



GLOBAL EXPANSION GUIDEBOOK EMPLOYMENT

South Africa



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INTRODUCTION

Welcome to the 2024 edition of DLA Piper's *Global Expansion Guidebook – Employment*.

GLOBAL EXPANSION GUIDEBOOK SERIES

Many companies today aim to scale their businesses globally and into multiple countries simultaneously. In order to help clients meet this challenge, we have created a handy set of global guides that cover the basics that companies need to know. The *Global Expansion Guidebook* series reviews business-relevant corporate, employment, equity compensation, intellectual property and technology, and tax laws in key jurisdictions around the world.

EMPLOYMENT

As business grows more global, the challenge for in-house counsel and HR professionals responsible for workforce issues and employment law compliance is intensifying. This guide is designed to meet that challenge head on and has been produced in response to feedback from clients in both established and emerging international businesses. We hope it will become an invaluable resource for you.

This 2024 edition of our popular guide covers all of the employment and labor law basics in 63 key jurisdictions across the Americas, Asia Pacific, Europe, the Middle East and Africa. From corporate presence and payroll set-up requirements, language rules, minimum employment rights, business transfer rules, through to termination and post-termination restraints, we cover the whole employment life span.

We have used our global experience and local knowledge to bring you this newest edition of our guide. With over 300 lawyers, DLA Piper's global Employment group is one of the largest in the world, with one of the widest geographical footprints of any global law firm. We partner with our clients, wherever they do business, to find solutions and manage risk in relation to their legal challenges and objectives.

While this guide provides high-level guidance, it is not a substitute for legal advice, and we encourage you to take advice in relation to specific matters. If you wish to speak to any of our contributors, their contact details are set out towards the back.

We hope that you find this guide valuable and we welcome your feedback.

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SOUTH AFRICA



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LEGAL SYSTEM, CURRENCY, LANGUAGE

Common law, civil law and customary law, subject to the Constitution. The official currency is the South African Rand (ZAR). There are 11 official languages: Afrikaans, English, Ndebele, Northern Sotho, Sotho, Swazi, Tswana, Tsonga, Venda, Xhosa and Zulu.

CORPORATE PRESENCE REQUIREMENTS & PAYROLL SET-UP

A foreign company conducting business within South Africa must register as an "external company" with the Companies and Intellectual Property Commission if it enters into employment contracts in South Africa, and it may be required to pay corporate income tax. A foreign company is regarded as conducting business within South Africa if that foreign company is a party to 1 or more employment contracts within South Africa or is engaging in a course of conduct, or has engaged in a course of conduct, in South Africa over the past 6 months that would lead a person to reasonably conclude that the entity intended to continually engage in business or conduct nonprofit activities in South Africa. Companies, including external companies, are obliged to register and deduct tax from an employee's salary and have reporting duties to the South African Revenue Service. The maximum personal tax rate is currently 45 percent.

Employers are required to make contributions to an unemployment insurance fund. Employee contributions to the unemployment insurance fund are deducted and paid on the employees' behalf by the employer. The employer is also required to match these contributions.

PRE-HIRE CHECKS

Required

Immigration compliance.

Permissible

It is permissible to carry out background checks. A criminal record check may only be carried out if the candidate provides a copy of their fingerprints. Furthermore, in terms of the Protection of Personal Information Act, 2013 (POPIA), which came into effect on July 1, 2020, consent is required to conduct a criminal record check.

The National Credit Act, 2005 prohibits the release of credit reports "unless directed by the instructions of the consumer." Furthermore, the purposes for which credit reports may be used are limited in that they should only be used for considering a candidate for employment in a position that requires trust and honesty and entails the handling of cash or finances. It also provides that the consent of the consumer should be obtained prior to requesting the credit report for this purpose.

A medical check requires the consent of the individual.

While consent is not required to conduct other checks such as a check on qualifications, references and employment history, it is advisable to obtain consent. Furthermore, in terms of POPIA the applicant should be notified about the background checks that will be carried out.

