

Trio of employment law developments in South Africa

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The Minister of Employment and Labour in South Africa (Minister) has recently published three important legal developments affecting South African employers and employees - the Draft National Labour Migration Policy and Employment Services Amendment Bill, the Code of Practice for Managing Exposure to Sars-CoV-2 in the Workplace 2022, and the Code of Good Practice on the Prevention and Elimination of Harassment in the Workplace.

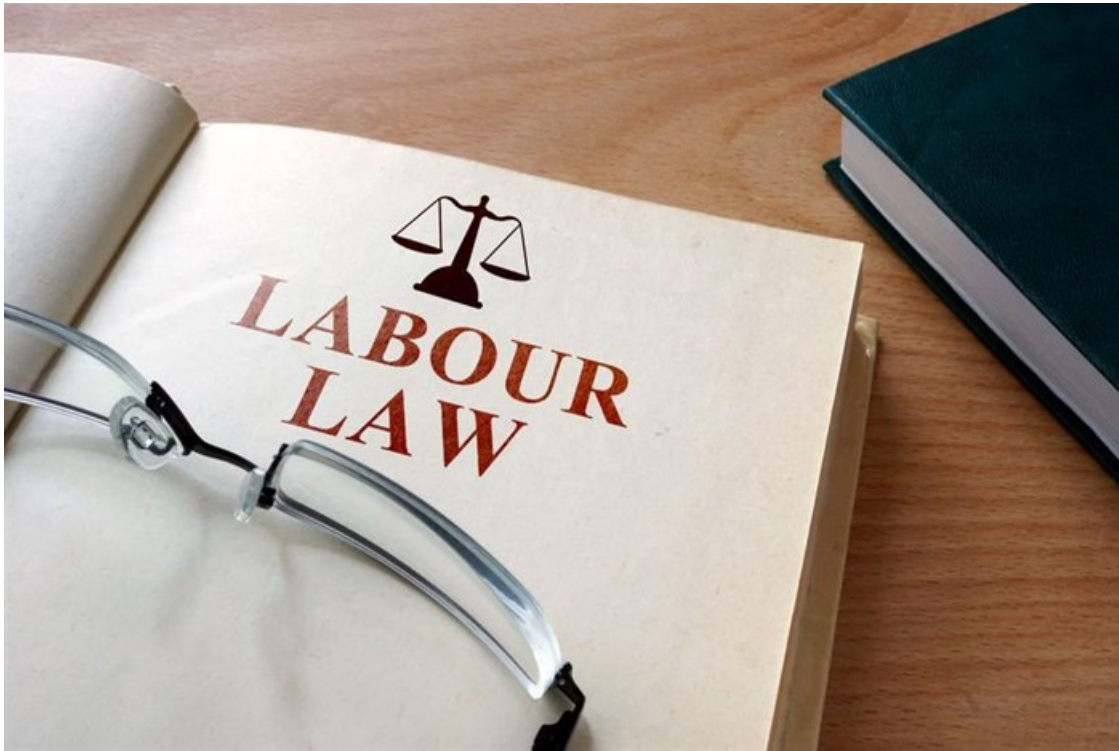


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The Draft National Labour Migration Policy and Employment Services Amendment Bill (Draft Bill)

The Draft Bill is currently open for public comment and aims to amend the Employment Services Act, as set out below.

Employment of foreign nationals

The main thrust of the proposed changes includes the Minister's right to set maximum quotas for the employment of foreign nationals as employees or workers in any sector. The Minister may set a quota to apply by sector, occupation, region or nationally. An employer will only be entitled to exceed this maximum quota if they have applied for and been granted an exemption, or if the foreign national fills a position for which critical skills are required.

The Draft Bill entitles the Minister to make regulations regulating the employment of foreign nationals, including:

- measures employers must take to confirm that there are no suitable persons for the role within South Africa
- requirements for employers to use a public employment service or private employment agency to assist employees to recruit suitable candidates
- requirements for the preparation of a skills transfer plan
- the criteria and procedure to apply for an exemption from the Minister
- the records employers must keep in respect of foreign nationals.

