

SOUTH AFRICA | Employment Law Overview



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1. LEGISLATIVE ENVIRONMENT

1.1. Employment in South Africa is regulated by statute, the common law and contract. South African employment laws applies to all employees working in South Africa. Although choice of law clauses are often recognized, these are only enforced where the chosen law is also the law to which the employment contract is most closely related. Usually, if the employee performs work and is remunerated in South Africa, South African law would apply. In certain instances, it may also apply to South African employees working abroad.

1.2. The most important pieces of legislation regulating the employment relationship are the following:

Labour Relations Act 66 of 1995 (“LRA”)

1.3. The LRA provides efficient procedures for the resolution of most labour related disputes, including unfair dismissals and unfair labour practice disputes. These can be resolved through statutory conciliation and arbitration by the Commission for Conciliation, Mediation and Arbitration (“CCMA”) or through independent alternative dispute resolution services accredited for these purposes. (The CCMA as a dispute resolution forum will be dealt with below.)

1.4. The LRA affords freedom to strike, but offers express statutory protection against dismissal to strikers who comply with the procedures laid down in the LRA.

1.5. Trade unions are also given defined access and other rights in terms of the LRA.

1.6. The LRA also regulates collective bargaining, the transfer of a business as a going concern and the reduction of staff on the grounds of the operational requirements of the employer.

Basic Conditions of Employment Act 75 of 1997 (“BCEA”)

1.7. The BCEA prescribes minimum terms and conditions of employment and regulates, amongst other things:

- working hours;
- leave (including annual leave, sick leave, family responsibility leave and maternity leave);
- record keeping;
- payslips;
- the prohibition of child and forced labour;
- circumstances when employers can make deductions from an employee's salary;
- the manner, timing and the payment of remuneration; and
- notice and payment on termination of employment.

1.8. The BCEA places administrative requirements on employers, for example, employers are obliged to provide employees with a certificate of service on termination of their employment, retention of records *et cetera*. Parties may agree to vary the terms set out in the BCEA provided that they are not less favourable to the employee than what is provided for in the BCEA.

Employment Equity Act 55 of 1998 (“EEA”)

1.9. In a nutshell, the purpose of the EEA is to achieve equality in the workplace. The EEA protects employees and job applicants by prohibiting unfair discrimination in the workplace on grounds such as age, gender, language, race and religion. It also provides a framework for the implementation or promotion of affirmative action measures which seeks to redress the disadvantages in employment experienced by designated groups (being black people, women and people with disabilities) in order to ensure their equitable representation in the workplace.

1.10. One of the most recent amendments to the EEA permits employees to refer disputes regarding equal pay for equal work to the CCMA.

Skills Development Act 97 of 1998

1.11. This Act aims to develop and improve the skills of the South African workforce. It establishes Sector Education and Training Authorities (SETAs) to develop and implement skills plans for each economic sector. A developed workforce is seen as key to attracting foreign investment.

Skills Development Levies Act 9 of 1999

1.12. This Act imposes a compulsory levy on most employers of an amount equal to 1% of the employer's total payroll, the proceeds of which are used to fund the various SETAs to train employees. Businesses that conduct or send employees to attend approved training programmes may qualify for a refund of a percentage of the levy paid.

Unemployment Insurance Act 63 of 2001

1.13. This Act provides financial support to employees who have lost their employment through pregnancy or other circumstances beyond their control. It establishes the Unemployment Insurance Fund ("UIF"). The Act prescribes claiming unemployment benefits for unemployment, maternity benefits, illness benefits et cetera. The Unemployment Insurance Contributions Act 4 of 2002 requires employers and their employees to make contributions to the UIF. An employer and an employee must each contribute 1% of the remuneration paid or payable to the employee. The employer is legally obliged to deduct the employee's portion and pay it into the UIF.

