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EMPLOYMENT ALERT

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SMOKE SIGNALS FOR EMPLOYERS

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On 9 May 2018, the draft Control of Tobacco Products and Electronic Delivery Systems Bill was published for public comment.

The Bill aims to address the changes that technology has brought on the industry. With particular reference to vapes, e-cigarettes and other kinds of electronic nicotine delivery systems.

Not only are technological changes at the heart of this Bill but the ever-increasing need to safe guard the health and well-being of the general public. Employers have been placed in an onerous position under the proposed Bill and face fines and even imprisonment where they are deemed to fall short of their obligations.

The definition of enclosed space includes an area that is open or closed and an area that has a roof or not.

What do employers need to know?

There are two definitions that are of importance:

Firstly, the definition of "smoke" has been expanded to mean "inhale, exhale, hold or- (a) otherwise have control over an ignited tobacco product or a heated but not ignited tobacco product that produces an emission of any sort; or (b) operate or otherwise have control over an electronic delivery system that produces an emission of any sort."

Secondly, "workplace" means "any place in or on which one or more persons are employed and perform their work, whether for compensation or voluntary, and includes - (a) any corridor, lobby, stairwell, elevator, cafeteria, washroom or other common area used during or incidental to the course of employment or work: (b) any vehicle which is available for use for business or commercial purposes: and (c) any vehicle registered to the government."

The Act goes further in that s2(1) makes reference to an enclosed workplace. The definition of enclosed space includes an area that is open or closed and an area that has a roof or not. For most of us, this would mean a company bar or even where the canteen area extends onto a balcony. Whilst this might have been used as a smoking area before, it will not qualify now. Caution should be raised to the entrances to buildings, the undercover parking areas and the nooks or crannies frequented by smokers presently.

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SMOKE SIGNALS FOR EMPLOYERS

CONTINUED

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Section 2(3) places responsibility at the feet of the owner of or person in control of a public place or workplace to designate the whole or part of any outdoor space as an area where smoking is prohibited. And the employer bears the duty to ensure no person smokes in that area. Furthermore, employers are required to adhere to the public announcements and signage prescribed by the Bill.

To any employer whose attention has not already been ignited, we lastly draw your attention to s2(6) which speaks specifically to employers. This section states that the employer must ensure that:

- Employees may object to smoking in the workplace in contravention of this Act, without retaliation of any kind.
- Employees who do not want to be exposed to tobacco smoke at the workplace, are not so exposed.
- It is not a condition of employment, expressly or implied that any employee is required to work in any portion of the workplace where smoking is permitted by law.
- Employees are not required to sign any indemnity for working in any portion of the workplace where smoking is permitted by law.

Most importantly, any employer who contravenes or fails to comply with the above will be liable on conviction to a fine or imprisonment not exceeding a period of one year or both a fine and such imprisonment.

The purpose behind these changes is to bring South Africa in line with the World Health Organisation's Framework Convention on Tobacco Control.

We would strongly recommend that employers take this Bill and its sanctions as a smoke signal indicating the changes to come and start making the necessary changes and accommodations to their businesses.

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DOES THE PRINCIPLE OF DOUBLE JEOPARDY BEAR LIMITS?

The appellant was appointed to work for SARS and as a result, her entitlement to the grants ceased.

The Labour Appeal Court (LAC) has recently taken the stance that not all cases where an employee has been disciplined twice for misconduct emanating from the same incident, will necessarily constitute double jeopardy. The court will distinguish between the charges levelled against the employee in each instance, and will ultimately rule in favour of fairness.

Two years later, evidence surfaced that the letters produced at the first disciplinary hearing had been forged.

In *Mahlakoane v SA Revenue Service* (2018) 39 ILJ 1034 (LAC), the appellant challenged the decision of the Labour Court (LC) to review and set aside a Commission for Conciliation Mediation and Arbitration (CCMA) award issued in her favour, the latter ruling that her dismissal from the South African Revenue Service (SARS) had been unfair.

The appellant, who had been receiving a child support grant in terms of the Social Assistance Act, was appointed to work for SARS and as a result, her entitlement to the grants ceased. Notwithstanding her appointment, the appellant continued to draw the grants. When the matter came to the knowledge of SARS, the appellant was charged with, amongst others, fraud and subjected to a disciplinary hearing (the first disciplinary hearing). She produced two South African Social Security Agency letters demonstrating that she had requested the payment of the grant to be stopped and as such, the Chairperson only found her guilty of continuing to receive the grants despite not qualifying therefor. As a sanction, she was issued with a final written warning.

