

Labour legislation in South Africa



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Relevant Acts

Labour Relations Act (LRA)

This Act deals with the employment relationship. It gives rights to both parties and dictates how the employer and employee are to conduct themselves in the employment relationship, for example employees are entitled to associate freely with Trade Unions. The Act also sets limits to how trade unions are organized and how they conduct themselves. The Act deals with strikes and lockouts and the resolution of disputes through the CCMA. The Act also defines dismissals and sets out how a dismissal is to be effected in order to be both procedurally and substantively fair.

Basic Conditions of Employment Act (BCEA)

This Act relates to the working conditions of employees by providing standard / basic conditions of employment. Some terms covered by the Act include leave, overtime, hours of work, etc. The terms of employment contained in the Act are very basic and employers cannot contract with employees on terms less advantageous than that contained in the BCEA, however, parties are free to contract on terms that are more favorable.

Employment Equity Act (EEA)

The EEA regulates the treatment of all employees and its main function is to ensure that all employees are treated equally and that there is no discrimination in the workplace. A recent amendment to this Act includes the call for employees who are engaged in same / similar work to be remunerated at the same/similar level.

Skills Development Act (SDA)

The SDA was passed in order to help employees improve and develop skills in the workplace. There is currently a skills development levy (SDL) that is payable to the South African Revenue Services for skills development of employees.

Unemployment Insurance Act (UIA)

The main purpose of the UIA is the regulation and administration of a fund (UIF) that collects contributions from employees and employers in order to assist the employees in periods of employment due to maternity, illness and unemployment.



Relevant Acts



Occupational Health & Safety Act (OHSA)

The OHSA ensures that employees work in a safe and healthy environment. Employers are also prohibited from allowing employees to work in a situation that is potentially dangerous. Employees have a right to know of any dangers in the workplace. Inspectors from the Labour Department are entitled to investigate and search any workplace and if an employer is found to be in contravention of the Act it can be fined up to R100 000.00 or two years in prison.

Compensation for Occupational Injuries and Diseases Act (COIDA)

The Act allows employees to claim compensation from the fund if they are injured whilst on duty or become sick as a result of their job. Families and dependants can also claim from the Fund if they have lost their breadwinner as a result of his or her employment. Contributions to the fund are paid by the employer only.

Workmen's Compensation Act (WCA)

This is the same as COIDA. The Act used to be called WCA until its amendments in 1993.



Employment contracts

Permanent employment contract

This is an employment relationship for an indefinite period. Typically under this contract the employee is entitled to more benefits and holds greater rights than any other type of employee.

Fixed term employment contract

This contract is for a specified duration agreed to at the start of the employment relationship. The contract automatically ends on the date specified unless it is renewed. Under the new amendments to the LRA Fixed term contracts cannot exceed a period of three months if the employee earns below the BCEA threshold unless it can be justified.

Independent contractor

There is no employment relationship in this instance. This is simply the hiring of services. Under this type of agreement the independent contractor works at his own will and without being subject to the control of an “employer” who is the person hiring the services. In this type of relationship there is also no concept of salary or remuneration, in most instances the independent contractor submits an invoice for payment.



Labour documents

Employment contracts

Employers must give all employees details of his or her employment. The following are considered to be important :

- 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 of work 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;
- 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.



Labour documents (cont)

