

A decorative graphic in the top left corner consisting of several overlapping, stylized chevron shapes pointing to the right. The colors range from light grey to a vibrant red.

## Legal update

No. 18 of 2014 • November 2014

### Sectoral determinations and how they may influence retirement fund membership – focus on the private security sector

This Legal Update clarifies the position with regards to employers whose operational activities fall within the ambit of a sectoral determination.

#### What is a sectoral determination?

Section 55 of the Basic Conditions of Employment Act entitles the Minister of Labour to make a sectoral determination that governs the basic employment conditions of employees employed in a specific sector. Sectoral determinations are legally binding on employers and employees operating within these sectors. There are various industries where sectoral determinations exist and which govern business entities operating within those sectors, for example hospitality, mining, security, cleaning and other industry sectors. The sectoral determination typically regulates the employer's basic conditions of employment, including, but not limited to, the payment of employees' remuneration, hours of work, leave, and employee benefits such as membership and contributions to retirement funds. A sectoral determination may require membership of an industry specific retirement fund. This means that an employer will not be allowed to associate itself and contribute to a retirement fund of its choice, unless they have been granted exemption as outlined in the sectoral determination.

The sectoral determination establishes the minimum employee benefits that an employer must provide to employees. The employer can however, in addition to contributing to the bargaining council fund, provide additional benefits, over and above those set out in the sectoral determination, to his employees; there is nothing prohibiting him from doing so. The provision of top-up benefits will be completely separate from and unrelated to any collective agreement or sectoral determination. These benefits will be provided outside the bargaining council structures. The employer must be guided by the terms and conditions of the collective agreement and must be careful not to duplicate benefits already provided for.

When Momentum is requested to provide quotations on any business, it would be important to consider whether a sectoral determination applies to the employer.

#### How do we establish if an employer falls within the ambit of a sectoral determination?

Typically employers operating within a particular sector should be aware of the sectoral determination that governs the employment conditions. All sectoral determinations are published in the Government Gazette and on the Department of Labour's website.

The sectoral determination will stipulate whether or not membership of an industry retirement fund is compulsory. In this note we will focus on the sectoral determination for the private security sector. Please keep in mind, however, that there are sectoral determinations that relate to the other sectors too, with each sectoral determination laying down the requirements applicable to that sector.

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## **The Sectoral Determination for the Private Security Sector and the Private Security Sector Provident Fund (the PSSPF).**

Employers of the private security sector must comply with Sectoral Determination 6 of 2001 published on 30 March 2001. This requires, amongst other things, membership of the PSSPF. This fund started on 1 November 2002.

The rules of the PSSP define an Employer as follows:

*“... any person (excluding an Employer who has been granted an exemption to participate in the Fund by the Trustees in terms of Rule 3.3) who employs or provides work to any person in the Private Security Sector and remunerates him or who permits any person in any manner to assist him in the carrying on or conducting of his business; ...”*

Therefore in terms of the rules of the PSSPF, if a private security employer meets the above criteria, they are eligible and, in fact, required to become a participating employer of the PSSPF. This includes an employer -

- who employs or is providing work to any person in the private security sector and remunerates such person; or
- who allows any person in the private security sector to assist him in any manner in carrying on or conducting of his business; and
- that has not been granted an exemption from the PSSPF under Rule 3.3.

PSSPF's Rule 3 and Sectoral Determination 6 of 2001 allows for the following two instances where an employer, who employs an employee for whom minimum wages are prescribed, may apply to be exempted from membership of the PSSPF:

1. where the employer *already* had an existing pension or provident fund in place for his employees prior to the publication of the determination on 30 March 2001; and
2. where the employer did not have an existing pension or provident fund in place on 30 March 2001, but had before that date consulted, in writing, with his employees to commence negotiations towards establishing a pension or provident fund.

Essentially this means that all employers that were not participating in any existing pension or provident fund prior to the publication of the determination on 30 March 2001, or shortly thereafter, and those employers that came into existence after the publication, are obliged to join and contribute to the PSSPF. Should such employer not have joined the PSSPF, that employer is non-compliant with the sectoral determination unless it obtained exemption from the PSSPF.

The PSSPF's board of management will consider all properly motivated applications for exemption from the PSSPF, as outlined in the determination, subject to conditions as laid down by the PSSPF's board. If there is a dispute, it will be referred to the Department of Labour.

*Security sector employers participating in the FundsAtWork Umbrella Funds that have not been granted exemption by the PSSPF, may be required to transfer to the PSSPF as referred to in section 14 of the Pension Funds Act.*

Financial planners and intermediaries will therefore need to be mindful of applicable sectoral determinations when considering joining FundsAtWork.

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