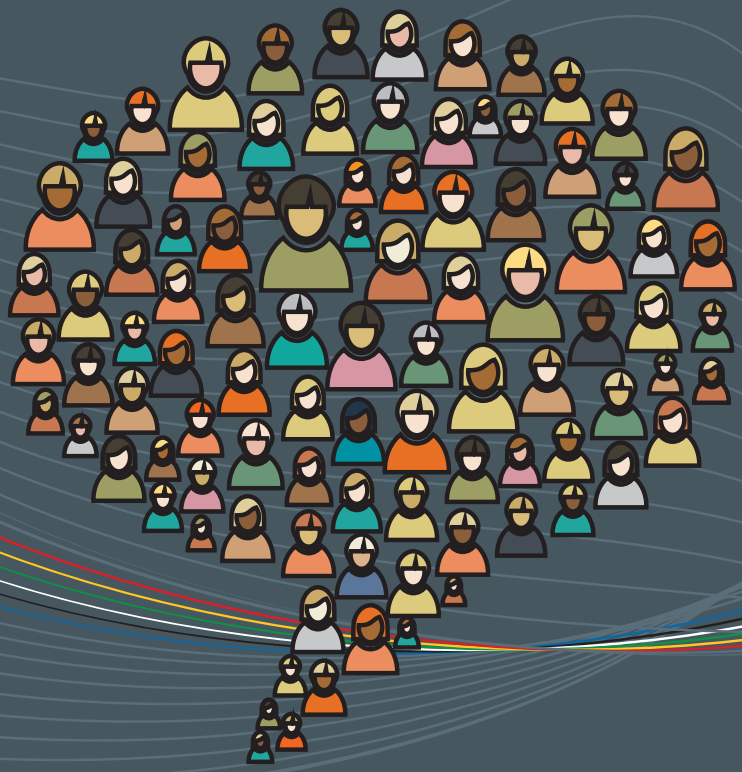

EMPLOYMENT LAW

Nick Robb, Pamela Stein, Kate Collier and Kirsten Eiser

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Overview of South African Labour Legislation

The pivotal legislation regulating employment and labour relations in South Africa is:

- the Constitution of the Republic of South Africa, 1996 (the Constitution), which enshrines the right to fair labour practices, the right to strike, the right to form and join trade unions and participate in trade union activities, and the right of trade unions and employers to engage in collective bargaining;
- the Labour Relations Act of 1995 (the LRA), which governs collective bargaining at the workplace, regulates the right to strike and the recourse to lockout, governs dismissal of employees and the relief to which unfairly dismissed employees are entitled;
- the Basic Conditions of Employment Act of 1997 (the BCEA), which establishes and governs minimum terms and conditions of employment;
- the Employment Equity Act of 1998 (the EEA), which governs the implementation of affirmative action measures in the workplace in order to eradicate discrimination against previously disadvantaged groups, provides for equal pay for equal work claims, prohibits unfair discrimination in any employment policy or practice and requires designated employers to formulate employment equity plans and report on implementation of such plans.

Other important legislation applicable to employment and labour relations include:

- the Occupational Health and Safety Act of 1993 (the OHSA), which provides for the health and safety of persons at work and for the establishment of an advisory council for occupational health and safety;
- the Skills Development Act of 1998 (the SDA) and the Skills Development Levies Act of 1999 (the SDLA) which provide for an institutional framework to devise and implement national, sector and workplace strategies to develop and improve the skills of the South African workforce and provide for the imposition of a skills development levy payable by employers;
- the Unemployment Insurance Act of 2002 (the UIA), which establishes the Unemployment Insurance Fund and which provides for the payment from the Fund of unemployment benefits to certain employees, as well as payment of illness, maternity, adoption and dependant's benefits;
- the Compensation for Occupational Injuries and Diseases Act of 1993 (the COIDA), which governs the granting of compensation for disablement or death caused by occupational injuries or diseases sustained or contracted by employees in the course of their employment;
- the Pension Funds Act of 1956 (the PFA), which governs retirement funds in regard to employee benefits, the monitoring of contributions and the distribution of surplus assets;
- the Medical Schemes Act of 1998 (the MSA), which governs medical schemes with regard to employee benefits;
- the Broad-Based Black Economic Empowerment Act of 2003 (the B-BBEEA), which provides for the introduction of black economic empowerment targets and empowers the Minister of Labour to issue codes of good practice and publish transformation charters in different sectors;
- the Prevention and Combating of Corrupt Activities Act of 2004 (the PCCAA), which provides for the strengthening of measures to prevent and combat corruption and corrupt activities and places a duty on persons in positions of authority to report certain corrupt activities;
- the Protected Disclosures Act of 2000 (the Whistleblowers Act), which provides protection for employees who disclose information and who then as a result fall victim to reprisals or occupational detriments at the workplace;
- the Regulation of Interception of Communications and Provision of Communication-Related Information Act of 2002 (the RICA), which provides for the regulation of the interception of certain communications and creates offences and prescribes penalties for such offences;
- the Protection of Personal Information Act of 2013 (the POPI), which is South Africa's data protection law which regulates inter alia the processing of employees' personal information. At the time of writing, while POPI has been promulgated as an Act of Parliament, the commencement date of many provisions is yet to be proclaimed.
- the Companies Act, 71 of 2008 (the Companies Act);
- the Immigration Act, 13 of 2002 (the Immigration Act);

Various statutes make provision for the publication of Codes of Good Practice (Codes), and also provide that such Codes be taken into account in the application or interpretation of relevant law. Some of the more important Codes that affect the employment relationship are:

- the Code of Good Practice on Dismissal (in terms of the LRA);
- the Code of Good Practice on Dismissal based on Operational Requirements (in terms of the LRA);
- the Code of Good Practice on Picketing (in terms of the LRA);
- the Code of Good Practice on the Handling of Sexual Harassment Cases in the Workplace (in terms of the LRA and EEA);
- the Code of Good Practice on Key Aspects of HIV/AIDS and Employment (in terms of the LRA and EEA);
- the Code of Good Practice on the Arrangement of Working Time (in terms of the BCEA);
- the Code of Good Practice on the Protection of Employees During Pregnancy and After the Birth of a Child (in terms of the BCEA);
- the Code of Good Practice for Employment and Conditions of Work for Special Public Works Programmes (in terms of the BCEA);
- the Code of Good Practice for the Employment of Children in the Performance of Advertising, Artistic or Cultural Activities (in terms of the BCEA);
- the Code of Good Practice on the Employment of People with Disabilities (in terms of the EEA);
- the Code of Good Practice on the Integration of Employment Equity into Human Resources Policies and Practices (in terms of the EEA);
- the Code of Good Practice on the Preparation, Implementation and Monitoring of Employment Equity Plans; and
- the Code of Good Practice for Broad-Based Black Economic Empowerment (in terms of the B-BBEEA).

There is a host of other legislation that has implications for the employment relationship, for example:

- the Income Tax Act of 1962;
- the Mine Health and Safety Act of 1996; and
- the Minerals Act of 1991.

Set out below is a summary of the salient aspects of each of the major employment laws.

The Constitution

Section 23 of the Constitution deals specifically with labour relations and provides, inter alia, that:

- everyone has the right to fair labour practices;
- every worker has the right to form and join a trade union, participate in the union's activities, and strike; and
- every trade union, employer's organisation and employer has the right to engage in collective bargaining.

The purpose of the LRA, the BCEA and the EEA is to give effect to the right to fair labour practices as contained in section 23 of the Constitution.