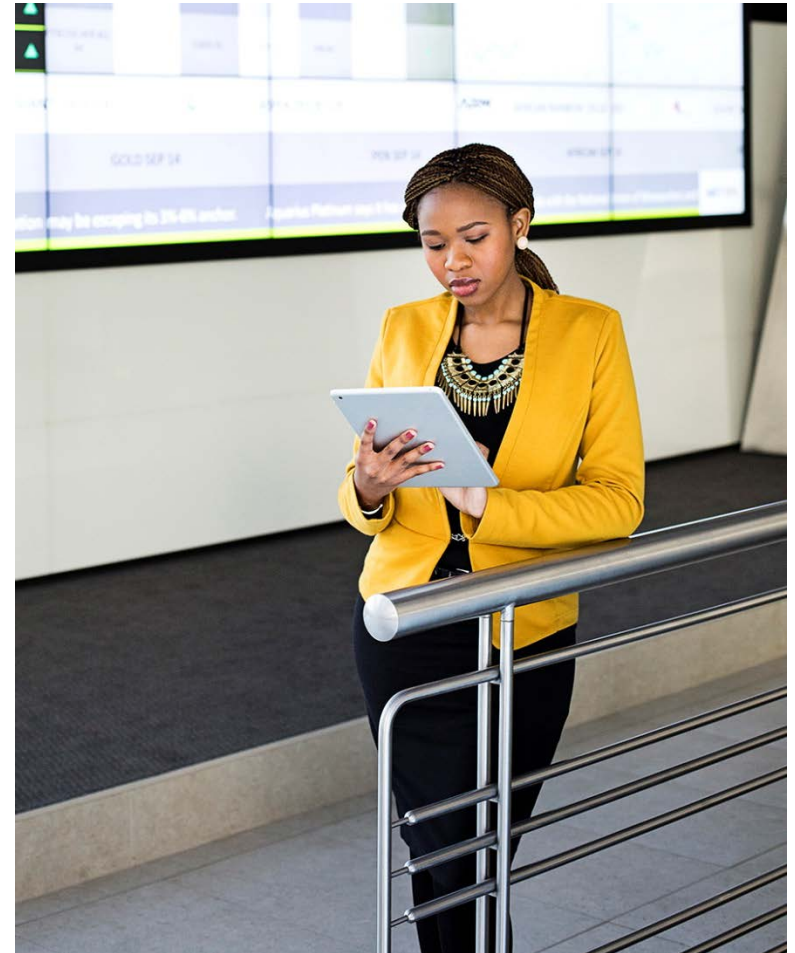
Employee records

Employers must keep records relating to employees for a period of three years from the date of the last entry. The details will include the employee's name and occupation, the time worked by each employee, the remuneration to be paid to each employee and in the case of any employee under 18, that employee's date of birth.

Handbooks, codes and policies

These documents are not mandatory as important terms can be included in the employment contract. They are however highly advisable as they serve as a guideline to the employee. A common concept of employment law is that an employee cannot be expected to comply with a rule or standard unless he was aware of it. It is thus important to have such codes and policies and to make the employee aware of these. Policies of importance would include the following:

- Code of conduct, work ethics
- Leave policy (annual, sick, maternity, family responsibility)
- Disciplinary policy
- Employment equity policy
- Grievance procedures
- Termination of employment contracts
- Period of notice and probation



Employment relations

Working hours

Employees are prohibited from working for more than 45 hours per week or more than nine hours per day (if they are employed for five days or less per week).

If an employee works in excess of the 45 hours per week then he / she is entitled to payment for overtime remunerated at 1 and ½ times the employee's normal wage.

Annual leave

In terms of the BCEA an employee is entitled to 15 paid working days of leave in every annual leave cycle. An annual leave cycle is a 12 month period. Leave should preferably be used within 6 months after the leave cycle within which it accrued.

Sick leave

Employees are entitled to 30 days of paid sick leave in every three year cycle. The leave can be taken at any time during the 3 month year and should not be construed as 10 days per year.

Maternity leave

Female employees are entitled to four months of unpaid maternity leave. At the employers discretion the parties can enter into an agreement where the employee can receive her full / part salary during the maternity period.

Family responsibility leave

Employees that have been employed for a period of four months and longer and employees who work at least 4 days a week for that same employer are entitled to Family responsibility leave. This is three days of paid leave in every leave cycle and is taken by the father when a child is born, when the employee's child is sick and in the event of death of the employee's spouse, parent, child, grandparent, grandchild or sibling.

Notice periods

The BCEA has standard notice periods. The notice period for terminations is as follows:

- One week if the employee has been employed for six months or less
- Two weeks if the employee has been employed for over six months to a year
- Four weeks if the employee has been employed for over a year.

