

News & Views

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OSFI revises pension directives to remove temporary COVID-19 related measures

On February 25, 2021, the Office of the Superintendent of Financial Institutions (OSFI) revised its Directives of the Superintendent pursuant to the Pension Benefits Standards Act, 1985 (the Directives) for federally regulated pension plans, reversing certain temporary measures that were introduced in light of the COVID-19 pandemic crisis and making certain other clarifications.

OSFI has also revised its frequently asked questions (FAQ) page to detail the changes to the Directives.

Regulatory deadlines

Under the revised Directives, OSFI has cancelled the temporary extension of deadlines for annual regulatory filings from six to nine months, which was discussed in the [April 2020 News & Views](#). The extension had applied to the following regulatory filings:

- Annual Information Return (AIR),
- Certified Financial Statement,
- Actuarial Report and Actuarial Information Summary (AIS) and, if required, Replicating Portfolio Information Summary (RPIS), and
- Annual statements to members and former members, as well as spouses and common-law partners.

OSFI invites plan administrators facing challenges complying with the prescribed timelines to contact their OSFI Relationship Manager.

Portability transfers

As of February 25, 2021, OSFI no longer requires solvency ratio projections for portability transfers (as discussed in the [June 2020](#) and [September 2020 News & Views](#)). Under the revised Directives, portability transfers must be paid out at the solvency ratio of the plan as determined in the most recently filed actuarial report, regardless of the valuation date.

The full commuted value transfer may be made for a plan with a solvency ratio of less than 1.0 if the employer remits the full amount of the transfer deficiency or if the transfer deficiency for any individual transfer is less than 20% of the Year's Maximum Pensionable Earnings (YMPE) for that year, provided that the sum of all individual commuted values transferred on this basis does not exceed 5% of the assets of the plan at the valuation date of the most recent actuarial report. It should be noted that the limit for any individual transfer was 5% of the YMPE prior to March 2020.

Annuity purchases

Effective February 25, 2021, a projected solvency ratio is no longer required for obtaining consent for buy-out annuity purchases. The revised Directives provide for automatic OSFI consent for buy-out annuity purchases by a plan administrator if the solvency ratio following the purchase of the annuity is not less than 0.85.

Comment

The revised Directives signal OSFI's belief that temporary COVID-19 related measures for pension plans may now be removed, and will provide greater flexibility for commuted value transfers for federally regulated defined benefit pension plans.

OSFI notes that it may reconsider re-introducing temporary restrictions in the event of a further deterioration in the financial and economic environment or renewed market volatility.

BCFSA releases draft information security guideline

The British Columbia Financial Services Authority (BCFSA) has released for consultation two guidelines on information security and outsourcing. The BCFSA is holding two separate 60-day consultations on the guidelines at the same time, with an April 19, 2021, deadline for stakeholder submissions on the Information Security Guideline.

Draft Information Security Guideline

On February 18, 2021, the BCFSA released its draft Information Security Guideline (the IS Guideline) for all BC pension plan administrators, as well as credit unions, insurance and trust companies. All of these regulated entities are referred to as provincially regulated financial institutions (PRFIs) for the purpose of the IS Guideline.

The draft IS Guideline establishes principles and best practices that PRFIs are expected to follow in order to mitigate information security risks posed by digital and online services. The BCFSAs has identified information security risks as including unauthorized, illegal, or accidental use, disclosure or destruction of data or impairment of network systems, which can cause serious harm to consumers and significant reputation damage to regulated entities.

The draft IS Guideline states that PRFI Boards of Directors or their equivalent are ultimately responsible for overseeing the prudent management of information security risks. The Board should, among other things, identify the governing body accountable for overseeing information security, approve the information security strategy of the organization, possess current and relevant knowledge in information security or recognize when expertise or third party advice is needed, and assess the competencies, skills and experience of senior management pertaining to information security. Senior management is responsible for the development, documentation, implementation and monitoring of information security strategies, policies and procedures.

The draft IS Guideline describes information security actions expected to be implemented across all PRFIs.

- **Information Security Risk Management**

Framework: Senior management should establish and document an effective information security risk management framework, which should be reviewed at least once a year. The framework should focus on security measures to mitigate information security risks. It should clearly set out strategies for responding to and recovering from major information security incidents and define escalation processes.

