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FEDS AIMING TO HIT THE PENSION BULL'S-EYE

Can the government overcome labour opposition to pass a bill that allows for target-benefit plans?

By ***Julius Melnitzer***

One year after the federal government unveiled legislation that would allow federally regulated employers to offer target-benefit pension plans, the proposal has stalled in the House of Commons but it's apparently still very much alive.

"The gist of Bill C-27 is to permit target-benefit plans to operate as a design option alongside defined benefit plans and [defined contribution] plans," says Jana Steele, a management-side pension lawyer at Osler Hoskin & Harcourt LLP in Toronto. "The intention is to create a more fulsome pension regime with a wider range of options."

Introduced in October 2016, Bill C-27 is awaiting second reading in the Commons. But that likely won't occur until the Liberal government has a chance to deal with public opposition, particularly from unions.

"The legislation remains on the agenda of the Ministry of Finance," says Bob Baldwin, an Ottawa-based pension consultant. "But first, they're hoping to lower the anxiety level of trade unions, who have been vociferously pitted against the legislation."

In May, Ginette Petitpas Taylor, then the parliamentary secretary to the minister of finance, told the Commons that the Liberals are "willing to take all the necessary time to give all parties the opportunity to share their suggestions regarding this process."

It's not yet clear what form the input will take. "The government appears to be open to consultations that may include public hearings of some kind," says Jordan Fremont, a partner in the Toronto office of Hicks Morley Hamilton Stewart Storie LLP, a management-side labour and employment law boutique firm.

Welcome middle ground?

For their part, Steele suggests employers see the legislation in its tabled form as providing a welcome middle ground. "By offering [target-benefit] plans as a design option, on the one hand, and allowing for conversion of DB plans on consent, on the other hand, the legislation does, in my view, strike an appropriate balance," she says. "Most employers are happy with it."

Still, Unifor, which has taken credit for forcing the government "to take a step back, halting the bill's progression," stated in an April 27 bulletin that it remains committed to seeking "full withdrawal" of the legislation. It argues the bill "threatens pension security" in federally regulated sectors and represents "an attack on workers and retirees" that "could reduce pension payments as plan members assume virtually all financial risk and responsibility to cover funding deficits." Some 2,600 union members and retirees signed Unifor's online petition opposing the law.

Bill C-27, labour groups complain, doesn't just affect new plans. Rather, it contemplates changing existing plans and their accrued benefits into target-benefit regimes, albeit with the consent of unions — where collective bargaining exists — or individuals, in the case of non-unionized environments.

"Bill C-27 creates a framework for exchanging guaranteed defined benefits for something less," says Murray Gold, a union-side pension lawyer at Koskie Minsky LLP in Toronto. "It puts employees, retirees and unions in a position where they have to defend what shouldn't need defending, especially because it's unusual in our law for the terms of a contract to change mid-stream."

Indeed, the Public Service Alliance of Canada (PSAC) contends that the voluntary consent provisions in Bill C-27 are a "sham" and that the process won't be meaningful.

COMMON MYTHS ABOUT TARGET-BENEFIT PLANS

1 Unlike defined benefit pensions, target-benefit plans create risk and uncertainty for employees and pensioners

"While DBs differ from [target benefits], DBs also have an element of risk in them," says Hicks Morley's Jordan Fremont. "But the extent to which DBs are guaranteed ultimately depends on the wherewithal of the funds and, where the fund isn't sufficient, the financial stability of the sponsor. The demise of Nortel is but one example of an employer's insolvency where the assets weren't enough to pay the pension liabilities."

As well, some defined benefit plans provide for ad hoc inflation indexing that depends on its funded position. And in some cases, employers have the power to amend plans to increase employee contributions, which in itself is a form of sharing risk.

Target benefit "is just a new name for something that's always existed in the way these things work on a practical level," says Toronto pension lawyer James Pierlot. "Both types of plans also have investment risk, longevity risks and the risk of intergenerational wealth transfer as common elements."

Ultimately, the extent of the risk depends on the approach a plan takes to the design, contributions and the investment strategy. "As is the case with DBs, there are no foolproof [target-benefit plans], but [target-benefit plans] are closer to DBs than people give them credit for," says Fremont.

2 Target benefits are the easy way out of defined benefit plans

That myth depends on the belief that the erosion of defined benefit plans won't continue if governments forbid target-benefit arrangements. But Kathryn Bush, a management-side pension lawyer at Blake Cassels & Graydon LLP in Toronto, says that's not the case. "The real question is the extent to which DCs will continue to replace DBs," she says. "But the unions may believe that DCs are easier to fight than [target-benefit plans]."

3 Target-benefit plans are new

Jana Steele of Osler Hoskin & Harcourt LLP says that's simply not true. Target-benefit plans "have existed for many years in many jurisdictions in the multi-employer space," she notes.

