

Law Navigator



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Compulsory fund membership

1. The employment contract

Freedom of choice as enshrined in our Constitution means that a person can choose who they work for. Once they have accepted employment with a particular employer, however, they cannot claim freedom of choice regarding their conditions of employment – they cannot accept only those conditions of employment that suit them and reject others.

To avoid unfair discrimination, an employer should have one basic set of employment conditions that applies to all employees. There may be slight variances between different categories of employees – for example, wage earners and contract employees or senior management and other staff. All the employer's conditions of employment apply to an employee, including a requirement to become a member of the retirement fund in which the employer participates. The employment contract is thus the main source of compulsory fund membership.

2. The law

Regulation 30(2)(f) of the Pension Funds Act requires all fund rules to set out the eligibility conditions for joining the fund and the circumstances under which membership shall cease, with specific reference to, inter alia, the class or classes of persons who are, or may in due course become, eligible to join the fund.

Paragraph (c)(ii)(bb) of the first proviso to the definition of "pension fund" in section 1(1) of the Income Tax Act states that SARS will only approve a pension fund if the rules of the fund stipulate that membership of the fund throughout the period of employment shall be a condition of employment for all persons of the class or classes specified in the rules who enter employment on or after the date from which the employer becomes a participant in the fund. This means that if a person starts employment with an employer who is already participating in SURF and they meet the eligibility criteria set out in the Special Rules applying to that employer, they must become a member of SURF from the start date of their employment contract.

Paragraph (c)(ii)(cc) of the same proviso allows a person employed by an employer immediately before that employer started participating in

the fund and who meets the eligibility criteria to choose if and when they want to become a member of the fund, on such conditions as may be specified in the fund rules. Thus, if a person was an employee before their employer started participating in SURF, that employee can elect not to become a member of SURF at all or to become a member at a later date. If they opt for the latter, SURF may limit their eligibility for risk benefits if it transpires that they only joined SURF at the later date to qualify for risk benefits.

The definition of "provident fund" in section 1(1) of the Income Tax Act contains similar provisions to those described above.

Legislation thus requires that an employee who meets the eligibility criteria set out in SURF's rules:

- Must become a member of SURF if they start working for an employer already participating in SURF;
- Can choose if and when to become a member of SURF if they were with the employer before it started participating in SURF; and
- Must stay a member of SURF for as long as they are employed by the participating employer.

3. SURF rules

Rule 3.2 of SURF's General Rules provide that eligible employees who enter service after the participation date will join the fund as a condition of employment, provided that for the purpose of any risk benefits, eligible employees will be deemed to have become members immediately on entering the participating employer's service unless otherwise stipulated in the Special Rules. For the purposes of retirement benefits, eligible employees will become members on the first day of the month coincident with or next following the date of entering the participating employer's service, or such later date as specified in the Special Rules.

"Eligible employee" is defined as an employee envisaged in Rule 3.2 regarded as eligible by a participating employer as specified in the special rules.

Each participating employer in SURF has its own set of Special Rules, in which the eligibility criteria are set out under the definition of "eligible employee". The Special Rules either generally define an eligible employee as an employee in the full-time permanent service of the employer, who at date of employment has not attained retirement age, or refer to a specific category of employee, for example employees in terms of a fixed-term contract, or wage- or

commission-earning employees under the normal retirement age. All employees under the normal retirement age (normally 65) who are employed by the employer after the date on which the employer starts participating in SURF and who fall within the definition of eligible employee are then compelled to become members of SURF.

The SURF General Rules and the participating employer's Special Rules are in line with the legislative provisions referred to above.

Employer's responsibilities

A participating employer has three main responsibilities with regards to membership.

1. Conditions of employment

A participating employer is obliged to ensure that compulsory membership of SURF is a condition of service for all new employees meeting the eligibility criteria.

2. Membership of the fund

The participating employer must ensure that all persons employed after the commencement of the employer's participation in SURF who meet the eligibility criteria are added as SURF members on the date their employment begins. This responsibility is twofold: they must ensure that the employee is registered with SURF and align the employee's employment start date with the commencement of their SURF membership.

The principle that it is the employer's obligation to register a member with a fund and not that of the fund was confirmed as far back as 2002 in the High Court case of Orion Money Purchase Pension Fund (SA) v Pension Funds Adjudicator and Others (1991/2001) [2002] ZAWCHC 38 and again in 2020 in the determination of the Pension Fund Adjudicator ("the PFA") in Kganye v Private Security Sector Provident Fund and another [2020] 3 BPLR 750 (PFA). Retirement funds cannot register eligible employees as members, chiefly because they do not know when such employees start employment with a participating employer.

3. Ensure continued membership

The participating employer must ensure that their employees' continued membership throughout employment is enforced, as required by the Income Tax Act. The employer must take steps to prevent fake or notional withdrawals from service by employees wishing to access their retirement fund benefits.

In a recent case before the PFA, the payment of a withdrawal benefit following a member's one-month break in service led to a reduced benefit being payable on the employee's retirement twenty years later. Confronted with the benefit paid to her upon her earlier withdrawal, the member claimed she should not have been paid a withdrawal benefit, as she had still been employed by the same employer. The PFA did not comment on the legality of the payment of the withdrawal benefit and the break in service which, on the evidence of the member, was clearly not a true resignation but instead an attempt to access her benefit prematurely (this part of the member's claim being time-barred) – if she had wanted to dispute this benefit payment, the member should have lodged a claim within three years of its payment.

The PFA found that the retirement benefit payable based on her contributions from the date of rejoining the fund after her break in service had been correctly calculated. The penalty paid by the member for the unlawful break in membership was the lost growth on the withdrawal benefit paid to her two decades previously.

Converting a member's permanent employment contract to a fixed-term contract in which the eligibility criteria specifically refer to permanent employment (which by implication excludes contract workers) may be regarded as a deliberate attempt to help the member prematurely access their withdrawal benefits.

A member may only claim a withdrawal benefit from the fund if their employment contract has been terminated – i.e. they have left employment.

Non-compliance with these requirements may result not only in SURF's retirement fund tax approval being revoked but also in a claim against the employer. This may include a claim by the dependant of a member who had met the eligibility criteria but was not admitted as a member of SURF or whose membership of the fund was terminated without a corresponding termination of employment.

In the Orion Money Purchase Pension Fund case, the court held that the employees not added by the employer as members of the fund were entitled to claim the loss of their benefits from the employer. The court ordered the employer to pay the benefits the employees would have received from the fund had they been members of the fund.

In the Kganye case, the employer registered the member a year after they had started working, making them ineligible for a disability benefit payable to members with more than one year's pensionable service. This failure resulted in the employer being ordered to pay the arrear contributions plus late payment interest, as well as the amount that would have been payable to the member had the employer timeously registered them as a member and paid all contributions to the fund, plus the disability benefit of R124 921.56.

This illustrates that the consequences of an employer failing to meet its obligations as set out above can be severe.

Take note

1. Employers

Register all eligible employees on SURF immediately they start working with you and ensure they remain members for as long as they are in your employment.

2. Members

Ask for confirmation from your employer's HR/salary department that you have been added as a member of SURF. Also check your payslip and benefit statements to see if contributions have been deducted and paid to SURF.