The Constitution enjoins the courts, when applying and developing the common law, to have due regard to the spirit, purport and objects of the Bill of Rights. The Labour Courts act as the guardian of the employment relationship by ensuring that equity principles and not just legal considerations regulate the mutual relationship between employer and employee.

The Labour Relations Act (LRA)

The LRA is concerned with the individual employment relationship and collective employment issues. The LRA's provisions prevail over the provisions of any other law (which includes every other Act of Parliament) save for the Constitution.

Amendments to the LRA were passed into law in August 2014 by means of the Labour Relations Amendment Act No. 6 of 2014 (the LRA Amendment Act). These amendments introduce significant changes to South African employment law particularly in relation to:

- non-standard (or atypical) employment such as part-time employment, fixed-term employment and employment through a temporary employment service or 'labour broker';
- large scale retrenchments;
- organisational rights;
- 'lock-out dismissals';
- picketing;
- enforcing and executing on arbitration awards; and
- reviewing proceedings in the Labour Court.

The date of commencement of the LRA Amendment Act has not yet been proclaimed. It is anticipated that this will take place in early 2015.

Collective employment law

The LRA gives effect to the constitutionally protected right of employees to freedom of association and provides that all employees are entitled to belong to a trade union and to participate in a trade union's activities. Employees who have followed a prescribed procedure are protected from dismissal while striking (although striking employees are not entitled to be paid while on strike). There are certain limitations on the right to strike:

- employees engaged in essential services or in maintenance services do not have the right to strike; and
- to the extent that the issue in dispute is one that may be arbitrated, or there is a collective agreement or other agreement that either prohibits a strike or requires dispute resolution by arbitration, employees are prohibited from striking in respect of such issue in dispute.

In general terms, disputes of interest form the subject matter for industrial action (strikes or lockouts), disputes of right do not. Disputes of interest are those that relate to terms and conditions of employment including rates of pay, disputes of right are those where an employees' rights (eg not to be unfairly dismissed) are infringed.

Disputes of right are capable of being adjudicated upon by an arbitrator or court, with the granting of relief in appropriate circumstances; disputes of interest are the subject matter of industrial action since an arbitrator or court cannot determine an outcome (eg the appropriate pay increase).

Employers have recourse to lock out employees in order to compel compliance with legitimate employer demands, however, an employer which locks out its employees is not entitled to employ replacement labour during the course of the lock-out, unless the lock-out is in response to a strike.

In order to encourage collective bargaining, the LRA accords organisational rights to registered trade unions which enjoy sufficient representation (which in certain instances requires majority representation) within an employer's workplace. These rights are:

- the right to compel the employer to deduct trade union subscription fees from members' wages and pay over such fees to the trade union;
- the right of members to elect trade union representatives (shop stewards) from within the workplace to represent them in matters such as disciplinary inquiries, monitor employer compliance with legal requirements, and report contraventions. Shop stewards are entitled to take reasonable time off with pay during working hours to carry out their functions (majority representation required);
- an employee who is an office-bearer of a registered trade union is entitled to take reasonable leave to perform the functions of that office; and
- the right of the trade union to access relevant information from the employer that will enable it to perform its functions effectively (majority representation required).

In addition a trade union has the right to access the workplace in order to recruit members or communicate with members, or otherwise serve their interests.

The LRA Amendment Act introduces a procedure by which minority trade unions may acquire those organisational rights afforded to a majority trade union, notwithstanding a collective agreement that sets thresholds of representivity which would exclude such unions.

A trade union, or more than one trade union acting jointly, may seek and obtain organisational rights notwithstanding any threshold agreement if they represent a significant or substantial number of employees in the workplace.

The LRA does not compel employers to engage in collective bargaining with trade unions notwithstanding a trade union's right to exercise organisational rights. The LRA, however, encourages and promotes formal collective bargaining between employers and unions at national, sectoral and plant level.

Individual employment issues

All employees have the right to protection from unfair dismissal. The act of dismissal includes, amongst others, situations where:

- the employer terminates the employment with or without notice;
- the employer fails to renew a fixed-term contract;
- the employer refuses to allow an employee to resume work after returning from maternity leave;
- the employer selectively re-employs employees who were dismissed for the same or similar reasons; and
- the employee terminates the contract of employment because the employer has made the employee's continued employment intolerable (known as a constructive dismissal).

The LRA provides that an employee may only be dismissed for a fair reason and in accordance with a fair procedure.

The LRA distinguishes between unfair dismissals and automatically unfair dismissals. Automatically unfair dismissals attract a punitive sanction (24 month's remuneration as compensation). An automatically unfair dismissal is where the reason for the dismissal is:

- the employer acts contrary to section five of the LRA which prohibits discriminating against an employee for exercising any right conferred by the LRA;
- the employee's participation in a protected strike, or a non-striking employee's refusal to do the work of a striking employee;
- a refusal by employees to accept their employer's demand in respect of any matter of mutual interest (eg to change terms and conditions of employment – this is the new wording in terms of the Amendment Act soon to be introduced - the 'lockout dismissal');
- the employee took action against the employer by exercising a right conferred by the LRA or participated in any proceedings in terms of the LRA;
- the employee's pregnancy, intended pregnancy or any reason related to her pregnancy;
- unfair discrimination against the employee on the basis of race, gender, sex, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, political opinion, culture, language, marital status or family responsibility;
- a transfer of a business or a reason related to such transfer; or
- a contravention of the Protected Disclosures Act by the employer.

Under the LRA amendments, the dismissal of employees on account of their refusal to accept their employer's demand in respect of any matter of mutual interest is automatically unfair. Previously, the courts accepted that an employer could justify, on the basis of the employer's operational requirements, the dismissal of employees who refused to agree to changes to their terms and conditions of employment.

An employer can no longer do this without risking a claim for 24 months remuneration from each dismissed employee. This amendment restricts the ability of an employer to introduce any type of workplace change.

The LRA accepts that an employee may be fairly dismissed on three grounds:

- misconduct;
- incapacity; and
- for a reason based on the employer's operational requirements (known as a retrenchment).

A consensual termination of the employment contract does not constitute a dismissal in terms of the LRA.

Dismissals for operational requirements under the LRA

Operational requirements are defined in the LRA as those based on the 'economic, technological, structural or similar needs of the employer'. The LRA requires that as soon as an employer contemplates dismissing one or more employees for reasons based on its operational requirements, it must consult with employees and engage in a meaningful joint consensus-seeking process before a final decision is taken to dismiss on account of operational requirements. Employers are required to consult on a number of issues, including:

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

Large scale retrenchments are accorded special treatment provided the number of employees contemplated for retrenchment exceeds the legislated threshold (which threshold increases proportionate to the size of the total workforce):

- a facilitation process is available;
- minimum waiting periods before termination of employment may occur are introduced;
- employees may strike (otherwise prohibited for disputes of right); and
- employees are entitled to seek interdictory relief to compel compliance with a fair procedure.

Previously, and in exchange for these concessions to employees, in any subsequent proceedings in the Labour Court to determine whether a dismissal was fair or not, an employee was limited to a remedy based only on the substantive unfairness of his dismissal.

The LRA Amendment Act has removed this restriction permitting the Labour Court to enquire into the procedural fairness of the retrenchment as well.

