

EMPLOYMENT LAW ALERT

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CLIFFE DEKKER HOFMEYR

INCORPORATING
KIETI LAW LLP, KENYA

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Three ways employers can help their employees forge ahead together

The nation has been in a state of political exhilaration. Political manifestos, political figures and discussions on the fifth presidency have consumed the better part of Kenyan conversations. To avoid rising tensions, employers should do three things to promote cohesion within the workplace whilst respecting their employees' constitutional rights. These include reminding employees of the boundaries around expressing their political opinion, conducting sensitivity trainings, and considering drafting policies that outline expectations.



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Three ways employers can help their employees forge ahead together

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Section 6 of the Occupational Safety and Health Act No.15 of 2007 provides that every employer "shall ensure the safety ... and welfare at work of all persons working in his workplace."

This duty of safety and welfare does not only relate to physical aspects but extends to the employee's overall well-being. Politically motivated behaviour can escalate within a work environment and create tension, discomfort and may even cause certain employees to feel unsafe. Some examples of behaviour that may undermine constructive interaction and threaten the safety and welfare of an employee's well-being, include:

- overly contentious political debates during work hours;
- wearing of political insignia or merchandise in the workplace; and
- placing of posters, notices and announcements in the workplace and in work-related group chats to encourage employees to take a particular stance or take certain action in response to a political decision, to name a few.

Given Kenya's political history, conduct of this nature is often rooted in deep-seated beliefs and opinions, which may incite conversations and actions that cause offence and irreparable damage to a working environment.

LEGAL FRAMEWORK

Section 46(1)(g) of the Employment Act, 2007 states that an employee's political opinion will not constitute a fair reason for termination or the imposition of a disciplinary penalty. This position is attributed to the various constitutional safeguards under the Bill of Rights in the Constitution of Kenya, 2010 (Constitution). These include an employee's: political rights enshrined in article 38; freedom of opinion under article 32; freedom of association under article 36; and freedom of expression under article 33.

Article 38 provides that every person is free to make political choices, which includes the right to participate in the activities of a political party, campaign or cause. Article 32, on the other hand, provides that every person has the right to freedom of thought, belief and opinion and the right to publicly manifest this. Sub-article 32(3) further states that "a person may not be denied access to any ... employment ... or the enjoyment of any right because of their belief". Moreover, article 36 entitles every person to join or participate in the activities of an association of any kind, while article 33 states that a person has a right to impart their ideas or any information. Notably, sub-article 33(2) limits this and provides that the right to impart ideas or information does not extend to the incitement to violence, the advocacy of hatred that constitutes ethnic incitement or vilification of others or hate speech.

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These provisions protect an employee's individuality of thought and expression and prevent political censorship. As such, an employer may not outrightly forbid an employee from manifesting their choices or thoughts on the current political situation. However, the exceptions to these constitutional rights, coupled with the duty to maintain a safe workplace mean that an employer may lawfully apply limits, so long as they are reasonable and justifiable. Doing so will ensure that an employee's rights are respected, the employer's duty to maintain a safe workplace is dispensed with and the employer's business and brand are protected.

We have not come across any reported cases relating to this subject in Kenya; however, the 2018 South African case of *NUMSA obo Kwena Masha and PFG Building Glass GPChem345-16/17* offers some guidance. In this case, the Commissioner of the National Bargaining Council for the Chemical Industry, determined that an employer is well within its rights to take reasonable steps to mitigate

unnecessary tension that arises from political intolerance in the workplace. In this case, the employer had a policy that set out standards of political neutrality. Despite this, an employee wore clothing that linked him to a political party and took a photo of himself at work and shared it on social media. It was held that "*wearing political clothing does not only have the potential to cause tension in the workplace but also impacts cohesion and constructive interaction, which should take place between employees ... and the employer*".

Of importance, the Commissioner was able to rule in this manner because the employer had a policy in place that the employee had clearly violated. It is therefore arguable that if such a policy did not exist, then the Commissioner may have decided differently. This case highlights one of the ways in which employers may lawfully regulate employee conduct and maintain cohesion in the workplace, by ensuring that politically motivated behaviour does not escalate to a level that causes offence or hinders constructive interaction between employees.



The Legal 500 EMEA 2022 recommended our **Employment practice** in **Tier 1** for employment.

The Legal 500 EMEA 2022 recommended **Fiona Leppan** and **Aadil Patel** as leading individuals for employment.

The Legal 500 EMEA 2022 recommended **Hugo Pienaar, Gillian Lumb, Anli Bezuidenhout, Imraan Mohamed, Jose Jorge and Njeri Wagacha** for employment.

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RECOMMENDATIONS

In light of the above, employers are advised that they may:

- Remind employees of their rights and the lawful limits of those rights. This may be done via email or a notice on a shared platform, to remind employees that although they have certain rights, they must respect each other's rights and ensure that their political expression does not incite violence, amount to hate speech or vilification of others. This is a short-term solution that is relatively quick to implement.
- Conduct sensitivity trainings. This is likely to require external stakeholders to help train employees on how to be sensitive to existing diversity and educate them on what constructive behaviour looks like in this context. Sensitivity trainings will also help develop and correct behaviour and emotional actions and reactions. This is a mid-term solution that is likely to require planning and financial resources to implement.

- Consider establishing policies. As highlighted in the case above, this option is likely to be an effective means of regulating political debates and expression of political opinion, without infringing on an employee's freedoms. This is a long-term solution that would establish the employer's position and set out its expectations and standards.

CONCLUSION

Employers have a statutory duty to ensure the safety of employees in the workplace, which, among other things, includes creating a politically neutral environment. Within the current political circumstances, this may present a challenge as employers navigate how to maintain safety and respect employee freedoms. Employers are advised that there are various options that they may use to ensure that their work environment remains pleasant and respectful.

**DESMOND ODHIAMBO,
TYLER HAWI AYAH AND
JOSEPH MACHARIA**

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ranked our Employment Law practice in
Band 2: employment.

Aadil Patel ranked by
CHAMBERS GLOBAL 2015 - 2022
in Band 2: employment.

Fiona Leppan ranked by
CHAMBERS GLOBAL 2018 - 2022
in Band 2: employment.

Imraan Mahomed ranked by
CHAMBERS GLOBAL 2021 - 2022
in Band 2: employment.

Hugo Pienaar ranked by
CHAMBERS GLOBAL 2014 - 2022
in Band 2: employment.

Gillian Lumb ranked by
CHAMBERS GLOBAL 2020 - 2022
in Band 3: employment.



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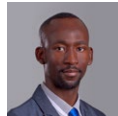
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BBBEE STATUS: LEVEL ONE CONTRIBUTOR

Our BBBEE verification is one of several components of our transformation strategy and we continue to seek ways of improving it in a meaningful manner.

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