Pensions & Retirement Plans

Contributing editor
Jan Van Gysegem

2017

GETTING THE DEAL THROUGH

GETTING THE
DEAL THROUGH

Pensions & Retirement Plans 2017

Contributing editor

Jan Van Gysegem

Claeys & Engels

Publisher
Gideon Roberton
gideon.roberton@lbresearch.com

Subscriptions
Sophie Pallier
subscriptions@gettingthedealthrough.com

Senior business development managers
Alan Lee
alan.lee@gettingthedealthrough.com

Adam Sargent
adam.sargent@gettingthedealthrough.com

Dan White
dan.white@gettingthedealthrough.com

Law Business Research

THE QUEEN'S AWARDS FOR ENTERPRISE: 2012

Published by
Law Business Research Ltd
87 Lancaster Road
London, W11 1QQ, UK
Tel: +44 20 3708 4199
Fax: +44 20 7229 6910

First published 2013
Fifth edition
ISSN 2052-8310

Printed and distributed by
Encompass Print Solutions
Tel: 0844 2480 112

CONTENTS

IORP II: the new EU Pensions Directive 5
Jan Van Gysegem
Ius Laboris

Belgium 7
Jan Van Gysegem
Claeys & Engels

Brazil 11
Cristiane Ianagui Matsumoto Gago, Diego Filipe Casseb and Lucas Barbosa Oliveira
Pinheiro Neto Advogados

Canada 16
Michael G Sherrard and Sundeep Gokhale
Sherrard Kuzz LLP, Employment & Labour Lawyers

Chile 22
Enrique Munita, Paola Casorzo, Marcela Salazar and Paula García-Huidobro
Munita & Olavarría – Ius Laboris Chile

China 26
Jiang Junlu and Pei Xiu
King & Wood Mallesons

France 32
Juliana Kovac and Philippe Montanier
Flichy Grangé Avocats – member of L&E Global

Germany 36
Jochen Leßmann and Rüdiger Hopfe
Schweibert Leßmann & Partner, Fachanwälte für Arbeitsrecht

Ireland 42
Maureen Dolan
McCann FitzGerald

Italy 47
Luca Failla
LABLAW – member of L&E Global

Japan 52
Taichi Arai, Rina Shimada, Hiroki Habuka and Kenta Nishioka
Mori Hamada & Matsumoto

Kenya 57
Carole Ayugi and Allison Amondi
Muthaura Mugambi Ayugi and Njonjo

Mozambique 64
Gimina Luis Mahumana Langa
SAL & Caldeira

Portugal 68
Ricardo Rodrigues Lopes
Caiado Guerreiro – Sociedade de Advogados, SP, RL

Switzerland 72
Rayan Houdrouge and Matthias Oertle
Lenz & Staehelin

United Kingdom 78
Penny Cogher
Irwin Mitchell LLP

United States 84
Steven J Friedman and Melissa B Kurtzman
Littler Mendelson, PC

Kenya

Carole Ayugi and Allison Amondi
Muthaura Mugambi Ayugi and Njonjo

Statutory and regulatory framework

1 What are the main statutes and regulations relating to pensions and retirement plans?

The main statutes are:
- The Pensions Act (Cap. 189);
- Pensions (Increase) Act (Cap. 190);
- Retirement Benefits Act (No. 3 of 1997);
- Income Tax Act (Cap. 470);
- National Social Security Fund Act (Cap 258);
- National Social Security Fund Act (No. 45 of 2013);
- National Health Insurance Fund Act (No. 9 of 1998);
- Provident Fund Act (Cap. 191);
- Public Service Superannuation Scheme Act (No. 8 of 2012);
- Parliamentary Pensions Act (Cap. 196);
- Presidential Retirement Benefits Act (No. 11 of 2003);
- Retirement Benefits (Deputy President And Designated State Officers) Act (No. 8 of 2015);
- Asian Officers' Family Pensions Act (Cap. 194); and
- Asian Widows' And Orphans' Pensions Act (Cap. 193).

The main regulations are:
- Retirement Benefits (Individual Retirement Benefits Schemes) Regulations 2000;
- Retirement Benefits (Occupational Retirement Benefits Schemes) Regulations 2000;
- Retirement Benefits (Minimum Funding Level and Winding up of Schemes) Regulations 2000;
- Retirement Benefits (Forms and Fees) Regulations 2000;
- Retirement Benefits (Managers and Custodians) Regulations, 2000;
- Retirement Benefits (Mortgage Loans) Regulations 2009;
- Retirement Benefits (Administrators) Regulations 2007;
- Retirement Benefits (Umbrella Retirement Benefits Schemes) Regulations, 2017;
- The Income Tax (Retirement Benefit) Rules 1994;
- Income Tax (National Social Security Fund) (Exemption) Rules, 2002; and
- Provident Fund Regulations.

2 What are the primary regulatory authorities and how do they enforce the governing laws?

The primary regulatory authorities in Kenya are the Retirement Benefits Authority and the Kenya Revenue Authority.

