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The Global Employer ™

South Africa Guide 2017

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About the Guide

This guide is intended to provide employers and human resources professionals with a comprehensive overview of the key aspects of South African labor law. It covers the entire life-cycle of the employment relationship from hiring through to termination, with information on working terms and conditions, family rights, personnel policies, workplace safety and discrimination. The guide links to our global handbooks, which include information for South Africa on immigration, data privacy, trade unions and works councils. The guide also contains information on the employment implications of share and asset sales.

Save where otherwise indicated, law and practice are stated in this guide as at January 2017.

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1 Overview

1.1 General overview

The South African legal system is comprised of a mixture between English common law, Roman Dutch law and customary law, perched against the backdrop of the Constitution.

In terms of South African labour legislation, employees are afforded a number of protections regarding (amongst other things) unfair labour practices, unfair dismissals and minimum terms and conditions of employment.

1.2 General legal framework

1.2.1 Sources of law

A few select pieces of legislation principally govern South African employment law, namely the:

- Constitution of the Republic of South Africa, Act 108 of 1996 ("Constitution");
- Labour Relation Act, 66 of 1995 ("LRA");
- Employment Equity Act 55 of 1998 ("EEA"); and
- Basic Conditions of Employment Act ("BCEA").

1.2.2 Collective agreements

A collective agreement is a written agreement encapsulating terms and conditions of employment, or any other matter of mutual interest, concluded by registered trade unions and employers and/or registered employers' organizations.

Collective agreements bind the following parties:

- parties to the agreement;
- members of every other party to the agreement, insofar as the provisions of the agreement are applicable;
- members of a registered trade union that is party to the agreement; and
- employers who are members of a registered employers' organization that is party to the agreement.

Employees who are not members of the registered trade union party to the collective agreement are bound by the agreement if:

- the employees are identified in the agreement;
- the agreement expressly binds the employees; and
- the trade union represents the majority of the employees in the workplace.

Among other things, collective agreements may regulate:

- terms and conditions of employment, for example, overtime and leave;
- wage agreements; and
- the conduct of the employer in relation to its employees.

Where a collective agreement binds an employer and employee and such agreement contains terms and conditions of employment that differ from those in the employee's contract of employment, the provisions of the employment contract will be amended to incorporate the provisions of the collective agreement.

Parties bound by a collective agreement will remain bound for the period that the agreement is in force. Where not stated, any party to the agreement may give reasonable notice of termination in writing to the other party, unless the agreement provides otherwise.

Collective agreements must contain procedures for dispute resolution regarding:

- the interpretation or the application of the collective agreement; and
- the interpretation and application of a settlement agreement.

The procedure must first require the parties to attempt to resolve the dispute through conciliation and, if the dispute remains unresolved, to resolve it through arbitration.

1.2.3 Court framework

Depending on the subject matter of the dispute, an aggrieved party may approach the Commission for Conciliation, Mediation and Arbitration ("CCMA"), Bargaining Council or Labour Court.

Where the CCMA is the forum of first instance and a party to the dispute is dissatisfied with the award, they may elect to take such decision on review to the Labour Court.

Following any process in the Labour Court, appeals can be brought before the Labour Appeal Court and, thereafter, the Constitutional Court. The Labour Appeal Court has the same standing as the Supreme Court of Appeal. The Constitutional Court has jurisdiction to hear all matters, irrespective of whether it concerns a constitutional matter, and is the highest court in South Africa.

1.2.4 Litigation considerations

The CCMA only has jurisdiction to hear disputes concerning employees. It cannot entertain matters where:

- an independent contractor is involved;
- the case does not deal with an issue in the LRA, BCEA or EEA;
- a bargaining council or statutory council exists for that sector; or
- a private agreement exists for resolving disputes.

Typical disputes referred to the CCMA include:

- unfair dismissal disputes, in which an employee has 30 days from the date on which the dispute arose to refer a dispute;
- unfair labor practice disputes, in which an employee has 90 days to refer a dispute; and
- unfair discrimination disputes, in which an employee has six months to refer a dispute.

When a matter is referred to the CCMA, the matter is generally firstly enrolled for a two-stage process called a "conarb", whereby the CCMA commissioner firstly attempts to conciliate the matter, failing which, the matter will go directly to arbitration.

An employer is entitled to object to the conarb process, which entails that the conciliation and the arbitration will be held separately.

The purpose of conciliation is to reach an agreement acceptable to both parties. Legal representation is generally not allowed during conciliation.

If the conciliation fails, or if no certificate of outcome is issued within 30 days, an employee is entitled to refer the matter to arbitration. An employee should apply for arbitration within 90 days from the date on which the commissioner issued the certificate.

Arbitration is more formal than conciliation where parties have the opportunity to lead evidence, including witness testimony. Each party may cross-examine the other's witnesses. Legal representation may, in certain instances, be allowed.

A party is entitled to represent themselves in the CCMA or the Labour Court. Alternatively, they may be represented by a trade union official. Legal representation is permitted in all circumstances in the Labour Court. There is no fee payable for litigants in the CCMA or the Labour Court. However, if a party elects and is allowed legal representation, that party will be liable to pay its own legal fees, unless there is a court order to the contrary.

Within 14 days from the date of the hearing, the commissioner must issue an arbitration award. An arbitration award is final and binding, and it may be enforced as if it were an order of the Labour Court in respect of which a writ has been issued, unless it is an advisory arbitration award.

If an arbitration award orders a party to pay a sum of money, the amount earns interest from the date of the award at the same rate as the rate prescribed from time to time in respect of a judgment debt, unless the award provides otherwise.

An arbitration award may only be enforced if the director of the CCMA has certified that the arbitration award is an award as above contemplated.

If a party fails to comply with a certified arbitration award that orders the performance of an act, other than the payment of an amount of money, any other party to the award may, without further order, enforce it by way of contempt proceedings instituted in the Labour Court.

An arbitration award in terms of which a party is required to pay an amount of money must be treated for the purpose of enforcing or executing that award as if it were an order of the Magistrate's Court.

Generally, the CCMA, bargaining councils or the Labour Court determines the type of disputes that may not form the subject matter of industrial action. If industrial action is threatened, the adverse party may approach the Labour Court to interdict the industrial action. Employees may be subject to disciplinary action for embarking on an unprotected strike.

The typical type of dispute that forms the subject matter of industrial action relates to increases in remuneration and an improvement in the terms and conditions of employment.

South Africa employment tribunals and courts are loath to award costs and parties are frequently liable to pay their own legal fees, specifically in the CCMA.

1.3 Types of working relationship

Individuals who provide their service broadly fall into the main groups detailed in the table below. The status of an individual is important because it determines the protection afforded to that individual.

Types of working relationship	
Employee	The employment contract serves as the foundation for the relationship between an employee and an employer. All rules of labor law depend, at least initially, on there being a contract of employment linking the individual employee to the employer. It is only when one looks at the contract that one can determine

Types of working relationship	
	whether there is a relationship between two parties. It is not a legal requirement that such contract be in writing. However, an employer must provide the employee with written particulars of employment. By carefully evaluating a given set of contractual terms, one may be able to ascertain whether or not a certain contractual relationship is based on a contract of employment or, for example, of agency. The essential elements of the employment contract can be summarized as being: • a voluntary agreement; • between two parties (employer and employee); • in terms of which the employee places labor potential at the disposal of and under the control of the employer; • in exchange for some form of remuneration by the employer. An employee is defined as: • 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 • any other person who assists in any manner in carrying on or conducting the business of an employer. There is a rebuttable presumption in South African employment law that a person who works for, or renders services to, any other person is presumed, regardless of the form of the contract, to be an employee if any one or more of the following factors are present: • the manner in which the person works is subject to the control or direction of another person; • the person's hours of work are subject to the control or direction of another person; • in the case of a person who works for an organization, the person forms part of that organization; • the person has worked for that other person for an average of at least 40 hours per month over the last three months; • the person is economically dependent on the other person for whom he or she works or renders services; • the person is provided with tools of trade or work equipment by the other person; or • the person only works for or renders services to one person. This presumption does not apply to any person who earns in excess of the threshold amount, currently ZAR 205,433.30 ("Threshold"). The fact that an applicant satisfies the requirements of the presumption by

Types of working relationship	
	establishing that one of the listed factors is present in the relationship does not establish that the applicant is an employee. However, the onus then falls on the "employer" to lead evidence to prove that the applicant is not an employee and that the relationship is in fact one of independent contracting. If the respondent fails to lead satisfactory evidence, the applicant must be held to be an employee. Employees can be employed on a definite (fixed-term) or part-time basis - see further at **5.2**.
Independent Contractor	A contract for the provision of work is known as an independent contractor relationship. Independent contractors are not afforded the protections and benefits contained in employment statutes such as the LRA and the BCEA. The noteworthy characteristics of an independent contractor relationship are as follows: • the object of the contract is to perform a specified work or produce a specified result; • an independent contractor is entitled to perform the obligations in terms of the contract through others; • an independent contractor must perform work (or produce results) within the period fixed by the contract; • an independent contractor is subservient to the contract, and is not under supervision or control of employer; and • it terminates on completion of work or production of specified result. A distinguishing feature of the contract of an independent contractor is that there is far less control by the principal over the agent (contractor) than an employer has over an employee.
Temporary Employment Service ("TES") Employee	In terms of the LRA, a TES means any person who, for reward, procures for or provides to a client other persons who perform work for the client. In order for a person providing or procuring the employees to fall within the definition of a TES, two elements must be present: • the person or business provides employees to a client; and • the person or business remunerates those employees (they are not remunerated by the client). A TES that procures or provides a person's services for a client is the employer of that person and that person is the employee of the TES. The TES and the client are jointly and severally liable if the TES, in respect of any of its employees, contravenes: • a collective agreement concluded in a bargaining council that regulates terms and conditions of employment;

Types of working relationship	
	• a binding arbitration award that regulates terms and conditions of employment; • the BCEA; or • a sectoral determination made in terms of the BCEA. If the client of a TES is jointly and severally liable or is deemed to be the employer of an employee: • the employee may institute proceedings against either the TES or the client, or both; • a labor inspector acting in terms of the BCEA may secure and enforce compliance against the TES or the client as if it were the employer, or both; and • any order or award made against a TES or client may be enforced against either. If a TES employee earns below the Threshold, section 189A of the LRA regulates the relationship between the employee, the TES and the client. In section 198A of the LRA, a "temporary service" means work for a client by an employee: • for a period not exceeding three months; • as a substitute for an employee of the client who is temporarily absent; or • in a category of work and for any period of time which is determined to be a temporary service by a collective agreement concluded in a bargaining council, a sectoral determination or a notice published by the minister. An employee: • performing a temporary service for the client is the employee of the TES in terms; or • not performing such temporary service for the client is deemed to be an employee of that client and the client is deemed to be the employer and employed on an indefinite basis by the client. The TES's termination of an employee's service with a client, whether at the instance of the temporary employment service or the client, for the purpose of avoiding the operation of the protections afforded in the LRA or because the employee exercised a right in terms of the LRA, is a dismissal. An employee deemed to be an employee of the client must be treated overall not less favorably than an employee of the client performing the same or similar work, unless there is a justifiable reason for different treatment.

1.4 On the horizon

The Employment Services Act, No 4 of 2014 ("ESA") came into effect on August 9, 2015.

The ESA provides for the registration of private employment agencies, which includes recruitment agencies and temporary employment services, more commonly known as labor brokers. However, the provisions relating to this have not yet come into effect. Regulations are expected to be issued in the near future to provide practical guidelines for the implementation of the ESA.

The ESA further provides for the creation of a Public Employment Service, which will be established and managed by the state. It is envisioned that the Public Employment Service will provide state assistance to unemployed job seekers.

