



LAWS OF THE WORLD



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LEGAL SYSTEM, CURRENCY AND LANGUAGE

Common law, civil law and customary law, subject to the Constitution. Rand (ZAR). Eleven official languages: Afrikaans, English, Ndebele, Northern Sotho, Sotho, Swazi, Tswana, Tsonga, Venda, Xhosa and Zulu.

CORPORATE PRESENCE REQUIREMENTS AND PAYROLL SET-UP

A foreign company must register as an 'external company' before it can enter into employment contracts in South Africa, and is required to pay Corporate Income Tax.

The nature of an 'external company' is described in the Companies Act, No 71 of 2008 (Companies Act). Where a company registered in a foreign country carries on business or non-profit activities in South Africa it will be regarded as an 'external company.' A company is deemed to carry on business in

South Africa, *inter alia*, if it has entered into one or more employment contracts with effect in South Africa. The consequences of being an 'external company' are dealt with in s23 of the Companies Act, which provides, *inter alia*, for registration with the Companies and Intellectual Property Commission (Commission) within 20 business days of commencing business in South Africa, and must maintain at least one office in South Africa, which is registered with the Commission. Companies (including external companies) are obliged to register and deduct tax from an employee's salary and, in addition, have reporting duties to the South African Revenue Services (SARS). The maximum personal tax rate is currently 40%.

Employers are required to contribute to prescribed employee benefit funds and make contributions to an unemployment benefit fund. Employee contributions to the unemployment benefit fund are deducted and paid on their behalf by the employer.



IMMIGRATION

All non-citizens must hold an appropriate work visa

A local sponsor for a work visa is generally required and it is also necessary to show that no local person is capable of filling the applicant's position. Foreign nationals who overstay will be declared undesirable and their employment prohibited.

PRE-HIRE CHECKS

Required

Immigration compliance. Profession specific requirements may apply, subject to the profession in question, eg directors of companies may not be unrehabilitated insolvents.

Permissible

Employees' personal information is protected by the Protection of Personal Information Act, No 4 of 2013 (POPI). Personal information may only be processed if the purpose for which it is processed is adequate, relevant and not excessive. The procedures to be followed to gain access to personal information will depend on the nature of the information and the reasons why

such information is sought. This may include criminal, credit and reference checks. There is no statutory limitation in the categories of positions for which such checks may be conducted. In practice, due to the cost and effort involved, employers tend to request background checks where they are relevant to the position applied for, or a warning light is raised in the reference checking or interview process.

HIRING OPTIONS

Employee

- Full-time permanent employment;
- Fixed-term;
- Part-time; and
- Employment below the minimum hours per month (which may result in exclusion from minimum benefits).

Independent contractor

Independent contractors are excluded from the employment protections afforded to employees, but legislation imposes a presumption of employment if certain elements exist in the working relationship, such as the right of supervision on the part of the employer. The presumption applies only to persons earning below a threshold amount published annually in terms of the Basic Conditions of Employment Act, No 75 of 1997 (BCEA), currently set at R205,433.30 (BCEA Threshold). For other workers, the common law dominant impression test will apply which implies that there is no single indicator of an employment relationship. Instead, the court will look at the relationship as a whole, to determine whether the relationship is one of employment or independent contracting. The level of control exercised by the employer over the 'employee' is one of the aspects considered.

Labour broker

Employees earning below the BCEA Threshold enjoy additional protection if placed at a client through a labour broker (also called temporary employment service or agency). Except in limited circumstances, after an initial period of placement, the worker will be deemed jointly employed by the client and labour broker, and become entitled to have terms of employment comparable to permanent employees of the client. No deemed employment applies to higher earning labour broker employees.

EMPLOYMENT CONTRACTS AND POLICIES

Requirements

No formalities are required, but written employment agreements are common. A contract comes into existence upon valid acceptance of a valid offer of employment. Consensus with regard to the nature of the services rendered and remuneration is required. On commencement of the employment relationship the employer is required to provide the employee with information such as the calculation and method of payment. The employee cannot contract out of certain minimum terms of service contained in the BCEA.

