

Memorandum



To: Our Clients

From: Administration Department

Date: May 21, 2013

Re: Pre-retirement Death Benefits

Introduction

The purpose of this memo is to remind our clients of the challenges in the administration of pre-retirement death benefits and to update our clients about the recent decision from the Supreme Court of Canada with respect to the rights of spouses to pre-retirement death benefits under section 48 of the Ontario Pension Benefits Act.

Pre-retirement Death Benefits

The Challenge

When a plan member dies, they can no longer tell us to whom any death benefit under the pension plan should be paid. As a result, plan administrators must rely on beneficiary designations completed by the member prior to death. Unfortunately, there are two challenges that often arise. First, the member may not have updated their beneficiary designation to reflect their current circumstances (marriage, divorce, etc.). Second, pension legislation in Canada often overrides beneficiary designations in certain circumstances to prioritize a “spouse” as the first recipient of some or all of the death benefit.

Actuarial Solutions Inc. has a standing practice of urging clients to take caution when paying death benefits from a pension plan when it is unclear who is the correct beneficiary.

The Court of Appeal’s Decision

On March 28, 2013, the Supreme Court of Canada denied leave to appeal the Ontario Court of Appeal’s decision in “Carrigan”.

The Court of Appeal’s decision in “Carrigan” considered the rights of spouses to pre-retirement death benefits under section 48 of the Pension Benefits Act. In denying the benefit to a common law spouse who was living with the member at the date of death, the Court gave an interpretation that was unexpected and inconsistent with how section 48 had been previously administered by many plan administrators.

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The Court of Appeal's interpretation of the pre-retirement death benefit provision under section 48 of the Pension Benefits Act is now the precedent under law. The decision directly affects members or former members of a pension plan who:

- have not started receiving a pension;
- are legally married to a person who they are living separate and apart from;
and
- are living with a person who qualifies as a common law spouse under the Pension Benefits Act.

Based upon the decision on "Carrigan", it appears that in cases where a member is living with a common law spouse but is still legally married to (and living separate and apart from) another person, the member is free to designate whomever he or she chooses to be the recipient of the pre-retirement death benefit, including his or her common law spouse.

Changing Legislation

In the recent Ontario Budget that was delivered on May 2, 2013 the government announced that it intends to "review the Ontario Court of Appeal's recent ruling regarding spousal entitlements in the case of Carrigan v. Carrigan Estate, propose amendments to the PBA and, if necessary, amend the regulations under the PBA."

Unfortunately, this adds to the uncertainty of how beneficiary designations should be completed and how death benefits will be administered in the future. We will therefore keep you informed of any further developments on this issue.

Next Steps

Actuarial Solutions Inc. cannot provide legal advice and in any event, we discourage our clients from giving employees legal advice with respect to beneficiary designations and recommend that clients advise employees to consider their circumstances and the potential need for obtaining legal advice to assist them in preparing their beneficiary designation.

We also recommend that our clients consider having all their plan members complete an updated beneficiary designation form on a periodic basis to ensure that the current beneficiary that is on file is the intended beneficiary based on the member's current situation.

Given the recent Carrigan decision and the potential change in legislation in Ontario, it is unclear whether updated designations should be encouraged immediately or deferred until the legislation is updated. Each client will need to consider these options.

Finally, the Carrigan decision has the potential to raise disputes with respect to the past administration of death benefits. Clients should consider if a "wait-and-see" approach is appropriate or if you would like to review the administration of any historical pre-retirement death benefits on a proactive basis to confirm that the appropriate beneficiary was the recipient of the benefits.

Please feel free to contact your consultant (Jason, Dean or Joe) if you would like to discuss any of the above.

