



PUBLIC PUBLISHING BY THE FSCA OF THE NAMES OF EMPLOYERS AND FUNDS THAT HAVE ARREAR CONTRIBUTIONS – FSCA COMMUNICATION 17 OF 2022

EMPLOYERS AND FUNDS

The Financial Sector Conduct Authority (FSCA) has announced that it will 'name and shame' those employers and funds that have arrear contributions.

Communication 17 of 2022 (the Communication), dated 9 June 2022, provides that:

"The Financial Sector Conduct Authority ... intends to publish the names of those retirement funds and employers who are in arrears"; and

"Retirement funds and employers are hereby formally alerted to an imminent publication of the names of employers and funds with arrear contributions".

It is probable that names will be published, at least, on the FSCA's website.

WHY IS THE FSCA TAKING THIS ACTION?

The FSCA is concerned about outstanding contributions owed to retirement funds and the effect this has on members. It states that their preliminary statistics indicate that:

"... municipalities and private sector companies have approximately R1 billion and R6 billion arrear contributions, respectively".

WHEN ARE CONTRIBUTIONS IN ARREARS?

Payment period

The Pension Funds Act (the Act) requires that not later than seven days after the end of the month in which the contribution is due, that contribution must be paid to the fund¹.

Contributions that are not paid in terms of the rules of the fund within the required period, including those that are short paid, would be arrear contributions.

FSCA communication

The FSCA specifies in the Communication that arrear contributions arise when employers:

"(a) deduct retirement contributions from employees' salaries and do not transmit this money into the bank account of a retirement fund, or
(b) fail to transmit employer contributions, in terms of the retirement funds' (in which they participate) rules, into the fund's bank account".

¹ See section 13A(3)(a)(i) to (iii) of the Pension Funds Act 24 of 1956 for the specific requirements around payments and receipt

FUNDS WITH SUSPENDED OR TERMINATED CONTRIBUTIONS

In our view, if the registered rules of a fund provide that contributions are not payable, are suspended or ceased, then contributions are not payable by the employer to that fund and, thus, the employer cannot be in arrears if it does not pay contributions to the fund. For example, 'paid-up' funds or funds that have rules that provide that contributions are suspended for a period.

The Communication provides that: "Arrear contributions do not arise in instances where the fund and employer have registered and applied rules which enable the suspension of contribution payments for a period".

EMPLOYERS, DIRECTORS AND CRIMINAL OFFENCES

Employers that do not pay contributions as required by the Act are guilty of an offence². They are liable on conviction to a fine not exceeding R10 million or to imprisonment for a period not exceeding 10 years, or both.

The Act³ also provides for potential personal criminal liability for, amongst other things, non-payment or late payment of contributions for certain directors of companies (and other employer entities).

Penalty interest is payable on late contributions in terms of the Act⁴.

TIMING AND COMMUNICATION WITH THE FUND

The FSCA has not provided a specific date when it will begin to publish names.

It has stated that it is currently compiling the list and checking the accuracy of the value of arrear contributions.

Indications are that the FSCA may contact the Principal Officer of a fund to confirm that contributions are outstanding.

COMMUNICATION TO EMPLOYERS BY THE FUND AND ACTION

The FSCA has stated, in the Communication, that "Retirement funds must immediately share this communication with the employers".

CONSIDER WHAT ACTION YOU NEED TO TAKE

If a fund or an employer is in a position where arrear contributions are owing it should, without delay, consider the actions it wishes to take, for example:

- Immediate payment of outstanding contributions;
- Ensuring that processes with employers are robust and clear in relation to contributions;
- Communication with, or reporting to, the FSCA;
- Ensure any rules, or changes to rules, regarding contribution suspension (or other actions in relation to contributions) are dealt with timeously and registered;
- If your name is published, you can probably expect press coverage - understand how you are going to manage it as well as the reputational damage;
- Communication with members;
- A plan for management of a possible increase in Pension Funds Adjudicator cases; and
- Communication with shareholders (for companies).

ENQUIRIES TO THE FSCA

Enquiries about the Communication to the FSCA must be addressed to:

Ms. Corlia Buitendag, at her email address: cornelia.buitendag@fsc.co.za.

² See section 37(i) of the Pension Funds Act 24 of 1956

³ See section 13(a)(8) of the Pension Funds Act 24 of 1956

⁴ See section 3(a)(7) of the Pension Funds Act 24 of 1956