

PROVISIONS OF EMPLOYMENT LAW THAT EMPLOYERS SHOULD KNOW

Presentation to Members of the
Barclays Bank Business Club

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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
- Denying employees 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 a working environment or working conditions/circumstances which expose employees to risk of disease, injury or death for which employer will be liable
- Failure to take up Workmen's Compensation Insurance

Major Types of Employment and the Implications of Each

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

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
- 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 (Chapter 226, Laws of Kenya) requires that contracts for a period of six months or more are reduced into writing and be signed by the employee
- Under the Employment Act (Cap 226), employers are obligated to maintain Employee Registers with a list of employees and terms of employment. Penalty for entering false information on Employment Register is Ksh 1,000/= 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

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. Employment Act (Cap 226), Regulation of Wages and Conditions of Employment Act (Cap 229), Factories Act (Cap 514), Workmen's Compensation Act (Cap 236)
- 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

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 Conditions of Employment Act (Cap 229)
- 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 400/= and payment of the amount that is due 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 at Ksh 200/=
- 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.

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 that tax plus interest thereon at 2 % per month. Directors and managers are 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

Workmen's Compensation for Death, Injury or Disease in the Course of Duty

- Employers have a duty under both common law and statutory law to provide safe working conditions and to take reasonable care to ensure the health and safety of employees
- Employers with factories should observe the health and safety regulations imposed by the Factories Act (Cap 514)
- Compensation for death, injury or disease is based on the Workmen's Compensation Act (Cap 236) and Common law
- Compensation under the Act excludes employees (not being manual laborers) who earn over Ksh 33,333/= per month
- Compensation under the Act is calculated on the basis of the workman's earnings and the degree of injury resulting in the employee being incapacitated
- In case of fatal injuries, compensation is paid to dependants

- Compensation can be made under both the Act and Common law. However any compensation received under the Act will be deducted from any damages awarded in a common law suit
- Employers can take insurance cover for payment of claims

Employment Rights and Benefits

- All fixed-term and permanent employees are entitled to a minimum of 21 working days per year of leave with full pay
- Where employment is terminated after two or more months of service, payment for one and three quarters days of leave for each completed month of service
- Women are entitled to two months maternity leave with full pay (in lieu of annual leave)
- Sick leave (at least 7 days with full pay, thereafter 7 days with half-pay) in each year. This may vary by industry
- 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
- Housing or house allowance
- Overtime payments are stipulated for some industries under Cap 229
- Severance pay in case of redundancy
- Safe working conditions

Major Modes of Termination of Employment

Termination by Notice Issued by Employer or Employee

- Notice should be for the mutually agreed period
- 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 (testimonials) should be given if asked for
- Does not apply for casual workers whose engagement ends at the end of each day

Dismissal/Sacking

- Due to wrongs done in connection with employment
- Dismissal can be effected after warning or summarily/instantly in case of gross misconduct
- In the case of dismissal after warning, warnings should be in writing and kept in the employer's records for the particular employee
- Summary dismissal is for serious misconduct. Grounds include absenteeism, crime, intoxication, disobedience, e.t.c.
- 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 (testimonials)
- 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

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

Services We Offer to Assist Employers Fulfil Their Legal Obligations and Safeguard Their Interests

- Legal audits of employment practices and policies to ensure legal compliance and minimisation of exposure to liability
- Drafting of employment contracts
- Legal representation in labour disputes
- Legal representation in disputes with governmental bodies such as the Kenya Revenue Authority
- General legal advice

Suggested Readings

- The Employment Act, Chapter 226, Laws of Kenya
- The Regulation of Wages and Conditions of Employment Act, Chapter 229, Laws of Kenya
- The Workmen's Compensation Act, Chapter 236 Laws of Kenya
- The Rights of an Employee in Kenya, Oketch Owiti (1990)
- Minimum Wage Guidelines (per relevant industry)