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THE MEMBER-FUNDED PENSION PLAN: A DEFINED BENEFIT PENSION PLAN THAT LIMITS THE EMPLOYER'S FINANCIAL RISK

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The decision by an employer to offer a pension plan to its employees is an important one. Various types of pension plans may be offered, and the financial risk of the employer depends on the type of plan chosen.

While unions and employees generally prefer defined benefit pension plans,¹ employers are now very reluctant to implement such plans because of the financial liability they entail. Indeed, when a defined benefit plan shows a deficit, the employer must make special payments into the plan to cover it. These special payments, which are in addition to the employer's regular contributions, often represent significant amounts. The strict funding rules applicable to traditional defined benefit pension plans are one of the main reasons why so few of these plans have been established in Quebec in recent years.

The Quebec Government was aware of this situation and took action

in February 2007 to permit the creation of a new type of defined benefit pension plan which limits the employer's financial risk.² This new type of plan is called the "Member-Funded Pension Plan" ("MFPP"). The MFPP is mainly intended for unionized workers, since the tax rules require such plans to be implemented pursuant to a collective agreement, except where the Minister of National Revenue waives this requirement. Accordingly, an exemption must be obtained from the Minister of National Revenue where one wishes to set up an MFPP that applies both to unionized and non unionized employees.³

The following are the main features of the MFPP:

- ▶ it must set the employer's contribution and the normal pension in advance;⁴
- ▶ it must provide that the active members of the plan are responsible for the cost of the plan's commitments, less the employer's contribution;
- ▶ it must contain a provision preventing the employer from unilaterally amending or terminating the plan;

- ▶ it must stipulate that only members and beneficiaries are entitled to any surplus assets (more commonly called "surpluses") determined upon termination of the plan;
- ▶ the effective date of the plan must be subsequent to March 15, 2007.

Under the MFPP, the active members bear the financial risk. Therefore, their

1. I.e. plans that promise in advance to pay a specific pension amount to the member upon his retirement.
2. This new type of pension plan is permitted under the *Regulation respecting the exemption of certain categories of pension plans from the application of provisions of the Supplemental Pension Plans Act* (the "Regulation").
3. According to the Régie des rentes du Québec, such an exemption should be granted if the MFPP covers the majority of the employer's employees.
4. A normal pension is a retirement pension which starts being paid at the normal retirement age, generally 65.

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contributions must not only be at least equal to the balance of the cost of the plan, they must also make the special payments to cover the deficits, if any.

In addition to the foregoing, it is important to note that the MFPP:

- ▶ may not include a defined contribution component;
- ▶ may not be an insured plan;
- ▶ must be a "career earnings"⁶ or "flat benefit"⁷ type of plan;⁵
- ▶ may not provide for the automatic indexation of pensions, either prior to or after retirement;
- ▶ may not be validly implemented by converting a traditional defined benefit plan into an MFPP.⁸

SETTING UP THE MFPP

An employer may set up an MFPP for its employees. However, the consent of the active members must be obtained because they bear the financial risk under this type of plan. The Regulation provides for specific rules in this regard. With respect to the active members who are unionized, a written declaration is required from the union. In this declaration, the union must acknowledge, on behalf of the members it represents, the obligations incumbent on each of them under the plan. In the event that certain active members are not represented by a union, their consent must be obtained in accordance with the consultation process provided under the Regulation.

ADMINISTERING THE MFPP

Like any traditional pension plan, the MFPP must be administered by a pension committee in accordance with the requirements of the *Supplemental Pension Plans Act*.⁹

CONTRIBUTION HOLIDAYS

The rules governing the employer's contribution holidays under a traditional defined benefit pension plan do not apply to the MFPP. In the case of the MFPP, surplus assets may be used to pay the employer's contribution only if doing so is necessary to comply with the tax rules.

AMENDING THE MFPP

As with the traditional defined benefit pension plan, the plan text of the MFPP must specify who may amend the plan and the conditions for doing so. However, as stated above, the plan text of the MFPP may not give the employer the power to amend it unilaterally.

Note that even if the plan text of the MFPP gives the union the power to unilaterally amend the provisions of the plan, any amendment which would either increase or decrease the employer's contribution requires the employer's consent, except if such amendment becomes mandatory as a result of the application of a new legislative provision which allows for no discretion.

TERMINATING THE MFPP

The plan text of the MFPP must indicate who has the power to terminate the plan and the conditions for doing so. As with the power to amend the provisions of the plan, the MFPP may not grant the employer the power to unilaterally terminate the plan.

