FROM RECRUITMENT TO RETIREMENT

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RECRUITMENT

For many employers, the key to having a productive and high-performing workforce is recruiting the right people to start with. However, it is important for employers to be aware that even before an employee reports for work, there are a number of legal issues that arise in the process of seeking, interviewing and selecting candidates for a position.

Selection for Recruitment

The decision of who to hire, rests with the employer, however employers may not act in a discriminatory manner when making this decision, except to the extent that the Employment Equity Act, No 55 of 1998 (EEA) allows employers to prefer an affirmative action candidate who is suitably qualified for the position, in order to achieve equitable access to positions for all races and genders within the workplace.

Discrimination (other than for appropriate affirmative action programmes) is prohibited by the EEA if the reason for the disparate treatment is based on the applicant's race, gender, pregnancy, marital status, family responsibility, ethnic or social origin, sexual orientation, age, disability, religion, HIV status, conscience, belief, political opinion, culture, language, or any other arbitrary ground.

As such, employers should evaluate the fairness of their employee interactions, right from drafting recruitment advertisements.

When short listing or selecting candidates, employers should ensure that any decision is based on consistent selection criteria, which are not discriminatory and are pertinent to the inherent job requirements. The code of good practice on the integration of employment equity into human resources policies and practices provides guidelines on how to conduct the recruitment and selection process, as well as what and how medical, psychological and other similar assessments may be conducted.

The promulgation of the Protection of Personal Information Act, No 4 of 2013 and the imminent implementation thereof will require employer compliance with its provisions when advertising or interviewing candidates. The protection of employees' personal information is an ongoing employer obligation, and is set out in more detail in the following paragraphs.

Making an Offer of Employment

Once an unconditional offer has been accepted, and before the applicant has to report for work, the applicant becomes an employee. A withdrawal from the agreement by the employer during this period may constitute an unfair dismissal.

Existing Restrictions

Prior to making an offer of employment, an employer should ensure that the prospective employee does not have any binding restrictions that may prevent the employee from entering into the employment contract, such as post-employment restrictive covenants imposed by the employee's former employer.

Employment Contract

In concluding the employment contract, an employer should be aware of the minimum statutory terms and conditions set out in the various employment-related legislation. The basic terms usually include the term, position, duties, probationary period (if any), remuneration, other benefits, annual leave, sick leave, maternity leave and family responsibility leave, mandatory retirement fund (if any), notice of termination, the right to summarily dismiss, protection of confidential information and intellectual property, post-termination restrictions (if any), governing law and jurisdiction and a data collection statement (once the legislation been fully implemented).

There is no general statutory requirement that a written contract must be entered into or signed, provided the employer has complied with the requirement to furnish the employee with the written particulars of employment as specified in the Basic Conditions of Employment Act, No 75 of 1997 (BCEA). Certain fixed-term contracts of employment must further be in writing. It is advisable to reduce the employment contract to writing.

Agreements between employers and employees, collective agreements between employers and trade unions, collective agreements concluded at Bargaining Council level, sectoral determinations and Ministerial variations may amend certain levels of basic conditions of employment (except several core rights) prescribed by the BCEA, and such collective instruments take precedence over provisions in contracts of employment between the employer and the employee. The National Minimum Wage Act, No 9 of 2018 (NMW Act) introduces a national minimum wage in South Africa. The effect of this is that every worker to which the NMW Act applies is entitled to be paid at least the national minimum wage by his or her employer. Employers can apply for an exemption from paying the national minimum wage. Non-compliance with the NMW Act may result in fines being imposed on the employer or referrals for claims for underpayment to the CCMA or appropriate court.

Unless excluded by agreement, some common law obligations, implied and tacit terms may also apply to the employment agreement.

