

South Africa

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Legislation and agencies

1 What are the main statutes and regulations relating to employment?

The Basic Conditions of Employment Act No. 75 of 1997 regulates minimum terms and conditions of employment. It applies if there is no industry agreement or sectoral determination. The Labour Relations Act No. 66 of 1995 (LRA) governs labour relations, provides for the registration of and regulates organisational rights for trade unions, promotes and facilitates collective bargaining at the workplace and sectoral levels, regulates the right to strike and the recourse to lock out, promotes employee participation in decision-making through the establishment of workplace forums, provides for dispute resolution procedures through statutory conciliation and arbitration (via the CCMA) and the establishment of the Labour Court and Labour Appeal Court, and regulates the law of dismissal so as to give effect to the constitutional right to fair labour practice. There are a number of codes of good practice that have been published under both of these Acts dealing in more detail with issues such as dismissal for misconduct, incapacity or operational requirements, the regulation of working hours, etc.

2 Is there any legislation prohibiting discrimination or harassment in employment?

Employees (and applicants for employment) enjoy protection against unfair discrimination by virtue of the Constitution and the Employment Equity Act No. 55 of 1998 (EEA). Harassment is defined in the EEA as a form of discrimination.

The EEA prohibits unfair discrimination (direct or indirect) in any employment policy or practice on the basis of race, gender, sex, pregnancy, marital status, family responsibility, ethnic or social origin, colour, sexual orientation, age, disability, religion, HIV status, conscience, belief, political opinion, culture, language and birth or any other related ground.

3 Is there any legislation protecting employee privacy or personnel data? If so, what are an employer's obligations under the legislation?

Under the disclosure of information provision in the LRA, an employer is not required to disclose private personal information relating to an employee unless that employee consents to the disclosure. Otherwise, there is no employee data protection legislation; this is an issue under consideration by the Law Commission.

4 What are the primary government agencies or other entities responsible for the enforcement of employment statutes and regulations?

The Department of Labour is the primary government agency responsible for enforcing employment laws. Bargaining councils are tasked with enforcing their own agreements.

Worker representation

5 Is there any legislation mandating the establishment of a works council or workers' committee in the workplace?

There is no legislation mandating the establishment of a works council or workers' committee in the workplace. The LRA provides for the establishment of a workplace forum at the instance of a majority trade union but very few have been established in the 13 or so years since the LRA was introduced.

Background information on applicants

6 Are there any restrictions or prohibitions against background checks on applicants? Does it make a difference if an employer conducts its own checks or hires a third party?

The important consideration in relation to pre-employment questions and background checks is the job applicant's right to privacy (and the right not to be discriminated against) and whether asking such questions or doing the checks is necessitated by the inherent requirements of the job. It makes no difference whether the employer conducts its own checks or hires a third party.

7 Are there any restrictions or prohibitions against requiring a medical examination as a condition of employment?

Medical testing is prohibited by the EEA unless it is required or permitted in terms of legislation or it is justifiable in the light of medical facts, employment conditions, social policy, the fair distribution of employee benefits or the inherent requirements of a job. Medical testing is defined in the EEA to include 'any test, question, inquiry or other means designed to ascertain, or which has the effect of enabling the employer to ascertain, whether an employee has any medical condition'. HIV/AIDS testing is prohibited unless such testing is determined to be justifiable by the Labour Court. An employer cannot refuse to hire an applicant who does not submit to a test unless it can show that the test is necessary in the circumstances.

8 Are there any restrictions or prohibitions against drug and alcohol testing of applicants?

Although alcohol or drug testing is not specifically prohibited under the EEA, it would probably constitute unfair discrimina-

tion not to hire an applicant because he or she (privately) took drugs or drank alcohol (unless the employer could prove inherent requirements of the job) and the employer would thus have to justify why it was necessary to conduct such a pre-employment test.