Their objects and functions are to:
- regulate and supervise the establishment and management of retirement benefits schemes;
- protect the interests of members and sponsors of retirement benefits sector;
- promote the development of the retirement benefits sector; and
- advise the minister on the national policy to be followed with regard to retirement benefits schemes and to implement all government policies relating thereto.

The Commissioner of Income Tax also determines which income under the schemes shall be considered tax exempt and the registration of pension schemes.

3 What is the framework for taxation of pensions?

The taxation of pensions in Kenya is guided by section 8(5) of the Income Tax Ac.

The following sums are not subject to tax:
- in the case of a lump sum commuted from a registered pension or individual retirement fund, the first 600,000 shillings;
- contributions that are less than 20,000 Kenyan shillings per month or 30 per cent of the pensionable salary, whichever is less;
- income earned from investments; and
- pension payments after attaining age of 65.

The benefits received by a member are taxed, but they can opt to receive a tax-free lump sum payment of 60,000 shillings on retirement for every year of membership up to a maximum of 600,000 shillings.

State pension provisions

4 What is the state pension system?

The National Social Security Fund Act No. 45 of 2013 (the New NSSF Act) commenced on 10 January 2014. The provisions of this Act were however challenged between 2014 and 2015 and therefore its implementation has not taken place.

Meanwhile, the state pension system that is in place is the National Social Security Fund that is set out in National Social Security Fund Act Cap. 258 (the Old NSSF Act).

The National Social Security Fund (NSSF) is a national scheme whose main objective is to provide basic financial security benefits to Kenyans upon retirement. It was set up as a provident fund to provide benefits in the form of lump sum payments. It works on a contributory basis. This fund, however, only covers formal sector employees thus limiting its coverage by excluding informal sector employees.

The statutory contributions are set at 10 per cent of the employee's pay, half of which is paid by the employer.

There is also the Public Service Pension Scheme that provides benefits for public service employees (civil servants). It is governed by the Pensions Act and the Public Service Superannuation Scheme Act. The scheme under the Pensions Act operates on a non-contributory basis. With the coming into of the new Public Service Superannuation Scheme Act, the aspect of a contributory scheme has been introduced to the Public Service.

5 How is the state pension calculated and what factors may cause the pension to be enhanced or reduced?

Currently in accordance with the Old NSSF Act, statutory contributions to the fund are set at 10 per cent of an employees' pay. A monetary ceiling is also present on the maximum combined contribution of 400 Kenya shillings per month.

In accordance with the New NSSF Act, the statutory contributions are set at 12 per cent of the employee's pay, 6 per cent which is contributed by the employee. The contributions are divided into two tiers. Tier 1 contributions will be based on pensionable earnings up to the lower earnings limit and Tier 2 contributions are based on pensionable earnings above the lower earnings limit. The lower earnings limit is a figure that is set by the Cabinet Secretary and is published monthly.

The New NSSF Act received assent from the president on 24 December 2013 and was to be implemented on 31 May 2014. However this implementation date has been further delayed because of numerous legal issues. Under this Act, the transitional period for contributions has been set at five years. Therefore the lower earnings limit will increase with each year from 6,000 shillings for the first year, to 7,000 shillings for the second year until the fifth year where it will settle at the amount set by the Cabinet Secretary at the end of each financial year as the average minimum monthly basic wage which is currently 12,600 shillings.

It should be noted that Tier 2 contributions can be contracted out to other private retirement benefit schemes. The proposed contracted-out scheme must be registered with the Retirement Benefits Authority, have a valid exemption from the Kenya Revenue Authority, comply with investment guidelines in the Retirement Benefits Act and any requirements prescribed by the Retirement Benefits Act and the NSSF Act. The New NSSF Act also allows persons not in formal employment to make voluntary contributions towards the fund in order to secure benefits.

6 Is the state pension designed to provide a certain level of replacement income to workers who have worked continuously until retirement age?

Yes, in accordance with the Old NSSF Act, a member of the scheme will be entitled to an age benefit on attaining the age of 55 years and having retired from regular employment.

Yes, in accordance with the New NSSF Act Retirement benefits are payable from the normal retirement age of 60 years, with earlier retirement being possible at age 50. Upon retirement, each individual's Tier 1 account balance can be paid out as a partial lump sum, with the remainder used to purchase an annuity from a registered insurer. Employees will have the option of taking up to a third of Tier II balances as a lump sum, with the remainder taken as scheduled withdrawals. Payment of the Tier II benefit can be deferred to coincide with the normal retirement date of any occupational plans into which the Tier II contributions are paid.

However, the lump sum benefit may be considered inadequate as, given the low monetary contributions, it may not be enough to sustain a member on retirement.

7 Is the state pension system under pressure to reduce benefits or otherwise change its current structure in any way on account of current fiscal realities?

Yes, the NSSF has undergone changes to its current structure so as to increase its level of assessment under the following criteria: adequacy, affordability, sustainability and robustness.