Persons rendering services as independent contractors, rather than employees, are excluded from all employment related benefits and protections, including for instance the right not to be unfairly dismissed, as it is found in the Labour Relations Act, No 66 of 1995 (LRA) and minimum conditions of employment found in the BCEA. Whether a person is an employee or an independent contractor depends on the specific circumstances, and will be determined based on the actual manner in which the person renders the services, rather than the terms of the contract (insofar as the two differ).

Immigration and Citizenship

All foreign employees in South Africa must hold an appropriate work visa if they do not have permanent residence. Detailed conditions governing the admission and residence of foreign nationals into South African territory are regulated by a system of entry visas and administered by the Department of Home Affairs, in accordance with the provisions of the Immigration Act, No 13 of 2002. South Africa generally recognizes three different categories of work visas (intra company, critical skills and general). A local sponsor for a work visa is generally required and under some categories of work visa it may be necessary to show that no local person is capable of filing the vacant position, it is further generally necessary to show that no local person is capable of filling the applicant's position.

A person is not permitted to work in South Africa with a work visa pending, so employers should ensure that the application is submitted well in advance of the employee's commencement date.

With the exception of company transfer and/or critically skilled foreigners, the Employment Services Act, No 4 of 2014 imposes additional limitations on employment of foreign nationals.

MANAGING RISK

A wide range of matters arise during the employment relationship which requires careful management in order to ensure that a positive ongoing relationship is maintained and that there is compliance with relevant legal obligations. It is important to note that the BCEA and other legislation that applies to the workplace impose liability on employers for a variety of breaches of the legislation.

As a result, a failure to comply with some of the employment-related obligations can result in heavy fines.

Non-standard Employment

In recognition of the business need to have some flexibility in obtaining required services that meets the business' particular needs, various ways may be employed to allow for non-standard employees, (where the standard method will be full-time, permanent employment). Commonly used non-standard employment types include:

- Fixed-term contracts of employment
- Independent contracting arrangements
- Placements through temporary employment services (TES)
- Part-time employment

Take note however that courts will give effect to the reality of the relationship, rather than the contractual terms, where the two differ.

Legislative amendments have partially or completely limited some or all of the aforestated employment options for employees earning below a statutory income threshold (currently R205,433.30 per annum). For instance, employers must be able to justify the use of fixed-term employees, where such employees are utilised for more than three months failing which employment will become permanent.

In the case of temporary employment services, after three months and where the placed employee earns below the statutory income threshold, the client is deemed to be the employer of the TES employees except if a limited number of exceptions apply. In both cases (TES employees and fixed-term employees) become entitled to not be treated less favourably than the other permanent employees, after three months. The legal implications of using employees provided by a TES are discussed in our Temporary Employment Services Guideline (which is available on the CDH website: https://www.cliffedekkerhofmeyr.com/en/practice-areas/employment.html#tab-brochures).

BENEFITS AND ENTITLEMENTS

Our expertise includes dispute resolution and opinion work in a range of specialisations, including in the following areas:

General

In addition to independent contractors, certain employees are also excluded from the protections afforded by the BCEA. Employees working for less than 24 hours per month will not be entitled to any of the protections of the BCEA, while others are only excluded from particular classes of protection.For instance, employees earning above the statutory threshold amount are not (unless in terms of a more beneficial contract of employment) entitled to be paid for overtime worked.

It is open to the parties to provide employees with benefits greater than the minimum, in terms of an individual or collective agreement. In limited circumstances, collective agreements may also result in reduced benefits and entitlements, insofar as the BCEA allows for such reductions.

Annual Leave

Employees are entitled to a minimum number of paid annual leave days. The minimum period of paid annual leave is 21 consecutive days on full remuneration for each annual leave cycle, or by agreement it can be accrued based on one day's annual leave accrued for every 17 days.

Statutory Holidays

There are currently 12 statutory holidays recognised in South Africa and all employees are entitled to paid leave on statutory holidays. Special overtime rates apply, to the extent that an employee is nonetheless required to work on public holidays.

