



INTRODUCTION TO COIDA



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INTRODUCTION

Occupational health and safety in South Africa is regulated and governed by the following prescript, among others:

The Compensation for Occupational Injuries and Diseases Act 130 of 1993, as amended (COIDA), which provides a system of no-fault compensation for employees injured or who contract occupational illnesses or diseases during the course of their employment. "*No-fault compensation*" is a legal rule where an aggrieved party claims compensation without having to prove any other party was at fault for the accident.

COIDA Q&A

What is the Compensation Fund and when must a business register with it?

- The Compensation Fund is a government institution put in place to protect employees and employers if an:
 - injury;
 - disease; and/or
 - death occur(s) to any employee *"in the line of duty"*.
- An employer carrying on business in South Africa is required to register their business with the Compensation Commissioner (Commissioner). They are further required to furnish the Commissioner with the prescribed particulars of their business within a period determined by the Commissioner, and furnish any additional particulars the Commissioner may require.
- Thereafter, the Compensation Fund registration number is issued in the name of the business and will remain until de-registration.

What are the consequences of a business not being registered with the Compensation Fund?

- Apart from being non-compliant with legislation, the business could encounter fines or even prosecution for its non-compliance. The business could also be liable for claims relating to injury on duty, diseases or death of an employee.

What does the Commissioner compensate for?

- Once the severity of the accident or the disease has been established, the Commissioner or the designated carrier will compensate the worker for lost income or any other expenses incurred through the accident or disease according to a prescribed scale of benefits.

If you are off work for three days or less, you will not receive compensation. Medical expenses will, however, be paid. For the first three months you are booked off from work, your employer is obliged to pay you 75% of your earnings/wages as at the time of the

accident, if your injury is serious and lasts for the first three months. Your employer will claim this back from the Compensation Fund.

Should an employer deduct annual and/or sick leave if an employee is off work because of an injury on duty?

- No. An employee should be granted special leave for the injury as the employer will be reimbursed for salaries paid for the first period of up to three months where the employee has been booked off duty due to the accident.

Will an employee be covered if they were injured during a team-building exercise?

- Yes. Provided that the event was not only approved by the employer, but the employer also encouraged and expected personnel to attend.
- An employee is also covered if they were acting on the instruction of their employer.
- Social events, such as having a few drinks after the team building, would likely fall outside that scope and may not be covered under COIDA.

Is an employee covered if involved in a motor vehicle accident in transportation that the employee arranged and/or paid for?

- If an employer instructs an employee to make use of a private vehicle or make use of public transport to carry out their job during working hours, or owing to an emergency, the employee will likely be covered. This does not apply to an employee's normal commute to and from work.
- However, on 17 April 2023, the Compensation for Occupational Injuries and Diseases Amendment Act 10 of 2022 (COIDA Amendment Act) was published. Although it is not yet in effect, COIDA's intended coverage will be extended to incidents that occur in transport that has been arranged by the employer. Essentially, an employee will be covered between the designated pick-up point and the workplace, and vice versa, where such pick-up and drop-off points are determined by the employer.



Does the Commissioner always award compensation for an injury on duty?

- No. Currently, COIDA can exclude an employee from compensation where the accident was the result of the employee's deliberate/wilful conduct. Once amended, COIDA will no longer contain this restriction. However, if an employee fails to co-operate in the soon-to-be-prescribed rehabilitation regulation, the employee could be denied an award of compensation.
- Employees will not receive a lump sum for every injury arising from their work. Only in prescribed serious cases will there be a lump sum payment. If the doctor indicates in the medical reports that an employee has a permanent injury, such as deafness, blindness, amputation of a limb or an injury that permanently disables them (for the rest of their life), it will be assessed according to the percentage of disability laid down in COIDA.
- If the employee's disability is assessed at 30% or less, the employee will be paid a lump sum, which is a once-off payment for that injury.

When would an employee receive compensation in the form of a pension?

- If the disability is assessed at more than 30%, the employee will receive a monthly pension together with the arrears payment from the date of stabilization of the employee's condition that is reflected on the final medical report, and a monthly pension is payable for life. The amount of this pension is calculated on the employee's earnings at the time of the accident, their percentage of disability and the benefits applicable at the time of the accident.

Does "employee" in section 35(1) of COIDA include employees covered by Occupational Diseases in Mines and Works Act 78 of 1973 (ODIMWA), notwithstanding that they are barred from claiming benefits under COIDA?