The process for terminating the MFPP is the same as for the traditional defined benefit plan, except with respect to the allocation of the surplus assets or payment of the deficit, as the case may be. If the MFPP shows a

surplus, it is allocated to the members. Conversely, if it shows a deficit, the rights of the members are reduced. Indeed, the employer is not required to pay into the pension fund the amount necessary to make up the deficit. It is only required to pay its contributions which are due but not yet paid as of the termination date.

OTHER SPECIAL RULES APPLICABLE TO THE MFPP

In addition to the features described above, other special rules also apply to the MFPP, particularly concerning the valuation standards applicable to this type of plan.

CONCLUSION

By adding a new type of defined benefit pension plan in which the employer assumes a limited risk, the Québec Government is offering a new option which may be interesting to some employers. Indeed, where a union requests a defined benefit pension plan, the MFPP may be an option to consider.

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5. I.e. a plan whose benefits and refunds are guaranteed at all times by an insurer.
 6. I.e. a plan in which the salary used to calculate the member's pension corresponds to the salary attributed for each of the member's eligible years of service.
 7. I.e. a plan in which the member's pension is determined by multiplying the fixed amount set out in the plan by the member's number of eligible years of service.
 8. Also, no split or merger can occur between a traditional defined benefit plan and an MFPP.
 9. R.S.Q., c. R-15.1.

DOING BUSINESS WITH THE GOVERNMENT: A QUESTION OF TRANSPARENCY

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Few ignore that in the Province of Québec the *Act respecting access to documents held by public bodies and the Protection of personal information* (the "Act") allows a person to access documents held by the government. Did you know however that the documents and information disclosed to a public body by an enterprise or an individual also fall under the purview of the Act and may be subject to a request for access to information?

In fact, a document need not have been prepared by or on behalf of a public body for the Act to apply. Whether the enterprise provided the information voluntarily, in connection with invitation to tender or to obtain a service, a subsidy, a permit or a certificate, or whether its disclosure was required by law, the Act will apply.

For a private-sector enterprise, this means that a public body could release non-accessible and often confidential documents or information to a citizen – or to a competitor – who submits such a request. This is especially worrisome since most enterprises, often unaware of the workings and effects of the Act, share and communicate to public bodies all sorts of information about their financial statements, their activities and their operations as though the Act did not exist.

SECTIONS 23 AND 24 OF THE ACT

Fortunately, the Act provides a mechanism whereby, prior to releasing information communicated by a third person, the public body which holds the information is required to consult with this third person to obtain his observations on the possible application of the restrictions under sections 23 and 24 of the Act.

To successfully raise sections 23 and 24 of the Act, that is to say, in a way that ensures confidentiality, the third person must have provided the information to the public body since it is not sufficient for the information to simply relate to the third party. For instance, sections 23 and 24 do not apply to clauses negotiated in a contract between an enterprise and a public body since they generally do not contain information provided by a third person. However, sections 23 and 24 of the Act could apply to the portions of a contract that were not the subject matter of negotiations and that contain information provided by the third person, for example the description of the technology or methods used by the enterprise to implement the contract.

This said, before section 23 of the Act can apply, the information must also fall under one of the following categories: industrial, financial, commercial, scientific, technical or union information. The third person must further demonstrate that this type of information is usually treated by enterprises operating in the same sector of activities as confidential (objective criterion) and that the third

person himself ordinarily treats this information as confidential (subjective criterion).

On the other hand, in order for section 24 of the Act to apply, the third person must show that the disclosure of the provided information would likely hamper ongoing or upcoming negotiations in view of a contract, would likely result in losses for the third person or in considerable profit for another person or substantially reduce the third person's competitive margin.

In each case, the third person who objects to the disclosure must convince the person in charge of access to information within the public body that the information falls under the restrictions of sections 23 or 24 of the Act and must bear the burden of proving that the above-mentioned conditions are met. Admittedly, while some information will easily meet the conditions of application of sections 23 and 24 of the Act (it is the case, for example, of the financial statements of a profit-oriented enterprise), more than a simple statement of the confidential nature of the information or the foreseeable consequences of its disclosure is needed to satisfy the criteria of the Act. Similarly, the fact that a document is marked "Confidential" or that it contains a non disclosure clause is not enough to ensure its confidentiality, even though it might serve as a good indication of the subjectively confidential nature of the information it contains.

