



March 16, 2022

The Honorable Steve Dowling
Director, Justice and Public Safety
Consumer, Corporate and Insurance Corporations
95-105 Rochford Street
Richmond Centre, 4th Floor
Charlottetown, PE C1A 7N8

Re: Potential Changes to the Employment Standards Act (Prince Edward Island) to Facilitate Automatic Features in Pension Plans

Dear Mr. Dowling:

We are writing today to ask you to consider amending the [Employment Standards Act, 2018 \(ESA\)](#) and to explicitly allow employers to deduct employee contributions from payroll automatically to facilitate auto enrolment and auto escalation features in workplace pension and savings plans. These include capital accumulation (CAP) retirement plans such as defined contribution (DC) registered pension plans, group registered retirement savings plans (RRSPs) and group tax-free savings accounts (TFSA's).

Current legislation, specifically the province's ESA, includes language that would prohibit pension plan administrators from introducing automatic features in workplace pension plans. Specifically, section 5.5(3)(b) requires employee consent to automatic deductions. We are recommending that this section be revised to enable automatic features. We have included an example in Appendix A of how this section of the ESA could be amended to enable auto features.

Making these changes would signal to pension plan administrators that the government supports automatic features in workplace pension and savings plans.

About ACPM

ACPM is the leading advocacy organization for a balanced, effective and sustainable retirement income system in Canada and our membership manages retirement plans for millions of plan members.

The Need for Change

The shift from defined benefit (DB) plans to CAP plans over the last generation has shifted the burden of having adequate income in retirement from employers to employees. Many employees do not understand how much money they will need to retire comfortably or how critical it is under a defined contribution pension plan to save as much as possible as early as possible. Many studies have shown that employees are increasingly concerned about not having enough money in retirement, yet many employees are not taking full advantage of their retirement programs and leaving employer matching contributions on the table or otherwise failing to maximize the possible contributions.

As employers moved to CAP plans, pension plans that included employee contributions and an employer matching component were primarily designed with voluntary member participation with the default being that employees would have zero contributions. This leads to many plans having low employee participation and, for those that made the decision to contribute, many are not making the level of contribution needed to receive the maximum match from their employer.

Behavioral research points to three main reasons why employees do not take full advantage of their employer plans:

1. **Poor planning skills:** Simply put, many employees are not motivated to act early in their careers with respect to retirement planning and do not prioritize saving for retirement in their budgets, if they even have a budget in place.
2. **Decision avoidance:** Employees often avoid making active decisions due to their lack of understanding of retirement plans and investment expertise. This results in them defaulting to making no contributions to the plan and missing out on the employer matching contributions.
3. **Procrastination and inertia:** In many cases, employees who delay making complex decisions never revisit their options. This is true for employees even if they do not feel like they are saving enough and say that they want to. This also holds true for employees who join a pension plan at a very low contribution level intending to increase their contributions over time but never do.

Employers have recognized that these issues are causing a lack of retirement readiness for employees. In many cases, they have amended their CAP design to automatically enroll new hires in the plan as part of the employee's new employment contract. However, employers are restricted from enabling auto enrolment or auto escalating contributions for current employees due to the requirement in the ESA that an employee give explicit consent for employers to make deductions from their wages. For these features to be adopted by employers, they need to be easily implemented and applicable to all CAP members.

Proof that Auto Features in DC Plans Work to Improve Retirement Readiness

Auto features are well known plan design strategies in U.S. Defined Contribution (DC) style plans. They have been adopted by many employers to improve retirement outcomes for their employees.

Studies published by Vanguard Research in 2018 and 2019 show the positive results of implementing auto enrolment and auto escalation design features, with opt-out options, in DC plans.

Since 2007, the adoption of auto enrolment has tripled to 48% of Vanguard plans and two-thirds of those plans also have automatic deferral rate increases. While many of these plans introduced auto enrolment for new hires only, over half of Vanguard's plans have recently "swept" non-participating and low participating members into the plan at the current default contribution rate and are applying automatic increases in the future.

The Vanguard studies show that for plans with auto enrolment, plan participation is 93% compared to only 47% for voluntary plans. In addition, for plans with auto escalation, less than 20% of plan participants opt out of the automatic increases in contributions. The studies also show that for both voluntary and automatic plans, employees do not tend to change their contribution percentage over time. In fact, 9 out of 10 employees make no changes to their contribution rates or, if auto escalation is included in their plans, follow the annual increase schedule with no changes.

The effectiveness of auto features in U.S. DC plans, show that employees' inertia work to the benefit of employees in a plan with auto features in place.

Another indicator that auto features are important to pension plans can be seen in the recently enacted U.S. SECURE Act where the contribution cap under 401(k) auto enrolment safe harbor was increased from 10% to 15%.