IMMIGRATION

All non-citizens must hold an appropriate work visa. Local sponsorship for a work visa is generally required, and under certain categories of work visa, it may also be necessary to show that no local person can fill the applicant's position. Foreign nationals who overstay their visa duration will be declared undesirable, and their ability to apply for any type of visa thereafter will be adversely affected.

HIRING OPTIONS

Employee

Full-time permanent employment, fixed-term, part-time and employment below the minimum hours per month, which may result in exclusion from minimum benefits. When engaging employees on fixed-term employment contracts, there may be a risk of a reasonable expectation of renewal or continued employment if the fixed-term employment contract is repeatedly renewed. In addition, where an employee is engaged on a fixed-term employment contract for longer than 3 months and the employee earns below a threshold amount determined by the Minister of Labour (*ie*, the Basic Conditions of Employment Act 75 of 1997 (BCEA) [RVI] threshold), which is set at ZAR241,110.59 per annum (equivalent to ZAR20,092.55 per month) with effect from March 1, 2023 and is likely to increase with effect from March 1, 2024, the employee is deemed to be employed on a permanent basis, unless one of a limited number of exceptions and/or reasons for using longer fixed-term employment exists. Furthermore, the employee must not be treated less favorably than a comparable employee performing the same or similar work unless there is a justifiable reason for different treatment.

Certain obligations arise for employers who employ part-time employees earning below the BCEA threshold. After an initial period of 3 months from commencement of such part-time employment, part-time employees earning below the BCEA threshold must be treated, on the whole, not less favorably than a comparable full-time employee doing the same or similar work, unless a justifiable reason for different treatment exists. After 3 months, employers are also required to provide part-time employees (earning below the threshold) with access to training and skills development, on the whole, not less favorable than the access applicable to comparable full-time employees.

A number of rights in the BCEA, including those relating to regulation of working time and leave, do not apply to employees who work fewer than 24 hours a month.

Independent contractor

Independent contractors are excluded from the employment protections afforded to employees, but legislation imposes a presumption of employment if certain elements exist in the working relationship, such as the right of supervision on the part of the employer. The presumption applies only to persons earning below the BCEA threshold. For other workers, the common law dominant impression test applies. There is no single indicator of an employment relationship. Instead, the court will look at the relationship as a whole to determine whether the relationship is one of employment or independent contracting. The level of control exercised by the employer over the "employee" is an important aspect to be considered.

Agency worker

Employees earning below the BCEA threshold enjoy additional protection if placed at a client through an agency (ie, temporary employment service). Except in limited circumstances, if the agency worker is placed at the client for longer than 3 months, the agency worker is deemed employed by the client for the purposes of the Labour Relations Act, 1995 but will remain employed by the agency or temporary employment service for the purposes of all other legislation. The agency worker also becomes entitled to be treated, on the whole, not less favorably than comparable permanent employees of the client unless there is a justifiable reason for different treatment. No deemed employment applies to agency workers earning in excess of the BCEA threshold.

EMPLOYMENT CONTRACTS & POLICIES

Requirements

In general, no formalities are prescribed, although the BCEA requires that a minimum list of written particulars of employment be provided. Compliance need not be in the form of a contract of employment; however, written employment agreements are common. Offers of fixed-term employment for employees earning below the BCEA threshold must be in writing and must contain certain prescribed terms (eg, the reason for use of a fixed-term agreement). Contract comes into existence upon valid acceptance of a valid offer of employment. Consensus with regard to the nature of the services rendered and remuneration is required. On commencement of the employment relationship, the employer is required to provide the employee with information such as the calculation and method of payment. The employee cannot contract out of certain rights contained in the BCEA.

