

TO WITHHOLD OR NOT TO WITHHOLD A MEMBER'S WITHDRAWAL BENEFIT?



Section 37D of the Pension Funds Act (the Act) permits certain deductions from a member's benefit - one of which is that an employer can claim compensation for loss or damages suffered as a result of a member's dishonesty, fraud, theft or misconduct (collectively referred to as "damages").

ALTHOUGH THE ACT MAKES PROVISION FOR AN EMPLOYER TO CLAIM LOSSES FROM AN EMPLOYEE'S RETIREMENT SAVINGS, MANY EMPLOYERS FAIL TO FOLLOW THE PROPER LEGAL PROCESS TO RECOVER THESE LOSSES.



WHAT ARE THE PROCEDURES THE EMPLOYER MUST FOLLOW?

Misconduct must be proven to show that the employer has suffered loss because of the employee's actions as defined in the Act.

TO LODGE A CLAIM, THE EMPLOYER MUST OBTAIN EITHER

1 An admission of liability and acknowledgment of debt signed by the member ("AOL")
The written AOL must be presented to the Fund for consideration. The Fund will assess the enforceability of the AOL and if in agreement, will authorise a deduction from the member's benefit.
The written AOL must comply with the section 37D of the Act.

1 OR **2**

2 A civil judgment against the member in any court.
The employer must:

- Inform the Fund that it has instituted civil action against the member
- Request the Fund to withhold the member's benefit up to the amount of the claim pending the outcome of the civil action.

Employers should ask themselves the following questions before making this request as these are the factors the trustees will consider:

- **Has the employer instituted civil action against the employee for recovery of compensation? Please note: the Trustees may not withhold a member's benefit if the employer has only pursued criminal proceedings by opening a case with SAPS as a criminal conviction is not a judgement against a member in terms of the Act.**
- Is the employer actively pursuing the matter? The employer cannot decide for themselves to withhold fund benefits by simply not forwarding the completed withdrawal claim form to the Fund.
- Does the employer have a legitimate case and sufficient evidence for why the benefit should be withheld by the fund? The employer does not have an automatic right to insist that the Fund withhold a member's benefit.
- Is the employer responsible for any delays in the legal proceedings?

In addition employers must ensure that the following documents accompany the request to the Fund to withhold a member's benefit:

- Estimate of loss suffered (including cost of legal fees, if any);
- Disciplinary hearing proceedings, internal enquiries/notices of dismissal or other such supporting evidence that will enable the trustees to understand the conduct that resulted in the loss to the employer;
- Completed withdrawal claim form;
- Full details of the criminal action, including copies of all court papers; and
- Continuous and timeous updates to be provided to the trustees throughout the civil legal proceedings. Unjustifiable delays may not be condoned by the Fund.

WHAT ARE THE PROCEDURES THE FUND MUST FOLLOW?

The Trustees are required to do the following on receipt of the request from the employer:

- Apply their minds appropriately, impartially and in a balanced manner when considering the interests of both the employer and member. Both the employer's claim and the member's case must be fairly considered by the trustees.
- If the member objects to the withholding, the member will be requested to respond to the employer's allegations and indicate the prejudice the member will suffer if the benefit is withheld.
- If the Trustees are satisfied that the benefit be withheld for a certain duration pending the outcome of the civil action; they are required to inform the member of their decision.



Please note:

- The Fund is not the agent of the employer and in matters related to issues regarding the employer and member, the Fund will act independently.
- The Fund has no legal interest in withholding payment of any benefit.

The LA Retirement Fund is committed to working closely with our HR partners to equip you with the necessary information you need to make your jobs easier and to ensure that our members are well taken care of.