

# ASPECTS OF THE KENYAN EMPLOYMENT LAW REGIME PERTINENT TO EMPLOYERS

## Common Mistakes Made by Employers

- Absence of written Contracts of Employment detailing terms of employment.
- Failure to keep records relating to casual and other staff. Some records are required by law while prudence dictates that other records such as Casual Workers records be kept.
- Failure to adhere to minimum wage guidelines.
- Failure to issue pay slip (itemized pay statement except for casual employees and those engaged on piece rate or task rate terms for a period under 6 months
- Denying employees minimum rights and benefits accorded to them by law.
- Failure to register for, deduct and remit P.A.Y.E. and NSSF and NHIF contributions.
- Keeping employees on casual or contract status indefinitely.
- Subjecting employees to unsafe working environment or working conditions/circumstances which expose employees to risk of disease, injury or death for which employer will be liable.

## Types of Employment

### Casual Employment

- Engaged and paid on a daily basis
- Suitable for companies with seasonal business patterns
- Casual employees are not entitled to many of the usual rights and benefits of employment

- Terminable by either party at the close of any day without notice.
- May be converted to term contract where employee works for a period or a number of continuous working days in the aggregate of not less than one month.
- May also be converted where the employee performs work which cannot reasonably be expected to be completed within a period of three months.

### Fixed –Term/Temporary Employment

- By oral or written agreement, the employee is engaged for a fixed period on agreed terms.
- Suitable for companies with seasonal business patterns or jobs for limited periods.
- Contract can be renewed.
- During the contract period, the employee is entitled to all rights and benefits of employment, and where agreed on, may be paid gratuity at the end of his contract.
- Statutory deductions (PAYE, NSSF and NHIF) should be made and remitted.

### Permanent Employment

- Employment contract or Offer Letter sets the duration of employment to a set retirement age.
- Employee is entitled to all statutory rights and benefits as well as those put in place by employer either voluntarily or under a Collective Bargaining Agreement.

### Probation

- Prospective employee is put on a job and ability and suitability are assessed

If the employer is satisfied, the employee can be confirmed to the position.

- During the probation period, person is not entitled to the usual legal rights and benefits of employment such as leave and off days.
- Probation period not to exceed six months.
- Statutory deductions (PAYE, NSSF and NHIF) should be made and remitted

### **Importance of Employment Contracts and Other Records of Employment**

- Statutory requirement. The Employment Act requires that contract of service for working days in the aggregate of three months or more must be in writing.
- Under the Employment Act, 2007 employers are obligated to maintain written records of all employees including employment registers. Penalty for entering false information on Employment Register is Ksh 100,000/= or 6 months imprisonment or both.
- Other records employers should maintain for all employees include Casual Workers Employment Cards, Employee Attendance Registers and Accident Registers.
- Contracts and records can help to resolve labor disputes or industrial accident claims.
- Should be witnessed by a person other than the employer.

### **Terms of Employment Contracts**

- Basic terms are negotiated and can be expressly agreed or implied.
- Implied terms to an employment contract are imposed by Acts of Parliament and any rules and regulations made thereunder, e.g. the Employment Act and the Regulation of Wages and Conditions of Employment Act.
- Other terms are based on common law, and company/industry practices.
- Where employees are members of a registered trade union, their terms of employment may from time to time be influenced by Collective Bargaining Agreements between the employer and the union representing employees.
- An employment contract cannot purport to deny the employee rights that are granted by law or by a Collective Bargaining Agreement. These even when absent in an employment contract constitute implied terms to the contract.

### **Mandatory Particulars in Contract of Service**

- Name, age, permanent address and sex of employee
- Name of employer
- Job description of the employment
- Date of commencement of the employment
- The form and duration of the contract
- The place of work
- The hours of work
- Remuneration and intervals at which paid

- Entitlement to annual leave and holiday pay
- Incapacity to work due to sickness.
- Pensions and Pension schemes
- Termination notice.
- Where contract not indefinite, the period it is to continue.
- Place of work
- Any collective agreements affecting terms of employment
- Where employee to work outside Kenya for over one month, period and remuneration currency and conditions relating to return.
- Where employer has over 50 employees specify disciplinary rules and appeals therefrom.
- Changes to the above particulars notified to employee by a written statement within a month after change.
- Change resulting in relocating employee outside Kenya for over a month requires 1 month notice.
- Failure to adhere attracts fine not exceeding Ksh. 100,000/- and/or two years imprisonment.

payment of the amount that is due to the employee (difference between minimum wage and the actual wages).

