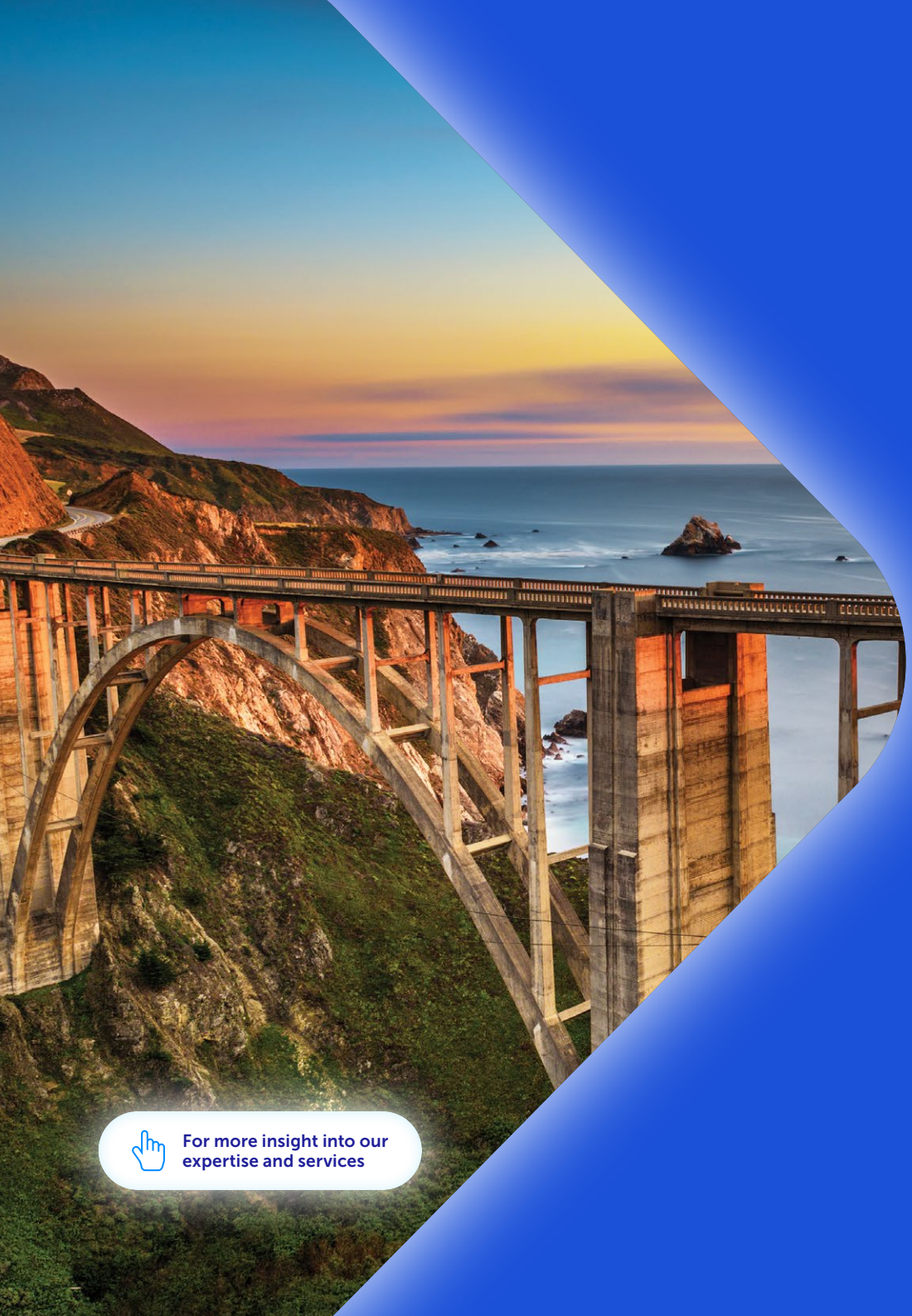


For more insight into our expertise and services

Employment Law

9 March 2026

SOUTH AFRICA

- Constructive Dismissal: The Constitutional Court confirms the importance of exhausting internal procedures before resigning
- The expanded definition of "*employee*": What you need to know about the 2025 Labour Law Amendment Bills
- Regulations relating to the processing of data subjects' health information by certain parties

