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LEGAL ALERT

WAY FORWARD ON NATIONAL SOCIAL SECURITY FUND (NSSF) CONTRIBUTIONS AFTER COURT OF APPEAL OVERTURNS EMPLOYMENT AND LABOUR RELATIONS COURT DECISION ON THE CONSTITUTIONALITY OF THE NSSF ACT, 2013

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On 3rd February 2023, a three-judge bench of the Court of Appeal handed down its decision in Civil Appeal No. 656 of 2022 – The National Social Security Fund Board of Trustees v. The Tea Growers Association & 14 Others, by which it overturned the Employment and Labour Relations Court's (the "ELRC") judgment issued on 19th September 2022 that had declared the National Social Security Fund Act, 2013 (the "NSSF Act") unconstitutional. The basis of the decision by the Court of Appeal is that the ELRC lacked jurisdiction to adjudicate over the matter as the dispute was not within the purview of an employer-employee dispute, but was rather a question of the constitutionality of the NSSF Act.

Additionally, the Court of Appeal overturned the ELRC's decision holding that the NSSF Act was unconstitutional on the basis that the Senate did not review the precursor NSSF Bill during the enacting process. The Court of Appeal held that the NSSF Act did not fall within the functional areas listed under the Fourth Schedule to the Constitution of Kenya 2010, that required the concurrence of both the National Assembly and the Senate before enactment.

The effect of this decision is that the NSSF Act was declared constitutional, thereby becoming operational. The NSSF Act sought to, amongst others, increase the amount of money contributed towards the NSSF Fund by employees and employers.

What does this mean for employees?

The operationalisation of the NSSF Act means that the pension contribution will be increased to 12% of the pensionable wages apportioned as follows; 6% shall be contributed by the employee while the other 6% shall be contributed by the employer. The total amount to be contributed towards NSSF Fund by both employers and employees shall therefore be increased from KES 400 to a maximum of KES 2,160 for workers earning more than KES 18,000.

What does this mean for employers?

Pursuant to Section 19(1) of the NSSF Act, every employer who employs one or more employees under a contract of service is required to register with the NSSF Fund as a contributing employer as well as register their employee(s) as members of the Fund. Failure to register as aforementioned amounts to an offence under the Act which attracts a penalty of a fine not exceeding KES 50,000.

Employers are also required to make Tier I mandatory contributions and make sure that their payroll systems are adjusted to fortify that NSSF deductions comply with the NSSF Act.

Similarly, employers are required to make Tier II contributions to the NSSF Fund. However, employers can opt-out of the NSSF and make the Tier II contributions to any other approved registered retirement scheme subject to the approval of the Retirement Benefits Authority.

What are the key takeaways from the NSSF Act

The NSSF Act is aimed at enhancing basic social security for its members. NSSF contributions are now contingent on the employee's salary, meaning the higher the income, the higher the contribution.

Disclaimer

This alert is for informational purposes only and should not be taken to be or construed as a legal opinion. If you have any queries or need clarifications, please do not hesitate to contact Jacob Ochieng, Partner, (jacob@oraro.co.ke) and Anne Kadima, Senior Associate, (anne@oraro.co.ke) or your usual contact at our firm, for legal advice.

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