus": in 2012 PBA was amended to cap employer contributions to a number of public sector plans for 5 years

TBPs

Key features:

- not DC but employer contributions are Fixed
- in Ontario contributions must be set out in a collective agreement
- benefit levels Variable, according to experience
- accrued benefits can be reduced, including benefits in pay to retirees

TBPs

- Resembles traditional MEPPs
- New Brunswick is the poster child
  - base benefit (statistical modelling provides that there is a 97.5% probability that base benefits will not have to be reduced over next 20 years)
  - earnings upgrades and indexing conditional on affordability

Traditional DC Conversion

- Move to pure DC on a prospective basis
- In most jurisdictions (including Ontario) conversion of past DB benefits to a DC amount can't be forced
- *ROM Decision* confirms that FAE formula can be capped
- In most unionized workplaces, it is very difficult to negotiate conversion for existing employees, typically negotiated for new hires only

DC "Efficiency Measures"

- Measures to give DC members access to low-cost investment options
- Employer-directed investments of member accounts
- Ontario PBA amended to allow for payment of "pensions" directly from a DC plan
- PRPP introduced as low cost alternative to DC RPP

The Pension Promise

- Recent events have caused employers and industry experts to examine the best model for providing benefits at a low cost and low risk to the employer

Short-Term Predictions

Short-Term Predictions

- No single fix will meet the needs of all employees and employers
- Trend towards DC will continue
- JSPPs and TBPs will continue to evolve
- Will require compromise and open minds to sharing both risk and reward
  - opportunities to improve DC plans
  - opportunities to maintain DB plans where DB is highly valued

There's a Battle Outside And it is Raging… Case Law and Legislative Update

Stephanie Kalinowski
Susie Taing

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Battles Raging

- Over the assets of insolvent plan sponsors…

Sun Indalex Finance, LLC v. *United Steelworkers* (2013) (S.C.C.)

Facts

- *Indalex* filed for CCAA protection in April 2009
- Court granted a stay, then in a later motion gave the debtor-in-possession agreement (DIP) lender a super-priority charge
- Salaried DB Plan was wound up prior to stay order, Executive DB Plan was ongoing, both had deficits
- sale proceeds were less than what was owed to DIP lenders, leaving no money for pension deficits
- Plan beneficiaries/union asserted the PBA deemed trust over sale proceeds and asserted *Indalex* was in a conflict of interest by seeking the stay and DIP lender motions

Sun Indalex Finance, LLC v. *United Steelworkers* (2013) (S.C.C.)

Split Decision

- PBA deemed trust is equal to the full wind up deficit, not only unpaid contributions up to the date of the wind up
- deemed trust for wind up deficit is not created until plan wind up
- CCAA Court could grant super-priority to DIP lenders over deemed trust
- *Indalex* did not breach its fiduciary duty to avoid conflicts of interest when it filed for the stay order, but did breach that duty when it brought motion for DIP lender super-priority without giving notice to plan members

Grant Forest Products Inc. (Re) (2013) (Ont. S.C.)

Facts

- June 2009, initial CCAA stay order
- DB plans not wound up at time of the stay order
- in 2012, pension regulator ordered wind up of both plans
- secured creditor wanted to petition GFPI into bankruptcy to access sale proceeds held back by the Monitor
- distinguished from *Indalex*
  - plans were not wound up at time of initial order
  - no request for DIP financing

Grant Forest Products Inc. (Re) (2013) (Ont. S.C.)

Decision

- Court interpreted and applied *Indalex*
- deemed trust did not apply to sale proceeds
- provincial pension priorities will apply prior to the initial stay order, at which time the federal insolvency rules will begin to apply
- allowing deemed trust to take priority after initial order affects predictability and certainty of CCAA process

Aveos Fleet Performance Inc. (2013) (Que. S.C.)

Facts

- in March 2012, *Aveos Fleet Performance* applied for CCAA protection
- initial CCAA stay order suspended special payments but allowed payment of normal costs
- May 2012, OSFI terminated the plan
- argued that federal PBSA deemed trust provisions required *Aveos* to make special payments
- secured creditors claimed priority over assets

Aveos Fleet Performance Inc. (2013) (Que. S.C.)