The New NSSF Act introduces changes transforming the NSSF from a provident fund only to both a pension and provident fund. The pension fund will cover individuals of 18 years old or above in the formal sector and the provident fund will be for self-employed persons who voluntarily register to be members of the fund. Therefore, every Kenyan with an income shall have an opportunity to contribute a percentage of his or her gross earnings so as to be guaranteed basic compensation in case of permanent disability, assistance to dependants in case of death and a monthly life pension upon retirement.

With regard to the pension scheme for persons employed in the public service, the Public Service Superannuation Scheme came into being and introduced contributory retirement schemes thus ensuring benefits are not to be determined by a member's final salary. This addressed the issue of benefits accruing for civil servants being inadequate because of low levels of salaries. It also enables members to transfer their savings to a new employer.

Plan features and operation

8 What are the main types of private pensions and retirement plans that are provided to a broad base of employees?

There are four types of pension plans in Kenya:
- public service pension fund;
- occupational pension scheme;
- individual pension plan; and
- umbrella scheme.

Under these types of plans, their structures take two forms:
- Defined contribution plan - Under this plan, the amount a member shall receive upon retirement depends on the total amount of money contributed and the performance of the fund's investments over time.
- Defined benefits plan – Under this plan, the amount a member shall receive upon retirement is determined in advance using a set formula. Members of the scheme contribute a fixed amount, and the sponsor meets the balance of the promised benefit. Defined benefit is treated as a liability by the employer to be paid when an employee retires. Most employers therefore lean towards the defined contribution plan.

9 What restrictions or prohibitions limit an employer's ability to exclude certain employees from participation in broad-based retirement plans?

Under Regulation 7(e) of the Retirement Benefits (Occupational Retirement Benefits Schemes) Regulations, the rules of a scheme should provide the requirements for admission to membership and the circumstances under which membership is to cease.

Regulation 18 (1) deals with eligibility of membership of schemes. In particular, it prohibits discrimination or restriction on membership on the basis of gender, race or religion and exercise of any discretionary powers in relation to membership by the employer, thus preventing exclusion of membership unless provided otherwise under the Authority.

In addition, section 5 of the Employment Act (No. 11 of 2007) prohibits discrimination of employees by employers in respect of any employment matter.

10 Can plans require employees to work for a specified period to participate in the plan or become vested in benefits they have accrued?

An employer may, under the scheme rules, provide for a qualifying period for membership of the scheme. This period should not be more than one year. Regulation 18(d) of the Retirement Benefits (Occupational Retirement Benefit Schemes) Regulations provides for this.

All benefits deriving from contributions should, however, vest in the member immediately.

The employer is therefore not to set a specific period one must work in order for the benefits accrued to vest. The same rule applies with sponsor contributions, they vest immediately.

11 What are the considerations regarding employees working permanently and temporarily overseas? Are they eligible to join or remain in a plan regulated in your jurisdiction?

Regulation 19(5) of the Occupational Retirement Benefits Regulations provides that permanent emigration of a member to another country qualifies as a situation under which retirement benefits may be granted and he or she may choose to receive the accrued benefits before acquiring retirement age.

If a member of a scheme is temporarily absent from service under the employer, the practice is that during the member's absence they will retain their membership with the scheme and still make contributions, as the sponsor does the same in their regard. Where the member absent is not in receipt of a pensionable salary then the trustees, with the consent of the employer, can opt to suspend the contributions from the member and those made on his or her behalf by the employer until he or she is back.

12 Do employer and employees share in the financing of the benefits and are the benefits funded in a trust or other secure vehicle?

The financing of benefits depends on whether the plan is contributory or non-contributory. If it is contributory the plan is funded through contributions from the members and employers, if it is non-contributory, the plan is completely funded by the employer.

Under a defined benefit plan, which is non-contributory, the employer finances the benefits. The employer meets the promised benefit due when the member completes his or her pensionable service under the employer and attains retirement age.

With defined contribution plans, which are contributory, both the employee and employer contribute a given percentage towards the fund.

Section 26 of the Retirement Benefits Act provides that pension schemes shall be established as trusts and the trustees hold the assets for the benefit of the members of the scheme.

13 What rules apply to the level at which benefits are funded and what is the process for an employer to determine how much to fund a defined benefit pension plan annually?

Benefits are funded by contributions. Under the defined contribution scheme, the level at which benefits are funded is determined in a number of ways:

- The employer compares and analyses the level of contributions that other schemes have set within the pension industry so as to provide competition.
- The employer considers the future benefits that he intends on making available to his employees.
- The employer also considers factors relating to the employees profile such as age and the type of employees. This then will guide him on how much to contribute towards each employee.

The employer can also be advised by an actuary who can make a conclusion based of statistical data of the employees and arrive at a well-calculated figure.

Defined benefit schemes' funding aims to provide the members with the promised benefit at the end of their service. The determination of the funding level can be left to the discretion of the employer or sponsor. However, in practice, it can be calculated by the multiple of length of one's service and the final pensionable salary. The figure normally arrived at is that where the employer intends to replace 0.2 per cent of the employee's final pensionable salary for every year of work.

