

Pension Commission

Update #12 Payment of Surplus Assets from Pension Plans

Revised November 2000

Reference: *The Pension Benefits Act Sections 26(2)(2.1)(2.2)(2.3), Regulation Sections 7(1) and 7(2)*

On June 24, 1992, amendments to the Act were enacted to lift the moratorium on requests for surplus refunds from on-going or active pension plans.

This Update has been prepared to outline the legislative and related requirements regarding surplus refunds from pension plans in Manitoba.

Legislative Requirements

The Pension Benefits Act states that no funds, including surplus, can be paid out of a pension plan to an employer unless the Commission consents to the refund in writing.

Section 26(2.1) of the Act states that the Commission shall not, under subsection (2), consent to the payment of surplus to an employer out of a pension plan, unless:

- a. subject to subsection (2.2), the Commission is satisfied that the employer is entitled to receive the surplus under the terms governing the pension plan;
- b. all facts relevant to the payment, including the amount of the assets and liabilities of the pension plan and such other relevant information as the superintendent may require, have been disclosed to all members of the pension plan; and
- c. the employer submits a written application for the payment that contains, or has attached, the information required by the Regulation.

Section 26(2.2) of the Act requires that where the Commission is not satisfied that an employer applying for the payment of surplus out of a pension plan is entitled to it under the terms governing the pension plan, the Commission shall not consent to the payment unless a judge of the Court of Queen's Bench, upon the application of the employer, determines that the employer is entitled under those terms to receive the surplus.

Section 26(2.3) of the Act states that the maximum amount of any surplus payable to an employer out of a pension plan under this section is that portion of the surplus is in excess of:

- a. two times the total amount of the employer's current annual service contributions, or
- b. 125% of the total amount of the liabilities of the pension plan determined on the basis of factors that would apply if the pension plan were being terminated or wound up on the date of the payment, less the total amount of those liabilities determined to the basis of the factors applying on the assumption that the pension plan is not being so terminated or wound up, whichever is greater, but this subsection does not apply where the payment of surplus occurs upon the termination or winding-up of the pension plan.

Section 7(1) of the regulations states that an application under clause 26(2.1)(c) of the Act must include a report, prepared in accordance with sections 3 to 5 of this regulation, indicating:

- a. the amount of surplus in the plan;
- b. the amount of surplus requested to be paid to the employer; and
- c. if the plan is not being terminated or wound up, the amount of surplus to be retained in the plan;

and the report shall be for a period ending not more than 90 days before the date of the submission to the commission. The report required by this section of the regulations shall be for the period ending not more than 90 days prior to the date of submission of the employer's applications to the Commission in this regard.

The aforementioned is not applicable to plans which are winding-up in accordance with the applicable provisions of the Act and regulation.

Section 7(2) of the Regulation states an application referred to in subsection (1)

- a. must specify the amount of surplus being requested;
- b. must include a copy of the terms of the plan that authorize the payment of surplus or a copy of the ruling of the Court of Queen's Bench declaring the employer's entitlement to a payment of surplus;
- c. must certify that the members, former members, an authorized agent of any of them, or a bargaining agent representing members or former members, and any other persons entitled to benefits under the plan have been provided
 - (i) the information specified in clause 26(2.1)(b) of the Act.
 - (ii) information as to the amount of surplus being requested by the employer in the application,
 - (iii) a statement indicating that any of them may make a written submission to the commission relating to the request for a payment of surplus within 30 days after receipt of the statement, and
 - (iv) a statement indicating that any of them may inspect and make extract from the application and all accompanying documents at the offices of the employer, and have been provided with information as to how to obtain copies of the documents from the employer, and,
- d. must include any other information requested by the commission.

The legislative requirements for members in other jurisdictions must also be considered in the employer's application for the surplus refund.

PROCESS

1. Contractual Rights

The employer's right to the payment of surplus assets from the pension plan must be clearly set out in the terms governing the plan. To determine this right, the plan text, investment contracts and all other related documents must be reviewed thoroughly and carefully. This review must incorporate all previous plan texts which have been superceded either by reason of conversion, merger, division, and so on.

The language of the documents must in every case clearly and consistently provide for such a payment to the employer. Should the plan clearly provide the plan members with entitlement to

surplus assets, any application to the Commission for payment to the employer will not be considered. If the language is unclear, has ever been amended, or the documentation is silent in this regard, the employer and trustees of the plan may wish to obtain a legal opinion before proceeding.

In situations where an amendment to clarify the wording of the plan text is being considered, the plan text will require careful review. Any legal requirements to effect such a change must be observed.

Where the Commission is not satisfied that the employer is contractually entitled to the payment of surplus from the pension plan and will not consent to the payment, the employer may wish to file an application with the Court of Queen's Bench for a judgment determining the employer's entitlement to receive a payment of the surplus from the plan.

Plan members should be notified of the pending court hearing, and the Commission provided with a copy of the application to the court along with all accompanying documentation.

2. Actuarial Report

The actuarial report prepared in relation to the employer's application to the Commission must meet the requirements of Section 7(1) and 7(2) of the regulation, and be prepared within the time frame set out in Section 7(1) as well as the information required by clauses (a) through (c).

3. Disclosure

It is advised that the issue of contractual rights to the surplus be settled prior to the members receiving the required disclosure. Plan members, former members and any other persons entitled to benefits under the plan must receive statements as outlined in Section 7(2)(c) of the regulation. The Pension Commission's address must be provided to the members in relation to their right under clause (iii) of this Section.

The employer may wish to submit a copy of the statement to the Commission for review prior to its being distributed to the affected plan members and beneficiaries, to ensure that it meets the requirements of the regulation. In any event, a copy of the statement inclusive of the date that the plan members were advised, must be included with the employer's application to the Commission for the payment of the surplus.

Consent to the Payment of Surplus

The Pension Commission will review all documentation and request any further information necessary to satisfy itself that the requirements of the Act and Regulation have been met.

Where all documentation is in order, and the Commission, in its opinion, is satisfied that the employer has met all the requirements of the Act and Regulation, the Commission will advise the employer in writing that it consents to the payment of surplus assets out the pension plan.

This update has no legal authority. The Pension Benefits Act of Manitoba and The Pension Benefits Regulation, 188/87 R amended should be used to determine specific requirements.