

OPERATIONAL RISK MITIGATION FROM A LEGAL STANDPOINT

Key ideas: a) Ensuring compliance with all applicable laws, rules and regulations with the aim of avoiding, or minimizing liability and attendant expenses

b) Eliminating/minimizing risk of unnecessary business expenses and avoidable losses by employing efficient and effective record keeping and related business practices

The key benefit for business people who think about and practice this knowledge is to ensure the continued smooth and profitable functioning of their businesses.

Major Areas

1. Industrial Accident and Related Claims by Employees/Government Against Employers

Under both common law and Statutes such as the Factories Act (Cap 514), the Employment Act (Cap 226), and the Regulation of Wages and Conditions of Employment Act (Cap 229), employers have a duty to provide safe working conditions and to take reasonable care to ensure the health and safety of their employees. In the course of their employment, employees can be subject to various perils that can cause injury, disease or death. These include factory or workplace accidents which can arise from tools, equipment or machinery that can injure, explosions and fires, occupational diseases, and motor vehicle accidents.

The employer's duty of care to employees has various elements, i.e.

- A sound and conducive working environment. The Factories Act, for instance addresses standards of cleanliness, space, ventilation, lighting, drainage, and sanitation.
- Providing the right tools and equipment for the work to be performed
- Providing, where required by law and by the nature of the work, protective gear and equipment to employees
- Not exposing employees to poisonous, noxious or otherwise dangerous substances either at all or without proper protective gear and equipment
- Providing, where necessary, appropriate training to employees before assigning them various tasks
- Fencing off dangerous machinery and locking up various dangerous tools and equipment
- Maintaining machinery, equipment and tools in proper working condition and servicing them regularly
- Ensuring employees have colleagues who are competent and responsible at their jobs so that they do not harm fellow employees

- Designing, implementing and maintaining a safe system of working. This refers to work practices, techniques and habits that ensure work is carried out as safely, efficiently and effectively as possible

When an employee is injured, contracts a disease or dies in the course of employment, they or their estate are entitled to bring an action for compensation against the employer. Compensation is recoverable under both common law and an Act of Parliament (the Workmen's Compensation Act, Cap 236). **(Refer to previous presentation: Provisions of Employment Law that Employers Should Know, for details. Available on the Legal Updates page at www.amelinyangu.net)**

Given the risk of claims against employers by employees for fatal and less serious injuries as well as diseases, employers should ensure they provide a safe working environment for their employees. This will minimize the risk of claims that can result in employers or their insurers paying significant sums as compensation. Even where employers have Workmen's Compensation insurance, a low or accident-free record is likely to reduce insurance costs. Furthermore, where accidents occur, courts, in deciding the case will consider whether the employer met the basic legal requirements for health, welfare and safety of employees.

Employers can minimize the risk of harm to employees by fulfilling their duty of care to employees. First, employers should comply with all requirements for employee protection that they may be subject to under various Acts of Parliament. These requirements vary by industry and are in such laws as the Factories Act. Employers should therefore know which requirements they are subject to and comply with them. The second aspect of fulfilling the duty of care to employees is observing the general elements of the duty of care as detailed above.

Employers are also at risk of false, fraudulent or exaggerated claims against them by employees for accidents that never occurred or where injuries suffered are falsified or exaggerated. This risk can be minimized by taking certain measures. First employers should keep appropriate and thorough records of workplace incidents. These records include Employment Registers, Accident Registers and Casual Workers Attendance and Payment Records. Daily employee attendance records can have a statement to the effect that no accident has occurred on the day of signature. These records can help disprove fraudulent claims. The second way to minimize the risk of false or exaggerated claims is to take injured employees to company assigned doctors to prepare. This is easy for employers who take medical insurance for employees.

Employers are obligated by law to provide certain basic conditions and amenities of employment. For instance, the Employment Act, Factories Act, and Regulation of Wages and Conditions of Employment Act all require that employers provide safe drinking water and sanitary facilities to employees. Compliance with these legal requirements minimizes employers' risk.

2. Emergency Response Procedures and Equipment

City Council By-Laws require that all business premises be fitted and equipped with specified emergency response equipment. This equipment includes fire extinguishers and first aid kits. Public Transport Licensing Regulations require the same of Public Service Vehicles. These requirements are also laid down in some Acts of Parliament such as the Factories Act. Compliance with these requirements has twofold benefits. First, the risk of injuries to both employees and third parties, and any claims from such occurrences, is minimized. Secondly, compliance with requirements ensures that business people are not fined by regulatory authorities.

3. Occupiers' Liability

By law, occupiers of residential and business premises are under a duty to ensure the safety of all visitors who are legitimately in the premises. It is therefore prudent to ensure that: the premises are fit for occupation and operation, any fixtures, fittings or other items or substances in the premises are unlikely to harm any person.

4. Employment Disputes

Disputes between employers and employees typically arise when employees' service is terminated. Thereafter, employees can make claims against their employers for reasons such as: whether termination was justified or properly carried out and/or whether all employee dues have been paid.

