

Medical Scheme, Retirement Fund and risk benefits during the COVID-19 lockdown, and skills development levy relief

The national lockdown has had various employment law consequences including disruption of normal remuneration processes. In respect of employees who are not working due to the lockdown (i.e. those who are not in essential services and who are not working remotely). This situation will continue in various respects even with the 1 May 2020 shift to level 4 as announced last night by President Ramaphosa.

While B4SA has called for maximum possible generosity in this regard, employers do not have a legal obligation to pay employees who are not rendering services during the lockdown period. The legal position has been mitigated by the COVID-19 TERS Benefit in that employees who lose, or may lose, income will have access to a special UIF benefit. However, the COVID-19 TERS benefit is limited and does not cover entire salaries. This raises the question as to how to deal with pension and medical contributions, especially where non-payment of contributions may result in termination of membership.

MEDICAL SCHEME BENEFITS

WHAT IS THE POSITION OF THE COUNCIL FOR MEDICAL SCHEMES?

On 26 March 2020, the Council for Medical Schemes (**CMS**) published 'Circular 25 of 2020: COVID-19 lockdown measures' in concurrence with the Minister of Health. The Circular is aimed at advising the industry of interventions, aimed at protecting the interests of members, in the wake of the ongoing (COVID-19) pandemic and during the national lockdown.

The interventions include:

- A request to medical schemes to investigate all disruptions to member contributions on a case by case basis and determine the merits thereof, prior to termination in the spirit of social solidarity.
- It appears that the CMS is encouraging schemes to give some temporary reprieve to employees before terminating membership in instances where this is deserved.

A further Circular was published by the CMS on 10 April 2020 titled 'COVID-19 Medical Schemes Industry Guidelines' (**Circular 28**). Circular 28 is aimed at providing proposals to medical schemes linked to COVID-19 during the national lockdown period. Contribution holidays and financial relief to members of medical schemes are included among the topics covered by Circular 28. The CMS advised that it anticipates the lockdown period will not last more than three months.

Contribution holidays

The CMS advised that it received requests from industry to grant a blanket exemption to medical schemes and their members from the provision of section 26(7) Medical Schemes Act, 1998 (**Act**). Following careful consideration, including the impact contribution holidays would have on the financial liquidity of medical schemes, the CMS advised that blanket exemptions will **not** be granted to medical schemes. Instead, the CMS will consider exemption applications from individual medical schemes and assess each application on its merits. Accordingly, each medical scheme wishing to be exempted from section 26(7) must apply to the CMS.

Financial relief to members and SMMEs

Circular 28 sets out options that may be considered by medical schemes. Briefly, the options are:

- Use of accumulated savings funds to offset contributions
- Ex-gratia payments
- Financial relief for SMMEs

Use of accumulated savings to offset contributions

The CMS advised that it would be in the public interest to grant exemptions to medical schemes from certain provisions of the Act by permitting schemes to use savings in "Personal Medical Savings Accounts" to offset member contributions to the scheme.

Accordingly, to avoid termination of membership due to non-payment of contributions, where a member has savings in his or her medical savings account, those savings may be tapped into to pay contributions due the scheme. It is important to note that the use of medical savings to pay contributions may impact defraying other medical expenses and medical benefits.

Circular 28 sets out the conditions medical schemes must comply with before using medical savings. One of those conditions is that members must have applied to the medical scheme for relief.

Some members of medical schemes already received SMS notifications from their medical schemes that may qualify to use the balance in the medical savings account to pay contributions to the scheme for up to three months.

Ex-gratia payments

Medical schemes may make ex-gratia payments to financially assist their members, however, according to the CMS's, **ex-gratia payments may not be used to off-set contributions**. Instead, the ex-gratia payments may only be used towards health services that were rendered or that will be rendered.

Financial relief applications – Small, Medium and Micro-sized Enterprises (SMMEs)

SMMEs (less than 200 employees) seeking financial relief to protect their employees' medical scheme membership cover may apply to the relevant medical schemes and demonstrate the financial impact caused to it by the COVID-19 pandemic.

