



## Legal Update 4 of 2022:

Participating employers must comply with the new section 13A requirements

Please read this Legal Update together with Legal Update 2 of 2020 - *Take heed of the consequences of not complying with section 13A.*


The FSCA issued a new Conduct Standard on the 'Requirements relating to the payment of pension fund contributions' which places various duties, obligations and liabilities on employers. It also introduces a new rate of penalty interest that is payable by an employer for any unpaid or underpaid contributions, namely prime rate plus 2 percent.

The Conduct Standard will become effective on 19 February 2023 and will replace Regulation 33 of the Pension Funds Act (the Act). Compared to Regulation 33, the new Conduct Standard requires a different level of detailed information that must be provided by employers for all of their eligible employees, and it could be that the type of information is not necessarily held by employers on their current payroll/HR systems.

The purpose of this Legal Update is to advise all the participating employers of the new requirements to make sure that, where necessary, their payroll/HR systems are enhanced to be able to comply with the new requirements by **19 February 2023**.

### New minimum information requirements

1. For the Funds to be able to effectively communicate, report and account to all their members and to provide services to them such as the payment of benefits, one of the obligations that participating employers must adhere to is ensuring that certain minimum information for their employees is provided to the Funds' administrator, Momentum Corporate, in the monthly contribution reconciliation extracts and within the periods prescribed in the Act.
2. If an employer fails to provide a fully completed monthly contribution reconciliation extract that matches the contribution payment for that month, Momentum Retirement Administrators cannot process the payment and there will be a delay in investing the members' contributions. Momentum Retirement Administrators cannot process only a part of the monthly contribution reconciliation extract because it cannot be expected to presume whose details are correct and whose are incorrect. The delay in processing the monthly contributions will also delay the processing of any exit benefits.
3. In terms of the **current provisions in the Act**, a participating employer must provide the following minimum information in their monthly contribution reconciliation extracts:
  - The name of the fund in which they participate, as documented on the employer portal.
  - The period for which the contribution is payable.
  - The name and address of the employer.
  - Where an employer has multiple pay-points, the pay-point which made the contribution deduction from the employees' salaries.
  - The contact person at the employer or pay-point dealing with enquiries on contribution statements and payment of contributions.
  - For each eligible employee who is a member of the Funds, the following minimum information:
    - full name;
    - date when they became a member of the Funds;
    - date of birth;
    - SA identity number or employer pay number or other means of identification;
    - annual fund salary;
    - percentage or the amount of contributions paid for the member to the Funds;
    - the split between the member and employer contribution; and
    - the details of any additional voluntary contributions paid on behalf of the member.
  - An indication of any changes compared to the contribution reconciliation extract for the previous period showing any differences in the data, including additions because of new members, reductions because of membership terminations, adjustments because of changes in member fund salaries, the payment of additional voluntary contributions, corrections because of errors or any other information that may be relevant.



4. All participating employers in the Funds will **in addition to** all of the minimum information shown above, also have to provide this minimum information in their monthly contribution reconciliation extracts **from 19 February 2023:**

- The identity of the “responsible person” at the employer as envisaged in the Act that will be held personally liable if they don’t comply with section 13A.
- For each employee who is a member of the Funds, this additional and/or new minimum information:
  - Either the member’s SA identity number or their passport number **and** either the employer pay number or the industry number if a participating employer participates in a certain industry. This means that the employer must provide both the member’s SA identity number (or passport number) and the employer pay number (or industry number) and no longer, as per the current requirements, only the SA identity number or the employer pay number. No other means of identification will be allowed.
  - Income tax number.
  - Contact number, including cellphone number, **if available**, as well as email address, **if available**. This means that providing the member’s cellphone number and email address will not be mandatory if the employer is able to provide another contact number. But, for the Funds to be able to adhere to their duty to adequately and properly communicate with members, they need members’ cellphone numbers and email addresses, so employers are requested to also obtain this information and provide it as part of the monthly contribution statements.
  - Postal address.
  - Residential address.
  - **Both** the percentage **and** amount of contributions, meaning no longer as per current requirements, either the percentage or the amount of contributions.
  - Membership number.

5. Participating employers will from 19 February 2023 also no longer be allowed to choose to either submit a “complete” monthly contribution reconciliation extract containing all of the minimum information or to only submit a monthly contribution reconciliation extract reconciling any changes compared to the contribution extract for the previous period by showing any differences in the data. All participating employers will be required to submit complete contribution extracts each month containing all of the minimum information except for the information on the identity of the “responsible person” at the employer which they only need to provide if the identity of the person has changed from the previous contribution reconciliation extract.

The Funds will make sure that the necessary fields are created on the system-generated monthly contribution reconciliation extracts to provide for all the new minimum information requirements.

### **Declaration by the employer that the minimum information of all eligible employees is reflected in the contribution reconciliation extract**

1. The Income Tax Act provides that for a fund to retain its tax free status, membership of the fund throughout the period of employment must be a condition of employment of all people belonging to the class or classes specified in the rules of the fund. The eligibility criteria for membership of a fund is determined by the employer participating in the fund and must be laid down in the rules of the fund.
2. As long as the membership eligibility criteria are objectively determined and do not amount to unfair discrimination, an employer may choose any criteria. Once the eligibility criteria have been set, all employees who meet the eligibility criteria must join the Funds as one of their terms and conditions of employment.



3. Retirement funds rely on participating employers to make sure that all eligible employees are included on the monthly contribution statements as this sort of breach could potentially mean that a fund falls foul of the Income Tax Act and loses its status as a retirement fund. This would subsequently impact the tax benefits of all members. It is clear from numerous complaints to the Pension Funds Adjudicator, that employers do not register all their employees with funds despite deducting contributions from their salaries.
4. To address this issue, the new Conduct Standard states that in the future it will be the employer who is responsible for “gatekeeping” their employees’ membership of the Funds, as this is a fund governance aspect that only the employer can monitor and control. All participating employers will be required to provide a declaration together with each monthly contribution statement, in which they declare/confirm that all employees eligible to be members of the Funds are accurately reflected in the minimum information set out in the contribution statements.

## Sanctions for non-compliance with the new requirements

1. The requirement to submit the necessary information to the Funds is placed directly on the participating employer. The Funds must just ensure that reasonable steps are taken to try and obtain the information from the employer.
2. This means that if an employer fails to comply with all of the requirements under the new Conduct Standard, they will be deemed to be in contravention of both the new Conduct Standard and section 13A of the Act. In terms of the Financial Sector Regulation Act, the FSCA can then impose an administrative penalty for such contravention. In addition, the Act provides that non-compliance with section 13A is an offence, which means that the non-compliance can also attract criminal prosecution for the responsible person at the employer. The participating employer can therefore be held directly accountable if they fail to comply with the new Conduct Standard.

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