- In the case of *Mankayi v Anglogold Ashanti Limited* [2011] (5) BCLR 453 (CC), the applicant was a mineworker who contracted phthisis while working for the respondent, a mining company, who instituted a civil claim against the respondent under the common law alleging that the respondent had breached its duty of care to have him in a safe and healthy work environment. The respondent contended that section 35 of COIDA precluded such a claim. The applicant contended that because he had contracted an "occupational disease" as defined in ODIMWA and had received compensation under ODIMWA, he was not precluded from suing the respondent at common law. Given that section 100(2) of ODIMWA barred him from claiming benefits under COIDA, he contended that the prohibition in section 35(1) of COIDA did not apply to him.
- In a unanimous judgment, the Constitutional Court concluded that ODIMWA did not bar the applicant from instituting a civil claim as there was an equivalent section 35 bar under COIDA located in ODIMWA.



RECENT AMENDMENTS TO COIDA

As mentioned, on 17 April 2023 the COIDA Amendment Act was published. The aim of the COIDA Amendment Act is to amend, substitute, insert, delete and repeal certain definitions and sections of COIDA. The commencement date of these amendments is yet to be proclaimed.



Key aspects of the amended COIDA

What are the new concepts that have been introduced regarding the rehabilitation of employees who have work-related injuries or occupational diseases?

- Section 16 makes provision for three new categories. The first is rehabilitation of persons who suffer work-related injuries or occupational illnesses or diseases. Second is to provide psychosocial support subsequent to an occupational injury, illness or disease, which forms part of clinical, vocational and social rehabilitation services, and third, the prescribed remuneration of the board members, Commissioner and staff of the Compensation Fund.

What does the expanded scope of compensation entail?

- Section 22 provides for employees' rights to claim benefits if they are involved in an accident resulting in their disablement or death at the workplace, in conveyance (transport) by or on behalf of their employer to or from their place of employment, or in conveyance to any place for the purposes of their employment by means of any mode of transportation in furtherance of the business of their employer.

When does "conveyance" (transport) commence and cease?

- The COIDA Amendment Act provides that "conveyance" will be deemed to start once an employee reaches the place designated by the employer for pick-up and ceases on drop-off at the place designated by the employer.

How are accidents that have occurred outside of South Africa to be dealt with?

- If an employee who is ordinarily employed in South Africa by an employer that carries on business in South Africa meets with an accident while temporarily employed outside South Africa, the employee will be entitled to compensation as if the accident had occurred in South Africa.
- It is important to note the compensation of an employee claiming from the Compensation Fund for accidents that occur outside South Africa would be determined on the basis of the earnings which the employee, in the opinion of the Commissioner, would have received if that employer had remained in South Africa at the time that the accident occurred.

Compensation for accidents in the course of work-related training?

- Section 25 provides compensation for employees who have suffered an accident during the training for or performance of emergency services while undergoing any work-related training in the furtherance and pursuance of the employer's business. This was not provided for before.

What does the COIDA Amendment Act provide in respect of business licensing and insurance?

- Section 30 provides for the provision of a license to carry out business of the Compensation Fund and allows the Minister of Employment and Labour (Minister), for a period and subject to the conditions the Minister may impose, to issue a license to carry on the business of insurance of employers against their liabilities to employees in terms of COIDA to a licensee. This is, however, subject to the licensee depositing securities considered by the Commissioner to be sufficient to cover the liabilities of the licensee in terms of the COIDA Amendment Act, and as may be requested and ordered by the Minister.
- If the Minister is satisfied that the whole or any portion of the security is no longer necessary and the licensee is not in a position to incur a liability, the Minister may call for the security, or a portion thereof, to be returned to the licensee.



Can an employer and the Compensation Fund recover damages or compensation paid under COIDA from the Road Accident Fund?

- Section 36 provides that the employer and the Compensation Fund will be unable to recover damages or compensation paid in terms of the COIDA Amendment Act from the Road Accident Fund, as it would no longer be considered a third party for the purposes of the COIDA Amendment Act. In the event where an employee is involved in a road accident, not arising out of and in the course of an employee's employment at the time the accident occurred, the employee would not be entitled to compensation in terms of the COIDA Amendment Act.

Is there a prescription period for claims under COIDA?

- Section 44 provides for a new prescription period of three years from the date when the accident occurred and that this must be brought to the attention of the Commissioner in that time frame.

When does the right to compensation for temporary total or partial disablement expire?

