

Tax & Legal Alert
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Social Health Insurance Act

As part of the government's commitment to provide healthcare to all citizens, the government established the **National Hospital Insurance Fund (NHIF)** which was established by an Act of parliament in 1966 as a department within the Ministry Of Health. The Act was later amended in 2022 to become the National Health Insurance Fund Act (NHIF Act), and the name of the corporation was changed to National Health Insurance Fund.

The Government of Kenya has repealed the NHIF Act following the presidential assent of the 4 Bills (Primary Health Care Bill, Facility Improvement Financing Bill, Digital Health Bill and the Social Health Insurance Bill) on **19 October 2023**. This also aims at replacing the National Health Insurance Fund by establishing the **Social Health Authority**.

The above **4 Acts** are expected to strengthen the provision of **Universal Health Coverage**. This communication highlights the changes introduced through the Social Health Insurance Act and the Regulations released thereafter.

Introduction

The **first of the 4 Acts** assented to is the Social Health Insurance Act, 2023 which shall be the focus of this alert.

The primary change introduced by the Social Health Insurance (SHI) Act is the dissolution of the NHIF fund, and creation of 3 new funds. We provide further details below;

Date of Commencement

Section 1 of the SHI Act provides that the Act shall only come into force on a date provided by the Cabinet Secretary (CS) through an **official notice** in the Kenya Gazette. Through Legal Notice No 194, the CS for Health designated **22 November 2023** as the commencement date of the Act.

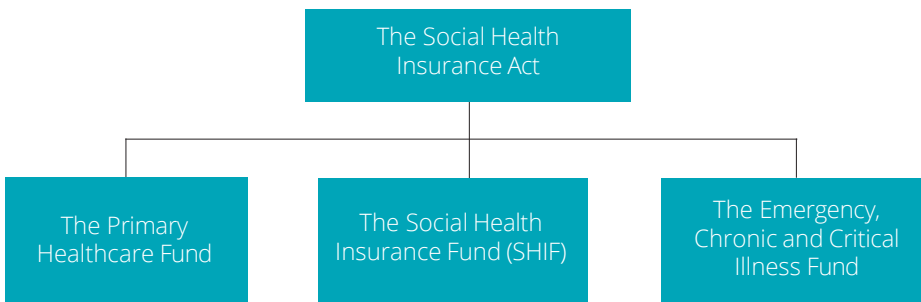
However, following the case filed at the Milimani Law Courts by Aura Joseph Enock challenging the implementation of the 4 Acts, the High Court issued a conservatory order on 27 November 2023 suspending the implementation of the Acts. The Conservatory order has subsequently been overturned by the Court of Appeal (COA) on **19th January 2024** hence allowing the implementation of the Acts.

The impact of the above COA ruling is that the SHI Act will be deemed to be in force from the gazetted commencement date of 22 November 2023.

Key Changes Introduced in the SHI Act 2023

The Act carries the following raft of changes to the present public health insurance landscape;

1. The introduction of the **Social Health Authority** to replace and take over the functions of the National Health Insurance Fund Board. The Authority is empowered to receive and administer the funds allocated under the SHI Act 2023.
2. The Act provides for dissolution of the National Health Insurance Fund and replaces it with **3 distinct funds** as indicated below;



The Social Health Insurance Fund

In terms of functions, SHIF closely resembles the previous NHIF regarding the roles, functioning and financing of the fund.

Registration of members into the Fund

1. **Every person ordinarily resident in Kenya** is required to register as a member of the fund within 90 days of the Fund being implemented.
2. Members of the repealed NHIF will be required to register afresh.
3. A non-Kenyan who intends to enter and remain in the territory of Kenya for *less than twelve months* is required to have a travel health insurance cover as may be designated by the Cabinet Secretary.



Who is Required to Contribute to the Fund?