The Public Employment Service will register job seekers and placement opportunities with the aim of matching job seekers with services and placement opportunities. The Public Employment Service will also provide training for unskilled job seekers and give the unemployed access to career information.

Employers in certain industries may be required to register vacancies and specific categories of work with the Public Employment Service. Employers may also be required to interview individuals recommended by the Public Employment Service and pay license fees to assist in funding the Public Employment Service.

2 Hiring employees

2.1 Key hiring considerations

The decision of who to hire rests with the employer. However, employers may not unfairly discriminate when making this decision. Employers should therefore be mindful of the fairness of their hiring process (see further at **14**).

Once the Protection of Personal Information Act, 4 of 2013 ("POPI") is fully in force, employers will be required to comply with its provisions in relation to the collection and processing of personal information and special personal information (see further at **11**). The POPI will come into force on a date to be determined by the President by proclamation in the Gazette. Certain provisions relating to the establishment of the Information Regulator ("Regulator") and the making of regulations under POPI were brought into force on 11 April 2014. The office of the Regulator was established towards the end of 2016.

2.2 Avoiding the pitfalls

In addition to eliminating unfair discrimination from the hiring process and adhering to data protection requirements, the employer should document the hiring process so that there is a paper trail in the event of any complaint or litigation. These documents, which should reflect the decision-making process in relation to each applicant, will be important in case an applicant challenges the hiring process and selection.

It is best practice to train all staff involved in the hiring process on the employer's equal opportunity or similar policy (if any) and the application of such policy to the hiring process.

2.3 Procedural steps and key documents in recruitment

The hiring process may involve a number of stages, depending on the vacancy and the employer's size, administrative resources and internal processes. These stages could involve shortlisting, scoring, interviews, assessment, and reference checks. The employer should ensure that its hiring process is fair, consistent and results in the best person being appointed for the job.

2.3.1 Identifying the vacancy

When identifying a vacancy, the employer should consider whether the job needs to be performed on a full-time or part-time basis and whether the appointment should be for an indefinite or fixed-term (see further at **5.2**).

The hiring process should also be informed by the employer's employment equity plan (if any) including the recommended affirmative action provisions. Where an employer utilizes the services of a recruitment agency, it should make the recruitment agency aware of its employment equity policy or plan (if any).

2.3.2 Preparing a job description and person specification for the position

Before advertising the vacancy, the employer should draw up a written job description and person specification. This helps focus the employer's mind on the skills and experience it needs for the vacancy. If this is done carefully and objectively and the successful applicant meets such requirements, this will assist the employer to show that it was not influenced by any discriminatory considerations when deciding who to hire.

The job description should describe the outputs of the job (what the job proposes to do). This description should provide an accurate and current picture of what functions make up a job, and should not include unrelated tasks. This should outline the job's location, purpose, responsibilities, authority levels, supervisory levels and interrelationships between the job and others in the same area.

The person specification should describe the knowledge, experience, qualifications, skills and attributes required to perform the job effectively. This specification should clearly state the essential or inherent requirements of the job. These are the minimum requirements that an employee needs in order to be able to function effectively in that job. These requirements should not be overstated so as to present arbitrary or discriminatory barriers to designated groups. In the interests of promoting the appointment of employees who may not meet all the essential or inherent job requirements, an employer may decide that an employee who has, for instance, six out of the 10 threshold or essential requirements, will be considered to be suitably qualified, subject to obtaining the outstanding requirements within a specified time. The specification should, however, be capable of flexible interpretation in the interest of promoting affirmative action.

2.3.3 Advertising the job

The employer should aim to reach as wide a pool of potential applicants as possible so as not to unfairly disadvantage or discriminate against particular applicants. There are also clear advantages to the employer to increase the number of applicants it has to choose from. Recruitment and selection is often the most important mechanism to increase the representivity of designated groups in the workplace.

Job advertisements should emphasize the suitability for the job, and accurately reflect the inherent or essential requirements of the job and competency specifications.

Job descriptions may either advance or undermine employment equity, depending on how they are written. Therefore, an employer must also be careful not to unfairly discriminate in the content of the job advertisement.

The employer may consider advertising all positions internally even if a job is being advertised externally. This will make current employees aware of the opportunities that exist within the workplace.

When advertising a position, the employer may state that preference will be given to members of designated groups. However, this does not suggest that the process of recruitment excludes members from non-designated groups.

2.3.4 Shortlisting and interviewing

The process of shortlisting job applicants should be standardized. Where no standards exist, an approach should be decided on before shortlisting commences.

The employer should consider involving more than one person in the process of shortlisting applicants to minimize individual bias. The shortlisting panel should be balanced in terms of representivity.

Where an employer has outsourced the shortlisting process, every effort must be made to ensure that the process is consistent with the recruitment and selection policies of the employer.

The employer should not rely on second-hand knowledge or assumptions about the type of work the applicant may be able to do.

The employer should ensure that it shortlists as many suitably qualified applicants from designated groups as possible. When shortlisting, an employer could include applicants from designated groups who meet most but not all the minimum requirements. These applicants with potential could be considered for development to meet all the job requirements within a specified timeframe.

The employer should use the same panel in the shortlisting and interviewing processes. Employers may develop a standard interview questionnaire to be asked of each applicant. The interview questionnaire should be based on the job description, particularly essential elements of the job and competency specifications. Employers should regularly audit their interview questionnaires to ensure that they do not contain questions that are potentially discriminatory. The interview questionnaire should be based on the job description, particularly essential elements of the job and competency specifications. Employers should regularly audit their interview questionnaires to ensure that they do not contain questions that are potentially discriminatory.

The employer should consistently and objectively assess all applicants interviewed using the job description, person specification and the measuring system. The same amount of time should be allocated for each candidate and the same or similar questions should be asked.

The measuring system should be standardized. The employer should allocate weightings to ensure that there is a balance between matching job requirements, numerical targets and the needs of the employer.

2.3.5 Making an offer of employment, subject to conditions where appropriate

Prior to making an offer of employment, an employer should ensure that the prospective employee does not have any binding restrictions that may prevent the employee from entering into the employment contract, such as post-employment restrictive covenants imposed by the employee's former employer.

Once the successful applicant has been identified, the employer is likely to write to him or her to make an offer of employment or, where it has initially spoken to the applicant, to confirm the offer. Matters to address when making an offer of employment include the terms and conditions of employment, which may be confirmed in an offer letter, employment contract and/or in an employee handbook or policy.

Employers often wish to make a job offer subject to conditions such as acceptable references, confirmation that the employee has the right to work in South Africa, confirmation that the employee is not prevented from accepting the role, satisfactory background checks if these are required professionally or due to the inherent requirements of the job, and confirmation that the applicant holds the qualifications that he or she claims to have.

It is highly recommended to conduct pre-hire checks before making the offer, or at least ensure that the conditions precedent are fulfilled before the applicant begins work. Whether or not someone is an employee is a factual question. Therefore, if the applicant works for the employer in return for remuneration, a withdrawal from the offer of employment may constitute a dismissal.

2.3.6 Involvement of trade unions or works council

The trade unions or workplace forums are not involved in the recruitment process by law. However, the employer should take cognizance of the employees' membership with any trade union or work council as this may affect the terms and conditions of employment (see further at **5**).

3 Carrying out pre-hire checks

3.1 Background and Reference checks

In certain circumstances, employers are permitted to conduct pre-hire background and reference checks on an applicant, including checking the applicant's credit and criminal record. Certain pre-hire background checks are necessary, as it is unlawful to employ someone who is not entitled to work in South Africa (there are specific procedures to determine whether an applicant is entitled to work in South Africa).

Reference checks should not be conducted in a manner that unfairly discriminates. The same type of reference checks must be conducted on all shortlisted applicants. An employer should only conduct integrity checks, such as verifying the qualifications of an applicant, contacting credit references and investigating whether the applicant has a criminal record, if this is relevant to the requirements of the job.

Other restrictions may apply to special categories of information. For example, the National Credit Act Regulations restrict accessing the credit reports of applicants for employment to those who are applying for a position that requires trust and integrity and the handling of cash or finances, provided prior consent of the applicant is obtained.

It is recommended, but not required in most instances, to obtain the applicant's consent prior to conducting pre-hire checks. Such consent can be given electronically. In practice, consent is usually incorporated in the application form. The employer must be careful not to reject an applicant based purely on refusal to provide such consent.

3.2 Medical checks

Medical testing is prohibited unless legislation permits or requires the testing, or it is justifiable in the light of medical facts, employment conditions, social policy, the fair distribution of employee benefits or the inherent requirements of a job. Testing for HIV/AIDS is prohibited unless a court order has been obtained which determines that it is justifiable. In addition, there are regulations on who may conduct certain types of tests, for example, those involving tissue or blood samples.

Psychological and similar assessments are also prohibited, unless the assessment being used has been scientifically shown to be valid and reliable, can be applied fairly to all applicants, is not biased against any applicant or group, and has been duly certified by the appropriate body. Assessments are required to be free from unfair discrimination based on the prohibited grounds.

An employer who uses medical, psychological and other similar assessments should develop a written policy for the workplace which identifies the purpose, context, methods and criteria applicable to selecting and conducting assessments.

The employer should ensure that assessments used are valid, reliable and fair, so that no group or individual is unfairly disadvantaged as a result of the assessment. Bias in the application of the

assessment should be eliminated. The test should match the job in question and should measure the minimum level of the competencies required to perform the job, which must be based on the inherent requirements or essential functions of the relevant job. Tests should avoid arbitrary or irrelevant questions. Only assessments that have been professionally validated as reliable predictors of performance for a particular job, irrespective of race, gender or disability, should be used.

All applicants for a particular job should be assessed against the same criteria. The process should make accommodation for diversity and special needs. The employer should ensure that reasonable accommodation is made for applicants where required, and that unfair discrimination does not occur in the arrangements for the administering of tests or in using assessment centers.

4 Immigration

All employees in South Africa must hold an appropriate work visa if they do not have citizenship or permanent residence. Detailed conditions governing the admission and residence of foreign nationals into South African territory are regulated by a system of port of entry visas and administered by the Department of Home Affairs, in accordance with the provisions of the Immigration Act, 13 of 2002 ("Immigration Act").

A visa can be applied for at the South African diplomatic representation in an applicant's country of origin, or at a South African diplomatic representation in a neighboring country if there is no South African diplomatic representation in the applicant's country of origin.

The Immigration Act and Regulations provide for different types of work visas depending on the circumstances surrounding the applicant's entry into South Africa. A work visa issued in terms of the Immigration Act is not transferable and is only valid for the purpose for which it was issued.

A person is not permitted to work in South Africa with a work visa pending. Therefore, employers should ensure that the application is submitted well in advance of the employee's commencement date.

Applicants may apply for the following visas in terms of the Immigration Act:

- a general work visa;
- a critical skills visa; or
- an intra-company transfer work visa.

In addition, a corporate applicant who is operating a business in South Africa and wishes to employ foreign nationals can apply for a corporate visa.

4.1 General work visa

General work visas are issued to applicants who wish to work in South Africa but do not have the particular skills and/or expertise listed on a closed list of critical skills published by the Department of Home Affairs ("Critical Skills List").