Dispute resolution under the LRA

The LRA establishes the Commission for Conciliation Mediation and Arbitration (CCMA) the labour tribunal to which alleged unfair dismissal and unfair labour practice disputes are referred for resolution via a process of mandatory conciliation followed by arbitration or court proceedings. The Labour Court and Labour Appeal Court are also established in terms of the LRA. Although the Labour Court's status is equivalent to that of the High Court, the High Court maintains its jurisdiction over labour matters to the extent that an employee frames his claim as one emanating from the contract of employment itself (as opposed to a claim emanating from the provisions of relevant employment law).

An employee who is unfairly dismissed may refer a dispute to the CCMA or a bargaining council having jurisdiction (certain industries have their own employment tribunal which has the same status as the CCMA) within 30 days of his/her dismissal. The unfairly dismissed employee is entitled to be reinstated (with full retrospectivity in appropriate circumstances) unless:

- the dismissal is only unfair because the employer did not follow a fair procedure; or
- it is not reasonably practicable for the employer to reinstate the employee; or
- the circumstances surrounding the dismissal are such that a continued employment relationship would be intolerable.

Labour Court judges and arbitrators are entitled to award unfairly dismissed employees who are not reinstated compensation up to a maximum of the equivalent of 12 months' remuneration. In the case of automatically unfair dismissals, maximum compensation is increased to the equivalent of 24 months' remuneration.

Transfers of businesses under the LRA

The LRA provides, in terms of section 197, that where a business or a portion thereof is sold as a going concern, there is an automatic transfer of the contracts of employment of employees engaged in the business being transferred. The transfer does not interrupt a transferred employee's continuity of service and all rights and obligations between the 'old employer' and each employee in existence at the time of the transfer continue as if they had been the rights and obligations between each employee and the 'new employer', unless otherwise agreed between the 'new employer' and the employees.

Since transferring (and non-transferring) employees may not be dismissed on account of the transfer or for a reason related to the transfer of a business, employers are obliged to exercise a great deal of care when any merger, buyout or the like is in the offing. Post-transfer the new employer may retrench provided the reason is the operational requirements of the business and not the transfer.

Since the term 'business' is defined to include a 'service', outsourcing transactions are also subject to the transfer provisions. However, the nature of the transaction and surrounding circumstances have to be carefully analysed to establish whether section 197 applies.

Presumption of employment

The LRA provides that any person who works for, or renders services to, any other person is presumed to be an employee, regardless of the form of the contract, if one or more certain listed factors are present, and provided the employee earns less than a stipulated amount (currently ZAR 205 433.30.00 per year). Such factors include:

- being subject to the control and direction of the employer;
- being economically dependent on the employer; and
- forming part of the employer's organisation.

These factors are utilised by the Labour Court in all cases in which there is a dispute as to whether an individual is an independent contractor or, irrespective of the contract, is in fact an employee.

Labour brokers and other non-standard (a-typical) employment

The employment of employees by labour brokers (defined as 'temporary employment services' or TES) is regulated by the LRA. A TES is any person who, for reward, procures for or provides to a client other persons who render services to, or perform work for, the client and who are remunerated by the TES.

The labour broking system in South Africa has been the subject of ongoing public debate concerning the need for more protection of employees in the sector. The LRA Amendment Act now introduces significant protections to employees employed by a TES .

Firstly, no person can operate as a TES unless they are registered in terms of the Employment Services Act. An employee may not be employed by a TES on terms and conditions of employment which are not consistent with the LRA, any employment law, sectoral determination or applicable collective agreement.

Unless such an employee is employed for less than 3 months, or as a substitute for an employee whose is temporarily absent, or in a category of work and for any period of time determined by law to be a temporary service, such employee is deemed to be the employee of the client and the client is deemed to be the employer.

A TES employee not performing a 'temporary service' will be deemed to be an employee of the client and employed on an indefinite basis by the client.

Where an employee is deemed to be employed by the client, the employee has an election to institute any proceedings against either the TES or the client or both, jointly and severally. If a labour broker terminates the employee's services with a client, whether at the instance of the labour broker or the client, for the purposes of avoiding the deemed employment from taking effect, such termination constitutes a dismissal and may be challenged by the employee. The TES employee must be treated on the whole no less favourably than an employee of the client performing the same or similar work, unless there is a justifiable reason for different treatment.

Labour broker employees who are servicing a client will acquire the above rights three months after the commencement of the LRA Amendment Act.

Fixed-term contract employees

These Amendments only apply to employees earning below the threshold, and exclude small employers (with less than 10 employees), employers who employ less than 50 employees and who have been in business for less than two years, or if the fixed-term contract is permitted by any statute, sectoral determination or collective agreement.

The LRA Amendments introduce protections for fixed-term contract employees earning below the BCEA threshold (currently ZAR 205 433.30 per year).

Employers will not be able to employ an employee on a fixed-term basis for longer than three months, unless it can be shown that a longer fixed-term period is justifiable due to the nature of the work or an alternative justifiable reason.

Justifiable reasons could include those listed in the LRA Amendments which include:

- project work;
- student or graduate internships;
- seasonal work;
- non-citizens who have been granted a work permit for a definite period;
- replacement of another employee who is temporarily absent;
- temporary increases in work volume;
- public works or job creation schemes or where the position is funded by external sources for limited periods; and
- after retirement age is reached.

An employer may only employ an employee on a fixed-term contract or successive fixed-term contracts for longer than three months of employment if the nature of the work for which the employee is employed is of a limited or definite duration or the employer can demonstrate any other justifiable reason for fixing the term of the contract.

All other employees who are employed for a fixed-term period longer than three months, are deemed to be employed on contracts of indefinite duration.

Fixed-term employees must not be treated less favourably than an employee employed on a permanent basis performing the same or similar work, unless there is a justifiable reason for different treatment and must be given equal access to opportunities to apply for vacancies with permanent employees.

These amendments take effect three months after the commencement of the LRA Amendment Act.

A fixed-term employee who is employed for a period longer than 24 months will be entitled to severance pay amounting to one week's remuneration for each completed year of service , unless the employee is offered a contract on the same or similar terms.

Similar protections are afforded to part-time employees. A part-time 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.

The Basic Conditions of Employment Act (BCEA)

The BCEA establishes minimum standards of employment for virtually all employees in South Africa. The only exceptions are members of the National Defence Force, the National Intelligence Agency, the South African Secret Service and unpaid volunteers working for charitable organisations. Statutory minimum terms and conditions of employment are also applicable to foreign nationals working in South Africa.

An employee is defined as:

- any person, excluding an independent contractor, who works for another person or for the State;
- any person who receives, or is entitled to receive, any remuneration; and
- any other person who in any manner assists in carrying out or conducting the business of an employer.

The BCEA enshrines certain employee rights as being 'core rights'. Such rights are incapable of being varied under any circumstances, even with the consent of the employees concerned. Core rights include ordinary hours of work (a maximum of 45 hours a week), the protection afforded to employees who perform night work, minimum annual leave, maternity leave, sick leave, and non-employment of children under 15 years of age.

A basic condition of employment, in terms of the BCEA, automatically constitutes a term of any contract of employment except to the extent that:

- any other law provides for a term that is more favourable to the employee or the basic condition;
- the condition of employment is replaced, varied or excluded in accordance with the provisions of the BCEA; or
- a term of the contract of employment is more favourable to the employee than the basic condition of employment.

Working time

The BCEA requires an employer to regulate the working time of employees:

- in accordance with the provisions of any Act governing occupational health and safety;
- with due regard to the health and safety of employees;
- with due regard to any code of good practice relating to the regulation of working time; and
- taking into account the family responsibilities of employees.

