
Ontario and federal governments provide temporary funding relief for pensions

The federal and Ontario governments have introduced regulatory changes to provide pension plan sponsors with relief and flexibility in how they meet their pension funding obligations. The solvency funding relief responds to the recent decline in the value of investments and the resulting pandemic of pension solvency deficits. Previously where a pension valuation report revealed a solvency deficit in the pension plan assets, federal and Ontario laws required pension plan sponsors to make up the deficit over a period of no more than five years. In light of the current difficult economic conditions, where many employers are experiencing financial stress and ongoing business viability issues, these requirements were seen to be too onerous. As a result, the two governments have passed regulations to give temporary funding relief options to plan sponsors.

THE FEDERAL REGULATION

On June 12, 2009 the federal Minister of Finance announced the coming into force of the solvency funding relief regulations (the 2009 Regulations) under the federal *Pension Benefits Standards Act 1985* (the PBSA). The PBSA regulates private pension plans in areas of employment falling within federal jurisdiction (telecommunications, banking, inter-provincial transportation, etc.). Although private pension plans are voluntary, usually they must be registered under the federal or provincial legislation. The legislation sets out standards to ensure adequate funding of promised benefits. It requires sponsors of defined benefit pension plans to file actuarial valuations every three years, or more often if required by the Superintendent of Financial Institutions.

Under the 2009 Regulations, where an actuarial valuation, submitted between November 1, 2008 and October 31, 2009, reveals that a plan's assets are less than its liabilities, plan sponsors are permitted to eliminate the deficiency over a 10-year period, as opposed to the previous prescribed period of five years. Prior and future deficiencies are not currently eligible for the increased amortization period.

In order to take advantage of the funding relief in the 2009 Regulations, plan sponsors must be up-to-date with their required contributions. Subject to that requirement, plan sponsors will have various options to obtain funding relief. All plan sponsors may extend their solvency funding schedule to 10 years for a period of one year. In order to continue under the lengthened payment schedule, plan sponsors will be required to either obtain support from two-thirds of the plan members and retirees, or provide a secured letter of credit for the difference between the 5-year and 10-year level of payments. If at least one of these conditions is not met within one year of the funding relief election, the lengthened payment schedule will revert back to a five-year plan.

Where a plan sponsor obtains the requisite support of plan members (which must be based on disclosure in plain language) there will be a restriction imposed on plan improvements in the first five years, unless such improvements are pre-funded and do not reduce the solvency ratio of the plan. Alternatively, a plan sponsor may make plan improvements by returning to the five-year payment schedule.

Under the second option, if a financial institution issues a letter of credit to the plan sponsor, should the plan sponsor terminate the plan or go bankrupt, the financial institution would be required to immediately pay the difference between the 5-year and 10-year payment schedules to the pension fund. Plan sponsors will be able to reduce the letter of credit as the financial position of the pension plan improves.

The funding relief is also available to federal Crown corporations with defined benefit pension plans. However such plans are not eligible to pursue the option of obtaining a secured letter of credit. Instead the plan sponsor must obtain member and retiree support, or be subject to alternative terms and conditions, one of which requires the federal Minister of Finance and the Minister responsible for the Crown corporation to file an acknowledgement that the Crown corporation intended to pursue this option with the Superintendent of Financial Institutions. It is anticipated that the Crown corporation will pay a fee to the Crown comparable to the fee that would be required to obtain a letter of credit from a financial institution.

THE ONTARIO REGULATION

Ontario has also introduced funding relief options for sponsors of defined benefit pension plans falling within provincial jurisdiction. On June 19, 2009, Ontario Regulation 239/09 was filed, which amended Regulation 909 under Ontario's *Pension Benefits Act*, the provincial legislation regulating private pensions. The funding relief options for Ontario defined benefit plans are available for deficits in the first valuation reports filed on, or after, September 30, 2008, unless the plan is excluded under the Regulation. Excluded plans include pension plans that are not up-to-date in regular contributions as of the date of the valuation report; Specified Multi-Employer Pension Plans; and most plans established after September 29, 2008.

Similar to the federal funding relief, the Ontario amendments permit eligible plan sponsors to boost the solvency funding period for new solvency deficiencies from five years to 10. This option requires the consent of pension plan members and retirees, except in the case of jointly governed plans. Jointly governed plans are exempt from the consent requirement since they have member representation on the Board or Committee administering the plan. Unlike its federal counterpart, this Ontario option permits benefit improvements during the lengthened amortization period. However, any increase in unfunded liabilities (on a going-concern basis) that arises as a result of such an improvement in benefits will not be subject to the lengthened funding period and must be liquidated over five years.

The Ontario amendments also permit eligible plan sponsors to defer the start of special payments for new solvency deficiencies for up to one year from the pension plan's valuation date. Plan sponsors are entitled to this deferral option without the consent of plan members or retirees.

Ontario will also provide plan sponsors with the option to consolidate pre-existing special payment schedules into a new five-year schedule commencing on the date of the valuation report. This option does not require the consent of employees and, once again, any increase in unfunded liabilities arising from an enhancement of benefits must be liquidated over the five-year period commencing on the date of the valuation report in which the liability is determined.

ENHANCED NOTICE REQUIREMENTS

Both the federal and Ontario amendments also provide for enhanced notice requirements where a plan sponsor elects one of the funding relief options and member and retiree consent is required. The notice requirements under both jurisdictions' amendments require plan sponsors to provide members with detailed information including:

- the amount of the solvency deficiency for which the payment schedule is extended;
- how the extension of the payment schedule may effect pension security; and
- the method by which members and retirees may object to the extension of the payment schedule.

The notice must also state that the payment schedule will only be extended if no more than one-third of plan members and retirees object. Collective bargaining agents in both jurisdictions are permitted to receive the information, and to object or consent on behalf of their memberships.

In Our View

The funding relief measures implemented by the federal and Ontario governments attempt to relieve some of the burden that plan administrators face when financing a significant solvency deficit during difficult economic times. It is unsurprising that the amendments were well received by business stakeholders. Nevertheless, extending the funding of solvency deficiencies may increase the risk of a plan termination with a deficiency. Plan administrators, who bear fiduciary obligations to plan members, should be aware that during difficult financial times when plan assets decline, administration decisions will come under increased scrutiny and be more susceptible to legal challenges, including class actions.

For further information, please contact [Kecia Podetz](#) at (613) 940-2752

For more news about recent developments in Employment and Labour Law, and for information about how our firm can assist you, please visit <http://www.emondharnden.com/>