The following documentation must be submitted by an applicant in support of his or her application for a general work visa:

- a written undertaking by the employer accepting responsibility for the costs related to the deportation of the applicant and his/her dependent family members, should it become necessary;
- a police clearance certificate;

- a certificate from the Department of Labour confirming that:
    - despite a diligent search, the employer has been unable to find a suitable citizen or permanent resident with qualifications or skills and experience equivalent to those of the applicant;
    - the applicant has qualifications or proven skills and experience in line with the job offer;
    - the salary and benefits of the applicant are not inferior to the average salary and benefits of citizens or permanent residents occupying similar positions in the Republic of South Africa; and
    - the contract of employment stipulating the conditions of employment and signed by both the employer and the applicant is in line with the labor standards in the Republic of South Africa and is made conditional upon the general work visa being approved;
- proof of qualifications evaluated by South African Qualifications Authority ("SAQA") and translated by a sworn translator into one of the official languages of the Republic of South Africa;
- full particulars of the employer, including, where applicable, proof of registration of the business with the Commission on Intellectual Property and Companies ("CIPC");
- an undertaking by the employer to inform the Director-General should the applicant not comply with the provisions of the Immigration Act or the conditions of the visa;
- an undertaking by the employer to inform the Director-General upon the applicant no longer being in the employ of such employer or when he/she is employed in a different capacity or role;
- a duly completed application form signed by the applicant;
- a valid passport;
- payment of the prescribed fee;
- in respect of dependent children accompanying the applicant or joining the applicant in the Republic of South Africa, proof of parental responsibilities and rights or written consent in the form of an affidavit from the other parent or legal guardian, as the case may be;
- in respect of a spouse accompanying the applicant or joining the applicant in the Republic of South Africa, a copy of a marriage certificate or proof of a relationship;
- a vaccination certificate, if required by the Immigration Act; and
- medical and radiology reports.

One of the key issues in obtaining a general work visa is that the employer must be able to demonstrate that there are no South African citizens or permanent residents with qualifications or skills and experience equivalent to those of the foreign applicant. Practically, this means that the employer will have to advertise the position, consider and interview applicants and provide reasons why the position cannot be filled by a citizen or permanent resident in South Africa.

Once all requirements have been fulfilled, the processing time of the application is a minimum of 8 to 10 weeks. The Department of Home Affairs cannot guarantee the outcome or the length of time an application takes to process. This is because applications are assessed individually and individual circumstances can mean processing times may vary and result in longer decision times.

A general work visa may be granted for a period not exceeding five years.

4.2 Critical skills work visa

Foreign applicants who possess the skills and/or qualifications on the Critical Skills List may apply for a critical skills visa.

An applicant, in support of his or her application for a critical skills visa, must submit the following documentation:

- a written undertaking by the employer accepting responsibility for the costs related to the deportation of the applicant and his/her dependent family members, should it become necessary;
- proof that the applicant falls within the critical skills category:
    - a confirmation, in writing, from the professional body, council or board recognized by SAQA or any relevant government department confirming the skills or qualifications of the applicant and appropriate post qualification experience;
    - if required by law, proof of application for a certificate of registration with the professional body, council or board recognized by SAQA; and
    - proof of evaluation of the foreign qualification by SAQA and translated by a sworn translator into one of the official languages of the Republic of South Africa;
- a duly completed application form signed by the applicant;
- a valid passport;
- payment of the prescribed fee;
- in respect of dependent children accompanying the applicant or joining the applicant in the Republic of South Africa, proof of parental responsibilities and rights or written consent in the form of an affidavit from the other parent or legal guardian, as the case may be;
- in respect of a spouse accompanying the applicant or joining the applicant in the Republic of South Africa, a copy of a marriage certificate or proof of a relationship;
- a vaccination certificate, if required by the Immigration Act;
- medical and radiology reports; and
- a police clearance certificate.

The employer does not have to demonstrate that it was unable to find a suitable citizen or permanent resident for the relevant position. Therefore, if a foreign national qualifies for a critical skills visa, this option is more preferable than a general work visa.

The processing time of the application is a minimum of 8 to 10 weeks. The Department of Home Affairs cannot guarantee the outcome or the length of time an application takes to process. This is because applications are assessed individually and individual circumstances can mean processing times may vary and result in longer decision times.

A spouse or dependent children of a holder of a critical skills visa will be issued with an appropriate visa valid for a period not exceeding the period of validity of the relevant critical skills visa.

A critical skills visa may be granted for a period not exceeding five years.

4.3 Intra-company transfer work visa

An intra-company transfer visa may be granted to a foreign national who is an employee of a foreign company, allowing him/her to work for another group entity in South Africa.

An applicant, in support of his /her application for an intra-company transfer work visa, must submit the following documentation:

- a written undertaking by the employer accepting responsibility for the costs related to the deportation of the applicant and his/her dependent family members, should it become necessary;
- a police clearance certificate;
- the applicant's contract of employment with the company abroad valid for a period of at least six months;
- a letter from:
    - the company abroad confirming that the applicant shall be transferred to a branch, subsidiary or an affiliate of that company in South Africa; and
    - the branch, subsidiary or an affiliate in South Africa confirming the transfer of the applicant and specifying the occupation and capacity in which that applicant shall be employed;
- a duly completed application form signed by the applicant;
- a valid passport;
- payment of the prescribed fee;
- in respect of dependent children accompanying the applicant or joining the applicant in the Republic of South Africa, proof of parental responsibilities and rights or written consent in the form of an affidavit from the other parent or legal guardian, as the case may be;
- in respect of a spouse accompanying the applicant or joining the applicant in the Republic of South Africa, a copy of a marriage certificate or proof of a relationship;
- a vaccination certificate, if required by the Immigration Act;
- medical and radiology reports; and
- an undertaking by the employer:
    - that the applicant will leave South Africa once the four-year period comes to an end;
    - confirming that the applicant's passport is valid; and
    - that the applicant will be employed in the position for which the visa is issued.

The processing time for applications is approximately one month, depending on the backlog at the Department of Home Affairs.

For international groups, these are the most common types of visas used to secure temporary work authorization for foreign nationals.

An intra-company visa may be granted for a period not exceeding four years.

4.4 Corporate visa

A corporate visa is issued to a resident corporate applicant established under the laws of the Republic of South Africa (as opposed to a foreign individual) and allows a corporate entity to employ a pre-determined number of foreign skilled/semi-skilled/unskilled workers.

A corporate applicant, in support of its application for a corporate visa, must submit the following documentation:

- proof of the need to employ the requested number of foreign nationals;
- a certificate by the Department of Labour confirming:
    - that despite a diligent search, the corporate applicant was unable to find suitable citizens or permanent residents to occupy the position available in the corporate entity;
    - the job description and proposed remuneration in respect of each foreign national; and
    - that the salary and benefits of any foreign national employed by the corporate applicant shall not be inferior to the average salary and benefits of citizens or permanent residents occupying similar positions in South Africa;
- proof of registration of the corporation with the:
    - South African Revenue Service;
    - Unemployment Insurance Fund;
    - Compensation Fund for Occupational Injuries and Diseases; and
    - CIPC, where legally required;
- an undertaking by the employer to inform the Director-General should any foreign employee not comply with the provisions of the Immigration Act or visa conditions, or is no longer in the employ of such employer or is employed in a different capacity or role;
- a written undertaking by the corporate applicant to pay the deportation costs of any foreign employee accepting responsibility for the return costs related to the deportation of the foreign employee, should it be necessary; and
- proof that at least 60 percent of the total staff complement that are employed in the operations of the business are citizens or permanent residents of South Africa employed permanently in various positions.

The Director-General will determine, in consultation with the Department of Labour and the Department of Trade and Industry, the maximum number of foreign nationals to be employed in terms of the corporate visa.

The Director-General may issue the corporate applicant with:

- a corporate visa for a period not exceeding three years; and
- authorization certificates to employ corporate workers, in terms of the corporate visa, for a period not exceeding the validity period of the corporate visa.

The Director-General may issue a corporate worker certificate to the corporate worker employed by the holder of a corporate visa, for a period not exceeding the validity period of the corporate visa. This will allow the corporate worker to work within the Republic of South Africa.

An application for a corporate worker certificate shall be accompanied by:

- a valid passport of the corporate worker;
- biometrics of the corporate worker;
- the authorization certificate of the corporate entity;
- a valid employment contract with the corporate worker;
- a written undertaking by the corporate entity to ensure that the foreign national departs from the Republic of South Africa upon termination of his/her contract of employment or accepting responsibility for the return or costs related to the deportation of the foreign employee should it become necessary;
- a yellow fever vaccination certificate if the corporate worker travelled or intends to travel from or transit through a yellow fever endemic area, unless the corporate worker traveled or intends to travel in direct transit through such area (i.e., did not or will not go through immigration control);
- a medical and radiological report in respect of the corporate worker, unless such worker is a pregnant women;
- payment of the prescribed fee;
- proof of qualifications evaluated by SAQA, and translated by a sworn translator into one of the official languages of South Africa, or skills and experience in line with the job offer; and
- a certificate of registration with the professional body, council or board recognized by SAQA.

A corporate worker may not renew his/her corporate worker certificate or apply for a change of status in South Africa.

5 The employment contract

5.1 Form of the employment contract

There is no requirement to enter into an employment contract. However, written employment contracts are common. Written employment contracts often contain additional obligations and undertakings relating to confidentiality, data protection, intellectual property and non-compete provisions.

If no employment contract is in place, the employer must give employees at least the following written particulars of employment:

- the full name and address of the employer;
- the name and occupation of the employee, or a brief description of the work for which the employee is employed;
- the place of work, and, where the employee is required or permitted to work at various places, an indication of this;
- the date on which the employment began;

- the employee's ordinary hours and days of work;
- the employee's wage or the rate and method of calculating wages;
- the rate of pay for overtime work;
- any other cash payments that the employee is entitled to;
- any payment in kind that the employee is entitled to and the value of the payment in kind;
- how frequently remuneration will be paid;
- any deductions to be made from the employee's remuneration;
- the leave to which the employee is entitled;
- the period of notice required to terminate employment, or if employment is for a specified period, the date when employment is to terminate;
- a description of any council or sectoral determination which covers the employer's business;
- any period of employment with a previous employer that counts towards the employee's period of employment; and
- a list of any other documents that form part of the contract of employment, indicating a place that is reasonably accessible to the employee where a copy of each may be obtained.

Where any of the information changes, the written particulars must be revised to reflect the change and the employee must be given a copy of the document reflecting the change.

This information is to be retained for a period of three years to comply with local labor laws. Basic employee information and information relating to remuneration, benefits, etc. must be kept for five years to comply with local tax laws.

Collective agreements between employers and trade unions, collective agreements concluded at Bargaining Council level, sectoral determinations and Ministerial variations may amend certain levels of basic conditions of employment prescribed by the BCEA. Such collective instruments take precedence over provisions in contracts of employment between the employer and the employee.

5.2 Types of employment contract

Employees can be hired indefinitely or for a definite term (known as a fixed-term contract in South Africa) on a full-time or part-time basis. The table below provides further information on part-time and fixed-term working.

