

This is a round-up of topical issues in May 2010

A Day and the case of the vanishing power to refund surplus

The new “simplified” pensions’ tax regime came into being on 6 April 2006 (“A Day”).

Where schemes give the trustees the power to return surplus funds to the sponsoring employer in certain circumstances, lawyers are warning that the trustees must pass an appropriately-worded resolution by 5 April 2011 if the power to return surplus is to be retained.

However, before they do this, the trustees must first consider whether it is in schemes members’ interests to do so and give members three months’ notice that they intend to pass such a resolution, so employers will need to ensure they get the ball before the end of this year.

The issue arises from unintended consequences of [section 251](#) of the Pensions Act 2004. (The intention had simply been to provide a 5-year window for schemes affected by onerous pre-A Day restrictions on the return of surplus to remove those restrictions.)

Whilst there is agreement that schemes will lose the ability to return surplus (if they currently have it – some do not) while they remain ongoing, legal opinion is divided, however, as to whether failure to pass a resolution would remove the ability of schemes to return surplus after all liabilities have been bought out on winding-up.

At first sight, it may not be obvious why trustees should want to pass a resolution to maintain the ability to return surplus to the employer. However, by so doing they will remove some of the “asymmetric risk” that often concerns employers (ie the ability to seek a refund if the scheme becomes over-funded) and this may make the employer more willing to agree to a tougher funding target than might otherwise have been the case.

More generally, there are transitional arrangements under which the old “IR limits” and, in particular, the “earnings cap”, continue to apply to schemes by default until 5 April 2011, unless removed by a specific deed of amendment.

This was to provide a period of grace during which employers could decide which of the old limits they wish to “hard code” into their scheme’s rules in order to avoid any unintended increase in members’ benefits and scheme liabilities.

Also, [The Registered Pension Schemes \(Modification of the Rules of Existing Schemes\) Regulations 2009](#), which came into force on 11 December 2009, allow schemes to remove any requirements that may have been written into their rules to obtain HMRC’s approval (which can no longer be obtained) before making certain rule amendments. However, the power to make such a change is currently set to expire 5 years after A-Day, ie on 5 April 2011.

ACTION: With the transitional arrangements now having only a few months left to run, employers should check whether appropriate changes have already been made and, where not, ensure the process is started soon so that their scheme’s rules can be amended and resolutions passed by 5 April 2011.

FRC issues new Code on UK Corporate Governance

A new version of the [UK Corporate Governance Code](#) was published by the Financial Reporting Council (FRC) on 28 May 2010. It applies to accounting periods beginning on or after 29 June 2010 and is intended to help company boards become effective and accountable to their shareholders. It will continue on a “comply or explain” basis.

Changes (from what was formerly known as the Combined Code) include:

- The company’s business model should be explained and the board should be responsible for determining the nature and extent of the significant risks it is willing to take – to improve risk management.
- Performance-related pay should be aligned to the long-term interests of the company and its risk policy and systems.
- All directors of FTSE 350 companies should be put forward for re-election every year – to increase accountability.

- There are new principles on the leadership of the chairman, the responsibility of the non-executive directors to provide constructive challenge, and the time commitment expected of all directors – to promote proper debate.
- There are new principles on the composition and selection of the board, including the need to appoint members on merit, against objective criteria, and with due regard for the benefits of diversity, including gender diversity – to encourage boards to be well balanced and avoid “group think”
- The chairman should hold regular development reviews with each director and FTSE 350 companies should have externally facilitated board effectiveness reviews at least every three years – to help enhance the board’s performance and awareness of its strengths and weaknesses.

ACTION: As institutional shareholders, trustees should familiarise themselves with the Code’s requirements. They could also consider whether any of the principles could make their own trustee boards more effective.

Default retirement age is to go

The Queen’s Speech given on 25 May 2010 confirmed that the new Coalition Government intends to introduce new legislation to phase out the default retirement age (currently 65).

ACTION: Employers should start to prepare for the removal of the default retirement age.

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