

## **PENSIONS AND EMPLOYEE COMPENSATION ADVISORY**

*January 2004*

### **PENSION PLAN COMMUNICATIONS - RECOGNIZING AND MANAGING THE RISK**

A recent survey of Defined Contribution (DC) pension plan sponsors disclosed a significant level of concern about potential litigation. Pension communications and education was identified as a key area of potential risk. A majority of survey respondents believe that plan member education is the most important defense against litigation. Notably, only 11% of those completing the survey thought they were doing "extremely well" in the area of communication and education. Member education and communication are topical concerns for both DC plans and Defined Benefit pension plans.

Employers and pension plan administrators have increasing obligations when communicating to plan members regarding their pension plan. First, there are statutory provisions that prescribe minimum standards to be followed with respect to communications with pension plan members. Second, recent court decisions have held pension plan administrators to a very high standard regarding the type of information that must be communicated to pension plan members and the manner in which it is communicated.

Getting these communications right is no easy task. However, the costs of failing to meet the standard may be high. Failure to comply with statutory requirements for communications is an offence, which can lead to stiff penalties both for the corporation, as well as its officers and directors. In addition, mistakes in pension communications can expose corporations to very large claims by pension members. Accordingly, it is critical that corporations invest the time and money in their communications process to ensure they meet the standard.

### **PENSION BENEFITS ACT REQUIREMENTS**

The *Pension Benefits Act* of Ontario imposes a number of requirements on pension plan administrators to provide prescribed information about their pension plan.

Failure to comply with one's statutory communications obligations is punishable by a fine of up to \$100,000 for the first conviction and up to \$200,000 for each subsequent conviction. Further, every director, officer or agent of a corporation who authorizes, acquiesces or participates in the commission of an offence by the corporation or who fails to take all reasonable care in the circumstances to prevent the corporation from committing the offence is also guilty of an offence. Failure to comply with statutory regulations may also expose the plan administrator to a civil claim.

### **COMMON LAW LIABILITY**

In addition to statutorily mandated communications, pension plan administrators regularly communicate, both formally and informally, with employees regarding the pension plan. Administrators are often called upon to explain the plan benefits or to field inquiries from members regarding the provisions of the plan. As recent cases have indicated, employee communications can be a minefield for plan administrators.

There has been a flurry of recent cases arising from such communications, in which administrators have been found liable to pension plan members for innocently providing them with information about their pension plan that the court found to be false, misleading or incomplete. The decisions in these cases have the following consequences:

1. Plan administrators owe a duty to provide pension plan members with accurate, clear and comprehensive information in all communications.
2. Plan administrators will be held to a very high standard when communicating with plan members, regardless of whether the communication is formal or informal. Plan administrators have been held liable, not only for providing a member with erroneous information, but also in the following circumstances:
  - (a) Where there is a failure to disclose information required by the member to make an informed decision about his benefits;
  - (b) Where the information is accurate and complete but found by the court to be confusing or ambiguous;
  - (c) Where an error in past communications is discovered but not corrected in a timely fashion.
3. It is difficult for the plan administrator to escape liability on the grounds that the plan member knew or ought to have known the information was incorrect. The courts recognise that the pension plan administrator is perceived to be an expert and that, as a result, members tend not to question the administrator's information.

### **REDUCING THE RISK**

Given the standards set by the Courts, and the availability of a class action brought on behalf of all members of the pension plan, the risk of liability arising from pension plan communications is high, with even the smallest errors or omissions potentially exposing the administrator to great risk. There are however a number of measures that a plan administrator can take to minimize these risks. They are as follows:

- (i) be aware of the requirements of the *Pension Benefits Act* and abide strictly by the requirements of the statute;
- (ii) provide members with clear, accurate and complete information regarding the pension plan;
- (iii) clearly identify information that is of a general nature, and advise members where they can obtain information that is member specific;
- (iv) seek professional advice when in doubt as to what should be communicated and how;
- (v) ensure that administrators have appropriate insurance coverage for liability arising out of pension communications;
- (vi) ensure that those who are responsible for communicating with members are properly trained in what the plan provides and how to properly communicate with plan members and that they keep records of their communications with members;
- (vii) insist that persons responsible for communicating with members not provide information or advice beyond their expertise or information;
- (viii) ensure that communications are accompanied by a disclaimer stating that the pension plan can be amended and that where there is a conflict between the actual communication and the plan document, the plan document shall govern; and
- (ix) use a focus group of members when preparing communications material to ensure that the message is being clearly understood by the average plan member.

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*The foregoing provides only an overview. Readers are cautioned against making any decisions based on this material alone. Rather, a qualified lawyer should be consulted.*

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Gina Rogakos is a member of the Litigation Group at McMillan Binch. Currently involved in all aspects of civil litigation, Gina has worked on range of corporate commercial disputes including a class action involving pension communications.

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