

CAP Guidelines

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Why Do I Need a Lawyer?

By Priscilla H. Healy

The Guidelines for Capital Accumulation Plans, including defined contribution pension plans and group registered retirement savings plans, became fully effective at the beginning of 2006.

These industry "best practices" developed by the Canadian Association of Pension Supervisory Authorities is voluntary but the Guidelines are well-understood, accepted and adhered to by providers and administrators of CAPs, including insurance companies and investment dealers.

So, why do you need a lawyer?

The short answer is that plan sponsors have new complex legal responsibilities under the guidelines which they must understand. And while compliance with the CAP Guidelines is not itself a protection from liability, it will provide a strong "good governance" defence to plan member allegations of breach of duty.

Fiduciary and Other Responsibilities

A prudent employer will act as if it were a fiduciary in most of its activities and decisions in respect of its CAP.

A careful, well-documented process of decision-making at the outset in respect of the key elements of the CAP will be evidence of performance of an employer's duty to members.

All CAPS must have a proper governance structure, and we can establish a workable structure for you that will comply with pension legislation.

The Plan Design and Operation

The first thing the employer must do is formulate the objectives of the plan. Is it savings or retirement? What are the other elements of compensation of which the plan is a piece? What are the human resources goals? Our development of a mission statement for you will create a thought process that can help shape these employer decisions.

CAP Provider

The level of service you want provided by your CAP provider is a primary consideration. Sample member booklets and member statements should be examined, and the provider's willingness to make changes in their standard materials determined. A clear understanding is necessary as to how many member information sessions are given and whether they are included in the provider's charges.

Employers will also want to be assured that the provider's member service representatives are legally qualified to give investment advice, and that there are independent financial planning services available through the service provider.

Once a decision is made to engage a CAP provider, we as your lawyer can review the contract with the provider to ensure that all areas of responsibility are clearly delineated, that the provider takes its proper responsibility for compliance, and that the schedule of fees and charges is clear.

Investment Options

Different providers will offer different investment options. A careful selection (considering the level of sophistication and the demographics of the work force, and in light of the current norms as to the numbers of options) is important.

We can also help you resist pressure from some employees to offer options with a higher degree of risk. Such employees can be advised they are free to invest their own money as they please outside the employer-sponsored plan.

Contribution Levels

Plan members cannot legally be prevented from withdrawing monies from some kinds of CAPs, but we can draft provisions discouraging withdrawals or only permitting them in specific circumstances.

Monitoring

We can help the employer determine how to meet its ongoing responsibility to monitor the performance of the investments and the administration of the plan.

Record Retention

Employers must understand the need to retain records of information given to members and of employee attendances (or not) at member information meetings.

Compliance

We can assist as to the compliance which may be required in a variety of other areas, including pension standards (DC plans), securities law, privacy requirements and human rights.

Member Communications

Lastly, we can help the employer avoid some common problems in communication with members. For example, members need to understand:

- that the CAP should be only one element of their retirement planning strategy.
- that they need to attend member information meetings and use the financial planning and risk tolerance tools provided; and

- that independent investment or financial planning advice may be required, particularly when initial investment decisions are made, if a spousal relationship changes, or where considerable amounts of money are built up in the CAP.

Other potential communication pitfalls can arise where there is a spousal account, insufficient clarity as to fees and charges, or where unrealistic projections of future investment income are included in educational material provided for CAP members.

The additional cost of legal advice in this complex area is far outweighed by the potential benefits to both plan sponsors and members. Once all the “i”s have been dotted and “t”s have been crossed, the vagaries of the stock market should be the only component of your CAP that has been left to chance.

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Pallett Valo LLP Pension Law Group

The Pallett Valo Pension Group has the senior counsel experience and capability to deal with all aspects of the establishment, operation and dissolution of pension plans. These can include plan mergers, asset transfers, surplus management and withdrawal, partial wind-up issues, as well as employer-sponsored retirement or savings arrangements (savings plans, Group RRSPs, defined contribution plans, defined benefit plans and executive supplementary arrangements). Recent regulatory guidelines governing capital accumulation plans have added a layer of complexity to these arrangements. We also advise and help develop compliance and good governance procedures in accordance with best practices to minimize liability of employers, administrators and custodians.

The members of the Pension Group work closely with the Pallett Valo Insolvency and Corporate Restructuring Group for the restructuring of pensions and other retirement or savings arrangements, and with respect to employee medical and insurance benefits.

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