



Legal update 2 of 2022: Section 197 transfers

This legal update will replace Legal update 8 of 2010

Section 197 of the Labour Relations Act

1. In terms of section 197 of the Labour Relations Act (LRA), if the transfer of the whole or part of any business of an employer as a “going concern” takes place, the new employer is automatically substituted in the place of the old employer. Unless otherwise agreed between the new employer and the transferred employees, all the rights and obligations between the old employer and its employees at the time of the transfer will continue to be in force as if they had been rights and obligations between the new employer and its employees, and the transfer does not interrupt an employee’s continuity of employment.
2. Section 197 also specifically provides that, as long as the requirements of section 14 of the Pension Funds Act are met, the transferred employees can become members of a retirement fund which might differ in nature to the type of retirement fund to which they belonged prior to the transfer. This means that as long as the transferred members’ rights and reasonable benefit expectations are met, it will be deemed that the new employer had complied with section 197 requirements even if, for example, the transferred employees used to belong to a self-standing fund at the old employer and have now become members of an umbrella fund with the new employer.
3. In *ME Galeboe v Alexander Forbes Core Plan (Provident Fund)* and others, the Pension Funds Adjudicator said that with section 197, the legislature envisages a mechanism in terms of which provision can be made for affected employees to transfer their accumulated pension benefits into a scheme in which

the transferee employer participates, or an alternative pension vehicle. The legislature was aware of the varied circumstances that could arise in relation to pension funding, transfers, and participation as a result of a section 197 transfer and it is therefore left to the parties to regulate this incidence of the transfer. The parties are of course the two employers, the transferor and transferee funds, and the affected employees, and the rules of the funds and the sale agreement between the two employers will regulate the transfer.

Excluding the entitlement of section 197-transferring members to cash benefits

1. To ensure that members are forced to preserve their pension benefit in a section 197-transfer scenario and thus not be allowed to take it in cash, the rules of the FAW Umbrella Funds exclude the entitlement of a transferring member to a cash benefit in a section 197-transfer scenario (other than in scenario 3 hereunder) by forcing them to transfer their retirement benefits to the new employer’s fund. This is in line with Government’s retirement reform proposals to discourage members from taking their pension benefits in cash rather than preserving it for their retirement.
2. The rules accordingly provide that if a participating employer’s business or part of its business is transferred to another employer under section 197 of the LRA **and** the sale agreement between the participating employer and the new employer provides for it, one of the following three scenarios will come into play:

Scenario 1: Continued membership of the FAW Umbrella Fund - On receipt by the FAW Umbrella Fund of a notice that the new employer will start participating in the FAW Umbrella Fund and that the members will be transferred to the new participating employer, the members will not become entitled to their withdrawal benefits but instead will be **forced to transfer from the old participating employer's scheme to the new participating employer's scheme.**

Scenario 2: Transfer to new employer's fund - On receipt by the FAW Umbrella Fund of a notice that the members must be transferred to another fund in which the new employer participates, the members will not become entitled to their withdrawal benefits but instead will be **transferred to the new employer's fund by means of section 14-transfer.**

Subject to the prior agreement of the new employer, the members will however be entitled to elect not to transfer their benefits to the new employer's fund

but to rather become paid-up members of the FAW Umbrella Fund. Important to note that members who chose to become paid-up members under this section 197-scenario, may only request payment of paid-up benefit before retirement if their employment with the new employer is terminated for whatever reason.

Scenario 3: No retirement funding provision - The new employer may choose to not participate in the FAW Umbrella Fund or in any other fund to which the affected members can transfer, in which event the affected members will automatically become paid-up members of the FAW Umbrella Fund. On receipt of the members' withdrawal notifications, such members' benefits **may then be paid in cash** or be **transferred to a preservation fund.**

It is therefore only under this scenario 3 that a member may become entitled to receive his retirement benefit in cash in a section 197-scenario.