Employment Law

SOUTH AFRICA

The Constitutional Court confirms the importance of exhausting internal procedures before resigning and calling a constructive dismissal

Reynolds Maleka was employed by Tyco International (Tyco) as an information technology (IT) director from 2014. He was placed at ADT Security (Pty) Ltd (ADT), a South African subsidiary of Tyco. As a director, Maleka was a member of ADT's executive committee.

Maleka's reporting lines were:

- Internationally, he reported directly to Paul Birmingham, the global head of IT.
- In South Africa, he had a dotted reporting line to Stuart Clarkson, ADT's managing director.

In 2016, Tyco and Fidelity Security Group (FSG) continued their ongoing negotiations for FSG to acquire ADT from Tyco.

According to Maleka, and ahead of the planned acquisition, Clarkson announced that Allan Quinn was appointed as ADT's new financial director, responsible for, among other things, overseeing the IT portfolio, which was headed by Maleka. Clarkson announced that after the acquisition, Quinn would report to Clarkson, and Maleka would report to Quinn, instead of Clarkson.

Maleka was unhappy with the change in his reporting line, which he believed required him to report to someone on the same level as him and as he had not been consulted on this change.

While Maleka alleged that the new reporting line would impact his status, authority and working conditions, Clarkson assured Maleka that Quinn's appointment was not intended to demote Maleka but to provide him with additional IT support on the SAP IT system that FSG would implement after ADT's acquisition. Maleka's direct reporting line remained unchanged.

After the approval of FSG's acquisition, and Quinn's appointment, Maleka alleged that Quinn tried to treat him as a subordinate. This led to Maleka complaining to Clarkson on a second occasion. At a meeting to discuss Maleka's complaint on 22 March 2017, Clarkson informed him that while the change was final, Maleka's duties, responsibilities, status and salary would remain the same.

Maleka resigned on 23 March 2017 claiming that the change in his reporting line was unacceptable, amounted to a change in his conditions of employment, and was a demotion from an executive to a managerial role. Maleka concluded his resignation letter by stating that he looked "*forward to discussions on termination conditions*".

Notably, Maleka did not lodge an internal grievance prior to his resignation.

Employment Law

Applicable law

Constructive dismissals are governed by section 186(1)(e) of the Labour Relations Act 66 of 1995 (LRA).

Litigation history

Commission for Conciliation, Mediation and Arbitration

Following his resignation, Maleka referred a dispute to the Commission for Conciliation, Mediation and Arbitration (CCMA). The commissioner dismissed Maleka's dispute based on, among other things, his failure to exhaust internal grievance procedures before his resignation, which suggested that his resignation was about discussing the terms of his exit, rather than resolving his complaint.

Labour Court

Dissatisfied, Maleka filed a review in the Labour Court. In considering whether Maleka should have exhausted the internal grievance procedure before resigning, the Labour Court held that while this requirement was flexible, particularly where the grievance would have been ineffective, Maleka's failure to effectively explain why he did not pursue an internal grievance was detrimental to his claim of constructive dismissal. This, the court held, provided a basis to dismiss his application.

The Labour Court held that requiring Maleka to report to someone on the same level as him did not amount to a constructive dismissal. In addition, it held that Maleka's claim for constructive dismissal was not supported based on there being a business rationale for the change in his reporting line.

The Labour Court agreed with the commissioner's reasoning that Maleka was more concerned with discussing the terms of his exit than resolving his complaint. His review application was dismissed.