- In case of payments below minimum wages, legal proceedings against employer can be instituted by a labour officer/inspector.
- Minimum Wage Guidelines once set by the Minister are published in the Kenya Gazette and can be obtained at the Government Press.
- Where employees are members of a registered trade union, their remuneration is also influenced by Collective Bargaining Agreements between the employer and the union.
- Negotiation and employer's current practices also determine the upper limit and nature of remuneration. Issues to consider include inflation rates and industry standards.
- Payable in cash or kind. There can be fringe benefits such as housing or house allowance, payment for children's education, e.t.c.

### **Determination of Wages and Salaries**

- Minimum wages and conditions of employment for certain industries are imposed by the Government under the Regulation of Wages and Orders issued annually under the Labour Institutions Act (No. 12 of 2007).
- Employees are entitled to these minimum wages and conditions of employment even if their contracts of employment state otherwise.
- Failing to adhere to guidelines on minimum wages and conditions of employment is a criminal offence. Penalty is Ksh 50,000/= or 3 months imprisonment or both together with

### **Deductions Allowable from Employee's pay**

- Contribution to a provident scheme.
- Reasonable amount for damage to or loss from wilful default of property of the employer.
- Money shortage arising from negligence or dishonesty where employee entrusted with money as per contract.
- Wages payable for days the employee was absent.
- Erroneously paid excess wages.
- Deductions authorized by law e.g. Court Order, Collective Agreement.

- Amount requested by employee on which employer has no beneficial interest.
- Amount due to employer on terms of a written agreement by way of repayment. Such deduction not to exceed 50% of net wages (i.e. wages after all such amounts above).
- Such other amounts as minister may prescribe.

Total amount of all deductions from wages above must not exceed two thirds of employee pay.

### **Pay As You Earn (PAYE)**

- The Income Tax Act places on employers an obligation to deduct and remit monthly, income tax for resident employees earning above Ksh 10,164/= per month. Employers are required also to tax benefits such as use of company vehicles.
- Annual income tax returns should be made by employers for ALL employees whether subject to PAYE or not.
- Penalty for failing to comply is twenty five per cent of the amount of tax involved or ten thousand shillings, whichever is greater. The employer is also subject to proceedings for the recovery of the tax plus interest thereon at 2 % per month.
- Directors and managers also liable to a fine of not less than ten thousand shillings but not more than two hundred thousand shillings or to imprisonment for a term not exceeding two years or to both.

### **NSSF and NHIF Deductions**

- Registration of Employers and Employees under the National Social

Security Fund Act (Cap 258) and the National Hospital Insurance Fund Act (Act No. 9 of 1998) is a statutory requirement.

- Standard NSSF contribution is Ksh 200/= deducted from employee's salary, with employer contributing an equal amount. Failure to comply is a criminal offence subject to a penalty equal to five per cent of the amount payable and a fine of up to Ksh 15,000/=.

- NHIF contribution is deducted from employee's salary and depends on the salary. Failure to comply is a criminal offence subject to a penalty equal to five times the amount of that contribution

### **Minimum Employment Rights and Benefits under the Employment Act**

- Part V and VI of the Employment Act give the basic minimum terms and conditions for any contract of service.
- Where employer's terms of service are more favourable to an employee than the terms provided in the Act then such favourable terms and conditions shall apply.
- **Hours of work** – An employee is entitled to at least one rest day in every period of seven days.
- **Annual leave** – after 12 consecutive months of service an employee is entitled to not less than 21 working days of leave with full pay.
- Where employment is terminated after two or more consecutive months of service employee is entitled to not less than one and three-quarter days of

leave with full pay in respect of each completed month of service.

- Employee may, with the consent of the employer divide the annual leave into different parts to be taken at different intervals.
- **Maternity Leave** – female employees are entitled to three months of maternity leave with full pay.
- Annual leave not forfeited on account of an employee having taken her maternity leave.
- **Paternity Leave**- male employees entitled to 2 weeks paternity leave with full pay
- **Sick leave** – after two consecutive months of service an employee is entitled to sick leave of at least 7 days with full pay, thereafter 7 days with half pay in each year.
- **Housing** – employer is obliged to provide reasonable accommodation for each of his employees or pay to the employee such sufficient sum, as rent, in addition to the salary of the employee.
- Above provision does not apply to an employee whose contract of service consolidates an element of basic salary for use by employee as rent.
- Public holidays and weekly rest days (one per week) on full pay in addition to leave days. Where employees work on public holidays they are entitled to payment at double their wage rate in addition to their normal wage.

