9.

Pension & Employee Benefit Plans

The federal Canada Pension Plan applies to employees and the self-employed in all provinces except Québec. Québec provides a similar pension plan, the Québec Pension Plan, for employees and the self-employed in that province. Both plans are statutory social insurance plans and are mandatory.

The territorial and provincial governments provide a variety of universal hospital and medical plans [as discussed in this chapter]. In addition, many employers opt to provide their employees with health and welfare plans for services not covered by provincial or territorial plans, as well as company-sponsored pension or savings plans and benefit plans.

Pensions and other Savings Plans

Government-Sponsored Pension Plans and Supplemental Income Programs

Both employers and employees are required to contribute to the Canada Pension Plan (CPP) or to the comparable Québec Pension Plan (QPP). These plans provide a basic level of income protection on retirement or disability. They are financed by contributions at each pay cycle that are deducted from an employee's pay for the employee portion and otherwise remitted by the employer for the employer's portion. The employer and employee each contribute an equal percentage of salary, on earnings from $3,500 up to the "year's maximum pensionable earnings", which is established annually by the federal government and is $68,500 in 2024. Members generally become eligible for unreduced benefits at age 65, even if they are still working. The pension may be received as early as age 60 subject to a reduction or deferred to as late as age 70 subject to an increase. Contributions cannot be made after age 70.

Old Age Security and the Guaranteed Income Supplement are also available to lower-income seniors.

The funding for these programs is derived from the federal government's general tax revenues, not employers or employees. A given province may have additional programs for lower-income seniors.

Company-Sponsored Pension Plans

Many employers provide company pension plans, which may be partially funded by employee contributions. Though private pension plans are not mandatory, if offered, they must be funded and operated according to provincial pension standards legislation (or federal standards legislation for those employees who work in the federal jurisdiction). Pension standards legislation is designed to protect plan members and to generally ensure, in defined benefit plans, that adequate funds will be available to pay the pension obligations in the future. Each jurisdiction with pension standards legislation also has a pension regulator that is responsible for overseeing the proper administration of pension plans registered with it. There are generally two main types of pension plans: defined benefit pension plans and defined contribution pension plans. However, many jurisdictions have also introduced a third type of pension plan, target benefit plans, which have elements of both defined benefit and defined contribution plans.

In addition to plans that an employer might sponsor for its eligible employees, there are pension plans provided by non-employer third parties. The traditional form is a union-sponsored plan for union-represented members. More recently, various collective plans are available in which an employer's obligation is limited to contributing and in which all decisions regarding administration and investment are provided by the third party.

Whether a plan is sponsored by an employer or a third party, the jurisdiction of registration for purposes of pension standards legislation is determined based on the Canadian jurisdiction in which the plurality of members is employed. The law of the province of registration applies to various matters, such as funding and investment. If the plan members are employed in more than one Canadian jurisdiction, then either the minimum standards of the applicable jurisdiction's pension standards legislation applies (for individual entitlements) or, for many whole plan-related matters, such as funding and investment, the law of the province in which the plan is registered applies. All Canadian jurisdictions other than Prince Edward Island have enacted pension standards legislation and have entered into a multi-jurisdictional agreement governing inter-jurisdictional regulation of pension plans in the form of the "2020 Agreement Respecting Multi-Jurisdictional Pension Plans." That agreement provides that the law of the jurisdiction of registration governs some matters and that the law of a member's jurisdiction applies to all other matters.

Most pension plans are also registered under the *Income Tax Act* (Canada) as a "registered pension plan" to benefit from favourable tax treatment. Subject to certain limits, the *Income Tax Act* (Canada) generally permits deductions from income for registered pension plan contributions and permits contributions and investment income in the pension fund to accrue on a tax-deferred basis until the pension income is paid to the member.

The Income Tax Act (Canada) also limits the amount of benefits that can be provided to members in a defined benefit plan and the amount of contributions that can be made in respect of members in a defined contribution plan. The Canada Revenue Agency's Registered Plan Directorate is responsible for the administration of the *Income Tax Act* (Canada) provisions applicable to registered pension plans.

In addition to a registered pension plan, some employers also offer supplemental pension plans, which provide retirement income benefits in excess of the benefit limits under the *Income Tax Act* (Canada). The benefits payable under supplemental plans can be funded or unfunded (i.e., paid out of the employer's general revenue). Such plans are subject to certain tax policy rules but are generally not subject to pension standards legislation and, if funded, are subject to additional provisions of the *Income Tax Act* (Canada).

Company-Sponsored Savings Plans and Profit Sharing Plans

Many employers provide group savings plans and profit sharing plans. Group savings plans include registered retirement savings plans and tax-free savings accounts. Profit sharing plans include deferred profit sharing plans and employees profit sharing plans (the latter not benefiting from tax assistance). Such plans are governed by the *Income Tax Act* (Canada) and Canada Revenue Agency regulatory policies in order to benefit from favourable tax treatment. They are not subject to pension standards legislation.

