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EMPLOYMENT LAW ALERT

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Persuade and conquer – NEDLAC agreement on workplace vaccinations

The South African Government, together with members of both the public and private sector, agreed at NEDLAC on COVID-19 workplace vaccine guidelines (Vaccine Guidelines). While the Vaccine Guidelines are yet to be signed and gazetted by the Minister of Employment and Labour, various spokespersons have indicated that the stance taken in the Vaccine Guidelines is one of persuasion rather than coercion.

Violence and harassment in the workplace: Employers' duty bound to expand protection of victims

This alert expands on a [previous alert](#) in which CDH explores the International Labour Conference's (ILO), new Convention and Recommendation titled the "*Convention Concerning the Elimination of Violence and Harassment in the World of Work*" (the Convention).

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KIETI LAW LLP, KENYA

Persuade and conquer – NEDLAC agreement on workplace vaccinations

The position by the Government has been made clear - there is no intention to compel workers to receive the vaccine and that an approach based on encouragement, education and persuasion is the preferred route to the vaccine roll-out.

The South African Government, together with members of both the public and private sector, agreed at NEDLAC on COVID-19 workplace vaccine guidelines (Vaccine Guidelines). While the Vaccine Guidelines are yet to be signed and gazetted by the Minister of Employment and Labour, various spokespersons have indicated that the stance taken in the Vaccine Guidelines is one of persuasion rather than coercion.

The key items from the Vaccine Guidelines at this stage, are as follows:

- workers will be encouraged to be vaccinated and vaccination will not be mandatory;
 - workers may not be dismissed for a refusal to be vaccinated;
 - workers will be granted paid time off in order for them to receive the vaccine;
 - high-risk industries such as the mining sector have also adopted a persuasion rather than a coercive stance;
 - attempts are being made to increase the number of workplace vaccination sites. At present, there are only two workplace vaccination sites, one in the motor industry and another in mining;
 - the position in relation to the re-imburement of the private sector for the vaccination of employees who are not on medical aid will be announced soon;
- while the procurement of vaccines remains a challenge, the Government is confident that by the end of July 2021 they will have a consistent supply of vaccines; and
 - registrations for the receipt of vaccines have been considerable low among uninsured persons and remains an area of development.

The position by the Government has been made clear - there is no intention to compel workers to receive the vaccine and that an approach based on encouragement, education and persuasion is the preferred route to the vaccine roll-out.

We await the publication of the Vaccine Guidelines in order to ascertain the exact nature of the obligations of employers. In light of the impending publication of the Vaccine Guidelines, employers must begin to consider the manner in which it will rotate employees who are registered to be vaccinated as well as the manner in which it will manage leave applications to receive the vaccine and leave applications related to any potential side effects thereafter.

Aadil Patel and Riola Kok

Violence and harassment in the workplace: Employers' duty bound to expand protection of victims

While there have been moves from the legislature to combat violence and harassment in the workplace, in many respects the current South African legislative framework has been seen as falling short.

This alert expands on a [previous alert](#) in which CDH explores the International Labour Conference's (ILO), new Convention and Recommendation titled the "*Convention Concerning the Elimination of Violence and Harassment in the World of Work*" (the Convention).

Currently, the Employment Equity Act 55 of 1998 (The Employment Equity Act) and the Amended Code of Good Practice and Handling of Sexual Harassment (The Amended Code) provides for how to handle sexual harassment and the various forms of sexual harassment in the workplace. The Amended Code does not cover any other of form of harassment in the workplace.

While there have been moves from the legislature to combat violence and harassment in the workplace, in many respects the current South African legislative framework has been seen as falling short.

A 2018 study in South Africa estimated that nearly a third of women were victims of unwanted sexual advances in their workplaces.

In August 2021, South Africa responded to address issues of gender-based violence and harassment in the workplace by publishing for comment the Draft Code of Good Practice on the Prevention and Elimination of Violence and Harassment in the Workplace (the Draft Code). The content of the Draft Code aligns with and is guided by the Convention, and is likely to be the statutory intervention that will implement the conscripts of the Convention once it is ratified. Accordingly, the Draft Code has created a larger obligation on the employer to counteract the devastating effects of violence and harassment in the workplace.