- **Identify:** A PRFI should develop an organizational understanding of information security risk to systems, people, assets, data, and capabilities. This includes collecting threat information and conducting risk assessments.

- **Protect:** A PRFI should develop and implement preventative physical and logical security measures against identified information security risks. These measures include providing training and awareness on information security to all personnel and performing timely IT system and software updates.
- **Detect:** A PRFI should establish monitoring processes to rapidly detect information security incidents and periodically evaluate the effectiveness of identified controls (e.g., monitoring, testing, audits, and reporting).
- **Respond:** A PRFI should develop and implement appropriate actions in response to information security incidents. It should establish processes to ensure consistent and integrated monitoring, handling, and follow-up of incidents.
- **Recover:** A PRFI should develop and implement activities to maintain plans for resilience, restore capabilities or services and comply with applicable legislation. It should document and be able to execute a recovery plan for information security incidents.
- **Communication with the Regulator:** PRFIs must notify their BCFSAs Relationship Manager of a major incident as soon as possible, and provide a written incident report within 72 hours of such notice. Until the incident is contained/resolved, the PRFI should provide their Relationship Manager with subsequent updates, including any short term or long term remediation actions and plans. Examples of major incidents include cyber attacks, service failure, third party breach, extortion threats and internal breach. The IS Guideline also provides a template for security incident reporting.

The draft IS Guideline applies to all PRFIs irrespective of size. However, the application of the IS Guideline will be determined on an institution-by-institution basis, and will ultimately depend on the nature, scope and complexity and risk profile of the PRFI. The BCFSAs directs regulated entities to refer to the Outsourcing Guideline where information management services are outsourced. The BCFSAs

expects PRFIs to ensure that all outsourcing services provided comply with all applicable legislation, regulations and/or rules, as well as the IS Guideline in the treatment of the PRFI's information.

Draft Outsourcing Guideline

On February 22, 2021, the BCFSA released a draft Outsourcing Guideline for all PRFIs. Pension plans are not included in the draft Outsourcing Guideline as pension outsourcing responsibilities are covered in the governance policy of a pension plan.

Comment

Although the draft IS Guideline is applicable across all of the BCFSA's regulated sectors, the release of the draft IS Guideline indicates a growing concern with information security among Canadian pension regulators. Most pension plan administrators will rely heavily on third party pension administrators and consultants. As a leading pension administrator and consulting firm, Morneau Shepell will carefully review the draft IS Guideline and will be making a submission to the BCFSA.

Recent cases discuss factors for determining spousal status

The determination of spousal status under a pension plan can be critical for determination of entitlement to pension benefits such as pre-retirement death benefits and survivor pensions. A number of recent cases in a variety of contexts demonstrate some of the complexities that can affect these determinations of spousal status and separation.

Court finds spousal status despite intermittent cohabitation

A recent Ontario Court of Appeal decision in *Climans v. Latner*¹ concerns the definition of "cohabitation" to determine entitlements to spousal support under section 29 of the *Family Law Act*, finding that

¹ 2020 ONCA 554.

unmarried partners were cohabitating despite maintaining separate residences.

Mr. Latner and Ms. Climans were in a long-term relationship for approximately 14 years, never having married or having children together. During their relationship the couple chose to maintain their own primary residences, but would live together during vacation periods, such as summers in Mr. Latner's cottage or weekends in Florida in the winter months. Ms. Climans would also sleep over at Mr. Latner's home on alternating weekends.

Early in their relationship, Ms. Climans quit her job and did not work again until after the relationship ended. Mr. Latner was a wealthy man and supported Ms. Climans financially by providing her and her children with a lavish lifestyle. The couple never merged their finances nor did they own property jointly. However, Mr. Latner provided Ms. Climans with substantial financial support, including a monthly income, home expenses, a credit card, and expensive gifts for her and her children. He also proposed and gave Ms. Climans an engagement ring. The couple celebrated anniversaries, supported each other during medical issues, introduced each other to their children, and attended couples counselling. Although Mr. Latner had prepared and presented various draft domestic contracts to Ms. Climans during their relationship, no domestic contract was ever signed.

The trial court determined that Mr. Latner and Ms. Climans were spouses within the meaning of the Family Law Act, and Mr. Latner was ordered to pay monthly spousal support for an indefinite duration.

