

MEMORANDUM



**HUMAN RESOURCES
LAW AND ADVOCACY**

To: Andrea Magahey
From: Lisa Mills & Rachel Arbour
Date: June 10, 2011
Re: Administration of Marriage Breakdown for UWO Pension Plans
(the "Plan" or "Plans") Post Bill 133

Summary of Bill 133 Provisions

The provisions of the *Pension Benefits Act* ("PBA") and the *Family Law Act* ("FLA") related to the division of a pension on marriage breakdown have been amended by the *Family Statute Law Amendment Act* ("Bill 133"). Bill 133 is not yet in force. It is expected to come into force no earlier than January 1, 2012. Draft regulations with respect to the pension division elements of the Bill were released March 3, 2011 and are expected to be finalized later this summer.

This memorandum summarizes the administrative steps associated with a marriage/relationship breakdown under Bill 133, amendments to the Plans, and other actions that the Joint Pension Board ("JPB") should consider in preparing to administer pension division requests once Bill 133 comes into force. This memorandum is restricted to members of the Plans who accrue entitlements on a pure defined contribution (DC) basis. Different considerations apply to Special Members.

Bill 133's amendments to the PBA, once in force, will require several key changes to the administration of a pension benefit on marriage/ relationship breakdown. These administrative changes fall into three categories: (1) the procedures required to be followed, including timelines and information rights of non-member spouses, (2) the requirement for the administrator to provide members and spouses with a valuation of the pension in the form of an imputed value statement; and (3) changes to the form of settlement available on marriage/ relationship breakdown.

Overview of Procedure under Bill 133

Once Bill 133 comes into force, the JPB will be required to provide an imputed value statement, as described below, within 60 days of receipt of a request. The request for an imputed value statement can be made by either the member or the member's legally married spouse. In the case of a common-law spousal relationship, only the member is eligible to make the request for the valuation.

The form that will be required to be used to request an imputed value statement has not yet been published by the Financial Services Commission of Ontario ("FSCO"). There is no obligation to charge a fee for the preparation of the valuation, but the JPB can charge a maximum fee of \$200 for DC plan members. The Bill 133 draft regulations specify the form of proof that is required to be submitted to the administrator with the request for the imputed value statement to establish the date of marriage, date of cohabitation and jointly elected dates. All documents are either required to be signed by both spouses or are required to be certified domestic contracts, marriage certificates, etc. It will be necessary to ensure that, upon receipt of an

application for an imputed value statement, that the accompanying documentation is complete and meets these formal requirements.

The imputed value statement is required to be delivered to both spouses and must include a number of prescribed items.

The imputed value statement is required to be provided on a form approved by FSCO. This form has not yet been published by FSCO. In light of recent jurisprudence regarding the required use of prescribed forms, it will be critical that the JPB for use the form ultimately approved by FSCO to the letter.

Following receipt of the imputed value statement, the administrator may receive an application to transfer a lump sum from the non-member spouse. The application must be in prescribed form approved by FSCO and be accompanied by proof of age and a certified copy of the domestic contract, arbitration award, or final court order requiring the transfer and must also include the details required enable the transfer. Upon receipt the completed application for transfer, Bill 133 requires the administrator to effect the lump sum transfer within 60 days. The transfer amount is required to either be a proportion of the imputed value or a set amount of the imputed value. No interest or investment return is to be added to a transfer but the terms of the court order, award or domestic contract will need to be considered in determining the ultimate amount to be transferred.

When the time to implement approaches, the JPB may wish to consider whether it is desirable to create a standard communication to provide the plans' members or spouses with a description of the process.

In addition, the JPB will likely have to implement additional administrative procedures to ensure that all applications, valuations and related information are retained, that all applications are complete, and that all timelines for issuing statements and for processing transfer applications are met. The JPB should also review existing member communications, such as member statements, newsletters and booklets, to determine whether adjustments should be made regarding the new system.

Valuation

The valuation of pension assets on marriage/relationship breakdown will be determined by the administrator and in accordance with a prescribed formula set out in Bill 133 and the associated regulations. Administrators will be required to calculate both the preliminary value of the member's pension (the total value of the pension up to the FLVD), and the imputed value of the member's pension (the proportion of the preliminary value attributable to the period of marriage or cohabitation).

The preliminary value for DC members is the Regular Account balance to the FLVD, or if it does not fall on a month end, at the end of the previous month. Additional voluntary contributions are not included in the preliminary valuation but are required to be listed on the imputed value statement as noted above. Our preliminary view is that only the Regular Account of a member is included in the preliminary value and any amounts in a member's Voluntary Account (regardless of their source) are excluded from the preliminary value. However, it is possible to read the definition of "additional voluntary contributions" to refer only to direct contributions to a pension plan and not to transfers into a plan from other sources. Therefore, the scope will need to be confirmed. On its face, the exclusion of locked-in transfers from the preliminary value suggests that they cannot be accessed for pension division purposes, a result which may not have been intended. The exclusion of non-locked-in amounts in the Voluntary Account makes good sense since there is no pension law restriction on access to those funds and they can be addressed by the parties independently.

