

## LEGAL ALERT ACCESS TO BENEFITS

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### 1.0 INTRODUCTION

The Cabinet Secretary (CS) in charge of the National Treasury and Planning is mandated by Section 55 of the Retirement Benefits Act to make Subsidiary Legislation.

Based on these powers, the CS made amendments to the Retirement Benefits (Occupational Retirement Benefits Schemes) Regulations through Legal Notice No. 88 of 2019 in which the following proposals were made: -

- (a) That the distribution of reserve funds be made to exiting members where the Pension Scheme maintains a reserve fund; and
- (b) Where the reserve fund exists or is created, a maximum reserve cap of 5% of the Scheme Fund be maintained.
- (c) That whilst Regulation 19(5)(a)(ii) allowed a person who retires early to access 100% of their own contribution and 50% of the employer's contribution; the new proposal was for the person to only access 100% of their own contribution but none of employer contribution until retirement age.

Following these proposals, the Committee on Delegated Legislation that is created by the National Assembly under its Standing Orders and is mandated to scrutinize all Subsidiary Legislation considered the proposals.

In particular, the Committee interviewed the Retirement Benefits Authority and in particular, took special interest in the memorandum to the Committee that was sent to it by a member of a Scheme who cited violations of his rights as a member of a Scheme.

### 2.0 RECOMMENDATIONS

The Committee observed that: -

- (a) There was insufficient public participation

## THE PENSIONS DIVISION



- (b) The CS did not provide a Regulatory Impact Statement
- (c) The Regulation made rights, liberties and obligation unduly dependent upon non-reviewable decisions and insufficiently defined powers as most decisions would be made by pension fund managers.

Subsequently, it was recommended that the National Assembly annuls the Legal Notice in entirety.

The Report was tabled to the National Assembly on 12<sup>th</sup> November 2019 and the House adopted the Report of the Committee on Delegated Legislation to annul the Retirement Benefits (Occupational Retirement Benefits Schemes) (Amendment) Regulations, 2019 (Legal Notice No.88 of 2019)

This means that the position **reverts to the previous position** where members who leave employ (resign or change jobs) or who retire early will be allowed to access 100% of their own contributions and in addition they can also access 50% of their Employers contributions. Members who left service and received payments after 13<sup>th</sup> June 2019 when Legal Notice No 88 was deemed to have come into effect can make successful claims to the withheld portion in addition to investment income

In effect, only 50% of their Employers contributions will be held in the Scheme and accessed when the member reaches retirement age.

The Retirement Benefits Authority through the CS may still introduce the preservation of Employers Contribution regulation once it satisfies the requirements on public participation and Regulatory Impact Assessment.

However, the position now reverts to the status before the now annulled proposal and Pension Schemes need not amend their Trust Deeds and Rules.

For more information or clarification on this alert, kindly contact us on the below address:-

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**APPENDIX 1**

**EXTRACT OF THE REPORT OF THE COMMITTEE**

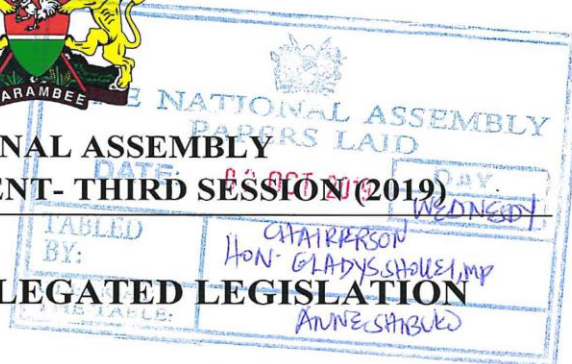


Approved for tabling, *Pat* SWA  
2/10/19



THE NATIONAL ASSEMBLY  
TWELFTH PARLIAMENT- THIRD SESSION (2019)

COMMITTEE ON DELEGATED LEGISLATION



## REPORT ON THE CONSIDERATION OF

- i. The Retirement Benefits (Occupational Retirement Benefits Schemes) (Amendment) Regulations, 2019 (*Legal Notice No. 88 of 2019*); and
- ii. The Insurance (Motor Vehicles Third Party Risks) (Certificate of Insurance) (Amendment) Rules, 2019 (*Legal Notice No. 92 of 2019*);

