



## Retirement Matters

3/2023

### Section 13A Guide

Section 13A, read together with Conduct Standard 1 of 2022, contains the statutory requirements relating to the payment of contributions to retirement funds. The purpose of this guide is to provide the board of management (“board”) with an overview of the process should a contravention of section 13A occur.

| Party responsible | Action  | Due date   | Notes   |
|-------------------|---|--|---|
| Board             | <ul style="list-style-type: none"> <li>Request identities of persons who will be personally liable in the case of contravention from the employer</li> </ul>                      | <ul style="list-style-type: none"> <li>Annually</li> </ul>   | <ul style="list-style-type: none"> <li>Use Annexure A to the Conduct Standard as provided by the FSCA in RF Notice 14 of 2022 to request the identities of persons who will become liable</li> </ul>  |
| Employer          | <ul style="list-style-type: none"> <li>Pay contributions to fund’s bank account</li> <li>Send contribution statement to fund administrator, accompanied by declaration</li> </ul> | <ul style="list-style-type: none"> <li>7<sup>th</sup> of the following month</li> <li>15<sup>th</sup> of the following month</li> <li>If 7<sup>th</sup> or 15<sup>th</sup> is not a calendar day, the first business day thereafter</li> </ul> | <p><b>Contribution statement must include:</b></p> <ul style="list-style-type: none"> <li><b>Initial contribution statement</b><br/>Fund name; registration number; period in respect of which the contribution is payable; name and address of the employer; where an employer has multiple pay-points, the pay-point that made the deduction; the contact person responsible at the employer or pay-point dealing with enquiries relating to contribution statements and payment of contributions; the identity of the person(s) personally liable for compliance with section 13A</li> <li><b>In respect of each member</b><br/>Full name; date of membership; date of birth, South African identity number or passport number; employer pay or industry number; income tax number; contact number; including (where available) cellular phone number; e-mail address (where available); postal address; residential address; annual pensionable emoluments; percentage and amount of contributions, split between member and employer contribution; and details of any additional voluntary contributions paid</li> <li><b>Subsequent statements</b><br/>Any changes to the above information, such as changes in pensionable salary, as well as the membership number allocated to each member by the fund and any new members or terminations of membership</li> <li><b>Declaration</b><br/>Made by the employer that all employees eligible to be members of the fund are accurately reflected in the minimum information</li> </ul> |

| Party responsible                      | Action   | Due date   | Notes   |
|--|--|--|---|
| Administrator                          | <ul style="list-style-type: none"> <li>Reconcile contributions and statement</li> <li>Report in writing to the monitoring person if they cannot reconcile (other than where discrepancy is less than 2,5% of the total contribution payable for the relevant period), the contribution statement was not received, or any other transgression</li> </ul>   | <ul style="list-style-type: none"> <li>Within 15 days of contribution statement due date</li> </ul>  | <ul style="list-style-type: none"> <li>Reports must be in writing and copies must be kept by the administrator for audit and inspection purposes</li> </ul>   |
| Monitoring person or principal officer | <ul style="list-style-type: none"> <li>Report in writing to the board if non-compliance of payment of contributions or submission of the contribution statement occurred (unless the discrepancy is less than 2,5% of the total contribution payable for the period), or if previous non-compliance remains unresolved</li> </ul>  | <ul style="list-style-type: none"> <li>Within 7 days of receipt of the administrator's report</li> </ul>   | <ul style="list-style-type: none"> <li>Reports must be in writing and copies must be kept for audit and inspection purposes</li> <li>If PO does not act as monitoring person, fund must appoint a monitoring person by application to the FSCA</li> </ul>   |
| Board                                  | <ul style="list-style-type: none"> <li>Bring contravention of section 13A to the attention of affected members, or all members if affected members cannot be identified</li> </ul> <p>and</p> <ul style="list-style-type: none"> <li>Report course of action to remedy the situation to the FSCA in the prescribed format, as well as adding details of the proposed course of action on the FSCA online system</li> </ul> | <ul style="list-style-type: none"> <li>Within 30 days of monitoring person's report to board</li> </ul>  | <ul style="list-style-type: none"> <li>Annexure B of RF Notice 14 of 2022 must be used to report to the FSCA</li> <li>Log on FSCA online system under Arrear Contributions – section 13A</li> </ul>   |
| Board                                  | <ul style="list-style-type: none"> <li>If contravention continues for a period of 90 days, report in sufficient detail to the SAPS</li> </ul> <p>and</p> <ul style="list-style-type: none"> <li>Bring to the attention of affected members, or all members if affected members cannot be identified</li> </ul>   | <ul style="list-style-type: none"> <li>Report to SAPS (nearest branch to fund's registered address) and members again within 14 days after the 90 days have expired (the 90 days start when the original 7 days have expired)</li> </ul> | <ul style="list-style-type: none"> <li>Annexure C of RF Notice 14 of 2022 must be used to report to the SAPS</li> <li>The FSCA now requests SAPS case numbers, where funds have reported employers as having contributions in arrears, therefore verifying that criminal cases were opened</li> </ul> |