Hiring of employees

9 Are there any legal requirements to give preference in hiring to particular people or groups of people?

The EEA contains affirmative action provisions that apply to all designated employers. An employer is designated based on either the number of employees it employs or its annual turnover which differs depending on the industry. Designated employers are required to have an employment equity plan which is designed to achieve equitable representation of employees from the designated groups in all categories and levels within the workforce. The designated groups are black people (defined as African, Coloured and Indian), women and people with disabilities.

10 Must there be a written employment contract? If so, what essential terms are required to be evidenced in writing?

There is no requirement for a written contract of employment but an employer must supply an employee, when the employee commences employment, with the following particulars in writing:

- the full name and address of the employer;
- the name and occupation of the employee or a brief description of the work for which the employee is employed;
- the place of work and, where the employee is required or permitted to work at various places, an indication of this;
- the date on which the employment began;
- the employee's ordinary hours of work and days of work;
- the employee's wage or the rate and method of calculating wages;
- the rate of pay for overtime work;
- any other cash payments that the employee is entitled to;
- any payment in kind that the employee is entitled to and the value of the payment in kind;
- how frequently remuneration will be paid;
- any deductions to be made from the employee's remuneration;
- the leave to which the employee is entitled;
- the period of notice required to terminate employment or if employment is for a specified period, the date when employment is to end;
- a description of any council or sectoral determination which covers the employer's business;
- any period of employment with a previous employer that counts towards the employee's period of employment; and
- a list of any other documents that form part of the contract of employment, indicating a place that is reasonably accessible to the employee where a copy of each may be obtained.

When any matter listed above changes, the written particulars must be revised to reflect the change and the employee must be supplied with a copy of the document reflecting the change. In practice most employers will conclude a contract of employment.

11 To what extent are fixed-term employment contracts permissible?

Fixed-term employment contracts are permissible provided they are entered into for a legitimate purpose and not to circumvent the provisions of any employment laws. Generally, this means that an employer can hire an employee on a fixed-term contract when the employer requires that employee's services for a limited period, for example, to replace another employee on a temporary basis or to complete a specified task or for the duration of a particular job that the employer needs doing. The regular renewal of fixed-term contracts can create an expectation of permanency and can give rise to an unfair dismissal claim if the contract is not renewed on a further occasion.

12 What is the maximum probationary period permitted by law?

There is no maximum probationary period – the period must be reasonable with reference to the nature of the job and the time it takes to determine the employee's suitability for continued employment. Six months as a rule of thumb is generally regarded as reasonable. The employer may extend the period for a reason that relates to the purpose of probation. The period of extension should not be disproportionate to the legitimate purpose that the employer seeks to achieve.

13 To what extent are post-termination covenants not to compete, solicit or deal valid and enforceable?

Post-termination covenants not to compete, solicit or deal are valid and enforceable. This is done by agreement, either in the employment contract or by way of a separate restraint of trade agreement. The starting point in South African law is that such agreements are binding and enforceable unless they are shown to be unreasonable, the onus being on the employee to show that an agreement is unreasonable and should not be enforced. This has recently been upheld by the Supreme Court of Appeal despite a challenge on constitutional grounds. An employee can be restrained from working for a competitor for a reasonable period (there is no stipulated maximum) and within a reasonable geographical area after termination where the employee has been exposed to trade secrets and information over which the employer has a proprietary interest.

14 What are the primary factors that distinguish an independent contractor from an employee?

The primary factors (none of which is conclusive on its own) that distinguish an independent contractor from an employee are:

- what the contract says;
- whether or not there is supervision and control of the person, which indicates employment if there is;
- whether there is control over the person's hours of work, which indicates employment;
- whether the person is provided with tools of the trade to enable them to work, which indicates employment;
- whether the person is economically dependent on the company, which indicates employment as opposed to working for more than one person which indicates independence; and
- whether the person is paid for making their productive capacity available to the employer (which indicates employment) or for the product or output of their labour which indicates independence.