Certain categories of employees are excluded from the working time provisions, namely:

- senior managerial employees;
- employees who earn in excess of a stipulated amount (currently ZAR 205 433.30 per year);
- sales representatives; and
- employees who work less than 24 hours a month for an employer.

The BCEA provides that employees must not work more than either:

- 45 hours a week and 9 hours a day (if they work a 5-day week); or
- 45 hours a week or 8 hours a day (if they work a 6-day week).

Such ordinary hours of work may be extended by up to 15 minutes per day subject to a maximum of one hour per week.

Employers are prohibited from obliging employees to work overtime unless the employees have agreed to do so. Where there is agreement, employees are not permitted to work more than three hours overtime per day subject to a maximum of 10 hours overtime per week.

Employees working overtime are required to be paid at an enhanced rate of 1½ times their ordinary rate. The parties may agree that the employee be allowed to take paid time off at the employee's ordinary rate instead of receiving overtime pay.

Employees who do not ordinarily work on a Sunday must be paid at double their hourly rate, while employees who ordinarily work on a Sunday must be paid at 1½ times their hourly rate. Should an employee work fewer hours than his ordinary shift on a Sunday, and the payment to which he is entitled is less than his ordinary daily wage, the employer must nevertheless pay the employee the employee's ordinary daily wage for such work.

Employees may not be required to work on public holidays except in accordance with an agreement. Should the public holiday fall on a day on which the employee would ordinarily work, the employer must pay the employee who does not work on that public holiday his ordinary wage. An employee who ordinarily works on a public holiday must be remunerated the greater amount of either double his ordinary wage or his ordinary wage plus an amount in respect of time worked on that day.

Where an employee works on a public holiday on which he would not ordinarily work, he must be paid his ordinary daily wage plus an amount earned in respect of work performed on that day. Currently South Africa recognises 12 public holidays per annum.

An employee may only perform night work after 18h00 and before 06h00 the next day if:

- the employee has agreed to do so;
- the employee is compensated in some way, whether by payment of an allowance or by a reduction of working hours; and
- transportation is available between the workplace and the employee's residence.

Employees who regularly (ie at least five times per month or 50 times per year) work longer than one hour after 23h00 and before 06h00 the next day must be informed of the health and safety hazards associated with such work, and are entitled to undergo a medical examination at the employer's expense. Should the employee suffer from a health condition that is associated with performance of such night work, he/she may be transferred to suitable day work if it is practical to do so.

Leave entitlements

All employees are entitled to 21 consecutive days' annual leave per annual leave cycle (three weeks for employees working a five-day week), which must be granted no later than six months after the expiry of the annual leave cycle in which it accrued. An annual leave cycle is a 12-month period calculated from the commencement of the employee's employment.

In every sick leave cycle (which is a period of three years), employees are entitled to paid sick leave equal to the number of days they would ordinarily work in a six-week period (in the case of an employee who works a five-day week, for example, paid sick leave would be 30 days in every three-year cycle).

An employee who is absent due to illness for more than two consecutive days or on more than two occasions during an eight-week period is required to produce a medical certificate upon the employer's request failing which the employer is not obliged to remunerate the employee for such period of absence.

Employees are entitled to unpaid maternity leave of at least four months. The job security of a pregnant employee is guaranteed in terms of the LRA upon her return to work.

The BCEA provides for three days' paid family responsibility leave per year, granted to employees after four months of employment, and provided that the employee works at least four days per week for the employer. The circumstances in which such leave may be taken are:

- the birth of the employee's child; or
- sickness of the employee's child; or
- the death of the employee's spouse or life partner, or the death of the employee's parent, adoptive parent, grandparent, child, adopted child, grandchild or sibling.

Termination of employment

The BCEA stipulates certain minimum periods of notice of termination of employment:

- 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 less than one year; or
- four weeks, if the employee has been employed for one year or more.

The BCEA recognises the right of an employer to dismiss an employee summarily (ie without notice) in particular circumstances and 'for any cause recognised by law', which would include gross misconduct.

Payments in the event of operational requirement dismissals

The BCEA provides that an employee who is dismissed on account of the employer's operational requirements is entitled to receive a severance package equal to at least one week's remuneration in respect of each completed year of continuous service.

This severance package is in addition to notice pay and the value of accrued leave pay at termination of employment. An employee who unreasonably refuses to accept an offer of alternative employment is not entitled to payment of a severance package.

Administrative obligations

The BCEA imposes administrative duties on employers. These include requiring the employer to give each of its employees, on commencement of employment, detailed and written particulars of the conditions of employment, which covers a host of information including:

- any period of continuous employment with any previous employer that counts towards the employee's period of employment;
- the employee's ordinary hours and days of work;
- the employee's wage or the rate and method of calculating such wage;
- the rate of pay for overtime work;
- the employee's place of work and where the employee is required or permitted to work at various places;
- any other cash payments to which the employee is entitled;
- any payment in kind to which the employee is entitled and the value of such payment in kind;
- the frequency of payment of remuneration;
- any deductions to be made from the employee's remuneration; and
- all periods of leave to which the employee is entitled.

The BCEA does not impose criminal sanctions in the event of non-compliance. However, labour inspectors are given the power to enter an employer's premises in order to investigate the employer's compliance with the BCEA, and eventually to enforce compliance by securing appropriate orders from the Labour Court.

Presumption of employment

The BCEA provides that any person who works for, or renders services to, any other person is presumed to be an employee until the contrary is proved, regardless of the form of the contract. This provision is similar to the one found in the LRA, discussed above.

The Employment Equity Act (EEA)

The EEA has two primary purposes:

- the prohibition of unfair discrimination in employment policies and practices (which includes pay); and
- the regulation of affirmative action measures in respect of previously disadvantaged groups.

Unfair discrimination

The EEA expressly prohibits direct or indirect unfair discrimination on the basis of race, gender, sex, pregnancy, marital status, family responsibility, ethnic or social origin, colour, sexual orientation, age, disability, religion, HIV status, conscience, belief, political opinion, culture, language, birth or any other arbitrary grounds.

The EEA specifically provides that it does not constitute unfair discrimination for an employer to take affirmative action measures in order to give employees from historically disadvantaged groups equal employment opportunities in the workplace or to distinguish, exclude or prefer any person based on the inherent requirements of a job. Amendments to the EEA that came into effect on 1 August 2014 strengthen an employee's claim for equal pay for equal work.

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

Regulations to the EEA, also effective 1 August 2014 set the following as a basic criteria to be used in evaluating whether work is of equal value:

- the responsibility demanded of the work;
- the skills, qualifications and experience required to perform the work;
- physical, mental and emotional effort required to perform the work; and
- the conditions under which the work is performed (to the relevant extent).

An employer may justify the value assigned to an employee's work by reference to the classification of a relevant job in terms of a sectoral determination made in terms of the BCEA binding on the employer. If jobs are accorded the same value and minimum remuneration in a sectoral determination, an employer covered by the determination is justified in basing their remuneration on that classification.

If an employee or trade union claims that minimum wages set by a sectoral determination violates the principle of equal remuneration for work of equal value, they may make representations to the Employment Conditions Commission or bring a legal challenge to the relevant sectoral determination.