Decision

- rights of secured creditors defeated deemed trust
- secured creditors had encumbered all of the assets before the deemed trust arose
- deemed trust could not arise before special payments were in default
- no provision in the CCAA that confirms or preserves the deemed trust in priority to other claims
- OSFI took too long to raise issue; too late to vary initial order

Post-*Indalex* World

- Although *Indalex* interpreted the scope of the PBA deemed trust to include wind up deficits, commercial courts are applying *Indalex* in a way that generally limits the effectiveness of the deemed trust
- Timing of wind up is important
- The terms of the initial stay order, and the predictability and flexibility it provides are important
- Objections by members and regulators should be raised in a timely fashion

Battles Raging

- Over entitlement to both severance and pension…

IBM Canada Ltd. v. *Waterman* (2013) (S.C.C.)

Facts

- *Waterman* was dismissed during a corporate restructuring
- entitled to a full, unreduced pension at termination
- *Waterman* rejected severance package, pursued claim for wrongful dismissal and was awarded 20 months' reasonable notice
- *IBM* wanted to reduce reasonable notice damages by *Waterman's* pension entitlement

IBM Canada Ltd. v. *Waterman* (2013) (S.C.C.)

Decision

- SCC concluded that the pension was not deductible:
  - pension is not an indemnity against wage loss;
  - pension is a free-standing employee entitlement; and
  - policy concern that companies would dismiss pensionable employees over non-pensionable employees

IBM Canada Ltd. v. *Waterman* (2013) (S.C.C.)

Implications

- the deductibility of benefits/payments from reasonable notice is dependent on contract language

Battles Raging

- Over pension entitlements and life insurance benefits after an employee has died…

Love v. *Love* (2013) (Sask. C.A.)

Facts

- employee designated spouse as his beneficiary under group life insurance policy
- following his divorce in 2006, employee emailed HR department to ask for form needed to change beneficiary from former spouse to his son "on my pension, etc."
- employee returned improperly completed form to HR
- employee died in 2009

Love v. *Love* (2013) (Sask. C.A.)

Decision

- employee's 2006 email and incomplete beneficiary designation form did not satisfy formalities for valid designation under the *Insurance Act*
- email was nothing more than a statement of intention
- rectification doctrine was successfully used to reflect the deceased employee's true intentions
  - employee took steps to give form legal effect
  - employer and insurer acted on form, suggesting they viewed it as valid

Love v. *Love* (2013) (Sask. C.A.)

Implications

- rectification may offer a solution where an error on a beneficiary designation form is not caught before the employee dies
- better practice may be to check beneficiary designation forms for completeness before filing

Carrigan v. *Carrigan Estate* (2012) (Ont. C.A.)

- Mr. Carrigan was separated from his spouse by marriage and living in a common-law relationship when he died prior to retirement
- ONCA interpreted Ontario PBA provisions to mean there was no spouse entitled to the pre-retirement death benefit because he was still married to his first spouse
- pre-retirement death benefit was to be paid to the designated beneficiary (who was the spouse by marriage)
- common-law spouse appealed to Supreme Court of Canada
- SCC denied leave on March 28, 2013

Carrigan v. *Carrigan Estate* (2012) (Ont. C.A.)

Government Response

- Ontario announced in its 2013 Budget that it would review the ONCA decision, propose legislative amendments

Bill 151 (December 11, 2013)

- clarifies that common-law spouse is entitled to pre-retirement death benefit or joint and survivor pension benefit in a "dual spouse situation"
- discharge for administrators who paid the PRDB or joint and survivor pension to the member's common-law spouse over the legally married spouse *prior to the Carrigan decision*
- unknown if and when Bill 151 will come into force

Vladescu v. *CTVglobemedia Inc.* (2013) (Ont. C.A.)

Facts

- federal PBSA pension plan
- member and former spouse executed a Separation Agreement in 2002:
    - plan administrator authorized/directed to pay "survivor benefits" to spouse
    - in the event of remarriage, member was required to make "all possible efforts" with any future spouse releasing her right(s) or claim(s) to his pension
- member was remarried when he died prior to retirement in 2009
- plan administrator treated Separation Agreement as designating Ms. V as irrevocable beneficiary under pension plan
- under federal PBSA, payment due to surviving spouse

Vladescu v. *CTVglobemedia Inc.* (2013) (Ont. C.A.)

