

# EMPLOYMENT LAW ALERT

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INCORPORATING  
**KIETI LAW LLP, KENYA**

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Mental health and its effect on an individual's functionality has increased in prominence in the last few years. The case of *Compensation Commissioner v Georgia Badenhorst* touches on the importance of mental health in the workplace and how it has become a significant factor in workplace safety.

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AND SERVICES

KENYA

## The National Hospital Insurance Fund (Amendment) Act, 2022

The National Hospital Insurance Fund (Amendment) Act of 2022 (Act) came into force on 28 January 2022. A key objective of the Act is to provide a mechanism to obligate employers to make a mandatory contribution to their employees' health insurance fund.

Prior to this, the law under the National Hospital Insurance Fund Act 9 of 1998 only required an employer to deduct an employee's contribution from their salary and pay it into the fund. An employer was therefore not required to contribute out of its own account. However, the Act changes this as it obligates an employer to make an equal contribution to its employee's fund, depending on the employee's salary band. At the date of this alert, the contribution rates range from KES 150 to KES 1,700 (approximately USD 1,50 to USD 17) and the salary bands from KES 5,999 to KES 100,000 and over (approximately USD 60 to USD 1,000 and over). This provision was fiercely contested during the legislative process, as aggrieved employers argued that it would hurt their wage bills and limit their ability to create jobs in a challenging pandemic economy. Notably, at that stage, Parliament had not indicated whether the requirement to make a matching contribution was in addition to, or as an alternative to private healthcare insurance and employers foresaw a dual obligation to insure

their employees. The Act, however, has addressed this concern as it permits an employer to apply for an exemption to make this matching contribution where the employer is providing private medical cover.

In order to qualify for this exemption, an employer will need to apply to the National Health Insurance Fund Management Board (Board) and present a certificate from the Insurance Regulatory Authority, certifying that the employer is insured and specifying the details, benefits, and duration of the insurance cover, in addition to any other documents that may be required under the regulations. Thereafter, if the Board is satisfied that the private insurance is adequate, it will grant the employer the exemption within 30 days.

### EXPANDED DEFINITION OF AN EMPLOYER

Notably, the Act expands the definition of an employer to include "any person, government entity, firm, or company that has entered into a contract of service with an individual". Given that the Employment Act of 2007 defines a contract of service as

meaning "an agreement, whether oral or in writing, and whether expressed or implied to employ or to serve as an employee for a period of time", the effect of these two provisions read together reaffirm that the Act will govern all employment relationships that fall within the definition of "employer" and "employee" respectively, regardless of whether the employment agreement is expressly entered into or captured in writing. This is because the definition of a contract of service includes a written and express contract, as well as an oral and implied contract. For example, a person who employs a domestic worker in their household may fall within this definition of an employer, even where the agreement is not in writing or expressly agreed upon, and may therefore be required to deduct their employee's contribution from their salary and make an equal contribution. It will be interesting to see how this requirement is implemented and complied with.

The Act seeks to make healthcare more accessible in Kenya, with the

KENYA

## The National Hospital Insurance Fund (Amendment) Act, 2022

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ultimate aim of attaining universal healthcare coverage. Given that most employers already provide comprehensive private health insurance, the Act is unlikely to increase the burden on an employer's wage bill, as initially foreseen in the legislative process. This is, however, only to the extent that the standard of healthcare provision required by the Act is equal to or less than an employer's private insurance. The Act is therefore only set to substantially impact those who previously did not provide healthcare insurance, or who did not make substantial contributions to an employee's healthcare coverage.

### NAME CHANGE

Notably, the title of the Act has been changed from the National Hospital Insurance Fund to the National Health Insurance Fund. Likewise, the list of healthcare providers has been widened from strictly "*declared hospitals*" to include any healthcare provider that is enlisted by the Board, as provided on the National Hospital Insurance Fund website. Without clear interpretation, we presume this

may mean that employees will be able to enjoy access to their health insurance across more facilities, as the list of healthcare providers is likely to be broader than the list of declared hospitals, aligning itself to the Government's objective of facilitating greater healthcare coverage.

Although the Act has come into force, its accompanying regulations are yet to be enacted. The National Health Insurance Fund is in the process of drafting the amended regulations to account for the changes. Once enacted, employers will need to either apply for an exemption or prepare to make an equal contribution to each employee's fund.

Employers need to be aware of these new requirements and prepare to comply with them. Employers that intend to seek an exemption are advised to begin facilitating the process of obtaining the above-mentioned certificate from the Insurance Regulatory Authority (where possible) ahead of the regulations.

**NJERI WAGACHA AND  
TYLER HAWI AYAH**

## 2022 RESULTS

**CHAMBERS GLOBAL 2014 - 2022**  
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.



Cliffe Dekker Hofmeyr

SOUTH AFRICA

## Developing legal approach to mental health in the workplace: *Compensation Commissioner v Georgia Badenhorst case*

Mental health and its effect on an individual's functionality has increased in prominence in the last few years. The case of *Compensation Commissioner v Georgia Badenhorst* [2022] ZAECGHC 1 touches on the importance of mental health in the workplace and how it has become a significant factor in workplace safety.

In this case, Georgia Badenhorst had a phobia of snakes and suffered from post-traumatic stress disorder (PTSD) after she accidentally grabbed a snake in the storeroom at work when reaching for a docket positioned above her head. As a result of holding the snake she developed numerous psychological conditions that led to her being mildly to moderately impaired. She was awarded 20% permanent disablement by the Compensation Commission, which was subsequently challenged in terms of section 91(5) of the Compensation for Occupational Injuries and Diseases Act (COIDA).

Badenhorst was successful in her challenge and the permanent disablement percentage was consequently changed to 75%. This was then appealed by the Compensation Commissioner.