Sick Leave

The BCEA states that employees are entitled to paid sick leave equal to the number of days the employee would normally work in a period of six weeks, in every sick leave cycle. A sick leave cycle is 36 months and begins on commencement of employment and on completion of every prior sick leave cycle. However, during the first six months of employment an employee is only entitled to one day paid sick leave for every 26 days worked.

Rest Periods

While employees may, in the normal course, be required to work up to 45 hours per week as part of their normal working week, the BCEA imposes certain minimum rest periods. For instance, employees are entitled to a minimum of 36 consecutive hours weekly and 12 consecutive hours daily rest periods.

BENEFITS AND ENTITLEMENTS...*continued*

Maternity Leave

Employees are entitled, subject to conditions, to a period of four months' unpaid maternity leave. Some payment during maternity leave may be claimed in terms of the Unemployment Insurance Act, No 63 of 2001, and the Unemployment Insurance Contributions Act, No 4 of 2002, which create an unemployment insurance fund (UIF), largely funded by mandatory contributions from the employer and employee. However, this may be less than the employee's normal remuneration and is further reduced in the event that the employer pays partial remuneration during maternity leave.

Family Responsibility Leave

Employees are entitled, subject to conditions, to a period of four months' unpaid maternity leave. Some payment during maternity leave may be claimed in terms of the Unemployment Insurance Act, No 63 of 2001, and the Unemployment Insurance Contributions Act, No 4 of 2002, which create an unemployment insurance fund (UIF), largely funded by mandatory contributions from the employer and employee. However, this may be less than the employee's normal remuneration and is further reduced in the event that the employer pays partial remuneration during maternity leave.

Parental Leave

The Labour Laws Amendment Act, No 10 of 2018 (LRAA) which is yet to come into operation, introduces parental leave. An employee who is a parent of a child is entitled to is entitled to 10 consecutive days parental leave on the birth of the parent's child or when adoption order is granted or when the child is placed in the care of the prospective adoptive parents by a court, whichever occurs first. The employer does not pay for the leave but the employee can claim for payment from the UIF for parental leave.

Adoption Leave

The LRAA also introduces adoption leave. An adoptive parent is entitled to 10 consecutive weeks unpaid adoption leave when the adoption order is granted, or the child is placed in the care of the prospective adoptive parent by a court.

The adoptive parent is only entitled to the adoption leave if the child is below the age of two. The employee can apply for payment of adoption benefits from the UIF and must be a contributor in employment for at least 13 weeks before applying for such benefits.

Commissioning Parent Leave

In terms of the LRAA, a commissioning parent in a surrogate motherhood agreement is entitled to at least 10 weeks commissioning parental leave when a child is born. The leave is unpaid, and the employee may apply to the UIF fund for commissioning parental benefits. In order to apply the employee must be a contributor and have been in employment for at least 13 weeks before applying for the benefits.

South African employers sometimes provide employees with a discretionary end-of-year payment, double pay or thirteenth cheque. It is usually paid out during December.

With a few exceptions, dismissals for operational requirements and automatically unfair dismissals are adjudicated by the Labour Court.

Remuneration

The definitions of wages and remuneration can be found in the BCEA and the related published schedule. It is important to understand the distinction, and to use the correct basis from which relevant statutory entitlements such as overtime payment, payments *in lieu* of notice, sick leave, annual leave pay and statutory severance pay in the event of dismissals for operational requirements, are calculated. The term remuneration is wider than wages, and includes, for instance, payments in kind such as accommodation. Some payments (such as annual leave and severance pay) must be calculated by reference to remuneration, while sick leave is paid based on wages only. Remuneration may be accrued based on fluctuating structures, eg commission.

With effect from 1 January 2019, the National Minimum Wage Act, No 9 of 2018 (NMW Act) introduces a national minimum wage in South Africa. The effect of this is that every worker to which the NMW Act applies is entitled to be paid at least the national minimum wage by his or her employer. Employers can apply for an exemption from paying the national minimum wage. Non-compliance with the NMW Act may result in fines being imposed on the employer or referrals for claims for underpayment to the CCMA or appropriate court.

