

Labour and Employee Benefits: South Africa

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A Q&A guide to labour and employee benefits in South Africa.

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General

1. Do the main laws that regulate the employment relationship apply to:

- Foreign nationals working in your jurisdiction?
- Nationals of your jurisdiction working abroad?

Laws applicable to foreign nationals

South African employment laws apply to foreign nationals working in South Africa. The Labour Court has held that this is the case even if they are working there illegally.

The main laws governing the employment relationship are the:

- Labour Relations Act No. 66 of 1995 (LRA).** This governs disputes relating to unfair dismissal and unfair practices in employment, and regulates the resolution of disputes between employers and employees, as well as the relationship between employers and trade unions.
- Basic Conditions of Employment Act No. 75 of 1997 (BCEA).** This sets minimum terms and conditions for all employees, with a few exclusions such as unpaid volunteers working for a charity. These terms and conditions apply to any contract of employment unless either:
 - a more favourable term has been negotiated or is provided for in another law; or
 - a term has been excluded under the BCEA's variation or exemption provisions.

Terms and conditions for specific sectors or industries are often regulated separately, either through:

- Bargaining councils set up for specific industries (if agreements are negotiated between representative employers and unions).
- Sectoral determinations (sector-specific rules) published by the Minister for Labour (usually after consultation with all interested parties).

These laws are mandatory for all employees falling under their jurisdiction.

Laws applicable to nationals working abroad

South African employment laws (*see above, Laws applicable to foreign nationals*) generally do not apply to nationals working abroad. However, they may apply to a South African national who works abroad temporarily on secondment, especially if the employment contract provides for this.

Employing people

2. Are there any age or nationality restrictions on managers or company directors? If so, please give details.

Age restrictions

There are no age restrictions specific to managers or company directors. However, it is prohibited to employ someone who is under either the:

- ❑ Age of 15.

- ❑ Minimum school-leaving age that is specified in any law (if this is 15 or older). The South African Schools Act No. 84 of 1996 requires that every learner (that is, any person receiving education or obliged to receive education under the Act) attend school until the end of the year in which the learner turns 15 or the end of the ninth grade, whichever comes first.

A child (that is, an individual under the age of 18) cannot be employed in a job that either:

- ❑ Is inappropriate for an individual of that age.

- ❑ Places at risk the child's:
 - ❑ well-being;

 - ❑ education;

 - ❑ physical or mental health; or

 - ❑ spiritual, moral or social development.

There are no rules that prohibit employing someone over a specified age.

Nationality restrictions

There are no nationality restrictions on managers or company directors, provided the individual has the required work permit (*see Question 4*).

3. Are any grants or incentives available for employing people? If so, please give details.

There are some incentives available for employing apprentices (known as learnerships) within certain industries (*Skills Development Act No. 97 of 1998*). These incentives usually take the form of a rebate on the skills development levy that all employers must pay (*see Question 20, Other taxes levied on*

employers and/or employees: Skills development levy). The Sector Education and Training Authorities in the various industry sectors can provide more information on the incentives available.

4. What permits do foreign nationals require to work in your country? Please explain:

- ❑ How these permits are obtained.
- ❑ How much they cost.
- ❑ How long the process takes.

Required permits

Foreign employees must obtain a work permit, except where they can take advantage of the following mechanisms:

- ❑ Visitor's visas with consent to work (for placements of under three months to provide services or to attend business meetings or provide training in South Africa).
- ❑ Exchange permits, either:
 - ❑ as part of a recognised exchange programme;
 - ❑ in the case of foreigners aged 25 years or younger, for any employment not exceeding one year's duration. A period of mandatory physical absence from South Africa may be imposed on expiry of the permit.
- ❑ Obtaining consent to work on a retired person's permit.
- ❑ Part-time work of up to 20 hours per week (and unlimited employment during vacation periods) on a study permit authorising study at a recognised tertiary institution.

Foreign employees do not require a separate residence permit, as a work permit confers the right to temporarily work and reside in South Africa. Accompanying family members require temporary residence permits allowing them to reside with the main work permit holder or to study, as appropriate.

There are various categories of work permits, including:

- ❑ **General work permits.** These allow foreigners to compete in the open market in South Africa for employment.
- ❑ **Intra-company transfer permits.** These allow employees to be transferred from a business abroad to a local branch, subsidiary or affiliate.
- ❑ **Exceptional skills permits.** These are granted to candidates who possess special expertise and know-how in relation to a particular industry.
- ❑ **Corporate permits.** These are granted to companies to allow them to employ a predetermined

number of foreigners in specific positions.

- ❑ **Quota permits.** These allow for the employment of a certain number of foreigners annually, within specific professional categories which have been identified as skills shortage areas.

Each of these categories has particular requirements that must be met.

A foreigner can apply for consent to study while employed on a work permit.