OCTOBER, 2019

*Directorate of Committee Services*  
The National Assembly,  
Parliament Buildings, Continental House, Room 402  
**NAIROBI.**





## 2.0 CONSIDERATION OF THE INSTRUMENTS

### 2.1 Retirement Benefits (Occupational Retirement Benefits Schemes) (Amendment) Regulations, 2019

#### 2.1.1 Introduction

1. The Retirement Benefits (Occupational Retirement Benefits Schemes) (Amendment) Regulations, 2019 were made by the Cabinet Secretary Treasury pursuant to section 55 of the Retirement Benefits Act (No 3 of 1997).
2. The Regulations were published in the Gazette as *Legal Notice No 88* of 2019 on the 13<sup>th</sup> of June, 2019, received by the Clerk of National Assembly on the 21<sup>st</sup> of June, 2019 and tabled before the House on 21<sup>st</sup> June 2019.<sup>1</sup>

#### 2.1.2 Purpose of the Regulations

3. The Regulations seek to amend various provisions of the Retirement Benefits (Occupational Retirement Benefits Schemes) Regulations, 2000 (Legal Notice 119 of 2000) with the following implications –
  - (i) To expand the requirements of the contents of the Scheme rules to include **the distribution of reserve funds to exiting members where the scheme maintains a reserve fund;**
  - (ii) While Regulation 19(5)(a)(ii) of the Principal Regulations allows a person who opts to retire early to access his/her own contribution and fifty *per cent* (50%) of his employer's contribution and the investment income that has accrued in respect of those contributions, where he/she is a member of a defined contribution scheme, the amendment **seeks to delete these benefits to a person opting to retire early;**
  - (iii) To limit a reserve fund where one is created, to a **maximum of five per cent of the total value of the scheme fund.**

#### 2.1.3 Summary of the Regulations

4. The Regulations propose to amend the Principal Regulations, i.e. the Retirement Benefits (Occupational Retirement Benefits Schemes) Regulations, 2000 (LN 119/2000) by –
  - (i) inserting the following new paragraph immediately after paragraph (0—  
*(fa) the distribution of reserve funds to exiting members where the scheme maintains a reserve fund.*
  - (ii) deleting the words "and fifty percent of his employer's contribution and the investment income that has accrued in respect of those contributions" appearing in Regulation 19(5)(a)(ii) of the principal Regulations.

<sup>1</sup> Annexure I: LN 88 of 2019

- (iii) deleting the word "may" and substituting therefor the word "shall" in paragraph (6) Regulation 25 of the principal Regulations.
- (iv) deleting paragraph (2) of Regulation 33 of the principal Regulations and substituting therefor the following new proviso—

*Provided that—*

- (i) a scheme shall not create and maintain a reserve fund that exceeds five percent of the total value of the scheme fund; and*
- (ii) the Authority may, in writing, require the trustees to adjust the reserve fund to such levels as it may determine.*

## 2.1.4 Scrutiny of the Instrument

5. Pursuant to section 16 of the Act, the Committee held a meeting with the regulation making authority on 18<sup>th</sup> of August, 2019 in Mombasa where the authority made a presentation to the Committee on the proposed changes to the Retirement Benefits (Occupational Retirement Benefits Schemes) Regulations, 2000. The Authority further informed the Committee that pension sector stakeholders were consulted prior to amendments to the principal Regulations.
6. The Committee's attention was drawn to a memorandum addressed to the Committee dated 6 August, 2019 by **Mr. Eliud Ogutu**<sup>2</sup> who cited various violations of his rights as a member of the Stanbic Bank Kenya Ltd Staff Retirement Benefits Scheme. He observed that the amendment will deny him access to investment income accrued from his own contributions. He also cited lack of public participation by the regulation making authority.
7. Members weighed the pros and cons of the impact of the amendment, with some supporting while others expressing concerns that the amendment will frustrate members of pension schemes who wish to exit and use their contributions to increase their incomes or sustain themselves in absence of any other source of income.

