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The Association of Canadian Pension Management
L'Association canadienne des administrateurs de régimes de retraite

June 29, 2020

The Honourable Monte McNaughton
Minister of Labour, Training and Skills Development
400 University Avenue, 14th Floor
Toronto, ON M7A 1T7
Email: mltsd.submissions@ontario.ca

Re: Ontario Regulation 228/20, *Infectious Disease Emergency Leave* (the "Leave Regulation") Implications for pension plans

Dear Honourable Minister McNaughton:

On behalf of the ACPM Ontario Regional Council (the "**ONRC**"), I am writing to you to highlight a number of significant implications for pension plans as a result of the Leave Regulation. The Leave Regulation altered the treatment of lay-offs and reductions in working hours for non-unionized employees under the Ontario *Employment Standards Act, 2000* (the "**ESA**") as a result of the COVID-19 pandemic.

About ACPM

ACPM is the leading advocate for Canadian plan sponsors and administrators in the pursuit of a balanced, effective and sustainable retirement income system in Canada. We represent plan sponsors, administrators, trustees and service providers. Our membership represents over 400 companies and retirement income plans that cover millions of plan members. The ONRC represents plan sponsors and administrators with hundreds of plans registered, and millions of members reporting to work, in Ontario.

The Leave Regulation

The Leave Regulation provides for a number of important changes to the legal position of non-unionized employees who do not perform duties during the "**COVID-19 Period**". The COVID-19 Period began on March 1, 2020, and ends six weeks after the end of the provincial emergency that was declared in relation to the COVID-19 pandemic. Subject to certain exceptions, where non-unionized employees are absent because of a temporary reduction in, or elimination of, working hours for reasons related to COVID-19, they are:

- retroactively deemed to be on an emergency leave of absence relating to an infectious disease under section 50.1 of the ESA, rather than a lay-off; and

- barred from obtaining remedies for constructive dismissal, or pursuing ESA complaints, in relation to reductions in hours of work or pay.

Additionally, such non-unionized employees and their employers are:

- under subsections 4(5) and (6) of the Leave Regulation, exempt for the duration of the COVID-19 Period from the operation of subsections 51(1) and (3) of the ESA, if the employee was not participating in the relevant plan on May 29, 2020. Subsections 51(1) and (3) of the ESA provide that employees are entitled to continue to participate in pension and certain other benefit plans during a leave of absence, and that employers are required to continue to contribute to such plans, unless the employee opts out of making the employee's own contributions for that benefit.

We understand that the objectives of the Leave Regulation were to provide a level of job security for employees, and to relieve employers of termination-related liabilities, including deemed termination of employment after 13 weeks' lay-off in a 20-week period under section 56 of the ESA. This relief was much needed by employers and welcomed. However, while we appreciate that the urgency of the government's objectives may have precluded consultation with pension industry stakeholders, we are concerned about several pension-related impacts of the Leave Regulation, which we believe are likely to have been unintended. These impacts, along with possible solutions, are discussed below.

Unintended impacts because of pension plan terms

As noted above, under subsections 4(5) and (6) of the Leave Regulation, subsections 50(1) and (3) of the ESA do not apply to employers and employees where a non-unionized employee deemed to be on emergency leave under the Leave Regulation was not participating in a pension plan on May 29, 2020. It appears that this exemption was intended to relieve employers of the requirement to contribute to a pension plan where, for example, the employee was laid off during the COVID-19 Period before May 29, 2020, and elected not to or was not permitted to contribute to their pension plan.

However, since each pension plan may treat various leaves of absence and lay-offs differently, there may be implications under the plan terms as a result of retroactively re-characterizing an absence from work, notwithstanding the requirements of the Leave Regulation. For many pension plans, benefit accrual in respect of a lay-off may not be permitted at all. If benefit accrual in respect of a lay-off is permitted, employee contributions may or may not be accompanied by employer contributions. By contrast, as a result of subsections 51(1) and (3) of the ESA, pension plans permit or require employer and employee contributions to continue during most or all ESA-protected leaves of absence. In addition, some pension plans allow employees to buy back service in respect of various absences, including leaves protected by the ESA, lay-offs and strike-related absences. The pricing of those buybacks under the plan terms may differ significantly between emergency leave and lay-off.

The interaction of the Leave Regulation and pension plan terms such as those described above may produce anomalous and, in some cases, potentially undesirable consequences, including the following:

- Notwithstanding the Leave Regulation, pension plan provisions may require non-unionized employees deemed to be on emergency leave, and their employers, to contribute to the plan, even where the employee was not contributing to the plan on May 29, 2020.

