

## Breakfast Seminar Series

---

# Things That Keep Us Up at Night – OHS, Pensions and Retiree Benefits

Kevin MacNeill  
Mark Newton

June 11, 2014

[www.ehlaw.ca](http://www.ehlaw.ca)

1

## Session Overview

---

- Pensions and Retiree Benefits Plans
- Occupational Health and Safety  
Awareness Training Regulation (OHS)

2

## **Pensions and Retiree Benefits**

### **Topics for Discussion**

---

- Making changes to pension plans
- Making changes to retiree benefits
- Questions / comments

## **Making Changes to Pension Plans**

---

- Labour, employment, human rights, pension law considerations
- Basic pension rule: no reduction to accrued benefits
- Some exceptions, but don't count on them
- Common scenarios: changing formulas, plan conversions

## Making Changes to Pension Plans

---

- Problematic legal case from Alberta Court of Appeal in 2010: *Halliburton Group Canada Inc. v. Alberta* 2010 ABCA 254
- Halliburton's application to freeze members' defined benefit (DB) plan was disallowed
- Members' accrued benefits included final average earnings at retirement

5

## Making Changes to Pension Plans

---

- Recent decision in Ontario distinguished Halliburton:
- *Royal Ontario Museum v. Ontario Superintendent of Financial Services* 2013 ONFST 9
  - ROM applied to reduce its final average earnings (FAE) formula from FAE 3 to FAE 5
  - Financial Services Tribunal held that this did not reduce members' accrued benefits
  - Accrued benefits determined as of date of amendment, not at retirement
  - Same logic applies to other changes, such as benefit freezes and conversions

6

## **Making Changes to Pension Plans: Practical Guidance**

---

- Communicate, communicate, communicate
- Document, document, document
- Negotiate, negotiate, negotiate

## **Making Changes to Retiree Benefits**

---

- Less regulated area
- Retirees are viewed by the courts as vulnerable
- Retirees have time to organize
- Retiree benefit cases are well suited for class action proceedings

## Making Changes to Retiree Benefits

---

- Main considerations: contractual terms, vested rights, consistency of communication, negligent misrepresentation, reservation of rights
- Reductions for future retirees vs. current retirees
- Basic principle: retiree benefits may be reduced or eliminated
- In principle this includes reducing benefits of current retirees

9

## Making Changes to Retiree Benefits

---

- *Dayco* [1993] 2 S.C.R. 230 created the myth that retiree benefits irrevocably vest upon retirement
- Several recent court cases since *Dayco*
  - *Lacey v. Weyerhaeuser Company Limited* 2012 BCSC 353, 2013 BCCA 252
    - Employer promised retiree benefits for life, did not clearly reserve right to make changes, benefits were a form of deferred compensation, not gratuitous
  - *Bennett v. B.C.* 2012 BCCA 115
    - Statutory scheme, retiree benefits not a term of employment, no promise of future benefits

10

## **Making Changes to Retiree Benefits**

---

- *O'Neill v. General Motors Canada Ltd.* 2013 ONSC 4654
  - Court of Appeal hearing set for June 12, 2014
  - Court ruled that retiree benefits may be changed after retirement
  - Retiree benefits do not irrevocably vest upon retirement
  - GM lost the case because it failed to adequately reserve its rights

11

## **Making Changes to Retiree Benefits**

---

- Class action, ~ 4,000 retirees
- GM announced that various changes would be made to retiree benefits
- Applicable only to employees who retired on or after 1/1/1995
- Main issues were what was communicated by GM and whether it reserved its right to make changes

12

## **Making Changes to Retiree Benefits**

---

- The Court reviewed 260 communications
- Employees had a reasonable expectation that they would have retiree benefits
- Retiree benefits were a form of deferred compensation
- GM's reservation of rights clause was not clear enough

13

## **Making Changes to Retiree Benefits: Practical Guidance**

---

- Before making changes, do due diligence, review all prior communications
- Assess whether retiree benefits are a term of employment, a gratuitous perk or a form of deferred compensation
- Determine the target group
- Decide upon timing and communication strategy

14

---

## Questions?

## OHS Awareness and Training Regulation Topics for Discussion

---

- New OHS Awareness and Training Regulation
- Background to the Regulation
- Training requirements
- Compliance
- Enforcement and penalties for non-compliance
- Introduction to OHS Comply by Emond Harnden LLP