The Draft Code has introduced a more extensive list of definitions for the various forms of conduct that may constitute violence and harassment in the workplace. The Draft Code is wider than sexual harassment to cover other forms of violence and harassment in the workplace. In particular, the definition of sexual harassment is shortened to "*unwelcome conduct of a sexual nature that violates the rights of an employee*", taking into account:

1. Whether the harassment is on the prohibited grounds of sex and/or gender and/or sexual orientation;
2. Whether the sexual conduct was unwelcome;
3. The nature and extent of the sexual conduct; and
4. The impact of the sexual conduct on the employee.

The Draft Code has removed the requirement that sexual harassment must also constitute a barrier to equity in the workplace. This further step will simplify the test for what may constitute sexual harassment.

The Draft Code extended the application of perpetrators and victims of harassment further to non-employees to include suspended workers, workers whose employment has been terminated, persons in training and retains the catch-all of "*others having dealings with the organisation*".

The courts have considered what constitutes the world of work, and when alleged sexual harassment in the workplace may occur. In the case of *Campbell Scientific Africa (Pty) Ltd v Simmers and Others* (CA 14/2014) [2015] ZALCCT 62 (23 October 2015), sexual

Violence and harassment in the workplace: Employers' duty bound to expand protection of victims

...continued

The Draft Code has confirmed the application of the aforesaid case law to encompass conduct that occurs in the course of, linked with or arising out of work.

harassment occurred away from the employer's premises and after working hours. The Court held that the employer was entitled to discipline the employee as the sexual harassment occurred in the context of a work-related social event and affected the employment relationship. (own emphasis)

The Draft Code has confirmed the application of the aforesaid case law to encompass conduct that occurs in the course of, linked with or arising out of work.

Item 5 of the Draft Code provides for seven "Guiding Principles" to guide the conventionalisation and implementation of strategies to prevent and eliminate violence and harassment in the world of work:

1. Workplaces should be free of violence and harassment;
2. Employers are responsible for providing information, instructions and training to ensure a working environment that is safe and without risk to health;
3. A workplace culture should be created so that complainants affected by violence and harassment may bring a complaint without fear of reprisal and with the assurance that their complaints will not be trivialised or ignored;

4. Employers, employees, employee organisations and trade unions are required to proactively refrain from committing acts of violence and harassment; and are re-quired to play a role in creating and maintaining a working environment in which violence and harassment is regarded as unacceptable;
5. Employers, employees, employee organisations and trade unions have a role to play towards creating and maintaining a working environment in which violence and harassment is regarded as unacceptable;
6. Employers, employees, employee organisations and trade unions should attempt to ensure that persons who are dealing with the employer are not subjected to violence and harassment; and
7. Employers, employees, employee organisations and trade unions should take appropriate action when instances of violence and harassment occur in the world of work.

Importantly, violence and harassment in the workplace is wider than sexual harassment and the Draft Code requires employers to implement measures that will combat all forms of violence and harassment in the workplace. The aforesaid principles should guide the implementation of preventative measures, policies, training and processes to deal with all incidents of violence and harassment and not just sexual harassment.

Violence and harassment in the workplace: Employers' duty bound to expand protection of victims

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Item 7 of the Draft Code identifies the four main forms of violence and harassment in the workplace which was not considered previously as sexual violence and harassment; violence and harassment of a racial, ethnic and social origin; bullying in the workplace; and violence and harassment due to a protected disclosure.

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The relevance and importance of the Draft Codes to employers are the following:

- The definition of perpetrator and victim has been expanded which means that employers have to implement additional controls and measures to prevent and eliminate violence and harassment in the workplace;
- While many continue to work from home and utilise technology to communicate with colleagues and clients, controls and procedures need to be implemented to counteract violence, harassment and bullying that occurs electronically;
- As we move back into a more traditional working environment the extension of the new forms of violence and harassment will require the employer to update their policies in line with the Draft Code; and

- Further consideration must be given to vicarious liability in terms of Section 60 of the Employment Equity Act which could render the employer liable for the wrongful conduct of the perpetrator upon the failure of the employer to take all reasonable steps.

That being said, employers are not without guidance in terms of the Draft Codes and should use the seven guiding principles, as well as the stipulated procedures to ensure they fulfil their obligations in terms of the Employment Equity Act to eliminate violence and harassment in the workplace, and in the unfortunate event that an incident has occurred that it is not swept under the rug.

There is no indication of when the Draft Code will be implemented but employers should consider a review of their internal policies and procedures in respect of violence and harassment in the workplace to ensure all employees, and others in the world of work, are protected and to protect itself from the rule of vicarious liability.

