



Legal update 2 of 2023:

An employer's section 13A(8) responsible person

1. Section 13A of the Pension Funds Act (the Act) specifies that a participating employer in the FundsAtWork Umbrella Funds (the Funds) must:
 - deduct and pay to the Funds their retirement fund contributions in full as detailed in their special rules;
 - pay the contributions to the Funds not later than 7 days after the end of the month for which the contribution is payable; and
 - submit to the Funds a fully completed contribution statement, which includes all the required minimum information, no later than 15 days after the end of the month for which the payment was made.
2. "Responsible person(s)" refers to the person(s) identified by a participating employer in terms of section 13A(8) of the Act who may be held personally liable for the employer's failure to comply with their section 13A obligations, and for the payment of any outstanding contributions and late payment interest to the Funds.
3. **In terms of section 13A(8) of the Act, these people are considered an employer's responsible person(s):**
 - 3.1 if the employer is a company, every director who is regularly involved in the management of the company's overall financial affairs;
 - 3.2 if the employer is a close corporation, every member who controls or is regularly involved in the management of the close corporation's overall financial affairs; and
 - 3.3 for any other employer, every person in accordance with whose directions or instructions the governing body or structure of the employer acts, or who controls or who is regularly involved in the management of the employer's overall financial affairs.
4. The Funds will annually request each employer to provide them with the updated names and contact details of their responsible person(s). From 20 February 2023, each employer must also, as part of the monthly contribution statement, submit the names of their responsible person(s) and update it monthly if they change.
5. If an employer fails to notify the Funds of the names of their responsible person(s), section 13A provides that all the directors (if the employer is a company), all the members regularly involved in the management of the closed corporation, or all the persons on the governing body of the employer, as the case may be, will be held personally liable for the employer's non-compliance with section 13A and for the payment of outstanding contributions.
6. **What does it mean for a responsible person to be held personally liable for their employer's non-compliance under section 13A?**
 - 6.1 In the 2022 high court ruling of Engineering Industries Pension Fund & Metal Industries Provident Fund Another v Pioneer Mechanical CC (in Liquidation) & John Nickel, the employer owed over R5 million in arrear contributions to the funds. The employer, a close corporation, was placed under voluntary liquidation. As Mr Nickel was the sole member of the close corporation, he was for the purpose of section 13A(8) of the Act regarded by the funds as the member who controlled, or was regularly involved in the management of the employer's overall financial affairs. The funds applied to the high court for an order against Mr Nickel in his personal capacity for the arrear contributions which should have been paid by the employer. The high court ruled that the purpose of section 13A(8) is to ensure that, where an employer fails to comply with section 13A, someone must and should, via compulsion, be responsible to 'step into the shoes' of the employer. Mr Nickel was ordered to, in his personal capacity in terms of section 13A(8) of the Act, to pay all outstanding contributions, together with late payment interest, to the funds, which amounted to over R5 million.
 - 6.2 It is clear that an employer's responsible person(s) will be held personally liable for their employer's arrear contributions in their personal capacities, even if the employer is in liquidation.
 - 6.3 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, which means that an employer's non-compliance with section 13A can attract criminal prosecution for their responsible person(s).

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