The Regulations also provide the following factors that may be used to justify differentiation in remuneration, provided that the differentiation is fair and rational:

- seniority or length of service;
- qualifications, ability, competence or potential above the minimum acceptable levels required for the performance of the job;
- performance, quantity or quality of work, provided that employees are equally subject to the employer's performance evaluation system and that the performance evaluation system is consistently applied;
- temporary employment to gain experience or training;
- shortage of relevant skill in a particular job classification; and
- any other relevant factor that is not unfairly discriminatory.

The EEA prohibits medical and psychological testing, or testing of an employee to determine his or her HIV status, except in certain circumstances. Testing to determine an employee's HIV status is permitted only with the permission of the Labour Court.

Medical testing is only permitted where legislation permits or requires 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.

Psychological testing is also prohibited unless the test being used has been scientifically shown to be valid and reliable, can be applied fairly to all employees and is not biased against any employee or group.

Psychological testing must be certified by the Health Professional Council of South Africa or any other body which is authorised by law to certify those tests or assessments.

Employees are now able to refer any dispute concerning unfair discrimination on the grounds of sexual harassment to the CCMA for arbitration.

Previously, such disputes had to be determined by way of adjudication at the Labour Court. Similarly, employees earning below the threshold (currently ZAR 205 433.30 per year) are able to refer any case concerning unfair discrimination to the CCMA for arbitration, as opposed to having it adjudicated by the Labour Court.

The EEA Amendments also introduce a statutory burden of proof. If unfair discrimination is alleged on a listed ground, the employer must prove, on a balance of probabilities, that such discrimination:

- did not take place as alleged; or
- is rational/not unfair, or is otherwise justifiable.

If unfair discrimination is alleged on an arbitrary ground, the complainant must prove, on a balance of probabilities, that:

- the conduct complained of is not rational;
- the conduct complained of amounts to discrimination; and
- the discrimination is unfair.

Affirmative action

The chapter in the EEA requiring employers to implement affirmative action measures only applies to defined 'designated employers'. The number of employees in its employ and its annual turnover determines whether an employer falls within the definition. An employer who employs 50 or more employees is deemed to be a designated employer, and if the employer employs fewer than 50 employees it will nevertheless be a designated employer if its total annual turnover is in excess of designated thresholds viz. ZAR 30 million per year in the manufacturing sector or finance and business services sector, or ZAR 75 million in the wholesale trade, commercial agents and allied services sectors.

Designated employers are required to implement affirmative action measures for people from designated groups which are defined as black people, women and people with disabilities who are citizens of the Republic of South Africa or who became citizens of the Republic of South Africa by birth or descent or who became citizens of the Republic of South Africa by naturalisation before 27 April 1994 or after 26 April 1994 and who would have been entitled to acquire citizenship prior to that by naturalisation, but who were precluded by apartheid policies.

Affirmative action measures are measures designed to ensure that suitably qualified people from designated groups have equal employment opportunities and are equitably represented in all occupational levels in the workforce of a designated employer.

Such measures must include:

- measures to identify and eliminate employment barriers that adversely affect people from designated groups;
- measures designed to further diversity in the workplace based on equal dignity and respect of all people;
- making 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;
- measures to ensure the equitable representation of suitably qualified people from designated groups in all occupational levels in the workforce; and
- the retention and development of people from designated groups and the implementation of appropriate training measures.

However, the EEA makes it clear that employers are not required to adopt employment policies that adversely affect people who do not come from historically disadvantaged groups.

The EEA requires designated employers to draft an employment equity plan. Before drafting such a plan, the employer is required to take the following steps:

- it must consult with its employees' trade union, nominated representatives, or the employees themselves;
- the employer has to ensure that those with whom it consults reflect the interests of employees from across all occupational categories and levels of its workforce, including employees from designated groups and from non-designated groups;
- it must disclose to the employees or representatives with whom it consults all relevant information in order to enable and allow the parties to consult effectively; and
- it must collect information and conduct an analysis of its employment policies, practices, procedures and the working environment in order to identify employment barriers which adversely affect people from designated groups and such analysis must include a profile of its workforce within each occupational category and level in order to determine the degree of under-representation of people from designated groups in various occupational categories and levels in the workforce. This analysis must include a profile of the designated employer's workforce within each occupational level in order to determine the degree of under-representation.

Once the employer has consulted, disclosed the information required and conducted the analysis, it is required to compile an employment equity plan, the stated aim of which is to achieve 'reasonable progress towards employment equity in its workforce'. The plan must state the following:

- yearly objectives;
- affirmative action measures to be implemented;
- numerical goals that have been set where under-representation of people from designated groups has been identified by the analysis;
- the timetable for each year of the plan for the achievement of goals and objectives;
- the duration of the plan (which may not be shorter than one year or longer than five years);
- procedures that will be used to monitor and evaluate the implementation of the plan;
- internal procedures to resolve disputes arising out of the interpretation or implementation of the plan; and
- those employees responsible for monitoring and implementing the plan.

Designated employers are required to report to the Department of Labour every 12 months on or by 1 October. An employer that becomes a designated employer on or after the first working day of April but before the first working day of October, must only submit its first report on the first working day of October the following year.

Employers who do not comply with the administrative provisions of the EEA are liable to penalties. In other words, an employer that does not consult with its workforce, analyse its policies, disclose information during the consultation process, prepare a plan, report to the Department of Labour, publish its report (in the case of a public company), prepare successive employment equity plans, designate a manager, keep its employees informed of the provisions of the Act or keep records, will be subject to such penalties as the EEA prescribes.

However, the failure of an employer to meet goals, achieve its self-imposed timetable, or achieve employment equity via affirmative action measures is not subject to penalty. It is not the aim of the EEA to penalise employers for failing to implement satisfactory affirmative action measures despite their intention, or stated intention, to do so.

Designated employers are required to submit a statement, at the time that each report is submitted, on the remuneration and benefits received in each occupational level of its workforce.

This 'income differential statement' is submitted to the Employment Conditions Commission. The EEA provides that where disproportionate income differentials are reflected, the designated employer must take measures to progressively reduce such differentials. The EEA does not attempt to define 'disproportionate'. In addition to the statutes discussed above, the following Acts also play an important role in employment and labour relations.

Occupational health and safety

The principal act governing occupational health and safety in South Africa, except in respect of work at mines and on ships, is the Occupational Health and Safety Act, No. 85 of 1993 (OHSA). Specific activities of employers may also be governed by additional legislation, for example hazardous substances or explosives, as well as provincial and municipal bylaws. The OHSA should never be read in isolation. It is the responsibility of each employer to determine whether additional legislation may apply.

The OHSA applies to all employers and self-employed persons and requires that all employers provide employees, as far as reasonably practicable, with a working environment that is safe and which does not expose employees to hazards to their health. This obligation extends to all employees and all personnel who may have been engaged through the services of a labour broker. All employers and self-employed persons are also required to conduct their operations in a manner that does not affect the health or safety of persons who are not their employees.

The OHSA requires that employers implement systems, based on the hazards to which their employees may be exposed, to ensure that work can be performed safely. These systems must, at least, include proper assessment and control of risk, the establishment of safe working procedures, safety training, the appointment of supervisors and other statutorily required appointees with, in some cases, specific qualifications and proper maintenance and enforcement of safety protocols. In addition to the general requirements set out in the OHSA itself, various regulations to the OHSA may apply to work being performed by employers.

These regulations may prescribe additional measures to be taken by employers and in some cases (particularly where employees are exposed to hazards to their health) require medical surveillance, monitoring, additional training and the use of specific personal protective equipment and clothing. In 2014, wide-reaching amendments to the Construction Regulations were enacted which apply whenever construction work is being performed and which place duties on the client, the principal contractor, designers and contractors.