The BCEA sets out a number of strict provisions in relation to the manner, timing and payment of remuneration that employers should comply with. It also strictly prohibits deductions being made by an employer from an employee's remuneration other than in certain limited circumstances.

Bonuses

South African employers sometimes provide employees with a discretionary end-of-year payment, double pay or thirteenth cheque. It is usually paid out during December.

Where bonus provisions are included in an employment contract they are no longer payable at the discretion of the employer unless such discretion is clearly retained and is not contradicted by long standing practice. The exercising of a discretion in the payment of discretionary bonus may be tested for fairness by the appropriate employment tribunal pursuant to referral of an unfair labour practice by an employee party.

It is not uncommon to find schemes incentivising employees.

Legislation requires equal pay for equal work, or work of equal value.

Retirement Benefits

Employers are not required to enroll their employees in a mandatory retirement fund. Where such a retirement fund is offered as a benefit of employment, both the employer and the employee are normally required by the rules of the fund to contribute to the fund at a specified rate of the employee's relevant income. Retirement funds are regulated by statute. There is no obligatory national retirement fund scheme although one is contemplated by Government.

Compensation for Unemployment and Injuries

Employees in South Africa are covered in respect of injuries arising out of and in the course of employment. Employers on a monthly basis must make contributions to the statutory fund created to cover claims arising from employment related illness or injury. The benefit to the employer (that complies with the relevant health and safety and payment obligations), is that it is indemnified against claims made by employees relating to illness developed or injuries sustained at work.

Employees are, subject to conditions, entitled to unemployment compensation for a prescribed term and according to a fixed formula. Employers and employees are also obliged to contribute to statutory fund created to provide these benefits (the UIF).

Taxation

All employees who earn income from a South African or foreign employer are liable to pay income tax.

Employers are further obliged to deduct tax from an employee's salary and, in addition, have reporting duties to the South African Revenue Services. Employers are further obliged to make contributions to statutory training programmes, although a percentage of such contributions may be recovered, should the employer conduct, or send employees to attend, approved training programmes.

Varying Terms and Conditions

In the normal course, terms and conditions of service are amended from time to time, by agreement between the parties, or in terms of the outcome of collective bargaining. The most common changes to terms of employment relates to annual increases in remuneration.

Where employees are represented by a recognised trade union, improvements to terms and conditions of service are the result of collective bargaining. If the parties are unable to reach agreement on issues being bargained on, employees may typically not refer a dispute for adjudication or arbitration, as the dispute relates to an interest issue, which must be resolved by bargaining and if that fails, by the use of industrial action (strike or lock-out).

Employers must remember basic contractual principles when considering their ability to vary the employment contract unilaterally. As a matter of contract law, one party cannot unilaterally vary a contract unless such a variation is authorised in the contract itself. Even if the contract does expressly allow for such unilateral variation, the power must be exercised reasonably and in accordance with the rights of the parties in terms of the LRA.

Existing judgments authorise employers to retrench employees who refuse to agree to amended terms and conditions of employment, if such amendments are justified by operational requirements. However, recent amendments to the LRA have rendered attempts to vary terms and conditions of employment by utilising this mechanism riskier. Employers should give consideration to using the lockout mechanisms provided in the LRA (a form of industrial action) to compel agreement to proposed amendments to terms and conditions of service.

Essential and Maintenance Services

As a general principle, employees cannot compel employers to improve terms and conditions of service in the absence of an agreement, and such agreement must be obtained in the bargaining arena, or if that fails, by the use of industrial action (strike or lock out). However, if the specific organisation falls within an essential or maintenance service, strikes and lock-outs are prohibited and the party to the employment relationship that seeks

to compel the other to agree to amendments to terms and conditions of service, must refer the dispute to final and binding arbitration. The legislative *quid pro quo* for designating part of the employer's operations as a maintenance service is that the employer is prohibited from employing replacement labour during a protected strike.