These schemes can also conduct actuarial valuations to determine the future benefits which will in turn determine the future contributions. As a contrast to defined contribution schemes whose funding level determination is based on contributions that will result in benefits, for defined benefit, the focus is on the benefits, which will then determine the contributions to be made.

14 What are customary levels of benefits provided to employees participating in private plans?

Under private plans the levels of benefits provided are as follows:

- Retirement benefits that vest on:
  - attaining normal retirement age;
  - early retirement age with consent of employer;
  - the ground of ill health; and
  - permanent emigration of member.
- death in retirement benefits that are provided to the member until his or her death and thereafter payable to the surviving spouse;
- death in service benefits that are payable when a member dies in service to surviving spouse and any other dependants; and
- benefits on member leaving service on own free will, dismissal by the employer or on redundancy or retrenchment.

15 Are there statutory provisions for the increase of pensions in payment and the revaluation of deferred pensions?

The Pensions (Increase) Act provides for rate and date of increase of pensions. This rate should not exceed 3 per cent per annum but is subject to the scheme's funding level.

Increase of pensions in payment can also be determined by each scheme or employer, or both.

Under the New NSSF Act, the transitional period with regard to contributions has been set at five years. Therefore the lower earnings limit will increase with each year until it settles at the monthly minimum wage. This increase in contributions eventually results in increased pensions.

16 What pre-retirement death benefits are customarily provided to employees' beneficiaries and are there any mandatory rules with respect to death benefits?

Regulation 26 of the Retirement Benefits (Occupational Retirement Benefit Schemes) Regulations 2000 provides that where a member dies before attaining retirement age the scheme rules may provide that benefits be payable to the nominated beneficiary.

Customarily, schemes provide benefits to beneficiaries such as survivor's benefit, orphans' pensions and widows' pension.

On death, the benefits payable from the scheme shall be paid to the nominated beneficiary and if the deceased member had not named a beneficiary then the trustees shall exercise their discretion in the distribution of the benefits to the dependants of the deceased member.

If a spouse dies while in service the benefit payable to the surviving spouse and any other dependants shall only become due and payable when the registered insurer under which the deceased is insured admits the claim for the benefit.

The death benefits shall not form part of the assets in the estate of the deceased member.

17 When can employees retire and receive their full plan benefits? How does early retirement affect benefit calculations?

In accordance with the Income Tax (Retirement Benefit) Rules 1994, payment of pension shall not commence until member reaches 50 years of age. This is the early retirement age.

The Public Service Superannuation Scheme Act section 27 (1) sets the normal retirement age as 60 years and on attaining that age, such benefit shall be payable. Members may opt to receive lump sum payments that are calculated depending on whether the member makes or does not make contributions.

A member will receive full benefits when he or she retires before the normal retirement age if it is on the grounds of ill health or if the member permanently emigrates from Kenya to another country.

Where a member of a defined benefit scheme leaves employment before attaining retirement age he or she will receive not more than 50 per cent of the accrued benefits.

Members of defined contribution schemes shall receive his or her contributions and 50 per cent of the employer's contributions if he or she retires before attaining retirement age.

18 Are plans permitted to allow distributions or loans of all or some of the plan benefits to members that are still employed?

Regulation 8(1) of the Retirement Benefits (Mortgage Loans) Regulations provides that a member may, if the rules of the scheme permit, assign a portion (not exceeding 60 per cent) of his or her benefits to a scheme for the purposes of furnishing a guarantee in favour of an institution and in respect of a loan granted or to be granted by the institution to a member.

No scheme funds shall, however, be used to issue a direct or indirect loan to any person. This is in accordance with section 38(1a) of the Retirement Benefits Act.

19 Is the sufficiency of retirement benefits affected greatly if employees change employer while they are accruing benefits?

It is not greatly affected. The benefits accrued can be fully transferred to a new scheme and will only be subject to transfer values which are reviewed and certified by an actuary.

20 In what circumstances may members transfer their benefits to another pension scheme?

Transferring of benefits is provided for under Regulation 40 of the Occupational Retirement Benefit Schemes Regulations. Where an employee is moving from his of her previous employer to join a new employer he or she is to transfer membership from the previous scheme to the scheme sponsored by the new employer and the transfer value of the accrued rights will be transferred to the new scheme as well.

If the employer is undergoing any reorganisation or reconstruction and completes an arrangement with another employer to undertake the employee's rights and obligations under the scheme, the trusts of the scheme shall continue to have effect under the new employer.

21 Who is responsible for the investment of plan funds and the sufficiency of investment returns?

The manager is responsible for the investment of plan funds and the sufficiency of investment returns.

The Retirement Benefit Act defines a manager as a company whose business includes:

- undertaking, pursuant to a contract or other arrangement, the management of the funds and other assets of a scheme fund for the purposes of investment;
- providing consultancy services on the investment of scheme funds; or
- reporting or disseminating information concerning the assets available for investment of scheme funds.

Trustees are required to ensure that the scheme fund has appointed an independent fund manager registered under either the Retirement Benefits Authority or the Capital Markets Act to invest the scheme funds on their behalf.