- By converting lay-offs into emergency leaves, the Leave Regulation may move some employees from one pricing category of the pension plan to another. This move may be more or less favourable to the employee and could be detrimental to the employer.

- Non-unionized employees who are laid off during the COVID-19 Period and deemed to be on emergency leave may benefit from employer contributions to a pension plan during their period of lay-off, whereas unionized employees who are laid off may have no option to accrue pension benefits in respect of their lay-off period or, if they do have that option, may not be entitled to accompanying employer contributions. Changes that create new distinctions between unionized and non-unionized employees may disrupt potentially delicate balances achieved in collective bargaining. Presumably, this was not the government's intention.

These anomalies may be addressed by amending the Leave Regulation or the ESA to explicitly specify that notwithstanding the terms of any pension plan, no employee deemed to be on emergency leave shall be required to contribute to a pension plan during the COVID-19 Period where the employee was not contributing to the plan on May 29, 2020.

Carve-out for employers not contributing on May 29, 2020 creates uneven playing field

Apart from the issues outlined above, which flow from the interaction of pension plan terms with the Leave Regulation, subsections 4(5) and (6) of the Leave Regulation are problematic in their own right. As noted above, these provisions create differential treatment based on whether or not an employee or employer was contributing to a pension plan on May 29, 2020. This distinction has unfair results for employers that decided to continue contributions during the period of absence based on the characterization of the absence as a lay-off.

An employer may initially have agreed to continue pension plan contributions during a temporary lay-off as a result of the ESA, which defines a "temporary lay-off" as a period of up to 35 weeks in a period of 52 consecutive weeks (rather than the ESA's default shorter period of 13 weeks in any period of 20 consecutive weeks) if pension plan contributions are continued. However, such an employer is now, as a result of the Leave Regulation, forced to continue these pension contributions for an indefinite period after May 29, 2020. But for the Leave Regulation, the employer would have had other options under the ESA to switch to alternative benefits over the course of an extended lay-off (such as "substantial payments" to employees or supplementary unemployment benefits). That flexibility is now removed. As employers (including competitors) who were not making pension plan contributions as of May 29, 2020, are not required to begin doing so, this creates an uneven playing field. Because the Leave Regulation was brought into effect without prior notice and with immediate effect on May 29, 2020, employers were not able to make an informed choice as to the benefits they were agreeing to provide.

An appropriate solution is to exempt employers who have made pension plan contributions during the COVID-19 Period from the obligation to continue such contributions under section 51 of the ESA. Such employers may of course *choose* to continue contributions (as those who were not contributing as of May 29, 2020, could also *choose* to begin doing so). In this way, however, every Ontario employer has the same "fresh start" and can choose to make employer pension contributions or not with the same information.

Treatment of a reduction in working hours is incompatible with federal income tax legislation

Under the Leave Regulation, non-unionized employees who do not perform the duties of their positions because their hours of work are temporarily reduced for reasons related to COVID-19 are also deemed to be on emergency leave.

Some pension plans provide for pension benefit accrual to continue during an employee's leave of absence, based on the employee's regular salary (e.g. salary before the start of the leave). Accrual of benefits based on such a notional salary, despite a temporary reduction in the employee's pay, is permissible under the federal *Income Tax Act Regulations* (the "**ITARs**") during an "eligible period of reduced pay", subject to certain requirements, including that the employee has at least 36 months' service with the employer.

The combined effect of plan text provisions relating to leave of absence, section 51 of the ESA, and the Leave Regulation is that an employee whose hours of work are reduced for COVID-19-related reasons, but who has not been employed for the requisite 36 months, may become entitled to accrue benefits based on regular salary, in contravention of the rules on eligible periods of reduced pay in the ITARs.

This issue could be resolved either through amendments to the Leave Regulation and/or the ESA to clarify its interaction with the ITARs or potentially even through an amendment to the ITARs, in consultation with the federal government.

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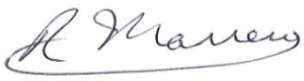
We reiterate that many employers welcome the relief the Leave Regulation provides from the termination and severance pay provisions of the ESA and are appreciative of the government's response. We are confident that with the proposed changes described above, it will be possible for the government to achieve the objectives of the Leave Regulation while avoiding the unintended pension-related consequences outlined above.

We would be pleased to discuss any aspects of these submissions, or to provide any further information that may be of assistance.

Yours sincerely,



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