

Supplemental Pension Plans

Newsletter

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Confirmation of an Employer's Right to Take a Contribution Holiday

On 1 January 2001, the Supplemental Pension Plans Act (RCR Act) was amended in order to introduce rules allowing an employer to confirm in the pension plan's dispositions the employer's right to take a contribution holiday. The use of these rules is optional. However, they make it possible to avoid any recourse as to the legitimacy of contribution holidays taken by the employer after the effective date of a confirmation amendment.

The confirmation process requires obtaining the consent of the union representing active members and of any party with whom the employer has reached a written agreement on the use of surplus assets during a plan's existence. Following passage of Bill 195, the RCR Act was again amended, on 28 April 2005¹ to provide that the foregoing consents must be accompanied by consents from certain active plan members, retirees and beneficiaries.

This issue of the Newsletter presents the conditions to meet in order for a plan amendment on contribution holidays to have the effect provided for in the RCR Act. The conditions apply both to defined benefit and to defined contribution plans.

Confirmation of the employer's right

The confirmation process provided for in the RCR Act² covers pension plans in effect on 31 December 2000 and plans resulting from their division. Those plans can give rise to disputes over contribution holidays, unlike plans that have come into effect since 1 January 2001, which must have a provision that either confirms or does not confirm a right for the employer to take a total or partial contribution holiday.

Employers are not required to use this process in order to take a contribution holiday nor to include or make changes to a provision on employer contribution holidays in a plan already in effect on 31 December 2000. In the event of a dispute, a court of competent jurisdiction can be asked to rule on the validity of total or partial contribution holidays taken by the employer.

Who takes the initiative?

It is up to the employer to initiate the procedure for confirming the employer's entitlement to take contribution holidays by submitting a draft amendment to the interested parties. The confirmation procedure can be undertaken at any time unless an application for union certification is pending or has been accepted. In

¹ Act to amend the Supplemental Pension Plans Act (S.Q. 2005, chapter 5).

² See sections 146.4 to 146.9 of the Supplemental Pension Plans Act.

that case, the procedure cannot be begun until the first collective agreement has been signed.

The consents required

Confirmation of the employer's right depends on the willingness of the plan's interested parties. Thus, the employer's proposition must be accepted by:

- the unions representing the pension plan's active members;
- any party with whom the employer has reached a written agreement on the use of surplus assets before plan termination, for example, an association of managers who are active plan members;
- the active members who are not represented by a union³ or included in a written agreement on the use of surplus assets before plan termination;
- the non-active members⁴ and the beneficiaries;
- each of the employers who participate in a multi-employer plan, even if the plan is not recognized as a multi-employer plan.

Unless the pension plan has specific rules, the RCR Act does not require obtaining these consents in order to use surplus assets to pay the cost of improvements during a plan's existence.

Consent of the members and beneficiaries

Within 60 days after receiving a proposal from the employer, the committee must issue a written call to each active member who is not represented by a union or covered by a written agreement on the use of surplus assets as well as to each non-active member and beneficiary to attend a special meeting for the purpose of reaching a decision on the employer's proposal. A special meeting does not have to be called if

the matter is on the agenda of a regular annual meeting called within the same period.

The members and beneficiaries who must be called to the meeting to make a decision on the employer's proposal are those who are qualified on the date of the call. Members and beneficiaries who are no longer qualified at the time of the meeting are not entitled to participate in making a decision on the employer's proposal. Any person who becomes qualified after the call to the meeting must be allowed to participate in reaching a decision.

The pension committee is responsible for the logistical organization of the special meeting, which must be held within a reasonable time after the meeting call is issued and must be held in a place where and at a time when the greatest number of members and beneficiaries will be able to participate.

The group of active members and the group of non-active members and beneficiaries must reach a decision on the employer's proposal at the meeting. A decision will be acceptable if each of the groups has expressed its consent to the proposal by a simple majority of the votes cast, that is, at least 50% of the votes plus one. If one of the groups does not give its consent to the employer's proposal, the employer's right to take a contribution holiday is not confirmed.

As is the case for designating members at the annual meeting, the pension committee can propose the method of voting (secret ballot, vote by proxy, etc.). If the committee does not propose a method or if a group refuses the methods proposed, the vote will be held in the manner decided by the group.