Circular 28 does not provide details as to the extent of the "financial relief" to SMMEs, however, it appears that where an employer is responsible for the payment of contributions in terms of an agreement between it and the relevant medical scheme, and the SMME cannot afford to do so currently because it is in financial distress, the employer may apply to the scheme for a payment plan to pay contributions due to the scheme when it is financially stable to do so again. Of course, the payment plan would need to be negotiated as between the employer and the scheme and would need to be assessed by the scheme on a case by case basis.

The CMS cautioned that boards of medical schemes, in considering applications from SMMEs, should ensure compliance with the provisions of the National Credit Act (NCA). The NCA deals with, amongst other things, the responsibilities of registered credit providers and when certain lending arrangements or transactions will trigger credit provider registration requirements under the NCA.

It does not appear that the intention is for schemes to grant loans or make credit available to employers, but instead to manage and negotiate contributions payable to medical schemes by employers. Should loans be granted, then it is important to note that if the loan attracts any interest, fees or charges whatsoever (beyond the principal loan amount), the NCA may be triggered and the medical scheme may need to register as a credit provider. Lending is not the business of a medical scheme and as such, it is likely that any "loans" granted to employers by medical schemes would be interest-free with no additional charges or fees levied on the principal loan amount.

WHAT SHOULD EMPLOYERS BE THINKING ABOUT?

Employers will have to review their contractual agreements with medical schemes, the rules of the schemes and the payment obligations arising from these documents. Following this review, employers can decide how to deal with contribution obligations i.e. continue making contributions and/or stop payments during the lockdown.

Ordinarily, non-payment of medical aid contributions will result in termination of membership and as a consequence cessation of further medical scheme cover in respect of the main member as well as his or her dependants. Accordingly, employers are urged to carefully consider their positions to find an outcome with minimum impact to employees.

Options available to employers may include the following:

- Consult with the relevant scheme to determine a payment plan in relation to the payment of medical scheme contributions.
- Using the remuneration received from the TERS benefit to contribute towards the medical aid portion and paying employees the remaining amount, where this is feasible, and only with the express written consent of the employee;
- Engaging with employees and labour representatives to agree that an employer may continue to pay the contributions during the lockdown without paying remuneration and/or plus the TERS portion. The amounts can then be deducted from employees' future remuneration once work resumes, but again, this will require agreement.

Employers are encouraged to start considering this aspect as soon as possible.

PENSION BENEFITS

WHAT IS THE POSITION WITH PENSION FUNDS?

Section 13A of the Pension Funds Act (**PFA**) obliges employers who participate in a fund to pay full contributions to the fund within a specified time period. This includes contributions which must be deducted from an employee's remuneration as well as any contribution that an employer is required to make in terms of the rules of the relevant fund. Non-compliance with section 13A is a criminal offence.

WHAT IS THE FSCA'S POSITION?

In a Notice titled FSCA Communication 11 of 2020 (RF) – COVID-19: Section 13A of the Pension Funds Act, 1956 and financially distressed employers and employees – submission of urgent rule amendments, the FSCA stated the following:

- That it is mindful of the financial impact of the COVID-19 global pandemic on employers and employees and that certain employers may not be in a financial position to pay their full contributions to the retirement funds they participate in.
- That the Notice is a guidance to funds to assist employers who are unable to pay the full or any contributions on behalf of their employees to their funds.
- Where '*rules which make provision for temporary absence from work (with or without pay) or a break in service (in instances where employees are not working) and/or postponement of contribution payments and/or reduction of pensionable service (in respect of employees who are working reduced hours)*' exist, funds are encouraged to apply the relevant rules to employers



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and members in order to alleviate the challenges that they are currently facing.

- In the event that funds do not have rules permitting payment holidays, the Notice requests such funds to submit rule amendments on this basis urgently.
- Funds must attempt to ensure that full risk benefit premiums continue to be paid in full in respect of the affected employees/members in order to ensure that the fund risk benefits will continue to be provided.

WHAT SHOULD EMPLOYERS BE THINKING ABOUT?

Employers should be considering the rules of the funds they participate in on an urgent basis and whether the rules provide for payment holidays. Where rules do not provide for payment holidays, employers should urgently be engaging with their pension funds in order to submit the relevant rule amendments to the FSCA, if this is required.