Obtaining permits

Permits are obtained by applying to the South African consular office in either the employee's:

- ❑ Country of ordinary residence.
- ❑ Home country.

If there is no consular office, permits are obtained by applying by courier to either the:

- ❑ Closest South African foreign mission (that is, the nearest South African embassy in another country).
- ❑ Department of Home Affairs in South Africa. The application must be made to the office that has jurisdiction over the area in which the employee will work.

Cost

The application fee is:

- ❑ ZAR1,520 (about US\$190) for a work permit.
- ❑ ZAR425 (about US\$50) for an accompanying family member's residence or study permit.

Length of process

Application times vary widely, depending on the type of permit applied for and the country in which the application is lodged. It can take between five days and two months, from the date of submission of a complete application, to obtain a work, residence or study permit. Applications at most consulate offices take 30 days to process. US, Canadian and EU applications are generally processed within ten to 14 days, while countries in Africa and the Far East usually take six to eight weeks to process an application.

Terms of employment

5. What terms govern the employment relationship? In particular:

- ❑ Is a written employment contract or statement of employment terms required?
- ❑ Are any terms implied by law into the employment contract (in addition to the

terms referred to in *Question 1*)?

- ❑ Are collective agreements with trade unions or employee representatives common (generally or in specific industries)?

Written employment contract

There is no requirement for a written employment contract, but an employer must supply an employee with the following information in writing when starting work:

- ❑ The employer's full name and address.
- ❑ The employee's job title or a brief job description.
- ❑ The employee's place of work and information about whether the employee is required or permitted to work at various places.
- ❑ The date on which the employment begins.
- ❑ 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 to which the employee is entitled.
- ❑ Any payment in kind to which the employee is entitled 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 that is required to terminate employment, or if employment is for a fixed term, the date on which employment terminates.
- ❑ A description of any council rules or sector-specific rules that cover the employer's business, for example rules covering minimum terms and conditions, and in some cases minimum wages, set by either a (*see below, Collective agreements*):
 - ❑ bargaining council agreement; or
 - ❑ sectoral determination for the relevant industry or sector.

- ❑ Any period of employment with a previous employer that counts towards the employee's period of employment.
- ❑ A list of any other documents that form part of the employment contract and a description of a place that is reasonably accessible to the employee where a copy of each can be obtained.

If any matter listed above changes, the written information must be revised to reflect the change and the employee must be supplied with a copy of the document setting out the change.

Some work permit applications require a written contract of employment, for example a general work permit or corporate work permit.

Implied terms

Any minimum terms and conditions set by law (that is, by the BCEA, sector-specific rules or a bargaining council agreement) are implied into the employment contracts of all employees to whom the legislation applies (*see Question 1, Mandatory laws*).

Any terms and conditions negotiated by collective agreement (*see below, Collective agreements*) are implied into the employment contracts of all employees who are members of the trade union that is party to the agreement at the time the agreement is signed, or who become members after the agreement becomes binding. If a trade union represents the majority of employees at a workplace, the collective agreement can also bind non-members if the agreement identifies and expressly binds them.

Collective agreements

Collective agreements with trade unions are common (more so in some industries than others, such as in the mining, manufacturing and motor industries, and the retail sector).

In some industries, bargaining councils have been formed between employers' associations and trade unions, and collective agreements are then negotiated at industry level. The Minister of Labour often extends these agreements to others who operate within the industry (but are not parties to the agreements) through an announcement in the *Government Gazette*. Company-level agreements are sometimes negotiated as well. In some cases, these are intended to regulate issues not covered in the industry agreement, but are more frequently used in industries that have not set up bargaining councils.

6. Is there a minimum wage? If so, please give details, in particular whether it applies to all employees, regardless of their age and experience.

There is no general minimum wage that applies to all employees.

However, minimum wages have been set (through sector-specific rules and bargaining council agreements) for certain sectors and industries. Minimum wages differ between sectors and between different categories of employees. They sometimes differ between geographical areas, with a higher minimum amount for urban locations and a lower threshold for rural areas.

7. Are there restrictions on working hours? If so, please give details.

Working hours are restricted under the BCEA, which states that employees must not work more than either:

- ❑ 45 hours a week and nine hours a day (if they work a five-day week).

- ❑ 45 hours a week and eight hours a day (if they work a six-day week).

Overtime hours can only be worked if:

- ❑ The parties agree to this.
- ❑ The overtime is restricted to ten hours a week.

The BCEA does allow some flexibility on working hours. A compressed working week is allowed, and the working hours can be calculated as an average for a period of up to four months (by collective agreement). Additionally, a collective agreement can extend the amount of overtime to 15 hours a week for up to two months in any one year.

The restrictions on working hours 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.
- ❑ Employees who earn more than ZAR149,736 (about US\$18,990) a year (this amount is changed from time to time by regulation and was amended with effect from 1 March 2008).