An essential service is:

- Service the interruption of which endangers the life, personal safety or health of the whole or any part of the population
- The parliamentary service
- The south african police services

A maintenance service is one whose interruption results in material physical destruction to any working area, plant or machinery. The essential services commission must determine whether the whole or any part of a particular service is an essential service, or a maintenance service.

The LRA permits collective agreements that provide for the maintenance of minimum services in a service designated as an essential service. A collective agreement must be approved by the essential services committee, after which employees employed outside of the agreed minimum services are permitted to strike even though they are employed in a designated essential service, and the employer may lock-out those employees.

Occupational Health and Safety

Employers in South Africa are subject to a statutory duty in respect of the health and safety of their employees. This includes a duty to take reasonable care, to provide a safe place of work and to protect employees from foreseeable risk of injury. The Occupational Health and Safety Act, No 85 of 1993 and its associated regulations also impose further statutory obligations in respect of workplace safety and health of employees and occupiers of premises. CEOs, as defined, and members of management may incur personal criminal liability for non-compliance with the provisions of the Act and regulations.

Data Privacy

Although the Protection of Personal Information Act, No 4 of 2013 (PPI) has been promulgated only certain sections have come into operation. Under the PPI, employers in South Africa will have to comply with its data protection principles when collecting and using employees' personal data. Broadly, the PPI requires that personal data should only be used for the purposes for which it was collected, or for purposes that are directly related to those purposes. The PPI imposes obligations in relation to informing individuals of the purposes for collecting the personal data and the use that would be made of that personal data.

In addition, the PPI restricts the use and storage of personal data and requires that the personal data should be collected by means that are lawful and fair. Employers are also required to ensure that the personal data is accurate and held securely. Individuals have a right to access and correct their personal data which is held by the employer.

Records

Employers are required by the BCEA and other workplace related legislation to keep employment records, annual leave records, sick leave records and maternity leave records.

The Income Tax Act, No 58 of 1962 similarly has requirements with regard to retaining specified records.

Various employment related statutes prescribe the display of extracts of statutes in the workplace.

Companies Act

The South African corporate landscape was significantly impacted by the promulgation of the Companies Act, No 71 of 2008, which came into effect in 2011.

Part of the reason for introducing the Companies Act was to bring South Africa in line with global trends. One such trend relates to the so-called 'enlightened shareholder value approach'. The traditional philosophy is that the powers granted by a company to its board of directors are to be exercised solely for the benefit of the shareholders of the company and with a view to profit maximisation.

Under the enlightened shareholder value approach, recognition is given that many companies have an impact on their environment (eg their employees' livelihood) and that it is necessary to increase companies' accountability and transparency to also take into account its other stakeholders' interests.

The enlightened shareholder value approach of the Companies Act is evident in, for instance, the increased recognition of employees' rights or interests in particular contexts. Trade unions and employees can now enjoy far greater access to company information than before. They have also been grantedaccess to remedies under the Companies Act that did not exist before, such as the right to apply to a court with jurisdiction to have a director of the employer company declared a delinquent director or placed under probation, and the right to participate in business rescue proceedings.

In addition, the position of directors (and in some instances also the next level of management, called 'prescribed officers') have been affected in a significant manner, relating to issues such the manner of their removal as directors, the partial codification of their duties and liabilities, and the extent to which they may be indemnified and/or insured by the company for liability arising from their conduct as directors.

TERMINATION

The termination of an employment contract can be brought about in a number of ways. For example, by exercising a contractual or statutory right to terminate (for cause), by agreement or by operation of law. No contract can allow an employer in the event of employer initiated dismissals to forego the obligations imposed on it by the LRA to ensure a fair dismissal. Where a termination of an employment contract therefore amounts to a dismissal, the LRA requires that such dismissal must be fair. To be fair, a dismissal must be for a fair reason and according to a fair procedure.