Various laws such as the Employment Act and the Regulation of Wages and Conditions of Employment Act, impose certain basic terms of employment on all employment contracts. Employers should comply with these implied terms. Hence apart from disputes with employees, an employer can also be exposed to action by regulatory authorities for non-compliance with basic, statutorily imposed terms and conditions of employment. Here, it's important to note the impending overhaul of labor laws in Kenya. The new laws are likely to confer improved terms and conditions on employees and to impose stiffer penalties on employers for non-compliance.

The best way for employers to mitigate the risk from these labor claims is, first, to know and comply with the basic legal requirements on the terms and conditions of employment and termination of employment. Secondly, employers should keep appropriate, complete and current employment records including employment contracts. Employers can seek legal help in drafting employment contracts to ensure compliance.

Employment issues are addressed in detail in our earlier presentation to members of the Queensway Business Club, **Provisions of Employment Law that Employers Should Know** (Legal Updates page on www.amelinyangu.net)

5. Vicarious Liability for Acts and Omissions of Employees, Agents, and Independent Contractors

Generally, employers are responsible for any injury, damage or loss that results to third parties from the deliberate, negligent, fraudulent or reckless acts or omissions of their employees when acting in the course of their employment.

Where employers are in the position of principals, they are similarly responsible for the deliberate, negligent, fraudulent or reckless acts or omissions of their agents when the agents act within the scope of the authority given by the principal. An agent is a person appointed by another, called the principal, to do certain specific or general acts on behalf of the principal. The acts of the agent bind the principal as if they were done by the principal.

On the other hand, employers are generally not liable for any injury, damage or loss resulting from the acts or omissions of independent contractors. An independent contractor is an independent (not an employee or agent) businessperson engaged to give certain services for the appointing person.

While there may not be much that can be done to prevent some occurrences leading to such vicarious liability, certain minimum precautions that can be taken. First, employers can ensure that employees are reliable, well-trained, experienced, and suited to the tasks assigned to them. Second, employees should be provided with tools, machinery, vehicles and other requirements of their work that are in proper working condition. These precautions are applicable also when selecting and working with various agents. A third way to minimize risk is to use qualified and competent independent contractors where appropriate instead of using employees. This can be for jobs that pose significant risks to members of the public.

6. Contracts

Businesspeople regularly enter into oral and written contracts of many kinds. The key issue that they should bear in mind is the advisability of having written contracts that set out all the terms and conditions the parties have agreed upon. Comprehensive written contracts minimize the risk of disputes and, where disputes occur, enable the true intention of the parties to be known.

Writing is furthermore a requirement under the Sale of Goods Act (Cap 31) in contracts for the sale of goods worth more than Ksh 200/=, under the Law of Contract Act (Cap 26) and contracts for sale of immovable property.

Another important area in contracts is asset acquisition. In the course of business, various movable and immovable assets will be acquired. In most cases it is vital that the acquirer conduct thorough due diligence investigations before committing to purchase and making any payments. The most important aspects of these investigations will cover the title of the seller and the physical condition of the asset(s) being acquired. As previously noted, it

is important and sometimes mandatory to have a written contract that is comprehensive and correctly executed. For purchase of immovable property (buildings and/or land) written contracts are required by law. Such transactions will require the advice of a trusted and competent advocate for the overall goal of protecting the buyer's interests. Searches can be conducted for immovable property and also for chattels (movable property) that have registries e.g. motor vehicles.

In contracts, it is important to include certain key clauses. These are clauses on correct and accurate description of the parties, termination, and dispute resolution. Contracts should be correctly executed.

In entering into contracts, it is important to know the distinction between an incorporated company and a business name (sole proprietorship or partnership). A company has legal personality and is the entity conducting business and acquiring assets in its own name. On the other hand, business names are not distinct legal entities. They are representations of the person(s) who registered them and who use the name to trade. Hence any dealings with sole proprietorships or partnerships are really dealings with the individuals and should be arranged as such. Contracts should be with the individuals indicating that they "trade as" a certain business name. Such contracts should therefore be signed by the individuals. On the other hand, contracts with companies should be executed using a company seal, and the seal should be witnessed by two directors or a director and the company secretary.

7. Contractual Conditions and Warranties

In transactions for the sale of goods, the Sale of Goods Act (Cap 31) imposes certain conditions and warranties which apply even if the parties are silent about them. Conditions are fundamental terms of the contract, the breach of which entitles the aggrieved party to terminate the contract or alternatively bring a suit for damages. Warranties are minor terms of the contract which when breached, do not entitle the aggrieved party to terminate the contract but only to bring a suit to recover damages.

These terms imposed by law add to any express conditions and warranties that the parties may agree on. From a risk mitigation perspective, the key implied conditions and warranty are:

- In a contract for the sale of goods identified by description, there is an implied condition that the goods actually delivered shall correspond with the initial description and that they are of merchantable quality
- In most contracts for sale of goods, there is an implied condition that the goods are reasonably fit for the purpose for which they are sold

Businesspeople who sell goods do occasionally have disputes with customers over goods that fail to work as expected. The question is usually whether the product failure that has occurred is covered by a warranty so that the seller should repair or replace it. Some

buyers spoil products by using them badly and then want to get a refund or replacement. This exposes the seller to risk of loss.