There are other restrictions and special requirements relating to night work, which is defined as work performed after 6.00pm and before 6.00am the next day.

Sector-specific rules and bargaining council agreements may have different provisions on working hours that apply to a certain sector or industry instead of the BCEA's provisions.

8. Is there a minimum holiday entitlement? If so, please give details. How many public holidays are there in a year and are they included in the minimum holiday entitlement?

Annual leave

All employees are entitled to annual leave of at least one of the following (*BCEA*):

- ❑ 21 consecutive (not working) days a year.
- ❑ One day of leave for every 17 days during which the employee worked or was entitled to be paid.
- ❑ One hour of leave for every 17 hours during which the employee worked or was entitled to be paid.

Leave must be granted within six months of the end of the annual leave cycle. This cycle runs from the date on which the employee starts employment, and therefore differs between employees depending on their start date.

Sector-specific rules and bargaining council agreements may have different leave provisions that apply to the relevant sector or industry instead of the BCEA's provisions.

Public holidays

Public holidays are not included in the annual leave. There are 12 statutory public holidays. If a public holiday falls on a Sunday, the following Monday becomes a public holiday as well. A public holiday can also be exchanged for another day if an agreement is made between the employer and the employee (*Public Holidays Act No. 36 of 1994*).

9. What rights do employees have to time off in the case of illness or injury? Is that time off paid? Can an employer recover from the state sick pay granted to its employees?

Employees are entitled, during every sick-leave cycle (a three-year period), to an amount of sick leave equal to the number of days they would usually work over six weeks (*BCEA*). As a result, the following amounts of leave are available over a three-year period:

- ❑ 30 days for employees who usually work a five-day week.
- ❑ 36 days for employees who usually work a six-day week.

Employees who work part-time are entitled to reduced leave.

Sick leave is paid at the standard wage rate and the employer cannot recover this pay from the state. Sector-specific rules and bargaining council agreements may have different sick-leave provisions that apply to the relevant sector or industry instead of the *BCEA*'s provisions.

10. What are the statutory rights of employees who are parents or carers (including those of disabled children and adult dependants)? How is employees' pay affected during periods of leave?

Maternity rights

Employees are entitled to four months' statutory unpaid maternity leave. Some employers offer maternity benefits, including paid maternity leave, and there are collective agreements that regulate the provision of maternity leave and benefits. Otherwise, employees can claim maternity benefits from the unemployment insurance fund.

Pregnant or breastfeeding employees must not be required to perform work that is hazardous to their health or that of their children. If it is possible to do so, suitable alternative employment must be provided.

Paternity rights

Employees who have been working for an employer for more than four months are entitled to three days' paid family responsibility leave a year (this is a statutory obligation, but is paid by the employer at normal rates), which can be used when a child is born or sick (*BCEA*). The leave does not accumulate from year to year.

Adoption rights

The maternity and family responsibility leave provisions (*see above, Maternity rights and Paternity rights (www.practicallaw.com/3-422-1548)*) do not specifically extend to adoption. However, it could be argued that an employer's failure to extend the provisions to adoptive parents would amount to unfair discrimination. In practice, most employers grant similar benefits to adoptive parents.

Parental rights

The family responsibility leave provisions (*see above, Paternity rights*) apply to both parents when a child is sick.

Carers' rights

There are no statutory provisions catering for the care of adult dependants or disabled children.

11. Does a period of continuous employment create any benefits for employees? If individual employees are transferred to a new entity, are they deemed to retain their period of continuous employment?

Benefits

If employees are made redundant for operational reasons, they are entitled to severance pay of one week's remuneration for every year of continuous service (*see Question 16, Severance payments*). For the purposes of determining length of employment, previous employment with the same employer must be taken into account if the intervening period is less than one year.

Transfer

If a business (or part of a business) is transferred from one employer to another as a going concern, the employees are transferred with the business and retain their continuous employment (*see Question 25*).

Temporary and agency workers

12. To what extent are temporary and agency workers entitled to the same rights and benefits as permanent employees?

An employee who works fewer than 24 hours per month for an employer is not protected under the BCEA, so minimum standards in respect of working hours do not apply. However, the employee is still regarded as an employee for the purposes of the LRA so has, for example, the right not to be unfairly dismissed.

If an employee is employed by an agency (that is, a temporary employment service as defined in the LRA) he enjoys all the rights of any other employee but as against the employing agency. If that employee renders services at the premises of a client of the agency, however, the client must comply with health and safety obligations towards those employees. There are no qualifying periods.

Employee protection

13. What statutory data protection rights do employees have?

An employer must not disclose private personal information relating to an employee unless that employee consents to the disclosure (*LRA*). There are no other employee data protection rights, but the South African Law Reform Commission is dealing with the issue and submitted a draft Bill to the Minister of Labour for consideration. Indications are that it will receive attention late in 2009 (*see Question 34*).

