

Offences under the Employment Act

The purpose of creating offences relating to employment - which ordinarily is a contractual relationship is perhaps to act as a deterrent and ensure that both parties' interests are protected. This article is however, of greater interest to an employer since employment laws always seem to favor the employee over the employer. This is because the employer is considered to have an advantage over the employee. Consequently, a majority of the offences under the Employment Act relate to employers. Below, are the offences created by the Employment Act in Kenya:

- 1. Use of Forced Labour:** Section 4 of the Employment Act prohibits the use of forced labour and makes it an offence for anyone to use or assist another person in recruiting, trafficking or using forced labour. An employer who commits this offence is liable upon conviction, to pay a maximum fine of five hundred thousand shillings or to imprisonment for a maximum of two years or both. The law however exempts from forced labour any work/service by virtue of compulsory military service -except where it involves recruitment of children. The law also exempts any work/ service which is a normal civic obligation of any Kenyan citizen, work done as a consequence of a conviction in a court of law, work/ service demanded in cases of an emergency and minor communal services performed by the members of the community in the direct interest of their community, provided the members of the community or their representatives are consulted.
- 2. Discrimination:** Employee discrimination is an offence under the Employment Act. Section 5 prohibits discrimination based on race,

colour, sex, language, religion, political or other opinion, nationality, ethnic or social origin, disability, pregnancy, mental status or HIV status. It also prohibits discrimination in respect of recruitment, training, promotion, terms and conditions of employment, termination of employment or other matters arising out of the employment. For this offence, the employer bears the burden of proving that the discrimination did not take place, and that the discrimination is not based on any of the grounds listed above.

- 3. Failure to give statements prescribed by law:** Failure to give an employee a statement of employment particulars, a statement of disciplinary rules and changes and an itemized pay statement is an offence under Section 16(4) of the Employment Act. The offence attracts, on conviction, a maximum fine of one hundred thousand shillings or imprisonment for a maximum of two years or both.
- 4. Failure to pay an employee:** Under Section 18, it is an offence for an employer to wilfully fail to make payment of or to tender the wages earned or payable to an employee or failing to tender the payment in a manner prescribed by law. On conviction, such an employer is liable to a maximum fine of one hundred thousand shillings or to imprisonment for a maximum of two years or both.
- 5. Failure to pay deducted amounts:** An employer is allowed to make statutory deductions and remit them on behalf of the employee. Failure to pay such deducted amounts in accordance with the period and other requirements specified in the law, agreement court order or arbitration is an offence, which attracts on conviction, a maximum fine of one hundred thousand shillings or imprisonment for a maximum of two years, or both.
- 6. Failure to pay wrongfully deducted amounts:** Under Section 25, failing to pay an employee amounts wrongfully deducted from his



remuneration is an offence and an employer who commits this offence is liable to a maximum fine of one hundred thousand shillings or to imprisonment for a maximum of two years or both on conviction. Additionally, such an employer is required to repay any remuneration wrongfully withheld or wrongfully deducted from the employee's wages.

7. **Refusal to give a certificate of service:** Under Section 51 of the Act, it is an offence for an employer to wilfully fail or neglect to give an employee a certificate of service or include a false statement in the certificate of service. Such an employer is liable on conviction, to a maximum fine of one hundred thousand shillings or to imprisonment for a maximum of six months or both.
8. **Employment by written contract for a child aged between 13 and 16 years:** Under Section 57 of the Act, it is an offence for a person to employ a child aged between thirteen and sixteen years or to cause such a child to be employed by a written contract. The offence is punishable by a maximum fine of one hundred thousand shillings or imprisonment for a maximum of six months or both. This also applies to parents, guardians or people in charge of the child and is subject to the provisions of the Industrial Training Act relating to contracts of apprenticeship for children of the 13-16 age bracket.
9. **Employment of a child:** Under Section 64, it is an offence for a person to employ, engage, or use a child in an industrial undertaking in contravention of the Act or use a child in any activity that is considered worst form of child labour. Such a person, on conviction is liable to a maximum fine of two hundred thousand shillings or to imprisonment for a maximum of twelve months or both. It is a defence if the accused person proves that he genuinely believed that the child was above the age limit.

10. Making false entries in employment records: Under Section 75 of the Act it is an offence for a person to knowingly make false entries into records required to be kept under the Employment Act, or to knowingly produce such false entries to an authorised officer. On conviction such a person is liable to a maximum fine of one hundred thousand shillings or imprisonment for a maximum of six months or both.

11. Failure to provide employment management information to the Director of Employment: Under Section 76 of the Act, an employer who employs twenty-five employees or more is required to notify the Director of employment when a vacancy arises and when an employee is terminated. Failure to provide this information constitutes an offence, which attracts a maximum fine of one hundred thousand shillings or imprisonment for a maximum of six months or both.

12. Prompting a foreign informal employment contracts: It is an offence to induce a person to go abroad under informal contract or to employ or knowingly help in the employment of a person with the intention that when he is employed, that person shall go outside Kenya. It is also an offence to induce or attempt to induce an employee to go outside Kenya. On conviction, this offence attracts a maximum fine of two hundred thousand shillings or imprisonment for a maximum of six months or both.

Generally, where the Act does not provide a specific penalty, the general penalty is a maximum fine of fifty thousand shillings or imprisonment for a term not exceeding three months or both. Where an offence is also punishable under another law, the offender can be punished under that other law. However, the offender cannot be punished twice for the same offence.