

# pensions picture

## Surplus in your Pension Scheme?!

This may seem a far cry from reality in the current economic climate, however if employers wish to retain the option of receiving a refund of any future surplus from their pension scheme, action will need to be taken soon and in any event by 5 January 2011.

Currently, where scheme rules contain a power to make payments to the employer, that power may be exercised only by the trustees. However, section 251 of the Pensions Act 2004 potentially prevents any future payment of surplus to an employer if the trustees do not pass a resolution confirming the continuation of such a power before 6 April 2011.

The following points are key:

- this only applies to pension schemes established before 6 April 2006 which had a power to repay surplus to the employer prior to that date;
- a resolution must be passed by the trustees of the scheme before 6 April 2011;
- prior to such resolution being passed, three months' notice must be given to members and all participating employers - this means action must be taken by 5 January 2011 at the absolute latest in order to pass the resolution before 6 April 2011;

- the resolution is only preserving the right to refund any surplus to the employer at a later date - it is not a resolution to actually refund the surplus;
- the trustees must be satisfied that the resolution is in the members' interests (and later when a refund of surplus is to be made, the trustees must again consider whether it is in the members' interests). The Pensions Regulator has commented that "employers may agree to higher scheme funding objectives, or more prudent assumptions, in the knowledge that where investments perform better than expected and extra funds are generated, they may be accessed by the employer", although it has also commented that trustees should proceed with caution in this area;
- the resolution may provide that the power to return surplus is subject to different or additional conditions to those set out in the existing rule; and
- a refund of surplus cannot be made unless the scheme is fully funded on a buy-out basis.

Although the legislation is aimed at surplus only in ongoing schemes, it is not clear whether the relevant provisions will also catch repayment of a surplus on winding-up and so trustees should take advice on whether this is required in respect of their particular scheme.

This is of interest to both employers and trustees alike. Employers will be keen for the power to repay a surplus to them to be retained and from the trustees' view, passing such a resolution may enable them to agree more generous funding from the employer as it may then be



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less concerned about surplus being trapped in an over-funded scheme.

There may be another reason for employers to seek such a resolution from the trustees: under International Accounting Standard 19, a power to repay a surplus may allow surpluses to be recognised on the employer's balance sheet (even if there is no actual proposal to repay them).

Employers and trustees should consider taking legal advice on this issue as soon as possible.

If you would like any assistance with the above, please contact any member of the HBJ Gateley Wareing's pension scheme.

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