14. What protection do employees have from discrimination or harassment, and on what grounds?

Discrimination

Employees (and applicants for employment) are protected from unfair discrimination (*Constitution* and the *Employment Equity Act No. 55 of 1998 (EEA)*).

The EEA prohibits unfair discrimination (direct or indirect) in any employment policy or practice, on the basis of:

- ❑ Race or colour.
- ❑ Ethnic or social origin.
- ❑ Culture, language or birth.
- ❑ Gender.
- ❑ Sexual orientation.
- ❑ Pregnancy.
- ❑ Marital status or family responsibility.
- ❑ Age.
- ❑ Disability.
- ❑ HIV status.
- ❑ Religion, conscience, belief or political opinion.
- ❑ Any other related ground.

Discrimination is justifiable in circumstances where:

- ❑ Positive discrimination measures are taken in accordance with the provisions and purpose of the EEA.
- ❑ It is used to distinguish, exclude or prefer an individual on the basis of a job's inherent requirements.

Harassment

Harassment is defined in the EEA as a form of discrimination. The courts have granted remedies, in the form of compensation, for harassment under the LRA, the EEA, common law and the Constitution. There are limits to the compensation available under the LRA, but no limits under the EEA, common law or the

Constitution.

There are no qualifying periods for either claim.

15. Do whistleblowers have any protection? If so, please give details.

Whistleblowers are protected from any occupational detriment (*Protected Disclosures Act No. 26 of 2000 (PDA)*). This is defined to include:

- Dismissal or suspension.
- Disciplinary action.
- Transfer against the employee's will.
- Being refused a transfer or promotion, or being denied an appointment.
- Harassment or victimisation.
- Being refused a reference or given an unfavourable reference.
- Being threatened with any of the above.

To qualify for protection, the employee must have made a protected disclosure as defined by the PDA. A disclosure to an employer qualifies for protection only if it was made in good faith and using the employer's prescribed procedure (if it has one).

It is automatically unfair to dismiss employees because they have made a protected disclosure (*LRA*).

Dismissals and redundancies

16. What rights do employees have when their employment contract is terminated?

Please provide information on:

- Notice periods.**
- Severance payments.**
- Any procedural requirements for dismissal.**

Notice periods

The BCEA specifies 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.
- Four weeks if the employee has been employed for one year or more. For domestic employees (that

is, employees who perform work in their employer's household, such as gardeners, drivers and those who take care of dependants) and farm workers, this notice period applies after six months.

If an employment contract specifies a longer period, the contractual provision applies.

Severance payments

Severance pay only applies to dismissals for operational reasons. The statutory minimum is one week's remuneration for every year of continuous service. Some collective agreements set out higher severance payments. There is also a procedural duty to consult employee representative bodies or the employees themselves over the issue of severance pay.

Procedural requirements

Employees must only be dismissed if there is a fair reason relating to the employee's conduct or capacity, or the operational requirements of the business.

The procedural requirements differ depending on the reason for the dismissal:

- ❑ A dismissal based on the employee's conduct must be preceded by a disciplinary hearing.
- ❑ A dismissal based on an employee's incapacity (that is, poor performance, ill-health or injury) must be preceded by a process of appropriate evaluation, instruction, training, guidance or counselling. The employee must also be given an opportunity to be heard before a final decision is taken.
- ❑ A dismissal based on operational requirements must be preceded by a specific notice and consultation procedure (*see Question 18*).

17. What protection do employees have against dismissal? Are there any specific categories of protected employees?

Employees have a right under the Constitution not to be unfairly dismissed, which is incorporated into the LRA. An employer can only dismiss for a fair reason related to the employee's conduct or capacity or the employer's operational requirements, and a dismissal must be procedurally fair (*see Question 16, Procedural requirements*).

The employer has the burden of proving that a dismissal was fair. All alleged unfair dismissal disputes must be referred to the Commission for Conciliation, Mediation and Arbitration (CCMA) for conciliation. If unresolved, the CCMA adjudicates disputes relating to conduct or capacity, and the Labour Court adjudicates dismissals for operational reasons (unless only one employee was made redundant, in which case this employee can elect to have the dispute adjudicated by the CCMA) (*see Question 24, Employee action*).

The remedies against unfair dismissal are:

- ❑ Reinstatement.
- ❑ Re-employment.
- ❑ Compensation of up to a maximum of 12 months' pay (or 24 months' pay if the dismissal was automatically unfair as defined in the LRA).

If the unfairness relates only to procedure, the remedy is limited to compensation.

18. What rules apply on redundancies?

A dismissal based on operational requirements must be preceded by notice and consultation in accordance with section 189 or 189A of the LRA.