Notice periods can and are usually agreed to between the employer and the employee. The length of the notice period is usually dependent on the inherent requirements of the job and the difficulty that the employer would face in having to replace the employee. Notice periods are usually between 1 -6 months long. The general practice is that the more senior the position of the employee then the longer the notice period.



Employment relations (cont)

13th Cheques/ Christmas bonuses

There is no requirement under South African employment legislation for employees to receive these payments.

Such payments are however granted to employees at the discretion of the employer. It is sometimes negotiated and agreed to at the start of the employment relationship and the terms are embodied in the employment contract.

Prohibition of competition and divulging of confidential information

A properly drafted employment contract should contain the following:

A restraint of trade clause- This prohibits the employee from assuming employment with a competitor of the current employer for a certain period after termination and within a certain area. It further restricts the employee from divulging trade secrets, client information, etc.

Confidentiality clause - The employee is restricted, despite any termination of the contract, from divulging any information that is reasonably classified as confidential by the employer.



Common pitfalls

Often employers are not aware of or simply disregard the basic laws. This can be detrimental for their organisations as there are numerous adverse consequences, fines and penalties.

Some common mistakes would include:

- Failure to keep written contracts of employment. This means that in the event of a dispute the employee can allege as he or she deems fit and there is nothing in writing that contradicts such allegations;
- Failure to adhere to minimum wage guidelines;
- Denying employees' rights and benefits accorded to them by law;
- Failure to register for, deduct and remit PAYE and UIF and SDL contributions;
- Keeping employees on casual or contract status indefinitely; and
- Subjecting employees to a working environment or working conditions/circumstances which expose employees to risk of disease, injury or death for which the employer will be liable.

Dismissals

The two most important considerations in South African employment law is that of substance and procedure. These two factors must be considered in all decisions and especially when a dismissal is involved.

Substance - This deals with the cause. There must exist a good enough reason for an employer to dismiss an employee. If there isn't a good and justified reason then the employer will be found guilty of an unfair dismissal.

Procedure - This is the manner in which the employee was treated and deals with the fairness of the proceedings.



Common pitfalls (cont)

Dismissals related to misconduct

Misconduct is usually a disregard for the rules of an employer. Serious offences may include:

<i>Gross dishonesty</i>	<i>Wilful damage to property</i>	<i>Wilful endangering of the safety of others</i>
<i>Assault and fighting</i>	<i>Gross insubordination</i>	<i>Insolence</i>
<i>Insubordination</i>	<i>Sexual harassment</i>	<i>Abusive language</i>
<i>Intoxication on duty</i>	<i>Time related offences</i>	<i>Collective absenteeism.</i>

However, with any type of misconduct the dismissals must be for a fair, recognised reason and effected in accordance with fair procedure.

Substantive fairness

In order to be substantively fair, the reason behind the dismissal must be serious enough to warrant the dismissal. The dismissal would be substantively fair if the employee is guilty of the offence that he was charged with and the offence is so serious that it justifies a dismissal.

In determining whether any act constitutes misconduct it is important to give regard to *Item 7 of the Code of Good practice on dismissal*.

In terms of the Code, the following questions should be asked:-

- Did the employee contravene a rule or standard regulating conduct in, or of relevance to, the workplace?

If the answer is in the affirmative, then ask:-

- Was the rule a valid or reasonable rule or standard?
- Was the employee aware or could they have reasonably been expected to have been aware of the rule or standard?
- Was the rule or standard consistently applied by the employer?
- Is dismissal an appropriate sanction for the contravention of the rule or standard?

There are numerous factors that are to be taken into account when determining whether a dismissal is fair and an appropriate sanction under the circumstances.