Note in point of fact that the public body remains free to accept or reject the third person's position. If the public body accepts the third person's argument and refuses to disclose the information, the person who submitted the request for access to information may petition the Commission d'accès à l'information to review the public body's decision. It will be up to the third person to assert that the conditions of application of

the aforementioned sections were met. On the other hand, if the public body does not support the third person's position, he will have to apply to the Commission for a review of the decision before access to the documents is granted.

SOME PRACTICAL ADVICE

On the whole, Québec enterprises, and especially those carrying on commercial activities with the government, cannot ignore the rules and principles set out in the Act. To mitigate the impact of this Act, an enterprise must modify certain practices, adopt guidelines and procedures, train employees and raise their awareness, etc.

Where the communication of information and documents to a

public body is required, enterprises would be well advised to limit the communication to what is necessary to meet the needs of the public body. Moreover, it would be advisable, even necessary, to prepare letters of transmittal in which the confidential nature of the disclosed documents and information is clearly outlined. In certain cases, confidentiality agreements will also be advisable, even though we have seen that such undertakings do not suffice to ensure the confidentiality of the disclosed information. Lastly, the confidential treatment of information within the enterprise will be of the utmost importance since the application of the restrictions under sections 23 and 24 of the Act depend, in particular, on the internal measures implemented by the enterprise to ensure the confidentiality of the information provided to the government.

population of some 33 million residents.

During the summer, public health authorities and many businesses stayed the course in anticipation of the second wave of the pandemic. While awaiting approval of a specific H1N1 influenza vaccine, raising awareness about the importance of hygiene measures continued in businesses and among the population in general.

On October 19th, despite a low degree of virulence, President Barack Obama declared H1N1 a national emergency. Seven days later, the Quebec Government commenced its vaccination program even though a survey showed that almost half of Quebecers had no intention of getting the vaccine.

Dr. Yves Bolduc, Minister of Health, then made headlines by stating that health workers who would refuse to be vaccinated could be removed from work, without pay. The Minister was most likely relying on a 2008 decision rendered in Quebec by Marcel Morin, a grievance arbitrator, in the case of *CSSS Rimouski-Neigette*³, and the subsequent judgment by the Honourable Judge Gaétan Pelletier of the Superior Court of Quebec, sitting in judicial review of Arbitrator Morin's award.⁴

YOUR COMPANY AND THE INFLUENZA H1N1 FLU PANDEMIC

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Between November 12 and 17, 2009, 37 Canadians died from the H1N1 influenza virus, bringing to 198 the number of victims nationwide since the spring of 2009. Of this number, 23 were from Quebec, bringing the total number of Quebec victims to 58. This means that 40% of the deaths that occurred in Quebec since the first wave were seen in less than a week in mid November while Ontario did not report any deaths during that same period.¹

When the first wave of the H1N1 influenza hit Quebec last March, many questions were raised about the possible effects of the pandemic

on various workplaces especially in light of the difficulty in forecasting the degree of the flu's virulence. While some models anticipated a long list of legal and operations problems for businesses and organizations such as high rates of absenteeism, forced quarantines and major social disruptions, others disagreed with the imminence of a major crisis.

In fact, the Public Health Agency of Canada reports that from March 2009 to the following July 15th, 10,156 cases of influenza A (H1N1) were confirmed in laboratory, resulting in 1,115 cases of hospitalization and 45 deaths.² Generally speaking, Canadian workplaces were spared the first wave, the number of reported cases remaining low for a Canadian

1. Data from the Public Health Agency of Canada, <http://www.phac-aspc.gc.ca/>
2. id. : <http://www.phac-aspc.gc.ca/alert-alerte/h1n1/surveillance-archiver/20090715-eng.php>
3. *Syndicat des professionnelles en soins infirmiers et cardio-respiratoires de Rimouski (FIQ) et CSSS Rimouski-Neigette*, April 24, 2008, T.A. 2008-2519 (Marcel Morin)
4. *Syndicat des professionnelles en soins infirmiers et cardio-respiratoires de Rimouski (FIQ) v. Me Marcel Morin et Centre de santé et de services sociaux de Rimouski-Neigette*, June 8, 2009, S.C.100-17-000847-089 (Gaétan Pelletier, J.S.C.) (Soquij AZ-50562125)

While these decisions were rendered in the health sector, do the principles that emerge apply to businesses? Can an employer adopt a mandatory vaccination policy and remove without pay any employee who refuses to comply?