The manager shall prepare, maintain and, after every three years, revise a written statement of the principles governing investment decisions for the purposes of the scheme or the pooled fund.

22 Can plan benefits be enhanced for certain groups of employees in connection with a voluntary or involuntary reduction in workforce programme?

No, under a retirement benefit plan, neither is a scheme nor the Authority to provide or approve of different pension factors and benefits where differentiation is based on wages, gender, race or any discriminatory factor.

23 Are non-broad based (eg, executive-only) plans permitted and what types of benefits do they typically provide?

No. Non-broad based plans are not permitted as plans are to be open to all members of the public or all members of said group for which they were formed.

24 How do the legal requirements for non-broad based plans differ from the requirements that apply to broad-based plans?

There are no legal requirements as non-broad based plans and broad based plans are not provided for legally in Kenya.

25 How do retirement benefits provided to employees in a trade union differ from those provided to non-unionised employees?

There is no difference between the benefits given to the two groups. Retirement benefit schemes in Kenya aim to show no difference or segregation when providing benefits. This is achieved by applying a uniform rate to all employees regardless of their membership in a trade union.

26 How do the legal requirements for trade-union-sponsored arrangements differ from the requirements that apply to other broad-based arrangements?

There arises no difference legally between the two as they are not expressly provided for under Kenyan law.

Enforcement

27 What is the process for plan regulators to examine a plan for periodic legal compliance?

Customarily schemes are required by law to make various submissions that in turn aid the regulators in examining whether it is complying with it. Such submissions, as provided for by section 34(4), include annual reports and a statement of audited accounts that must be submitted within three months after the end of each financial year. The scheme's record of contributions shall be submitted to the Authority by the 15th day of every third calendar month.

Actuarial valuations must be carried out on defined benefit schemes every three years and a copy of the valuation report must be submitted to the Retirement Benefits Authority within five months of end of financial year. Defined contribution schemes can also be valued but only on decision of the Authority.

Customarily, plan regulators can also examine scheme for legal compliance by attending the meetings of the scheme, which must be held at least twice a year.

One of the functions of the Authority is to regulate the management of retirement benefits schemes. This includes ensuring they are complying with the government policies relating thereto. The Chief Executive Officer of the Authority can, if so directed by the board, cause an inspection to be made by an inspector of any scheme registered under the Act. In the course of the inspection, all the administrators of the scheme shall make available to the inspector all the documents of the scheme and relating to the scheme as required.

The inspector shall then submit his report to the Chief Executive Officer indicating if there has been any breach of any of the requirements under the act and regulations.

28 What sanctions will employers face if plans are not legally compliant?

Various offences would result in the employer facing different sanctions. For example:

- under section 22(5) of the Retirement Benefits Act, non-registration of a scheme or a manager shall result in one being liable to a fine not exceeding 500,000 shillings or imprisonment for a term not exceeding two years; and
- sSection 34(4A) provides that, non-submission of a copy of the audited accounts to the Authority shall result in one being liable to a fine not exceeding 500,000 shillings or a prison term not exceeding two years and an additional 5,000 shillings per day if it is a continuing offence.

In addition to the above, the general penalty as provided under section 53 of the Act is, if an employer commits an offence it will be liable, on conviction, to a fine not exceeding 100,000 shillings or imprisonment of a term not exceeding one year.

If the scheme is not legally compliant, the CEO of the authority may appoint an interim administrator to assume control over the affairs of the scheme who will annually submit a report on the management and financial position of the scheme.

Under section 45 (2b), the chief executive officer may also remove any trustee, manager, custodian or administrator who has contravened any section under this Act.

Employers can also face sanctions under the Income Tax Act by failing to either register the scheme for tax purposes where the penalty shall be 100,000 shillings per month but not exceeding 1 million shillings, retain records and documents where the penalty shall be 10 per cent of amount payable, late submission of returns or avoidance of tax altogether, which will result in a penalty double the tax liability.

29 How can employers correct errors in plan documentation or administration in advance of a review by governing agencies?

The employer on identifying an error can liaise with the scheme trustees to amend the trust deed and rules in accordance with the procedure and the obligation is handed to the trustees to do the same under the trust deed and rules. The trustees must then prepare a deed of amendment and file it with the Authority. The amendments to the trust deed and rules require the consent of the employer and the Authority.

The employer is also mandated by section 34(3) of the Retirement Benefits Act to have an auditor audit accounts of the scheme fund. The auditor will then prepare an opinion letter setting out the errors in plan documentation and the rectifications that should be made.

The trustees and managers of the scheme can also report to the authority, in advance, any unusual occurrence that could affect the administration of the scheme, especially in relation to the rights of the members or sponsors, section 40(c) of the Retirement Benefits Act.