Section 189A applies to large employers (that is, employers with over 50 employees) carrying out large-scale redundancies, and provides for:

- ❑ Minimum consultation periods before notice can be issued to an employee.
- ❑ A third-party facilitator (usually provided by the CCMA), which is allowed to assist in the consultation process.

Consultation is a joint problem-solving exercise, which aims at reaching consensus on (*section 189(2), LRA*):

- ❑ Ways to avoid, minimise the number of, or change the timing of, dismissals.
- ❑ Ways to mitigate the adverse effects of dismissals.
- ❑ The method of selecting employees for redundancy and severance pay for redundant employees.

The procedure for disputing dismissals based on operational requirements differs depending on whether section 189 or 189A applies. Employees have a right to strike against large-scale redundancies.

Taxation of employment

19. What is the basis of taxation of employment income for:

- ❑ Foreign nationals working in your jurisdiction?
- ❑ Nationals of your jurisdiction working abroad?

Foreign nationals

Taxation is based on residence. Foreign nationals who work in South Africa but are not tax residents are only subject to South African income tax on their South African-sourced income (that is, remuneration received for services carried out in South Africa), subject to relief under an applicable double taxation treaty (DTT).

However, foreign nationals who become tax resident in South Africa are taxed on their worldwide income, although this may be subject to relief under a relevant DTT. An individual can become tax resident by either:

- ❑ Being ordinarily resident in South Africa. Individuals are ordinarily resident in South Africa if they regard South Africa as their home (that is, the place they return to after travelling).

- ❑ Satisfying the physical presence test. Individuals are considered tax resident in South Africa if they are physically present there for all of the following:
 - ❑ more than 91 days in the relevant tax year (that is, the year in which the determination of tax residence is made);
 - ❑ more than 91 days in each of the five preceding tax years; and
 - ❑ more than 915 days in total during the five preceding tax years.

Therefore, a foreign national can become tax resident in the sixth tax year of his being physically present in South Africa.

The physical presence test does not apply to an individual who is deemed to be exclusively a resident of another jurisdiction under a DTT between that jurisdiction and South Africa.

Nationals working abroad

Nationals working abroad usually retain their status as South African tax residents while working abroad, and remain subject to tax in South Africa on their worldwide income. However, their foreign employment income is exempt from South African tax if both:

- ❑ They spend at least 183 days in any 12-month period outside South Africa, of which at least 60 days must be for a continuous period.
- ❑ The foreign services are rendered during this period/these periods.

If they cease to be tax resident in South Africa, they are only taxed on South African-sourced income, but a deemed disposal of all their assets for capital gains tax purposes takes place when they cease to be tax resident.

20. What is the rate of taxation on employment income? Are any other taxes or social security contributions levied on employers and/or employees? If so, please give details, including the rates.

Taxation of employment income

Tax rates are progressive:

- ❑ The lowest bracket (an annual taxable income of up to ZAR132,000 (about US\$16,740)) is taxed at 18%.
- ❑ The highest bracket (an annual taxable income of over ZAR525,000 (about US\$66,580)) is taxed at 40%.

There are the following annual rebates:

- ❑ A primary rebate of ZAR9,756 (about US\$1,240) to individuals under the age of 65.
- ❑ A secondary rebate of ZAR5,400 (about US\$685) to individuals aged 65 or older (in addition to the

primary rebate).

These rates and amounts are for the 2010 tax year, which runs from 1 March 2009 to 28 February 2010. The employer must deduct employees' tax on a monthly basis and pay it to the South African Revenue Service (SARS).

Other taxes levied on employers and/or employees

Unemployment insurance fund. Both the employer and the employee must make monthly contributions to the unemployment insurance fund, which provides unemployment benefits to individuals. The employer and employee must each contribute 1% of the employee's remuneration (that is, a total contribution of 2%). Remuneration for this purpose is currently limited to a maximum of ZAR12,478 (about US\$1,580) a month. These contributions are not required in relation to foreign employees who will be repatriated from South Africa at the completion of their South African assignment.

Skills development levy. This levy is charged for the purposes of funding education and training of the South African workforce. All employers must pay this levy at 1% of the aggregate monthly remuneration payable to employees. The levy is collected by the SARS (together with employees' tax and unemployment insurance contributions (*see above, Unemployment insurance fund*)). Employers with an annual payroll of less than ZAR500,000 (about US\$63,410) are exempt.

Workmen's compensation levy. Employers must pay a levy known as workmen's compensation (*Compensation for Occupational Injuries and Diseases Act No. 130 of 1993*). The amount that employers must pay is determined by an annual assessment based on the remuneration paid to employees and the class of industry in which the employer operates.

Employers must submit all required information to the Commissioner, who then assesses the amount payable according to an assessment tariff. This is based on a percentage of annual earnings of the relevant employer's employees that is required to operate the fund, as well as the capitalised value of pensions. The Commissioner prescribes a maximum amount of earnings on which the assessment is based. This is currently (since 1 July 2009) ZAR239,172 (about US\$30,330) a year. In addition, the Commissioner can impose a minimum contribution on any employer or category of employer.