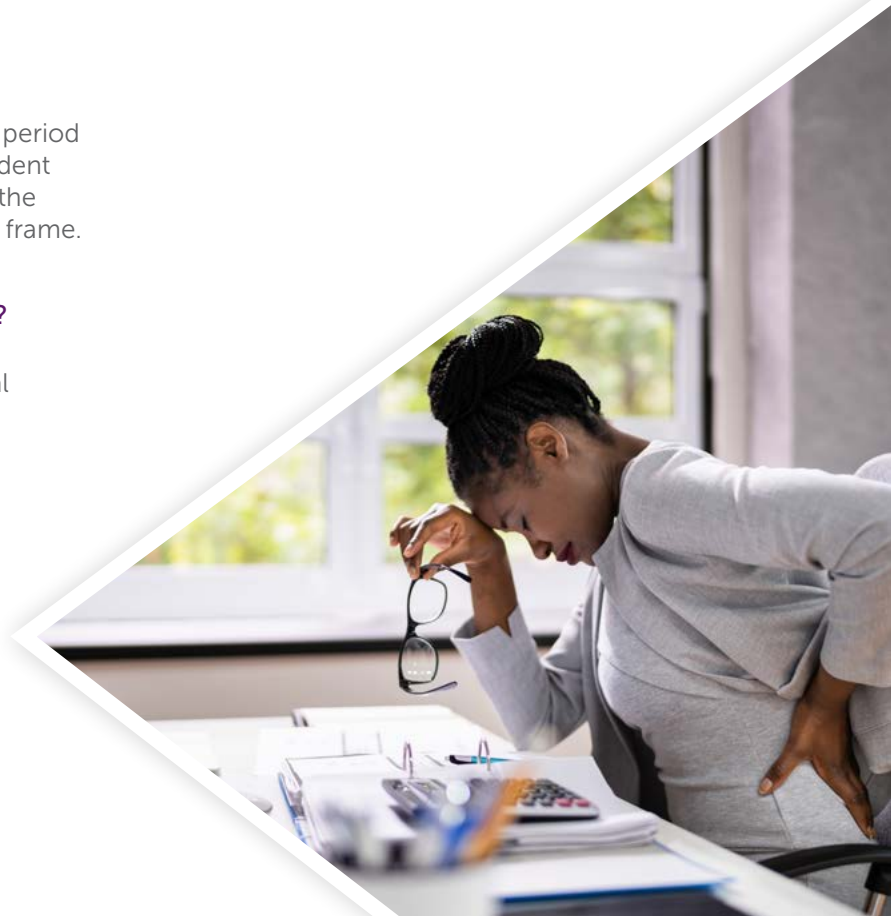
- Section 48 provides that the right to compensation for temporary total or partial disablement will expire if the employee is declared medically fit to resume the work for which they were employed at the time of the accident or occupational disease or resumes any other work at the same or greater earnings.

Within what time period must an objection be lodged?

- Section 91 provides that any person affected by a decision of the Commissioner may, within 12 months after the decision, lodge an objection against that decision with the Commissioner in the prescribed manner.

What are the consequences for non-compliance?

- Section 99 provides that any person who does not comply with the provisions of sections 39, 40, 47, 64, 68, 81, 82 and 83 will be liable to a penalty or penalties as specified in the various sections.





Draft return to work and rehabilitation regulations

What is the purpose of section 70A (the return-to-work provision) and the regulations?

- The purpose of the regulations is to regulate the implementation of the new incoming section 70A of CODIA. As of the date of this guideline's drafting, the regulations are in draft form. They will become effective upon the implementation of the amendments to COIDA.
- **Regulation 4(1):** The Compensation Fund, licensee and employer shall provide access to facilities, services and benefits aimed at rehabilitating employees suffering from occupational injuries or diseases so that they can return to work or be in a position to seek gainful employment in the labour market.
- **Regulation 4(2):** Where an employee has suffered a disability as a result of an occupational injury or disease, the Compensation Fund, licensee, or employer, with the consent of the employee, shall provide the employee with access to rehabilitation programmes to assist in restoring the employee's health, independence and participation in the labour market to the maximum extent practicable.

- **Regulation 4(4):** The Compensation Fund will be the custodian and the case manager of the fund or licensee has the authority to approve the referral for rehabilitation upon the recommendation of the employer's health and wellness representative or a healthcare practitioner.

What are the requirements for enrolment into a rehabilitation and return-to-work programme?

- **Requirement 1:** The employer and healthcare provider shall notify the Compensation Fund or licensee of the need to enrol the employee in the rehabilitation and return-to-work programme.
- **Requirement 2:** The liability for the injury is one that has been accepted by the fund in that it was for an injury on duty or someone attending to their occupation.
- **Requirement 3:** The injury has to be severe and be classified as a disability as per the categorised diagnoses of the Compensation Fund.

What are the obligations of employees after an accident?

Regulation 9 requires that:

- The employee must report the injury as soon as practicable after the injury or diagnosis to their immediate supervisor or health and safety representative.
- Supply any relevant medical reports relating to rehabilitation and period of absence from work and comply with any medical restrictions imposed at all times.
- Avail themselves and actively participate in the implementation of the rehabilitation and return-to-work plan.
- Return to their pre-injury duties at the pre-injury workplace where medically reasonable and safe.
- Accept an offer of reasonable accommodation, duties and assistive devices and technology where this is part of an agreed return-to-work plan.



