SIDEBAR
News, Announcements & Insight

Brown Mills Klinck Prezioso LLP
Pension, Benefits & Executive Compensation Law

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COVID-19: Cross-Canada Updates for Employers

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Pension regulators and governments across the country have implemented a variety of initiatives in response to the COVID-19 pandemic. This Sidebar focuses on employer funding relief initiatives, including a summary of novel solvency relief measures recently introduced for federally and Alberta-regulated pension plans. Please see our COVID-19: Cross Canada Updates for Pension Plan Administrators for a summary of relief measures and updates relating to plan administrator duties and responsibilities.

This Sidebar outlines current government and regulatory announcements and initiatives and is based on public information current to the date and time indicated at the outset of this document. Further pension law and policy changes are anticipated over the coming months as regulators and governments continue to navigate the current circumstances.

This Sidebar will be updated on a regular basis as changes are released. Please continue to check here for updated versions.

This Sidebar updates our July 10, 2020 Sidebar to address draft regulations amending the Québec *Supplemental Pension Plan Act*, published on July 15, 2020.

Broader employment and labour law considerations are **not** analysed herein, but will also need to be taken into account by employers and plan administrators in the current environment.

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Defined Benefit Plan ("DB") Funding Relief

Under pension legislation across the country, employers are required to make normal cost contributions (in relation to current accruals) and special payments (for historic plan deficits) to DB plans within prescribed time periods, based upon the most recently filed actuarial valuation report. Recent drops in Bank of Canada interest rates and the recent significant losses suffered in financial markets will have caused a deterioration in the funded status of many DB plans in Canada. As a result, if a new actuarial valuation report is required for a plan in 2020, it is likely that an employer's solvency funding obligations under the plan may have increased, at a time when many employers will be hard pressed to pay additional pension contributions. For this reason, many plan sponsors have been looking to governments and regulators for temporary relief from these funding obligations.

Moratorium on Solvency Payments for Federally-Regulated DB Plans

On May 27, 2020, the "Solvency Special Payments Relief Regulations, 2020" came into force (the "2020 Federal Solvency Regulation"). The 2020 Federal Solvency Regulation provides an immediate moratorium on solvency payments for the remainder of 2020 under the *Pension Benefits Standards Act, 1985* (the "PBSA") for federally-regulated DB plans.

In contrast to historic solvency relief initiatives, the 2020 Federal Solvency Regulation provides that solvency payments are reduced, and no further solvency instalments are due, in 2020 without employers' need to take any steps to opt-in to the solvency funding relief regime. If an employer made a solvency special payment to a federally-regulated DB plan in April or prior to May 27, 2020, this payment can be used as a credit towards normal cost contributions or going concern special payment due in the remainder of 2020. Employers will be required to continue to make normal cost contributions for current benefit accruals. If an employer makes solvency special payments in 2020 to a federally-regulated DB plan, such payments **cannot** be used as a credit towards contributions owing after 2020.

Other provisions of the 2020 Federal Solvency Regulation allow a reduction in the face value of a letter of credit commensurate with the reduced solvency payments. Members and retirees will need to be notified of the solvency payments that were not made to a plan in their next annual statements. Plan amendments that would improve benefits will be subject to restrictions.

The Federal Government has also announced that it will be consulting with stakeholders over the coming months regarding options to provide funding relief in 2021, as necessary.

Alberta

On June 24, 2020, the regulations under the Alberta *Employment Pension Plans Act* ("EPPA") were amended to permit a temporary suspension of unfunded liability and/or solvency deficiency payments for DB (and target benefit) pension plans until the end of 2020. An administrator must apply for consent from the Alberta Superintendent of Pensions (the "Alberta Superintendent") in order to take advantage of this relief. Approval may be retroactive, but the relief cannot begin any earlier than June 24, 2020.

The Alberta Superintendent issued EPPA Update 20-04, which provides further details regarding the application process. In particular an application must be in writing and include the estimated financial position of the plan (going concern and solvency) as of the date of application, as well as the rationale for seeking funding relief. The application must also confirm that no benefit improvements will be made during the time relief is being provided.