Foreign workers**15 Are there any numerical limitations on short-term visas? Are visas available for employees transferring from one corporate entity in one jurisdiction to a related entity in another jurisdiction?**

Employment of Foreign workers is governed by the Immigration Act 13 of 2002 and regulations published pursuant thereto. The Act provides a number of work permit options to foreigners wishing to work in South Africa.

Foreigners wishing to render services in South Africa, whether remunerated in South Africa or abroad, for a period of up to 90 days should apply for a visitor's visa with consent to work in terms of section 11(2) of the Immigration Act.

Visa exempt nationals may, by prior arrangement with the immigration officials at the port of entry, obtain a section 11(2) visitor's visa at the port of entry into South Africa, valid for the period for which they are visa exempt, usually either 30 days or 90 days.

Should a visa exempt national wish to obtain a section 11(2) visa valid for longer than the period for which they are visa exempt, they would be obliged to obtain the visa from the South African High Commission in the country in which they are ordinarily resident, prior to their departure for South Africa.

A section 11(2) visa can be renewed only once, for a period equal to that of the initial visa. There is however no limitation on the number of section 11(2) visas that may be held consecutively, nor is there any limitation on the maximum number of days one can spend in South Africa per annum.

In terms of the Immigration Act, foreigners wishing to work in South Africa for a period of more than three months will need to obtain a temporary residence work permit. There are a number of temporary residence work permit options available to foreigners wishing to render services in terms of section 19 of the Immigration Act.

Section 19 of the Act makes provision for various categories of work permits, including quota work permits, general work permits, exceptional skills permits and intra-company transfer permits, each of which have particular requirements which need to be complied with.

The quota work permit system was designed to secure foreign skills in areas where South Africa is experiencing a skills shortage. The minister of home affairs has set quotas for the employment of a certain maximum number of foreigners annually within specific professional categories. For example, the quotas allow for the employment of 500 economists per annum on quota work permits. A work seeker who is eligible for a quota permit but who has not yet secured an offer of employment can initially obtain a three month permit during which time they can secure employment.

The general work permit application allows a foreigner to compete for employment in the open market against citizens and permanent residents. The position to be filled in terms of a general work permit must have been advertised in the national print media in a specified format to allow South Africans to apply for it. The employer will need to give reasons for why the foreign candidate has been appointed to the post rather than a citizen or permanent resident.

Exceptional skills permits can be granted to candidates who possess special expertise and know-how in relation to the market in which they operate.

An intra-company transfer work permit allows for employees to be transferred from a corporate entity in one jurisdiction to a related entity in another jurisdiction. The permit may be issued

to a foreigner who is employed abroad by a business operating in South Africa in a branch, subsidiary or affiliate relationship and who by reason of his or her employment is required to work in South Africa for a period not exceeding two years. Legislation is currently pending to extend intra-company transfer work permits to a duration of four years.

Corporate permits are suited to corporate applicants who intend employing a predetermined number of foreigners in specific positions.

Other permits which offer mechanisms allowing a foreigner to work include exchange permits; obtaining consent to work on a retired person's permit, or part-time work on a study permit.

In principle, a company can employ an unlimited number of foreigners, provided that each foreign employee holds a valid work permit. One must, however, bear in mind that in each work permit application, the applicant will need to indicate why it needs to employ a foreigner and the number of foreigners, permanent residents and citizens employed by the employer must be disclosed in each application. A foreigner may not hold more than one type of permit at a time.

16 Are spouses of authorised workers entitled to work?

A spouse wanting to work in South Africa will need to qualify for one of the above-mentioned work permits in his or her own right.

17 What are the rules for employing foreign workers and what are the sanctions of employing a foreign worker that does not have a right to work in the jurisdiction?