Labour Appeal Court

Maleka argued that the Labour Court erred in finding that he had not established a constructive dismissal because he failed to exhaust the internal grievance procedure. Maleka contended that he raised various complaints to Clarkson over a three-month period before being informed that the decision was final. The Labour Appeal Court (LAC) was unsatisfied with Maleka's failure to pursue alternative remedies short of resigning, including the referral of an unfair labour practice dispute to the CCMA, finding that his working conditions had not become intolerable. Maleka's appeal was dismissed.

Constitutional Court (majority judgment)

Having lost thrice in succession, Maleka argued in the Constitutional Court that the Labour Court and LAC did not apply the test to determine a constructive dismissal as set out in Strategic Liquor Services v Mvumbi N.O [2009] 30 ILJ 1526 where the court held that the test was not whether the employee had alternatives to dismissal (such as exhausting internal grievances), but whether the employer made continued employment intolerable.

While the court agreed with the CCMA commissioner's decision that Maleka had not been constructively dismissed, the court considered whether an employee is required to explore alternative remedies to resolve their dispute before resigning. This was an import focus of the case considering previous cases in the lower courts on this point.

The court agreed with the approach adopted in previous Labour Court decisions, specifically that where an employee elects not to follow internal grievance procedures, the employee cannot claim constructive dismissal unless they can demonstrate that circumstances exist to absolve them of this procedural step.

Employment Law

Alleging no confidence in a grievance process or the outcome of such grievance is not sufficient.

The court considered the facts before the CCMA commissioner, and importantly Maleka's admission that he was aware of ADT's grievance procedure. Despite being aware of this, Maleka failed to lodge a grievance. Maleka's explanation for not lodging a grievance was due to him being informed by Birmingham that he was not aware of the change in Maleka's reporting line, and it would have been unnecessary for him to lodge a grievance with Clarkson, the highest person of authority in South Africa. The court disagreed with Maleka's explanation. Maleka should have lodged a grievance, and seen how the process unfolded, instead of prejudging the fairness of the outcome.

The court agreed with the commissioner's finding that Maleka's failure to lodge an internal grievance was not in his favour. Maleka's application was dismissed.

Importance of exhausting internal procedures confirmed by the Labour Court

In the recent decision in *Sally v CPES (Pty) Ltd t/a Vivo SA* (JS419/22) [2026] ZALCJHB, Mohamed Sally, a practising Muslim, was employed by CPES (Pty) Ltd t/a Vivo SA (CPES) as a spare part manager with effect from 7 March 2022.

On 10 March, Sally requested religious accommodation which would allow him to attend Friday prayers the next day. Sally resigned less than 24 hours later (on 11 March 2022) alleging that his resignation constituted a constructive dismissal that was automatically unfair based on CPES' refusal to accommodate his request to attend Friday afternoon prayers.

Importantly, before his resignation, Sally did not (i) provide CPES with an opportunity to implement a solution, including the unpaid leave option he proposed, or (ii) exhaust internal procedures.

The Labour Court dismissed Sally's claim and cautioned that constructive dismissal should not be found where an employee fails to use internal procedures to resolve a grievance (where reasonably available) unless the internal process would be objectively futile.

Key takeaways

- Informal complaints to a manager are not to be misconstrued as substitutes to lodging a formal grievance.
- Where an employer has an available and functional grievance procedure, an employee who resigns without using it will be hard pressed to establish constructive dismissal, unless they can demonstrate that following such process would be futile.
- Constructive dismissal is a matter of last resort and is not for the taking. Failure to exhaust internal remedies is fatal to a claim of constructive dismissal.