Decision

- assignments must be clear and unambiguous
- no assignment
  - separation agreement did not reflect transfer member's rights to former spouse
  - agreement did not use the word "assign"
  - express recognition that a subsequent spouse could have priority to his pension benefits
- leave to appeal to Supreme Court of Canada dismissed on January 16, 2014

Battles Raging

- Over the ability to collect a pension from prior employer after being transferred to a successor employer…

Ontario Pension Board v. Ratansi (2013) (Ont. Div. Ct.)

Facts

- Ontario government employees transferred to Canada Revenue Agency
- moved from Ontario PSPP to federal PSSP
- Ontario PBA provides that in a sale of business, if

  an employee of the original employer who is a member of the original pension plan becomes an employee of the successor employer and a member of the successor pension plan, his or her employment is deemed, for the purposes of this *Act*, not to have been terminated by the change of employer

- some employees eligible to commence pension under original PSPP
- FST decided that PBA deemed continued employment rule doesn't prevent pension commencement under original plan

Ontario Pension Board v. Ratansi (2013) (Ont. Div. Ct.)

Decision

- Court: FST's interpretation "untenable," "internally inconsistent"
- s. 80(3) deems employment between two employers to be continuous to protect employment and pension benefits
  - "for the purposes of the *Act*" means that the deemed continuation of employment applies to entire PBA
- PSPP (original pension plan) did not permit employees to continue employment and receive a pension benefit

Implications

- confirms longstanding interpretation of PBA
- transferred employees do not have right to transfer commuted value or start pension while in successor pension plan

Battles Raging

- …Or not? New Ontario PBA asset transfer rules may facilitate easier transfers between plans

Asset Transfer Rules

- Amendments to PBA and regulations came into force January 1, 2014
- Prior to amendments, difficult to obtain Superintendent consent for DB asset transfer applications following the 2004 case, *Aegon Canada Inc. and Transamerica Life Canada v. ING Canada Inc.*
- Reforms facilitate asset transfers in corporate restructurings, including sale, assignment or disposition of a business
- **Two Major Changes:**
  1. Superintendent consent on an asset transfer will be granted if the prescribed conditions are satisfied
  2. the successor pension plan does not need to provide the same pension benefits to transferred members

Sale of Business (s. 80)

- Superintendent approval will be granted if the following conditions are met:
  - agreement transferring responsibility between the original and successor employer in respect of member benefits;
  - if member consent is required, consent must be obtained in accordance with prescribed conditions;
  - manner in which assets are to be transferred must be agreed upon by the original and successor plan administrators;
  - if benefits under successor plan are different, CV between two plans must be maintained (determined as of the effective date of the asset transfer); and
  - if applicable, portion of surplus must be included in asset transfer
- Prescribed conditions on funding and liabilities must also be observed

New Pension Plans (s. 81)

- (New) successor pension plan is deemed to be a continuation of the original pension plan, but the new plan does not need to provide the same benefits
- Superintendent consent will be granted if the following criteria are met:
  - both administrators have agreed on the manner of determining transferred assets;
  - if different benefits are provided under the new plan, CV of the transferred assets must be maintained (determined as of the effective date of transfer); and
  - if applicable, portion of surplus must be transferred in accordance with regulations

Prescribed Conditions for ss. 80 and 81

- Effective date
  - s. 80 – sale of business to the successor employer
  - s. 81 – effective date of the amendment purporting to transfer assets
- Notice to members within 6 months of effective date
- Application must be filed 9 months from effective date
- Asset transfer must be completed within 120 days of the Superintendent's consent
- Within 60 days after completion of asset transfer, administrators must file:
  - statement certifying transfer's compliance with the PBA and regulations
  - DB: actuarial cost certificate indicating amount of transferred assets
  - DC: statement indicating amount of transferred assets

