

The Employment Amendment Bill – Third Time Lucky?

August 2019

Executive Summary

- Over the last 2 years, 3 substantive employment amendment bills have been proposed as well as 2 other bills which contain other amendments to the Employment Act. That is:
 - in 2017 a bill proposed increasing maternity leave from 3 months to 6 months. This bill has since stalled. Our full review of the 2017 bill can be read [here](#);
 - in March 2019 a new bill was put to Parliament seeking to provide for 3 months adoption leave (the same duration as maternity leave). A copy of the Bill is available [here](#);
 - the Data Protection Bill, 2019 (gazetted in June) seeks to legislate how employers obtain, use and save employee personal data. While the Finance Bill, 2019 seeks to delete the definition of ‘employee earnings’ and replace it with a term ‘basic salary’. The bill defines basic salary as an employee’s gross salary excluding allowances and other benefits; and
 - in April 2019 the Kenya Law Reform Commission (KLRC) and the State Department for Labour published a draft bill and presented it for public consultation. This bill proposes a wide range of changes as discussed in this article. A copy of the Bill is available [here](#).

The Employment Act (Amendment) Bill, 2019 (the Bill)

The Bill is still in its formative stages and has not been placed before Parliament. This article highlights the salient provisions of the Bill which if enacted will have a significant effect on labour and employment practices in Kenya.

• Restraint of Trade and Non-Disclosure

The Bill seeks to make void any provision in an employment contract that prohibits / restrains an employee, following termination of their employment, from exercising their ‘lawful profession or use knowledge or skills gained during employment’.

The Bill permits employment contracts to contain non-disclosure / confidentiality provisions provided they are for a ‘reasonable period’.

• Foreign Employees

The Bill prohibits an employer from employing a foreigner whose immigration status has not been regularised. This prohibition already exists under the Kenya Citizenship and Immigration Act, 2011.

• Sexual Harassment & Disciplinary Policies

The Bill proposes to reduce the minimum number of staff that employers need to have before

triggering the need for a sexual harassment policy down to 5 from the current 20.

The Bill further proposes to abolish the threshold requirement for an employer to have 50 or more employees before they are required to have a disciplinary policy. Thereby making it mandatory for all employers to have such a policy in place.

- **Transfer of Employees in M&A Transactions**

The Bill creates a mechanism to transfer employees from one entity to another and ensures the employees' rights are protected. In brief it provides that on transfer:

- employees' contracts of employment will continue with the new employer under the same terms;
- any ongoing dispute between the employee and the old employer are taken over by the acquirer; and
- prior to the transfer the employer is to consult with the employee.

The Bill anticipates that the Cabinet Secretary will enact regulations to give greater guidance in this regard.

- **Wages in a Foreign Currency**

The Bill proposes an amendment that removes the requirement in the Employment Act that wages should be paid in Kenya Shillings and allows for payment in any currency recognised in Kenya.

- **Overtime**

The Bill requires an overtime agreement to be in place before an employee works overtime. As a

minimum the agreement will have: a restriction that the employee cannot work more than 12 hours a day; that payment for overtime will be 1 ½ times the normal hourly rate and for rest days or public holiday at twice the normal hourly rate. The Bill does not distinguish between different forms or levels of employment.

- **Night Work**

Night work is now defined as work undertaken between 10 pm and 6 am. An employee who works these hours can be compensated by shift allowance or reduction of working hours. The employer will also be required to provide transportation to and from work to the employee's residence.

- **Flexible working time**

Employees will be entitled to apply for flexible working. This provision is counterbalanced by detailing the grounds the employer can rely on to refuse the request.

- **Maternity and Adoption Leave**

The Bill provides for:

- 1 month maternity leave where an employee suffers a still birth;
- paternity leave to be 14 days. The current Employment Act provision is for 2 weeks; and
- adoption leave for 1 month for a child below the age of 2 or if the child is born out of a surrogacy arrangement 2 months.

- **Compassionate, Sick and Study Leave**

The Bill proposes:

- compassionate leave for 5 days on full pay in the case of the death of a parent,

spouse, child or sibling. Currently there is no provision in the law;

- sick leave for 30 days on full pay and then 15 days on half pay; and
- education leave for 10 days in a leave cycle with full pay. The employee will need to be enrolled in a recognised learning institution. There is no requirement that the further studies undertaken has to be relevant to the employee's current role.

- **Suspension & Dismissal**

The Bill creates a provision for an employee to be suspended. The suspension is limited to 14 days with full pay.

The Bill lays out the process an employer will need to follow for a summary dismissal to be held to be fair. That is, the employer is required to: inform the employee of the charges; give the employee the opportunity to state their case; inform the employee of any right to appeal; and provide the employee with written reasons for dismissal. This is reflective of current case law.

Importantly the Bill proposes to remove the exclusion of employees on probationary contracts from challenging termination of employment. In effect, an employer has to have justifiable grounds for terminating a probationary contract and has to follow due process.

An employee who is summarily dismissed for lawful cause is entitled on dismissal to be paid all wages, allowances etc. due and pension paid into a scheme as at the dismissal date. This seeks to ensure the employee's dues and benefits are not held beyond the dismissal date.

- **Retirement**

Where an employee is retired under either normal retirement or on medical grounds the employer will be required to provide a "Certificate of Retirement".

- **Gratuity & Service Pay**

The Bill provides for gratuity pay to an employee on a contract of service of not less than 15 days pay for every completed year of service calculated based on the last salary earned. It further provides for service pay for every year worked to an employee on a contract who has worked for an aggregate of 1 year irrespective of payment of wages.

Gratuity and service pay are not payable to an employee who is either a member of a registered pension or provident fund, a gratuity or service pay scheme established by a CBA or any other scheme established and operated by an employer whose terms are more favourable than the service pay scheme established under section 35 of the Employment Act and the NSSF.

- **Employee Audits**

In June 2019 the newly launched National Employment Authority (NEA) published a notice requiring all employers in Kenya to submit returns in relation to their employees. The returns will include details of all employees: full names, age, sex, occupation, date of employment, nationality and level of education.

At present the requirement would only apply to employers with 25 or more employees. However, the Bill seeks to reduce the reporting threshold down to 5 employees.

For further advice about any of the information contained here please feel free to contact:

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