Not all terminations of employment equate to dismissals. A termination of an employment contract that will not constitute a dismissal, is for instance when the contract was for a limited duration, and terminated by effluxion of time.

The LRA recognises three fair reasons for a dismissal: misconduct, lack of capacity (based either on ill health, or lack of the ability to perform the functions of the position to which the employee was appointed) or the employer's operational requirements.

A dismissal may be automatically unfair if the reason for the dismissal is: the employee participated in, or supported a strike; the employee refused to accept a demand in respect of any matter of mutual interest; related to pregnancy; unfair discrimination by the employer; any reason related to a transfer of a business or service as a going concern; because the employee has made a protected disclosure; or because the employee took action against the employer by exercising any right in terms of the LRA.

The employee's remedy for an unfair dismissal is reinstatement (which may have retrospective effect) and/or under specified circumstances payment of compensation limited to a maximum of 12 months' remuneration.

In the case of an automatically unfair dismissal, the remedy is reinstatement and/or where payment of compensation is appropriate, payment of compensation limited to 24 months' remuneration.

Alleged unfair dismissals for misconduct or incapacity are adjudicated by the Commission for Conciliation Mediation and Arbitration (CCMA) or a Bargaining Council with jurisdiction. Such disputes are resolved by way of a conciliation meeting followed by arbitration if the matter cannot be settled.

With a few exceptions, dismissals for operational requirements and automatically unfair dismissals are adjudicated by the Labour Court.

Challenges to arbitration awards of the CCMA are largely limited to reviews on restricted grounds, while an appeal lies from the Labour Court to the Labour Appeal Court (LAC), subject to leave to appeal being granted. The Labour Appeal Court is the final court of appeal in all labour matters, other than constitutional matters or matters that raise an arguable point of law of general public importance, which matters be determined by the Constitutional Court.

Notice Requirements

In South Africa, both employers and employees are permitted to terminate the employment relationship by providing notice, or for the employer, making a payment *in lieu* of notice. The required length of notice for employment contracts is set out in the BCEA but may be extended by the contract of employment. For indefinite period contracts the notice period is whatever the contract provides, but not less than 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, and one month if the employee has been employed for a year or more. Employers may however only terminate the employment relationship if one of the aforementioned fair reasons exist, and pursuant to having followed the correct process.

An employer is entitled to summarily dismiss an employee (ie without a notice period) after having followed a fair process in certain limited circumstances of gross misconduct. Employers should note that the threshold to justify a summary dismissal in South Africa is high.

Procedural Requirements

The LRA requires that an employer must follow a fair process prior to dismissing an employee for one of the authorised fair reasons for dismissal (ie misconduct, incapacity or operational requirements). The procedure to be followed differs depending on the reason for the dismissal. The procedure to be followed in the event of operational requirement dismissals is the most regulated, given that this type of dismissal normally affects more than one employee, and therefore has the greatest societal impact.

Termination Payments

An employee may be entitled to the following payments on termination: accrued but unpaid remuneration for work performed; a payment *in lieu of* notice (if the employer elects that the employee should not work the notice period); and accrued but unpaid leave pay.

In addition, employees who are dismissed by reason of redundancy or for operational requirements are entitled to a severance payment if they have been employed for 12 consecutive months or more. The minimum severance payment is calculated in terms of a prescribed formula (one week's remuneration per completed year of service). The parties are further compelled to consult and attempt to reach agreement regarding a possible increase in the minimum benefits due to retrenchees.

Protected Employment

Employers are prohibited from dismissing employees in certain circumstances including employees who have served notice of pregnancy (until the employee returns from maternity leave) or who are on sick leave.

Employers should also ensure that any dismissal decision does not involve contravening the discrimination legislation which prohibits unfair discrimination on the listed grounds, without justification.