Types of employment contract	
Part-time	A part-time employee is an employee who is remunerated wholly or partly by reference to the time that the employee works and who works fewer hours than a comparable full-time employee does. A comparable full-time employee is an employee who: • is remunerated wholly or partly by reference to the time that the employee works; • is identifiable as a full-time employee in terms of the custom and practice of the employer; and

Types of employment contract	
	• does not include a full-time employee whose hours of work are temporarily reduced for operational requirements as a result of an agreement. For the purposes of identifying a comparable full-time employee, regard must be given to a full-time employee employed by the employer on the same type of employment relationship who performs the same or similar work in the same workplace as the part-time employee. If there is no comparable full-time employee who works in the same workplace, regard must be given to a comparable full-time employee employed by the employer in any other workplace. Part-time employees who earn below the annual earnings threshold (currently ZAR 205, 433.30 per annum) ("Threshold"), are afforded the following specific protections: • taking into account the working hours of a part-time employee, an employer must treat a part-time employee on the whole not less favourably than a comparable full-time employee doing the same or similar work, unless there is a justifiable reason for different treatment; and • provide a part-time employee with access to training and skills development which are on the whole not less favorable than the access applicable to a comparable full-time employee. These provisions in the LRA do not apply to: • employees earning in excess of the Threshold; • an employer that employs less than 10 employees or that employs less than 50 employees and whose business has been in operation for less than two years (unless the employer conducts more than one business or the business was formed by the division or dissolution, for any reason, of an existing business); • an employee who ordinarily works less than 24 hours a month for an employer; and • an employee's first three months of continuous employment with an employer.
Fixed-term Contract	An employer is entitled to engage the services of an employee on a fixed-term contract of employment. Where an employee is employed on a fixed-term contract and reasonably expects the employer to (i) renew the contract or (ii) retain the employee indefinitely on the same or similar terms, and the employer refuses to do so or offers less favorable terms, this will constitute a dismissal. An expectation of renewal/retention may arise from words (e.g., promises) or conduct (e.g., past renewals). Fixed-term contracts of employment must expressly provide for early termination for reasons based on the employer's operational requirements. In the absence of such provision, the employer will not be able to retrench the fixed-term employee before the expiry of the fixed-term, unless it pays the employee out for the

Types of employment contract	
	balance of the contract. Fixed-term employees who earn below the Threshold are afforded the following additional protections: • after three months of employment (on the same or successive fixed-term contracts), the employee will be deemed to be employed for an indefinite or permanent period, unless the nature of the work is of a limited or definite duration or the employer can demonstrate any other justifiable reason for fixing the term of the contract; • if there is a justifiable reason for fixing the term of the contract, this must be stated in the contract; • subject to any applicable collective agreement, severance pay equal to one week's remuneration for each completed continuous year of service is payable on the expiry of a fixed-term contract for a period exceeding 24 months; • an employee employed in terms of a fixed-term contract for longer than three months must not be treated less favorably than an employee employed on a permanent basis performing the same or similar work, unless there is a justifiable reason for different treatment; and • an employer must provide an employee employed in terms of a fixed-term contract and an employee employed on a permanent basis with equal access to opportunities to apply for vacancies. These protections do not apply in the case of employers who employ less than 10 employees or employers who employ less than 50 employees and whose business has been in operation for less than two years, unless the employer conducts more than one business or the business was formed by the division or dissolution for any reason of an existing business. Further, these protections do not apply to an employee employed in terms of a fixed-term contract which is permitted by any statute, sectoral determination or collective agreement. The conclusion of a fixed-term contract will be justified if the employee is: • replacing another employee who is temporarily absent from work; • employed on account of a temporary increase in the volume of work which is not expected to endure beyond 12 months; • a student or recent graduate who is employed for the purpose of being trained or gaining work experience in order to enter a job or profession; • employed to work exclusively on a specific project that has a limited or defined duration; • a non-citizen who has been granted a work permit for a defined period; • employed to perform seasonal work; • employed for the purpose of an official public works scheme or similar public job creation scheme;

Types of employment contract	
	• employed in a position which is funded by an external source for a limited period; or • at the normal or agreed retirement age applicable in the employer's business.
Independent Contractors	The law differentiates between a proper contract of employment (employment relationship) and a contract for the provision of work (independent contractor relationship). Independent contractors are not afforded the protections and benefits contained in employment statutes such as the LRA and BCEA. The courts adopt a substance over form approach and will look beyond the legal structuring to determine the true nature of the relationship. Therefore, irrespective of what the parties choose to call the agreement, if the true nature of the relationship is one of employment, it will be treated as such. For independent contractors earning below the Threshold, the independent contractor will be presumed to be an employee if one or more prescribed factors exist. These factors are as follows: • the manner in which the person works is subject to the control or direction of another person; • a person's hours of work are subject to the control or direction of another person; • in the case of a person who works for an organization, the person forms part of that organization; • the person has worked for that other person for an average of at least 40 hours per month over the preceding three months; • the person is economically dependent on the other person for whom he/she works/renders services; • the person is provided with tools of trade and/or work equipment by the other person; and • the person only works for or renders services to one person. The presumption referred to above is rebuttable. Therefore, the employer will have an opportunity to prove why the individual is truly an independent contractor. For independent contractors earning above the Threshold, these factors as well as other employment indicators, such as the provision of training, are still relevant to assess the true nature of the relationship.

5.3 Language requirements

The Constitution recognizes 11 official languages. Whilst there is no legal requirement to provide the employment contract in an employee's home language, where an employee is not able to understand the written particulars, the employer must ensure the details are explained to the employee in a language and manner the employee understands.

6 Working terms and conditions

6.1 Trial periods

A probationary period is possible and customary, but it must be expressly agreed and determined in advance. The length of the probationary period should be reasonable. A probationary period is generally determined based on the nature of the job and an estimate of the time necessary to determine the employee's suitability for the job/position.

Generally, probationary periods are for a period of three to six months. However, there is no "maximum" probationary period. The overriding principle is fairness, and the length of the probationary period must be evaluated in each individual case. The employer may only extend the period of probation for reasons related to the purpose of probation. The period of extension should not be disproportionate to the legitimate purpose that the employer seeks to achieve and such period of extension should generally not exceed the initial probationary period.

If the employer determines that the employee is incompetent or his/her performance is below standard, the employer should advise the employee of any aspects in which the employer considers the employee to be incompetent or where he or she is failing to meet the required performance standards.

An employee's employment may not be terminated during nor at the conclusion of the probationary period unless the employee is given the opportunity to address the employer's complaints regarding his/her unacceptable performance.

Should an employee's performance remain unsatisfactory, an employer may terminate the employee's employment. However, the reason for the dismissal and the procedure followed must be fair.

6.2 Working time

All employees are subject to the following working hours/overtime laws, except for:

- senior management;
- employees in sales positions who travel to the worksites of customers and regulate their own hours of work;
- employees who work fewer than 24 hours per month; and
- employees who earn more than the Threshold, unless otherwise stated below.

Ordinary working hours: The maximum ordinary working hours for regular employees are 45 hours per week and nine hours per day (for a working period of five days or less per week), or eight hours per day (for a working period of more than five days per week). Hours may be regulated differently if a collective agreement, sectoral determination (which specifies terms and conditions of employment for certain categories of workers) or bargaining council agreement applies.

Overtime: An employer may not require or permit an employee to work overtime except in accordance with an agreement. Furthermore, an employer may not require or permit an employee to work more than three hours' overtime a day or 10 hours' overtime a week. A collective agreement may increase the maximum permitted overtime to 15 hours per week, provided that the additional overtime hours do not last more than two months in any 12-month period.

Compressed working week: Employers and employees may agree that, either individually or under a collective bargaining agreement, employees will work a compressed working week, i.e., up to 12 ordinary hours per day, including meal breaks, without receiving overtime pay. Such agreements may

not require or permit an employee to work more than 45 ordinary hours; more than 10 hours overtime; or more than five days, in any week.

Averaging of hours of work: If there is a recognized trade union, the law permits the averaging of ordinary working hours (and up to five hours of overtime) in the terms of a collective agreement. The hours of work may be averaged over a period of up to four months.

Sunday work: Employees must be paid at least two times their regular wages for work performed on a Sunday if they do not ordinarily work on a Sunday. Employees who do ordinarily work on a Sunday must be paid 1½ times their regular wage for each hour worked. If an employee works less than their ordinary shift on a Sunday and the payment that he or she is entitled to is less than his/her ordinary daily wage, the employer must pay the employee their ordinary daily wage. The employer and employee may agree to the employee being granted paid time off equivalent to the difference in value between the pay normally received by the employee and the pay to which the employee would be entitled under these provisions. In this scenario, the time off must be given within one month of when the employee earned such time off, unless the employer and employee agree to extend the time period up to 12 months.

Public holiday work: Unless otherwise stated, the provisions relating to public holiday work apply to both employees earning above and below the Threshold. An employer may only require an employee to work on a public holiday by written agreement. If a public holiday falls on a day on which the employee would ordinarily work and the employee does not work on the public holiday, the employer must pay the employee his/her ordinary daily wage.

If a public holiday falls on a day on which the employee would ordinarily work and the employee does work on the public holiday, the employer must pay the employee at least two times what the employee would ordinarily have received for work on that day or, if it is more, the amount the employee would ordinarily have received for work on that day plus any amounts earned for the time worked on that day.

The following provision does not apply to employees earning above the Threshold: if a public holiday falls on a day on which the employee would not ordinarily work and the employee does work on the public holiday, the employer must pay the employee their ordinary daily wage and any amounts earned for the time worked on that day.

Meal breaks: Employers must give regular employees who work for more than five consecutive hours a meal break of at least one continuous hour (although the employer and employee may agree to reduce the meal break to 30 minutes, or dispense with the meal interval for an employee who works fewer than six hours a day). During the meal break, the employee may only be required or permitted to perform those duties that cannot be left unattended and cannot be performed by another employee. In such instances, an employee must be paid for the meal break; otherwise the meal break is unpaid.

Employers must provide regular employees with a daily rest period of at least 12 consecutive hours between ending and recommencing work, and a weekly rest period of at least 36 consecutive hours between works which, unless otherwise agreed, must include Sunday. By written agreement, the daily rest period may be reduced to 10 hours for regular employees who live on the workplace premises and have meal breaks that last at least three hours. The weekly rest period may also be amended by written agreement to provide for a rest period of at least 60 consecutive hours every two weeks, or by reducing the weekly rest period by up to eight hours in any week provided that the rest period in the following week is extended by an equivalent period.

Night work: Night work is work performed between 6 p.m. and 6 a.m. The employer may only require or permit a regular employee to perform night work if the employee agrees, and if the employer pays the employee an additional (non-prescribed) allowance and makes transportation available between the employee's home and the workplace at the beginning and end of the employee's shift.

The following provisions apply to employees earning above and below the Threshold: Employees who perform night work on a regular basis (i.e., more than one hour between 11 p.m. and 6 a.m. at least five times per month or 50 times per year) must be informed in writing, either before starting such work or within a reasonable time after starting such work, of any health and safety hazards associated with the work and of the employee's right to undergo a medical examination in connection with performing such work. The employee must be allowed (at his/her request) to undergo such an examination at the time of commencing work and/or at appropriate intervals during the period the employee is performing regular night work.

Employers in South Africa are required to track all employees' working hours. Failure to do so may result in penalties against the employer. It is common practice for employers to track the employees' hours through timesheets completed by the employees, a time clock or a daily attendance register. For companies that enter into contracts with clients to provide work that is expected to take a certain amount of time for a set fee, it is common practice to keep track of the employees' time through the use of time sheets. The registers of attendance are used by the authorities to monitor compliance with the working hours legislation, and to penalize employers who are in breach of this legislation.

Employees who are employed outside South Africa but are working on a limited basis for a customer or client in South Africa might be covered under South Africa's working time provisions (as well as other applicable local employment laws), depending on the period of time they are in South Africa, and other related considerations.

6.3 Wage and salary

There is no general statutory minimum wage. However, there are a number of sectoral determinations which set minimum wages and conditions of work in particular sectors. The Minister of Labour will publish a sectoral determination following an investigation (including public hearings) into the working conditions of a particular sector. If employees are represented by a recognized trade union with collective bargaining rights, wages may be negotiated at the plant or company level. If there is no such trade union or applicable sectoral agreement, wages will be determined by the employer or by the employee(s) and employer jointly.

Employers must comply with the following requirements when paying employees:

- remuneration must be paid in South African currency;
- wages must be paid daily, weekly, bi-weekly or monthly;
- the method of payment must be cash, check or direct deposit into an account designated by the employee. Where remuneration is paid in cash or by check, it must be given directly to each employee in a sealed envelope at the workplace or a place agreed to by the employee during the employee's working hours or within 15 minutes of the commencement or conclusion of those hours; and
- remuneration must be paid no later than seven days after completion of the applicable pay period or the employee's termination date.