It is a criminal offence to knowingly employ a foreigner in violation of the Immigration Act No. 13 of 2002 and an employer can be held liable on conviction to a fine or to imprisonment not exceeding one year, provided that such employer's second conviction of such an offence shall be punishable by imprisonment not exceeding two years or a fine and the third or subsequent convictions of such offences by imprisonment not exceeding three years, without the option of a fine.

The 2002 Act provides that no person shall employ an illegal foreigner or a foreigner whose status does not authorise him or her to be employed by such person, nor may one employ a foreigner on terms, conditions or in a capacity different from that contemplated by such a foreigner's residence permit.

Every employer has an obligation to make a good faith effort to ascertain that it does not employ any illegal foreigner and to ascertain the status or citizenship of those whom it employs. An employer employing a foreigner must maintain certain records pertaining to the employment of such foreigner for two years after the termination of such employment. The employer is also obliged to report the termination of such foreigner's employment and any breach on the side of the foreigner of their status to the director-general of the Department of Home Affairs.

If an illegal foreigner is found on any premises where a business is conducted, it is presumed that the foreigner was employed by the person who has control over such premises, unless prima facie evidence to the contrary is adduced.

18 Is a labour market test required as a precursor to a short or long-term visa?

A labour market test is required in respect of applications for general work permits. The position to be filled in terms of a general work permit must have been advertised in a national print

publication acceptable to the Department of Home Affairs. The advertisement must comply with a specified format. The employer will also need to give reasons why the foreign candidate has been appointed to the post rather than a citizen or permanent resident. An application must also be lodged for certification by the Department of Labour. Although the application to the Department of Labour is geared toward confirming that the salary of the foreign worker is not under the market salary for a South African filling the same post, the Department of Labour will comment on whether they support the application or whether, in their opinion, South Africans are available to fill the post.

When applying for corporate permits, companies must seek a letter of endorsement from the Department of Labour, which will comment on whether South Africans are available to fill the posts.

Terms of employment

19 Are there any restrictions or limitations on working hours and may an employee opt out of such restrictions or limitations?

Working hours are restricted under the BCEA which says that no employee may work more than 45 ordinary hours a week and nine hours a day (if he or she works a five-day week) or eight hours a day (if he or she works a six-day week). Overtime can only be worked by agreement and is restricted to 10 hours a week. The BCEA does allow for some flexibility on working hours via a compressed working week and the averaging of working hours for a period of up to four months (by collective agreement). A collective agreement can also extend the amount of overtime to 15 hours a week for up to two months in any one year. These restrictions do not apply to:

- senior managerial employees;
- sales staff who travel and regulate their own hours;
- employees who work for less than 24 hours a month; or
- employees who earn more than 149,736 rand (US\$19,000) per year (the figure as of March 2008; it is changed periodically by regulation).

There are restrictions and special requirements relating to night work, which is defined as work performed after 6pm and before 6am the next day.

Sectoral determinations and bargaining council agreements can have different provisions on working hours that would apply to the relevant sector or industry instead of the BCEA provisions.

20 What categories of workers are entitled to overtime pay and how is it calculated?

Any employee who earns less than 149,736 rand per year (the figure as of March 2008) is entitled to overtime pay at a rate of one-and-a-half times the employee's wage. An agreement may allow the employer to grant the employee paid time off in lieu of overtime pay at a rate of 90 minutes for every hour of overtime worked or allow the employer to pay the employee his or her normal rate and grant him or her 30 minutes of paid time off for every hour of overtime worked. Payment for work on Sundays is at double the employee's normal wage unless that employee ordinarily works on a Sunday in which case it is at one-and-a-half times the employee's wage.

21 Is there any legislation establishing the right to annual vacation and holidays?

The BCEA provides that all employees are entitled to annual leave of at least:

- 21 consecutive (not working) days per year; or
- one day's leave for every 17 days on which the employee worked or was entitled to be paid; or
- one hour of leave for every 17 hours on which the employee worked or was entitled to be paid.

Leave must be granted within six months of the end of the leave cycle.