The following options could apply to the employer. However, these options must be tested against the applicable fund's rules to determine whether any of these options are indeed available, and if not, request rule amendments:

- Reduce employer and/or employee contributions to the fund to an affordable contribution rate and retain risk benefit (death and disability) premium payments;
- Cease future employer and/or employee contributions to the fund for a period as agreed between the fund and employer while, however, continuing payment of risk benefit (death and disability) premiums;
- Amend pensionable salaries where employees are still working, and reduce employer and/or employee contributions accordingly including risk benefit premiums;
- Where employees are temporarily absent from work (i.e. are not working with consent from the employer), suspend employer and/or employee contributions during the period of absence while, however, continuing payment of risk benefit (death and disability) premiums.

UNAPPROVED AND APPROVED RISK BENEFITS

In addition to retirement fund contributions and medical scheme contributions, employers must have regard to the impact COVID-19 may have on unapproved risk benefit premiums and cover.

What are unapproved benefits?

Unapproved benefits are those covered under a separate policy of insurance. For example, death benefits are most commonly provided through a group life insurance policy, the employer being the policyholder and responsible for premium payments to the insurer. Other unapproved benefits include disability, ill-health, disease, income protection and funeral benefits.

“Unapproved benefits” must be distinguished from “approved benefits”.

What are approved benefits?

Approved benefits are those provided by a retirement fund and may include a policy of insurance between the fund and the insurer to cover death and permanent disability benefits provided by the retirement fund. The retirement fund is the policyholder and a portion of the contributions paid to the fund is used to cover the risk benefit premium.

The difference between approved and unapproved risk benefits is also important because the tax treatment of these benefits differ.

WHAT SHOULD EMPLOYERS CONSIDER?

Many employers in financial distress have reduced salaries as well as retirement fund contributions. Where contributions to retirement funds have been reduced or suspended, premiums to cover approved risk benefits should remain intact. Arrangements should be made to ensure that they do remain intact.

Where employers reduce salaries, regard must be had whether the reduction will impact on other employee benefits, such as unapproved benefits and whether the reduction will impact on the premium payable towards unapproved risk benefits and the cover provided under the insurance policy. A reduction in salaries is likely to result in reduced cover as cover is usually a factor of an employee's remuneration. Where cover and premiums are impacted, it is suggested that employers liaise with their respective benefit consultant and/or broker or directly with the insurer to manage any adverse impact on employees.

Similarly, where no salaries are paid, employers must have regard for the impact thereof on the continuation of risk benefit cover. To the extent possible, given the pandemic, risk insurance policies covering death, disability, income protection, funeral and other benefits are essential to maintain during these unprecedented times. In this event, arrangements should be made to continue paying premiums even if these cannot be deducted from remuneration and to agree for this to be deducted from future salaries as and when they are paid. If there is any prospect that cover is to be lost, employees must be advised of this in order that they are given the opportunity to make alternative arrangements.

Premium relief is now possible



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The arrangement could include premium relief by the insurer, in line with the exemption notices issued by the Financial Sector Conduct Authority (**FSCA**) on 15 April 2020 in relation to short-term and long-term insurers.

According to the FSCA's communication, published together with the exemption notices, the FSCA acknowledged the potential impact COVID-19 and the national lockdown may have on the ability of affected policyholders to pay the premiums due under their policies. The exemption notices are aimed at facilitating premium relief to policyholders and set out the conditions insurers must comply with should they agree to grant premium relief.

In essence, premium relief relates to the temporary release from the policyholder's obligation to pay the premium payable under an existing policy in whole or in part. The relief measures permit non-payment of premiums for a limited amount or allow for an extended period of grace for the payment of the premium due to the insurer – without reducing or limiting any policy benefits under the policy.

SKILLS DEVELOPMENT

Employers are required to pay a skills development levy equal to 1% of its payroll. However, on 23 April 2020, National Treasury announced relief for employers in that, from 1 May 2020, a contribution holiday will apply for four months. This means that employers are not required to make these contributions in respect of May, June, July and August 2020. Contributions will only resume in September 2020.

B4SA Labour workstream

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