Occupational Health and Safety Act 85 of 1993

1.14. Apart from the common law duties imposed on employers in respect of the health and safety of their employees, this Act extends further statutory duties on employers to ensure a safe and healthy working environment for its employees. Safety standards are prescribed by this Act and its regulations issued in terms thereof. The Act aims to provide and regulate health and safety in the workplace for all employees. Failure to comply with this Act is a criminal offence and may give rise to civil liability.

1.15. Employees are also legally obliged to obey health and safety rules and to report unsafe or unhealthy situations or incidents to their employers.

Compensation for Occupational Injuries and Diseases Act 130 of 1993

1.16. This Act provides a system of "no fault compensation" for disablement or death caused by occupational injuries or diseases sustained or contracted by employees out of and in the course and scope of their employment. The employer is indemnified of liability for damages claims and in return is required to make monthly contributions to the Compensation Fund ("Fund"). Employees are, subject to conditions, entitled to compensation from the Fund instead regardless of whether the injury or illness was the employer's fault. Employees are entitled to unemployment compensation for a prescribed term and according to a fixed formula.

Protection of Personal Information Act 4 of 2013

1.17. Employers are required to collect, use and process personal information (which is widely defined to include biographical information pertaining to an individual and may include, bank account details, salary, leave records, performance reviews et cetera) relating to their employees for a wide range of business reasons. This Act places obligations on employers to, among others:

- use such personal information only for the purpose for which it was collected or intended to be used;
- that there are security measures in place to protect the information;

- that the information is complete, accurate, not misleading and up to date;
- implement procedures for employees to gain access to their information.

1.18. Employment agreements should contain relevant clauses whereby employees consent to the processing of personal information. This Act imposes various criminal offences for non-compliance infringements.

Conclusion

1.19. Various employment related statutes prescribe the display of extracts of statutes in the workplace.

2. LABOUR COURT FORUMS / TRIBUNALS

2.1. Some disputes have been selected for resolution by various forms of third party intervention – conciliation, arbitration or litigation. Various forums have been established by legislation to entertain these disputes. Of importance are bargaining councils, the CCMA and the Labour Court.

2.2. The CCMA is a dispute resolution body established in terms of the LRA. The CCMA's functions include, amongst others, to resolve all disputes referred for conciliation in terms of the LRA, and the arbitration of those disputes not resolved by conciliation if a party has requested arbitration and the dispute is one that may be arbitrated upon in terms of the LRA.

2.3. Trade unions and employers' organizations may form bargaining councils. Bargaining councils deal with collective agreements, solve labour disputes, establish various schemes and make proposals on labour policies and laws. Bargaining councils primarily have jurisdiction over disputes between parties falling within their registered scope, but their jurisdiction may be extended to non-members in certain circumstances.

2.4. The Labour Court is a superior court for labour issues with equivalent status to that of the High Court. The Labour Court may only adjudicate labour disputes and constitutional disputes arising out of labour issues. The Labour Court reviews arbitration awards issued by the CCMA relating to employment disputes and directly adjudicates disputes such as automatically unfair dismissals, unprotected strike dismissals and dismissals for operational requirements.

3. HIRING

3.1. Employers may not discriminate unfairly (unfair discrimination is dealt with above) against job applicants. Under the EEA, job applicants are included in the definition of “employee”. Employers should evaluate the fairness of their employee interactions from the recruitment stage. When interviewing, short listing or selecting job applicants, employers should ensure that their decisions:

- are based on fair and consistent selection criteria;
- fall within the inherent requirements of the job; and
- are in no way discriminatory in nature.

3.2. Once an unconditional offer is accepted by a job applicant and before he reports for duty, he is deemed an employee. He may have an unfair dismissal claim should the employer renege on its offer.

3.3. There is no statutory requirement that an employment agreement must be concluded in writing or signed provided that the employer has complied with the requirements to furnish the employee with certain written particulars (inter alia, place of work, commencement date of employment, ordinary hours of work et cetera) of employment as set out in the BCEA. It is advisable however to reduce the employment agreement to writing.