Generally, the employer will explain the proposal to the members and beneficiaries at the meeting. The notice of amendment (see below the rules for registration of an amendment) may accompany the notice of call for the meeting in order to give the members and beneficiaries information that will be useful to them in reaching their decision.

³ The union must be a certified association within the meaning of the *Labour Code*.

⁴ The term "non-active member" includes retirees and people whose pensions are not being paid.

Registration of a confirmation amendment

It is the responsibility of the pension committee to apply for registration of the amendment that confirms the employer's right to take contribution holidays. The usual rules under the RCR Act apply to registration of that amendment.

The committee must give written notice of the proposed amendment to each member and beneficiary as well as to the union representing the active plan members. This notice is subject to specific rules and must be sent at least 60 days before the effective date of the amendment and must contain the following information:

- the amount of surplus assets that was used to pay employer contributions during the plan's last four fiscal years ended before the date of the notice.
- a copy of the plan provisions on the use of surplus assets during the plan's existence, with the effective date of each provision;
- the text of the plan provisions as they will read after the coming into force of the confirmation amendment as well as the effective date of the amendment.

The application for registration of the confirmation amendment must be accompanied with a certificate from the pension committee that affirms that the committee has obtained the required consents and that the committee can submit them to the Régie des rentes du Québec on request.

Generally, the employer will undertake to obtain the required consents from the union, the employers party to a multi-employer plan and any persons covered by a written agreement. The consents will usually be given by means of a resolution of the employer or a letter of agreement from the union, which will be provided to the pension committee, whose responsibility it is to hold the consents.

With respect to the consent of the members and beneficiaries, the procedures for the vote must be well documented in the minutes of the meeting so that the pension committee can certify that the required consents have been obtained and that they can be presented to the Régie.

The effect of a confirmation amendment

No lawsuit can be instituted to contest employer contribution holidays taken as of the effective date of a confirmation amendment. In the event of a discrepancy between a provision of the pension plan or an agreement and the provisions resulting from the confirmation procedure, the latter will prevail.

The effect given by the RCR Act to a confirmation amendment does not exclude the possibility for the members and beneficiaries to contest any other use of a plan's surplus assets that they consider not to be in conformity with the provisions of the pension plan or the undertakings of the employer.

The provisions of a pension plan that are the result of a confirmation amendment must be indicated in a section reserved exclusively for that purpose so that they will be easy to find. For example, if a provision requires an improvement to the plan's pension benefits whenever the employer takes a contribution holiday, that provision must be placed with the provisions governing the taking of the contribution holiday.

The effective date of a confirmation amendment must be indicated in each plan provision affected by that amendment. To ensure the persistent character of the amendment, no date of expiry may be provided.

Amendments to plan provisions that confirm the employer's right

The replacement, revocation or amendment of plan provisions that arise from a confirmation amendment are subject to the procedure for

obtaining consents that is described above. The same requirements apply also for an amendment to the provision on the employer's right to take a contribution holiday under a pension plan that came into effect after 31 December 2000.⁵

Merger and division of pension plans.

Recourse to the confirmation procedure may be required for the Régie to be able to authorize an amendment whose purpose is the total or partial merger of pension plans. If either the absorbing plan or the absorbed plan contains a provision confirming the employer's right to take a contribution holiday, all those whose consent is required in the absorbed plan must agree to the rules of the absorbing plan, since the rules of the absorbing plan will apply as of the effective date of the merger amendment. However, where the provisions of the plans confirming the employer's right to take a contribution holiday are identical as to their effects, no consent is required.

Moreover, for the Régie to authorize the division of a plan with a provision confirming the employer's right to take a contribution holiday, the new pension plan to which a portion of assets is transferred must have provisions that are identical as to their effects.

Furthermore, the procedure provided for in the RCR Act must be applied to confirm the right of the employer to take a contribution holiday in a new plan that is the result of the division of a plan in effect on 31 December 2000 that does not have a provision for that purpose.

⁵ Section 21.1 of the *Supplemental Pension Plans Act*.

Transitional provisions

Any plan amendment that was not already registered with the Régie on 28 April 2005 must be accepted by the active members not represented by a union or not covered by an agreement, the non-active members and the beneficiaries in order for the amendment to confirm the employer's right to take a contribution holiday.

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