Policies

No specific policies are mandatory. Employers are not required to have written health and safety policies but are required to adhere to the requirements contained in the Occupational Health and Safety Act, No 85 of 1993. Codes of good practice may recommend particular policies. Codes of good practice are generally published as guidelines to employers, and are often not binding, except to the extent that enabling legislation determines otherwise (eg the enabling legislation may require decision makers in arbitration tribunals to have regard to the code, failing which they may commit reviewable irregularities).

A failure to abide by the codes must however be explained by the employer, and in the absence of good cause, may render employer action unfair.

Probation

Permissible for a 'reasonable period' (normally between three and six months).

Third party approval

None required.

EMPLOYEE REPRESENTATION

Employees are constitutionally entitled to join a trade union, to be represented by such a trade union and to strike.

The result is an extensive framework of collective bargaining, organisational rights, collective agreements and bargaining councils that play a central role in most commercial and employment activities. Industry-wide collective bargaining agreements may be concluded. These agreements may apply to parties in a Bargaining Council (a body formed by organised labour and organised employers for a particular sector which, *inter alia*, creates a forum for collective bargaining applicable to the whole or part of the industry). Employer parties may be bound to a collective agreement concluded in a Bargaining Council, even if they did not themselves agree to the collective agreement, and may even be extended to employers who are not members of the Bargaining Council. Conditions apply.

LANGUAGE REQUIREMENTS

When rights of employees are affected, employers are required to ensure that the employees understand the action taken, or information imparted.

This may require that information be supplied in a language that the employees can understand. Disciplinary proceedings may be considered unfair if conducted in a language with which the employee is insufficiently familiar to enable effective participation in the proceedings. Translators must then be supplied.

DISCRIMINATION

Direct and indirect discrimination are prohibited. sexual harassment and unequal pay constitute unfair discrimination and are given express protection.

Designated employers are obliged to put into place affirmative action policies, including numerical targets but excluding quotas, to increase access to opportunities for previously disadvantaged South African citizens (African, Coloured and Indian people, women and people with disabilities).

The listed grounds protected from unfair discrimination are 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, birth and any other arbitrary ground.

MINIMUM EMPLOYMENT RIGHTS

Employees entitled to minimum employment rights

Independent contractors are excluded from all employment protection. Specific categories of employees may further be excluded from some legislative protections, for instance employees working less than 24 hours per month are excluded from minimum employment terms under the BCEA, and employees earning above the BCEA Threshold are not entitled to overtime payments unless their contracts of employment provide otherwise.

Working hours

- Maximum 45 hours a week, subject to the exemptions identified in the BCEA (eg employees earning above the BCEA Threshold, senior managerial employees, etc.).
- Rules on rest breaks, night work and rest periods between shifts apply.
- Agreements on compressing work weeks and averaging of work hours can impact maximum work hours.

Maternity/parental leave and pay

A minimum of four consecutive months of unpaid maternity leave. Employees may claim partial remuneration through the Unemployment Insurance Fund.

No specific paternity leave, however family responsibility leave of three days per year (non-cumulative) can be used as paternity leave, or as contractually agreed.

Overtime

Overtime may be worked by agreement. An agreement to work overtime, concluded in the first three months of employment is only valid for 12 months. Limitations on maximum overtime apply (10 hours per week, or 15 hours in terms of a collective agreement), but agreements on compressing work weeks and averaging of work hours can alleviate limitations. Compensation for overtime is payable to employees earning below the BCEA Threshold, but higher earning employees are excluded from overtime payment unless the employment contract provides to the contrary. Minimum statutory overtime rates are either one and a half times the normal rate, or two times the normal rate, with the highest rate being payable if the overtime is worked on a Sunday or public holiday and the employee is not normally required to work on Sundays and/or public holidays. Time off may be given *in lieu* of paying overtime, by agreement.

Wages

No general prescribed minimum wage applies. Sectoral determinations provide for minimum terms and conditions of employment in a particular industry or sector, which

include minimum wages. A sectoral determination is promulgated by the Minister of Labour, and sets up basic conditions of employment for specific sectors and areas. This is normally used for sectors that are not well organised and where individual or collective bargaining is unlikely to be able to achieve equitable agreements on improvements to terms and conditions of service.