4. FIRING

Unfair Dismissals

4.1. All employees (irrespective of the level of remuneration or their seniority) have the right to be fairly dismissed. To be fair, a dismissal must be for a fair reason (substantive fairness) and according to a fair procedure (procedural fairness). The LRA recognizes the following 3 fair reasons upon which an employer may terminate an employee's employment contract:

- misconduct of the employee (by way of example, abuse of leave, theft, fraud et cetera);
- incapacity of the employee (related to poor work performance or based on ill health/injury); and
- operational requirements (or sometimes called a “retrenchment”) of the employer (operational requirements is defined as requirements based on the economic, technological or similar needs of an employer).

4.2. The procedure which an employer is required to follow depends on the reasons for the dismissal. Essentially, the employee must be given a fair opportunity to be heard or state his case before a decision is taken to terminate his services.

4.3. An employee can refer an unfair dismissal dispute to the CCMA or relevant bargaining council.

4.4. The primary remedy for an unfair dismissal is retrospective reinstatement or the employee can be re-employed in another reasonably suitable work within the organization. Alternatively, the employee may be awarded payment of compensation which is limited to a maximum amount of 12 months' remuneration.

Automatically Unfair Dismissals

4.5. A dismissal may be automatically unfair if the reason for the dismissal is related to, among other reasons, pregnancy, that the employee participated in a protected strike or unfair discrimination by the employer.

4.6. The employee's remedy for an automatically unfair dismissal is reinstatement (which may have retrospective effect) or payment of compensation limited to a maximum amount of 24 months' remuneration.

Tribunals / Forums

4.7. Alleged unfair dismissals for misconduct and incapacity are adjudicated by the CCMA or relevant bargaining council. Disputes not settled by conciliation are referred to arbitration or to the Labour Court, depending on the classification of the dispute.

4.8. Generally, dismissals for operational requirements and automatically unfair dismissal disputes are adjudicated by the Labour Court.

Payments on termination of employment

4.9. On dismissal, an employee is entitled to:

- accrued but unpaid annual leave pay;
- payment in lieu of notice (unless the employee is summarily dismissed or where the employee is required to work the notice period); and/or
- any other amount to which the employee is contractually entitled to such as bonuses or a pro rata portion of a 13th cheque.

4.10. In addition, employees who are dismissed for operational requirements are entitled to a severance payment of a minimum of 1 weeks' salary for every completed year of service with the employer (unless of course the employee unreasonably refuses an offer of alternative employment).

Notice periods

4.11. Employers and employees are allowed to terminate the employment relationship by giving notice, or for the employer, making a payment in lieu of notice. The BCEA sets out the required length of notice for employment contracts:

- 1 week, if the employee has worked for less than 6 months;
- 2 weeks if the employee has been employed for more than 6 months but less than 1 year; and
- 4 weeks, if the employee has been employed for more than 1 year.

4.12. Parties may agree to extend the above-mentioned notice periods.

4.13. It is fairly common for the employment contracts of more senior employees to contain longer notice periods in order to effect a proper handover.

4.14. Employers may, however, only terminate the employment relationship if one of the aforementioned reasons exists and once the correct process is followed.

5. EMPLOYEE RIGHTS AND MATTERS INCIDENTAL THERETO

Hiring of Foreigners

5.1. Foreigners must be in possession of appropriate valid work visas authorizing them to work for an employer in South Africa. The Immigration Act 13 of 2002 provides for various visas, the most commonly used are general work visas, critical skills work visas, intra-company transfer work visas and corporate visas. Work visas are issued to foreigners where there are no South African citizens with the relevant skills to perform the work. These visas are issued for a specific duration which varies depending on the type of work the visa is being issued for. Advice in this regard should be obtained from a registered immigration practitioner.