## **Modes of Termination of Employment**

### Termination of probationary contracts

- Probation period must not exceed 6 months but extendable for another 6 months with employee consent.
- Termination notice of probationary contract is not less than 7 days or payment of wages in lieu.

### Termination by Notice Issued by Employer or Employee

- Minimum statutory notice period for monthly employment is one month
- Where no notice is given, there should be payment of wages for the notice period in lieu of notice by the party terminating
- Employees are entitled to moneys, allowances and benefits earned while in employment, e.g. salary, accrued leave payments, bonuses, retirement benefits, e.t.c.
- Certificates of Service must be given.
- Does not apply for casual workers whose engagement ends at the end of each day

### Termination on grounds of misconduct and summary dismissal

- Summary dismissal is for serious misconduct. Grounds include absenteeism, crime, intoxication, disobedience, e.t.c.
- Summary dismissal and termination on grounds of misconduct, poor performance or physical incapacity reasons thereof must be explained to the employee.



- During explanation employee entitled to have another employee or a shop floor union representative of his choice present.
- The representations of the employee and person present with him must be heard and considered before termination (Sec 41).
- In the case of dismissal after warning, warnings should be in writing and kept in the employer's records for the particular employee.
- Dismissed employees are entitled to moneys, allowances and benefits earned while in employment, e.g. salary, accrued leave payments, retirement benefits, e.t.c.
- Dismissed employees are entitled also to certificates of service.
- Upon dismissal, the employer should make a written report to the district labor office explaining the circumstances leading to, and reasons for, the dismissal as well as giving other specified details of the employee's terms of employment

#### Termination on account redundancy

- Occurs when employees cannot be utilized for any work, e.g. during a period of recession when the company has little business.
- Termination of employment in this manner should be carried out according to law and the area labor office should be notified.
- Employees are entitled to severance pay (15 days for every year worked), one month's wages in lieu of notice

and accrued leave payments and all other benefits due.

#### Unfair termination

A termination is unfair if the employer fails to prove:-

- Validity of reason for the termination
- Fairness of reason for the termination i.e. based on operational requirements of the employer or related to the employees conduct, capacity or compatibility.
- Use of fair procedure in termination ie employer was just and equitable,

Industrial Court also considers:

- procedure adopted by employer in reaching decision to dismiss the employee.
- the manner of communication of the decision and the handling of any appeal.
- the conduct and capability of employee up to the date of termination.
- extent to which employer has complied with any statutory requirements connected with the termination.
- the previous practice of the employer in dealing with the type of circumstances which led to the termination.
- the existence of any previous warning letters to the employee.

#### Service pay

- Members of registered pension schemes, employees receiving a gratuity or those registered under NSSF are not entitled to service pay for every year worked( Sec 35(6))

### **LABOUR INSTITUTIONS ACT, 2007**

- Establishes labour institutions, provides for their functions, powers and duties and related matters.

- Establishes the Industrial Court.

#### Remedial Powers of the Court in cases of wrongful dismissal (Sec 15)

- Reinstatement of employee from date not earlier than the date of dismissal
- Re-engage the employee in same or reasonably suitable capacity.
- Pay compensation to the employee to a maximum of 12 months wages.

#### Authorised Officers under the Act

##### Labour Officers

To enforce labour law compliance he may:

- require production of employment records and seize them if believed to contain evidence of an offence.
- require information on names and addresses of employees and remuneration.
- examine employee to whom a wages Order applies
- Enter and inspect premises an employee work premises to determine adherence to labour laws.
- Examine and inspect food provided for employees.
- Institute proceedings in respect of contravention of labour laws.

#### **Suggested Readings**

- The Employment Act No. 11 of 2007.
- The Labour Institutions Act No. 12 of 2007.
- The Occupational Safety and Health Act No. 15 of 2007.
- The Work Injury Benefits Act No. 13 of 2007.
- The Labour Relations Act No. 14 of 2007.
- The Industrial Court Act No. 20 of 2011
- Minimum Wage Orders (per relevant industry).

#### **WORK INJURY BENEFITS ACT, 2007**

- Act of Parliament to provide for compensation to employees for Work related injuries and diseases contracted in the course of their employment.
- A number of provisions in this Act declared null and devoid of status of law.