In addition, the amendment to the EPPA regulations also introduced an increase to the limit of funding excess that may be used to reduce or eliminate contributions for a single fiscal year of the plan. Currently, Alberta DB plans which are more than 105% funded on a going-concern basis can use funding excess to reduce or eliminate current service contributions, subject to the restriction that not more than 20% of the excess can be used in a fiscal year. This limit has been temporarily increased to 40% for a single fiscal year ending no later than December 30, 2021. This relief is also not automatic and an administrator must apply in writing for consent from the Alberta Superintendent.

British Columbia

The British Columbia Financial Services Authority stated in its COVID-19: Frequently Asked Questions Bulletin that DB plan administrators can apply to the Superintendent of Pensions to extend the amortization periods for unfunded liabilities and/or solvency deficiencies.

To date, no other jurisdictions have announced COVID-19-related changes to DB plan funding requirements. We will continue to monitor developments in this regard.

Off-Cycle Actuarial Valuations

Generally, actuarial valuation reports must be filed triennially.[1] For plans where actuarial valuations are due in 2020, there is a risk that the COVID-19 economic conditions could result in a significantly deteriorated funded status. As a result, an employer may wish to have a valuation report prepared using a pre-COVID-19 valuation date (e.g., December 31, 2019) – commonly referred to as an "off-cycle valuation

[1] Actuarial valuation reports are required annually depending upon the funded status of the plan. For example, under Ontario's funding regulations, where a filed actuarial valuation report reveals solvency concerns (e.g. the funded status determined on a solvency basis is less than 85%), the next report must be filed within one year of the previous valuation date.

report" – so that the funded status of the plan and the employer's funding requirements are calculated without regard to the current market conditions.

The Financial Services Regulatory Authority of Ontario ("FSRA") confirmed that it will extend filing deadlines for off-cycle valuations reports with an original due date in 2020.[2] FSRA has requested that the administrator inform FSRA of the intention to file the off-cycle report and request the extension at least two weeks in advance of the filing deadline.

FSRA has also provided guidance on the preparation of a valuation report prepared as at December 31, 2019, in its Pension Sector Emergency Management Response (see Q6 and Q7). Notably, FSRA takes the position that such valuation reports must disclose the significant stock market and economic decline in 2020 (referred to as a "market shock") as a "subsequent event" in accordance with the Canadian Institute of Actuaries ("CIA") Pension Standards ("Standards"). Also in accordance with the CIA Standards, FSRA expects valuation reports prepared as at December 31, 2019, to make disclosures on plausible adverse scenarios that recognize all known events, including the market shock and its potential financial impact on the plan.

Québec Actuarial Valuation Changes

Under the Québec *Supplemental Pension Plans Act* (the "SPPA"), if a pension plan is less than 90% funded, a actuarial valuation report is required at least annually until funding is at least 90%. On July 15, 2020, the Québec government published draft regulations amending the SPPA to eliminate the requirement to file an actuarial valuation as at December 31, 2020, for private sector DB pension plans whose funding level as at December 31, 2019, is *less* than 90%. If the regulation is relied on to not file an actuarial valuation as at December 31, 2020, a notice must be sent to Retraite Québec (by September 30, 2021) informing it of the financial position of the pension plan as at December 31, 2020.[3] The draft regulation remains subject to comments until August 29, 2020.

Ontario – Late Payment of PBGF Assessments

On April 30, 2020, the *General* regulation under the Ontario *Pension Benefits Act* was amended to reduce the penalty for late payment of PBGF assessments. For assessments due between April 30, 2020 and December 31, 2020, if paid late, the employer is required to pay interest on the amount of the assessment, rather than 120% of the assessment, as is normally the case, provided the payment is made by December 31, 2020.

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[2] Note that the regulations under the Ontario *Pension Benefits Act* were recently amended to provide an automatic filing extension for valuations with a valuation date of December 31, 2019 or January 1, 2020, regardless of whether the filing is off-cycle or not. FSRA's discretionary filing extension applies for valuations that do not qualify under this automatic extension. In normal circumstances, FSRA does not provide filing extensions for off-cycle valuation reports.

[3] The notice is a standard notice which must typically be provided to Retraite Québec in the years between triennial valuations.

