

Legal update 8 of 2021: Access to retirement annuity and preservation fund benefits

This Legal Update replaces Legal Update 14 of 2020.

A: Summary

Members of retirement annuity and preservation funds (referred to as retail funds) often request withdrawal of their benefits from the fund before they turn 55. This document sets out when a member would be able to do so.

- Paragraph B summarises the provisions of the Income Tax Act dealing with access to fund benefits.
- Paragraph C explains what benefit can be taken at normal retirement and the tax payable on that benefit.
- Paragraph D sets out the requirements for early retirement due to medical disability and deals with how the benefit will be paid and the taxation thereof.
- Paragraph E focuses on benefits payable on emigration.
- Paragraph F deals with benefits payable on repatriation, when the member's visa or work permit expires.
- Paragraph G explains the difference between withdrawals from a preservation fund when a pre-retirement benefit was transferred to the preservation fund and when a post-retirement benefit was transferred.
- Paragraph H deals with a withdrawal from a retirement annuity fund where the benefit falls under the *de minimus* amount.

B. Access under the Income Tax Act

The Income Tax Act allows access to **retirement annuity fund** *and* **preservation fund benefits** if the member –

- is 55 years old;
- is medically disabled;
- has emigrated, or
- has left the country on expiry of his visa or work permit.

In addition, a member of a –

- **preservation fund** is also allowed to make one withdrawal from his benefit before retirement, if the benefit that was transferred into the preservation fund was not a retirement benefit (refer to paragraph G further in this document), and
- **retirement annuity fund** is also allowed access to his benefit if the total benefit is less than the prescribed minimum.

C. Normal retirement

When the member reaches the age of 55, he may access his retirement benefit. It is important to note that the member does not *have* to retire when he reaches the age of 55. He is only compelled to retire once he has elected to receive a retirement benefit.

Benefit payable: A member on a retirement annuity fund and a pension preservation fund may only take one third of his retirement benefit in a lump sum; the rest of the benefit must be used to buy an annuity (a pension). If however the total benefit in the fund is R247 500 or less, the member can take the whole benefit in a lump sum.

A member of a provident preservation fund may take his vested benefit as a lump sum. His non-vested benefit will be subject to annuitisation. Refer to

paragraph 1 of Legal Update 3 of 2021 for more information on annuitisation and the impact on a provident preservation fund.

A member of a provident preservation fund can still use any portion of the retirement benefit to buy an annuity.

Tax: The lump sum benefit must be taxed on the retirement tax table, after all the deductions under paragraph 5 of the Second Schedule to the Income Tax have been made. For instance, if the member made contributions that did not previously qualify as a deduction, those contributions must be deducted from the lump sum first, and the balance of the lump sum must then be taxed on the retirement table.

D. Early retirement due to medical disability

A member may retire before age 55 if he is *permanently incapable of carrying on his or her occupation due to sickness, accident, injury or incapacity through infirmity of mind* (in this paragraph referred to as medical disability / medically disabled). This implies that the following conditions must be met for a member to claim his retirement benefit due to medical disability:

1. The member must have been in an occupation before he became medically disabled;
2. the disability must result in him being permanently incapable of carrying on with his job, which in turn means that
3. his job must have been terminated as a result of the disability.

Since the medical disability relates to the inability to carrying on with one's occupation, it means that if the member did not have an occupation, in other words, did not work, he will not be able to qualify for this benefit.

The member can access his medical disability early retirement benefit at ANY time after the date on which he becomes medically disabled. It does not say anywhere that he must claim the disability benefit

immediately after he became disabled. He can do it a year later, BUT to qualify for the benefit, he must still be disabled at the time of the claim, because the definition of medical disability in this case is that it must render him *permanently incapable* of working. If he was disabled a year ago and only claims now, but has since recovered, he will not qualify for the benefit. He will have to give us medical evidence of still being *permanently incapable* of working at the time that he claims the benefit. What we need to establish is that he was working up to the point of becoming medically disabled, and has not been able to work since then as a result of that disability.

If the member stopped working three years ago for any reason other than medical disability, and he now becomes medically disabled, it will be extremely difficult if not impossible to show that he now qualifies for the medical disability benefit. The reason for that is that he did not work immediately before he became disabled and the disability therefore did not render him incapable of working. We must keep in mind that this benefit is not based on the disability itself; it is based on the fact that the disability has the effect of depriving the

member of his ability to work. Put differently – the member is not compensated because he is disabled – that is what a disability policy is for; the fund benefit is paid because the member cannot work as a result of the medical disability.