30 What disclosures must be provided to the authorities in connection with plan administration?

The disclosures that must be provided to the authorities are as follows:

- annual and audited accounts of the scheme within three months after end of financial year;
- annual reports containing statements of assets and liabilities of the scheme;
- actuarial reviews or reports of the scheme;
- statutory returns;
- return indicating the number and amount of guarantees issued including details of loans repaid and guarantees redeemed;
- statement of all investments of the scheme fund;
- record of contributions every quarter;
- investment policy on the investment of scheme funds;

- statement of scheme fund, investment portfolio and investment transactions; and
- report reviewing investment activity and performance of the investments and the manager's proposals.

31 What disclosures must be provided to plan participants?

In normal practice, members are allowed to make any inquiries with regard to the scheme, as the main purpose of the trust is for their benefit. This is contained in the trust deed and rules and any amendments made thereto. They are also entitled to receive a summary of the annual audited accounts and benefit statements within six months of the end of each financial year. This is as per Regulation 30(3b) of the Retirement Benefits (Occupational Retirement Benefit Schemes) Regulations.

32 What means are available to plan participants to enforce their rights under pension and retirement plans?

Customarily, retirement benefit plans are required to have in place internal dispute resolution procedures. There is a three-tier dispute resolution mechanism in place.

Plan participants have an option of engaging in alternative dispute resolution with the party assumed to be at fault, after which the said party will issue a response to the complaint.

Section 46 (1) enables a plan participant, dissatisfied by the decision to request, in writing, that the CEO of the Authority review the decision and ensure it was made in accordance with scheme rules and the Act.

If the plan participant is still not satisfied with the review of the CEO, then they may appeal to the Appeals Tribunal within 30 days of receipt of the CEO's decision under section 48 of the Retirement Benefits Act.

Plan changes and termination

33 What restrictions and requirements exist with respect to an employer's changing the terms of a plan?

Consent from the employer is required by the trustees to amend the scheme's rules. Approval from the Authority and the Commissioner of Income Tax must also be sought.

The amendments being made should:

- not vary the main purpose of the scheme;
- not authorise any payment to the employer unless said scheme is being dissolved.
- not diminish or invalidate any pension already being paid in accordance with the rules or any rights or interests which shall have accrued to a member in respect of pension benefits secured under the scheme;
- not extend the operation of the scheme beyond the trust period of the scheme;
- not prejudice or cause withdrawal of approval or registration of the scheme under the Income Tax Act or the Retirement Benefit Act;
- not purport to affect any right of a creditor of the scheme other than as a member;
- not purport to invalidate or reduce accrued rights and interests of the employer and members of the scheme;
- be approved by the Retirement Benefit Act; and
- be referred to an actuary if the amendments will affect financial position of scheme.

34 What restrictions and requirements exist with respect to an employer terminating a plan?

Customarily, an employer will be considered to have terminated a plan only in the following events.

- Discontinuing of payments of contributions:
  - if the employer ceases to exist or for any other reason ceases to operate and some other statutory body has not been empowered to undertake the rights and obligations of the employer;
  - if the employer is going into liquidation other than for the purpose of reconstruction or amalgamation with any other company;
  - if the contributions being paid by the employer and reasonably expected from it in the future are so low as to affect the long-term financial position of the scheme; and
  - if the employer fails to remedy any breach of its obligations under this trust deed or the rules within the required number of days.

Some employers close their plans to future accrual and continue to fund the scheme. This option is available to defined benefit schemes and they will continue operating as closed schemes.

The employer must give written notice to trustees indicating intent to discontinue contributions. The trustees shall then take into account the relevant circumstances and ask an actuary to propose an arrangement providing for the benefits and contributions of the scheme. This agreement will be submitted to the employer and trustees to determine whether the scheme will be wound up.

The trustees must pass a resolution that is to be approved by the Authority.

A liquidator shall be appointed to wind up the affairs of the plan and is to submit to the Authority preliminary accounts signed and certified by him as a correct record. This statement of preliminary accounts shall also be submitted to members. Fees payable to the liquidator shall be borne by the scheme.

A notice stating that the preliminary accounts above are open for inspection by interested persons shall be published in the Gazette.

35 What protections are in place for plan benefits in the event of employer insolvency?

Retirement Benefits (Minimum Funding Level and Winding up of Schemes) Regulations govern the winding up of schemes.

Regulation 5(7) provides that, in the winding up of a plan, value of interests and benefits of the members shall be ascertained in such manner as the court may direct. Benefits accrued will not be affected during employer insolvency. The total moneys in the fund shall be applied to provide benefits for all members on an equitable basis. Members will have the option of transferring such benefit to another registered retirement benefit scheme. Regulation 9(4) provides that members will also have the option of being issued guarantees from the new scheme they are transferring to if they were affected by the winding up of their previous one. The liquidator shall be required to provide for the distribution of surpluses under Regulation 5(8A).

Pension schemes can also be established as irrevocable trusts ensuring the assets of the beneficiaries are protected and cannot revert back to employer in instances of insolvency. Section 24(1) of the Act provides for this.

36 How are retirement benefits affected if the employer is acquired?

In practice, where an employer is acquired and the acquiring body does not undertake the rights of the employer then the trust is considered to have been terminated and the benefits accrued become due.