Transfers Between DB Plans

- Regulations prescribe formula to determine amount of assets to be transferred
- At least one of the following funding conditions must be met after asset transfer:
  - solvency ratio of successor pension plan is 0.85 (s. 80) or 1.00 (s. 81); or
  - solvency ratio of successor plan does not decrease by more than 0.05 below the solvency ratio of each of the original plan and successor plan prior to the transfer
- Special payments must be made if the transfer would result in new going concern unfunded liability or solvency deficiency
- Transfer valuation reports must be filed
- Accrued pension cannot be reduced by more than 15% after transfer

DC Plans, Past Divestments, MEPPs

DC Plans

- Superintendent will grant consent provided the amount transferred in the original pension plan is the same as the amount in the successor pension plan

Asset Transfers for Certain Past Divestments (s. 80.1)

- specified pension plans affected by past divestments can enter into transfer agreements between January 1, 2014 until June 30, 2016
- benefits provided in successor pension plan do not need to be the same as those provided in the original pension plan
- Superintendent consent is not required if agreement is filed and prescribed conditions are met

Trade Unions, MEPPs (s. 80.2)

The Retiree Benefits Pendulum

Rachel Arbour

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Introduction

- Notable developments and updates in retiree benefits cases from past year
- Overall still very few decisions on merits to guide changes to retiree benefits programs
- Language in employee communications remains key

O'Neill v. *General Motors of Canada Ltd.* (2013) (Ont. S.C.)

- *GM* changed the post-retirement benefits provided to retired salaried employees and executives
- Class proceeding was certified on consent
- Motion for partial summary judgment
- *GM* relied on reservation of rights (ROR) clauses contained in its employee communications
- ROR clauses differed between salaried employees and executives
- Court determined *GM* had right to make changes for retired executives, but not for salaried retirees

O'Neill v. *General Motors of Canada Ltd.* (2013) (Ont. S.C.)

- ROR clause for salaried retirees:

  General Motors reserves the right to amend, modify, suspend or terminate any of its programs (including benefits) and policies by any action of its Board of Directors or other committee expressly authorized by the Board to take such action. The Programs, benefits and policies to which a salaried employee is entitled are determined solely by the provisions of the applicable program, benefits or policy.

  [emphasis added by Court]

- Contractual interpretation:
  - did not clearly and unambiguously provide for amendments to retirees
  - *contra proferentem* applied
  - employment contracts interpreted to protect employees and under "lens of good faith"

O'Neill v. *General Motors of Canada Ltd.* (2013) (Ont. S.C.)

- For retired executives
  - reductions permitted based on documentation that established program
    - program unfunded, not guaranteed, paid out of current earnings
    - executives signed a form on retirement which provided that benefits paid under the retirement program may be reduced or eliminated
- Decision has been appealed

Lacey v. *Weyerhaeuser Company Ltd.* (2013) (B.C.C.A.)

- *Weyerhaeuser* advised it was freezing its payments towards retiree benefit program
- Retirees to be responsible for any rate increases
- Trial Court held that company did not reserve right to make changes to retirees
  - documentation promised that "company will pay"
  - ROR clause permitting "changes from time to time" not sufficient to permit changes following retirement
- Court of Appeal upheld trial decision
- SCC denied leave to appeal

Public Service Alliance of Canada - Labour Arbitration

- Grievance arbitration determining use of funds in a Retiree Benefits Plan (RBP)
- RBP pre-funded by employer, payroll deductions and retiree premiums
- Effective June 14, 2010, a group of unionized employees changed their bargaining agent
- Were RBP contributions made prior to the 2010 transfer for benefit of the employees and retirees of the union (and therefore stay with the remaining employees represented by that union) or for the benefit of the employees (and therefore follow those employees to their new bargaining agent)?
- *PSAC* proposed to attribute funds in the RBP for the transferred employees to the employees

Public Service Alliance of Canada - Labour Arbitration

- Arbitrator held that:
  - the RBP was a trust;
  - the interpretation of the trust should ensure protection of all employees who contributed; and
  - the implied intention of the trust was for the employees to benefit from their contributions, even if no longer a member of the first union.
- Grievance dismissed