The best way to reduce risk from warranties is to have clear warranty terms that indicate what the extent of the warranty on the goods is. Warranties ideally should cover only manufacturer's defects. They should indicate the warranty period and that in the event of any problem with the product within that period the customer should return the item directly to the seller for repair not replacement. Warranties can be printed on the sale receipt or can be contained on a separate warranty card.

8. Bad Debts

Many businesses experience in varying degrees of severity the problem of debtors who do not settle their debts either at all or in time.

To enable recovery of receivables, either in legal proceedings or otherwise, businesses should keep appropriate and complete records of credit sales. The records that should be kept include: signed Local Purchase Orders that are verified as authentic, Pro Forma Invoices and Invoices that are signed and stamped by an authorized employee of the customer or the individual customer, and Delivery or Goods Received Notes that are signed and stamped by an authorized employee of the customer or the individual customer. Invoices and Delivery Notes should have a statement that indicates the credit period. They should also indicate that interest is payable on overdue accounts and set the rate at commercial levels (although where no interest rate is stipulated, a court judgment can award interest at court rates).

Other precautions against bad or overdue debts are: getting copies of appropriate identification documents from credit customers whether individuals or organizations, verifying customers' physical addresses, verifying that individuals who claim to represent organizations actually do so before selling to them. In establishing the customer's identity, it is important to know the distinction between an incorporated company and a business name (sole proprietorship or partnership). A company has legal personality and is the entity conducting business and acquiring assets in its own name. On the other hand, business names are not distinct legal entities. They are representations of the person(s) who registered them and who use the name to trade. Hence any dealings with sole proprietorships or partnerships are really dealings with the individuals and should be structured as such. Contracts for sale of goods, for instance, should be with the individuals.

Sellers may also take the precaution of conducting a search on companies and businesses to accurately establish matters such shareholders, proprietors, capital, e.t.c.

Where all these practices are strictly followed and precautions taken bad debts will not be a major problem and where accounts are overdue, it is relatively easy to bring successful legal proceedings against the debtor. In case of legal proceedings for recovery of an easily ascertained amount backed by proper documentation, the proceedings can be expedited by making a summary judgment application. Note that the greater portion of

the legal and other costs of the legal proceedings to recover debts are recoverable from the debtor.

9. Tax Compliance

Taxpayers can avoid exposure to tax problems (stiff penalties, interest, possible shutdown of business, and distractions from usual business activities) by complying with established tax laws and requirements. There are various tax systems that businesses and their employees are subject to. These include income tax for business owners and their employees, corporate tax, Value Added Tax, Customs and Excise Duty and turnover tax (from 2008).

It is not illegal to arrange one's affairs in such a manner as to minimize their tax burden. In this regard we refer you to our article **Tax Planning in Kenya (Legal Updates page on www.amelinyangu.net)** for tips on how to mitigate the tax burden.

10. Business Permits and Licenses

It is important that businesses obtain all necessary approvals, permits, and licenses to enable them conduct operations.

11. Consumer Safety and Protection

Kenya does not currently have consumer protection legislation but Parliament is debating the Consumer Protection Bill. Consumer grievances against sellers are currently handled within the framework of existing laws such as contract and tort law. In this area the key thing to have in mind is to sell products or services that meet the minimum contractual expectations of consumers and that do not cause any harm. Where appropriate therefore, sellers should procure product testing and verification to ensure quality. Such testing and quality assurance tests are a legal requirement for certain industries and business people should comply.

Business people who obtain quality certification such the KEBS Diamond Mark of Quality or ISO standards for their products or services can also enhance the business's reputation in the market.

12. Shareholder and Partner Disputes

Occasionally, co-investors, whether shareholders in a company or partners in a partnership, fall out. After the disputes emerge, it can become impossible to continue in business together and there needs to be a separation. Such separations can take various forms such as: winding up of a company; certain shareholders sell their shareholding; a partnership is dissolved, e.t.c. They are often acrimonious, protracted and expensive. Typically, some shareholders or partners are oppressed. One way to minimize the acrimony, time and other resources spent in the separation and to guard against oppression of weak shareholders or partners is to prepare agreements that state what is to

happen in the event of a separation. For a company, a Shareholders Agreement is typically used while a Partnership Deed is drafted for a partnership.

Legal Audit/Check up

Various industries have specific requirements and regulations that apply to participants. For instance building projects require an Environmental Impact Assessment and thereafter approval by the National Environment Management Authority (NEMA). Another example is the requirement that imports of dry cell batteries meet certain minimum quality standards.

The key point is that business people in various industries should know what special legal requirements apply to them and ensure they comply. Where appropriate, a business can work with lawyers to conduct a comprehensive study of the laws to which a business entity is subject vis-à-vis actual practice to ensure knowledge and compliance. This review can extend to operational risks of liability that can be minimized by following effective and efficient business practices.