If the new employer takes on the rights, they are to prepare a deed of adherence undertaking the rights of the previous employer. The deed sets out that the new employer takes on the years of service and will allow the old members to continue participating in the new scheme.

Members can transfer their benefits wholly to another scheme where their pensionable service under the previous employer will be regarded as service with the new employer.

37 Upon plan termination, how can any surplus amounts be utilised?

Under Regulation 7(n) of the Occupational Retirement Benefit Schemes Regulations, every scheme shall have rules that provide for a manner of determining surplus and deficit and disposing of such surplus or providing for such deficit.

As per Regulation 8A of the Retirement Benefits (Minimum Funding Level and Winding Up of Schemes) Regulations on winding up of schemes, the liquidator shall provide for the distribution of surpluses on a 50-50 basis between the members and the sponsor.

However, section 22(A) (7) and 8(10) (b) of the Income Tax Act provides that where a registered fund is wound up, any surplus funds therein shall be deemed to be the funds of the employer and shall be immediately withdrawn by the employer unless the trust deed in respect of such registered fund specifies the contrary.

Update and trends

A new regulation of the Retirement Benefits Act, the Retirement Benefits (Umbrella Retirement Benefits Schemes) Regulations, 2017 introduces into Kenya's pension sector, a new type of pension scheme. This is the umbrella scheme that will provide benefits to members employed by several employers and will be a contributory scheme.

The retirement benefits sector has also greatly developed in the aspect of protection of members' benefits and governance of schemes as a result of the recent legislation.

Fiduciary responsibilities

38 Which persons and entities are 'fiduciaries'?

The term 'fiduciary' was originally used in the common law to describe the nature of the duties imposed on a trustee. The trustees of the scheme are therefore the fiduciaries as they are required to act in the best interests of members, and impartially. Their obligations to the employer are limited unless stated otherwise in the trust deed and rules.

39 What duties apply to fiduciaries?

The fiduciaries have a duty not to benefit from the trust and not to delegate the trust.

They are to act in the best interests of the members and ensure the scheme is administered in accordance with the trust deed and rules. In the course of discharging their duty they are not to put themselves in a position where their personal interest and their duty as a trustee conflict. Their duties are:

- administering scheme in accordance with provisions of the Act;
- keeping all proper books of records of account;
- computing and preparing statements of payments of benefits to members;
- liaising with the authority and the other scheme administrators;
- collecting and updating data with respect to each member;
- updating the sponsor each quarter on all matters regarding the scheme;
- ensuring contributions have been remitted to the custodian;
- ensure scheme funds have been invested by a manager, appointed by themselves;
- communicate regularly with the members with respect to affairs of the scheme;
- ensure all documents binding scheme are professionally prepared;
- convening annual meeting for members; and
- ensuring all minutes, statements and resolutions are properly kept and maintained.

40 What are the consequences of fiduciaries' failing to discharge their duties?

The general penalty for breach of trust is sanctions imposed on the fiduciary as given within the Retirement Benefits Act under section 53. The sanctions may vary through the act with regard to specific offences committed. Common law also sets civil penalties and prohibitions as consequences a trustee would face where they failed to impose due duty of care.

Most scheme rules contain provisions that indemnify the trustees when they exercise power on a matter where they had a personal interest in the result. However, they must disclose the same to other trustees and the sponsor.

This exclusion from personal liability does not extend to situations where the trustee has engaged in fraud and professional negligence.

Trustees shall also not be victimised, removed from office or discriminated against for having performed their functions under the scheme's trust deed and rules.

Legal developments and trends

41 Have there been legal challenges when certain types of plans are converted to different types of plan?

When it comes to conversion of plans, the stem of the problem is the lack of a clear and specific legislation to govern the process. Conversion of schemes is mostly done as an amendment to the rules and not as a process.

The lack of these kinds of rules results in numerous challenges. In practice, the employer can exercise its discretion on how to fund the new scheme. They can force all members to transfer to the scheme, a matter that should be decided by the member. The employer should operate the old scheme as a closed scheme up until all pending dues, to the members especially, have been paid.

Conversion of defined benefit to defined contribution plans has led to lower benefit levels and, as stated above, such matters are left to the discretion of the employee, thus not providing the members with an avenue to protest.

Recently, numerous schemes have been accused by former employees of miscalculation of the benefits they receive on retirement thus resulting in inadequacy of said benefit. This challenge is mainly in defined benefit schemes as said schemes are based on final pensionable salary, a sum that is inadequate to support members comfortably on retirement.

42 Have there been legal challenges to other aspects of plan design and administration?

Legal challenges mostly concern compliance with the Retirement Benefits Act, its regulations and all other legislations that govern the sector of with scheme complying by the scheme. Examples of such challenges include non-remittance of contributions, non-submission of requisite documents to the authority, commutation of retirement benefits.

The office of the trustees has also resulted in legal challenges especially with regard to their duties. So much so that it was recently legislated that trustees are not to be victimised for performing in their power in accordance with the scheme rules.

43 How will funding shortfalls, changing worker demographics and future legislation likely affect private pensions in the future?

Funding shortfalls mainly affect defined benefit schemes.