A member applying for a medical disability benefit from a retail fund must find out from the fund what the procedure for such a claim is. The member might for instance have to complete a medical disability claim form and submit a medical report confirming that the medical condition resulted in the member being incapable of working.

Benefit payable: A disability benefit is still a retirement benefit, which means that if the member is on a

E. Emigration

A member of a retirement annuity fund who has been a non-resident for at least three consecutive years on or after 1 March 2021 can access his benefit before retirement.

A member of a pension or provident preservation fund may only access his benefit due to non-residency if he has already taken his one pre-retirement withdrawal.

The Income Tax Act makes it clear that an emigration benefit can be taken **before retirement date**. The definition of *retirement date* refers to the date on which the member *elects to retire*. This means that even if a member has already reached the age of 55 but has not yet elected to retire, he will be able to access his retirement benefit due to emigration. If the member has already reached 55 and has also already elected to retire, he will not be able to access his full benefit due to emigration. He will then have to take his benefit as a normal retirement benefit, and the provisions under paragraph C will apply.

The SARS External Guide to Complete Tax Directive Applications lists the following requirements for a non-resident to access their benefits: the member –

- should have informed SARS that he ceased to be a resident. The member can do this on his annual tax return as soon as he ceases to be an SA resident.

retirement annuity fund or a pension preservation fund, a maximum of one-third may be taken as a lump sum, provided that if the total benefit is R247 500 or less, it can all be taken as a lump sum. A member of a provident preservation fund will be entitled to take the full vested benefit as a lump sum. His non-vested benefit will be subject to annuitisation. Refer to paragraph 1 of Legal Update 3 of 2021 for more information on annuitisation and the impact on a provident preservation fund.

Tax: The same tax rules as mentioned under paragraph C apply.

The process on how to do this can be found on the SARS website at sars.gov.za. SARS will then update their system with that information. If the member did not inform SARS of his non-residency, SARS will reject the withdrawal application;

- must be out of the country for an uninterrupted period of three years or longer, and
- must provide the administrator with evidence confirming that he was out of the country for an uninterrupted period of three years or longer.

In addition to the application form for the withdrawal, the member must also submit the following documents to the fund administrator:

- a copy of his SARS issued Tax Compliance Status ('TCS');
- a certificate of residence not older than six months issued by the Tax Authority of the country of residence, and
- documentation confirming cessation of residence such as for instance the member's passport and indicating the entry in and out of SA and tax assessments issued by his country of residence.

The Fund must submit the following to SARS when applying for a tax directive:

- declaration of Non-South African Tax Residency-form;

- certificate of residence, and
- documentation confirming cessation of residence.

SARS has indicated that as this process unfolds, the list of acceptable evidence will be expanded. The SARS External Guide: *Tax Directive: Emigration, Cease to be Resident and Expiry of Visas*, which can be found on the SARS website, will be updated with the additional information.

F. Repatriation (expiry of visa/work permit)

An *immigrant* is someone who comes *into* South Africa. If that immigrant becomes a member of a retirement annuity fund and then returns to his country of residence when his work permit or visa expires (repatriates) before retirement, he can access his benefit.

A member of a pension or provident preservation fund may only access his benefit due to repatriation if he has already taken his one pre-retirement withdrawal.

In addition to the application form, the member must also submit the following:

1. A copy of the member's certificate of residence obtained from the relevant Tax Authority of the country in which the member resides (translated to English, if required).

G. Withdrawals on preservation funds

Transferred benefit was pre-retirement benefit

A member of a preservation fund who transferred a pre-retirement benefit such as for example a withdrawal or liquidation benefit to the preservation fund, is allowed to make one withdrawal from the preservation fund during his membership of the preservation fund.

If the member made a withdrawal from his pension or provident fund **before** transferring to the preservation fund, that does not count as his one pre-retirement withdrawal. Examples of this are a member who decided to take a part of his withdrawal benefit in his pension fund as a lump sum and transfer the balance to the preservation fund, or a member who had an outstanding housing loan at the time of his withdrawal

The member can also contact the administrator to get a list of the documents required.

Benefit payable: The benefit will be paid as a lump sum.

Tax: The benefit will be taxed on the withdrawal tax table, after all the deductions under paragraph 6 of the Second Schedule to the Income Tax have been made.

2. A copy of the member's –
 - a. passport indicating that he left South Africa, or
 - b. visa indicating what it was issued for and the expiry date.

A member should not apply for a withdrawal under this provision if his visa has not expired yet as SARS will then not process the withdrawal application.

