

Bill C-228: What secured parties need to know



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Introduction

Bill C-228, known as the “Pension Protection Act” (the PPA) received Royal Assent in April 2023 and is now law. The PPA significantly expands the super-priority protections that insolvency statutes provide for defined benefit (DB) pension plans. In this article, we consider the impact of the PPA on secured financing transactions and steps secured lenders can take to potentially minimize exposure.

Prior to the PPA, insolvency regimes provided super-priority status to two types of contributions payable to a DB plan: (i) contributions deducted from an employee’s pay and (ii) unpaid “normal cost” contributions.

The PPA expands the super-priority to unpaid contributions required to fund any unfunded liability or solvency deficiency, and the amount required to liquidate any unfunded liability or solvency deficiency of any federally or provincially registered DB pension plan.

Considerations for secured lenders

At a minimum, secured lenders seek a level of visibility and certainty on the dollar value of the obligations that rank ahead of their own claims. However, the amounts subject to the new super-priority are not always capable of precise and timely measurement and may vary significantly after the date a loan is made. To address the risk of being primed by the new super-priority where the borrower has an existing DB plan, secured lenders have taken various precautions from enhanced and periodic disclosure of the DB plan’s funded status throughout the term of the loan, to reducing available credit, or taking additional security.

In extreme cases, lenders have reserved the right to have plans revalued and to take reserves in excess of any deficit to ensure adequate collateral. For borrowers without a DB plan, some secured lenders are prohibiting the existence of DB plans outright and are limiting the acquisition of companies with DB plans. However, as the risk of being primed ultimately relates to the viability of the business itself, the extent to which lenders seek or obtain such protections ultimately depends on the financial health of the borrower and the industry in which it operates.

Timing

Although the PPA has a transition period of four years for employers with an existing DB plan in place before April 2023, it is important to consider the required provisions for credit agreements being refinanced and credit agreements being entered into now, given that many credit agreements have a five year term and the provisions will come into force during the term of the credit agreement. In addition, the four years may not extend to DB plans where the employer has changed since April 2023, for example, as a result of an acquisition or reorganization.

Conclusion

The PPA has been in force for a short time and it is already clear that there is no one-size-fits all approach to this issue. If you have questions regarding the impact of the PPA, please reach out to the authors.