Confidential Information/Post-termination Restrictive Covenants

Employers should ensure that they have in place sufficient protection in relation to their confidential information and other protectable interests such as client relationships, to prevent a departing employee from causing significant damage to the employer's business by engaging in inappropriate conduct after termination of employment.

To be enforceable, a post-termination restrictive covenant must protect a legitimate business interest and go no further than reasonably necessary to protect that interest. Some of the relevant factors taken into account to determine reasonableness include:

- The seniority and role performed by the employee
- Whether the employee had access to legal advice before signing the agreement
- The proximity of the employee to the employer's key knowledge and confidential information
- The geographical area of the restraint

- The relationship between the employee and the employer's customers
- Any payments made to the employee during or for the restraint period
- The duration of any restraint

References

An employer must provide an employee with a certificate of service in accordance with the provisions of the BCEA. Employers may provide an employee with a further reference, if they so wish.

Dispute Resolution

The Labour Court and the Civil Courts share jurisdiction to enforce contractual employment rights.

Disputes relating to statutory employment rights, such as unfair dismissals, automatically unfair dismissals, unfair labour practices, and unfair discrimination disputes, must however be referred to specialist Labour Courts or tribunals clothed with the requisite jurisdiction by the relevant statute creating that right. Such disputes may be referred to either arbitration under the auspices of the CCMA or a Bargaining Council, or adjudication by the Labour Court. Almost all labour disputes are first referred to the CCMA or a Bargaining Council with jurisdiction, for an attempt at conciliating the dispute.

Some types of labour disputes are capable of justifying a protected strike or lockout. With some very limited exceptions though, disputes that the LRA reserves for determination by the CCMA, a Bargaining Council, or the Labour Court, may not form the subject matter of industrial action. If industrial action should be embarked on, the Labour Court will then be able to interdict the continuation of the industrial action, and further adverse consequences may follow for the perpetrators, such as disciplinary action taken against employees embarking upon an unprotected strike.

The typical type of dispute that is left for resolution by negotiation and eventual power play in the form of industrial action, is that relating to increases in remuneration and other increases in terms and conditional of employment.

Transfer of Contracts of Employment

The LRA (in s197) regulates the transfer of contracts of employment in the context of a business transfer.

For a transaction to fall within the ambit of s197, the following three elements must simultaneously be present:

- A transfer of an entity by one employer to another
- The transferred entity must be the whole or a part of a business
- The business must be transferred as a going concern

If such a transfer takes place, the new employer is automatically substituted in the place of the previous employer in respect of all contracts of employment in existence immediately before the date of transfer. Only by agreement between the previous employer (and/or), the new employer and the employees (duly represented) may the terms and conditions of employment of transferred employers be varied subsequent to the transfer. In addition, s197(7) requires the two employers to reach certain agreements pertaining to transfering employees (eg accrued dues) and to arrange for proper disclosure of relevant information to employees.

The previous employer and the new employer may be jointly and severally liable for certain payments to transferred employees (leave pay, severance pay and any other payments that accrued prior to the date of transfer), if such employees are dismissed within 12 months after the business transfer, as a result of the new employer's operational requirements or liquidation. The old employer can however escape this liability if it can show that it complied with the provisions of s197.

The dismissal of an employee for a reason related to such a transfer constitutes an automatically unfair dismissal.

Where the initial transfer of business or service relates to a portion of the business or service that the original employer may in due course need to again conduct internally, or where a service provider may be replaced, special care must be taken when entering into the original transfer of business or service agreement. Any subsequent transfer of the same business or service may well constitute a further transfer of a business as a going concern, either back to the original employer, or the new service provider, which may have significant unintended cost implications.

There is no statutory retirement age. Employers are entitled to agree on a retirement age with employees, or impose a normal retirement age in the form of an internal policy, which must be fairly arrived at, and consistently applied.

The retirement age usually coincides with the age specified in the rules of an applicable retirement fund.

Termination of the employment agreement on attaining the retirement age does not constitute a dismissal.

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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