If the problem befell a defined contribution scheme it would probably be a result of wrong computing or entering of data during the actuarial valuation. These actuarial reviews can guide the employer in setting the contribution rate of the scheme. Within the three years the scheme funds may not perform as expected. This will affect the investment return and the benefits funded by it.

The problem of funding shortfalls therefore affects both private and state pensions. In the future, most defined benefit schemes will be converted to defined contribution schemes as per a government circular resolution. If a sponsor is faced with a funding shortfall, the burden will be eased on conversion as the members' contributions will go towards the funding of the scheme.

Legislation always impacts the retirement benefits sector. The impact may at times be positive and result in better administration and governance of pensions because the main aim of said legislation is to protect the beneficiaries of the scheme. It will also better protect the scheme administrators. However, sometimes the impact may be negative and maybe not favour employers. Such laws will in turn not motivate the employer and may delay the provision of benefits. Legislation should be of an impartial nature and be considerate of all parties. It should not be restrictive but instead be progressive. Recently Regulation 7(g) of the Retirement Benefits (Occupational Retirement Benefits Schemes) Regulations was amended by Legal Notice 111 of 2015 to limit the re-election term of trustees to only one further term of three years. This may negatively affect the employer as the constant shift in trustees every six years may lead to delayed and disconnected decision making.

Change in worker demographics will greatly expand the pensions and retirement benefits sector, as it will have to develop to accommodate all workers. An example is the Mbao Pension Plan, which is for persons employed in the informal sector. This plan's membership will increase in size with the development of the informal (Jua Kali) sector. The New NSSF Act, which is yet to be implemented, is considered a game changer in the pensions industry as it aims to covering everybody including members of the informal sector and the self-employed. It now encourages all employers and employees to contribute towards it.

This change will also result in more types of benefits being provided to various demographic groups such as the elderly and women. The New NSSF Act will introduce new benefits such as:

- withdrawal benefit for members who opt to retire before attaining the retirement age;
- emigration grant that is paid to members of the scheme who permanently emigrate outside Kenya. This would be in accordance with globalisation and the increase in workers seeking international employment; and
- a funeral grant that is payable to a dependant of a deceased member nominated by the family and identified by the local administration.

MMAN ADVOCATES

Carole Ayugi **cayugi@mman.co.ke**
Allison Amondi **alloyd@mman.co.ke**

1st Floor, Wing B, Capitol Hill Square
Off Chyulu Road, Upper Hill
PO Box 8418
Nairobi 00200
Kenya

Tel: +254 202 596994/+254 718 268683
www.mman.co.ke

Getting the Deal Through

Acquisition Finance
Advertising & Marketing
Agribusiness
Air Transport
Anti-Corruption Regulation
Anti-Money Laundering
Arbitration
Asset Recovery
Aviation Finance & Leasing
Banking Regulation
Cartel Regulation
Class Actions
Commercial Contracts
Construction
Copyright
Corporate Governance
Corporate Immigration
Cybersecurity
Data Protection & Privacy
Debt Capital Markets
Dispute Resolution
Distribution & Agency
Domains & Domain Names
Dominance
e-Commerce
Electricity Regulation
Energy Disputes
Enforcement of Foreign Judgments
Environment & Climate Regulation
Equity Derivatives
Executive Compensation & Employee Benefits
Financial Services Litigation
Fintech
Foreign Investment Review
Franchise
Fund Management
Gas Regulation
Government Investigations
Healthcare Enforcement & Litigation
High-Yield Debt
Initial Public Offerings
Insurance & Reinsurance
Insurance Litigation
Intellectual Property & Antitrust
Investment Treaty Arbitration
Islamic Finance & Markets
Labour & Employment
Legal Privilege & Professional Secrecy
Licensing
Life Sciences
Loans & Secured Financing
Mediation
Merger Control
Mergers & Acquisitions
Mining
Oil Regulation
Outsourcing
Patents
Pensions & Retirement Plans
Pharmaceutical Antitrust
Ports & Terminals
Private Antitrust Litigation
Private Banking & Wealth Management
Private Client
Private Equity
Product Liability
Product Recall
Project Finance
Public-Private Partnerships
Public Procurement
Real Estate
Restructuring & Insolvency
Right of Publicity
Securities Finance
Securities Litigation
Shareholder Activism & Engagement
Ship Finance
Shipbuilding
Shipping
State Aid
Structured Finance & Securitisation
Tax Controversy
Tax on Inbound Investment
Telecoms & Media
Trade & Customs
Trademarks
Transfer Pricing
Vertical Agreements

Also available digitally

Online

www.gettingthedealthrough.com

Law Business Research

Pensions & Retirement Plans
ISSN 2052-8310

THE QUEEN'S AWARDS FOR ENTERPRISE: 2012

LACCA
LATIN AMERICAN CORPORATE COUNSEL ASSOCIATION

Official Partner of the Latin American Corporate Counsel Association

ABA Section of International Law
Your Gateway to International Practice

Strategic Research Sponsor of the ABA Section of International Law