Common pitfalls (cont)

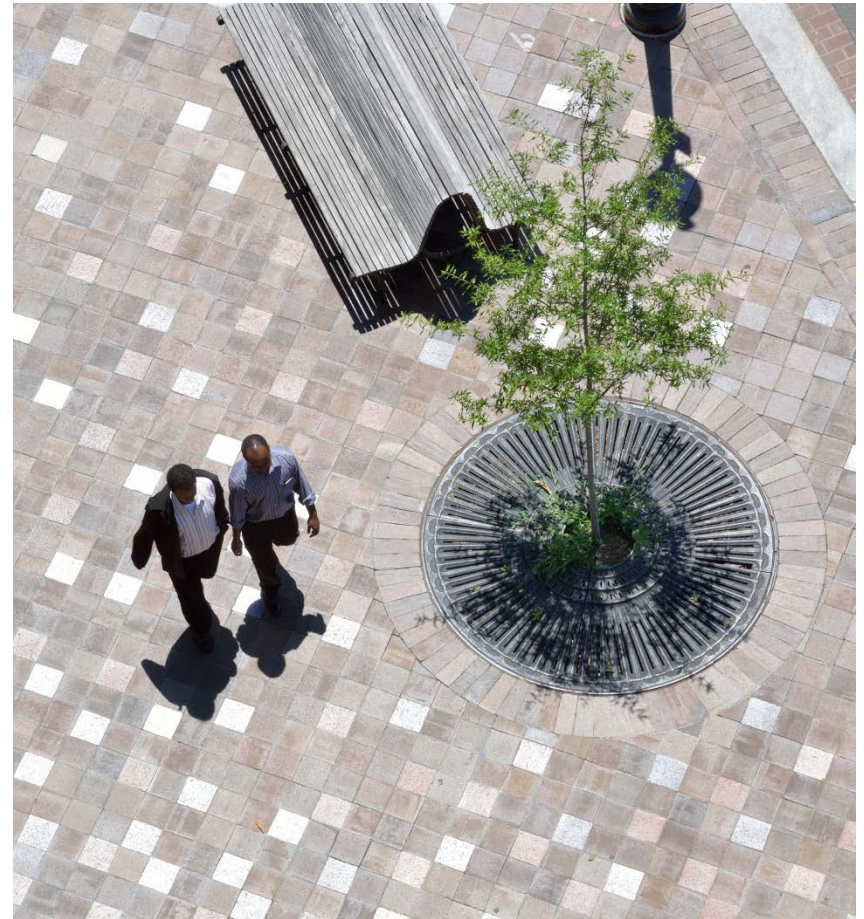
Procedural fairness

Procedural fairness relates to the process from the time the employee is charged to the time the sanction is meted out. It is extremely important that the Employer follow the proper procedure. Even where the substantive element is satisfied a dismissal can be held to be unfair if proper procedure is lacking.

Item 4(1) of the Code of Good practice on dismissal is usually consulted on the procedural requirements to follow for misconduct cases.

- The employer should conduct an investigation.
- The employer must notify the employee of the allegations against him.
- The employee must then be allowed to prepare a response and obtain the assistance of a fellow employee or trade union.
- The employee must then be allowed to state his/her case in response to the allegations.
- After the enquiry the employer must communicate the decision made and preferably provide the employee with the outcome in writing.

When a dismissal is found to be unfair the employee can be awarded reinstatement and/or compensation for damages.



Common pitfalls (cont)

Dismissals based on operational requirements

Employers facing a financial crisis usually dismiss employees through the process of retrenchment. Such a dismissal can best be described as a dismissal based on the economic, technological, structural or similar needs of an employer.

The company will, however, have to justify the dismissal and must prove the existence of a genuine need to retrench. The company cannot simply allege that they are experiencing financial difficulty as it may be called to provide evidence of a financial crisis in the event that the dismissal is challenged.

When such a dismissal is considered the provisions of *S189 of the LRA* will have to be complied with, both in substance and procedure.

Substance, in that the reason for the dismissal must be fair and procedural, in that the process as leading up to the dismissal must also be fair. The element of substantive fairness will be satisfied if the employer can show that there was a fair reason and a genuine need to dismiss the employee.

Procedural fairness calls for engaging and consulting with the employee. The employer should engage in a joint consensus seeking process in order to save the Employee from the impending retrenchment.