The OHSA, however, also requires employees to be responsible for their health and safety. The OHSA specifically makes it an offence for an employee to fail to co-operate with his employer on matters relating to health and safety or to fail to obey a lawful instruction relating to his health and safety. Employees are also required to take an active role in managing health and safety through the involvement of employee-elected health and safety representatives and participation on a health and safety committee for each workplace.

The OHSA is enforced by inspectors with the Department of Labour who have the power to enter any site, seize any article and/or question any person on matters relating to health and safety. Inspectors also have the power to issue compliance instructions if an inspector believes an employer is failing to comply with the OHSA or an applicable regulation.

In addition, if an inspector believes that employees may be exposed to hazards, the inspector may issue a Prohibition Notice, prohibiting any work, use of machinery or entry into an area (or site). A failure to comply with any instruction or notice issued by an inspector is an offence in terms of the OHSA.

Inspectors also investigate work-related accidents or incidents. An investigation and/or formal inquiry may be held at which evidence may be led and witnesses questioned. Legal representation is permitted at such investigations and/or inquiries.

A breach of the OHSA, or a negligent act that results in injury or death of an employee, may result in an employer, or responsible person, being prosecuted and facing charges in a criminal court. If successfully prosecuted, a fine and/or period of imprisonment may be imposed.

The Skills Development Act (the SDA)

The SDA provides an institutional framework to devise and implement sector and workplace strategies to develop and improve the skills of the South African workforce, to integrate those strategies within the national qualifications framework contemplated in the National Qualifications Framework Act of 2008, to provide for learnerships that lead to recognised occupational qualifications, to provide for financing of skills development by means of a levy-financing scheme and a National Skills Fund and to regulate employment services.

The SDA established the National Skills Authority to advise the Minister on a national skills development policy and strategy and to allocate subsidies from the National Skills Fund.

The Minister may establish a Sector Education and Training Authority with a constitution for any national economic sector (the SETA). A SETA is a body accredited in terms of the South African Qualifications Authorities Act to monitor and assess learning and training.

The SETA will co-ordinate training and implement a skills plan for the industry in which it has jurisdiction. As an accredited body a SETA may establish learnerships, if such learnerships consist of a structured learning component, practical work experience and may lead to a qualification registered by the South African Qualifications Authority.

The learnership involves an employer, training provider and the learner. Skills development is funded by levies collected in terms of the Skills Development Levies Act and monies appropriated by parliament for the National Skills Fund.

The Skills Development Levies Act (the SDLA)

The SDLA provides that employers currently pay a skills levy of 1% of payroll. Every employer in South Africa who is registered with the South African Revenue Service for PAYE or has an annual payroll in excess of ZAR 500 000 must pay the levy. An employer who is liable to pay the skills levy must register with the South African Revenue Service. The employer must choose one SETA which is most representative of its activities. The list of SETAs include accounting and other financial services sectors, banking, chemical and allied industries, clothing textile and footwear, construction, defence, education training and development practices, energy and so forth.

Each month the South African Revenue Service will provide all registered employers with a return for remittance form that will enable employers to calculate the amount payable and effect payment. The first payment must be made to the Revenue Service after registration, no later than seven days after the end of the month in respect of which the levy is payable. A labour inspector appointed in terms of the BCEA is empowered to monitor and enforce compliance with the SDLA insofar as it relates to the collection of levies by a SETA or approved body.

The inspector is granted powers to enter and search the business premises of the employer. Employers who are already training their workforce qualify for a grant in terms of the SDLA.

There are four categories of grants:

- grant A amounts to 15% of the total levy payment. An employer must show that it has appointed or used a skills development facilitator who is an employee or formally contracted to the employer;
- grant B amounts to 10%. The employer qualifies for grant B only if the employer's application for grant A has been approved. It can recover 10% of the total levy by preparing and submitting a work skills plan;
- grant C amounts to 20%. An employer who is approved for grants A and B can claim grant C for the implementation of the work skills plan in year one; and
- grant D amounts to 5%. A SETA will make available a grant to the equivalent of 5% of the levy payment by the employer for specific skills shortages in its sector and to implement recommendations from the National Skills Fund. Failure to pay the levy is an offence that may, on conviction, attract a fine or imprisonment for a period not exceeding one year.

The Unemployment Insurance Act (UIA)

The UIA establishes the Unemployment Insurance Fund from which payment of unemployment benefits is made. In addition, other benefits are paid from the Fund, for example, maternity benefits. In terms of the UIA, all employees are required to pay unemployment insurance and are entitled to benefits on a sliding scale and subject to a cap. Currently each employee is required to contribute 1% of his monthly salary to the Fund, which is matched by the employer.

The Compensation for Occupational Injuries and Diseases Act (COIDA)

COIDA applies to all employees and casual workers who, as a result of a workplace accident or work-related disease, are injured, disabled, killed or become ill. This excludes the following people:

- workers 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 and the South African Police Service;
- any worker guilty of willful misconduct (unless he is seriously disabled or killed);
- anyone employed outside South Africa for 12 or more consecutive months; and
- workers working mainly outside South Africa and only temporarily employed in South Africa.

COIDA provides that employees are entitled to compensation, on a no fault basis, if they are injured while working or contract any work-related disease. Employees may receive compensation for temporary or permanent disablement and their dependants may receive compensation in the event of the employee's death.

Employees may apply for additional compensation if they are injured or contract an occupational disease due to the negligence of their employer or an employee of the employer. If such additional compensation is awarded, the Compensation Fund may seek to recover such additional amounts from the employer. Other than this possible claim for additional amounts paid, the Compensation Fund steps into the shoes of an employer and an employee, or deceased employee's dependants that may be entitled to compensation in terms of the COIDA are not able to bring a claim for damages against his/her employer as a result of the accident or incident for which compensation is paid.

Employees or their dependants must submit claims for compensation to the Compensation Commissioner, their employer or the relevant mutual association within 12 months of the injury or diagnosis of a disease, or the date of death. Employers are obliged to submit the required forms to the Compensation Commissioner within seven days after an injury and within 14 days of being notified of the diagnosis of a disease. A decision of the Compensation Commissioner may be objected to, using the internal objection processes set out in the COIDA.

Employers are required to register with the Compensation Fund and pay annual assessment fees if they employ one or more full- or part-time workers. The annual assessment fee is calculated on workers' earnings and is based on the risk associated with the type of work being done. The following employers are not required to pay assessment fees:

- national and provincial governments;
- local authorities who have exemption certificates;
- municipalities; and
- employers who are fully insured by a mutual association.

It is an offence for an employer to fail to register with the Compensation Fund. If an employer is based outside South Africa, the employer must provide the Compensation Commissioner with the address of its head office within the Republic of South Africa and the name of its chief executive officer, who shall be deemed to be the employer for purposes of the COIDA.

The Pension Funds Act (PFA)

The PFA provides for the registration, incorporation, regulation and dissolution of pension funds established with the object of providing retirement benefits for their members. A Pension Fund Adjudicator is appointed in terms of the PFA to adjudicate over complaints from fund members.

The Medical Schemes Act (the MSA)

The MSA provides for the consolidation of the laws relating to registered medical schemes, the establishment of the Council for Medical Schemes, which, inter alia, protects the interests of beneficiaries and controls and co-ordinates the functioning of medical schemes in a manner that is complimentary with the national health policy.