Additionally, the employer must provide the employee with the following information in writing on the day that the employee is paid (most commonly, on the pay stub):

- the employer's name and address;
- the employee's name and occupation;
- the period for which the payment is made;

- the employee's rate of regular remuneration, overtime rate, amount earned and the amount and purpose of any deductions made from the remuneration;
- the actual (net) amount paid to the employee; and
- the number of ordinary hours, overtime hours, and hours worked by the employee on a Sunday or public holiday during the period for which the payment is made.

There is no requirement for salary increases (inflationary or otherwise), unless provided for in an employment agreement or a collective bargaining agreement, but a number of employers provide an annual increase in line with the inflation rate.

6.4 Making deductions

No deduction may be made from the employee's remuneration unless:

- the employee agreed in writing to such deduction and the amount of the debt is specified in the agreement; or
- the deduction is otherwise required or permitted by law (e.g., employee income tax).

6.5 Overtime

An employee must be paid at least 1½ times the employee's regular wage for all overtime work performed or, upon agreement between the employer and employee, the employee:

- may agree to be paid their regular wage for overtime worked and granted at least 30 minutes' paid time off for every hour of overtime worked; or
- may be granted at least 90 minutes' paid time off for each hour of overtime worked.

In this scenario, the time off must be given within one month of when the employee earned such time off, unless the employer and employee agree to extend the time period up to 12 months.

6.6 Bonus and commission

There are no statutorily required bonuses or cash benefits. Any bonuses paid will be at the employer's discretion or in accordance with an agreement with the employee, a trade union or in terms of a sectoral determination or agreement.

6.7 Benefits in kind

There are no statutorily required benefits in kind. This, however, may present itself in respect of the provision of accommodation at no charge to the employees.

6.8 Equity incentive plans

Employee share schemes are popular in South Africa. In any option scheme, the company grants employees an option to subscribe for shares in the company. Typically, the option may be exercisable by employees after a specific period of service to the company, such as 3, 5 or 10 years, or the granting of the option may be linked to the performance of the employees.

The specifics of the equity incentive plans are delineated in the scheme rules, including where an option shall lapse if, for example, an option holder ceases to be in employment of the employment company for reasons such as resignation, dismissal as a result of misconduct, or poor or substandard performance.

6.9 Pensions

It is not a statutory requirement for an employee to participate in a pension plan. This may, however, be imposed and regulated by an employment contract or a collective bargaining agreement.

6.10 Annual leave

An annual leave cycle means the period of 12 months' employment with the same employer immediately following an employee's commencement of employment or the completion of that employee's prior leave cycle.

An employer must grant an employee at least:

- twenty-one consecutive days' paid leave for every period of annual leave (i.e., 15 working days leave if on a five-day work week);
- by agreement, one day's paid leave for every 17 days worked or for which the employee was entitled to be paid; or
- by agreement, one hour's paid leave for every 17 hours worked or for which the employee was entitled to be paid.

6.11 Sick leave and pay

An employee's sick leave entitlement is calculated based on the employee's "sick leave cycle." An employee's "sick leave cycle" is a 36-month period of employment with the same employer, which starts to run on the employee's first day of employment or the first day following completion of that employee's prior sick leave cycle.

During every sick leave cycle, an employee is entitled to an amount of paid sick leave equal to the number of days the employee would normally work during any six-week period, e.g., if an employee works five days per week, the employee would be entitled to 30 days' paid sick leave. During the first six months of employment, an employee is entitled to one day paid sick leave for every 26 days worked. After the first six months, the employee is entitled to full sick leave (i.e., an amount of paid sick leave equal to the number of days the employee would normally work during any six-week cycle).

During an employee's sick leave, the employer must pay the employee's regular wages under the employer's regular pay practices. The employer and employee may agree to reduce an employee's sick leave pay provided that: (i) the number of sick days the employee is entitled to take is increased commensurately with any reduction in the employee's sick leave pay; and (ii) the employee's reduced sick leave pay is at least 75 percent of the employee's regular wages.

6.12 Taxes and social security

Employees must pay Pay-As-You-Earn (i.e., employee income tax), which is deducted by the employer from the employee's earnings before remitting the balance to the employee. The employer is responsible for the deduction and payment of PAYE to the South African Revenue Services.

In addition, an employer that expects the total salaries to exceed ZAR 500,000 over the following 12 months is liable to pay a skills development levy equal to 1 percent of the total amount paid in salaries to employees (including overtime, leave pay, bonuses, commissions and lump sum payments).

Subject to certain limited exclusions, both employers and employees are each required to contribute 1 percent of the remuneration paid to the employee to the unemployment insurance fund (i.e., a total contribution of 2 percent) up to a statutory maximum of ZAR 148.72 each, per employee per month.

7 Family rights

7.1 Time off for antenatal care

There is no statutory obligation for employers to provide their employees with time off for antenatal care.

7.2 Maternity leave and pay

Female employees are entitled to at least four consecutive months' unpaid maternity leave. An employee may take her maternity leave at any time starting four weeks before the expected date of birth (unless otherwise agreed by the employer and employee) or earlier if a medical practitioner or a midwife certifies that is necessary for the employee's health or that of her unborn child. Employees are not permitted to work for six weeks after childbirth unless a medical practitioner or midwife certifies that the employee is fit to return to work. An employee who has a miscarriage during the third trimester of pregnancy or bears a stillborn child is entitled to maternity leave for six weeks after the miscarriage or stillbirth, whether or not the employee had already commenced maternity leave.

In the event that an employer elects not to pay the employee for the duration of the maternity leave, that employee may apply to the Unemployment Insurance Fund ("UIF") and the UIF will pay the employee her salary, or a portion thereof, each month for the duration of maternity leave, subject to the employee having made contributions in terms of the Unemployment Insurance Contributions Act, No. 4 of 2002.

7.3 Paternity leave and pay

An employee who has been working for an employer for longer than four months and who works for at least four days a week is entitled to three days' paid family responsibility leave during each annual leave cycle. Family responsibility leave can be used for the birth of a child, taking care of a sick child, or for the death of the employee's spouse, life partner, parent, adopted parent, grandparent, child, adopted child, grandchild or sibling. Family responsibility leave does not accrue if unused.

7.4 Parental leave and pay

Please refer to **7.3**.

7.5 Adoption leave and pay

Please refer to **7.3**.

7.6 Other family rights

Please refer to **7.3**.

8 Other types of leave

8.1 Time off for dependants

Please refer to **7.3**.

8.2 Time off for training

This will be dependent on the contractual terms negotiated between the employer and the employee and it is not a legal requirement for an employer to grant study leave to an employee.

8.3 Works council

An employee who is an office-bearer of a representative trade union, or of a federation of trade unions to which the representative trade union is affiliated, is entitled to take reasonable leave during working hours for performing the functions of that office.

The representative trade union and the employer may agree to the number of days of leave, the number of days of paid leave and the conditions attached to any leave.

8.4 Public duty leave

Individuals are not required to perform public duties, such as jury duty. As such, there is no provision for public duty leave.

9 Termination provisions and restrictions

9.1 Notice periods

Please refer to **15.5**.

9.2 Payment in lieu of notice

Payment in lieu of notice is permitted at the employer's discretion. If both parties agree, notice may be waived.

9.3 Garden leave

Employers are permitted to place employees on gardening leave during their contractual notice period. During this period, employees should receive their remuneration and full benefits. There is potential for an employee to challenge the fairness of the gardening leave as an unfair labor practice relating to suspension. However, this generally only occurs where the employee challenges the fairness of the dismissal.

9.4 Intellectual property

In terms of South African common law, ownership in intellectual property created by an employee within the course and scope of his/her employment automatically vests in the employer.

This provision has been codified in the Copyright Act 98 of 1978, the Patents Act 57 of 1978 ("Patents Act") and the Designs Act 195 of 1993 ("Designs Act").

Both the Patents Act and the Designs Act provide that any condition in a contract of employment that:

- requires an employee to assign to his/her employer a design or an invention made by him/her otherwise than within the course and scope of his/her employment; or
- restricts the right of an employee in a design or an invention made by him/her more than one year after the termination of the contract of employment,

shall be null and void.

9.5 Confidential information

In terms of South African common law, an employee is bound by confidentiality restrictions regarding his/her employer's confidential information, in perpetuity.

The protection of an employer's confidential information is commonly regulated in the employment contract or a restraint of trade agreement. However, this is not strictly speaking necessary.

9.6 Post-termination restrictions

Post-termination, non-solicitation and non-compete restraints are permitted, but are only enforceable to the extent that they are reasonable and go no further than is necessary to protect the employer's proprietary and confidential information, including customer lists or identities and customer connections. The employer's protectable proprietary interests are generally balanced and weighed against the individual's constitutional right to choose a trade, occupation or profession, as well as public policy considerations. Each component of a non-compete (i.e., the nature of the work prohibited, the geographic scope and the period of the restraint) must be reasonable. Generally, such restraints are not longer than one-two years but the reasonableness will always be a factual inquiry.

No additional payment is required for valid post-termination non-compete or non-solicitation restraints, but paying consideration in exchange for the restraint may support the contention that the restraint is reasonable.

9.7 Retirement

There is no statutory retirement age and this is generally governed by an employment contract.

10 Managing employees

10.1 The role of personnel policies

There are no legal requirements for employers to have written policies. Policies are, however, commonplace and it is good practice to put in place policies that set standards expected of employees, help the business run efficiently and reduce legal risks by making sure employees and managers understand their respective legal rights and responsibilities in the employment context.

10.2 The essentials of an employee handbook

The table below shows the policies and procedures that are highly recommended and commonly in place, those that are best practice, and those that are less common.

Recommended Policies	Best Practice	Less Common
Disciplinary/grievance procedures	Employee benefits	Termination
Harassment, especially sexual harassment	Leave	Dress code
Health and safety	Working hours and overtime	
IT	Maternity	
Code of conduct	Performance review	
Employment equity	Data protection	

10.3 Codes of business conduct and ethics

Work rules, handbooks or policies are not required by law, although they will assist the employer in handling discipline, poor work performance and the daily management of employees. If an employer has work rules, handbooks or policies, these should not form part of the employees' contracts of employment. Work rules, handbooks and policies should be issued separately to enable the employer

to effect amendments without requiring specific consent from the employees. Employers are entitled to amend their policies and work practices as long as this does not constitute a unilateral variation of the employment terms and conditions, or an unfair labor practice.

11 Data privacy and employee monitoring

Please refer to our Global Privacy Handbook, which is accessible HERE, for information on data privacy and monitoring requirements in South Africa.

12 Workplace safety

12.1 Overview

Employers have extensive statutory obligations to provide a safe working environment, and a breach of these obligations could result in substantial fines or criminal penalties, including imprisonment.

The two main pieces of legislation governing occupational health and safety are the:

- Occupational Health and Safety Act, No. 85 of 1993 ("OHSA"); and
- Mine Health and Safety Act, No. 29 of 1996 ("MHSA").

12.2 Main obligations

Employers are required to inform health and safety representatives of incidents, inspections, investigations and inquiries.

An employer who employs 20 or more workers must appoint health and safety representatives (who must be full-time employees familiar with the workplace). Shops and offices must have at least one representative for every 100 workers or portion thereof. All other workplaces must have at least one representative for every 50 workers or part thereof.

These representatives are tasked with monitoring, investigating and reporting on health and safety matters. The employer is required to form a health and safety committee when an employer has appointed two or more health and safety representatives or when instructed to do so by inspectors.