Imraan Mahomed and Taryn York

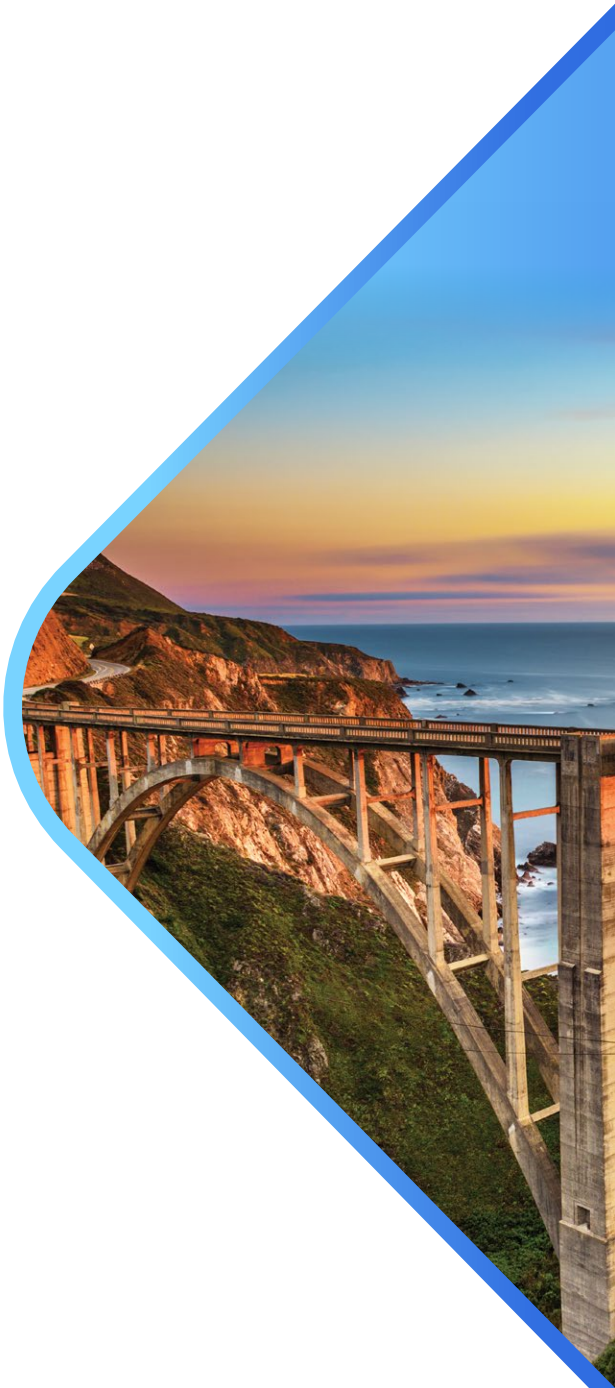
Employment Law

The expanded definition of "*employee*": What you need to know about the 2025 Labour Law Amendment Bill

On 26 February 2026, the Minister of Employment and Labour published the Employment Laws Amendment Bill, 2025, and the Labour Relations Amendment Bill, 2025, for public comment. The Bills are the product of consultations between the Department of Employment and Labour, organised business, and organised labour. Public comments must be submitted by 30 March 2026.

Among the most significant of the proposed amendments is the introduction of an expanded definition of "*employee*" under both the Labour Relations Act, 1995 (LRA) and the Basic Conditions of Employment Act, 1997 (BCEA). The Explanatory Memorandum to the LRA Amendment Bill acknowledges that changes in the nature and organisation of work have resulted in an increasing proportion of the South African workforce falling outside the statutory definition of an employee, with the result that they do not receive the protections of labour legislation.

In this alert, we examine the existing definitions of "*employee*", the proposed expanded definitions, the rebuttable presumptions that accompany them, and the practical implications for employers.



Employment Law

The Existing Definitions of "*Employee*" in South African Labour Law

The definition of *"employee"* is not uniform across South African legislation. The scope of each statute's coverage is determined by its own definition, and these definitions differ in material respects.

