

Law Navigator

Payment of Contributions



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Welcome to the first edition of Legal Navigator, a publication focused on issues relevant to participating employers and members in SURF as well as the financial advisors assisting them.

The focus of this month's issue is on employers' responsibility to pay over members' monthly contributions to retirement funds.

Where is the responsibility codified?

Section 13A of the Pension Funds Act (the Act) requires that an employer pay both the member and employer contributions as set out in a retirement fund's rules to the fund within seven days of the end of the month for which it is due. This means that the contributions due for a specific month must be paid no later than the seventh day of the following month. The employer must submit the contribution schedules to the fund within that same period to enable the fund to allocate the contributions to the correct members.

Who must ensure that contributions are paid in full and in time?

In terms of section 13A(9) of the Act, an employer participating in a pension or provident fund must communicate to the fund who will be responsible for the payment of contributions and the submission of the contribution statements. The employer cannot nominate anyone of its choosing for this purpose; it must be the persons regularly involved in the management of the employer's overall financial affairs. If the employer fails to communicate who these persons are, all the directors, members of the close corporation or the governing body of the employer will be held personally liable.

What must the fund do if contributions are not paid in full or in time or contribution statements are not submitted in time?

Every pension and provident fund must appoint a monitoring person, who may be the principal officer of the fund. The person responsible for checking whether contributions have been received must advise the monitoring person of their findings. The monitoring person must then report any non-compliance with section 13A to the board of the fund, who in turn must ensure that non-compliance is communicated to the affected members and is reported to the Financial Sector Conduct Authority (FSCA). This may result in strain on employee-employer

relations. Where any material contravention of section 13A or failure to submit contributions or contribution statements continues for 90 days, it must also be reported to the South African Police Service.

What are the implications of section 13A non-compliance for employers and members?

Failure to pay the full contributions and submit contribution statements in time has numerous implications for an employer and the person responsible for ensuring that this obligation is met.

1. Late payment interest payable by the employer

If the full contributions are not paid in time, the employer must pay interest on the outstanding amount. The prescribed rate as set out in FSCA Conduct Standard 1 of 2022 (RF) is the prime rate plus 2%. The prime rate was reduced to 11% on 31 January 2025, so the current late payment interest rate is 13%.

Once paid, the interest will be added to the affected members' retirement savings accounts. As long as the investment returns earned on the members' retirement savings in the fund are lower than the interest payable, the members should not be negatively affected by the employer's late payment of contributions.

2. Naming and shaming of the employer

Section 251(2)(a) of the Financial Sector Regulation Act allows the FSCA to publish the names of employers who do not fulfil their contribution payment obligations. To date, the FSCA has published three lists of defaulters. In the press release accompanying the last list, published on 20 November 2024, the FSCA advised that 7 770 defaulting employers had been reported to them as at 31 December 2023. Based on the size of the outstanding contributions and the duration of non-compliance, the FSCA published a reduced list of 2 336 employers' names in FSCA Communication 41 of 2024 (RF).

3. Civil liability: Fine payable by the employer

Non-payment of contributions is an offence that can lead to a fine of up to R10m.

4. Criminal liability: Imprisonment of accountable person(s)

In addition to or instead of the fine above, the persons responsible for ensuring that contributions are paid in time can be sent to prison for up to 10 years if the employer is in breach of the contribution conditions. Non-compliance with section 13A affects the employer but also has severe consequences for members.

5. Impact on savings withdrawal benefits

Savings withdrawal benefits are intended to be used for emergencies, and late or unpaid contributions affect when and how much a member can take as a savings withdrawal benefit. For example, if a member takes their whole savings component in February as a savings withdrawal benefit and wants to take another savings withdrawal benefit in June, the available balance will be less than the member expected if the employer has not paid contributions to the fund since April. Depending on the circumstances that made it necessary for the member to make another withdrawal, this could have severely adverse consequences for the member.

6. Impact on retirement benefits

If a member retires and outstanding contributions have not yet been recovered, the payment of their retirement benefit will be delayed. Most members of pension and provident funds do not have additional savings to rely on; their fund benefit is their only source of income after retirement. Any delay to the payment of their retirement benefit is thus irresponsible and likely to be extremely stressful for the retiree.

