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LEGAL UPDATE FAW 14/2009: COMPULSORY MEMBERSHIP

Momentum receives numerous requests to allow an existing member of the FundsAtWork Umbrella Pension or Provident Fund to withdraw from the fund while still employed. These applications for termination of membership cannot be allowed, as they contradict Income Tax legislation.

Paragraph (c)(ii)(bb) of the definition of 'pension fund' in section 1 of the Income Tax Act, provides that SARS will only approve a pension fund if it is satisfied that the rules of the fund provide that membership of the fund throughout the period of employment will be a condition of the employment by the employer of all people of the class or classes specified, who enter their employment on or after the date from which the fund comes into operation.

The General Rules of the FundsAtWork Umbrella Pension and Provident Funds provide that *an ELIGIBLE EMPLOYEE who enters EMPLOYMENT on or after the PARTICIPATION DATE must become a MEMBER*. It also states that *a MEMBER may not withdraw from the FUND while he remains in EMPLOYMENT*. This is in line with the Income Tax Act provision referred to above.

ELIGIBLE EMPLOYEE is defined as *an employee of a PARTICIPATING EMPLOYER who satisfies the membership qualifications as specified in the SPECIAL RULES*. The Special Rules generally specify the membership qualifications as follows: *All full-time employees in EMPLOYMENT under NORMAL RETIREMENT AGE*. This means that all full-time employees under the normal retirement age (normally 65) who are employed by the employer after the date on which the employer starts participating in the Fund have to become members of the Fund.

As can be seen from the above, membership of a pension fund that has been approved by SARS is compulsory for all qualifying employees entering into employment with the employer after the commencement date of the fund. The employer is obliged to ensure that membership of the fund is a condition of service for all new employees meeting the eligibility criteria, and has to make certain that continued membership throughout the member's employment is enforced. Fake or notional withdrawals from service in an effort to access pension benefits should not be allowed. A member will only become entitled to the benefit payable by the fund if there is a genuine termination of the employment contract. Non-compliance with these requirements may not only result in the tax approval of the scheme being revoked, but may also lead to a claim against the employer. This includes a claim by a dependant of a member who met the membership qualifications but was not admitted as a member of the fund or whose membership of the fund was terminated without the corresponding termination of employment.

Hettie Joubert
Legal Adviser
Momentum BenefitsAtWork

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