Statute	Definition of "*Employee*"	Scope
LRA, s 213 / BCEA, s 1	*"(a) any person, excluding an independent contractor, who works for another person or for the State and who receives, or is entitled to receive, any remuneration; and (b) any other person who in any manner assists in carrying on or conducting the business of an employer."*	All provisions of the LRA and BCEA respectively.
Employment Equity Act, s 1	*"Any person other than an independent contractor who — (a) works for another person or for the State and who receives, or is entitled to receive, any remuneration; and (b) in any manner assists in carrying on or conducting the business of an employer."*	All provisions of the EEA. In each of these statutes, a person who is an "independent contractor" is excluded from both limbs of the definition, with the result that subsection (b) has minimal, if any, practical effect.
Unemployment Insurance Act, s 1	*"Any natural person who receives remuneration or to whom remuneration accrues in respect of services rendered or to be rendered by that person, but excludes any independent contractor."*	All provisions of the UIA.
COIDA, s 1	A person who has entered into or works under a contract of service or of apprenticeship or learnership with an employer, whether the contract is express or implied, oral or in writing, and whether the remuneration is calculated by time or by work done, or is in cash or in kind. Includes casual employees, directors and TES-placed workers.	All provisions of COIDA.
National Minimum Wage Act, s 1 ("*worker*")	*"Any person who works for another and who receives, or is entitled to receive, any payment for that work whether in money or in kind."*	All provisions of the NMWA. Wider than "employee" in the LRA/BCEA.
LRA, s 200A (existing rebuttable presumption)	A person who works for, or renders services to, any other person is presumed to be an employee if any one or more of the following factors are present: (a) the manner in which the person works is subject to the control or direction of another person; (b) the person's hours of work are subject to the control or direction of another person; (c) in the case of a person who works for an organisation, the person forms part of that organisation; (d) the person has worked for that other person for an average of at least 40 hours per month over the last three months; (e) the person is economically dependent on the other person for whom he or she works or renders services; (f) the person is provided with tools of trade or work equipment by the other person; or (g) the person only works for or renders services to one person.	Applies to persons earning below the BCEA threshold.

Employment Law

The Proposed Expanded Definitions

Neither Bill amends the general definitions of *"employee"* in section 1 of the BCEA or section 213 of the LRA. Instead, each Bill introduces a new, broader definition that applies only for limited purposes.

Schedule 11 of the LRA Amendment Bill

The LRA Amendment Bill proposes to add a new Schedule 11 to the Act. For the purposes of this Schedule, an *"employee"* means *"an individual, other than an employee as defined in section 213 of the Act, who works for a person that is not a client or customer of any profession, business or undertaking carried on by the individual."* The Bills now also define who qualifies as an *"employer"* for the purposes of these provisions. Schedule 11 provides that an *"employer"* means *"any person or entity for whom an employee works."*

