Practical considerations in pension plan administration during COVID-19

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Plan administrators are subject to fiduciary duties and a duty of care in plan administration. The COVID-19 pandemic does not change this but likely creates practical difficulties in discharging the duties. This article highlights various difficulties an administrator may face as a result of the pandemic.

Conflict of interest

One of the key fiduciary duties of a plan administrator is to avoid conflicts of interest. There is always a risk of a conflict (potential or actual) where the employer is also the plan administrator. Financial difficulties due to the pandemic make the risk even more apparent when the employer has become unable to meet its obligations under the plan. An employer who is also the administrator should be sensitive to situations that may put itself in a conflict of interest and should take appropriate action in addressing the conflict.

Knowledge base

An administrator needs to be familiar with the legislative requirements and regulatory policies applicable to pension plans. Pension regulators across Canada have adopted, and continue to update, practices regarding plan administration in order to deal with the pandemic. It is anticipated that there will be changes in the pension benefits legislation. There are also changes in other legislation such as employment standards legislation, which may have an impact on plan administration. It is challenging for administrators to keep up with the changes to ensure they comply. The challenge is even more complex for multi-jurisdictional pension plans. BLG's Pensions and Benefits Group is monitoring the legislative and regulatory changes across Canada on an ongoing basis to assist our clients.

Funding and contributions

One of the key responsibilities of an administrator is to ensure that all contributions are paid into the plan fund when due. The pandemic may result in employers defaulting in making required contributions. Without regulatory changes, employers are not relieved

from their obligations to fund benefits under defined benefit plans. Contributions (employer and employee) under defined contribution plans cannot be “suspended” without plan amendments. An administrator is required by pension benefits legislation to notify the pension regulator when contributions are not paid when due. In addition, administrators need to consider what actions they should take in respect of the non-payment in order to discharge their fiduciary duties. Where the employer is also the administrator, the administrator should be sensitive to the risk of a conflict of interest in determining what should be done regarding non-payment of contributions.

Pension fund investment

Economic downturn and poor investment performance caused by the pandemic may render some aspects of a pension plan’s investment policy or investment options offered under a defined contribution plan inappropriate. It is time for the administrator to review the investment policy and the investment options to determine whether there should be any changes (short-term and long-term). Changes in the plan sponsor’s funding policy may also have an impact on the investment policy. At a minimum, an administrator should turn its mind to pension fund investment, although it may not necessarily result in any changes. Enhanced communications to members of capital accumulation plans may be advisable.

Member communication and disclosure

There are undoubtedly practical challenges in member disclosure and communications when plan members and delegates in administration (like human resources and third-party service providers) work from home. The privacy of personal information contained in communications by electronic means while working remotely may be more vulnerable to violation. Daily administration tasks such as collecting information for, and distributing, prescribed member statements, handling member enquiries and complaints and timely responses to member requests for information and inspection of plan documents are more difficult to perform.

Transparency and accuracy in communication are key to minimizing exposure to claims of misrepresentation and breach of fiduciary duties and the duty of care. An effective communication strategy is crucial. More member enquiries about benefit security are likely during times of instability. It may be advisable for an administrator to engage and communicate with plan members (particularly pensioners) on the financial situation of the plan to address their concerns with the security of their pension benefits.

Some pension regulators have extended the time-frames for the distribution of annual and biennial statements while some regulators may grant an extension only on request. Where a plan administrator intends to rely on an extension, it should review the plan text to determine whether any plan amendment is necessary to ensure that it continues to administer the plan according to its terms (for example, some plan texts set out a specific time-frame for distribution of member statements). It is also desirable for the administrator to communicate the delay to plan members to manage their expectation.

Portability

Pension benefits legislation prescribes a solvency or transfer ratio threshold for transfers of pension benefits out of the plan fund or purchases of annuities under a defined benefit pension plan. When a plan falls below the threshold, full transfer cannot be made without regulatory approval. The solvency or transfer ratio will likely have fallen significantly from the last actuarial valuation report. Some pension regulators have declared a temporary full freeze on portability without regulatory approval. The temporary freeze does not affect a member's entitlement to portability options, but prohibits the transfer without the required approval. The pension benefits legislation does not require the administrator to apply for regulatory approval on behalf of the members. The decision of whether or not to apply for approval (and when to do so) falls on the administrator as part of its duties in plan administration. Clear and effective communication to members is again crucial in these circumstances.

Administration practices and delegation

Working remotely provides a different set-up for plan administration, particularly delegation, reporting and supervision (for example, in-person meetings are unlikely). Deviation of actual administration from committee mandates, administration policies or third-party service agreements in plan administration is harmful to plan administrators when there are claims against them. We recommend that committee mandates, administration policies and service agreements be reviewed to determine whether revisions are required to reflect changes in administration practices. It is also advisable for administrators to be sensitive to practical risks in electronic communications and meetings in different formats.

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