Hugo Pienaar, Jaden Cramer and Michael Bailey

AN EMPLOYER'S GUIDE
TO MANDATORY WORKPLACE VACCINATION POLICIES

FOR A COPY OF THE CDH
EMPLOYMENT PRACTICE
GUIDE, [CLICK HERE](#)



SEXUAL HARASSMENT IN THE WORKPLACE

Including the virtual
world of work

[A GUIDE TO MANAGING
SEXUAL HARASSMENT](#)

The purpose of our 'Sexual Harassment in the Workplace – Including the Virtual World of Work' Guideline, is to empower your organisation with a greater understanding of what constitutes sexual harassment, how to identify it and what to do if it occurs.

[CLICK HERE TO ACCESS
THE GUIDELINE](#)



COVID-19 WORKPLACE HEALTH AND SAFETY ONLINE COMPLIANCE TRAINING

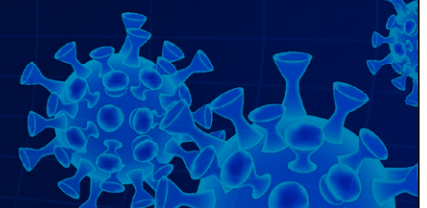
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CDH'S COVID-19 RESOURCE HUB

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A CHANGING WORK ORDER

[CLICK HERE](#) to access CDH's 2020 Employment Law booklet, which will assist you in navigating employment relationships in the "new normal".

CASE LAW UPDATE 2020

2021 RESULTS

CHAMBERS GLOBAL 2014 - 2021 ranked our Employment practice in Band 2: Employment.

Aadil Patel ranked by CHAMBERS GLOBAL 2015 - 2021 in Band 2: Employment.

Fiona Leppan ranked by CHAMBERS GLOBAL 2018 - 2021 in Band 2: Employment.

Gillian Lumb ranked by CHAMBERS GLOBAL 2020 - 2021 in Band 3: Employment.

Imraan Mahomed ranked by CHAMBERS GLOBAL 2021 in Band 2: Employment.

Hugo Pienaar ranked by CHAMBERS GLOBAL 2014 - 2021 in Band 2: Employment.

Michael Yeates ranked by CHAMBERS GLOBAL 2020 - 2021 as an up and coming employment lawyer.



2021 RESULTS

Our Employment Law practice is ranked as a Top-Tier firm in THE LEGAL 500 EMEA 2021.

Fiona Leppan is ranked as a Leading Individual in Employment Law in THE LEGAL 500 EMEA 2021.

Aadil Patel is ranked as a Leading Individual in Employment Law in THE LEGAL 500 EMEA 2021.

Gillian Lumb is recommended in Employment Law in THE LEGAL 500 EMEA 2021.

Hugo Pienaar is recommended in Employment Law in THE LEGAL 500 EMEA 2021.

Jose Jorge is recommended in Employment Law in THE LEGAL 500 EMEA 2021.

Imraan Mahomed is recommended in Employment Law in THE LEGAL 500 EMEA 2021.

Anli Bezuidenhout is recommended in Employment Law in THE LEGAL 500 EMEA 2021.



POPI AND THE EMPLOYMENT LIFE CYCLE: THE CDH POPI GUIDE

The Protection of Personal Information Act 4 of 2013 (POPI) came into force on 1 July 2020, save for a few provisions related to the amendment of laws and the functions of the Human Rights Commission.

POPI places several obligations on employers in the management of personal and special personal information collected from employees, in an endeavour to balance the right of employers to conduct business with the right of employees to privacy.

[CLICK HERE](#) to read our updated guide.

EMPLOYMENT

RETRENCHMENT GUIDELINE



[CLICK HERE](#) for the latest thought leadership and explanation of the legal position in relation to retrenchments, temporary layoffs, short time and retrenchments in the context of business rescue.