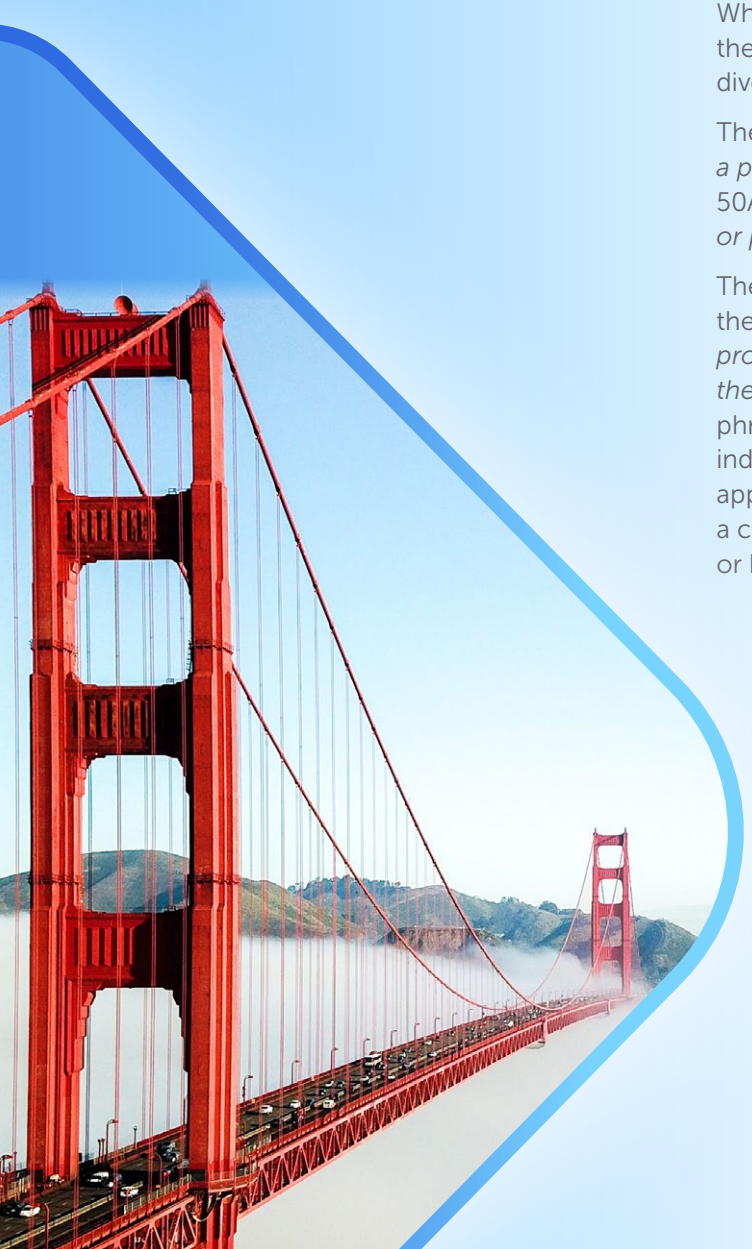
Schedule 11 extends the rights contained in Chapter II (freedom of association), Chapter III (collective bargaining) and Chapter IV (the right to strike) to persons who satisfy this expanded definition. Existing trade unions will be entitled to alter their constitutions to enable them to recruit workers falling in this category.

Section 50A of the BCEA Amendment Bill

The BCEA Amendment Bill proposes to insert a new section 50A, which provides: *"Notwithstanding the definition of employee, for purposes of Chapter 8 - (a) 'employee' also means any individual who performs work or provides services for another person and who is not conducting an independent trade, profession or business in which the person receiving the work or services is a client or customer."* Section 50A likewise provides that an "employer" includes *"any person or entity for whom an employee works."* This definition is identical to the Schedule 11 definition of *"employer"* under the LRA Amendment Bill.

Clause 6 of the BCEA Amendment Bill further proposes to amend section 62A to make the definition of *"employee"* introduced by section 50A applicable to the provisions in Chapter 10 of the BCEA (monitoring, enforcement and legal proceedings). The practical effect is that workers captured by this expanded definition will be subject to sectoral determinations made by the Minister under Chapter 8, and will have access to the compliance and enforcement machinery of Chapter 10.

Employment Law



Key Differences Between the Two Definitions

While both definitions pursue the same objective, their wording differs in ways that may produce divergent outcomes.

The Schedule 11 definition uses the phrase *"works for a person"* - a simpler formulation - whereas section 50A uses the more expansive phrase *"performs work or provides services for another person."*

The exclusion clause in section 50A requires that the person is *"not conducting an independent trade, profession or business* **in which** *the person receiving the work or services is a client or customer."* The phrase *"in which"* may mean that even if a person is independent in all other respects, the exclusion only applies if the person receiving the work or services is a client or customer of that specific trade, profession or business.

The Three Rebuttable Presumptions

Both provisions create a presumption that an individual is an employee unless the employer demonstrates that **all three** of the following factors are satisfied:

(a) the person is not subject to the control and direction of the employer in connection with the performance of the work or provision of the services;

(b) the person is not part of the organisation of the employer; and

(c) the person does not perform work for or provide services to customers or clients on behalf of the employer under terms set by the employer.