Employers usually consult with Trade Union Officials and Employee Representatives. However, when it is just one employee to be dismissed he or she can be consulted personally.

The employer must allow the other party an opportunity to make representations and alternatives to the dismissal must also be considered for example:

- Measures to increase productivity;
- Rationalizing costs and expenditure;
- Decreasing the number of contractors and temporary staff;
- Skills development to enable employees to take up different positions;
- Extended unpaid leave or temporary lay off.

The “compensation” or payment given to an employee during a retrenchment is called severance pay.

Employees are entitled to one week’s severance pay for each completed year of service.

Severance pay is governed by the *Basic Conditions of Employment Act (BCEA)*, which also provides for contracting out of its requirements if the terms are more favourable.

The obligation to pay severance pay will however fall away if the employee is offered alternative employment with the employer or another employer and unreasonably declines such offer.



Union activity and strikes

South Africa is a very unionised country; unions play a large role in many workplaces and there are numerous strikes that often get violent. The LRA governs the formation of trade unions, its membership and their activities. Unions act on behalf of the members, the employees to protect and enforce their rights.

The employer and union usually enter into collective agreements that dictate the terms of the employment relationship.

Strikes usually occur when the parties cannot find consensus on issues that the employment contract and collective agreement are silent on. It must however be pointed out that the union and its members cannot simply embark upon a strike, there must be failed negotiations between the parties and further proper procedure must be followed. It is only when the Commission for Conciliation, Mediation and Arbitration (CCMA) has issued a certificate of non-resolution of the dispute between the parties that the Union can proceed to issue the strike notice. Even then, the union must give the employer 48 hours to comply with demands or enter into further negotiations before proceeding with the strike action.

Unions usually organize in certain industries for example the National Union of Mineworkers (NUM) operate only in the mining industry.

Some of the largest unions in SA include the Congress of South African Trade Unions (COSATU), South African transport and Allied workers Union (SATAWU) and The National Education Health and Allied Workers Union (NEHAWU).

Recent strike action

- On 6th May 2015 hundreds of members affiliated to the South African Municipal workers Union (SAMWU) embarked on a three day strike in Cape Town. The strike had been conducted in accordance with proper procedure and was thus protected and legal. The members were fighting for better wages and for female firefighters who lost allowances during pregnancy.
- The communication giant MTN and its employees and their unions are currently in dispute as their employees are striking over their salaries and other payments. The Union is demanding a 10% salary increase, higher weekend and public holiday wages and for temporary staff to be made permanent. The strike has turned violent on a few occasions and some employees were injured.
- Earlier in this year about 8000 employees stationed at Eskom's Medupi plant embarked on an illegal strike. They were protesting over poor living conditions and demanded higher pay.



How can PwC assist you?

PwC offers a wide range of employment law services. We have a qualified labour law attorney on our team, with the requisite expertise and knowledge to assist with all labour related matters to ensure compliance with legislation and to avoid risk.

Some of our services include:

- Advice relating to South African employment law legislation;
- Explanation of minimum compliance requirements and consequences of non-compliance;
- Trainings on legislation and amendments;
- Drafting of specimen employment contracts, HR policies and handbooks for example health & safety in the workplace, disciplinary policies relating to absenteeism, substance abuse, etc;
- Reviewing employment contracts and policies for compliance with current employment law legislation;
- Advice on disputes stemming from the employment contract, collective agreement and in any employment relationship;
- Draft template letters for performance, misconduct and incapacity;
- Guidance on disciplinary procedures including poor performance, misconduct and incapacity;
- Drafting of charge sheets;
- Termination procedures;
- Assistance with unions and negotiations;
- Enforcement of legislation and guidance on dealing with enforcement forums;
- Representation at CCCMA (Conciliation, Mediation & Arbitration);
- Chairing of disciplinary hearings;
- Guidance on unionisation & collective agreements;
- Requirements for employing foreign nationals and secondment agreements.

Our engagement and fees can be structured to your specific requirements.



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