The MSA provides that a medical scheme shall not be registered or carry on business unless provision is made in its rules for, inter alia, the appointment of a board of trustees, a principal officer and an auditor, the power to invest funds, the amendment of the rules and the payment of beneficiaries.

The Prevention and Combating of Corrupt Activities Act (PCCAA)

The purpose of the PCCAA is to prevent and combat corruption and related corrupt activities. The PCCAA deals with, amongst other things, the offences of receiving or offering unauthorised gratifications by or to a party to an employment relationship.

The PCCAA provides that any person who is a party to an employment relationship and who, directly or indirectly gives, accepts, agrees or offers to give or accept from or to any other person any unauthorised gratification, whether for the benefit of that person or some other person, is guilty of the offence of receiving or offering an unauthorised gratification.

The PCCAA also provides that any person who holds a position of authority and who knows, or ought reasonably to have known or suspect, that any other person has committed any offence under Part 1, 2, 3 or 4 of Chapter 2 or the offence of theft, fraud, extortion, forgery or uttering a forged document involving an amount of ZAR100 000 or more, must report such knowledge or suspicion to any police official.

Any person in a position of authority who fails to comply with the above, is guilty of an offence. The PCCAA lists those people who, for the purposes of the section, hold positions of authority. It includes directors of companies and those in positions of managerial authority at the workplace.

The Protected Disclosures Act (the Whistleblowers Act)

The purpose of the Whistleblowers Act is to promote an environment in which employees are protected if they disclose in the prescribed manner, information of criminal and other irregular conduct by their employer or co-employees without fear of reprisal.

The Act applies in the state and private sector, and seeks to protect such employees from any occupational detriment by their employers on account of the protected disclosures being made.

The Whistleblowers Act defines what type of information may be disclosed, and to whom it must be disclosed, in order for the employee to qualify for the protection afforded by the Act.

Such information includes the commission of a criminal offence, the failure to comply with a legal obligation, the endangerment of health and safety of others, or unfair discrimination, by the employer or its employees.

If an employee makes a protected disclosure, the employer is prohibited from subjecting the employee to any form of 'occupational detriment', which includes disciplinary action, dismissal, suspension, transfer, alteration of a term and condition of employment to the employees disadvantage, harassment and intimidation.

An amendment to the Whistleblowers Act is in the pipieline which will extend its application to independent contractors, consultants, agents or persons rendering services to a client while being employed by a temporary employment service.

The proposed amendments impose a duty on the employer to investigate disclosures of information regarding unlawful or irregular conduct and grants immunity to the whistleblower against civil and criminal liability flowing from a disclosure of information which shows or tends to show that a criminal offence has been committed, is being committed or is reasonably likely to be committed. It is unknown when this Bill will be promulgated and if so in what form.

The Regulation of Interception of Communications and Provision of Communication-Related Information Act (the RICA)

The RICA was assented to on 30 December 2002, but only commenced on 30 September 2005. The RICA is relevant in the employment arena since it regulates the extent to which individuals and companies may lawfully intercept and monitor their employees' communications.

The RICA provides guidance in determining whether or not an employer acts lawfully when it monitors and/or accesses an employee's e-mails, records or telephone conversations.

Section 2 of the RICA provides that employers may not intercept any communication, other than in terms of the exceptions set out below, and to do so in the absence of falling under one of the exceptions, amounts to the commission of an offence which may result in a fine of up to ZAR2 million or up to 10 years' imprisonment.

The exceptions to the general prohibition are as follows:

- any person (including an employer) may intercept any communication if he/she is a party to that communication (Section 4);
- any person (including an employer) may intercept any communication if one of the parties to the communication has given their prior written consent to such interception (Section 5);
- any person (including an employer) may intercept any indirect communication in the course of carrying out any business, provided that certain exceptions are met ('the business exception') (Section 6); and
- Section 6(1) of RICA provides that any person may, in the course of carrying out any business, intercept any indirect communication:

    - by means of which a transaction is entered into in the course of that business;
    - which otherwise relates to that business; or
    - which otherwise takes place in the course of carrying on that business in the course of its transmission over a telecommunication system.

The section goes further and also requires the express or implied consent of the system controller. The interception or keeping of records by an employer must be done for a legitimate purpose, namely:

- to establish the existence of facts;
- to investigate or detect the unauthorised use of the employer's telecommunication system; or
- to secure the effective operation of the employer's telecommunications system.

In addition to the above, further requirements for lawful interception are as follows:

- the telecommunication system concerned must be provided for use wholly or partly in connection with that business; and
- the system controller must have made all reasonable efforts to inform individuals using the telecommunication system in advance that indirect communications transmitted through it may be intercepted, and the system controller has intercepted the communication him/herself or has consented to such interception.

It is important to note that the business exception only applies to an indirect communication that is transmitted over a telecommunication system, as defined in the Telecommunications Act, which is intercepted during the course of transmission.

Therefore an employee's e-mails and internet usage may be lawfully intercepted by his or her employer provided all the requirements listed above have been complied with. It is also important to note that RICA requires that the indirect communication be intercepted during the course of transmission.

Thus, where a message has already arrived at its destination, the business exception no longer applies. Since there are a variety of communications that fall outside the business exception, employers should obtain the written consent from both their current and future employees in order to allow them to lawfully intercept communications in circumstances where the business exception does not apply.

The Companies Act

Disqualification and ineligibility of prescribed officers

The Companies Act contains a number of provisions dealing with the ineligibility and disqualification of directors and prescribed officers, which may impact upon employment.

The Act provides that a person is a prescribed officer of a company if, despite not being a director of the company, that person:

- has general executive control over and management of the whole, or a significant portion, of the business and activities of the company; or
- regularly participates to a material degree in the exercise of general executive control over and management of the whole, or a significant portion, of the business and activities of the company.

For the purposes of the provisions of the Companies Act dealing with the ineligibility or disqualification of directors to act as directors of a company, the term 'director' includes 'prescribed officers', as defined above.

Disqualification

A director is disqualified from acting as such if:

- a court has prohibited that person from so acting;
- the person is a rehabilitated insolvent;
- the person is prohibited in terms of any public regulation from acting as a director of a company;
- the person has been removed from an office of trust on the grounds of misconduct involving dishonesty; or
- the person has been convicted in South Africa or elsewhere, and imprisoned without the option of a fine, or fined more than the prescribed amount, for theft, fraud, forgery, perjury or an offence involving fraud, misrepresentation or dishonesty.

Ineligibility

A person is ineligible from acting as a director if the person:

- is a juristic person;
- is an unemancipated minor; or
- does not satisfy any qualification set out in the company's memorandum of incorporation.

A person who is ineligible or disqualified must not be appointed or elected as a director or prescribed officer of a company, or consent to being so appointed or elected.

The Companies Act also provides that a person who becomes ineligible or disqualified while serving as a director or prescribed officer of a company ceases to hold such office immediately.

In addition to the grounds of ineligibility or disqualification set out above, a company's memorandum of incorporation may impose additional grounds of ineligibility or disqualification or minimum qualifications that are required to be met by directors or prescribed officers of that company.

If a director who is an employee of a company becomes ineligible or disqualified under the Companies Act for holding this office, this will impact on the employment contract. Likewise, employees who hold positions falling within the definition of a prescribed officer, will similarly be affected.

In our view, a compelling argument may be made that when such an employee becomes ineligible or disqualified on account of the provisions of the Companies Act, that employee may be dismissed on grounds of incapacity. Accordingly the employer will be obliged to follow incapacity procedures prior to making a decision to terminate such employee's employment.

