Focus

LABOUR & EMPLOYMENT

Bright new idea for pensions

Jessica Bullock

In the past several years a novel type of pension plan has emerged which may dramatically alter the pension landscape in Canada. Target benefit plans (TBPs) are unique pension arrangements where the risk is shared equally between the employer and employees.

In a traditional defined benefit (DB) pension plan, employers are solely responsible for funding any deficit of the pension plan within the time frames set out in the applicable pension standards legislation. In a traditional defined contribution (DC) pension plan, the employee is solely responsible for ensuring that the value of the employee's DC pension account is sufficient to fund the employee's financial needs at retirement.

TBPs are seen as a compromise which is intended to minimize the risks associated with traditional DB and DC pension plans. They can best be described as a hybrid between DB and DC pension plans whereby employers and employees make fixed pre-determined contributions to the TBP based on a percentage of the employees' earnings and the employees receive a target DB-like pension benefit at retirement. Employer and employee contributions and pension benefits will be adjusted downwards or upwards over time based on plan performance. To illustrate, if the investment returns of the TBP are significantly better than anticipated, employer and employee contributions may be reduced and/or pension benefits may be increased.

New Brunswick is the only jurisdiction in Canada which permits the establishment of TBPs, which are referred to as "shared risk pension plans" (SRPPs) in the enacting legislation. The legislation mandates that SRPPs have in place a funding policy, an investment policy, risk management goals and procedures including asset/liability modeling and annual actuarial valuations, and a dispute resolution process, all of which must be reviewed and approved by the New Brunswick superintendent of pensions. An employer cannot be the administrator of an SRPP — this role must be filled by an individual trustee, board of trustees or a non-profit corporation. The sole obligation of the employer is to make their required contributions to the SRPP. The independent administrator is responsible for carrying out the purposes of the SRPP and for making decisions, in accordance with the SRPP's policies, to increase or decrease employer and employee contributions and/or pension benefits.

In conducting affordability testing for a SRPP, the following two legislated risk-management goals must be met:

1. The primary risk-management goal is a 97.5 per cent probability that over the next 20 years, the "base benefits" will not be reduced.

2. The secondary risk-management goal is that, over the next 20 years, at least 75 per cent of the "ancillary benefits" will be delivered.

"Base benefits" are the normal retirement pension benefits based on the member's years of credited service, earnings and age of retirement. "Ancillary benefits" are additional benefits such as survivor benefits, bridge benefits and cost-of-living adjustments. Actuarial valuations are conducted annually for SRPPs and must evaluate and disclose the results of the affordability testing. There are no requirements for funding a SRPP on a solvency basis, although the "termination value funded ratio" must be disclosed in the actuarial valuation.

A member's termination value under a SRPP is the greater of: (i) the member's contributions with interest; and (ii) the actuarial value of the member's pension benefit multiplied by

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Reasonable accommodation for medical marijuana

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Since 2001, employers have faced a new challenge in complying with their obligations to maintain safety in the workplace: employees whose possession and use of marijuana is legal, based on medical need. Recent regulation changes appear to make their position more difficult.

Under the old regulations, individuals seeking a licence for medical marijuana were required to show that they fell within one of two defined categories and to obtain a physician declaration to that effect. These categories have now been eliminated.

Under the new federal *Marihuana for Medical Purposes Regulations*, SOR/2013-119 (MMPR), medical marijuana is available on the authority of a medical practitioner. The MMPR neither place conditions on the exercise by medical practitioners of the powers conferred upon them, nor provide guidelines on the appropriate use of medical marijuana. The government has effectively dropped these decisions into the lap of the medical community. They have done so in an effort to treat marijuana similar to other narcotic drugs used for medical purposes, while enabling a commercially viable marijuana industry for individuals who have legitimate prescriptions to purchase from a licensed producer.

This development may not be as problematic as it sounds. It is true that licences for medical marihuana had been consistently on the rise under the licencing system; the most recent statistics released by Health Canada show that 28,970 persons held authorizations in January 2013, with the number rising to 37,884 by December 2013. However, this upward trend might slow once the ball is firmly in the court of medical practitioners.