According to Koskie Minsky's Murray Gold, the comparison isn't a fair one. "The [target-benefit plans] that exist in the multi-employer space are very different from the ones being proposed in Bill C-27," he says. "Where [target-benefit plans] tend to exist is in more volatile sectors, like the construction industry, where the benefits are high and the funding is done in a deliberately aggressive way, even if that means taking a bit of a risk. These are considerations that don't apply in the public sector or in federally regulated sectors like banking, where pensions are generally more modest and the funding is more conservative."

ONTARIO'S MOVES ON TARGET-BENEFIT PLANS

While Ontario doesn't apply the target-benefit label to the multi-employer pension plans that exist in that province, they amount to the same thing because it's possible to adjust the benefits. But Ontario, which announced proposals to allow for target-benefit plans in certain situations in June, has never permitted an adjustment of accrued benefits in a single-employer pension plan, says Toronto pension lawyer James Pierlot. In contrast to Bill C-27, the proposed federal legislation that would provide employers with the option of converting such benefits to target-benefit plans with employee or union consent, the province's new proposals apply only to multi-employer plans.

"Hopefully, the province will look at [target benefits] in the context of single-employer plans in the near future," says Jana Steele of Osler Hoskin & Harcourt LLP.

Unfortunately, the Ontario announcement has even less detail than Bill C-27 provides. "But both the federal and Ontario proposals contemplate funding policies for the new types of plans, governance policies with retiree participation and risk management," says Steele.

The new rules, however, would introduce a more fulsome regime for multi-employer plans operating under a target-benefit framework in Ontario. It would include specific funding provisions (a permanent solvency exemption along with a reserve provision); certain governance rules (such as requirements for governance policies); provisions around benefit reductions; and requirements for increased transparency.

The proposals are, in effect, "layering on some protections and requirements" for target-benefit multi-employer plans, says Steele.

"Bill C-27 would permit employers to pressure their workers and retirees into 'surrendering' their pension rights," the union stated in its submissions on the legislation. "In the past, employees have demonstrated their willingness to enter arrangements or provide funding relief for pension plans — which implicitly takes on certain risks — but have not compromised accrued benefits, which remain an important feature of their pension plans. Bill C-27 now makes it likely that employers will pressure employees to do both."

Gold sees the consent issue in terms of the balance of power. "The fact that there's an imbalance when you have a big employer makes the prospect of consensual conversion very unattractive," he says.

But according to Steele, Bill C-27 does mandate a high bar for obtaining consent. "The legislation says that the explanation of the change must be understandable to a person without pension knowledge," she says.

Objections 'dramatically overstated'

Baldwin, who spent a decade as an in-house pension specialist for the Canadian Labour Congress, was one of four advisors to Ontario's expert commission on pensions and has 40 years of experience in the field, says labour groups' objections to Bill C-27 are "dramatically overstated."

And according to James Pierlot of Pierlot Pension Law in Toronto, the assumption that the labour movement is uniform in its opposition is also an overstatement. "As it turns out, union-sponsored [target-benefit] plans do exist in Canada, particularly in the [multi-employer pension plan] space," he says.

Multi-employer plans, however, require at a minimum that there be some form of joint governance. Bill C-27 requires only the appointment of a single plan member to participate in administrative oversight.

"This is a significant departure from the best governance practices for target-benefit plans," PSAC stated in its submission on the bill.

According to Baldwin, some of the labour movement's concerns have merit, however overstated he believes the overall position may be. He believes the federal government should address the concerns without abandoning the option of target-benefit plans.

"Canada can and should signal that it will accept conversion on a past-service basis only in exceptional circumstances and spell out in some detail what those exceptional circumstances might be," he says. "The government should also signal that regulatory requirements will be different and more stringent for plans that do not have joint governance by plan members and employer representatives."

Such changes, Baldwin believes, would make the legislation more palatable to unions.

"If the government moves on these two points, target benefits would look far less threatening than they otherwise might," he says.

Lingering questions

Still, much of the perceived threat appears to emanate from the unknown. A major question mark in PSAC's submission relates to Bill C-27's lack of detail regarding funding policies for target-benefit plans. While the legislation requires funding policies to address areas such as the benefit formula and subsequent changes to it, the precise details won't be clear until the government releases the regulations.

"It is impossible to evaluate the balance struck by this legislative proposal without [information about the regulations]," PSAC stated in its submission. "In a target-benefit plan, in which members and retirees bear all the relevant risk, they should also own all the relevant rewards, but this is not stated in Bill C-27, or made a condition of a funding policy."

Resolving those issues, however, will be a complex matter. "There are a lot of technical issues that need to be fleshed out around the funding requirements," says Fremont.

As Pierlot sees it, even the unions may ultimately realize that the resolution of these and other issues is the best way to go.

"After all, target-benefit plans are a lot better option for employees than conversions to defined contribution plans, which is what's been happening with a lot of employers in the private sector," he says. BC

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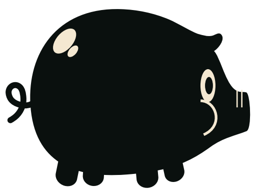

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