The purpose of the workmen's compensation levy is to provide:

- ❑ Compensation for either:
 - ❑ injury or disability caused by an accident at work;
 - ❑ occupational diseases contracted by employees in the course of their employment.

- ❑ Death benefits if death occurs as a result of injuries sustained in the course of employment.

Liability

21. Are there any circumstances in which:

- ❑ **An employer can be liable for the acts of its employees?**
- ❑ **A parent company can be liable for the acts of a subsidiary company's**

employees?

Employer liability

An employer can be held liable for the acts of its employees under the principle of vicarious liability. This means that when employees, acting in the course and scope of their employment, cause someone to suffer harm, loss or damage through their own fault (which can include negligence), the employer can be held liable.

The EEA specifically states 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 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 providing a safe physical working environment (*see Question 22*). It includes the duty to take reasonable steps to ensure that the working environment is free of harassment.

Parent company liability

South African law tends to follow English law in relation to lifting the corporate veil, so the courts are generally reluctant to look behind the separate legal identity of companies. However, if the parent company's own conduct is responsible for harm to an employee, there is a possibility of a direct action in tort against the parent company. This situation could arise, for example, if the parent company dictated policies to and controlled the conduct of its subsidiary, and this subsidiary caused harm to the employee.

22. What are an employer's obligations regarding the health and safety of its employees?

The employer has a general duty to provide and maintain a working environment that is safe, and without risk to employees' health (*Occupational Health and Safety Act (No. 85 of 1993) (OHSA)*). This includes:

- ❑ Providing and maintaining plant and machinery that is safe (as far as is reasonably practicable).
- ❑ Eliminating or mitigating hazards or potential hazards to employees' health and safety.
- ❑ Taking measures to ensure that everyone in the workplace complies with the OHSA's requirements.
- ❑ Ensuring that work is performed under the supervision of an individual trained in safety issues and able to take precautionary measures.
- ❑ Enforcing such measures as may be necessary in the interests of health and safety.

The OHSA contains specific requirements for certain types of work, such as manufacturing. It also sets out provisions for appointing health and safety representatives and committees, and specifies what must be done if an accident takes place.

In addition, there are a number of specific regulations published under the OHSA, including:

- ❑ General Administrative Regulations.
- ❑ General Safety Regulations.

- Regulations for specific types of work.
- Regulations that apply if specific types of machinery or equipment are used, or if specific substances are involved.

An employer must establish which specific regulations apply to its business and ensure that it complies with these.

An employer who operates in the mining industry must consider the Mine Health and Safety Act No. 29 of 1996 (MHSA) in relation to the occupational health and safety of individuals at a mine. The purpose of the MHSA is to:

- Provide a culture of health and safety in the mining industry.
- Provide relevant health and safety training.
- Facilitate co-operation and consultation on health and safety between the state, employers, employees and employees' representatives.

Employers and employees must identify hazards and minimise, control and eliminate health and safety risks at mines (*MHSA*). The MHSA provides for:

- The enforcement of health and safety measures.
- Investigation and inquiries to improve health and safety.

Consultation

23. Are employees entitled to management representation (such as on the board of directors) or to be consulted about issues that affect them? Is employee consultation or consent required for major transactions (such as acquisitions, disposals or joint ventures)?

Management representation

There are no legal provisions specifying that management representation must be allowed. Employees are entitled to be represented by the union representatives (if they are union members) in certain circumstances (such as when they are disciplined or lodge a grievance).

Consultation

An employer must consult with employees if it is contemplating redundancies as a result of its operational requirements (*see Question 18*).

There is a set hierarchy of who the employer must consult (*section 189(1), LRA*). The employer must consult the first on the list, and if this does not exist, consult the second, and so on. The first on the list is the party specified in a collective agreement, the second is a workplace forum (that is, a body with elected members established on application by a trade union in a workplace with more than 100 employees), and

the third is a registered trade union the members of which are affected by the proposed retrenchment. Ultimately, if there is no workplace forum or union, and no collective agreement dealing with the issue, the employer must consult the employees themselves or representatives they have nominated for that purpose.

If there is a workplace forum, the employer must consult it on a range of issues (*sections 84(1) and 85, LRA*). However, very few workplace forums have been set up in South Africa.

Major transactions

The same consultation rules apply to major transactions (*see above, Consultation*), apart from where redundancy of a significant number of employees is contemplated. If a large employer (that is, an employer with 50 or more employees) intends retrenching a specified number of its employees (based on a sliding scale set out in the LRA) then section 189A of the LRA applies to the process. This means that either party can request facilitation by a third party (usually the CCMA) in the process.