## Background to the Regulation

---

- Christmas eve 2009 – 4 workers fell to their deaths after defective scaffolding swing stage collapsed (Metron)
- January 2010 – MOL appointed Expert Advisory Panel on OHS to conduct a review of Ontario's OHS system
- December 2010 – Panel's Report and Recommendations released
- December 2012 – Draft Regulation released, public consultation
- November 2013 – Final Regulation filed

## Background to the Regulation

---

- Recommendation 14 – MOL should require mandatory health and safety awareness training for all workers
- Recommendation 15 – MOL should require mandatory health and safety awareness training for all supervisors responsible for frontline workers

## The Regulation

---

- Worker training
- Supervisor training
- Mandatory minimum content
- Timing
- Exemptions
- Record keeping

## Mandatory Training – Workers

---

- Duties and rights of workers under OHSA
- Duties of employers and supervisors under OHSA
- Roles of health and safety representatives and joint health and safety committees under OHSA
- Roles of Ministry, the WSIB and Health and Safety Associations
- Common workplace hazards
- Information and instruction on controlled products (WHMIS)
- Occupational illness, including latency

## **Mandatory Training – Supervisors**

---

- Duties and rights of workers under OHSA
- Duties of employers and supervisors under OHSA
- Roles of health and safety representatives and joint health and safety committees under OHSA
- Roles of Ministry, the WSIB and Health and Safety Associations
- How to recognize, assess and control workplace hazards
- How to evaluate controls on workplace safety
- Sources of information on occupational health and safety

## **When Must Training be Completed**

---

- Workers – “as soon as practicable”
- Supervisors – “within one week of performing work as a supervisor”

## Exemptions

---

- Workers or supervisors completed previous comparable training
- Provides employer with proof of prior completion
- Employer must verify previous training meets the Regulation's basic requirements
- Applies even where training is completed with a former employer

## Record Keeping

---

- Employer must maintain records
  - Workers and supervisors who have completed the training
  - Workers and supervisors who were exempt from the training
- Written proof of completion must be given on worker or supervisor request
  - Up to 6 months after employee ceases to work for the employer

## Other Training Obligations

---

- New Regulation revoked O. Reg. 780/94 *Training Programs*
  - Previously required employers to provide training programs necessary to enable JHSC members to become certified in accordance with WSIB policies and procedures
- Replaced by provision in New Regulation
  - Requires employers to carry out the training programs necessary to enable JHSC members to become certified in accordance with requirements of the Chief Prevention Officer (CPO)
  - May 2014 – CPO released new standards for JHSC training programs and training providers anticipated to come into effect in early 2015

25

## Compliance

---

- When?
  - July 1, 2014, Regulation comes into force
- Who must comply?
  - All workplaces under OHSA, regardless of size or sector
- Required to use external trainers?
  - Not required, however training backed by expertise is recommended
- How long will training take?
  - Designed to take approximately 1 hour

26

## Compliance

---

- Regulation expands on previous employer duties – s. 25(2)(a) of OHSA
  - Employers have a general duty to provide information, instruction and supervision to a worker to protect worker's health and safety
- Existing training regime may meet new requirements

## Compliance

---

- Emond Harnden's OHS Comply
- Provides training and comprehensive resources to ensure employers are up-to-date with OHS obligations
- Learning Management System (LMS) allows for tracking, reporting, communication and delivery of certificates
- [www.ohscomply.com](http://www.ohscomply.com)

## Enforcement and Penalties

- MOL inspection blitzes – various sectors and compliance in specific areas (i.e. Summer safety blitz, new and young workers)
- Unclear what fines will be levied under new Regulation
- Corporate penalties – up to \$500,000
- Section 25 (2)(a) contraventions as guidance
  - Fines range from \$5,000 to \$350,000
  - Higher fines – non-compliance causing a dangerous workplace

## Enforcement and Penalties Section 25(2)(a)

Employer	Year	Fine	Nature of Injury
National Steel Car	2014	\$140,000	Permanent injury
Town of Bracebridge	2013	\$50,000	Multiple fractures
MacDonald Steel Ltd.	2013	\$75,000	Fractures, concussion
Maple Leaf Foods	2012	\$100,000	Hand injury
Goldcorp Canada	2012	\$350,000	Fatality
Hubert Sabourin Inc.	2012	\$100,000	Fatality
Transgear Manufacturing	2012	\$150,000	Electrical shock/burns
Town of Pelham	2012	\$60,000	Crushed hand

S. 25(2)(a) provide information, instruction and supervision to a worker to protect the health or safety of the worker

---

**Questions?**