Practical Implications for Employers

The expanded definitions create what the Explanatory Memorandum describes as a category of workers *"now often referred to by the internationally used term of 'dependent contractors'."* These are workers who fall between the traditional categories of employee and independent contractor. They appear to be the primary target of the amendments.

Reclassification risk. The Bills create de lege employee status for platform workers, gig economy participants and de facto dependent contractors until the employer proves otherwise. The third rebuttable presumption - *"terms set by the employer"* - is particularly onerous, as even genuine independent sub-contractors commonly work under principal set terms of engagement based on commercial requirements.

Employment Law

The Bills and Explanatory Memoranda do not define *"client or customer"*, do not explain what counts as *"terms set by the employer"*, and do not specify what *"on behalf of"* means in ordinary contracting chains.

Industries most affected. The amendments are likely to affect platform and gig economy companies (e-hailing, food delivery, freelance platforms), companies using independent contractor models (owner-driver distribution networks, independent sales agents, and commission-based contractors), and outsourcing and facilities management companies.

Limited scope of rights. It is important to note that employees under the expanded definitions do not receive the full suite of LRA and BCEA protections. Under the LRA, they gain freedom of association, organisational rights, collective bargaining and the right to strike - but not unfair dismissal protection (save for strike-related automatically unfair dismissals) or unfair labour practice protection. Under the BCEA, they gain access to sectoral determinations and the compliance and enforcement machinery, but not the general protections regarding working hours, leave, or other basic conditions.

What Employers Should Do Now

The Bills are currently open for public comment. Employers who rely on independent contractor models, particularly in the platform economy, gig economy, outsourcing and distribution sectors, should audit their existing arrangements to assess reclassification exposure under the expanded definitions. Affected employers should also consider making submissions during the public comment period.

Employment Law practice

Cliffe Dekker Hofmeyr

Legal500

2025

TIER 1

Employment

Employment Law

Regulations relating to the processing of data subjects' health information by certain parties

The Regulations are published under the Protection of Personal Information Act 4 of 2013 (the Act) and focus on the processing, security, and transfer of health information by responsible parties. The purpose of these Regulations is to assist with the interpretation of section 32(6) of the Act, enhance transparency, and provide a framework for the information regulator on enforcement mechanism for the processing of health information of data subjects as provided in section 32(6) of the Act.

Responsible party

A responsible party includes insurance companies, medical schemes, medical scheme administrators, pension funds, administrative bodies, employers, managed healthcare organisations, and institutions working for employers.

Processing of data subject's health information

Processing of health information is permitted only under specific legal authorisations. A responsible person may, subject to section 27 of the Act, not process personal information concerning the religious beliefs, race or ethnic origin, trade union membership, health or sex life, or biometric information of a data subject.

Safeguards

Responsible parties must implement appropriate technical and organisational measures to ensure confidentiality, integrity, and the restricted availability of information in their possession or under their control. These measures are aimed at preventing loss or damage to or unauthorised destruction of health information, as well as unlawful access to or processing of health information.

Safeguards include measures to secure record management and the proper disposal of that information to prevent unauthorised access or unlawful disclosure.

Transfer of personal information

The Regulations prohibit the transfer of health information of a data subject to a third party in a foreign country unless one or more of the requirements set out in section 72(1) of the Act are met.

Commencement

The Regulations commenced on date of publication, 6 March 2026.