What are the obligations of employers after an accident?

The employer must:



Facilitate access to rehabilitation for the occupationally injured or diseased person.



Establish and maintain a system of rehabilitation and return to work reporting for all employees exposed to occupational injuries and diseases.



Facilitate access and assistance to enable a disability case manager to perform their functions.



Develop and implement a workforce rehabilitation and return to work policy and programme (this will largely affect incapacity policies).



Provide reasonable, transitional or temporary work to allow the injured employee to work safely in the return-to-work process.



Modify work areas, duties, equipment or processes in accordance with injured persons' capacity to allow for reasonable accommodation.

What should the rehabilitation, reintegration and return-to-work policy look like?

- It introduces health and wellness representatives who will act as liaison officers between the Compensation Fund, injured employee and rehabilitation service providers.
- It clarifies how the return-to-work plan will be implemented and who will be responsible for it.
- It explains how access will be provided for such rehabilitation.
- It defines how to report injuries and liaise with disability case managers from the Compensation Fund.

Should the rehabilitation, reintegration and return-to-work policy fail or not be successful, what can an employer do?

- **Regulation 8(t):** The employer must notify the Compensation Commissioner in the prescribed manner about the inability to resume duty or inability to retain employees after all efforts have been made to preserve the employment of the injured or diseased employee. The goal is to retain, but if it does not happen, there are certain prescribed measures that would need to be taken.
- **Regulation 8(h):** Reports on rehabilitation and reintegration are to be kept for a period of no less than 40 years. This complies with sections 12 and 13 of the Protection of Personal Information Act 4 of 2013 as the purpose of keeping such documentation will be justified by legislation.





Can an employer dismiss an employee, reduce their remuneration or alter the terms of service should rehabilitation fail?

- An employer must not dismiss an employee based on incapacity or reduce their remuneration or alter terms of their conditions of employment to a less favourable one as a result of being injured on duty without first reporting same and its reasons to the Chief Inspectorate and the Compensation Fund.
- **Regulation 8(s):** Yes. However, an employer must report any such intended alteration or dismissal and its reasons to the Chief Inspectorate and the fund in writing. However, no guidance is given as to how this process may be escalated or challenged.
- **Item 10(4) of the Code of Good Practice:** Dismissal requires particular consideration to be given to employees who are injured at work, or who are incapacitated by work-related illness. South African courts have held that the duty on the employer to accommodate the incapacity of the employee is more onerous under these circumstances.
- If these Regulations are passed in the present form, employers will have to adapt their incapacity policies and procedures to:
 - create a rehabilitation programme in an effort to return the employee to work; and
 - facilitate the rehabilitation of employees that have suffered an occupational injury or disease resulting in physical impairment. This has to be integrated in the employers' policies.

- Therefore, employers may not dismiss or alter the terms and conditions of employment of occupationally injured or diseased employees without:
 - firstly facilitating the rehabilitation, reintegration and return to work; and
 - secondly, reporting the outcome to the Chief Inspectorate and the Compensation Fund in writing.

Who bears the costs of the rehabilitation?

- **Regulation 10(2)(a):** The costs for clinical rehabilitation, social rehabilitation and assistive devices and technology for previously employed employees with permanent disablement is borne by the Compensation Fund. This includes the cost of supplying, maintaining and repairing assistive devices and tech for as long as they need it.
- **Regulation 10(2)(b):** The costs for the vocational rehabilitation for employees who have already returned to work shall be borne by the employer. This includes the costs of reasonable accommodation.

Are employees supposed to be remunerated during their rehabilitation period?

- **Regulation 14:** Employees undergoing rehabilitation shall be entitled to compensation benefits payable under COIDA.

What are the penalties for non-compliance?

- **Regulation 27:** An employer who fails to comply with the provisions of these regulations shall be liable to a fine or penalty as determined by the Commissioner.

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.

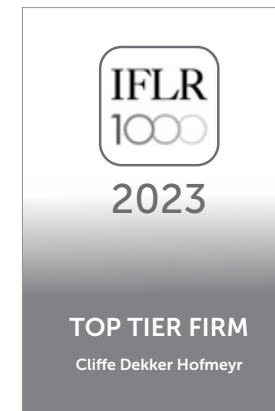
The Legal 500 EMEA 2023–2024 recommended **Phetheni Nkuna** for employment.

The Legal 500 EMEA 2022–2024 recommended **Desmond Odhiambo** for dispute resolution.

The Legal 500 EMEA 2023 recommended **Thabang Rapuleng** for employment.

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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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