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LEGAL UPDATE 2/2010
SECTION 13A OF THE PENSION FUNDS ACT: PAYMENT OF CONTRIBUTIONS AND CERTAIN BENEFITS TO PENSION FUNDS

1. Introduction

On a regular basis we read in the media of people who are responsible for the payment of contributions and premiums on behalf of members of retirement funds failing to do so. This is of great concern and the government, the Financial Services Board (FSB) and the Office of the Pension Funds Adjudicator (OPFA) have run out of patience with employers who deduct retirement fund contributions from their employees' pay packages and fail to pay the money over to the funds or to the administrators.

Momentum is an underwriter and administrator of retirement funds and policies providing group life and disability cover. We are governed by the provisions of the Pension Funds Act, 24 of 1956 ("the Act") in respect of the payment of contributions into retirement funds. We are obliged by law to ensure that we do receive contributions which are deducted from members' salaries, and to report defaulting employers and funds to the authorities as provided in the Act. In a very simplistic way, we would like to highlight the implications of non-compliance with Section 13A and Regulation 33 of the Act. Late payment or non-payment of retirement fund contributions is punishable by law, and must be avoided at all costs. The Registrar of Pension Funds, by means of the Financial Services Laws General Amendment Act, 2008 which came into effect on 1 November 2008, is now also empowered in terms of the Financial Services Board Act to report non-payment of contributions to an Enforcement Committee to take action against any person who fails to pay.

2. Application of Section 13A of the Act (Payment of contributions and certain benefits to pension funds)

According to section 13A, an employer of any member of a fund must make its monthly contribution payments no later than the 7th day of each month after the end of the month for which such a contribution is payable. In addition, the employer must submit accompanying data either with the payment or by the 15th day of each month, in respect of the deductions made for the prior month.

The implications of not receiving the contributions and banking them before the expiry of the period as prescribed above, is that interest will be payable on the outstanding contributions from the first day following the expiry of the period in respect of which the contributions had to be paid (section 13A(7)).

3. Application of Regulation 33 (Requirements in terms of section 13A of the Act)

Regulation 33 sets out the manner and form in which the provisions of section 13A must be carried out.

Momentum, as the insurer, must notify the monitoring person who has been appointed to comply with the provisions of section 13A of the extent to which there is non-compliance with the provisions of section 13A. The monitoring person has a duty to bring the infringement to the attention of the members of the fund in respect of whom the contributions are payable.

The Regulations place a monitoring duty on the principal officer of the fund or another party authorized by the board of trustees whose duty it is to ensure that non-payment of contributions is reported to the board of trustees. Momentum is the administrator of the FundsAtWork Umbrella Pension Fund and the FundsAtWork Umbrella Provident Fund. The funds have appointed their own monitoring person to monitor the payment of contributions. Momentum has also appointed an authorised person to account for contributions received by the funds and to notify the funds' authorised person of non-payment. A similar process is followed in respect of all the other funds where Momentum is the administrator - Momentum notifies the fund's monitoring person when non-payment takes place.

Regulation 33(5) requires that where failure to pay contributions by the deadline has continued for 90 consecutive days, the monitoring person is required to report the matter to the National Prosecuting Authority within a further 14 days after the end of the 90 day period. The FSB must also be advised accordingly.

4. Consequences of non-payment of retirement fund contributions

Non-compliance with section 13A has the following consequences for the offending party.

- 4.1. The Registrar of Pension Funds may report the non-payment to the Enforcement Committee set up by the FSB.
- 4.2. A criminal record will be opened when the section 13A contravention is reported to the National Prosecuting Authority.
- 4.3. The State Prosecutor has the prerogative whether to pursue the employer or not. Momentum therefore will not be in a position to withdraw a case once the prosecutor has started with the prosecution.
- 4.4. Besides the late payment interest and administrative penalties indicated below, an offender may face imprisonment.
- 4.5. Interest is payable on late payments of contributions as well as unpaid contributions if payment is not received by the fund within 7 days after the end of the month for which the contribution was payable in terms of section 13A(3)(a). The amount of the late payment and unpaid amount is determined per participating employer. Interest is payable at the prescribed annual rate, compounded daily and payable to the fund.

- 4.6. In terms of section 37 of the Act, the FSB may impose an administrative penalty on the fund, administrator or third party, to an amount not exceeding R1 000 or such other amount prescribed by the FSB for every day which the failure continues.
- 4.7. The High Court and the Pension Funds Adjudicator have held in numerous cases that where the employer fails to pay the contributions and the fund is then unable to invest the money in the financial markets, the member is entitled to the benefit they would have received had the contributions been made timeously and invested in the markets, plus interest on that amount. Put differently, the employer may also be held liable for any investment loss suffered by the member.

5. Momentum requirements to ensure compliance with the payment of contributions

The last thing Momentum wants to do is to report employers to the regulators. We would like to encourage all participating employers and trustees to work closely with Momentum to ensure compliance with section 13A of the Act. Where an intermediary has subscribed to this via the MDS inform service, Momentum will, in addition to informing the fund's monitoring person of an employer's failure to pay contributions, also notify the intermediary via an inform message to attend to the matter in liaison with the client. We want to avoid reporting employers at all costs but we are very dependent on our intermediary support to ensure that such situations are avoided. In order to smooth the process we want the intermediaries to encourage employers to submit their **data to Momentum by the 10th of each month**, and ensure that **contributions are paid to Momentum by the 5th day of the month**. This will enable Momentum to reconcile the contributions with the data submitted and to deposit the contributions within the prescribed period in compliance with the Act. Currently there have been several cases of non-payment with the result that Momentum had no other choice but to report such failure to the regulators. If the late payments become consistent, Momentum has a reporting duty as explained above and we must report incidences of non-payment in accordance with the requirements of the Act.

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