Fiona Leppan and Biron Madisa

OUR TEAM

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

Aadil Patel
Practice Head & Director:
Employment Law
Sector Head:
Government & State-Owned Entities
T +27 (0)11 562 1107
E aadil.patel@cdhlegal.com

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

Frieda Kishi
Director | Namibia
T +264 83 373 0100
E frieda.kishi@cdhlegal.com

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

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

Nadeem Mahomed
Director:
Employment Law
T +27 (0)11 562 1936
E nadeem.mahomed@cdhlegal.com

Yvonne Mkefa
Director:
Employment Law
T +27 (0)21 481 6315
E yvonne.mkefa@cdhlegal.com

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

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

Jean Ewang
Counsel:
Employment Law
T +27 (0)11 562 1499
E jean.ewang@cdhlegal.com

Thabang Rapuleng
Counsel:
Employment Law
T +27 (0)11 562 1759
E thabang.rapuleng@cdhlegal.com

JJ van der Walt
Counsel:
Employment Law
T +27 (0)11 562 1289
E jj.vanderwalt@cdhlegal.com

Ebrahim Patelia
Legal Consultant:
Employment Law
T +27 (0)11 562 1000
E ebrahim.patelia@cdhlegal.com

Daniel Kiragu
Senior Associate | Kenya
T +254 731 086 649
+254 204 409 918
+254 710 560 114
E daniel.kiragu@cdhlegal.com

Lee Masuku
Senior Associate:
Employment Law
T +27 (0)11 562 1213
E lee.masuku@cdhlegal.com

Leila Moosa
Senior Associate:
Employment Law
T +27 (0)21 481 6318
E leila.moosa@cdhlegal.com

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

Kgodisho Phashe
Senior Associate:
Employment Law
T +27 (0)11 562 1086
E kgodisho.phashe@cdhlegal.com

Taryn York
Senior Associate:
Employment Law
T +27 (0)11 562 1732
E taryn.york@cdhlegal.com

Chantell De Gouveia
Associate:
Employment Law
T +27 (0)11 562 1343
E chantell.degouveia@cdhlegal.com

OUR TEAM

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

Ra'ees Ebrahim
Associate:
Employment Law
T +27 (0)11 562 1735
E raees.ebrahim@cdhlegal.com

Ayesha Karjieker
Associate:
Employment Law
T +27 (0)11 562 1568
E ayesha.karjieker@cdhlegal.com

Kevin Kipchirchir
Associate | Kenya
T +254 731 086 649
+254 204 409 918
+254 710 560 114
E kevin.kipchirchir@cdhlegal.com

Biron Madisa
Associate:
Employment Law
T +27 (0)11 562 1031
E biron.madisa@cdhlegal.com

Thato Makoaba
Associate:
Employment Law
T +27 (0)11 562 1659
E thato.makoaba@cdhlegal.com

Thato Maruapula
Associate:
Employment Law
T +27 (0)11 562 1774
E thato.maruapula@cdhlegal.com

Sheilla Mokaya
Associate | Kenya
T +254 731 086 649
+254 204 409 918
+254 710 560 114
E sheilla.mokaya@cdhlegal.com

Sashin Naidoo
Associate:
Employment Law
T +27 (0)11 562 1482
E sashin.naidoo@cdhlegal.com

Billy Oloo
Associate | Kenya
T +254 731 086 649
+254 204 409 918
+254 710 560 114
E billy.oloo@cdhlegal.com

Melisa Wekesa
Associate | Kenya
T +254 731 086 649
+254 204 409 918
+254 710 560 114
E melisa.wekesa@cdhlegal.com

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.

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
Merchant Square, 3rd floor, Block D, Riverside Drive, Nairobi, Kenya. P.O. Box 22602-00505, Nairobi, Kenya.
T +254 731 086 649 | +254 204 409 918 | +254 710 560 114
E cdhkenya@cdhlegal.com

ONGWEDIVA
Shop No A7, Oshana Regional Mall, Ongwediva, Namibia.
T +264 (0) 81 287 8330 E cdhnamibia@cdhlegal.com

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

WINDHOEK
1st Floor Maerua Office Tower, Cnr Robert Mugabe Avenue and Jan Jonker Street, Windhoek 10005, Namibia.
PO Box 97115, Maerua Mall, Windhoek, Namibia, 10020
T +264 833 730 100 E cdhnamibia@cdhlegal.com