Defined Contribution ("DC") Pension Plans

Suspension of DC Contributions

Many employers are considering reducing or suspending employer and/or employee contributions to DC registered pension plans on a temporary basis as a cost-cutting measure.

Under published Canada Revenue Agency ("CRA") policy, an employer is required to contribute a minimum of 1% of the total pensionable earnings (compensation) paid to all active plan members to a DC registered pension plan each year. However, on May 5, 2020, the CRA announced that the 1% rule would be waived for the remainder of 2020 if the pension plan is amended to suspend accruals for the year, so that there will be no employer or employee contributions made to the pension following the plan amendment.

In order to implement changes to employee and/or employer contribution rates, the contribution formula under the pension plan text must be amended. In most jurisdictions, the plan amendment must be filed before the amendment can be operative. In addition, notice of an amendment to reduce or suspend contributions to a DC pension plan will need to be provided to members. Notice requirements vary between jurisdictions and will need to be considered on a case-by-case basis. Please contact us for more details in this regard.

The following chart outlines jurisdictions where a full suspension of employer contributions is or may be permissible on a temporary basis.

Jurisdiction	Additional Information
Federal	OSFI has noted that there is no prohibition under the PBSA or its regulations from amending a pension plan to reduce the level of employer or employee contributions to a DC plan on a go-forward basis.
Ontario	Until further notice, FSRA will not order a plan to be wound up solely because the plan has, as a result of the COVID-19 disruption, been amended to temporarily suspend contributions for a portion of 2020.
British Columbia	Where employees are required to contribute, their contributions must be suspended as well. An application to the B.C. Superintendent for the continuation of the pension plan is required. Members must be provided advance notice of the change to their contributions.
Alberta	An application to the Alberta Superintendent for the continuation of the pension plan must include the following: • written confirmation that the participating employer intends to continue in operation; • the reason for the suspension; • confirmation that the participating employer and administrator understand that Annual Information Returns will continue to be required.

	Where the employee contribution rate is changed, the requirement that the administrator provide 30 days' advance notice of the change is temporarily waived. Instead, the administrator must provide notice within 60 days of the date the employee contribution rate is changed.
Saskatchewan	The amendment must provide that contributions are suspended for both employees and the employer and set out the applicable time period for the suspension (i.e. it must be temporary).
Newfoundland and Labrador	Members must be provided advance notice.
New Brunswick	The New Brunswick Superintendent will not order a plan to be wound-up solely because an employer temporarily ceased contributions for a portion of the 2020 calendar year as a result of COVID-19.
Québec (*new*)	Draft changes to the SPPA provide that the amendment to the pension plan providing for the suspension of contributions must take effect no earlier than July 15, 2020, and set an end date for the suspension. See the below section entitled "Québec - Temporary Suspension of Accrued Benefits for DB and DC Plans" for more details.

Retroactive DC Catch-Up Contributions

Draft amendments to the *Income Tax Regulations* released by the Department of Finance on July 2, 2020 will permit retroactive catch-up contributions in respect of the 2020 calendar year to be made in 2021 to a member's account under a DC pension plan. This will be permitted where an amendment is made to the plan to reduce DC contributions in 2020, and the retroactive contribution is made in 2021 to replace, in whole or in part, the contribution that would have otherwise been required to be made to the plan in 2020.

The retroactive contributions must generally be made between January 1, 2021 and April 30, 2021. Retroactive contributions (both employee and employer) may be paid at a later date where a member makes a written commitment no later than April 30, 2021 to the plan administrator to make the retroactive contribution.

Québec – Temporary Suspension of Accrued Benefits for DB and DC Plans - *New*

On July 15, 2020, the Québec government published draft regulations amending the SPPA to allow both DB and DC pension plan members to maintain active membership in a pension plan where the plan has been amended to temporarily suspend the accrual of benefits (normally, members would cease to be active members and if the plan no longer has any active members Retraite Québec would have the authority to terminate the plan). The suspension must begin in 2020 (no earlier than July 15, 2020) and last for no longer than 12 months following the date on which benefit accrual ceased. A plan amendment must be filed to provide for the suspension as soon as possible and the amendment must include an end date for the suspension. In the case of a DB plan, an actuarial valuation must also be filed to reflect the amendment suspending accruals.