The expert evidence that was adduced likened the constant anxiety and other disorders – in accordance with Schedule 2 of COIDA – to someone who has lost a leg between the knee and hip or someone who

has lost their arm between the elbow and shoulder. The severity of these injuries highlighted the effect of PTSD and other disorders that Badenhorst suffered from and justified the 75% disablement ruling.

This case ultimately highlighted the extent to which PTSD can be as crippling as any physical disorder.

The court considered the fact that the only issue the Compensation Commissioner raised was the disablement percentage and not the rationale of the expert evidence itself. The fact that no evidence was presented on behalf of the Compensation Commissioner to rebut the expert's recommendation of the 75% disablement meant that there was no reason to question the expert's assessment of the impairment.

Furthermore, the court found that the mere presentation that the disablement was mental and not physical was insufficient to justify intervention.

Building on the argument, the applicant's Compensation Commissioner counsel could not

rebut evidence that justified the differential treatment of mental disorders to those of physical disorders. The appeal merely sought to change the expert's determination without adducing any evidence as to why the determination needed to be changed. The court therefore dismissed the appeal with costs.

The importance of mental health and the need for mental well-being in the workplace is highlighted in this case. The courts have clearly recognised that simply because disablement is psychological in nature does not mean it is any less impairing on the normal functioning of an individual.

**HUGO PIENAAR, ASMA CACHALIA  
AND JACQUES ERASMUS**

# COIDA COVERS COVID-19 VACCINE INJURIES

The Compensation Commission established in terms of the Compensation for Occupational Injuries and Diseases Act 130 of 1993 (COIDA) issued a notice on compensation for COVID-19 vaccination side-effects (Notice) on 22 October 2021.



## WHAT IS THE PURPOSE OF THE NOTICE?

The Notice confirms that the Compensation Commission will cover employees who suffer injury, illness or death as a result of receiving the COVID-19 vaccine.



## WHAT ARE THE 6 REQUIREMENTS FOR A CLAIM TO BE MADE?

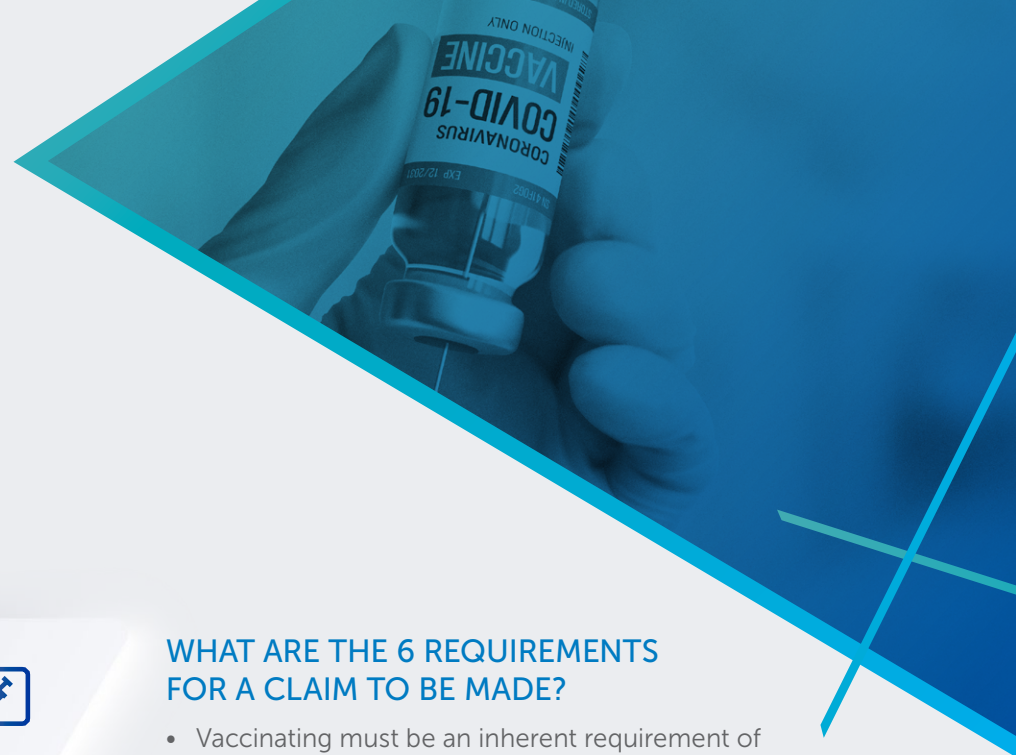
- Vaccinating must be an inherent requirement of employment as determined in the employer's risk assessment
- The employee must have received a SAHPRA-approved COVID-19 vaccine
- Evidence of the employer's risk assessment and vaccination plan must be provided
- The chronological sequence between the employee receiving the vaccine and when the employee's symptoms and clinical signs developed must be provided
- The symptoms and clinical signs generally recognised as side effects of the COVID-19 vaccine; and
- Additional tests may be required to assess the presence of abnormalities of any organ affected.



## IN WHAT CIRCUMSTANCES WILL THE COMPENSATION FUND NOTICE APPLY?

- Where the requirement to be vaccinated is an inherent requirement of the employee's job.
- Where the employee is required to do so in terms of the employer's risk assessment carried out in terms of paragraph 3(1)(a) of Consolidated Directions on Occupational Health and Safety Measures in Certain Workplaces issued on 11 June 2021.

**The Compensation Commission reiterated that employee's may not be subjected to inoculation against their will.**



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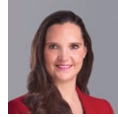
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**BBBEE STATUS:** LEVEL ONE CONTRIBUTOR

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.

**PLEASE NOTE**

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