The imputed value of the pension for married spouses represents the total contributions made and investment return earned over the member's entire period of participation in the plan to the FLVD, multiplied by the ratio of

the period from the date of marriage (unless the spouses jointly elect an earlier date, if they cohabitated prior to marriage) to the FLVD, to the full period of the member's participation in the plan to the FLVD. For common-law spouses, the imputed valued calculation will prorate on the basis of the cohabitation period.

The formula required for determining the imputed value for members who participated in the plans prior to their marriage/cohabitation is not as simple as taking the account balance at the FLVD and subtracting from it the account balance at the date of marriage/cohabitation.

Settlement

Once the imputed value statement has been provided to the spouses, if a division of the pension is required under a court order, family arbitration award or domestic contract, Bill 133 requires that, in the context of a DC plan, the only form of settlement is an immediate settlement of the former spouse's entitlement. For divisions governed by Bill 133, there is no longer a requirement to wait for the member's termination, normal retirement date or death to effect the pension division. Note that the date of separation is irrelevant to the determination of whether Bill 133 applies. The relevant date is the date of the order, award or domestic contract.

The amount to be transferred to the spouse cannot exceed 50% of the imputed value of the pension plus interest at a prescribed rate (not the investment return earned on the member's account balance) from the FLVD to the beginning of the month of transfer. Bill 133 requires the transfer of the lump sum payable the spouse to be made to the spouse's LIRA, LIF or to another RPP, within 60 days of receipt of the request for the transfer. The JPB can also elect to amend the Plans to permit a non-member spouse to leave his or her lump sum share of the pension in the plan to the credit of the non-member spouse. However, it is not required to do so under the terms of Bill 133. The default, even given the administrative practice of establishing ex-spousal accounts under the Plans, if no amendment is made, would be to require non-member spouses to transfer their entitlements out of the Plans.

Following the transfer to a spouse, Bill 133 requires an adjustment in the member's pension account to reflect the transfer for annual statement and all other purposes. The adjustment requires a simple subtraction of the transferred amount from the member's Regular Account. The administrator is discharged of liability once it has made the transfer to the non-member spouse in accordance with the application and the PBA provisions.

Transitional Matters

Subject to the discussion below, there will be no change in administration for members and their former spouses with court orders, family arbitration awards or domestic contract which predate the coming into force of Bill 133. The JPB will need to assess court orders, arbitration awards or domestic contracts based on the date they were created or issued to determine whether they precede the coming into force of Bill 133. This will determine the regime that will apply to the pension division.

Court orders, arbitration awards and domestic contracts that require one spouse to pay to the other spouse an amount for the equalization of net family property made prior to the date on which Bill 133 comes into force continue to be administered under the current regime and are excluded from the requirement that the division of a pension under the plans must now be solely in accordance with the immediate settlement provisions.

One of the conditions to the application of the Bill 133 immediate settlement regime is that the spouses have received the statement of imputed value of the pension from the administrator. Where there is a pre-existing *court order* regarding the equalization of family property prior to Bill 133 coming into force, Bill 133 precludes the applicable spouses from being eligible to apply for the statement of imputed value from the administrator. It is not yet clear whether spouses with pre-existing arbitration awards or domestic contracts will be permitted to

amend their arrangements voluntarily to bring themselves under the Bill 133 regime but certainly the Bill 133 regime will not automatically apply to these individuals.

In addition, for those marriage/ relationship breakdowns that are excluded from the immediate settlement regime provided under Bill 133, an additional administrative practice is required under the terms of Bill 133. Where the administrator is given a certified copy of a court order, arbitration award or domestic contract that is not subject to the immediate settlement method because it predates Bill 133, when the member subsequently terminates employment the administrator is now required to notify the spouse within 30 days of the termination of that employment and to provide the spouse with a copy of the termination statement given to the member and information regarding the options available to the spouse. The JPB will likely wish to prepare a standard communication with respect to this obligation.

Plan Amendments

We have reviewed the two Plans and have determined that certain provisions of those Plans will require amendment upon coming into force of the Bill 133 regime as well as some optional amendments that can be made.

The Plans should be amended to specify that the division of a pension following a marriage breakdown is subject to both the requirements of the FLA and the PBA, as the current language references the FLA requirements only. This will require an amendment to the General Provisions found in Article XIII, Section 3(c) of each Plan. The General Provisions, found in Article XIII should also be amended to reflect the requirement for the Plan to re-calculate the Member's benefit following a pension division (in Section 3) and the additional information rights related to valuation on marriage breakdown, the extension of those rights to former married spouses and reference the fee, if any, required to be paid in cash or cheque when a member or legally married spouse requests the JPB to prepare an imputed value statement (in Section 4).

Our understanding is that the JPB has previously decided not to allow former spouses to remain in the Plans once Bill 133 is enacted and to the extent possible, require the transfer out of spousal accounts established under the pre Bill 133 regime where the member spouses have retired, terminated or died. If the JPB choose to reverse this decision and to permit the former spouse of a member to maintain their lump sum payment in his/her own account in the applicable Plan, a number of changes will be required to the Plans to reflect the status of this individual, the ability of the individual to manage their account until "retirement", and the manner in which such former spouse can commence receiving the benefit under the Plan.

Given the existence of ex-spousal accounts under the pre-Bill 133 regime, if the JPB does not wish to permit the spouse of a member governed by the Bill 133 regime to maintain their transferred amount within the Plans, it is recommended that the Plans be amended to specifically exclude this option.