Vacation

Minimum three weeks' paid annual leave as well as 12 days' statutory holidays, on full remuneration.

Sick leave and pay

All employees are statutorily entitled to paid sick leave of six weeks per 36 month employment cycle. Payment of sick leave is based on wages, not full remuneration. The latter term includes the former, as well as all other payments in cash or kind. Note however that the exact composition of remuneration may differ depending on the particular statutory provision, for instance, it has a slightly different content when calculating severance benefits.

Pro-rated leave entitlements may apply for shorter periods of employment and in the first six months of employment.



DATA PRIVACY

Employee monitoring is impacted by legislation, including POPI, but not prohibited.

POPI restricts the extent to which employers can access the private information of its employees. Employees must generally be notified of the reason for personal data processing, and provide consent.

BENEFITS AND PENSIONS

The contract of employment will determine whether the employee is entitled to any further benefits, including subsistence, travel and pension allowances, bonuses or acting allowances.

No mandatory membership of a retirement fund applies.

TERMINATION

Grounds

Unilateral termination of employment is permissible provided it is substantively and procedurally fair. Dismissal is only justifiable by reason of misconduct, capacity (ill-health or performance) or operational requirements. Termination by effluxion of time (ie fixed-term agreement comes to an end or the employee reaches retirement age) is not considered dismissal, hence no requirement of fair reason or fair process applies.

Employees subject to termination laws

All employees, from the beginning of the employment relationship, are entitled to dismissal protections although termination is easier during a probation period. Independent contractors are not protected.

Prohibited or restricted terminations

Automatically unfair dismissals are prohibited, and increased penalties will attach if a dismissal is motivated by one of the prescribed prohibited reasons. Automatically unfair dismissals include for instance dismissals due to employee participation in lawful strike action and dismissals due to an employee's pregnancy or a reason related to pregnancy.

Third party approval for termination/termination documents

Not required.

Severance

- Only payable in the event of operational requirement dismissals.
- Minimum of one week's remuneration per completed year of service, subject to additional payments agreed in the consultation period. Severance is one of the mandatory topics of consultation.

Mass layoff rules

Strict information and consultation rules apply to all mass layoffs (operational requirement dismissals or retrenchments). Additional requirements apply to large scale retrenchments (size of retrenchment determined on a sliding scale, by reference to number of affected employees compared to total employees).

No notice to government officials required.

Notice

Minimum BCEA notice periods of between one week and four weeks apply, unless contracts (individual or collective) provide for longer notice, or a collective agreement provides a shorter period. Notice to be given in writing. Notice cannot be given while the employee is on any type of leave.

Statutory right to pay in lieu of notice or garden leave

The employer may freely elect to pay remuneration *in lieu* of notice, irrespective of who gives notice. The decision to waive the obligation to work during a notice period rests with the employer, but the employee must agree to a waiver of the obligation to pay remuneration. The employee cannot be compelled to take accrued leave during the notice period. Garden leave is neither regulated by statute, nor commonly provided for in employment contracts.

POST-TERMINATION RESTRAINTS

In principle enforceable, with the party seeking to escape its effect having the onus of proving that the restraint ought not to be enforced, for being against public policy.

The enforcing party must, however, be able to show a protectable interest, and the limitations to competition must not go beyond what is reasonably necessary to protect such legitimate business interest. Protectable interests include client relationships and trade secrets.

Non-competes

Permissible both on a temporal and geographic scale. Determination of enforceability of a restraint agreement is done on a case by case basis. A restraint will only be enforced if the employer has a protectable interest worthy of being protected at the time of an alleged breach of the restraint, and to the extent that the restraint does not exceed what is necessary to protect such interest. In some instances a longer restraint (and/or for a wide geographical area) may be justified if the protectable interest requires this, and the impact on the employee does not outweigh the impact on the employer, while in another case, a shorter period may be justified.

Customer non-solicits

Permissible.

Employee non-solicits

Permissible.



WAIVERS

Employees can contract out of common law rights without any formalities.

The right to waive statutory rights may however be limited (ie only to the extent that legislation may allow such waiver). No specific requirement that the employee waiving a right must be represented, or for any formalities to be met.