Sectoral determinations and bargaining council agreements can have different provisions on leave that would apply to the relevant sector or industry instead of the BCEA provisions.

Annual leave is in addition to public holidays. South Africa has 12 statutory public holidays. If a public holiday falls on a Sunday then the following Monday becomes a public holiday as well. Under the Public Holidays Act, a public holiday can be exchanged for another day by agreement between the employer and the employee.

22 Is there any legislation establishing the right to sick leave or sick pay?

The BCEA provides that an employee is entitled during every sick-leave cycle (period of 36 months) to an amount of sick leave equal to the number of days an employee would normally work in a six-week period. This means 30 days over a three-year period if the employee normally works a five-day week and 36 days if he or she normally works a six-day week (or less if he or she works part-time). During the first six months of employment, sick leave accrues at a rate of one day for every 26 days worked. Sick leave is paid at normal wage rates.

Sectoral determinations and bargaining council agreements can have different provisions on sick leave that would apply to the relevant sector or industry instead of the BCEA provisions.

23 In what circumstances may an employee take a leave of absence? What is the maximum duration of such leave and does an employee receive pay during the leave?

The BCEA provides that any employee who has been working for an employer for longer than four months is entitled to three days' paid family responsibility leave per year which can be used when a child is born or is sick or on the death of a close relative. The leave does not accumulate from year to year.

An employee is entitled to four months' statutory unpaid maternity leave. Some employers offer maternity benefits including paid maternity leave and there are some collective agreements regulating the provision of maternity leave and benefits. Otherwise employees can claim maternity benefits from the unemployment insurance fund.

Any other leave of absence would have to be individually negotiated or provided for in an employment contract.

24 What employee benefits are prescribed by law?

There is currently no obligation on employers in South Africa to provide any benefits, including retirement funding or medical benefits but it is common (especially among larger corporate employers) to provide access to pension and medical aid schemes. The rules of each retirement fund will provide for the basis on which contributions are to be made. There is usually an

employer and an employee contribution but sometimes the entire contribution is made by the employer.

25 Are there any special rules relating to part-time or fixed-term employees?

Many of the provisions of the BCEA, in particular the provisions on the regulation of working time and on leave, do not apply to employees who work less than 24 hours a month for an employer. This exclusion does not apply to fixed-term employees.

Liability for acts of employees

26 In which circumstances may an employer be held liable for the acts or conduct of its employees?

An employer can be held liable for the acts of its employees under the principles of vicarious liability. This means that when an employee, acting in the course and scope of his or her employment, causes someone to suffer harm, loss or damage through his or her fault (which can include negligence) then the employer can be held liable.

Note, however, that if an employee is injured on duty, then there is no claim against the employer; rather, the employee has a claim for compensation under the Compensation for Occupational Injuries and Diseases Act, even if the injury was caused by another employee.

The EEA specifically says that an employer can be held liable for acts of discrimination (which includes harassment) committed by its employees, unless the employer has taken all reasonable steps to prevent such discrimination from taking place. The South African Supreme Court of Appeal has also held, in the context of a sexual harassment claim, that an employer owes a duty of care to its employees which extends beyond the duty to provide a safe physical working environment. It includes the duty to take reasonable steps to ensure that the working environment is free of harassment.

Taxation of employees

27 What employment-related taxes are prescribed by law?

South Africa levies income tax using progressive tax rates, with the lowest bracket (annual taxable income of up to 122,000 rand) being taxed at 18 per cent. The top rate is 40 per cent and this applies to annual taxable income in excess of 490,000 rand. A primary rebate of 8,280 rand applies to persons younger than 65. These rates and amounts are for the 2009 tax year which runs from 1 March 2008 to 28 February 2009.