Interaction Between the ESA and the Human Rights Commission on the Age Discrimination Issue

When implementing similar changes to enable auto features in other jurisdictions, the issue of age discrimination was considered. Although an opinion on the legal validity of using age and service factors for auto escalation is beyond the scope of ACPM's mandate as an organization, we can provide some general comments.

We do not see any serious human rights risks associated with auto escalation. There are DC plans now in existence that have implemented escalated contribution formulas for their members without challenge. These formulas are typically service-based or based on age and service combined, not solely age-based.

Jurisprudence has generally held that service-based criteria for benefits do not contravene human rights laws, and age and service criteria have also withstood challenge. In addition, courts, including the Supreme Court of Canada, have acknowledged that not every differentiation in treatment constitutes "discrimination" within the meaning of human rights legislation.

As a result, decision makers have accepted that it is not always discriminatory to provide different categories or levels of benefits to employees, particularly employees at the end of their careers, based on factors such as the purpose and function of the benefit in question, the position of those seeking the benefit within society and the effect that providing or not providing the benefit will have on intended beneficiaries or those seeking the benefit.

In fact, it is possible that increasing contributions at older ages or higher service levels might in fact be more substantively equal if the cost of retirement income increases as employees age.

We would observe that it is not necessary for the government to resolve this question to permit such features. The legislation simply needs to make it clear the auto enrolment or increase to contributions does not violate the ESA. It would continue to be up to employers designing their retirement plans to avoid creating provisions that violate the Human Rights Code.

Other Regulatory and Legal Issues to Consider

We would note that the province of Prince Edward Island does not have a *Pension Benefits Act* or corresponding regulations, like other provinces across the country. As such, the same level of protections that are offered to pension plan members in other regions across Canada are generally not available to PEI plan members. This is something that we feel should be considered if government does, in fact, make any changes to the ESA in your province.

We would strongly recommend that plan sponsors assess their plan provisions and determine whether amendments need to be made, and if member communication is appropriate prior to implementing any auto enrolment or auto escalation features. A legal opinion may be appropriate.

The Time to Act in Canada is Now

Advocating for changes to legislation to allow employers to automatically deduct contributions from employee's wages, with an option to opt out, is not new. In fact, in ACPM's May 2008 paper, [Delivering the Potential of DC Retirement Savings Plans](#), changes to legislation across the country was encouraged to promote employers adopting these auto features to improve retirement readiness. This position was reiterated in [Decumulation, The Next Critical Frontier: Improvements for Defined Contribution and Capital Accumulation Plans \(March 2017\)](#).

Since that time, a number of provinces have updated their pension or employment standards to specifically permit employers to deduct pension contributions from employee wages without requiring explicit consent from the employees. These provinces include Saskatchewan and Quebec, with both Alberta and British Columbia pension regulators confirming that they believe their respective pension regulations also enable automatic deductions. We are encouraged that some provinces have taken these important steps but other provinces, including Prince Edward Island, have not yet made changes to enable these auto features.

We are asking that serious consideration is given to making these changes to the legislation in Canada today. These changes are as important as ever or even more critical.

During these difficult times, employees who are participating in their employer CAP plan and may have been contributing an amount to maximize the employer match, may have had to make the difficult decision to lower their contributions due to other financial needs, even if they would not have under normal circumstances. With the knowledge we have of employee behavior, it could be very challenging to have these same employees increase their contribution to the pre-pandemic level voluntarily once the financial situation stabilizes. Allowing employers to amend their pension plans to include auto enrolment and auto escalation features will assist employers in helping employees get back on target for a secure retirement.

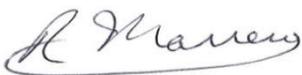
To summarize, we encourage the Prince Edward Island government to amend the ESA to permit the following features to be used in CAP plans:

1. Auto enrolment with automatic member contributions set at a level determined by the plan sponsor. Employees would be given the option to opt out of the automatic member contributions through a written waiver once they start.
2. Auto escalation of member contributions based on age and/or service. Again, members would be given the ability to opt out in writing.

The legislation could specify that these changes be introduced for existing employees with advance notice.

ACPM would be glad to discuss this issue in more detail and how such features could be implemented via legislative changes. Please feel free to contact us if we can be of further assistance.

Sincerely,



Ric Marrero
Chief Executive Officer
ACPM

Appendix A

5.5 Deductions from pay

Idem

(1) An employer may withhold, deduct, or require the return of an amount of all or part of an employee's pay if the withholding, deduction or required return

(a) is related to a group benefit plan that the employee participates in;

(b) is a contribution towards a defined contribution (DC) registered pension plan, group registered retirement savings plan (GRRSP), group deferred profit sharing plan (DPSP) or a group tax-free savings account (TFSA) in which membership is required as a term of employment for new or existing employees, and where the plan text or plan rules allow employees to opt-out, and where the employee has received advanced notice of the deduction; or

(c) is the result of a previous advance of pay to the employee.