Retraite Québec's FAQs were updated July 15, 2020, to provide further guidance on this proposed change to the SPPA.

Pension Accruals During Leaves and Other Absences

The COVID-19 pandemic has resulted in unprecedented changes to workplaces across Canada, with very different changes depending upon the particular workforce. Employees are absent from the workplace for a variety reasons on both a paid and unpaid basis (e.g., sick leaves or short-term disability leaves in accordance with the employer's established policy, a COVID-19 leave in accordance with employment standards COVID-19 leave provisions (which vary by jurisdiction) or an employer-specific policy and temporary lay-offs).

Whether or not pension accruals and contributions continue during a particular absence is governed by the terms of the applicable pension or retirement savings plan, subject to any statutory requirements. Employers should review the leave provisions of all of their pension and retirement savings plans (all registered plans as well as savings plans and supplemental plans) to ensure that the current leave provisions are consistent with how the employer wishes various leaves to be treated for pension and savings plans "accrual" and contribution purposes.

Some employers are paying additional remuneration to front-line workers during the pandemic. These employers also need to consider: (i) whether they intend this additional remuneration to be included as "earnings" under the provisions of the applicable pension or retirement savings plan, and (ii) whether the terms of the applicable plan reflect the employer's desired approach.[4]

Pension Accruals During Periods of Reduced Pay

Some employers may have temporarily reduced their employees' pay during the COVID-19 pandemic *without a corresponding reduction to their working time*. Where the employer wishes to continue to provide full pension accrual under the pension plan during a period of reduced pay based on the employee's regular full-time/part-time remuneration, the period must qualify as an "eligible period of reduced pay" under the *Income Tax Regulations*. The same rules apply to DB and DC pension plans.

In order to qualify as an "eligible period of reduced pay", two of the requirements currently are:

- the member must have been employed for at least *36 months*, and
- there is a corresponding *reduction to the member's regular working time*.

[4] Please also refer to our Sidebar COVID—19: Cross Canada Updates for Pension Plan Administrators, regarding the federal and provincial governments' recent announcements on "pandemic pay" along with a summary of Ontario's infectious disease emergency leave under the Ontario *Employment Standards Act, 2000* and its impact on employer pension and benefit plans.

Draft amendments to the *Income Tax Regulations* released by the Department of Finance on July 2, 2020 will provide an exception to these two requirements for pension plan members whose pay is temporarily reduced during the COVID-19 pandemic. This exception will allow employers who wish to do so to provide full pension accrual for employees whose pay has been reduced, including those employees who have been employed for less than 36 months. For the 2020 calendar year, such periods of reduced pay will qualify as an "eligible period of reduced pay" and count toward the cumulative income tax limits on pension accrual applicable to leaves of absences, lay-offs, and periods of reduced pay.

Deferred Salary Leave Plans

A "deferred salary leave plan" ("DSLP") enables employees to maintain a stable income level during a leave of absence by allowing them to defer part of their salary over a number of years in order to fund the leave of absence. The tax rules require DSLPs to satisfy certain conditions, which include the following:

- the deferral period cannot be longer than six years; and
- the leave of absence must generally be a continuous period of at least six months.

Draft amendments to the *Income Tax Regulations* released by the Department of Finance on July 2, 2020 will:

- extend the maximum deferral period to 84 months for employees whose deferral period would end after March 14, 2020 and before May 1, 2021; and
- allow employees whose leave of absence is suspended after March 14, 2020 to resume their leave of absence provided that it resumes no later than April 30, 2021.

Health Care Spending Accounts ("HCSA")

Some employers use a HCSA to reimburse employees or retirees for certain medical expenses not otherwise covered by provincial or private healthcare plans. The CRA has indicated that credits allocated to a member under a HCSA that have not been used due to the COVID-19 pandemic may be carried forward beyond their expiry date without jeopardizing the HCSA's preferred tax status as a "private health services plan" under the *Income Tax Act* (Canada). HCSAs under which unused credits would normally expire between March 15 and December 31, 2020 may permit the carry forward of unused credits for a period of up to six months if the terms of the HCSA permit or are changed to permit the longer carry forward period.

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If you have any questions regarding this update, please do not hesitate to call a sidebar with any of us – we're here to help.

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