Trade union rights

The Companies Act provides for a number of rights for registered trade unions. These rights are as follows:

- the right to apply to the High Court for an appropriate order to restrain a company from doing anything inconsistent with the Companies Act;
- the right to access company financial statements for the purposes of initiating a business rescue process;
- the inclusion of trade unions in the definition of an "affected person" in relation to a company in the chapter in the Companies Act dealing with business rescue proceedings. As a consequence of which, trade unions acquire a number of significant rights during the business rescue process, including the right to receive notice of all court processes and other relevant events concerning the business rescue process and to participate in any court proceedings;
- the right to receive a copy of any resolution in terms of which the board of a company authorises the company to provide direct or indirect financial assistance to a director or prescribed officer of the company;
- the right to make disclosures (whistleblowing) and enjoy qualified privilege in respect of such disclosure as well as immunity from any civil, criminal or administrative liability in terms of such disclosure provided the disclosure is made in good faith to one of a number of prescribed bodies and provided the disclosure related to the company has contravened the provisions of one of a number of named Acts, failed to comply with any statutory obligation to which the company is subject, engaged in conduct endangering health or safety or the environment, engaged in an act of unfair discrimination or condoned an act of unfair discrimination, or contravened legislation which exposes the company to actual or contingent liability or is inherently prejudicial to its interests;
- the right to apply to the High Court to declare a director delinquent or under probation in certain prescribed circumstances;
- the right to conduct derivative actions in the name of and on behalf of the company in circumstances where the company has either declined to institute action or decided to discontinue action already instituted.

A foreign company which is a party to an employment contract in South Africa

Section 23(1) of the Companies Act provides that an external company must register with CIPRO within 20 business days after it first begins to conduct business within South Africa. There are a number of consequences which arise after the registration by a foreign company as an external company.

Section 23(2) provides that a foreign company must be regarded as conducting business, or non-profit activities as the case may be, within South African if that foreign company is a party to one or more employment contracts within South Africa.

Being a party to an employment contract is not necessarily limited to employing an individual in South Africa; a foreign company which seconds its employee to a South African subsidiary, which thereafter employs that individual in circumstances where the foreign company is a party to the employment contract between the seconded employee and the South African company, could trigger the provisions of this section.

Employment of foreign nationals/foreign companies and employment of South Africans abroad

South African employment and labour legislation applies to all employees employed in South Africa irrespective of their nationality or the status of their employer. In the normal course foreign nationals employed in South Africa enjoy the protection of South African employment and labour legislation.

In certain confined circumstances a South African court may decide it cannot exercise jurisdiction over a foreign entity to the extent that that entity has no presence and no assets in South Africa. In those circumstance an employee – whether South African or foreign – might be required to launch an application to found and confirm jurisdiction, before a court would be prepared to entertain a claim against the entity.

The terms of the employment contract could play a decisive role in this exercise, particularly where an employee has submitted to an alternative jurisdiction, which jurisdiction has a link to the entity's domicile, and where the employee has expressly disavowed reliance on the protections available under South African legislation.

Employment of an employee – whether a South African or foreign national – by a foreign entity without a formal presence in South Africa may amount to the establishment of a presence in South Africa, thereby triggering taxation consequences. Specialist tax advice would be required to avert that possibly unintended and unwelcome consequence.

A South African employed abroad would not, generally, be afforded the protection of local legislation. The exception to that general principle would be where the employee has been seconded by the employer to work abroad, and the contract of employment specifically provides it is governed by and subject to South African legislation.

The Labour Court has held that foreign nationals employed illegally in South Africa are nonetheless entitled to invoke the protection of employment law against unfair dismissal.

Trade union consultation and disclosure of information to trade unions

As set out above, a registered representative trade union is afforded specific organisational rights in terms of the LRA. One of those rights is the right to elect representatives ie shop stewards. Such representatives are entitled to represent members in certain proceedings (disciplinary and grievance proceedings, and an investigation into poor performance), to monitor employer compliance with certain laws, to report contraventions, to perform other agreed functions, and to have certain relevant employer information disclosed to them to enable them to perform their functions.

In the context of collective bargaining (such as annual wage negotiations) and retrenchments, the disclosure requirements are particularly important. The employer may designate certain information as being confidential; if the disclosure of such information may cause substantial harm to the employer or an employee its disclosure is not required. Similarly, legally privileged information, information subject to a legal prohibition, and private personal information of an employee may be withheld.

The trade union is required to be consulted in respect of the contemplated retrenchment of union members. The trade union is not required to be consulted in the case of an automatic transfer of employment pursuant to the sale of a business as a going concern, in terms of section 197 (referred to above), or in the case of a sale of shares or assets, unless any such transaction may ultimately result in retrenchment (and provided, of course, the reason for any such retrenchment is not the transfer or a reason related to the transfer, since that is prohibited as set out above).

The Immigration Act

In terms of the Immigration Act, no person who is not a South African citizen or a permanent resident may be employed in South Africa without a valid working visa issued by the Department of Home Affairs. Foreign employees do not require a separate residence visa since a work visa confers upon the employee the right to reside in South Africa for the duration of the work permit.

The Immigration Amendment Act came into effect from May 2014 and makes significant changes to South Africa's immigration laws and regulations which, inter alia, place more onerous obligations on employers, such as an undertaking to bear the costs of repatriation if necessary and ensuring that foreign employees hold valid passports at all times. The Amendment Act has removed quota and exceptional skills work permits and has replaced such permits with a critical skills work visa. There are now only three categories of work visas:

- general work visas – issued for a period not exceeding five years;
- intra-company transfer work visas – issued for a period not exceeding four years and which is not renewable; and
- critical skills work visas – issued for a period not exceeding five years.

Each of these permits have specific requirements that must be fulfilled.

All applications for work visas must be accompanied by various supporting documents, including:

- a valid passport;
- a yellow fever vaccination certificate (if required by law);
- a medical and radiological report (not applicable to children under the age of 12 and pregnant women);
- in respect of dependent children accompanying the applicant or joining the applicant, proof of parental responsibilities and rights or written consent in the form of an affidavit from the other parent or legal guardian;
- payment of the applicable application fee; and
- a marriage certificate (if applicable).

General work visas must, in additional to the documents required for all work visa applications, be accompanied by the following:

- a written undertaking by the employer accepting responsibility for the costs related to the deportation of the applicant and his or 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 prospective 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 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 labour standards in South Africa and is made conditional upon the general work visa being approved;
- proof of qualifications evaluated by the South African Qualifications Authority (SAQA) and translated by a sworn translator into one of the official languages of South Africa;
- full particulars of the employer, including, where applicable, proof of registration of the business with CIPC;
- an undertaking by the employer to inform the Director-General should the applicant not comply with the provisions of the Immigration Act or conditions of the visa; and
- an undertaking by the employer to inform the Director-General upon the employee no longer being in the employ of such employer or when he or she is employed in a different capacity or role.

Intra-company visas must, in addition to the documents required for all work visa applications, be accompanied by the following:

- the applicant's contract of employment with the company abroad valid for a period of no less than six months; and
- 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 foreigner shall be employed.

Critical skills visas must, in additional to the documents required for all work visa applications, be accompanied by proof that the applicant falls within the critical skills category in the form of:

- confirmation, in writing, from the professional body, council or board recognised 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 recognised 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 South Africa.

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