

Employment Law and Tax & Exchange Control

ALERT | 3 October 2024



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KENYA

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Implementation of the Social Health Insurance Fund on track: Court of Appeal rules

The Social Health Insurance Fund (SHIF) was established by the Social Health Insurance Act, 2023 (Act). This, alongside the Primary Health Care Act, 2023 and the Digital Health Act, 2023 (the acts), were established to promote the right to affordable healthcare under the Constitution of Kenya, 2010 (Constitution). On 12 July 2024 the High Court declared some of the sections of the Act unconstitutional and gave Parliament 120 days to adhere to its orders, as discussed in our alert [here](#).

Aggrieved by this judgment, the Cabinet Secretary for Health filed an appeal at the Court of Appeal (CoA) and filed an application for stay of execution of the High Court's judgment, arguing that the implementation of the judgment would cause irreparable harm to the healthcare system and would render the appeal nugatory. In this alert, we focus on the CoA's ruling and what it means for employers and the public.

The CoA ruling

On Friday, 20 September 2024, in the case of *The Cabinet Secretary, Ministry of Health v Joseph Enock Aura and 14 Others, Civil Appeal (Application No. E565 of 2024)*, eKLR the CoA allowed the application for a stay of execution of the High Court's judgment, pending the hearing and determination of the main appeal by the CoA. Key considerations of the CoA in granting the stay were:

- whether the appeal before the CoA was arguable;
- whether the applicant had demonstrated that the appeal would be rendered nugatory if the stay was not granted; and
- whether it was in the public interest to grant the stay.

In its analysis, the CoA determined that the appeal was arguable and not frivolous, and thus deserving of further consideration. Moreover, it agreed with the Cabinet Secretary that the implementation of the High Court judgment would render the appeal nugatory, as it would significantly disrupt the healthcare system.

The CoA also agreed with the argument advanced by the Cabinet Secretary for Health that it was in the public's best interest to grant the stay of execution. In arriving at this position, the court observed that since the acts commenced on 22 November 2023, a reversion to the National Health Insurance Fund (NHIF) with the possibility of the regime returning to the SHIF in case of a successful appeal would create needless uncertainty in the crucial health sector.

Due to public interest, the CoA has directed that the appeal be disposed of on a priority basis to expedite the hearing of the main appeal and issue a final determination.

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What is the way forward?

Following the CoA's ruling, the Government's plan to implement the SHIF on 1 October 2024 will remain on course. Employers and Kenyan residents are mandated to register online on the Social Health Authority's (Authority) portal (<https://sha.go.ke>). After registration, individuals are required to visit a designated SHIF office to complete their biometric verification.

Employers will also be required to deduct 2,75% of an employee's gross salary in their October payroll and remit the contribution by 9 November 2024. Employees will also be entitled to a relief on the deduction, computed as the lower of 15% of the SHIF contribution or KES 5,000 per month. This is a welcome relief since the SHIF contribution will be significant compared to the NHIF rates, where the highest contribution was set at KES 1,700.

For now, contributions for the September 2024 payroll will be based on the old NHIF rates.

Below is a comparison between the NHIF deduction and the SHIF deduction for insight into how payrolls will be affected.

Gross pay (KES)	NHIF DEDUCTION (KES)	SHIF DEDUCTION (KES)
60,000	1,300	1,650
80,000	1,500	2,200
100,000	1,700	2,750
500,000	1,700	13,750
900,000	1,700	24,750



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It is important to note, however, that there are fewer benefits under the SHIF compared to the prevailing benefits that some private insurance companies in Kenya are offering at comparable premiums. For instance, for childbirth, the SHIF offers KES 10,000 for a normal delivery and KES 30,000 for a caesarean section. However, some private insurers offer KES 20,000 more for each type of delivery. Similarly, dental care under the SHIF is limited to KES 2,000 per household per year, while other providers offer from KES 10,000. For optical care, beneficiaries will get a yearly limit of KES 1,000 under the SHIF, compared to the KES 7,000 to KES 10,000 offered by private insurance providers.

Implications for employees and employers

The new SHIF deductions are higher than the previous deductions under the NHIF. This extra deduction, along with the increase in National Social Security Fund (NSSF) contributions from KES 200 to as much as KES 2,160 and the implementation of a 1.5% housing levy on gross pay, have greatly reduced the amount of money workers take home. Employees who are servicing different obligations deducted from their salaries will feel the greatest pinch and may have to reorganise their budgets.

The increased deductions may also pose a compliance challenge for employers under the Employment Act, 2007 (Employment Act). Section 19(3) of the Employment Act provides that deductions should not exceed two thirds of an employee's wages. Bearing in mind that some employees may have already committed two thirds of their wages to service different obligations, employers and employees may need to review their remuneration structures to ensure compliance with the maximum threshold of deductions.

Our commentary

The ruling provides a temporary green light for implementation of the acts as the stay orders will remain in force until a final judgment of the main appeal is delivered by the CoA. In the meantime, employers should endeavor to comply since non-compliance attracts a penalty of 2% of the contribution due for the period in which the contribution remains unpaid.

Please contact our employment and tax teams for clarifications or assistance on SHIF.

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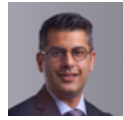
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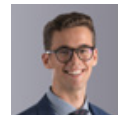
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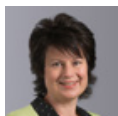
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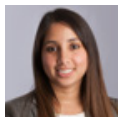
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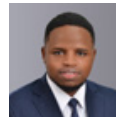
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BBBEE STATUS: LEVEL ONE CONTRIBUTOR

Our BBBEE verification is one of several components of our transformation strategy and we continue to seek ways of improving it in a meaningful manner.

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