Probationary

Probationary periods are permitted. The duration of the probationary period must be reasonable when regard is had to the period that would be required to determine the employee's suitability for the job, and probation periods of 3 to 6 months are fairly common. An employer may not simply terminate an employee's employment at the end of the probationary period, and is instead required to follow a fair performance management process in terms of which an employee is given reasonable guidance, counseling and training before terminating their employment. Thus, a fair process is required whether or not the employee is on probation, but South African courts have held that the reasons for the dismissal for poor performance may be "less compelling" when an employee is on probation.

Policies

An employer must have a sexual harassment policy as well as a policy dealing with protected disclosures (ie. a whistleblowing policy). In regard to the former, a new code has been published in South Africa, called the Code of Good Practice on the Prevention and Elimination of Harassment in the Workplace, in an attempt to prevent and manage harassment in the workplace. The new Code has created additional obligations for employers and employees. In particular, the Code:

- Expands on the definition of harassment
- Changes the definition of sexual harassment
- Refers to a new category of harassment, namely racial, social and ethnic origin harassment
- Expressly provides that a perpetrator and a victim can be an employee or 3rd party such as a contractor, supplier or another person who has dealings with the employer and
- Provides for additional sick leave for employees who are harassed.

The Code also sets out certain guidelines in terms of what should be included in employers' policies, procedures and practices related to harassment and what steps employers should take to deal with harassment in the workplace.

In addition, the law provides that all employers must adopt disciplinary rules that establish the standard of conduct required of employees. This generally takes the form of a disciplinary code. Other policies are recommended but not mandatory. Employers are not required to have written health and safety policies unless directed otherwise but are required to adhere to the requirements contained in the Occupational Health and Safety Act. Employers who are responsible parties (ie, data controllers) in terms of POPIA are required to have a PAIA Manual in place which sets out both a summary of the employer's processing activities and the process for data subjects to follow should they wish to request access to information.

Third-party approval

None required.

LANGUAGE REQUIREMENTS

When rights of employees are affected, employers are required to ensure that the employees understand the action taken, or information imparted. This may require that information be supplied in a language that the employees can understand. Disciplinary proceedings may be considered unfair if conducted in a language with which the employee is insufficiently familiar to enable effective participation in the proceedings. Translators must then be supplied.

WORKING TIME, TIME OFF WORK & MINIMUM WAGE

Employees entitled to minimum employment rights

Independent contractors are excluded from all employment protection provided that they are part of genuine independent contractor relationships, failing which there may be a misclassification risk. Specific categories of employees may further be excluded from some legislative protections – for instance, employees working less than 24 hours per month are excluded from minimum employment terms under the BCEA, and employees earning above the BCEA threshold are not entitled to overtime payments unless their contracts of employment provide otherwise.

Working hours

Employees who earn below the BCEA threshold may work a maximum of 45 ordinary hours a week (ie, 8 hours per day for employees who work a 6-day week and 9 hours per day for employees who work a 5-day week), subject to the exemptions identified in the BCEA. Employees who earn below the BCEA threshold may be required to work up to 10 hours' overtime per week provided that they are only required to work a maximum of 12 hours in any day. Employees earning above the BCEA threshold, senior managerial employees and employees engaged as sales staff who travel to the premises of customers and who regulate their own hours of work may be required to work all reasonable hours necessary to efficiently perform their duties and responsibilities, including on weekends and public holidays, without any additional pay. Rules on rest breaks, night work and rest periods between shifts apply. Agreements on compressed work weeks and averaging of work hours may impact maximum work hours.

Overtime

Overtime may be worked if agreed between the employer and employee. An agreement to work overtime concluded in the first 3 months of employment is only valid for 12 months. Limitations on maximum overtime apply (ie, 10 hours per week, or 15 hours in terms of a collective agreement), but agreements on compressing work weeks and averaging of work hours may alleviate limitations. Compensation for overtime is payable to employees earning below the BCEA threshold, but higher-earning employees are excluded from overtime payment unless the employment contract provides for it. Minimum statutory overtime rates are either 1.5 times the normal rate or 2 times the normal rate, with the highest rate being payable if the overtime is worked on a Sunday or public holiday and the employee is not normally required to work on Sundays and/or public holidays. Time off may be given in lieu of paying overtime by agreement.