Group Benefit Plans

Although provincial and territorial health care plans cover physician and hospital services, they do not cover other health and welfare benefits. As a result, employers frequently provide supplemental health, dental, and drug plans, as well as disability and life insurance to active employees and their dependants. Although life insurance and long-term disability benefits are generally insured by third-party insurers, health and dental benefits may be self-insured by the employer. Depending on the plan design, employees may share in the premiums and deductibles payable under such plans.

Retiree plans are declining, as fewer employers today are providing benefit plans to retirees. In industries where retiree benefits are still the norm, some employers have retirees pay premiums for their benefits after retirement, subject to any prior binding commitment by an employer to pay the full cost.

Purchaser's Strategic Considerations

Unionized Environments

In unionized environments, the collective agreement may require the employer to provide a pension or savings plans and benefit plans to unionized employees. This can generally create complications for a purchaser.

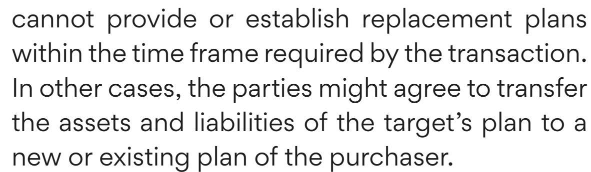
For instance, the collective agreement may dictate that a particular pension plan be provided, such as a multi-employer plan that is provided to various unrelated employers through the union. As a result, the purchaser may be forced to make contributions to a pension plan over which it has little or no control.

The collective agreement may also restrict or limit the purchaser's ability to eliminate or modify the terms of the pension, savings and benefit plans without union agreement. As a result, the purchaser may be required to assume or replace a plan. That scenario can be particularly problematic in the case of a distressed target acquisition, where a union will likely be more vigilant regarding the entitlements of its members and the purchaser may want a lower-cost plan.

Asset vs. Share Purchase

In a share purchase, the legal personality of the target does not change. As a result, if the target maintains pension, savings and benefit plans, the plans remain with the target by operation of law when the shares of the target are acquired (unless the parties agree otherwise to carve out the plan). In some cases, the parent company of the target maintains all or some of the plans for its subsidiaries and the purchaser buys the shares of a subsidiary. As a result the purchaser may need to provide replacement plans for employees of the acquired subsidiary, subject to the agreement of the parties and labour and employment law considerations.

Asset purchases provide a certain degree of flexibility in the treatment of pension, savings and benefit plans. Often, the target's plans will be excluded from the acquired assets and liabilities. In such cases, the purchaser may provide replacement plans. However, the nature and value of such plans will be governed by the agreement of the parties (as set out in the terms of the purchase agreement) and other business considerations, such as attracting and retaining the acquired workforce. Alternatively, the purchaser may decide to assume some or all of the seller's pension, savings and benefit plans for various reasons. For example, the purchaser may not otherwise have operations in Canada and



cannot provide or establish replacement plans within the time frame required by the transaction. In other cases, the parties might agree to transfer the assets and liabilities of the target's plan to a new or existing plan of the purchaser.

Pension Plans in an Asset Purchase

The purchaser in an asset purchase may decide to:

- Assume the seller's pension plan if it is limited to only its employees
- Provide a new plan on a going-forward basis for future service exclusively
- Provide a comprehensive plan covering both past and future service

The approach agreed upon between the parties will impact the terms of the purchase agreement and possibly result in an adjustment to the purchase price. For instance, where the purchaser assumes the pension plan of the seller, the plan may be underfunded, such that the purchaser assumes the related funding liability and requires compensation for taking on a plan in deficit.

Additionally, where the purchaser decides to provide a replacement plan that covers past and future service, it will be necessary to transfer assets of the seller's plan to the purchaser's plan to cover liabilities that were assumed from the seller's plan. Regulatory consent to the transfer of assets between pension plans must be obtained before any such assets are transferred between the plans, and the parties must cooperate to obtain such regulatory consent. The requirements for regulatory approval of an asset transfer vary considerably across jurisdictions and, for a defined benefit plan, may result in a funding shortfall that similarly requires a purchase price adjustment.

Due Diligence Process

Before completing a share purchase or an asset purchase in which the pension, savings and benefit plans are assigned to the purchaser, the purchaser will need to obtain and review copies of any relevant pension and benefit plan documentation. The main issues that need to be considered at this stage are:

- Identifying the types of plans and whether they will transfer to the purchaser in connection with the transaction
- Compliance with any regulatory requirements
- Funding and other financial liabilities (including unfunded benefit obligations)
- Maintenance and administration requirements post-acquisition
- Historical obligations that are still in effect even if the current terms of the plan do not articulate them

Timing

Changes to existing pension, savings and benefit plans or the creation of new plans may involve the preparation of new plan documentation, as well as insurance contracts or trust agreements, particularly if the purchaser is required to establish a new plan. For registered pension plans, regulatory approval may be required. It is not uncommon that the work of establishing a replacement plan is completed after the transaction has closed. In such cases, the seller and the purchaser will often agree that the seller will continue providing "transition services" under some or all seller plans until the purchaser's plans are operational. Because group benefit plans are typically governed by an underlying insurance contract, if the purchaser is required to provide a new plan, such plans generally cannot be retroactive.