



Labour & Employment

in 31 jurisdictions worldwide

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Legislation and agencies

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

The Basic Conditions of Employment Act, 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, 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, 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, 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 yes, 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 10 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 discrimination 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 yes, 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;
- 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.

- 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 covenants not to compete valid and enforceable?

Covenants not to compete 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;
- 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 to a related entity?

There are a number of work permit options available to foreigners wishing to work in South Africa. Foreigners wishing to work in South Africa for a period of up to three months can apply for a visitor's visa with consent to work. Such a visa can be renewed once for a further three-month period if necessary.

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 work permit options including quota work permits, general work permits, exceptional skills permits and intra-company transfer permits. A company wishing to employ a number of foreign workers may also apply for a corporate permit.

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 foreign financial market analysts per annum on quota work permits.

The position to be filled in terms of a general work permit must have been advertised in the national print media to allow South Africans to apply for it. The employer will need to state 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 may be issued to a foreigner who is employed abroad by a business operating in the Republic in a branch, subsidiary or affiliate relationship and who by reason of his or her employment is required to work in the Republic for a period not exceeding two years.

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

In principle, a company can employ an unlimited number of foreigners, provided that each foreign employee holds the appropriate 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.

16 Is spousal work authorisation available?

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 about having a work-authorised workforce and what are the sanctions if you do not?

It is a criminal offence to knowingly employ a foreigner in violation of the Immigration Act, 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.

Terms of employment

18 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;
- employees who earn more than R115,572 per year (this is the current amount, it is changed from time-to-time 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.

19 What categories of workers are entitled to overtime pay and how is such pay calculated?

Any employee who earns over R115,572 per year (this is the current amount, it is changed from time-to-time by regulation) 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 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.

20 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.

21 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.

22 In what circumstances may an employee have the right to 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.

23 What employee benefits are mandated 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 amongst 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.

24 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

25 Under what circumstances may an employer be held legally 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

26 What employment-related taxes are mandated by law?

South Africa levies income tax using progressive tax rates, with the lowest bracket (annual income of up to 112,500 rand) being taxed at 18 per cent. The top rate is 40 per cent and this applies to annual income in excess of 450,000 rand. A primary rebate of 7,740 rand applies to persons younger than 65. These rates and amounts are for the 2008 tax year which runs from 1 March 2007 to 29 February 2008.

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 taxable income, but with a maximum contribution (from 1 July 2006) of 11,662 rand.

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

Update and trends

In recent years we have seen a marked increase in litigation concerning 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 recently 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 or she wants to get out of the agreement.

We have also seen an increase in litigation on discrimination issues, especially sexual and racial harassment cases. Our courts have confirmed that all employers have

a duty of care in relation to employees which extends beyond the physical and includes an obligation to protect an employee from the psychological harm that could be caused by harassment. An employee who has been harassed can obtain compensation under the LRA, damages under the EEA and constitutional damages if the other remedies are not available in the circumstances (for example, because the identity of the perpetrator was not known and the employer failed to deal with the incident effectively).

In the area of business restructuring, the courts have continued to endorse the employer's prerogative to manage the business effectively and have confirmed that provided the employer provides a sound commercial rationale for what it is doing and follows a fair procedure, the courts should not second guess the employer.

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

If an employment contract provides for longer than the contractual provision apply. An employer may pay the employer what he would have earned had he worked in lieu of notice.

Employee-created IP

27 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'.

Termination of employment

28 Can 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.

29 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;
- four weeks if the employee has been employed for one year or more (for domestic workers and farm workers this applies after six months).

30 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.

31 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.

32 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.

33 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;
- is because the employee made a disclosure that is protected in terms of the Protected Disclosures Act.

34 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.

Mass retrenchments must be dealt with following the consultation and notice requirements set out in section 189A of the LRA.

Dispute resolution

35 Can 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.



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36 Can 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.

37 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.

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