Wages

The National Minimum Wage Act, 2018 provides for a minimum wage of ZAR25.42 per hour with effect from March 1, 2023. The minimum wage is also ZAR25.42 per hour for the farming sector and the domestic worker sector with effect from March 1, 2023. The minimum wage will increase to R27,58 per hour effective from March 1, 2024. This new rate will also be applicable to farm- and domestic workers.

Vacation

Employees are entitled to a minimum of 21 consecutive days' paid annual leave per annum on full remuneration in addition to official public holidays.

Sick leave & pay

All employees are statutorily entitled to paid sick leave equal to the number of days that the employee would work during a 6-week period per every 36-month employment cycle. Payment is based on basic wages the

employee would have received for work on that day, not full remuneration. Pro-rated leave entitlements may apply for shorter periods of employment and, in the first 6 months of employment, an employee is only entitled to 1 day's sick leave for every 26 days worked.

Maternity/adoption/commissioning parental/parental leave and pay

Currently a minimum of 4 consecutive months of unpaid maternity leave. Employees may claim partial remuneration through the Unemployment Insurance Fund. An employee who adopts a child under the age of 2 is entitled to 10 consecutive weeks' unpaid adoption leave, provided that, if the adoption order is in respect of 2 adoptive parents, then only 1 adoptive parent may apply for adoption leave and the other adoptive parent may apply for parental leave. An employee who is a commissioning parent in a surrogate motherhood agreement is entitled to 10 consecutive weeks' unpaid commissioning parental leave upon the birth of a child as a result of a surrogate motherhood agreement, provided that, if a surrogate motherhood agreement has 2 commissioning parents, only 1 commissioning parent may apply for commissioning parental leave and the other may apply for parental leave.

Employees who are not eligible for maternity leave, adoption leave or commissioning parental leave are eligible for 10 consecutive days' unpaid parental leave in the event of the birth or adoption of a child. While the abovementioned leave is unpaid, employees may claim benefits from the Unemployment Insurance Fund.

These leave types may be amended in view of a recent judgment in South Africa holding that these provisions are unconstitutional insofar as they unfairly discriminate between mothers and fathers and between one set of parents and another on the basis of whether the children were born of the mother, conceived by surrogacy or adopted. The Constitutional Court has not confirmed the judgment.

Employees are also entitled to 3 days' paid family responsibility leave to be used when an employee's child is sick or in the event of the death of a close family member.

Other leave/time off work

None.

DISCRIMINATION & HARASSMENT

Direct and indirect unfair discrimination is prohibited in terms of the Employment Equity Act, 1998. No person may be unfairly discriminated against on the basis of any listed ground or other arbitrary ground. The listed grounds are race, gender, sex, pregnancy, marital status, family responsibility, ethnic or social origin, color, sexual orientation, age, disability, religion, HIV status, conscience, belief, political opinion, culture, language, birth and any other arbitrary ground. Sexual harassment and unequal pay for work of equal value on prohibited grounds are given express protection as forms of unfair discrimination.

Where an employer is a designated employer (ie, employs more than 50 employees or has an annual turnover in excess of the prescribed threshold), they are obliged to put into place affirmative action measures to ensure that suitably qualified people from designated groups (ie, African, Colored, Indian, women and people with disabilities) have equal employment opportunities and are equitably represented in all occupational levels in the workforce. Proposed amendments could revise the definition of a 'designated employer' to remove the annual turnover threshold. While this amendment was anticipated to take effect in 2023, it has not yet come into effect..

WHISTLEBLOWING

The Protected Disclosures Act, 2000 protects employees and workers from an occupational detriment as a result of having made a protected disclosure. The Companies Act, 2008 extends whistleblowing protection to, among others, suppliers of goods or services to the company, which may include all types of personal services, irrespective of classification as employee or independent contractor.