In addition to the above obligations, the OHSA provides that an employer must provide and maintain a working environment that is safe and without risk to the health of its employees. In particular, an employer must, as far as is reasonably practicable:

- provide and maintain systems of work, plant and machinery that are safe and without risks to health;
- take steps to eliminate or mitigate any hazard or potential hazard to the safety or health of employees, before resorting to personal protective equipment;
- make arrangements for ensuring the safety and absence of risks to health in connection with the production, processing, use, handling, storage or transport of articles or substances;
- establish what hazards to the health or safety of persons are attached to any work and establish what precautionary measures should be taken with respect to such work;
- provide such information, instructions, training and supervision as may be necessary to ensure the health and safety at work of its employees;
- not permit any employee to do any work or to produce, process, use, handle, store or transport any article or substance or to operate any plant or machinery, unless the prescribed precautionary measures have been taken;

- take all necessary measures to ensure that the OHSA is complied with;
- enforce such measures as may be necessary in the interest of health and safety; and
- ensure that work is performed and that plant or machinery is used under the general supervision of a person trained to understand the hazards associated with it and who have the authority to ensure that precautionary measures taken by the employer are implemented.

In terms of the MHSA, the employer of every mine that is being worked must, as far is as reasonably practicable:

- ensure that the mine is designed, constructed and equipped:
  - to provide conditions for safe operation and a healthy working environment; and
  - with a communication system and with electrical, mechanical and other equipment necessary to achieve those conditions;
- ensure that the mine is commissioned, operated, maintained and decommissioned in such a way that employees can perform their work without endangering the health and safety of themselves or others;
- compile an annual report on health and safety at the mine, including the statistics on health and safety that must be kept in terms of the MHSA and the annual medical report; and
- if the employer is a body corporate, and employs more than 50 employees, publish a report to the body corporate's shareholders or members.

The employer of a mine that is not being worked, but in respect of which a closure certificate has not been issued, must take reasonable steps to continuously prevent injuries, ill health, loss of life or damage of any kind from occurring at or because of the mine.

12.3 Claims, compensation and remedies

The Compensation for Occupational Injuries and Diseases Act 130 of 1993 ("COIDA") provides compensation to employees for disablement or diseases sustained or contracted in the course of an employee's employment, or for death resulting from such injuries or diseases.

An accident shall be deemed to have arisen out of and in the course of the employment of an employee notwithstanding that the employee was, at the time of the accident, acting:

- contrary to any law applicable to his/her employment;
- contrary to any order by or on behalf of his/her employer; or
- without any order of his/her employer, if the employee was, in the opinion of the Director-General of the Department of Labour, acting for the purposes of, in the interests of or in connection with the business of his/her employer.

The compensation is provided to employees through a state fund for (limited liability) occupational injuries and diseases sustained/contracted by an employee in the course of his/her employment. An employer must register with the Compensation Commissioner, and will be assessed on a tariff that is then paid as an assessment fee.

COIDA does not apply to:

- employees who are totally or partially disabled for less than three days;
- domestic workers;

- anyone receiving military training;
- members of:
    - the South African National Defence Force, or
    - the South African Police Service;
- any employee guilty of willful misconduct, unless they are seriously disabled or killed;
- anyone employed outside South Africa for 12 or more continuous months; and
- workers working mainly outside South Africa and only temporarily employed in South Africa.

Where an employee is precluded from claiming compensation in terms of COIDA, the employee is still vested with his/her common law right to institute proceedings to claim for delictual damages.

13 Employee Representation, Trade Unions and Works Councils

Freedom of association is a Constitutional right that gives every employee the right to join a trade union. Section 4 of the LRA determines that every employee has the right to participate in forming a trade union and to join a trade union, subject to its constitution.

Trade unions do not have to register with the Department of Labour, but they are encouraged to do so. Registration affects the rights of unions.

If unions wish to be registered, their constitutions have to meet certain requirements, including:

- provision in the constitution for a ballot of members before a strike or lock-out is called; and
- no provision in the constitution that discriminates on the grounds of race or sex.

A trade union wishing to register must also be free from the influence or control of an employer or an employer's organization.

There is no 'duty to bargain' or to 'recognize' a trade union in South Africa.

Employers can recognize trade unions and afford them certain organizational rights, which are provided for in the LRA. Recognition and the associated organizational rights are generally regulated in a recognition agreement entered into between the employer and the trade union.

Registered trade unions that are 'sufficiently representative' of employees in a workplace may be granted the following organizational rights:

- access to the workplace;
- deduction of trade union subscriptions; and
- leave for trade union activities.

Employers who refuse to grant these rights can be compelled to do so by the CCMA. Put differently, trade unions have the option to strike or refer such disputes to arbitration. Such 'recognition' of the trade union does not imply any right to bargain on behalf of the trade union members.

When a registered trade union represents the majority of employees in the workplace, it may be granted additional organizational rights, such as:

- election of trade union representatives, known as shop stewards; and

- disclosure of information.

Employers may enter into collective agreements with registered trade unions representing the majority of employees in a workplace. The LRA allows these agreements to be extended to cover all the employees in that workplace, including non-member employees, subject to certain conditions.

The LRA countenances 'agency' and 'closed-shop' collective agreements. In such circumstances, non-members of the registered trade union may be forced to contribute to the funds of the trade union against their will.

If an employer employs more than 100 employees, a workplace forum may be established, although they are uncommon. Workplace forums permit non-trade union representation in the consultation and joint consensus seeking processes.

14 Discrimination

14.1 Who is protected?

An employer is not permitted to unfairly discriminate against any employee or job applicant on an arbitrary ground or any of the following listed grounds: race, gender, sex, pregnancy, marital status, family responsibility, ethnic or social origin, color, sexual orientation, age, disability, religion and HIV status, conscience, belief, political opinion, culture, language and birth.

Discrimination based on an inherent requirement of the job or affirmative action is not unfair.

14.2 Types of unfair discrimination

Unfair discrimination includes:

- direct discrimination, which means treating someone less favorably than others in similar circumstances on an arbitrary or listed ground;
- indirect discrimination, which means applying a provision, criterion or practice which puts a group of persons of a particular sex, disability, age, etc. at a disadvantage and which is not capable of objective justification; and
- harassment, which means subjecting an individual to unwanted or unsolicited attention based on an arbitrary or listed ground, or a combination thereof.

14.3 Special cases

14.3.1 Disability discrimination

Unfair discrimination in the workplace based on a person's disability is prohibited. Disability is defined in the EEA to mean a long-term or recurring physical or mental impairment which substantially limits a person's prospects of entry into, or advancement in, employment.

The Code of Good Practice on the Employment of People with Disabilities ("Disability Code") is a guide for employers and employees on how to provide equal opportunities and fair treatment to people with disabilities. The Disability Code applies to both physical and mental disabilities, and requires employers to reasonably accommodate the needs of people with disabilities with the aim of reducing the impact of the impairment of the person's capacity to fulfil the essential functions of a job. The duty arises equally where the disability is voluntarily disclosed by the employee and where it is reasonably self-evident to the employer.

The Disability Code applies to applicants for employment as well as existing employees. However, the employer is not required to accommodate an applicant or an employee with a disability if this would impose an unjustifiable hardship on its business.

A dismissal based on an employee's disability is automatically unfair.

14.3.2 Equal pay

A difference in the terms and conditions of employment between employees of the same employer performing the same or substantially the same work, or work of equal value, that is directly or indirectly based on an arbitrary or listed ground is unfair discrimination.

The principle of equal pay applies to work that is the same, substantially the same or of equal value (referred to as work of equal value), when compared to an appropriate comparator of the same employer.

However, an employer can differentiate between employees, provided that the difference in the terms and conditions of employment is fair and rational. Therefore, differentiation may be permissible if it is based on one or more of the following factors:

- seniority and length of service;
- qualifications, ability, competence or potential;
- performance, quantity and/or quality of work (provided that employees are subject to the same performance evaluation system which is consistently applied);
- demotion due to operational requirements;
- temporary employment for purposes of gaining experience and/or training (internships, learnerships);
- shortage of relevant skills or the market value in a particular job classification; and
- any other relevant factor that is not discriminatory.

If an employer relies on one or more of the above factors to justify a differentiation in the terms and conditions of employment, the employer must ensure that the differentiation is not biased against any employee or group of employees. The employer must also ensure that the differentiation is applied in a proportionate manner.

14.4 Exclusions

14.4.1 Occupational requirements

Provided it is relevant to the inherent job requirements of a position or as part of the employer's affirmative action measures, an employer may require a job applicant to have a particular characteristic.

14.4.2 Affirmative action

The EEA places an obligation on every designated employer to implement affirmative action measures. Designated employers in the private sector include employers who employ 50 or more employees, and employers who employ less than 50 employees but whose annual turnover exceeds an industry specific amount. The industry specific amounts vary from ZAR 6,000,000 in respect of the Agriculture industry to ZAR 15,000,000 in respect of the Community, Special and Personal Services industry.

The beneficiaries of affirmative action are individuals from designated groups who are suitably qualified. A “designated group” is defined to include black people, women and people with disabilities. The term “black people” is a statutory term that refers to African, Coloured and Indian people, each of which is a recognized term in South Africa, used to identify specific groups of people.

Designated employers must implement measures to ensure that designated groups have equal opportunities in the workplace and are equally represented in all occupational levels.

Employers must implement measures to:

- identify and eliminate employment barriers, including unfair discrimination, which adversely affect people from designated groups;
- further diversity in the workplace based on equal dignity and respect of all people;
- provide reasonable accommodation for people from designated groups in order to ensure that they enjoy equal opportunities and are equitably represented in the workforce of a designated employer;
- ensure the equitable representation of suitably qualified people from designated groups in all occupational levels in the workforce;
- retain and develop people from designated groups and implement appropriate training measures, including measures in terms of any legislation providing for skills development; and
- ensure equal representation of designated groups in all job categories and levels in the workplace.

To identify employment barriers, a designated employer must first collect information and conduct an analysis of its employment policies, practices, procedures and the working environment.

A designated employer must prepare and implement an employment equity plan aimed at achieving reasonable progress towards employment equity in that employer’s workforce. The employment equity plan must state:

- the objectives to be achieved for each year of the plan;
- the affirmative action measures to be implemented;
- where underrepresentation of people from designated groups has been identified by the analysis:
    - the numerical goals to achieve the equitable representation of suitably qualified people from designated groups within each occupational level in the workforce;
    - the timetable within which this is to be achieved; and
    - the strategies intended to achieve those goals;
- the timetable for each year of the plan for the achievement of goals and objectives other than numerical goals;
- the duration of the plan, which may not be shorter than one year or longer than five years;
- the procedures that will be used to monitor and evaluate the implementation of the plan and whether reasonable progress is being made towards implementing employment equity;

- the internal procedures to resolve any dispute about the interpretation or implementation of the plan;
- the persons in the workforce, including senior managers, responsible for monitoring and implementing the plan; and
- any other prescribed matter.

A designated employer must submit a report to the Director-General on progress made in implementing its employment equity plan once every year, on the first working day of October. If an employer becomes a designated employer on or after the first working day of April but before the first working day of October, that designated employer must only submit its first report on the first working day of October in the following year.

A designated employer must take reasonable steps to consult and attempt to reach agreement on the:

- conduct of the analysis;
- preparation and implementation of the employment equity plan; and
- report.

A designated employer must consult with the representative trade union representing employees in the workplace and its employees or representatives nominated by them. If no representative trade union represents employees in the workplace, the designated employer must consult with its employees or representatives nominated by them.

The employees or their nominated representatives with whom an employer consults must reflect the interests of:

- employees from across all occupational levels of the employer's workforce;
- employees from designated groups; and
- employees who are not from designated groups.

14.4.3 Exceptions relating to age

A dismissal on the basis of an employee's age is automatically unfair, unless the reason for termination is that the employee has reached the normal or agreed retirement age for persons employed in that capacity.