OUR TEAM

For more information about our Employment Law practice and services in South Africa and Kenya, please contact:



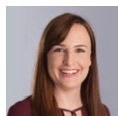
Aadil Patel
National Practice Head
Director
T +27 (0)11 562 1107
E aadil.patel@cdhlegal.com



Imraan Mahomed
Director
T +27 (0)11 562 1459
E imraan.mahomed@cdhlegal.com



Thabang Rapuleng
Director
T +27 (0)11 562 1759
E thabang.rapuleng@cdhlegal.com



Anli Bezuidenhout
Director
T +27 (0)21 481 6351
E anli.bezuidenhout@cdhlegal.com



Bongani Masuku
Director
T +27 (0)11 562 1498
E bongani.masuku@cdhlegal.com



Hedda Schensema
Director
T +27 (0)11 562 1487
E hedda.schensema@cdhlegal.com



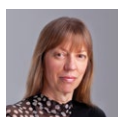
Jose Jorge
Director
T +27 (0)21 481 6319
E jose.jorge@cdhlegal.com



Phetheni Nkuna
Director
T +27 (0)11 562 1478
E phetheni.nkuna@cdhlegal.com



Njeri Wagacha
Partner | Kenya
T +254 731 086 649
+254 204 409 918
+254 710 560 114
E njeri.wagacha@cdhlegal.com



Fiona Leppan
Director
T +27 (0)11 562 1152
E fiona.leppan@cdhlegal.com



Desmond Odhiambo
Partner | Kenya
T +254 731 086 649
+254 204 409 918
+254 710 560 114
E desmond.odhiambo@cdhlegal.com



Michael Yeates
Director
T +27 (0)11 562 1184
E michael.yeates@cdhlegal.com



Gillian Lumb
Director
T +27 (0)21 481 6315
E gillian.lumb@cdhlegal.com



Hugo Pienaar
Director
T +27 (0)11 562 1350
E hugo.pienaar@cdhlegal.com



Mohsina Chenia
Executive Consultant
T +27 (0)11 562 1299
E mohsina.chenia@cdhlegal.com

OUR TEAM

For more information about our Employment Law practice and services in South Africa and Kenya, please contact:



Faan Coetzee
Executive Consultant
T +27 (0)11 562 1600
E faan.coetzee@cdhlegal.com



Sean Jamieson
Senior Associate
T +27 (0)11 562 1296
E sean.jamieson@cdhlegal.com



Rizichi Kashero-Ondego
Associate | Kenya
T +254 731 086 649
T +254 204 409 918
T +254 710 560 114
E rizichi.kashero-ondego@cdhlegal.com



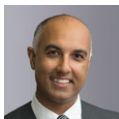
Jean Ewang
Consultant
M +27 (0)73 909 1940
E jean.ewang@cdhlegal.com



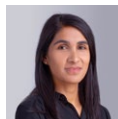
Tamsanqa Mila
Senior Associate
T +27 (0)11 562 1108
E tamsanqa.mila@cdhlegal.com



Jordyne Löser
Associate
T +27 (0)11 562 1479
E jordyne.loser@cdhlegal.com



Avinash Govindjee
Consultant
M +27 (0)83 326 5007
E avinash.govindjee@cdhlegal.com



Asma Cachalia
Associate
T +27 (0)11 562 1333
E asma.cachalia@cdhlegal.com



Christine Mugenyu
Associate | Kenya
T +254 731 086 649
T +254 204 409 918
T +254 710 560 114
E christine.mugenyu@cdhlegal.com



Riola Kok
Professional Support Lawyer
T +27 (0)11 562 1748
E riola.kok@cdhlegal.com



Jaden Cramer
Associate
T +27 (0)11 562 1260
E jaden.cramer@cdhlegal.com



Peter Mutema
Associate | Kenya
T +254 731 086 649
T +254 204 409 918
T +254 710 560 114
E peter.mutema@cdhlegal.com

BBBEE STATUS: LEVEL TWO 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.

JOHANNESBURG

1 Protea Place, Sandton, Johannesburg, 2196. Private Bag X40, Benmore, 2010, South Africa. Dx 154 Randburg and Dx 42 Johannesburg.
T +27 (0)11 562 1000 F +27 (0)11 562 1111 E jhb@cdhlegal.com

CAPE TOWN

11 Buitengracht Street, Cape Town, 8001. PO Box 695, Cape Town, 8000, South Africa. Dx 5 Cape Town.
T +27 (0)21 481 6300 F +27 (0)21 481 6388 E ctn@cdhlegal.com

NAIROBI

CVS Plaza, Lenana Road, Nairobi, Kenya. PO Box 22602-00505, Nairobi, Kenya.
T +254 731 086 649 | +254 204 409 918 | +254 710 560 114 E cdhkenya@cdhlegal.com

STELLENBOSCH

14 Louw Street, Stellenbosch Central, Stellenbosch, 7600.
T +27 (0)21 481 6400 E cdh Stellenbosch@cdhlegal.com

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INCORPORATING
KIETI LAW LLP, KENYA



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