Updates

- *Vivendi Canada Inc.* v. *Dell'Aniello* (2014) (S.C.C.)
  - SCC upheld Quebec Court of Appeal decision to certify class proceeding
  - Certification had been denied at trial based on lack of common issue, but Court of Appeal (and SCC) held that the validity of changes to retiree benefits program made in 2009 were common to the entire class and would advance the resolution of all claims
- *Memorial University of Newfoundland* v. *Lee and Acreman*
  - change to payment schedule for retiree benefits – University historically paid 50% for benefits, but in 1978 began subsidizing in full. In 1993, University implemented a gradual schedule to bring subsidy back to 50%
  - pre-1993 retirees commenced the action which was certified as a class proceeding, and upheld by Newfoundland Court of Appeal in 2011
  - claim settled in 2013 – University to pay 70% for health insurance and 50% for other than health benefits as well as a lump sum to the class

Approaching Changes

- Has the pendulum swung?
- Changes can be made during active employment
- For retirees – analysis focused on communications – "clear and unequivocal" language
- Context and strategy remain important and essential

DC Plans Today:
10 Years After the CAP Guidelines

Natasha Monkman

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CAP Guidelines – Still Important

- CAP Guidelines introduced in 2004 by Canadian Association for Pension Supervisory Authorities (CAPSA)
- CAP Guidelines address:
  - selecting and monitoring service providers
  - selecting investment options
  - providing information to members
  - description of fees and expenses
  - changing investment options or providers
- CAP Guidelines have been reviewed and CAPSA concluded no changes were required, however …

Update on CAPSA DC Plan Guideline

- CAPSA consultation on *draft* Defined Contribution Pension Plan Guideline released July 13, 2012
  - no additional information available from CAPSA on status of Guideline
- The DC Plan Guideline is intended to supplement existing CAPSA guidelines related to DC plans (including CAP Guidelines)
- DC Plan Guideline provides:
  - clarification of rights and responsibilities of those involved with DC plans
  - clarification regarding what constitutes an adverse amendment for DC plans

Update on CAPSA DC Plan Guideline

- DC Plan Guideline provides:
  - guidance on information to be provided to members
    - during accumulation phase
    - approaching payout phase
    - during payout phase
    - adverse amendments
  - Guideline indicates that active members should receive information regarding investment choices, contributions and **projected account balance at retirement**
  - for members approaching retirement, information should also include tools to assist members in selecting a retirement product (e.g., LIRA vs. annuity)
  - Guideline would also require statements be provided during the payout phase – if the DC plan provides variable benefits

Pending DC Plan Legislation in Canada

- No legislation specifically governing DC plans in Ontario
  - waiting for variable benefit legislation to come into force
- Also waiting for DC investment regulations under federal PBSA

  8(4.3) If a pension plan permits a member, former member, survivor or former spouse or former common law partner of a member or former member to make investment choices, **the administrator must offer investment options of varying degrees of risk and expected return that would allow a reasonable and prudent person to create a portfolio of investments that is well adapted to their retirement needs.**

  - if these criteria are satisfied, will be deemed to satisfy standard of care
- In Quebec, at least 3 investment options must be offered "which not only are diversified and involve varying degree of risk and expected return but also allow the creation of portfolios that are generally well-adapted to the needs of members"

Target Date Funds – What's New?

- Target Date Funds (TDFs) have become very popular in the U.S. and Canada – many plans include them as default funds
  - TDFs are collective investment schemes in which the asset mix shifts over time (ranging from aggressive to more conservative) as member approaches the target date (i.e. retirement)
  - similar principles apply to "funds of funds"
- No specific legislation or regulatory guidance in Canada

Target Date Funds – What's New?