Benefit payable: The benefit will be paid as a lump sum.

Tax: The benefit will be taxed on the withdrawal tax table, after all the deductions under paragraph 6 of the Second Schedule to the Income Tax have been made.

from his pension fund which the pension fund settled when he withdrew from the pension fund.

However, if the member transferred from another preservation fund and he has already made a withdrawal from that preservation fund before transferring to the preservation fund, that **does** count as his one pre-retirement withdrawal. He will then not be entitled to another withdrawal from the preservation fund.

The right to make a pre-retirement withdrawal applies separately to each payment or transfer to the preservation fund. This means that a preservation fund should have a separate record or account for each

amount that the member transferred into the preservation fund. If he for instance resigned from three employers and transferred his withdrawal benefits from three different funds to the preservation fund, he will have three different records in the preservation fund. He may then make a pre-retirement withdrawal from each one of these three records. However, if the amount that he withdraws is more than the amount in one of his records, it will result in him restricting his future pre-retirement withdrawals. This is best illustrated by way of an example.

- Mr M resigned from employer A and transferred his R10 000 withdrawal benefit from fund X to the Momentum Pension Preservation Fund. This will be record 1.
- Two years later he resigned from employer B and transferred his R20 000 withdrawal benefit from fund Y to the Momentum Pension Preservation Fund. This will be record 2.
- A year later he resigned from employer C and transferred his R15 000 withdrawal benefit from fund Z to the Momentum Pension Preservation Fund. This will be record 3.
- He now withdraws R25 000.
- None of the three records has R25 000 in it. The withdrawal therefore has to be made from two records.
- If the preservation fund takes the R10 000 in record 1 and uses R15 000 of the R20 000 in record 2, it will mean that the member now only has one more withdrawal available, and that withdrawal must be made from the R15 000 in record 3.
- If the preservation fund takes the R10 000 in record 1 and uses the full R15 000 in record 3, it will mean that the member will be entitled to make another withdrawal from record 2, which has a value of R20 000.
- In this example, it would be better to split the R25 000 withdrawal between records 1 and 3 instead of between 1 and 2, because the member will be left with the option of making a withdrawal against a bigger amount.

Transferred benefit was post-retirement benefit

From 1 March 2019, a member is entitled to transfer his benefit on or after normal retirement age but before

retirement date in a pension or provident fund to a preservation fund. This means that a member who has reached the normal retirement age as defined in the rules of his pension or provident fund but who has not elected to retire yet, can still transfer his benefit (referred to as a post-retirement benefit) to a preservation fund. The member will however not be entitled to the one pre-retirement withdrawal option that is available to a member who transferred his withdrawal benefit to the preservation fund. His only option is to take that benefit as a retirement benefit, in which case the provisions under paragraph C will apply. If for example Mr M in the example above transferred his post-retirement benefit of R100 000 from fund S to a pension preservation fund, he will not be allowed to take any part of that transferred benefit as a pre-retirement withdrawal. He will therefore not be allowed to request a pre-retirement withdrawal for R50 000, as the records from which he can make pre-retirement withdrawals only amount to R45 000.

Benefit payable: A member on a pension preservation fund may only take one third of his retirement benefit in a lump sum; the rest of the benefit must be used to buy an annuity (a pension). If however the total benefit in the Fund is R247 500 or less, the member can take the whole benefit in a lump sum.

A member of a provident preservation fund may take his total vested benefit in a lump sum. Refer to paragraph 1 of Legal Update 3 of 2021 for more information on annuitisation and the impact on a provident preservation fund.

A member of a provident preservation fund can still use any portion of the retirement benefit to buy an annuity.

Tax: The lump sum benefit must be taxed on the retirement tax table, after all the deductions under paragraph 5 of the Second Schedule to the Income Tax have been made. For instance, if the member made contributions that did not previously qualify as a deduction, those contributions must be deducted from the lump sum first, and the balance of the lump sum must then be taxed on the retirement table.

H. Benefit under prescribed minimum – retirement annuity funds

When the **total benefit** in a retirement annuity fund is less than the prescribed amount, the member may access his benefit.

It is very important to note that the TOTAL benefit in the fund must be less than the prescribed amount. If the member has more than one policy in the same fund, the value of both the policies must be less than the prescribed amount.

The prescribed amount currently has been increased from R7 000 to R15 000 with effect from 1 March 2021.

Benefit payable: The benefit will be paid as a lump sum.

Tax: The benefit will be taxed on the withdrawal tax table, after all the deductions under paragraph 6 of the Second Schedule to the Income Tax have been made.

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