Unemployment Insurance Fund (UIF) contributions are payable by both the employer and the employee, and the UIF provides, inter alia, unemployment benefits to the employee. The contributions are one per cent of remuneration as defined, with a maximum contribution base (from 1 February 2008) of 12,478 rand, and therefore a maximum contribution of 124.78 rand from the employer and an equivalent amount from the employee.

Skills development levies are for the purposes of funding the education and training of the South African workforce. The levy is payable by all employers at a rate of one per cent of the aggregate monthly remuneration paid or payable to employees.

Workmen's compensation is a levy payable by employers in terms of the Compensation for Occupational Injuries and Diseases Act No. 130 of 1993. The purpose of the levy is to provide compensation for injury or disability caused by an accident at work or occupational diseases contracted by employees in the course of their employment or death benefits arising where

death occurs as a result of injuries sustained in the course of the deceased's employment.

Employee-created IP

28 Is there any legislation addressing the parties' rights with respect to employee inventions?

The employer is usually the owner of intellectual property rights created by an employee in the course and scope of his or her employment, even where the employment contract is silent on this point. It is, however, advisable to deal specifically with ownership of the various forms of intellectual property rights in the employment contract.

This general rule does not apply to independent contractors. Where an independent contractor creates intellectual property rights then the independent contractor will usually be the owner of the intellectual property rights unless the parties have entered into a written agreement in terms of which the intellectual property rights are assigned to the 'employer'.

Business transfers

29 Is there any legislation to protect employees in the event of a business transfer?

When the whole or part of any business, trade, undertaking or service is transferred as a going concern, employees transfer automatically to the buyer in terms of section 197 of the LRA. According to the courts, this rule can apply to an outsourcing depending on the facts of the case. The buyer of the transferred business must provide employees with terms and conditions that are generally no less favourable than those that applied before the transfer. However, the buyer can transfer employees to different retirement plans or similar schemes. Employees cannot be dismissed due to the transfer of a business or any reason related to the transfer (section 187(1)(g) of the LRA). A dismissal that breaches this provision is automatically unfair. After the disposal, the buyer can dismiss if it has justifiable operational reasons for doing so that do not relate to the transfer of the business.

When it is only the shares in the company that are being sold then there is no impact on employment as the employees simply remain with the company that now has new shareholders.

Termination of employment

30 May an employer dismiss an employee for any reason or must there be 'cause'? How is cause defined under the applicable statute or regulation?

An employer may only dismiss for cause which is defined in the LRA to mean a fair reason related to the employee's conduct or capacity or based on the employer's operational requirements.

31 Must notice of termination be given prior to dismissal? May an employer provide pay in lieu of notice?

The BCEA prescribes a minimum notice period of:

- one week if the employee has been employed for six months or less;
- two weeks if the employee has been employed for more than six months but less than one year; or
- four weeks if the employee has been employed for one year or more (for domestic workers and farm workers this applies after six months).

If an employment contract provides for longer than the contractual provision applies. An employer may pay the employer what

Update and trends

Dismissal law has been in the spotlight with the Constitutional Court ruling on the extent to which the CCMA commissioners who hear unfair dismissal cases may interfere with an employer's decision to impose dismissal as a sanction. The Constitutional Court has confirmed that CCMA commissioners do not have to defer to employers but are tasked with considering whether the dismissal (and the penalty) was fair and reasonable in all the circumstances. This has meant that employers need to pay more attention to the allegations that they put to employees and the evidence that they produce in internal disciplinary hearings. The Department of Labour has started taking an active role in enforcing employment equity legislation and has taken some companies to the Labour Court where it is of the view that those companies are not meeting their obligations under the Employment Equity Act. This has resulted in protracted litigation in some cases where companies feel that they have been unfairly

accused of non-compliance. Previously the DoL had adopted a more advisory and facilitative role.