## 2.1.5 Committee Observations

8. The Committee observed THAT –
  - (i) the Regulations were submitted to the National Assembly within the statutory timelines contemplated under section 11(1) of the Statutory Instruments Act having been published on the 13<sup>th</sup> of June, 2019, received by the Clerk of National Assembly on the 21<sup>st</sup> of June, 2019 and tabled on the 21<sup>st</sup> June, 2019;
  - (ii) the regulation making authority did not demonstrate sufficient public participation contrary to Articles 10 and 118 of the Constitution and section 5 and 5A of the SI Act on the Regulations. There was a complaint through a memorandum addressed to the Clerk of the National Assembly by a member of the public (Mr. Eliud Ogutu, a lawyer and Member of the Stanbic Kenya Retirement Benefits Scheme) detailing

<sup>2</sup> Annexure 2: Letter dated 6<sup>th</sup> August, 2019 by Mr. Eliud Ogutu

lack of public participation and how his rights are adversely affected by the Regulations.

- (iii) the Regulations are likely to impose significant costs on the persons who may opt for early retirement or change schemes hence ought to have been accompanied with a Regulatory Impact Statement within the meaning of Sections 6, 7, and 8 of the Act which should have been notified in the *Gazette* and in a newspaper likely to be read by members of the various occupational retirement benefits schemes under the Act, as required by section 8(1) of the Statutory Instruments Act.
- (iv) contrary to section 13(k) of the Statutory Instruments Act, the Regulations makes rights, liberties or obligations unduly dependent upon non – reviewable decisions.
- (v) contrary to section 13(m) of the Act, the Regulations make rights, liberties or obligations unduly dependent on insufficiently defined administrative powers as most decisions would be by the pension fund managers.

### 2.1.6 Committee Recommendation

9. Having examined the Retirement Benefits (Occupational Retirement Benefits Schemes) (Amendment) Regulations against the Constitution of Kenya, the Statutory Instruments Act (No 23 of 2013), the Retirement Benefits Act (No.3 of 1997 and the Interpretations and General Provisions Act (*Cap 2*) Laws of Kenya, the Committee **recommends that the House annuls in entirety the said statutory instrument** for the following reasons –
- (i) **insufficient public participation contrary to Articles 10 and 118 of the Constitution and section 5 and 5A of the SI Act.**
  - (ii) **the Regulations were not accompanied with a Regulatory Impact Statement within the meaning of Sections 6, 7, and 8 of the Act which should have been notified in the *Gazette* and in a newspaper likely to be read by members of the various occupational retirement benefits schemes under the Act, as required by section 8(1) of the Statutory Instruments Act.**
  - (iii) **contrary to section 13(k) of the Statutory Instruments Act, the Regulations makes rights, liberties or obligations unduly dependent upon non – reviewable decisions.**
  - (iv) **contrary to section 13(m) of the Act, the Regulations make rights, liberties or obligations unduly dependent on insufficiently defined administrative powers as most decisions would be by the pension fund managers.**



**EXTRACT OF THE HANSARD REPORT OF 12<sup>TH</sup> NOVEMBER 2019**



ADOPTION OF REPORTS ON ANNULMENT OF THE RETIREMENT BENEFITS (OCCUPATIONAL RETIREMENT BENEFITS SCHEMES) (AMENDMENT) REGULATIONS, 2019 AND THE INSURANCE (MOTOR VEHICLES THIRD PARTY RISKS) (CERTIFICATE OF INSURANCE) (AMENDMENT) RULES, 2019

THAT, this House adopts the Report of the Committee on Delegated Legislation on its consideration of the Retirement Benefits (Occupational Retirement Benefits Schemes) (Amendment) Regulations, 2019 (Legal Notice No.88 of 2019) and the Insurance (Motor Vehicles Third Party Risks) (Certificate of Insurance) (Amendment) Rules, 2019 (Legal Notice No.92 of 2019), laid on the Table of the House on Wednesday, 2<sup>nd</sup> October 2019, and pursuant to the provisions of Section 18 of the Statutory Instruments Act, 2013 and Standing Order No.210(4)(b) annuls in entirety -

- (i) The Retirement Benefits (Occupational Retirement Benefits Schemes) (Amendment) Regulations, 2019 (Legal Notice No. 88 of 2019); and,
- (ii) The Insurance (Motor Vehicles Third Party Risks) (Certificate of Insurance) (Amendment) Rules, 2019 (Legal Notice No. 92 of 2019).

*(Hon. George Gitonga on 7.11.2019)*

*(Debate concluded on 7.11.2019)*

**Hon. Speaker:** Again, Hon. Members, the debate on this Motion was concluded last week. What remained was for the Question to be put, which I hereby do.

*(Question put and agreed to)*

Next Order!

**BILL**