

EMPLOYMENT LAW

ALERT

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INCORPORATING
KIETI LAW LLP, KENYA

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KENYA

Review of the Persons with Disabilities Bill, 2021

The Persons with Disabilities Bill, 2021 (the Bill) was introduced into the National Assembly on 17 February 2022, with the objective of repealing the current Persons with Disabilities Act 14 of 2001 (the Act), and replace it with a law that is consistent with the provisions of the Constitution of Kenya, 2010 (the Constitution). The Bill emphasises the human rights aspect of the Constitution and seeks to change the law relating to persons with disabilities (PWDs) towards a more dignified and non-discriminatory approach.

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KENYA

Review of the Persons with Disabilities Bill, 2021

The Persons with Disabilities Bill, 2021 (the Bill) was introduced into the National Assembly on 17 February 2022, with the objective of repealing the current Persons with Disabilities Act 14 of 2001 (the Act), and replace it with a law that is consistent with the provisions of the Constitution of Kenya, 2010 (the Constitution). The Bill emphasises the human rights aspect of the Constitution and seeks to change the law relating to persons with disabilities (PWDs) towards a more dignified and non-discriminatory approach.

The Bill aims to realise the rights of PWDs in Kenya and outlines the societal responsibility to protect and promote PWDs. Section 19(2) of the Bill seeks to require an employer to make adjustments during the recruitment process and the employment relationship. In particular, the Bill seeks to oblige employers to reserve five percent (5%) of their employment opportunities for PWDs. This proposed amendment mirrors article 54(2) of the Constitution, which requires the State to ensure that at least five percent (5%) of the members of the public in elective and appointive bodies are PWDs. The Bill is therefore seeking to extend this constitutional requirement to all employment relationships. In addition, the Bill seeks to oblige employers to avoid discrimination on the basis of disability, to avoid conducting medical tests during the recruitment and employment relationship, and to develop accommodating policies to improve the work environment for PWDs.

Importantly, the Bill seeks to hold employers accountable by requiring them to submit an annual report to the National Council of Persons with Disabilities (the Council) on the status of PWDs in their organisation. Although it is not expressly stated, we presume that the requirement is likely to include information on the percentage of PWDs employed, as well as information on the mechanisms put in place to reasonably accommodate a PWD.

In relation to discrimination, the Bill echoes the provisions of the Constitution and seeks to prevent employers from:

- developing job classifications that prejudice PWDs;
- using recruitment tests that limit career progression or do not reflect the skill and aptitude of a PWD;
- discriminating in the form of pay, promotion, training, or access to opportunities; and

- assigning PWDs to positions where they are unable to perform because of their disability, to name a few.

Notably, the Bill defines discrimination in this context as “*failing to make reasonable accommodation for a known limitation of an employee with a disability.*” Employers will therefore have to ensure that they identify and investigate ways in which they can make reasonable accommodation for PWDs in their organization, such as providing ramps for ease of access, flexible or modified working hours, providing interpreters or readers, or reassigning the employee to a more suitable position. In the recent *Gichuru v Package Insurance Brokers Limited* (Petition 36 of 2019) [2021] KESC 12 (KLR) case (the Gichuru Case), the Supreme Court considered the question of “*reasonable accommodation*” and, stated that *an employer is only required to “reasonably accommodate” an employee’s disability, to the extent*

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that such accommodation would not amount to undue hardship for the employer. As such, if the Bill is passed, an employer would be required to take steps to reasonably accommodate PWDs in their organization, unless the employer can prove that such accommodation would cause undue hardship. In the Gichuru Case, the Supreme Court did not qualify what amounts to undue hardship and therefore it is likely that this is to be determined on a case-by-case basis.

Employers need to be aware of the proposed changes and prepare to comply with them should Parliament decide to enact the Bill. However, it should be noted that the Bill must go through the Kenyan legislative process, which involves a first, second and third reading, followed by presidential assent and enactment. At present, the Bill has been introduced before the National Assembly for its first reading.

CDH Kenya's Employment Law Practice is monitoring the Bill closely, and shall provide updates on developments.

**NJERI WAGACHA AND
TYLER HAWI AYAH**

2022 RESULTS

CHAMBERS GLOBAL 2014 - 2022
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in Band 2: employment.

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

Hugo Pienaar ranked by
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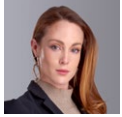


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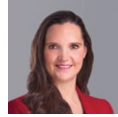
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BBBEE STATUS: LEVEL ONE CONTRIBUTOR

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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