| Party responsible | Action   | Due date  | Notes   |
|-------------------|--|---|---|
| Board             | <ul style="list-style-type: none"> <li>To interrupt prescription and to claim payment, the Board should also institute civil proceedings to recover any outstanding amounts</li> </ul> | <ul style="list-style-type: none"> <li>At any stage during the section 13A process</li> </ul> | <ul style="list-style-type: none"> <li>Refer to <i>Private Security Sector Provident Fund v Isidingo Security Services (t/a Unitrade (Pty) Ltd) (3048/2021P) [2022] ZAKZPHC 69 (14 June 2022)</i> – see <a href="#">In Perspective 2/2023</a></li> </ul> <p>The fund should appoint attorneys to institute legal proceedings. The fund can also refer the case to the Pension Funds Adjudicator to obtain a warrant of execution if a determination is made in favour of the fund and the employer fails to comply with the order</p> |

## Report to the South African Revenue Service

The FSCA has the authority, on receipt of the monitoring person's report, to report the matter to the South African Revenue Service for whatever action it may deem necessary against the employer and/or the fund's board of management, e.g. the withdrawal of the fund's income tax approval, or disallowing the deduction of unpaid employer contributions from the employer's taxable income.

## Penalty interest

Compound interest is payable by the employer to the fund, in respect of any contribution or part thereof not paid in full into the bank account of the fund by the 7<sup>th</sup> day of the month following the end of the month in respect of which such contribution was payable. This provision applies equally to unpaid contributions, late contributions, and underpaid contributions.

The FSCA has confirmed in Communication 15 of 2023 that interest must be calculated from the **day after the 7<sup>th</sup> day** referred to in section 13A(3)(a)(i) of the Pension Funds Act. Section 13A(3)(a)(i) refers to "**not later than seven days...**", which implies that efforts should be made to make payment earlier where possible and the transfer of contributions to the fund should not be unreasonably delayed, thus prejudicing members.

Interest is prescribed to be the prime rate plus 2%. Interest shall constitute investment income for the fund and must be payable to the fund by no later than the end of the second month, following the month in respect of which the amount is payable.

The following example illustrates the calculation and payment of penalty interest:

- The employer pays the contribution of R200 000 for October 2022 into the fund's account on 12 November 2022. This constitutes a late payment of the contribution in the amount of R200 000.
- Reconciliation of the contribution reveals that the correct contribution should have been R220 000. This constitutes an underpayment in the amount of R20 000 for the contribution.
- The employer corrects the underpayment of R20 000 on 3 December 2022 when paying the November 2022 contribution.

- Interest at the prescribed rate is therefore payable to the fund by the employer in respect of:
  - R200 000 (paid late) for the period 8 November 2022 to 11 November 2022, plus
  - R20 000 (underpaid) for the period 8 November 2022 to 2 December 2022.
- The employer must pay the interest in question to the fund by no later than 31 December 2022.

## In duplum rule

The FSCA has confirmed that the *in duplum* rule applies to the arrear interest an employer must pay on the late payment of contributions. In terms of the *in duplum* rule, interest cannot in aggregate exceed the unpaid balance of the principal debt at the time that the default occurs. If, for example, the unpaid contributions amount to R10 000 and arrear interest continues to add up while the contributions remain unpaid, the interest will be limited to the R10 000.

## Personal liability and fines

The non-payment or late payment of contributions by an employer could result in personal liability for certain individuals within the employer and constitute a criminal offence. If the employer fails to notify the fund of the identities of the applicable individuals, *all* the directors, *all* the closed corporation members regularly involved in the management of the closed corporation, or *all* the persons comprising the governing body of the employer, will be personally liable for the non-payment or late payment of contributions.

The fund must request the identities of the persons who could be liable from the employer. The format of the request is prescribed in the Conduct Standard and the board of management must retain proof of sending and delivery of the letter to the participating employer(s), as the FSCA may call upon it to furnish such proof. The employer must provide the board of management with confirmation on an annual basis of the identities of the applicable individuals.

In terms of section 37(1) of the Pension Funds Act, any person who contravenes or fails to comply with section 13A, is guilty of an offence and liable on conviction to a fine not exceeding R10 million or to imprisonment for a period not exceeding 10 years, or to both such fine and such imprisonment.

## Consequences of non- / under payment of contributions for members

The affected members:

- may lose part of their retirement savings,
- will not receive any investment growth on the required contribution, and
- risk benefits (death or disability) may be jeopardised due to the non-payment of premiums to the insurer. If claims are rejected by the insurer because premiums were not paid, the fund will be liable for payment of such benefit.

## Pension Funds Adjudicator

It has been confirmed by the office of the Pension Funds Adjudicator that members may lodge complaints relating to the non-payment of contributions with their office. As the Pension Funds Adjudicator's determinations have the same force and effect as court orders, in the event of the employer not complying with the order, the fund may obtain a warrant of execution against the property of the defaulting employer and the sheriff can attach and dispose of the employer's property.