CRIMINAL SANCTIONS

Employment law is largely decriminalised, however, specific legislation renders some behaviour a criminal offence.

For instance, disclosure of the private information of employees to third parties is an offence.

REMEDIES

Discrimination and sexual harassment

Claims must first be referred to the Commission for Conciliation, Mediation and Arbitration (CCMA) or a Bargaining Council with jurisdiction for conciliation. If conciliation fails, the claim is referred to the Labour Court for adjudication, or for arbitration at the CCMA or Bargaining

Council in limited circumstances (ie, sexual harassment cases, with the parties' consent, or if the complainant earned below the BCEA Threshold). Strict time limits apply.

Remedies include compensation (unlimited) and damages (limited to the BCEA Threshold).

Unfair dismissals and unfair labour practices

The majority of disputes must be referred to the CCMA or Bargaining Council with jurisdiction for conciliation. If conciliation fails, the nature of the dispute determines whether the dispute must be referred to adjudication at the Labour Court, or arbitration at the CCMA or Bargaining Council. Strict time limits apply.

Remedies are primarily reinstatement (possibly retrospective) and compensation, limited to a maximum of 12 months' remuneration for unfair dismissal and 24 months for automatically unfair dismissal.

Failure to inform and consult

There is no separate cause of action for failure to consult, but this may constitute the basis of a finding of procedural unfairness in an operational requirements dismissal. Where only procedural unfairness is found, the reinstatement remedy is not available.

MARKET RECOGNITION

Our Employment Law team is externally praised for its depth of resources, capabilities and experience.

Chambers Global 2014–2024 ranked our Employment Law practice in Band 2 for employment. *The Legal 500 EMEA 2020–2024* recommended the South African practice in Tier 1. *The Legal 500 EMEA 2023–2024* recommended the Kenyan practice in Tier 3 for employment.

The way we support and interact with our clients attracts significant external recognition.

Aadil Patel is the Practice Head of our Employment Law team, and the Head of our Government & State-Owned Entities sector. *Chambers Global 2024* ranked Aadil in Band 1 for employment. *Chambers Global 2015–2023* ranked him in Band 2 for employment. *The Legal 500 EMEA 2021–2024* recommended Aadil as a 'Leading Individual' for employment and recommended him from 2012–2020.

The Legal 500 EMEA 2021–2024 recommended **Anli Bezuidenhout** for employment.

Chambers Global 2018–2024 ranked **Fiona Leppan** in Band 2 for employment. *The Legal 500 EMEA 2022–2024* recommend Fiona for mining. *The Legal 500 EMEA 2019–2024* recommended her as a 'Leading Individual' for employment, and recommended her from 2012–2018.

Chambers Global 2021–2024 ranked **Imraan Mahomed** in Band 2 for employment and in Band 3 from 2014–2020. *The Legal 500 EMEA 2020–2024* recommended him for employment.

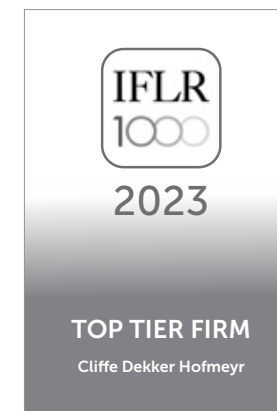
The Legal 500 EMEA 2023–2024 recommended **Phetheni Nkuna** for employment.

The Legal 500 EMEA 2022–2024 recommended **Desmond Odhiambo** for dispute resolution.

The Legal 500 EMEA 2023 recommended **Thabang Rapuleng** for employment.

Chambers Global 2024 ranked **Njeri Wagacha** in Band 3 for FinTech. *The Legal 500 EMEA 2022–2024* recommended Njeri for employment.

The Legal 500 EMEA 2023–2024 recommends her for corporate, commercial/M&A.



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.

PLEASE NOTE

This information is published for general information purposes and is not intended to constitute legal advice. Specialist legal advice should always be sought in relation to any particular situation. Cliffe Dekker Hofmeyr will accept no responsibility for any actions taken or not taken on the basis of this publication.

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