Arbitrator Morin heard grievances that contested the removal of some nurses from the workplace further to their refusal to get the seasonal flu vaccine or to take antiviral drugs. In the wake of the severe acute respiratory syndrome (SARS) crisis that shook Ontario in 2003, the health sector had adopted protocols pursuant to which health care givers were required to either get vaccinated or take antiviral drugs. These measures were intended to protect the health of the public and health-care workers alike. In compliance with the establishment's protocol, the CSSS suggested but did not impose the vaccination.

The arbitrator was of the view that the right to refuse the vaccine was protected by both the Quebec Charter and the *Civil Code of Québec*, but that the objective of protecting patients was important enough to justify the infringement of the right to refuse the vaccine. The arbitrator concluded that the forced removal from work was a reasonable measure and that the Charter did not protect the loss of remuneration related to the exercise of a right.

While the Superior Court reached the same conclusion, its reasoning differed. Judge Pelletier rightly considered that inasmuch as the nurses were entitled to refuse the vaccination, it cannot be concluded that a fundamental right was infringed. As the wage cut was an economic constraint and not an infringement of a fundamental right, the removal from work without pay was justified and reasonable.

We believe that the principles established in the *Rimouski-Neigette* cases may apply in a business context.

In the current state of Quebec law and in the absence of a vaccination order under the *Public Health Act*⁵, no one should be vaccinated against his or her will.

The decision to "impose" the vaccination should be taken based on a specific work environment, in consultation with the company's consulting physician. In circumstances where the vaccination is necessary, refusal to be vaccinated may result in forced removal from work, subject to the specific provisions of a contract of employment or a collective agreement.

To avoid any confusion, businesses should adopt an influenza policy and make their employees aware of the importance of the vaccination. The policy should specify that no one will be vaccinated against his or her will and clearly state the consequences of refusal when the employee cannot be re-assigned to safe duties.

The flu policy should address several other aspects related to the management of the pandemic status, such as the use of personal protection equipment, hygiene rules at work, the obligation to report the existence of flu symptoms and to refrain from working in such case. The policy should set out income protection terms and conditions in case of the flu, such as short and long term disability insurance coverage, sick days, flexible leaves and unpaid leaves.

While careful to comply with the provisions of the *Act respecting labour standards* (the "ALS")⁶, the policy could also include conditions on taking annual leave, either to prohibit it in situations of staff shortage or to force employees to take it while operations are halted or slowed down.

It is important to understand that if the right to the annual leave is recognized under the ALS, the choice of when it can be taken is up to the employer. However, as the employee is entitled to know the date of the annual leave

four weeks in advance, it is possible to prohibit employees from taking vacation during a period of staff shortage or to cancel vacation time that has already been authorized, provided the notification is made at least four weeks prior to the effective date of the leave.

Moreover, employees who are not entitled to sick days or other income protection measures in the event of a short absence may ask the employer to split their annual leave. Usually, the employer who authorizes the annual leave will have to agree to it if the request is intended to split the annual leave into two periods. However, while the employer is not obliged to grant a request to split the leave into more than two periods, he may, under certain circumstances, benefit from it.

It goes without saying that a flu policy and its implementation may be limited by the relevant clauses of collective agreements and of individual contracts of employment. In our opinion, such a policy does not have to outline all the measures that could be allowed. For instance, the issue of telework or the possibility of flexible schedules may not apply to everyone and, consequently, may have to be assessed on a case by case basis. Furthermore, it is not necessary to list all the leaves and benefits employees may be entitled to under the various statutes. It is not a question of re-writing the laws but of specifying some of the terms and conditions which the company wants to implement during the pandemic. Regardless of the measures taken, it is advisable to convey them to the employees and the union as soon as possible in the hope of getting their support.

5. R.S.Q., chapter S-2.2

6. R.S.Q., chapter N-1.1

To conclude, while no one can really predict the scope of the pandemic, it seems that, for the moment, few businesses in Quebec are seriously disrupted by the flu.

However, companies that initiate planning measures in anticipation of the pandemic are quickly reaping the benefits. In fact, the identification of preventive measures requires an analysis of the company's strengths and areas of vulnerability. This will result in a better knowledge of the organization and the permanent improvement of some procedures. The company's various components, such as supply, operations, human resources, occupational health and safety, IT and communications departments, will have to work together, resulting in greater cohesion. Along the same lines, better hygiene habits at work can only be beneficial in the long run. There is no doubt that companies that undertake these steps will come out ahead of the game.

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