Two years later, evidence surfaced that the letters produced at the first disciplinary hearing had been forged. SARS charged the appellant with at least five counts of misconduct, including fraud and forgery (the second disciplinary hearing).

In the second disciplinary hearing, a sanction of dismissal was imposed on the appellant. She successfully challenged her dismissal in the CCMA, however, the LC reviewed and set aside the CCMA's ruling.

The LAC supported the view held in previous LAC decisions, that the principle of "double jeopardy" entails that an employee generally cannot be charged again with the same misconduct that he or she was either found guilty or not guilty of; and that there are, however, instances where breaches of this principle can be condoned, with the paramount consideration being fairness to both sides.

Notwithstanding the above view, the LAC drew a distinction between the charges levelled against the appellant in the first and second disciplinary hearings and held that the double jeopardy principle did not come into consideration in this case. It held that the main allegations in the first disciplinary related to the appellant continuing to take grants knowing well that she no longer qualified. The charges in respect of the second disciplinary hearing, on the other hand, centered on the falsification of the dates on the letters, which had never been in contention in the first disciplinary hearing. The LAC dismissed the appellant's application with costs.

Employers, therefore, ought to bear in mind that where new facts relating to an already concluded disciplinary process arise, the double jeopardy principle will not be an absolute bar to revisiting the matter but fairness to the parties will ultimately be the determining factor as to whether the disciplinary process can be revisited.

Aadil Patel and Anelisa Mkeme

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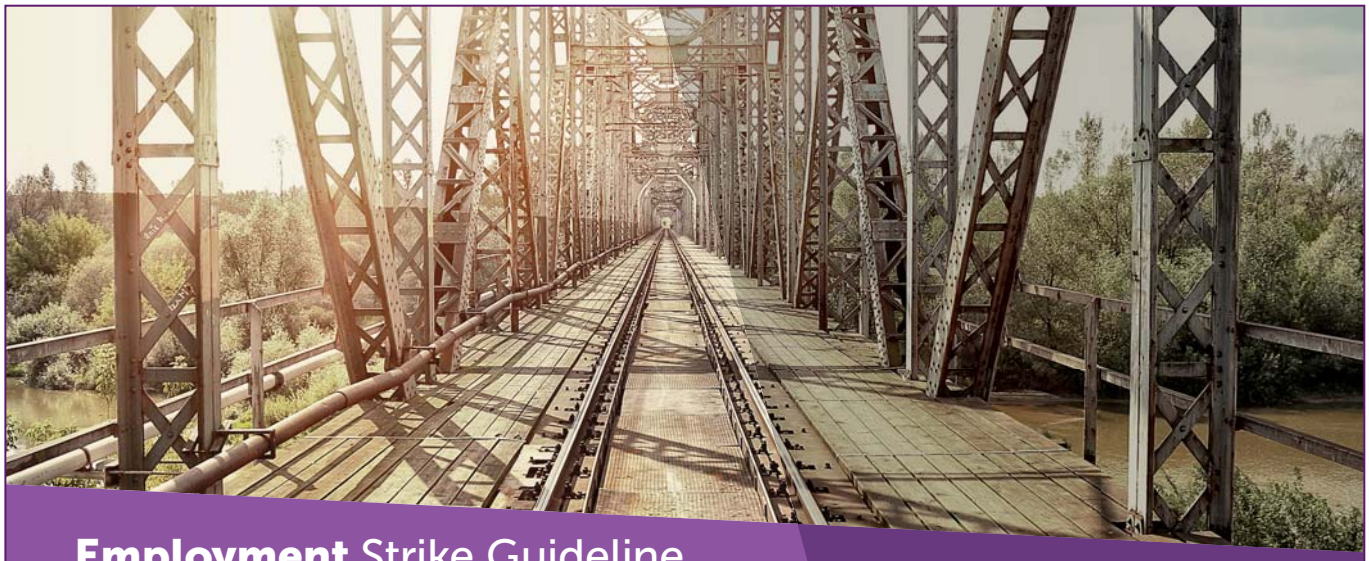

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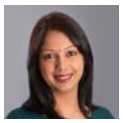

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