- U.S. Department of Labour (DOL) active in issuing policy regarding TDFs
  - the DOL guidance, "Target Date Retirement Funds — Tips for ERISA Plan Fiduciaries," released in February 2013
- Relevant Tips identified by the DOL:
  - fiduciaries need to understand the differences between types of glide paths e.g. "to versus through"
  - understand the principal investment strategies and risks and underlying assets
  - consider plan demographics
  - consider fees
  - understand differences between "proprietary" and "non-proprietary" funds, and inquire about the availability of "custom" TDFs
  - ensure participants have the information needed to understand TDFs and understand that they are not a "guarantee"

DC Default Fund Litigation

- U.S. vs. Canadian approaches
  - U.S. more "codified" (ERISA)
  - Canadian is a mix of statutes (provincial and federal), the common law and guidelines
- Canadian experience:
  - room for uncertainty and creativity
  - little jurisprudence to date
- Look to U.S. for lessons learned because their DC experience is longer, and more members are reaching retirement age and discovering they do not have sufficient retirement funds
  - goal is to prevent similar litigation here

DC Default Fund Litigation

***Laboy* v. *Bd. of Trustees of Bldg. Service* (2013) (U.S.)**

- Plan provided 14 investment options, failing which members' accounts were invested in default fund, which was a conservative portfolio
- Members alleged breach of fiduciary duties on basis that fund underperformed and charged excessive fees
- Trial decision found there was no fiduciary breach arising from plaintiffs' claims

DC Default Fund Litigation – *Laboy*

- On appeal, District Court found that plaintiff's excessive fee claim failed because the fees charged by the default fund were within the range of fees charged by similar investment vehicles provided under plan
- Plaintiffs' claim that the fund should have been replaced due to underperformance was rejected since the fund performed within the top third of its peer group during the relevant period
- Unlike other cases alleging imprudent investment selection, no allegation of self-dealing or conflict of interest was made to form the basis of a plausible breach of fiduciary duty claim

DC Default Fund Litigation – *Laboy*

Implications

- Case illustrates that default fund's returns is not only relevant consideration
  - courts will look to whether or not fees charged are excessive in context of other funds in plan
  - will also compare returns to other funds
  - most importantly, courts will examine whether administrator acted properly when picking fund

DC Default Fund Litigation

***Bidwell* v. *University Medical Center, Inc*. (2012) (U.S.)**

- Plan allowed participants to allocate accounts among various funds, including a stable value fund (which also served as default fund)
- Plaintiff elected to allocate 100% of his account to the stable value fund.
- In 2008, employer decided to change the default fund to a life cycle fund (i.e. a TDF)

DC Default Fund Litigation – *Bidwell*

- The employer decided that all amounts invested in the prior default fund would be transferred to the new life cycle fund unless the participant specifically directed that his plan account should remain in the stable value fund
- The employer mailed notices and noted the deadline for participants to decide
- Plaintiff did not respond and his account was transferred from the stable value fund to the life cycle fund

DC Default Fund Litigation – *Bidwell*

- The plaintiff immediately transferred his account back to the stable value fund, but his account had **lost $85,000**
- Not surprisingly, the plaintiff sued
- Court concluded that process taken by employer was prudent – provided adequate notice and disclosure with opportunity to elect to direct investments
- Permissible to treat plaintiff the same as other members who were invested in the default fund because they did not provide directions

DC Default Fund Litigation – *Bidwell*

Implications

- If changing default fund and some members have directed investment in same fund, do not have to move all assets, but it is permissible to treat all members with accounts in default fund the same when changing funds
- Must ensure adequate disclosure is provided to affected members if fund is changed and have clear records evidencing that disclosure was made
- Provide sufficient time within which members may elect to move funds

Future Areas For Regulation

Enhanced Mandatory Disclosures

- in February, 2012, DOL issued a rule on disclosures to members of DC plans
- plan-related information to be disclosed includes:
  - explanation of fees and expenses for administration services charged to all accounts
  - explanation of fees and expenses that may be charged to or deducted from individual accounts based on that member's actions or decisions
  - quarterly statements showing the dollar amount of plan-related fees and expenses actually charged to or deducted from individual accounts
- investment related information (e.g. performance data, benchmarks) should be presented to members in a comparative format

Future Areas For Regulation

Enhanced Mandatory Disclosures

- on May 8, 2013, DOL issued proposed requirements for DC plans to provide illustrations of potential monthly lifetime income amounts
- at a basic level, benefit statements would include:
  - value of the account balance
  - projected account balance
  - lifetime income illustrations based on actual balance and projected balance
  - additional illustrations required if member is married
- CAPSA DC Plan Guidelines propose requiring similar projections be provided to DC plan members