BENEFITS & PENSIONS

The contract of employment determines whether the employee is entitled to any further benefits, including subsistence, travel and pension allowances, bonuses or acting allowances.

There is no obligation on employers to provide pension fund benefits and medical aid benefits to employees.

DATA PRIVACY

The right to privacy is protected under the Constitution of the Republic of South Africa, 1996, the common law and the POPIA. Case law recognizes that the right to privacy is not absolute and may be limited where it is reasonable and justifiable to do so. Personal information may be processed on the basis of one of the justifications for processing personal information under POPIA. These justifications include consent and where it is necessary for pursuing the legitimate interests of the responsible party or employer or 3rd party to whom it is disclosed.

RULES IN TRANSACTIONS/BUSINESS TRANSFERS

Employees automatically transfer to the new employer by operation of law in the event of a transfer of a business or service as a going concern. There is no general consultation requirement, and employees transfer on terms and conditions that are, on the whole, not less favorable. Disclosure of information to employees required as well as the conclusion of a written agreement setting out a valuation of the accrued employee-related liabilities, with failure to do so resulting in limited joint and several liability for the 2 employers for a period of 12 months if an employee is dismissed for operational requirements. A dismissal that is related to a transfer is automatically unfair, but dismissals due to genuine operational requirements may still be implemented if the reason for dismissal is unrelated to the transfer.

EMPLOYEE REPRESENTATION

Employees are constitutionally entitled to join a trade union, to be represented by such trade union, and to strike. Industry-wide collective bargaining agreements may be concluded, which apply to parties in a bargaining council (ie, a body formed by organized labor and organized employers for a particular sector, which forms the forum for industry wide collective bargaining). The result is an extensive framework of collective bargaining, organizational rights, collective agreements and bargaining councils that play a central role in most commercial and employment activities.

TERMINATION

Grounds

There is no employment-at-will. Termination is permissible but must be both substantively and procedurally fair. Dismissal is only justifiable by reason of misconduct, incapacity (ie, ill-health or performance) or operational requirements. Termination by effluxion of time (ie, fixed term or retirement age) is not considered dismissal; hence there is no requirement for a fair reason or fair process in such circumstances.

Employees subject to termination laws

All employees, regardless of their income or length of service, are protected from unfair dismissal.

Prohibited or restricted terminations

There are increased penalties for automatically unfair dismissals. Automatically unfair dismissals include for instance dismissals due to employee participation in lawful strike action, dismissals due to an employee's pregnancy or a reason related to pregnancy, dismissal on account of having made a protected disclosure, dismissal related to a transfer and dismissal for any unfairly discriminatory reason.

Third-party approval for termination/termination documents

No approval is required from any labor authority unless this is a condition imposed by the competition law authorities arising from an intermediate or large merger.

Mass layoff rules

Strict information and consultation rules apply to all retrenchments (ie, operational requirement dismissals or retrenchments). Additional requirements apply to large-scale retrenchments which are governed by section 189A of the Labour Relations Act, 1995. This applies where the employer employs more than 50 employees and contemplates the retrenchment of a prescribed threshold number of employees compared with the total number of employees in the workforce, taken together with the number of employees retrenched during the past 12 months.

No notice to government officials required, but the involvement of the Commission for Conciliation, Mediation and Arbitration is required in the case of mass retrenchments.

Notice

Except for the limited instances justifying summary dismissal, minimum BCEA notice periods of between 1 week and 4 weeks apply, unless contracts of employment provide for longer notice, or a collective agreement provides a shorter period. Notice to be given in writing. Notice cannot be given while the employee is on any type of leave.

Statutory right to pay in lieu of notice or garden leave

Employer may freely elect to pay remuneration in lieu of notice, irrespective of who gives notice. The decision to waive the obligation to work during a notice period rests with the employer, but the employee must agree to a waiver of the obligation to pay remuneration. The employee cannot be compelled to take accrued leave during the notice period. Garden leave is not regulated by statute.