Section 27 of the SHI Act provides that the following are required to make contributions to the fund;

- Every Kenyan Household;
- A **Non-Kenyan resident**, ordinarily residing in Kenya for a period exceeding 12 Months;
- The **National** Government; and
- A **County** Government

A household is defined in the Act to mean *a social unit comprising of an eligible contributor, whether contributing by self or paid for, and their beneficiaries, or who share the same social-economic needs associated with consumption and production.*

Contribution rates

Based on the Regulations currently going through public participation, SHIF contributions will be as summarized below:

Category	Rate of contribution	Minimum contribution	Maximum contribution	Frequency	Payment deadline
Salaried employment income	2.75% of gross salary	KES 300 per month	no cap	monthly	ninth day of each month
Income not derived from employment	2.75% based on means testing	KES 300 per month	no cap	annually	fourteen days before the lapse of the annual contribution

We note that the Act as well as the Regulations do not provide a definition of 'gross salary' and this is likely to pose a challenge for employers when accounting for this contribution. We trust this will be addressed when gazetting the final Regulations after the public participation.

Means Testing Instrument for non-employment income

1. A key part of the Regulations is the provision of the means testing instrument that will be used to determine the base for contributions made by individuals who are not salaried employees.
2. This instrument will be used to determine and estimate the household's income by collecting data relating to:
 - housing characteristics;
 - access to basic services;
 - household composition and characteristics; and
 - any other socio-economic aspects as may be relevant.
3. There shall be periodic means testing reviews on households whose income is not derived from salaried employment to ensure the most accurate data is being referenced.



Employer Obligation

An employer will be required to:

- Deduct the contribution from the employee;
- Remit the contribution to the Authority by the 9th of the following month; and
- Notify the Authority of any employment terminations within 30 days.

Penalties for non-compliance

The Act imposes a late payment penalty equal to **two percent (2%)** of the outstanding amount due for the period which the contribution remains unpaid.

Other implications for non-compliance by individuals

The Regulations also require all government related bodies and public institutions to ensure all individuals they serve produce the social health insurance number and confirm that their individual contributions are up to date.

Therefore, if the Regulations are passed as they are, non-compliant individuals may be denied essential services from government bodies.

The Emergency, Chronic and Critical Illness Fund

The SHI Act also creates the Emergency, Chronic and Critical Illness Fund and the purpose of this fund is to:

- ensure access to quality emergency services and treatment;
- finance the provision of emergency, chronic and critical medical care; and
- cover the costs of emergency treatment.

The Primary Healthcare Fund

The main purpose of this fund is to purchase primary healthcare services from health facilities.

Implications of the CoA Ruling of 19th January 2024 on payroll reporting

Though the SHI Act ought to have commenced in November 2023, a conservatory order barred the operationalization of the Act pending resolution of the subsequent appeal.

The impact of the lifting of these conservatory orders is as follows;

1. The SHI Act is in force as from the date of commencement – 22 November 2023.
2. The COA identified some provisions of the Act that would remain suspended, pending the full hearing of the appeal. These clauses include;
 - Section 26(5) that makes registration and contribution to the SHI a prerequisite to access all other public services.
 - The provision that seeks to allow access to health services for only members who are fully compliant with their contributions.
 - The provision requiring all Kenyans to be uniquely identified for purposes of provision of health services.



Following the lifting of the conservatory orders, the Ministry of Health has invited public participation on the Regulations with the deadline for submissions being **9th February 2024**. Therefore, while the Act is already in force, the contribution rates prescribed in the Regulations are yet to be gazetted.

During this transition period as we await for finalization and gazette of the Regulations, in our view employers should continue deducting and remitting the old NHIF contributions.

Conclusion

With the SHI Act in force, but the final Regulations not yet gazetted, the old NHIF rates continue to apply. The indications from the CS for Health is that the target month for new SHI rates is March 2024 as they expect to complete the public participation process and gazette the final Regulations by end of February.

Employers should ensure that their views count since even though there is no SHI employer contributions, with the current high cost of living, enhanced SHI contributions for employees, will heavily impact their well-being thus reducing productivity.

In addition, there is a need for employers to keep a close eye on the public participation process and gazette of the final Regulations to ensure adjustments on the payroll are effected in time for compliance.



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