Future Areas For Regulation

Caps on Fees and Expenses For Default Funds

- in late 2013, U.K. government released consultation paper proposing to introduce caps on "charges" (maximum 1%) on default funds by April 2014
- three proposed options:
  - option 1: a higher charge cap of 1% of funds under management
  - option 2: a lower charge cap of 0.75% of funds under management
  - option 3: a two-tier "comply or explain" cap. There would be a cap of 0.75% but a higher cap of 1% would be available to employers who provide explanations to the Pensions Regulator why the scheme charges in excess of 0.75%
- in January, 2014, reports released that cap on charges likely delayed for at least 12 months due to contentious nature of proposals

Conclusion

- Canadian DC landscape continues to evolve but little in the way of legislation or litigation has surfaced yet
- Plan sponsors should continue to assess compliance with CAP Guidelines and CAPSA DC Plan Guidelines, if and when they are effective
- Plan sponsors should continue to monitor developments in U.S. and U.K., for lessons to be learned to avoid similar litigation here

Preserving Your Rights – the Plan Administrator as Defendant and Plaintiff

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Preserving Your Rights

- Plan Administrator as Defendant
- Plan Administrator as Plaintiff
- Professional practice issues
  - record-keeping
  - limitation periods, competence
  - conflicts of interest
  - knowing your client
  - dealing with unrepresented litigants

Plan Administrator as Defendant

- Consider this scenario…

Plan Administrator as Defendant

- Record retention is important because claims can come many years after a member's departure or the event in question
- Limitation periods may or may not eliminate the claim

Record Retention

***Hunte* v. *Ontario (Superintendent Financial Services)* (2013) (FST)**

- Almost 30 years after terminating employment, a former employee claimed to have a deferred vested pension:
  - alleged there was an agreement he would have unbroken service despite a brief departure
  - claimed that he received only AVCs when he left and if only basic contributions were paid, payment violated plan terms

Record Retention

- FST held that former employee had the initial onus to prove his entitlement; if satisfied, burden shifts to plan administrator
- Employee had no documents supporting claim; witnesses he called could not provide specific details about his situation
- Canada Life was able to produce some microfiche evidence of payment, and CRA summaries showing a matching income inclusion

Record Retention

- FST accepted Canada Life's version of events
- Noted that Canada Life's record-keeping was adequate for the time and not a breach of fiduciary duty, but it might now wish it had retained more
- Plan administrators must consider what pension documents to retain when a member terminates employment

Record Retention

- Fiduciary duty/compliance reasons to develop retention policy
- Regulator policies
  - CAPSA, FSCO
- Often heavy reliance on service provider
  - need to understand provider's contractual obligations and its current policy/practice
  - look for gaps

Limitation Periods

- Limitation periods must also be considered
  - discoverability
  - not all claims are covered by Ontario *Limitations Act*
    - common-law vs. PBA complaint to Superintendent

Limitation Periods

***Boys* v. *Shoppers Drug Mart* (2013) (Ont. S.C.)**

- Plaintiffs terminated from employment with entitlements under the Shoppers Plan and its non-registered supplementary plan (SERP)
- under a later partial wind up, Plaintiffs became entitled to grow-in benefits under the Shoppers Plan
- plaintiffs received option statement in 2009 advising them that benefit under SERP would be lowered to reflect grow-in benefits under the Shoppers Plan

Limitation Periods

- Plaintiffs commenced action on November 14, 2012 for the unpaid SERP benefits
- Shoppers argued that limitation period had expired two years after receiving option statement
- Plaintiffs claimed damage occurred at the time the SERP payment should have been made (2012)
- S. 5(1) of the *Limitations Act* states that a claim is discovered on the day on which the claimant knew that "the injury, loss or damage had occurred"

Limitation Periods

Decision

- the damage arose when Shoppers failed to pay the SERP benefit, not when the option notice was received
- see also *O'Flanagan v. Ontario (Ministry of Education)* (2013) (HRT)
  - discrimination complaint about calculation of survivor pensions under the OTPP
  - limitation period under the *Human Rights Code*