7. Impact on risk benefits

The risk benefits provided by SURF are reinsured with an insurer. The payment of these benefits is conditional on the timely payment of the insurance premiums, which form part of the contributions payable to SURF. If the contributions are not paid to SURF in time, the insurance premiums will not be paid and the cover will lapse. Once the cover has lapsed, it cannot be reinstated. If a member or their beneficiaries cannot claim a risk benefit from the fund because no premiums were paid, the employer may be liable for the payment of that benefit from its own pocket.

Case law relating to persons at an employer being held personally liable for non-payment of contributions

Two High Court judgements delivered on subsequent days in January 2025 confirmed the personal liability of the persons responsible for the financial management of the employer.

16 January 2025: *Engineering Industries Pension Fund and Another v Installair (Pty) Ltd and Others (1633/2023) [2025] ZAWCHC 8*

The two directors of a company in liquidation unilaterally adjusted their employees' salaries and used the contributions intended for the Engineering Industries Pension Fund and the Metal Industries Provident Fund (the applicant funds) to subsidise salaries when the company was in financial distress. They also failed to submit contribution schedules to the applicant funds for the period from May 2020 to July 2020. Acting Judge Rehana Parker confirmed the employer's obligation to deduct and pay over contributions and to submit contribution schedules.

The directors maintained that if a director's inability to comply with their obligations under section 13A was due to circumstances beyond their control and not due to recklessness or negligence, the circumstances leading to the non-compliance and the extent to which they were responsible for those circumstances should be taken into account to determine whether they should be held personally liable for non-compliance. The judge rejected this argument, pointing out that section 13A(8)(a) allows a member to hold an employer's directors personally liable for the employer's debts.

Judge AJ Parker ordered the directors to submit the contribution schedules for the period from May 2020 to July 2020 to the applicant funds and to pay the contributions based on these schedules, as well as the arrear contributions of R93 715.53 reflected on contribution schedules already submitted to the applicant funds, together with late payment interest thereon. The directors were also ordered to pay the funds' legal costs on an attorney and own client scale (a punitive cost

order for the legal fees paid by the funds at the attorney's own rate rather than the capped court tariffs).

17 January 2025: *Municipal Workers' Retirement Fund v Mafube Local Municipality and Others (1653/2024) [2025] ZAFSHC 7 (17 January 2025)*

The fund claimed payment of arrear contributions in the amount of R10 210 053.38 plus late payment interest of R4 513 586.14 from the municipality. The amount payable and the fact that the contributions had been deducted from members' salaries were not in dispute. The municipality's non-payment of contributions had already formed the subject of eight previous court cases, all of which were lost by the municipality, with costs orders (mostly on an attorney and client scale). Judge Mareena Opperman condemned the actions of the municipality and its officers, saying: "The disdain with which the respondents regard the litigation and courts is astounding" [par 61].

The fund eventually joined the Municipal Manager, the Chief Financial Officer, the Executive Mayor and the Administrator of the municipality (appointed as the lead provincial Exco representative of the municipality) as the second to fifth respondents. Despite different officers occupying the same office over different periods and some officers only having served in an acting capacity, the judge found that they all qualified as accountable persons as contemplated in section 13(8), having been part of the municipality's governing body and being regularly involved in the management of the employer's overall financial affairs.

The Municipal Manager claimed that non-payment was necessary due to the municipality's financial constraints and that the fund officers could not be held personally liable. The judge pointed out that fault was not required for personal liability to apply.

A claim of some sort of settlement was also unsuccessful. The judge referred to the "non-negotiable mandatory prescriptions" of the Pension Funds Adjudicator and the provisions of the Fund's rules, which would have made it "reckless and illegal for the Fund to accept the compromise" [par 34(c)].

Judge Opperman ordered the fund officers in their personal capacity to pay the arrear contributions plus late payment interest thereon, as well as the costs of the application on an attorney and client scale, including the costs of two counsel.

Recognising that the Pension Funds Act imposes both civil and criminal sanctions in instances of non-payment of contributions, the judge directed the Registrar of the Free State High Court to forward the judgement to the Director of Public Prosecutions: Free State, Bloemfontein, signalling potential criminal proceedings against the fund officers.

Take note

Employers: Pay contributions and submit contribution statements in time.

Members: Check your benefit statements regularly to ensure that the contributions deducted from your salary match the contributions paid to SURF. If they do not, immediately take the issue up with the person responsible for the management of your employer's financial affairs. If you receive a notification from the fund that your contributions have not been paid or that a contribution statement has not been submitted in time, take it up with the management of your employer.