Severance

Only payable in the event of operational requirement dismissals. Minimum of 1 week's remuneration per completed year of service, subject to additional payments agreed upon in the consultation period. Severance is one of the mandatory topics of consultation.

POST-TERMINATION RESTRAINTS

In principle, enforceable, with the party seeking to escape its effect having the onus of proving that the restraint ought not to be enforced, for being unreasonable and/or against public policy. The enforcing party must, however, be able to show that there is a proprietary interest worthy of protection, and the limitations to competition must not go beyond what is reasonably necessary to protect such legitimate business interest. Furthermore, the restraint must be reasonable as regards the nature, duration and the geographical area in which the restraint applies.

Proprietary interests include client relationships and trade secrets.

Non-competes

Permissible, in principle, if the employer has a proprietary interest worthy of protection and the restraint goes no further than necessary to protect that interest and the restraint is reasonable as regards the nature, duration and the geographical area in which it applies. A restraint period of 12 months is generally regarded as reasonable.

Customer non-solicits

Permissible.

Employee non-solicits

Permissible.

WAIVERS

Employees may contract out of common law rights without any formalities. Limited right to waive statutory rights (ie, only to the extent that legislation may allow such waiver). No specific requirement that the employee waiving a right must be represented or for any formalities to be met. Waivers are enforceable provided that the employee is paid something more than what they are legally entitled to (ie, a gratuity).

REMEDIES

Discrimination and sexual harassment

An employer may be held vicariously liable for the acts of its employees. In order to defend a claim, the employer must show that they were either not made aware of the conduct or took all reasonable steps once they became aware. If the employer becomes aware of discriminatory conduct, the employer is required to immediately investigate and take steps to eliminate the discriminatory conduct.

Unfair discrimination claims must first be referred to the Commission for Conciliation, Mediation and Arbitration (CCMA) or a Bargaining Council with jurisdiction for conciliation. If conciliation fails, the claim is referred to the Labour Court for adjudication or for arbitration at the CCMA or Bargaining Council in limited circumstances (ie, sexual harassment cases, with the parties' consent, or if the complainant earned below the BCEA threshold). Strict time limits apply – usually 6 months from the cause of action arising.

Remedies include compensation and damages (uncapped).

Unfair dismissal and unfair labor practices

The majority of disputes must be referred to the CCMA or Bargaining Council with jurisdiction for conciliation. If conciliation fails, the nature of the dispute determines whether the dispute must be referred to adjudication at the Labour Court or arbitration at the CCMA or Bargaining Council. Strict time limits apply.

The primary remedy for a substantively unfair dismissal is re-instatement. Where the employee does not seek re-instatement or re-instatement is not practicable or the dismissal is only procedurally unfair, then compensation, limited to a maximum of 12 months' remuneration, may be ordered. This increases to 24 months' remuneration for an automatically unfair dismissal.

Failure to inform & consult

A failure to consult may constitute the basis of a finding of procedural unfairness in an operational requirements dismissal. Where only procedural unfairness is found, the re-instatement remedy is not available. For large-scale retrenchments, if an employer does not comply with a fair procedure, which includes engaging in consultations, the Labour Court may be approached for orders including compelling the employer to comply with a fair procedure or interdicting the employer from dismissing before a fair procedure is complied with.

CRIMINAL SANCTIONS

Employment law is largely decriminalized; however, specific legislation renders some behavior a criminal offense – for example, fraudulent behavior. Law enforcement bodies must be notified if the employer knows or suspects that the employee has viewed child pornography. Section 34 of the Prevention and Combating of Corrupt Activities Act, 2004 requires an employer to report certain criminal offenses committed by an employee. These include criminal offenses such as theft, fraud, forgery and extortion involving an amount over ZAR100,000. It also includes corruption regardless of the amount involved.

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