In finding that the parties were spouses, the trial judge referenced a number of criteria discussed in the case law, namely "shared shelter, sexual and personal behaviour, services, social activities, economic support, children as well as the social perception of the couple." The trial judge considered all of the elements of their relationship together to reach the conclusion that they were spouses.

The Ontario Court of Appeal dismissed Mr. Latner's appeal of the trial judge's decision. The Court of Appeal agreed that there have been many cases where courts had found cohabitation where the parties cohabitated only intermittently.

Determining when cohabitation commenced

A recent British Columbia case demonstrates the difficulty of determining the precise time when cohabitation begins. In *Turner v. Stabeck Estate*², Ms. Turner asked the court to find that she was in a marriage-like relationship for at least two years before Mr. Stabeck's death, in which case she would be considered the spouse under the *Wills, Estates and Succession Act* (WESA) and would inherit the largest portion of his estate under the intestacy rules for individuals who die without a will.

Although Ms. Turner and Mr. Stabeck maintained separate residences in different cities during their relationship, Ms. Turner had started to move her personal belongings and some of her furniture into Mr. Stabeck's residence, with plans of making their living arrangement permanent once her caregiving duties to her grandson were no longer required. Ms. Turner also claimed that once her caregiving responsibilities to her grandson were no longer required in the summer of 2017, she moved her remaining possessions to Mr. Stabeck's residence and continued to live and travel with him until his sudden death in September 2018.

The British Columbia Supreme Court held that the relationship between Ms. Turner and Mr. Stabeck was marriage-like for at least two years before his death, as they had mutually agreed to have an intimate and exclusive relationship of lengthy and indeterminate duration no later than September 2016. The Supreme Court confirmed that although WESA refers to people living with each other, a relationship could be "marriage-like" for purposes of the legislation even when each person maintains their own residence. In support of this position, the court listed a number of factors that may determine spousal status, such as physical residency, sexual and personal behaviour, personal affairs such as meals, personal and household maintenance, and shopping, social relations with family and the community, how others perceive the couple, economic support and children.

² 2020 BCSC 1553.

Impact of a period of separation

Even where a common law relationship status is established, when the parties separate for a period and get back together, measuring the period of cohabitation presents an added level of complexity. In the recent case *Canada (Attorney General) v. Redman*³, Ms. Redman claimed a survivor pension under the Canadian Pension Plan (CPP) following the death of her common-law partner, Mr. Johnson.

The provisions of the *Canada Pension Plan*, R.S.C. 1985, c. C-8 (CPP statute), require a common-law partner to cohabit with the CPP contributor for a continuous period of at least one year. Ms. Redman and Mr. Johnson began their relationship in 2012; however, in February 2016, Mr. Johnson moved out of the home he shared with Ms. Redman. The couple began cohabiting again from around July 2016 until November 3, 2016, the date of Mr. Johnson's death.

The Appeal Division, which is responsible for appeals from the Social Security Tribunal under the CPP, found in favour of Ms. Redman's claim, suggesting that the one year of cohabitation did not need not be immediately before the contributor's death in order for a claimant to be considered a common law partner under the CPP. The fact that Ms. Redman had resided with Mr. Johnson in a conjugal relationship for over one year in the past, coupled with the fact that she had also resided with Mr. Johnson in such a relationship at the time of his death, were considered sufficient by the Appeal Division.

However, the Federal Court of Appeal found that the Appeal Division had misinterpreted the case law and had not performed the exercise of interpreting the CPP statute. It found that there was a lack of clarity in the case law as to whether a continuous one-year period of cohabitation must immediately precede the passing of the deceased contributor for the purposes of eligibility for a survivor's pension under the CPP.

As a result, the Federal Court of Appeal found the Appeal Division's decision unreasonable and remitted the matter back to the Appeal Division for determination by a different tribunal member.

³ [2020] F.C.J. No. 1175.

Comment

The cases discussed above give some indication of the type of issues that must be considered when determining whether an individual qualifies as a spouse and when the spousal relationship commenced. Pension and benefit plan administrators are often called upon to make these determinations or assist plan members in determining whether a partner qualifies as a spouse. These determinations are fact-specific and the facts are often conflicting or ambiguous, which may necessitate the involvement of the courts in some cases.

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