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AMPed up Pension Enforcement Coming to Ontario

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In December 2016, the Ontario legislature passed changes to the Ontario *Pension Benefits Act* (PBA) which, when proclaimed into force, will authorize the Superintendent of Financial Services (the Superintendent) to impose administrative monetary penalties (AMPs) in connection with certain breaches of the PBA or related obligations. On September 15, 2017, supporting regulations were filed which, among other things, prescribe the compliance requirements that will be subject to AMPs starting January 1, 2018. The regulations also preview the procedures by which the Superintendent will levy AMPs, and the scope that the pension industry will have to challenge these new penalties.

The new provisions of the PBA will be proclaimed into force on January 1, 2018 and have the potential to significantly alter the approach to pension standards compliance both for the pension industry and the pension regulator. In this inaugural *Sidebar*, we outline the changes and discuss how sponsors and administrators of Ontario-registered pension plans can prepare for them.

What are AMPs?

Before discussing what AMPs are, it is helpful to set the context. Presently, contravention of the PBA or its related regulations is a regulatory offence. Persons convicted of an offence under the PBA can be fined up to \$100,000. Second and subsequent convictions are subject to a fine of up to \$200,000. Prosecution of regulatory offences under the PBA requires a full trial, which can be costly and time consuming. For this reason, prosecutions under the PBA are generally reserved for the most serious breaches.

Unlike the fines imposed upon conviction for a regulatory offence, under the new AMP regime penalties are levied without a trial. Rather, persons who have been penalized have limited rights to challenge the AMP through a hearing before the Financial Services Tribunal (FST).

General and Summary AMPs

When they come into force, the pending changes will introduce two types of AMPs to the PBA. **General AMPs** will apply to relatively more serious compliance issues, while **summary AMPs** will apply to relatively less serious compliance issues.

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Under the new regulations (O. Reg. 365/17; the AMP regulations), **summary AMPs** will apply to filing deficiencies. The Superintendent will be able to levy a summary AMP when an administrator fails to file enumerated documents within the timeframes set out in the PBA regulations – for example, valuation reports, cost certificates, Actuarial Information Summaries, Annual Information Returns, Investment Information Summaries, financial statements, statements of investment policies and procedures (SIPP), and SIPP amendments. When imposing a summary AMP, the Superintendent is confined to the daily amount prescribed for a particular filing – either \$100 or \$200 per day of contravention, subject to the maximum AMP.

The Superintendent's authority to levy **general AMPs** applies to a list of over one hundred PBA and regulatory requirements, as specifically enumerated in Schedule 1 to the AMP regulations. Examples of administrator obligations that will be subject to general AMPs for non-compliance include:

- routine plan administration matters such as the requirements to provide member notices and statements within the specified period, and the requirement to file plan documentation with the Superintendent within the specified period;
- requirements relating to plan events (e.g., asset transfers, wind ups and surplus distributions);
- the obligation to administer the plan in accordance with its terms;
- failures to comply with Orders of the Superintendent; and
- failures to comply with undertakings to the Superintendent.

When imposing a general AMP, the Superintendent has discretion in determining the amount of the penalty. However, the AMP regulations require that the Superintendent only consider the following criteria when determining the amount of a general AMP:

1. The degree to which the contravention or failure was intentional, reckless or negligent;
2. The extent of the harm or potential harm to others resulting from the contravention or failure;
3. The extent of any attempts made by the person who is subject to the AMP to mitigate any loss or take other remedial action;
4. The extent to which the person who is subject to the AMP derived, or might reasonably have been expected to derive, any direct or indirect economic benefit from the contravention or failure; and

- Any other contraventions of, or failures to comply with, the PBA or other provincial or federal pension standards legislation during the preceding five years by the person who is subject to the AMP.

In relation to both summary and general AMPs, the maximum penalty is \$10,000 for an individual and \$25,000 for a person other than an individual (e.g., a corporation). Importantly, AMPs cannot be paid out of a pension fund.

Heightened Emphasis on Strict Compliance

In the past, minor PBA compliance issues may not have been viewed as problematic, given the limited range of enforcement “tools” available to the Superintendent. For example, a plan administrator who anticipated missing a filing deadline by a matter of days may not have formally requested a filing extension, so long as the deficiency was expected to be cured in a reasonably timely way and was not prejudicial to members.

Once the regime is fully implemented, we expect that AMPs will have a significant impact on the pension industry’s approach to PBA compliance. AMPs will serve as a very strong incentive for employers and administrators to ensure strict and timely compliance with all PBA and regulatory requirements.

Starting in January 2018, a delay in the delivery of member annual statements, a failure to file a copy of an amendment notice with the Superintendent, or late remittance of contributions can result in AMPs.

The best way for pension plan administrators to avoid being hit

with AMPs is to implement a robust pension governance structure. This entails creating a detailed inventory of the myriad plan-related tasks required by the PBA and regulations, identifying the timeline associated with each task, and ensuring that accountability for each task is allocated to a specified person or committee within the organization. Strong pension

AMPs at a Glance			
Type	Dollar Value	Dispute Process	Examples
General	Maximum of \$10,000 (individual) or \$25,000 (other persons)	Penalized person can request FST hearing to challenge Superintendent’s notice of intended decision (NOID) to levy a general AMP within 15 days of NOID being issued	Failures to comply with select requirements of the PBA/PBA regulations, such as: <ul style="list-style-type: none"> Member disclosure requirements (enrolment disclosure; periodic benefit statements; member access to prescribed plan documents) Requirements to administer benefit elections upon retirement, termination or death Certain requirements with respect to the filing of plan documentation with the Superintendent
Summary	\$100 or \$200 penalty per day, subject to limits above	Opportunity to make submissions before the summary AMP is ordered Summary AMP can be appealed to the FST within 15 days of being ordered	Failure to file certain regulatory filings on time

governance also entails a clearly articulated system of oversight to ensure that each task is carried out by the responsible party in a timely fashion.

We recommend that administrators of Ontario-registered pension plans review their pension governance systems and checklists before AMPs arrive in January 2018, to ensure that procedures are in place to mitigate the financial and reputational risk associated with having an AMP imposed. Serious breaches of the PBA will continue to be subject to prosecution under the existing regulatory offences regime.

If you have any questions regarding AMPs, or to call a sidebar with us regarding your current governance systems and checklists, please don't hesitate to contact any of us.

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