The College of Family Physicians of Canada (CFPC) has repeatedly disavowed marijuana as an effective treatment. The CFPC released its Statement on Health Canada's Proposed Changes to Medical Marijuana Regulations, noting:

- The absence of evidence and conflicting evidence as to the effectiveness of therapeutic marijuana;
- Inadequate research into risks;
- The failure of Health Canada to give marijuana the same treatment as other drugs through explicit statements on its indications, precautions and contraindications;
- The hazardous nature of smoke as a delivery system; and
- The availability of alternative forms for delivery of THC, the active ingredient of cannabis and synthetic cannabinoids.

The CFPC and other physician organizations such as the Federation of Medical Regulatory Authorities of Canada have continued to document their reservations about therapeutic marijuana, indicating a woeful lack of evidence supporting its therapeutic value.

In such circumstances, employers may have little difficulty in insisting on safeguards to insure that an individual's use of medical marijuana is not permitted to compromise health, safety and productivity at the workplace. Employers have a statutory duty to maintain a safe workplace. They also have the right to seek medical confirmation of fitness for duty where there are reasonable grounds to believe that an employee is unfit or may be a danger to himself/herself or others. Authorization to use medical marijuana is no different, in this context, than any other prescription medication capable of impairing mental and physical function.

That said, employers and the lawyers who advise them can and should prepare for the specific possibility of medical marijuana users on their workforce. As a first step, they should review any existing drug and alcohol policy to insure that it will encompass medical marijuana, that it clearly sets out the necessity for the reporting of and the acceptable use by employees of medical marijuana, and that it imposes disciplinary consequences for failure to comply.

The duty to accommodate employee disability carries with it a right to the medical information necessary to fulfil that duty. When faced with an employee who is authorized to use medical marijuana, an employer should exercise that right to fully understand whether medical marijuana is a disability-related need and, if so, what its likely effect will be on the employee's abilities to perform his or her duties and to function effectively in the workplace.

Armed with that information, the employer should consider what is reasonable in terms of accommodation. For example, it may be that an employee in a safety-sensitive position can be reasonably accommodated only through a medical leave of absence or a reduction of working hours. However, it is important to insure that all potential options are fully and objectively explored and a rush to judgment is avoided. Paid administrative leave during the exploration of these options may be a useful approach.

It is still far from clear how or if medical marijuana will be a factor in most workplaces. Given the volume of information available, questioning the effectiveness of marijuana for all but a few disabling conditions and the expressed objections of medical bodies to its treatment as a therapeutic drug, employers may not be facing a significant increase in legal usage among their workforce. If medical practitioners are indeed as reluctant to prescribe marijuana as their professional bodies suggest, it may be a rare case when an employer is faced with these issues.

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the termination value funded ratio.

The SRPP administrator must disclose to all members and other beneficiaries the nature of the SRPP and the pension benefits provided under the plan, including a "clear, plain language statement that the contributions are limited to those allowed under the funding policy," and that past and future base benefits and ancillary benefits may be reduced. The SRPP administrator must also disclose the SRPP's funding policy and funded status and explain how benefits adjustments are determined.

All members and other beneficiaries must be informed annually, within 12 months of the review date, of the key results of the most recent actuarial valuation for the SRPP, including a summary of the SRPP's funding policy and a description of how the member's pension benefits would be calculated if the SRPP were terminated on the effective date of the actuarial valuation.

Ontario, Alberta, British Columbia and Nova Scotia have enacted legislation to expressly permit TBPs but extensive regulations are still required and the legislation in these jurisdictions has not been proclaimed into force. Interestingly, Ontario and Nova Scotia limit the establishment of TBPs to collectively-bargained employees; Alberta and B.C. do not.

In Quebec, temporary legislation provides for the establishment of TBPs in certain pulp and paper sector enterprises. Although this legislation is of limited application, it is a first step toward a legal framework that would allow the establishment of TBPs in Quebec. These rules are temporary until permanent legislation is promulgated for all TBPs in Quebec.

On April 24, the federal government announced a proposal to implement TBPs for federally regulated private sector and Crown corporations. Federally regulated industries include banking, transportation, telecommunications, and radio and TV broadcasting. The proposed framework would allow eligible employers to convert their existing DB pension plans to TBPs. The TBP proposal will not affect the core public service pension plans. A 60-day consultation process was launched in connection with the TBP proposal, pursuant to which stakeholders could submit their comments to the finance department.

It remains to be seen how many Canadian employers will establish TBPs, or convert existing DB pension plans to TBPs. Depending on interest, we may see a marked alteration in the type of pension benefits Canadians receive and the number of Canadians with pension coverage (it being anticipated that TBPs will increase current levels of pension coverage).

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