New NSSF Act - Providing Absolute Clarity

Background

The National Social Security Fund ("NSSF") bill was passed by parliament on 4th December 2013, received presidential assent on December the 24th 2013, gazzetted on 27th December 2013 making it the NSSF Act No. 45 of 2013 with the effective date being January 10th 2014. On 21st January 2014, the NSSF acting Managing Trustee published a Public Notice in the local dailies advising employers to make arrangement to submit the NSSF contributions as per the new Act and computation guidelines from January 2014.

Employers however lobbied the Labour ministry citing that the period from assenting, gazzettment and commencement of the Act was too short and there were various grey areas within the law that the NSSF and the Labour Ministry needed to clarify before the New Act took effect. This led to the Labour Cabinet Secretary suspending the effective date to May 31st 2014 to enable employers make the necessary adjustments.

The new Act repeals the previous NSSF Act Chapter 258 Laws of Kenya. It is expected the new NSSF Act will increase contributions from the current level of Kshs 1.2 billion/month to Kshs 15billion/month.

We examine below in summary the key highlights and what will be the implications to employers and their employees.

Old fund versus new fund

The new Act sets up a Pension Fund covering individuals of eighteen years old or above in the formal sector and a Provident Fund for self-employed persons who voluntarily register to be members of the Fund. The repealed NSSF Act had only the Provident Fund. The main difference between these retirement funds is payment method of benefits upon retirement.

All formal industry members of the old Provident Fund on the effective date become members of the Pension Fund while members making voluntary contributions to the old Provident Fund will be covered by the new Provident Fund.

The liabilities of the Old Provident Fund are to be settled and the Provident Fund closed within five years from the new Act effective date.

Registration & Contributions (employees, employers & volunteers)

The repealed NSSF Act provided contributions of Kshs 400 per employee, made up of Kshs 200 deducted from employee's pay and Kshs 200 from the employer.

The new contributions will be at 12% of the monthly employee's **pensionable pay**, with 6% deducted from the employee and 6% contributed by the employer. The contribution will be deducted in a two Tier contributions system i.e.;

- ✓ Tier I referring to the monthly contributions of pensionable earnings up to the **lower earnings limit**; and
- ✓ Tier II monthly contributions above the lower earnings limit but below the **upper earnings limit**.

The lower earnings limit, with the exception of the first four years (2014-2017) from the NSSF Act effective date (May 31st 2014) is the amount gazetted by the Cabinet Secretary as the average statutory minimum monthly basic wage for the top urban centers, second tier urban centers and rural areas for the year.

The upper earnings limit, with the exception of the first four years from the NSSF Act effective date will be four times the National Average Limit.

For the first four years from May 31st 2014, the contributions will be as follows;

Year	Lower Earnings Limit	Upper Earnings Limit
2014 (1st year)	6,000	50% times National Average Limit
2015 (2nd year)	7,000	1 times National Average Limit
2016(3rd year)	8,000	2 times National Average Limit
2017 (4th year)	9,000	3 times National Average Limit
2018 (5th year)	Amount gazetted by the Cabinet Secretary as the average statutory minimum monthly basic wage for the top urban centers, second tier urban centers and rural areas for the year	4 times National Average Limit

Where;

1. Pensionable earnings are the lower of the member's **monthly wages** and the **Upper Earnings Limit**;
2. *Monthly wages* is the gross earnings of the employee minus any fluctuating earnings; and
3. *National Average Earnings* being the average wage earnings per employee as published by the Kenya National Bureau of Statistics in the Economic Survey for the prior year. The National Average Earnings for financial year 2012 is Kshs 36,000.

Note that there is no mandatory contributions for amounts above the upper earnings limit.

Illustration

New NSSF Monthly Contributions Financial year 2014 From May 31st 2014						
Gross income	15,000	18,000	50,000	100,000	500,000	1,000,000
Pensionable earnings = 50% of 36,000 or monthly wages whichever is lower	15,000	18,000	18,000	18,000	18,000	18,000
Tier I base (6,000 for 2014 as per above table)	6,000	6,000	6,000	6,000	6,000	6,000
Tier II base (Difference between Tier I & pensionable earnings)	9,000	12,000	12,000	12,000	12,000	12,000
Amounts above upper earnings limit.	-	-	32,000	82,000	482,000	982,000
NSSF Contributions - Tier 1 (6% 0f Tier I base)	**360**	**360**	**360**	**360**	**360**	**360**
NSSF Contributions - Tier 1 (6% 0f Tier II base)	**540**	**720**	**720**	**720**	**720**	**720**
Total employee's deductions (6%)	**900**	**1,080**	**1,080**	**1,080**	**1,080**	**1,080**
Total employer's contributions (6%)	**900**	**1,080**	**1,080**	**1,080**	**1,080**	**1,080**
Total Monthly NSSF contributions (12%)	**1,800**	**2,160**	**2,160**	**2,160**	**2,160**	**2,160**

The employer is not permitted to deduct the employer's contribution from the employee's earnings. The employer shall remit his/her part from their own resources and remit the amounts to the employee's account.

Taxwise

Contracting out by the employer
Contracting out refers to where employers opt to pay Tier II contributions into a contracted out scheme they participate in or opts to establish/participate in.

A contracted out scheme refers to an occupational retirement benefits scheme including an umbrella retirement benefits scheme or an individual retirement benefit scheme which has been approved and registered by the Retirement Benefits Authority ("RBA").

The employer has to make a written request to RBA of its intention to opt out at least 60 days before contracting out. The application has to set out the details of the contracted out scheme. The proposed contracted out scheme must be registered with the RBA, have a valid exemption from the Kenya Revenue Authority, complies with investment guidelines in the RBA and any requirements prescribed by the RBA and the NSSF Act and maintains an accurate record of the Protected rights in a manner prescribed by the RBA.

