



Financial Sector
Conduct Authority



Legislative Framework: Arrear Contributions

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FSCA Retirement Funds S13A Webinar 2022: Municipal Funds

08 September 2022



Section 13A of the Pension Funds Act

- Section 13A of the Pension Funds Act imposes a statutory obligation on participating Employers to pay contributions to funds in accordance with its rules.
- Payment must be timely; not later than 7 days after the end of the month into the fund's bank account (section 13A(3)(a)).
- The minimum information to accompany the payment of contributions is as prescribed; not later than 15 days after the end of the month (section 13A(2)(a)).

(See also van der Riet Family Trust t/a Cathedral Peak Hotel v Hospitality Industry Pension and Provident Fund [2009] 1 BPLR 7 (SCA))

Section 13A cont.

- Employers owe employees/members a duty of good faith to pay full contributions to funds.
- It is not a split responsibility, which rests with members as well.
- Imposes statutory duty to deduct full contributions from employees' salaries and pay it over to the fund.

(See PC van Niekerk Plant Hire CC t/a PC's Transport v AF Nhleko, the Transport Sector Retirement Fund and the Pension Funds Adjudicator (Financial Services Tribunal))

Section 13A cont.

- The Act does not impose an obligation on a Fund to notify an Employer of any underpayment of contributions.
- The obligation and duty to ensure that the Employer makes correct contribution payments and submits the correct contribution schedules is that of the Employer.

(See Municipal Workers Retirement Fund v Ndlambe Local Municipality [2018] ZAECGH 139)

Section 13A cont.

- The Principal Officer or authorised person* must monitor and ensure compliance with section 13A and have a duty to report non-compliances to interested parties as prescribed (section 13A(6)(a)).
 - PO/Monitoring person must ensure that the Board is notified.
 - Board must ensure that monitoring person brings breach to the attention of members.
 - Board must ensure that the FSCA is informed of non-compliance and action/proposed action taken.

See Conduct Standard 1 of 2022 (issued on 19 August 2022)

*Authorised by board and FSCA advised of authorised person

Boards' further duties: payment of arrear contributions

- Section 7C provides, *inter alia*, that the Board must:
 - Take all reasonable steps to ensure that members' interests are protected at all times; &
 - Act with due care, diligence and in good faith.
- Section 7D(d) provides that the Board must take all reasonable steps to ensure that contributions are paid timeously to the fund in accordance with this Act.

Consequences of non-compliance

- Late payment interest (section 13A(7))
 - Payable in respect of unpaid contributions;
 - Interest at the prescribed rate* becomes payable by the employer, which runs from the first day after the payment was due until the date of payment to the fund;
 - Compound interest;
 - Late Payment Interest constitutes investment income for the fund.

*See Conduct Standard 1 of 2022

Consequences of non-compliance cont.

- Personal liability for late or non-payment of contributions (section 13A(8))
 - If the Employer is a company, every director regularly involved in management of company;
 - If the Employer is a CC, every member who controls or is regularly involved in the management of the CC's financial affairs;
 - Any other Employer, any person on whose instructions the governing body acts or who controls/regularly involved in the management of the employer's financial affairs.

Consequences of non-compliance cont.

- Personal liability for late or non-payment of contributions (section 13A(9))
 - Ito section 13A(9)(a) a fund must request the employer to notify it of the identity of persons personally liable ito section 13A(8)
 - Information Circular 1/2016 (current sample letter)
 - Determination to Conduct Standard 1 of 2022 (still to be published sample letter)
 - In the event of non-compliance with the request ito section 13A(9)(a) then section 13A(9)(b) applies, which provides that:
 - ✓ All directors in respect of a company;
 - ✓ All members regularly involved in managing the affairs of the CC; or
 - ✓ All persons comprising the governing body of the employershall be liable for non-compliance

Steps to be taken by Board iro s13A non-compliance

- Breach of section 13A must be reported to the NPA and SAPS to take criminal action against the employer. (See Conduct Standard 1 of 2022 re time-frames)
Penalty: A fine of up to R10 million and/or imprisonment of up to 10 years may be imposed. (section 37).
- A member or fund can lodge a complaint with the OPFA (determinations have the force of court orders and may lead to attachment of the employer's assets)
- Litigation by fund for recovery of arrear contributions iro members – the fund has *locus standi* to bring application before court

(See *Joint Municipal Pension Fund v Ehlanzeni District Municipality* [2018] ZAGPPHC 594)

QUESTIONS ???

THANK YOU