14.5 Employee claims, compensation and remedies

An employee who feels that he/she has been unfairly discriminated against, or that an employer has contravened employment equity laws, can lodge a grievance with his/her employer.

Any party to a dispute concerning unfair discrimination may refer the dispute, in writing, within six months after the act or omission allegedly constituting unfair discrimination. The dispute must first be referred to the CCMA for conciliation. If the dispute remains unresolved after conciliation, any party to the dispute may refer it to the Labour Court for adjudication; or all the parties to the dispute may consent to arbitration of the dispute by the CCMA.

In cases of unfair discrimination, the courts are empowered to award both damages and compensation. The award of damages is based on the actual financial loss suffered and is aimed at restoring the employee to the position he or she would have been in had the unfair discrimination not occurred. Compensation is awarded for non-patrimonial loss such as injury to human dignity. The courts are generally more conservative in awarding compensation for non-patrimonial loss. When

awarding both compensation and damages, the courts strive to achieve a balance to ensure that the total amount awarded is fair to both the employee and the employer, and there is no duplication of relief.

In cases of unfair dismissal based on unfair discrimination, the courts may award reinstatement, re-employment, or compensation of up to 24 months' remuneration.

14.6 Potential employer liability for employment discrimination

If it is alleged that an employee, while at work, contravened a provision of the EEA, or engaged in any conduct that, if engaged by the employer, would constitute a contravention of the EEA, the conduct must immediately be brought to the attention of the employer. The employer must consult all relevant parties and take necessary steps to eliminate the conduct and comply with the EEA.

If the employer fails to take the necessary steps, and it is proved that the employee has contravened the EEA, the employer is deemed to have also contravened that provision. An employer may escape such liability if it can prove that it did all that was reasonably practicable to ensure that the employee would not act in contravention of the EEA.

14.7 Avoiding discrimination and harassment claims

Every employer must take steps to promote equal opportunity in the workplace by eliminating unfair discrimination in any employment policy or practice.

Allegations of harassment or discrimination should be taken very seriously and investigated in an appropriate way. Managers should be trained to be proactive in identifying and dealing with any behavior that may constitute harassment or discrimination.

The risk of successful discrimination and harassment claims may be minimized by providing regular training to employees (particularly managers) and having robust policies and procedures in place in relation to the key points of the employment relationship (recruitment, terms and conditions, promotion, bonuses, disciplinary action and dismissal).

15 Termination of employment

15.1 General overview

Dismissals should be both substantively and procedurally fair. This means that there must be a fair reason for the dismissal and the process followed leading up to the decision to dismiss must be fair.

15.2 By the employer

There are three reasons which are considered to be substantively fair grounds for dismissal:

- misconduct: When the employee breaches a workplace rule or engages in serious or repeated misconduct and the employer has exhausted all attempts at progressive discipline;
- incapacity based on:
    - ill health or injury: The employee's incapacity affects his/her ability to perform his/her normal duties and the employer has determined that the employee's work cannot be adapted to accommodate the ill health or injury; or
    - poor performance: The employee does not meet the employer's performance standards notwithstanding that the employee is or reasonably could have been aware of those standards, and has been given a fair opportunity to meet the standards; and

- operational requirements: Requirements based on the employer's economic, technological, structural, and other similar needs (generally known as retrenchment or redundancy).

The pre-dismissal procedures differ depending on which one of the substantive reasons applies, and each of these procedures is, in turn, highly regulated. An employee who faces dismissal may be assisted by a trade union representative or fellow employee in the pre-dismissal procedures.

In cases of misconduct, the employer should first investigate the allegations. If dismissal may be an appropriate sanction, the employer should provide the employee with a written notice of the charges against him/her and allow him/her sufficient time to prepare for a disciplinary hearing before an independent and impartial chairperson. At the disciplinary hearing, the employee must be given an opportunity to state his/her case and call witnesses, as well as to cross-examine the employer's witnesses. The parties may lead evidence on both the question of whether the employee committed the misconduct, and whether dismissal is an appropriate sanction. After the hearing, the employer should notify the employee in writing of the decision made by the chairperson, with clear reasons.

In cases of incapacity based on ill health or injury, the employer should investigate the extent of the incapacity or injury. If the employee is likely to be absent for a time that is unreasonably long in the circumstances, the employer should investigate all the possible alternatives short of dismissal. When alternatives are considered, relevant factors might include the nature of the job, the period of absence, the seriousness of the illness or injury and the possibility of securing a temporary replacement for the ill or injured employee. In cases of permanent incapacity, the employer should ascertain the possibility of securing alternative employment, or adapting the duties or work circumstances of the employee to accommodate the employee's disability. The employer may convene an incapacity hearing to allow the employee an opportunity to make representations. After the hearing, the employer should notify the employee in writing of the decision made by the chairperson, with clear reasons.

In cases of incapacity based on poor performance, the employer should inform the employee of where he/she fails to meet the required performance standards. The employer should give the employee reasonable evaluation, instruction, training, guidance or counselling in order to allow the employee to render a satisfactory service. The employee must be given a reasonable opportunity for improvement. If, despite this, the employee continues to perform poorly, the employer should consider other ways, short of dismissal, to remedy the matter. The employer may convene an incapacity hearing to give the employee an opportunity to make representations. After the hearing, the employer should notify the employee in writing of the decision made by the chairperson, with clear reasons.

Please refer to **15.10** for the pre-dismissal procedure when contemplating dismissals for operational requirements.

15.3 By the employee

An employee may resign from employment by giving his/her employer notice of termination.

15.4 Employee entitlements on termination

Upon termination, an employee must receive all payments that have accrued to him/her (e.g., overtime, commissions, Sunday work, non-discretionary entitlements or a pro rata portion thereof) and the value of any accrued but untaken annual leave. In addition, severance pay equal to one week's remuneration for each completed year of continuous service is payable in cases of dismissal for operational requirements and on the expiry of a fixed-term contract for a period exceeding 24 months in the circumstances set out in **5.2** above.

When calculating remuneration for the purposes of accrued leave pay, severance pay and notice pay (if applicable), the following is included:

- housing or accommodation allowances or subsidy and housing or accommodation received as a benefit in kind;
- car allowances or provisions of a company car;
- cash payments or payments in kind not subject to an exclusion;
- employer contributions to medical aid, pension, provident, or similar funds and schemes; and
- employer contributions to funeral or death benefit schemes.

15.5 Notice periods

The following minimum notice periods apply to employees who work more than 24 hours in a month:

- one week, if the employee has been employed for six months or less;
- two weeks, if the employee has been employed for more than six months but not more than one year; and
- four weeks, if the employee has been employed for one year or more (or is a farm worker or domestic worker who has been employed for more than six months).

Employees cannot be required to give notice longer than that required by the employer. However, employers and employees may both agree to longer periods of notice.

Pay in lieu of notice and placing an employee on garden leave are both permissible. The parties may also agree to waive both notice and pay in lieu of notice.

15.6 Terminations without notice

Summary dismissals are fraught with difficulties and should only be used in cases of serious misconduct or breach of a material obligation in the employment contract. In such circumstances, the employer must still follow a fair procedure and allow the employee an opportunity to make representations.

15.7 Form and content of notice termination

Notice of termination of a contract of employment must be given in writing, except when it is given by an illiterate employee.

If an employee who receives notice of termination is not able to understand it, the notice must be explained orally by, or on behalf of, the employer to the employee in a language the employee reasonably understands.

Notice of termination of a contract of employment given by an employer must not be given during any period of leave to which the employee is entitled and must not run concurrently with any period of leave to which the employee is entitled, except sick leave.

15.8 Protected employees

A dismissal will be regarded as automatically unfair if the reason for the dismissal is:

- that the employee participated in or supported, or indicated an intention to participate in or support, a strike or protest action that complies with the provisions of the LRA;
- that the employee refused, or indicated an intention to refuse, to do any work normally done by an employee who at the time was taking part in a strike that complies with the provisions of

the LRA or was locked out, unless that work is necessary to prevent an actual danger to life, personal safety or health;

- a refusal by employees to accept a demand in respect of any matter of mutual interest between them and their employer;
- that the employee took action, or indicated an intention to take action, against the employer by:
    - exercising any right conferred by the LRA; or
    - participating in any proceedings in terms of the LRA;
- the employee's pregnancy, intended pregnancy, or any reason related to her pregnancy;
- that the employer unfairly discriminated against an employee, directly or indirectly, on any arbitrary ground, including, but not limited to, race, gender, sex, ethnic or social origin, color, sexual orientation, age, disability, religion, conscience, belief, political opinion, culture, language, marital status or family responsibility;
- a transfer, or a reason related to a transfer, of the business as a going concern or in circumstances of insolvency; or
- a contravention of the Protected Disclosures Act 26 of 2000 by the employer, on account of an employee having made a protected disclosure as defined in that statute.

15.9 Mandatory severance

Employees who are terminated for misconduct or poor performance are not entitled to severance pay.

Severance pay equal to one week's remuneration for each completed year of continuous service is payable in cases of dismissal for operational requirements and on the expiry of a fixed-term contract for a period exceeding 24 months in the circumstances set out in **5.2** above. However, if the employee is offered alternative employment and unreasonably refuses, no severance pay is required.

A collective agreement, company policy or practice, or agreement with the employee may require a more favorable rate of severance pay.

15.10 Collective redundancy situations

The term "redundancy" is used to describe dismissals based on the operational requirements of the employer. Operational requirements of an employer are defined as the requirements based on the economic, technological, structural or similar needs of an employer:

- Economic reasons are those that relate to the financial management of the employer;
- Technological reasons refer to the introduction of new technology that affects work relationships either by making existing jobs redundant or by requiring employees to adapt to the new technology of the workplace; and
- Structural reasons relate to the redundancy of posts consequent to a restructuring of the employer's enterprise.

Dismissals based on the operational requirements of the employer are colloquially known as retrenchments.

15.10.1 Thresholds

The LRA provides for different procedures to be followed depending on whether the retrenchments contemplated are small- or large-scale.

A large-scale retrenchment will be contemplated if an employer, who employs more than 50 employees, contemplates dismissing at least:

- ten employees, if the employer employs up to 200 employees;
- twenty employees, if the employer employs more than 200 but not more than 300 employees;
- thirty employees, if the employer employs more than 300 but not more than 400 employees;
- forty employees, if the employer employs more than 400 but not more than 500 employees; or
- fifty employees, if the employer employs more than 500 employees.

In calculating whether a retrenchment exercise falls within the thresholds above, the number of employees that the employer presently contemplates making redundant plus the number of employees who have been made redundant in the 12 months prior to issuing the notice to consult must be taken into account.

If the retrenchment does not fall within the thresholds above, then it is termed a small-scale retrenchment. The procedure for both small- and large-scale dismissals is similar, with a few additional considerations relevant to large-scale dismissals.

15.10.2 Procedure and information and consultation requirements

When an employer contemplates dismissing one or more employees for reasons based on the employer's operational requirements, it must undertake a process of consultation. The consultation process must commence when redundancies are contemplated.

The employer starts the consultation process by issuing a written notice inviting affected employees to consult with it. The notice must contain:

- the reasons for the proposed dismissals;
- the alternatives that the employer has considered before proposing the dismissals and the reasons for rejecting each of those alternatives;
- the number of employees likely to be affected and the job categories of the employees;
- the proposed method for selecting which employees to dismiss;
- the time when, or the period during which, the dismissals are likely to take effect;
- the severance pay proposed;
- any assistance that the employer proposes to offer to the employees, if dismissed;
- the possibility of the future re-employment of the employees, if dismissed;
- the number of employees employed by the employer; and
- the number of employees that the employer has made redundant in the preceding 12 months.

