



SECTION: Refund of Employer Overpayment

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TITLE: Application under subsection 78(4)
PBA, 1990

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Refunds of Employer Overpayment to Pension Fund

1. Subsection 78(4) of the *Pension Benefits Act*, 1990 (the "PBA") provides for the following:

The Commission may consent to payment out of a pension fund to an employer of an amount not in excess of the amount of an overpayment by the employer into the pension fund or of an amount paid by the employer that should have been paid out of the pension fund, but shall not consent unless the application is made in the same fiscal year of the pension fund as the fiscal year in which the overpayment or the payment occurred. 1987, c. 35, s.79

2. There are certain situations in which an employer may be considered to have over-contributed to a pension fund for the purposes of subsection 78(4) of the PBA including, but not limited to situations where:
- a) the employer contributes on the basis of an actuarial report for which the effective date has passed but a new report is not yet filed; or
 - b) payments have been made directly by an employer which should have been made from the pension fund; or
 - c) employer contributions are paid into the pension fund of the wrong pension plan as a result of an administrative error.

In such circumstances, the employer may be considered to have over-contributed notwithstanding that there may be a solvency deficiency or going concern unfunded actuarial liability in the pension plan.

3. The Commission is of the view that in exercising its statutory decision making power under subsection 78(4) of the PBA, it has a common law duty of fairness to ensure that sufficient notice of an application has been given to those whose interests may or will be affected by its decision.
4. The Commission is of the view that those parties whose interests may or will be affected by its decision should be those parties identified under subsection 78(2) of the PBA.
5. Ordinarily it is expected that notice will be transmitted by personal delivery or first class mail to:
 - a) any trade union that represents members of the pension plan; and
 - b) any advisory committee established in respect of the pension plan.
6. It is recognized that individual notice to members, former members, and any other individuals who are receiving payments from the pension fund may not be practical or reasonable in all circumstances. For example, the requested refund may be relatively small. In such circumstances, notice may be sufficient if it is given by:
 - a) general notice posted in an unrestricted area in the location(s) of employment for members of the pension plan to which the pension fund relates; and
 - b) public advertisement for each former member, and any other individual who is receiving payments from the pension fund; or
 - c) such other method of notice which is acceptable to the Commission in the circumstances.
7. In the ordinary course it is expected that notice will contain the following information:
 - a) the name of the pension plan and the registration number;
 - b) the review date of the actuarial report provided with the application, if applicable;
 - c) the funding surplus or deficiency on both an ongoing and solvency basis, if applicable;
 - d) the authority for the refund of employer overpayment (in plan text, trust agreement and legislation);
 - e) a statement to advise plan members that submissions concerning the application may be made in writing to the Registrar of the PCO within thirty days after receipt of notice;
 - f) a statement advising interested parties that copies of the actuarial report, if applicable and any other pertinent material filed with the Commission in support of the application may be reviewed at the office of the employer and at the Pension Commission of Ontario (an appointment should be made in advance); and
 - h) information as to how copies of the documents may be obtained.

8. An application for the Commission's consent to a refund of overpayment to an employer should include:
 - a) certified copies of the notices that were given;
 - b) details of the classes of persons to whom the notices were given;
 - c) the method of distribution of the notices and the date on which each form of notice was given;
 - d) excerpts from the actuarial report(s) which support the applicant's position that an over-payment has been made; and
 - e) evidence of the actual overpayment made.
9. The applicant will be expected to justify that the notice provided was appropriate and reasonable given the circumstances of the case. The Commission may reject an application if it is not satisfied that notice was appropriate and reasonable in the circumstances.
10. Where the Commission is satisfied that there are reasonable grounds for an extension of the time limit under subsection 78(4), an extension may be permitted in accordance with section 105 of the PBA.

*This policy does not apply to refunds arising from the requirement of the ITA (Canada) to refund contributions to the employer in order to avoid revocation of a pension plan's registration by Revenue Canada. Refunds for this purpose must comply with the requirements of subsections 47(11) to (16), as applicable, of the Regulations under the PBA. **Please refer to the policy, catalogued as A400-500, which is published in this issue on page 8.***