An employer must consult with employees when it is contemplating the possibility of redundancies because of its operational requirements (*see above, Consultation*). Therefore, if it is contemplating a disposal of assets that may result in job losses and redundancies, it has a duty to consult. However, the employer has no duty to consult if it is contemplating either a:

- ❑ **Share sale.** The employees remain employed by the company that becomes owned by new shareholders, so no job losses are created.
- ❑ **Sale of the business as a going concern.** The employees transfer automatically to the buyer (*section 197, LRA*), so there are no job losses (*see Question 25*).

24. What are the remedies that are available if an employer fails to comply with its consultation duties? Can employees take action to prevent any proposals going ahead?

Remedies

When there are redundancies for operational reasons, the remedy for failure to consult is compensation of up to 12 months' remuneration. If the redundancies are large-scale, remedies can also include:

- ❑ An order preventing the employer from going ahead with redundancies until it has consulted properly.
- ❑ An order directing proper consultation.
- ❑ The reinstatement of dismissed employees pending compliance with fair procedure.

Employee action

Employees can refer via the CCMA a dispute over unfair procedure, either on its own or together with a dispute over the substantive fairness of a dismissal (*see Question 17*). In a large-scale redundancy for operational reasons, the employee must bring a claim alleging unfair procedure by applying to the Labour Court within 30 days of receiving notice of redundancies, and the application will generally be heard on an urgent basis. But if the dispute concerns alleged substantive unfairness it must be referred to the CCMA

and then to the Labour Court for trial if not resolved at the CCMA.

25. Is there any statutory protection of employees on a business transfer? In particular:

- ❑ Are they automatically transferred with the business?
- ❑ Are they protected against dismissal (before or after the disposal)?
- ❑ Is it possible to harmonise their terms of employment with other (existing) employees of the buyer?

Automatic 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 (*section 197, LRA*). According to the courts, this rule can apply to an outsourcing, depending on the facts of the case. Under recent case law, section 197 does not apply to second generation outsourcing.

Protection against dismissal

Employees cannot be dismissed due to the transfer of a business or any reason related to the transfer (*section 187(1)(g), LRA*). A dismissal that breaches this provision is automatically unfair. After the disposal, the buyer can make dismissals if it has justifiable operational reasons for doing so that do not relate to the transfer of the business.

Harmonisation

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 (*section 197, LRA*). However, the buyer can transfer employees to different retirement plans or similar schemes.

If the buyer wishes to significantly alter the terms and conditions of employment after a transfer to achieve harmonisation, it must either:

- ❑ Obtain the employees' consent to the changes (through a bargaining process).
- ❑ Participate in an operational requirements consultation process, with a view to making the employees that do not agree to the changes redundant (*section 189, LRA*) (*see Question 23, Consultation*). As this option carries risks, careful planning and advice is required.

Pensions

26. Do employers and/or employees make pension contributions to the state in your jurisdiction? If so, please give details of:

- ❑ The contributions payable.

- The tax treatment of those contributions.**
- The monthly amount of the state pension.**

Contributions

There is no requirement for employers or employees to make pension contributions to the state.

Tax

Not applicable.

Monthly amount

Not applicable.

27. Is it common (or compulsory) for employers to provide access, or contribute, to supplementary pension schemes for their employees? Do such schemes provide pensions the value of which:

- Can usually be determined at the start of the arrangement (for example, the value is linked to the employee's salary)?**
- Cannot usually be determined at the start of the arrangement (for example, the value is dependent on employer and employee contributions and investment return on those contributions)?**

Pension and provident schemes

It is not compulsory, but it is common (especially among large corporate employers) to provide access to pension or provident schemes (a provident scheme provides a lump-sum payment on retirement). These can be either company schemes or umbrella schemes (that is, schemes in which various different companies participate). The rules for each scheme specify the basis on which contributions are made and calculated. Usually both the employer and employee pay contributions to a pension scheme, while the employer makes the entire contribution to a provident scheme.

Retirement annuity funds

Employees can also contribute to retirement annuity funds. These are retirement schemes in which individuals voluntarily participate, rather than closed funds that employers set up for their employees.

Value of pensions

Most pension and provident schemes are defined contribution schemes (that is, the value of the pension benefits is not defined but depend on the contributions and investment returns). There has been a move away from defined benefit pension schemes where the pension benefits are based on the employees' salary at retirement and this type of scheme is not widely used.

28. Is there a regulatory body that oversees the operation of supplementary pension schemes? If so, please briefly summarise the regulatory framework.

The Pension Funds Adjudicator regulates supplementary pension schemes and complaints relating to pension issues can be referred to him for determination. The Pension Funds Adjudicator's decision can be reviewed in the High Court.

29. Are any tax reliefs available on contributions to supplementary pension schemes (by the employer and employees)? If so, please give details.