We continue to see an increase in litigation over restraint of trade issues, with many employers going to court to enforce agreements when their employees leave and take up employment with competitors. The Supreme Court of Appeal has endorsed the traditional South Africa approach to these agreements despite arguments that the approach should change in the light of the Constitutional Bill of Rights. This means that restraint of trade agreements are generally enforceable and the onus is on an employee to prove that enforcement would be unreasonable or contrary to public policy if he wants to get out of the agreement. Employers are also taking advice in order to put in place properly drafted restraint of trade agreements and confidentiality clauses so as to protect their rights during the employment relationship and after termination.

he would have earned had he worked in lieu of notice.

32 In which circumstances may an employer dismiss an employee without notice or payment in lieu of notice?

An employer may dismiss an employee without notice for serious misconduct which is conduct that makes the continuation of the employment relationship intolerable. Examples of serious misconduct would be dishonesty, wilful damage to the employer's property, assault, gross insubordination.

33 Is there any legislation establishing the right to severance pay upon termination of employment? How is severance pay calculated?

The BCEA makes provision for the payment of severance pay when an employee is dismissed for operational requirements. The statutory minimum is one week's remuneration for every year of completed continuous service. The employer does not have to

pay severance pay if it is able to offer the employee reasonable alternative employment with it or another employer.

34 Are there any procedural requirements for dismissing an employee?

A dismissal has to be effected in accordance with a fair procedure. Procedural requirements differ depending on the reason for the dismissal. A misconduct dismissal must be preceded by a disciplinary hearing. A dismissal for incapacity (poor performance, ill-health or injury) must be preceded by a process of appropriate evaluation, instruction, training, guidance or counselling with an opportunity to be heard before a final decision is taken. A dismissal based on operational requirements must be preceded by notice and consultation in accordance with the provisions of section 189 or 189A of the LRA. No prior approval from a government agency is required by law.

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35 In what circumstances are employees protected from dismissal?

Employees may not be dismissed for a reason that:

- is discriminatory on a listed or any arbitrary ground; the listed grounds are race, gender, sex, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, political opinion, culture, language, marital status or family responsibility;
- is connected with the employee's participation in a protected strike or because the employee refused to fill in for another employee who was on strike;
- compels an employee to accept a demand on a matter of mutual interest (a lock-out dismissal);
- the employee is pregnant or any reason related to her pregnancy;
- is related to the employee exercising rights or participating in any proceedings under the LRA;
- is because of a transfer of an undertaking or any reason related to such a transfer; or
- is because the employee made a disclosure that is protected in terms of the Protected Disclosures Act.

36 Are there special rules for mass terminations or collective dismissals?

Where an employer wants to dismiss employees for participation in an unprotected strike it must contact a trade union official to discuss the course of action it intends to adopt. It must also issue an ultimatum to the employees in clear and unambiguous terms stating what is required of the employees and what will happen if they do not comply. The employees should be allowed sufficient time to reflect on the ultimatum. If possible, the employer should afford the employees an opportunity to be heard before a decision is made to dismiss.

Retrenchments must be dealt with following the consultation and notice requirements set out in section 189 of the LRA and large-scale retrenchments must comply with section 189A of the LRA where facilitation by a third party is provided for as well as minimum consultation periods.

Dispute resolution**37 May the parties agree to private arbitration of employment disputes?**

Parties may agree to private arbitration of employment disputes. In some cases, private arbitration is provided for in collective agreements or even in employment contracts.

38 May an employee agree to waive statutory and contractual rights to potential employment claims?

A contract of employment cannot deprive an employee of minimum terms and conditions or the right to fair employment practice. An employee can compromise or waive his or her rights in a settlement agreement provided that he or she is aware of the rights he or she is waiving and does so freely and voluntarily.

39 What are the limitation periods for bringing employment claims?

An unfair dismissal claim must be referred to the CCMA (or bargaining council) within 30 days of the date of the dismissal or the outcome of the appeal if there was an internal appeal. A late referral can be condoned on good cause shown.

An unfair employment practice or alleged discrimination claim must be brought within six months of the conduct or omission giving rise to the claim.