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SECTION: Class of Employee

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*Note: Due to legislative changes, references to ss. 32(1) and s. 35 of the PBA, 1987 should now read ss. 31(1) and s. 34 of the PBA, R.S.O. 1990, and references to "PCO" should now read "FSCO."*

#### **A Discussion of the Issues Affecting "Class of Employees"**

One of the goals of pension reform is to expand coverage for employees—including those who work part-time. This is to be achieved within the framework of a voluntary private pension system and without artificial or arbitrary distinctions among plan members. The concept of "class of employees" is of great importance among pension professionals and often poses difficulties when attempting to define or describe it. Two concepts—"class" and "eligibility" are closely intertwined, and it is important to clarify their meanings as much as possible.

This article is neither a definitive examination of a difficult concept nor a resolution of the many problems which flow from it. It briefly discusses the issue in the context of pension reform; summarizes current PCO practice in interpretation; reviews some common enquiries; and makes suggestions as to how your specific questions may be directed to the PCO staff.

The key provisions in the PBA, 1987 which apply to class are:

- 32(1)** Every employee of a **class of employees** for whom a pension plan is established is eligible to be a member of the pension plan.
- (2) An employee in a **class of employees** for whom a pension plan is maintained is entitled to become a member of the pension plan upon application at any time after completing twenty-four months of continuous full-time employment.
- (3) A pension plan may require not more than twenty-four months of less than full-time continuous employment with the employer, with the lesser of,
  - (a) earnings of not less than 35 per cent of the Year's Maximum Pensionable Earnings; or
  - (b) 700 hours of employment with the employer, in each of two consecutive calendar years immediately prior to membership in the pension plan, or such equivalent basis as is approved by the Superintendent, as a condition precedent to membership in the pension

plan.

- 35** An employer may establish or maintain a separate pension plan for employees employed in less than full-time continuous employment if the separate pension plan provides pension benefits and other benefits reasonably equivalent to those provided under the pension plan maintained by the employer for employees of the **same class** employed in full-time continuous employment.  
*(emphasis added)*

These provisions have given rise to a number of important questions that can be divided into two general categories: what are the eligibility rules for membership in a plan and, can a person or group of persons constitute a separate class? Many of the questions related to eligibility can be answered with relative ease:

**1. Can the statutory requirements be waived to provide for more liberal requirements?**

While statutory requirements cannot be waived, the PBA, 1987 sets out minimum standards; any plan may improve upon them and be more generous.

**2. Can a part-time employee satisfy the YMPE test in year 1 and the hourly test in the second year?**

Yes, whichever occurs first.

**3. Can students who work part-time be treated differently than regular part-time employees?**

No; once they satisfy the eligibility requirements, membership must be offered to them.

**4. Are seasonal workers who are terminated each year and then re-hired next year eligible if they satisfy the part-time requirements in two consecutive years?**

No; termination of employment requires the seasonal worker to start again each year. However, the terms of their employment should not be structured so as to contravene the spirit of the PBA, 1987.

**5. Can a deadline be established by which date a member must join the plan when he becomes eligible?**

No. In a voluntary pension plan, once the member has met all eligibility requirements he must be permitted to join the plan at any time.

**PCO Interpretation Bulletin I**

The above enquiries are straightforward; some enquiries are broader in scope, and call for further interpretation. In response, the PCO produced Interpretation Bulletin I in March, 1988. In making a determination as to what constitutes a class of employees, both the nature and the terms of employment must be taken into account. Whether or not a separate class exists depends upon the specific employment facts. For example, any of the

following groups would constitute a separate class: salaried employees, hourly employees, union members, non-union members, supervisors, management, executives, officers, and significant shareholders.

With respect to eligibility requirements, full-time employees are eligible once they satisfy the twenty-four month continuous service requirement; part-time employees must be permitted to join the plan when they complete twenty-four months of continuous employment, and in each of the two consecutive years immediately prior to membership, meet one of the two tests (35% of YMPE earned or 700 hours). For full or part-time employees, reasonable waiting intervals (i.e., one pay period) to join the plan will be permitted for administrative purposes, but

part-time employees of MEPPs may be required to wait until January 1 of the year immediately following attainment of eligibility. When determining reasonably equivalent benefits for part-time employees, all benefits including ancillary benefits must be reasonably equivalent.

While Interpretation Bulletin I succeeded in clarifying some of the areas of concern regarding classes of employees, many uncertainties remained. Whenever a plan wants to treat certain individuals in a different manner, the possibility of a class issue may arise. Many of the issues are very plan-specific and cannot be dealt with generally. Staff of the PCO have attempted to provide general guidelines, which are set out below.

## **A Sampling of Recent Enquiries Concerning Class of Employees**

### **Criteria For Determining Classes**

One of the most common questions is whether certain criteria are acceptable in determining a class of employees. The criterion “employees on different salary levels” is probably too vague, as “salary” is a loose concept; but, “employees hired after a certain date” could form a separate class. Depending on the context, members of a plan who are “employed at a separate location” can make up a separate class. In certain circumstances where some employees are in a different province, a separate class for them may be necessary because of different legal requirements.

### **Individuals As Separate Classes**

In general, an individual cannot constitute a class; if special pension provisions are to be made for that person, it should be in the form of a separate plan. (However, care must be taken to adhere to Revenue Canada’s requirements and limits for single-member plans.) But a class can be made up of a few individuals if they constitute a readily identifiable group (such as vice-presidents of a corporation).

### **Different Requirements For Full and Part-Time Employees**

While section 35 of the PBA, 1987 refers to reasonably equivalent *benefits*, there can be **different eligibility requirements** for full and part-time employees. For example, a plan could provide that full-time employees may become members of the plan as soon as they begin employment, but that part-time employees must satisfy the statutory requirement of twenty-four months of continuous employment before they become eligible. This should be distinguished from **vesting requirements**, which must be on a comparable basis in that the 2-year vesting “clock” (for post ‘86 benefits) commences as soon as an individual becomes a member. The vesting period may be shortened, but would have to be done so for both full and part-time employees.

### **Miscellaneous Enquiries**

When an employee moves to a new position in the same company, the plan may require the employee to join a different class in the pension plan covering the new position even if the future benefits are inferior; however, any past benefits can not be reduced.

In determining the definition of earnings for the 35% of YMPE test, the total amount of the employee’s taxable employment income must be taken into account, as the YMPE measure includes the aggregate of all amounts of income received. In determining the 700 hours test, the total number of hours worked must be taken into account, including overtime.

An employee who previously elected not to become a member of a plan and who then decides to become a member cannot constitute a separate class on that basis alone.

## **Conclusion**

The PBA, 1987 is silent on many class-related issues. As a result, it may be necessary to direct questions to the PCO staff. However, it is frequently the case that in the absence of direction from the legislation, the **terms of the specific plan** will determine the answer; pension professionals are urged always to check this first. In interpreting questions concerning class, staff of the PCO make use of Interpretation Bulletin I and the “spirit” of the pension reform objectives of widening participation.

When making enquiries of PCO staff on class-related matters, it is very important to provide **all the relevant facts with full disclosure of the context**. For example, a simple question as to whether employees at a different plant location can constitute a separate class may not be sufficient; it is necessary to add, for instance, that this group consists of only 2 employees or, that they are significant shareholders or, that one is part-time or, that the employees are part of a larger sub-group. An over-simplified question may elicit a simple answer but it may be of little use when the amendment is rejected because of the factual context.

PCO staff recognize the complexity of class and eligibility problems, and wish to assist in resolving them as expeditiously as possible.