Within 30 days from receipt of the application, the RBA shall respond indicating its approval or otherwise and notify the NSSF Board. If no application is lodged, NSSF will receive full mandatory contributions. Note that opting out is only applies to Tier II contributions. Tier I contributions have to be paid to the NSSF.

Exemption from Income Tax
Any contributions at the prescribed rates (6%) to the Pension Fund or a contracted out scheme will be tax deductible for both employers and employees without being affected by any other written Law in Kenya. Meaning that the contributed amounts are deducted before taxation of the employer or employee. This is in conflict with the Kenya Income Tax Act where pensions contributed are capped to Kshs 20,000/month for employees.

The NSSF Fund investment income, benefits payable by the Fund and under protected rights in the contracted out scheme and any property vested in the Fund are tax exempt.

Voluntary contributions
This refers to contributions which a member may choose to pay to Fund in order to secure benefits. Any person not in formal employment may choose to make contributions to the Provident Fund. Minimum aggregate contributions in a year of Kshs 4,800, with monthly minimum contributions being Kshs 200. The fund shall notify members of the receipt of contributions.

Individual accounts
Each member will have an individual credit account where contributions will be credited. The individual Pension credit account will have a breakdown of Tier I and Tier II contributions splitting them between employee and employer's contributions, any transfer payments and interest credited into the account.

An Individual Provident Fund Credit on the other hand shall show at any particular date, a full breakdown of voluntary contributions, any transfer payments and interest credited.

All members will be entitled to an annual benefit statements and on request at any time.

Exempted parties
An exempt person shall not be registered as a member of the Fund. The individuals exempted from the contributions are;

- Persons entitled to exemption from contribution to social security under any International Convention; and

- Non-resident persons employed in Kenya for periods not exceeding three years at any one time or such longer periods as the Cabinet Secretary may allow, who contribute to a similar social security scheme in their resident countries.

However an exempt person may elect to register as a voluntary contributor thus being a member of the provident fund.

Benefits
Benefits are based on the member's size account. Investment income (interest) will be credited to the accounts of the members at such rates as the NSSF Board may on being advised by an actuary or other qualified person. The frequency of interest allocation is at least annually.

The benefits falls in two categories i.e. Pension and Provident Fund benefits. Under the Pension fund, a member is entitled to retirement pension, invalidity pension, survivors' benefit, funeral grant and emigration benefit while the Provident fund benefits are age, survivors', invalidity, withdrawal and emigration benefits.

Cost of non-compliance
Delayed or incorrect contributions will result in a 5% of the due contributions penalty per month.

Any person convicted of misrepresentation or non-disclosure of any material facts and receives any benefit that there not entitled to is liable to a fine not exceeding Kshs 300,000 or a 3 months imprisonment or both.

Employers' failure to register attracts a fine not exceeding Kshs 50,000.

The Act provides for a general penalty of Kshs 100,000 for any offences not expressly provided for in the Act.

Management and oversight of NSSF
The NSSF Board of Trustees is vested with the responsibility of directing and managing the fund. The board is comprised of Chairperson appointed by the Cabinet Secretary from among the Trustees, two Principal Secretary one responsible for finance and the other Social Security, two persons, one of whom is of opposite gender nominated by representative employers' organization in the country, two persons, one of whom is of opposite gender nominated by representative employees' organization in the country, three other persons who are not public officers appointed by the Cabinet Secretary based on their knowledge and experience in NSSF administration relevant fields.

With the increases in contributions, the NSSF needs to strengthen its corporate governance. The NSSF Act thus provides that the NSSF will be subject to the RBA like all other registered schemes. NSSF will thus comply with the RBA Act and regulations that includes investments in accordance with the investment guidelines, compliance with finance and disclosure requirements and investment and custody by external registered fund managers and custodians. This will ensure maximization of the benefits accruing to members.

Challenges and conclusions.
The main challenge will be the securing of the opting out for Tier II contributions and what would be the way forward should an employer's opting out application is rejected. What remedies are available to employers' in such a situation.

Another employers' headache will be the adjustment of the current compensation structures and existing pension plans to take into account the new system of contribution.

Let's Talk
The implementation of the new NSSF Act by employers requires a review of the existing/planned pension schemes vis a vis the provisions of the NSSF Act taking into consideration the high non-compliance penalties.

To ensure this risk is mitigated, employers have to conduct a in-depth review of the current pension structure and adjust it to conform with the new Act. Furthermore, periodic reviews of the NSSF contributions needs to be undertaken to ensure accurate NSSF deductions are paid on time.

Taxwise Consulting will strive to create value to your company through;

- ✓ assisting with implementation of the new law by reviewing existing pension schemes, the impact of the new NSSF Act and how to effect transitions;
- ✓ advisory on structuring of planned pension schemes;
- ✓ Designing special purpose checklists to ensure compliance with the new law; and
- ✓ Periodic reviews of the NSSF contributions to mitigate against penalties in the future.

For further information or assistance kindly contact your regular Taxwise Consulting analyst or the below named persons.

Martin Kisuu
9th Floor, Barclays Plaza, Loita Street
P. O. Box 9539 - 00100, Nairobi
Tel: 020 2217150
Mobile: (+254) 717 077 824
Email: martin@taxwiseconsulting.com
Website: http://www.taxwise-consulting.com/

Samuel Njoroge
9th Floor, Barclays Plaza, Loita Street
P. O. Box 9539 - 00100, Nairobi
Tel: 020 2217150
Mobile: 0737625680
Email: snjoroge@taxwiseconsulting.com
Website: http://www.taxwise-consulting.com/