The consultations must take place between the employer and:

- any person whom the employer is required to consult in terms of a collective agreement;

- if there is no collective agreement that requires consultation:
    - a workplace forum, if the employees likely to be affected by the proposed dismissals are employed in a workplace in respect of which there is a workplace forum; and
    - any registered trade union whose members are likely to be affected by the proposed dismissals;
- if there is no workplace forum in the workplace in which the employees likely to be affected by the proposed dismissals are employed, any registered trade union whose members are likely to be affected by the proposed dismissals; or
- if there is no such trade union, the employees likely to be affected by the proposed dismissals or their representatives nominated for that purpose.

The employer must engage in a meaningful joint consensus-seeking process and attempt to reach consensus with employees on:

- appropriate measures to:
    - avoid the dismissals;
    - minimize the number of dismissals;
    - change the timing of the dismissals; and
    - mitigate the adverse effects of the dismissals;
- the method for selecting the employees to be dismissed; and
- the severance pay for dismissed employees.

Subject to considerations of privilege, confidentiality and privacy, the employer must disclose all relevant information that will allow the employees or their representatives to engage effectively in consultation.

The employees or their representatives must be afforded an opportunity to make representations or suggestions on any of the issues listed in the notice to consult. If any representations or suggestions are made in writing, the employer's response must similarly be provided in writing.

In large-scale retrenchments, either the employer or the party representing the majority of the affected employees may request the CCMA to appoint a facilitator to assist in the consultation process.

The facilitator's role is to act as a resource to the consultative process and assist the parties (to the extent possible) to reach consensus on the operational needs of the employer, and the employment implications for the staff. Failing that, a facilitator may help the parties to narrow the issues in dispute and keep relations on an even keel during and after the retrenchment exercise.

The facilitator's window of opportunity to assist the parties effectively comes to a close 60 days after the notice to consult is issued. If facilitation does not lead to a mutually agreeable outcome within 60 days of the date of the notice to consult:

- the employer may issue notices of termination to any or all of the affected employees; and
- the employees facing dismissal may either:
    - give notice of their intention to embark on strike action over the issue; or
    - refer a dispute about the fairness of the proposed dismissals to the Labour Court.

If a facilitator is not appointed, the following periods apply when contemplating large-scale retrenchments:

- a party may not refer a dispute to a council or to the CCMA unless a period of 30 days has lapsed from the date on which notice to consult was given to the employees;
- an employer may then only issue a notice to terminate contracts of employment after a further 30 days have elapsed after the referral to a bargaining council or the CCMA of an issue in dispute that is the subject of a contemplated strike or lockout; and
- the notice of termination will trigger the employees' right to proceed with strike action or litigation.

There is no facilitator or prescribed time periods when contemplating small-scale retrenchment. In practice, small-scale retrenchments usually take anywhere from two weeks to three months.

After consultation has duly taken place (and the above time periods have lapsed in the case of a large-scale retrenchment), the employer may decide whether or not to proceed with the retrenchments as contemplated and, if so, issue written notices of termination to the employees who are to be dismissed.

15.11 Claims, compensation and remedies

In the case of unfair dismissals, dismissed employees may claim reinstatement, re-employment or compensation of up to 12 months' remuneration. In cases of automatically unfair dismissals, the same remedies apply, however the compensation is capped at 24 months' remuneration.

Reinstatement or re-employment of a dismissed employee represent the primary remedies available, unless:

- the employee does not want to be reinstated or re-employed;
- a continuation of the employment relationship would, under the circumstances, be intolerable;
- it is not reasonably practicable for the employer to reinstate or re-employ the employee; or
- the dismissal was procedurally unfair, but substantively fair.

If reinstatement or re-employment is not ordered, the remedy will take the form of compensation in addition to any other sums the employee may be entitled to.

15.12 Waiving claims

Claims may be settled and waived. A properly drafted settlement agreement signed by an employee, accepting a sum of money (or other valuable consideration) in full and final settlement of all claims, will be fully enforceable in respect of contractual and other common law and statutory claims.

There are no statutory requirements regarding the drafting of a settlement agreement, and it is up to the parties to negotiate the terms of settlement. It is highly recommended to conclude any settlement agreement in writing and ensure both parties sign it.

In practice, settlement packages of three to six months' salary are common. However, the ultimate settlement agreed depends on the particular circumstances of each case, whether the employer has substantively fair grounds to terminate the employee, the employer's appetite for risk, and ultimately, the commercial needs of the business.

16 Employment implications of share sales

16.1 Acquisition of shares

Where control of a business is transferred by way of a share transfer and the legal identity of the employer remains the same, there is no need to provide for the transfer of employment contracts. The rights and obligations existing between the employer and employees will remain in existence after the share acquisition.

After the share acquisition, should the employer, under new direction and ownership, wish to make changes to the employment relationship, it may do so by negotiation.

16.2 Information and consultation requirements

There are no information and consultation requirements in respect of share purchases unless the share purchase constitutes an intermediate or large merger as defined in the Competition Act 89 of 1998. In such a case, the contracting parties must provide a copy of the notice given to the Competition Commission to:

- any registered trade union that represents a substantial number of employees; or
- the employees concerned or representatives of the employees concerned, if there are no such registered trade unions.

Employees, trade unions or other employee representatives have no other right to be informed and consulted merely because control of the employer is to change hands, unless the employer has agreed to do so, for example by way of a collective agreement.

17 Employment implications of asset sales

17.1 Acquisition of assets

The automatic transfer of employees in an asset sale takes effect provided that the asset sale comprises the sale of a business (which includes the whole or a part of any business, trade, undertaking or service) from one employer to another employer, as a going concern.

‘Business’ is defined widely in section 197 of the LRA to include the whole or part of any business, trade, undertaking or service. One can generally establish whether what is being transferred is a business by looking at the constituent parts of the business, and by determining which of these parts are to be divested of by the ‘seller’.

Not all the components of a business need to be transferred, or transferred simultaneously, for section 197 to be applicable.

A ‘business’ has a variety of components such as, among other things:

- tangible or intangible assets;
- goodwill;
- management staff;
- a workforce;
- premises;
- its name;

- contracts with particular clients;
- the activities it performs; and
- its operating methods.

The various components that are transferred must be sufficiently linked so that, together, they form an economic entity capable of being transferred.

Whether the element of 'going concern' has been met is a factual enquiry determined objectively in light of the circumstances of each transaction. The test for determining a 'going concern' can be described as a 'snapshot' test, where the business is compared before and after the transfer, and if sufficiently alike, the transfer will be regarded as a going concern.

The intention of the parties (whether a transfer as a going concern is planned) is relevant but not decisive, as our courts have adopted a substance over form approach.

17.2 Automatic transfer of employees

If a transfer of business as a going concern takes place, employees who are assigned to the business transfer automatically, i.e., by operation of law. The new employer (i.e., the purchaser) is automatically substituted in place of the old employer in respect of all contracts of employment in existence immediately before the date of transfer of the business, and the transfer does not interrupt an employee's continuity of employment. All the rights and obligations between the old employer and an employee at the time of transfer continue in force as if they had been rights and obligations between the new employer and an employee.

Any act of the old employer before the transfer, including dismissal of an employee or the commission of an unfair labor practice or act of unfair discrimination, is considered an act of the new employer.

The automatic consequences of a transfer of business may be amended through collective bargaining between either the old employer, the new employer, or the old and new employers acting jointly, and the appropriate employee representative body or person. In any such negotiations, the employer(s) must disclose all relevant information that will allow effective engagement by the employee representative body or person.

Where a part of the business is being transferred, it becomes difficult to determine whether employees form part of the 'business'. There is no South African authority on this issue. However, based on international law, relevant considerations should include:

- which cost center pays the employee's cost;
- how much time the employee spends on the business (or part thereof);
- whether the employee(s) allocated to the particular business unit form a coherent grouping;
- the amount of value given to the business by the employee; and
- the terms of the employee's contract of employment.

17.3 Changes to terms and conditions of employment

Generally, terms and conditions that cannot transfer automatically due to their specific structure, e.g., benefit plans, commission, bonus or stock option arrangements, if any, should be replicated as closely as possible and must be on the whole not less favorable to the employee than the current position. This deviation from identical continuation is only applicable where the continuation is technically impossible or unreasonable by objective standards. Any changes to compensation and/or benefits

require the affected employees' written consent, and that consent will only be valid if the employees are fully aware of their right to be transferred under identical terms.

The transferred employees only need to be consulted on the terms and conditions of employment if the previous and/or new employer wants to contract out of the protections afforded employees in terms of section 197.

Such consultation cannot result in a unilateral implementation of the employers' position - it is only possible to deviate from section 197 by agreement. It is not possible to agree that the transfer will interrupt the employee's term of service, as the years of service with the previous employer cannot be nullified.

Where transferred employees terminate their employment because the new employer, after transfer, altered the employee terms and conditions of employment either without consultation or in a way that has the effect of employing transferred employees on terms and conditions that are on the whole less favorable to them than those provided by the old employer, those resignations may constitute constructive dismissal. Constructive dismissal is recognized as an unfair dismissal in South African law.

17.4 Information and consultation requirements

The old employer and/or the new employer must notify each of the transferring employees in writing of the transfer. The notice ought to include the following information:

- that their employment will be transferred in terms of the LRA; and
- that the old employer and new employer have agreed to a valuation, as at the date of transfer, of the following:
    - leave pay accrued to transferred employees;
    - severance pay that would have been payable to the transferred employees in the event of a dismissal by reason of operational requirements; and
    - any other payments that have accrued to the transferred employees but have not been paid; and
- the terms of the written agreement between the old employer and the new employer regarding:
    - which employer is liable for paying the sums referred to above, and in the case of the apportionment of liability between them, the terms of the apportionment; and
    - what provision has been made for the payments contemplated above if any employee becomes entitled to receive a payment in future.

Provided the employees are automatically transferred to the new employer as set out above, there are no additional statutory approval or consultation requirements; but the above procedures are recommended as best practice.

17.5 Protections against dismissal

If the new employer intends to make any transferring employees redundant, it should carefully consider the employees' rights to damages in an unfair dismissal case, as a dismissal will be automatically unfair if the reason for the dismissal is simply a transfer of business as a going concern, or a reason related to a transfer of business as a going concern. In the case of an automatically unfair dismissal, an employee can be awarded up to 24 months' of remuneration as compensation.

Section 197 introduces some formalities for the commercial partners in the transfer of the business, which, if not complied with, may result in post-transfer liabilities for the old employer.

The old and new employers must agree on a valuation (as at the date of transfer) of various amounts due to employees, such as accrued leave, severance pay that would have been payable and any other unpaid amounts that have accrued to employees.

The two employers must also agree which employer is liable to pay these amounts, and what provision is being made for such payment. If they agree to apportion the liability, the terms of the apportionment must be agreed.

The terms of the agreement must be disclosed to all the transferred employees. If the old employer fails to meet the obligation to reach this agreement with the new employer, the old employer will be jointly and severally liable with the new employer for a period of 12 months after the transfer, should any of the listed accrued dues become payable.

In addition, the old and the new employer are jointly and severally liable for any claim concerning any term or condition of employment that arose prior to the transfer.

Despite this, if the operational requirements of the new employer genuinely necessitate a reduction of the workforce, then the new employer may commence retrenchment proceedings (See **15.10**).

17.6 Other considerations

Section 197 envisages that the parties to a transfer may, through the conclusion of an agreement, vary the employment consequences of the transfer.

Such agreements must be in writing, and must be entered into between at least one of the previous or new employers (or both) and the employees, as well as any person or body (such as a trade union) that the employer must consult with in an operational requirement dismissal context.

Examples in which such an agreement is concluded would be where the terms and conditions of employment on which the employee will transfer are on the whole less favorable than those under which the employee was previously employed.

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