Pension and provident schemes

The following tax provisions apply:

- ❑ Employers' contributions to approved pension or provident schemes do not constitute a taxable benefit for employees.
- ❑ Employees' contributions to an employer's pension scheme are tax deductible, up to an amount that does not exceed the greater of:
 - ❑ ZAR1,750 (about US\$220);
 - ❑ 7.5% of the employee's retirement funding employment income (RFEI) (that is, the portion of an employee's remuneration package that is used to calculate the contribution payable and which is usually defined (for example, it may exclude variable portions of remuneration)).
- ❑ Employees' contributions to a provident scheme are not tax deductible.
- ❑ Employers' contributions to pension, provident and benefit schemes on behalf of employees are generally tax deductible up to 20% of approved remuneration (that is, approved by the Commissioner for the South African Revenue Service) in aggregate.

Retirement annuity funds

Employees' contributions to retirement annuity funds are deductible up to an amount that does not exceed the greater of:

- ❑ 15% of their remuneration package after excluding the RFEI.
- ❑ ZAR1,750.
- ❑ ZAR3,500 (about US\$444) less current deductions to a pension fund.

30. Can the following participate in a pension scheme established by a parent company in your jurisdiction:

- ❑ **Employees who are working abroad?**
- ❑ **Employees of a foreign subsidiary company?**

Employees who are working abroad, or employees of a subsidiary company in a foreign jurisdiction, can, depending on the circumstances and the rules of the particular scheme, belong to a South African pension scheme set up by a parent company. However, the potential tax reliefs discussed in *Question 29* only benefit employees who are subject to South African tax on their employment income. Careful planning is required to ensure that the South African parent company can claim a tax deduction for the pension contributions.

Employees who are South African residents for exchange control purposes cannot make contributions to a foreign pension fund without obtaining Reserve Bank approval.

Bonuses

31. Is it common to reward employees through contractual or discretionary bonuses? Are there restrictions or guidelines on what bonuses can be awarded? If so, please give details.

There are no obligations or restrictions on the issue of bonuses. It is up to each employer to decide what sort of scheme it wishes to put in place and whether the bonus will be guaranteed or discretionary.

IP

32. If employees create IP rights in the course of their employment, do the employees or the employer own the rights?

The employer usually owns IP rights that employees create in the course and scope of their employment, even if the employment contract does not contain a provision to this effect. It is, however, advisable to address the ownership of various forms of IP rights specifically in the employment contract.

An exception to the general rule applies to independent contractors. If an independent contractor creates IP rights, it usually owns these rights, unless they have been assigned to the employer in a written agreement.

Restraint of trade

33. Is it possible to restrict an employee's activities during employment and after termination? If so, in what circumstances can this be done? Must an employer pay its former employees remuneration while they are subject to post-employment restrictive covenants?

It is possible to restrict an employee's activities during employment and after the employment relationship is terminated. This is done by agreement, in either:

- ❑ The employment contract.

- ❑ A separate restraint of trade agreement.

Employees can be restricted from working for a competitor within a reasonable period and geographical area after their contracts are terminated, if they have been exposed to trade secrets and information over which the employer has a proprietary interest. These agreements are binding and enforceable, unless they are shown to be unreasonable. The onus is on the employee to show that an agreement is unreasonable and should not be enforced.

An employer does not have to pay its former employees remuneration while they are restrained. It is also not obligatory to provide consideration in advance (or at all) for a restraint of trade undertaking.

Proposals for reform

34. Are there any proposals to reform employment law or pensions law in your jurisdiction?

The South African Law Reform Commission has issued a draft bill on the Protection of Personal Information following its previously published Issue Paper on this subject. If enacted, there will be a general data protection statute supplemented by codes of conduct for various sectors (the statute will apply to both the public and private sectors). This statute will:

- ❑ Cover both the automatic and manual processing of information.
- ❑ Protect identifiable natural and legal individuals.

If the statute is adopted, it has been suggested that the data protection provisions in South Africa will be brought into line with international standards and developments.

Labour brokers (that is, temporary employment services) have been the subject of much debate in the press in recent months with Cosatu (the major trade union federation) and the South African Communist Party repeatedly calling for an outright ban on labour brokers. President Jacob Zuma has pledged that the government will introduce policies to regulate the sector. Other commentators have said regulation alone would not solve the problems and could result in employers resorting to illegal forms of hiring. No formal proposals for reform have yet been submitted.

There is an amendment bill proposing to increase the period of time for which employees who are retrenched can claim unemployment insurance from eight months to 12 months. However, some commentators have questioned whether the fund has the resources to meet such increased claims. The courts have stressed that there is a duty on employers to deal fairly at all times with their employees, and that the obligation has a substantive and procedural dimension. For example, where an employer intends to change an employment policy regarding the provision of bonuses, the employer arguably must both:

- ❑ Have a good reason for altering the policy (the substantive component).
- ❑ At the very least consult with employees before making the change (the procedural component).

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