National Minimum Wage

5.2. There is generally no applicable minimum wage. Collective agreements (agreements between the relevant employer and trade union), bargaining council agreements or Sectoral/Ministerial Determinations (determinations issued by the Minister of Labour regulating the terms and conditions of employment for particular industries) may prescribe a minimum wage in respect of specified categories of employees. The government is presently considering whether to implement a national minimum wage.

Trade Unions

5.3. Unions are recognized in South Africa and are active in all sectors of the economy. Employees have the right (should they wish) to join a trade union of their choice. Depending on the business concerned, there may be mandatory collective bargaining arrangements in place.

Working Hours

5.4. Employees who earn below the earnings threshold prescribed in terms of the BCEA (currently ZAR 205 433 per annum as at 1 July 2013) are entitled to the protection of the working hours provisions of the BCEA. These employees may not work more than 45 ordinary hours per week and more than 10 hours' overtime per week. Employees are entitled to overtime pay at the rate of 1.5 times the employee's ordinary rate of pay. By agreement, employees may be given time off work in respect of overtime worked. The BCEA also prescribes a premium rate of pay in respect of work on Sundays, night work and public holidays.

5.5. Employees earning above the earnings prescribed threshold amount are not subject to the working hours

provisions of the BCEA and may be required to work any reasonable hours that are required for the efficient performance of their duties.

Employee Leave

5.6. The BCEA entitles all employees (irrespective of their level of remuneration or seniority) to a minimum of 21 consecutive days (or 15 working days) paid annual leave in respect of each **annual leave** cycle of 12 months.

5.7. Employees are entitled to 30 days' paid **sick leave** in respect of each 3 years of continued employment. The sick leave cycle begins on the commencement of employment and runs until the completion of every prior sick leave cycle. During the first 6 months of employment an employee is only entitled to 1 day paid sick leave for every 26 days worked. This leave cannot be accrued.

5.8. The BCEA also provides for a minimum of 3 days' paid **family responsibility leave** per annum which may be taken for a defined list of family responsibilities (inter alia, in the event of the birth or illness of an employee's child, or the death of a close family member). Reasonable proof of such events may be demanded by the employer. This leave cannot be accrued.

5.9. Employees are entitled to 4 consecutive months' unpaid **maternity leave**. It is fairly common practice for employers to agree to pay an employee's normal salary or part thereof during maternity leave in return for an appropriate work-back undertaking. Employees are entitled to claim maternity leave benefits from the UIF provided that they and their employers have contributed to the UIF and provided that the employer does not pay the employee's full wage during the maternity leave period.

5.10. There are currently 12 official Public Holidays recognized in South Africa. All employees are entitled to paid leave on these statutory holidays. Special overtime rates apply to the extent that an employee is required to work on a Public Holiday.

Retirement Benefits / Age

5.11. Employers are not obliged to enrol their employees in a mandatory pension or provident fund unless they are subject to a Statutory or Bargaining council agreement which provides so. Where such a fund is offered as a benefit for employees, both the employer and the employee are required by the rules of the fund to contribute towards the fund on a monthly basis at an agreed rate of the employee's income. Government is considering whether to implement a national retirement fund.

5.12. There is no statutory retirement age. Employers are entitled to agree on a retirement age with employees or impose a normal retirement age in the form of a workplace policy. The retirement age usually coincides with the age specified in the rules of the applicable pension or provident fund. Termination of the employment relationship on attaining the retirement age does not constitute a dismissal.

Income Tax

5.13. All employees are liable to pay income tax to the South African Revenue Services. Employers are obliged to deduct tax from an employee's salary.

Confidential / Restraint of Trade Undertakings / Intellectual Property Rights

5.14. Employers should ensure, and especially where senior employees, employees with specialist skills, and/or executives are concerned that they put in place safeguards in the employment agreements in relation to:

- confidential information;
- restraint of trade undertakings particularly where the employer has a legitimate proprietary interest; and
- any intellectual property rights.

5.15. We would advise that you obtain the services of a specialist employment attorney to assist in drafting such clauses.



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