Practice Issues

- Who is the client?
  - employer/corporate policies may not be adequate given special fiduciary nature of obligations as plan administrator
  - in-house counsel must be alive to conflict and to whom it is advising when considering appropriate record retention policies

Knowing Your Client

Rules of Professional Conduct

- **Subrule 2.02(1.1)** deals with a lawyer's obligation when their client is an organization
  - even where instructions may be received from an officer, employee, agent, or representative, when a lawyer is employed or retained by an organization, including a corporation, the lawyers must, in exercising her duties and in providing professional services, act for the organization

Conflicts of Interest

- **Rule 2.04** deals with avoiding conflicts of interest
- Conflict of interest is defined under the Rules as an interest:

    (a) that would be likely to affect adversely a lawyer's judgment on behalf of, or loyalty to, a client or prospective client, or

    (b) that a lawyer might be prompted to prefer to the interests of a client or prospective client

Conflicts of Interest

- Under **Subrules 2.04(2)-(5),** lawyers are required to avoid conflicts of interest such that they may not:
  - advise or represent more than one side of a dispute
  - act or continue to act in a matter when there is or is likely to be a conflicting interest unless, after disclosure adequate to make an informed decision, the client or prospective client consents
  - act against a client on a matter for which they have previously represented the client or against persons who were involved in or associated with the client in: the same matter, any related matter, or (with some exceptions), in any new matter, if the lawyer has obtained from the other retainer relevant confidential information unless the client and those involved in or associated with the client consent

Practice Issues

- Who retains the documents?
  - what does legal department retain vs. pension/HR?
  - in-house counsel may need to develop its own systems for file management, retention and disposal when giving advice to employer/plan administrator

Plan Administrator as Plaintiff

- Consider this scenario…

Plan Administrator as Plaintiff

- Overpayments can arise due to administrator error, service provider error, failure of next of kin to notify company of death of retiree or spouse, etc.
- Administrators may have obligation to attempt to collect the overpayment
- Limitation period becomes critical to ability to recover

Competence

- **Subrule 2.01(2)** deals with "competence" and provides that:

  "A lawyer shall perform any legal services undertaken on a client's behalf to the standard of a competent lawyer."

Competence

- **Rule 2.01(1):** means having and applying "relevant skills, attributes, and values," including:
  - knowing general legal principles, procedures and the substantive law in the lawyer's area of practice
  - investigating facts and ascertaining client objectives
  - communicating in a timely and effective manner
  - recognizing limitations in ability to handle a matter or some aspect of it
  - managing one's practice effectively

Practice Issues

- Communicate with pension/HR departments about importance of identifying overpayments and taking action as soon as it arises
- Understand how limitation periods apply to pension plans
- Develop a system to track limitation period and make decision about formal legal action before it expires

Practice Issues

- Often, contact will be with former employee, surviving spouse, or estate who does not retain counsel and who may be adverse in interest
- In-house counsel providing advice in connection with pension matters must be mindful of their obligations to unrepresented (and represented) individuals as dictated by the *Rules of Professional Conduct*

Unrepresented Litigants

- Under **Rule 2.04(14),** when dealing with unrepresented persons, lawyers have an obligation to:

  (a) urge the unrepresented person to obtain independent legal representation,

  (b) take care to see that the unrepresented person is not proceeding under the impression that his or her interests will be protected by the lawyer, and

  (c) make clear to the unrepresented person that the lawyer is acting exclusively in the interests of the client and accordingly his or her comments may be partisan

Unrepresented Litigants

- Under **Subrule 6.03 (7)**, once an employee obtains counsel, lawyers must not:

  (a) approach or communicate or deal with the person on the matter, or

  (b) attempt to negotiate or compromise the matter directly with the person

- Under **Rule 7.01** there are limited exceptions to this Rule where the individual is receiving legal services under a limited scope retainer

Practice Issues

- Not like communicating with another lawyer
- Extra care may be needed to ensure communications are clear and can be understood
- Make it clear you act for company, not individual
- Suggest party get advice from an independent lawyer
- Reputational/public relations concerns may also dictate tone of communication

Hicks Morley

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Times, They are a Changing in the Pension & Benefits World

January 28 and 29, 2014

accredited cpd