Introduction of digital labour platforms and workers

The legislature proposes a new section to make provision for work or service provided to digital labour platforms. A digital labour platform is defined as "an electronic entity that enables the provision of work or services to any other person in the Republic". A platform which meets this definition is considered an employer of the person who performs the services or work, for the purpose of the Draft Bill. The person performing the services is classified as a worker, which is defined as "any person who works for another and who receives, or is entitled to receive, any payment for that work, whether in money or in kind".

A digital labour platform will be considered to be the employer of the workers if (1) the digital labour platform determines the payment and/or terms and conditions of the work or services provided; and (2) the digital labour platform remunerates the worker. The definition of worker will apply only in the context set out in the Draft Bill. The result of the inclusive nature of this definition is that the Minister may set the maximum quotas for the engagement of foreign nationals as platform workers.

Definition of private employment agency

The requirement for a private employment agency to provide employment services "for gain" has been removed. Therefore, a company that provides employment services to any other company will need to be registered and licensed to operate as a private employment agency, should the Draft Bill be enacted in its current form.

The Code of Practice for Managing Exposure to Sars-CoV-2 in the Workplace 2022

The Code of Practice for Managing Exposure to Sars-CoV-2 in the Workplace 2022 (Covid Code) will take effect when the national state of disaster in South Africa is lifted. Among other things, the Covid Code reiterates an employer's right to implement a vaccine mandate and clarifies the grounds on which employees can refuse the vaccine. The Covid Code creates a legal framework for managing the pandemic and its impact in the workplace. The rules now make specific provision for employers to ascertain their employees' vaccination status.

Employers will no longer be required to screen employees daily for Covid-19 symptoms or report such information. Employees will only be obliged to inform employers when they have Covid-19 symptoms. Employers will be entitled to request a negative Covid-19 test to allow the employee to return to the office.



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According to the new rules, employees would no longer have to limit their refusal to vaccinate to constitutional or medical

grounds. Where employees base their refusal on a contraindication to the vaccine, the employee must produce a medical certificate confirming this. The employer may then request that the employee be medically assessed to confirm their medical status, which the employer must pay for. Employers must reasonably accommodate employees who refuse vaccination.

In recent cases at the CCMA, the employment tribunal has upheld numerous employers' decisions to dismiss or suspend employees who refused to get vaccinated or take regular tests. Taking into consideration the Covid Code, the updated regulations and a recent decision by the labour court, employers could implement an admission policy, which would require employees to present either a vaccination certificate or a negative Covid test (at the employees' expense) in order to enter the office.

Employment Equity Act - Code of Good Practice on the Prevention and Elimination of Harassment in the Workplace

In March 2022, the Minister published the Code of Good Practice on the Prevention and Elimination of Violence and Harassment in the World of Work (Code) in the Government Gazette. This Code, which is now in effect, has been guided by various conventions adopted by the International Labour Organisation, including the convention and recommendation on eliminating and preventing Violence and Harassment in the World of Work (Convention 190, 21 June 2019).

The Code replaces the Code of Good Practice on the Handling of Sexual Harassment Cases in the Workplace, as amended (Code of Good Practice). In addition, the new Code expands substantially on the different types of violence that an employee may experience in the workplace and what steps employers are required to take to deal with these forms of violence.

The Code lists four forms of violence and harassment in the workplace. These are:

Sexual violence and harassment

This includes any conduct that the person knows (or should know) is not welcome, offends the complainant or makes the complainant feel uncomfortable, and interferes with work. The Code lists various forms of conduct which would amount to sexual violence and harassment, including unwanted sexual attention and quid pro quo sexual harassment.

The Code also compels employers to consider further factors in a matter involving sexual violence and harassment. These factors include whether the conduct was unwelcome; the nature and extent of the conduct; and the impact of the conduct.

Racial, ethnic, or social origin violence and harassment

In terms of the Code, racial violence and harassment are types of conduct which demean, humiliate or create a hostile or intimidating work environment for a complainant. This may include conduct which (1) intends to induce submission based on actual or threatened adverse consequences for the complainant and (2) relates to a person's membership of a group. Abusive language and racist jokes, racially offensive material, racist name calling, negative stereotyping, offensive behaviour creating hostility, exclusion from workplace interaction and activities, and marginalisation and threatening behaviour fall under this form of violence and harassment.

Workplace bullying

Workplace bullying is unwanted persistent conduct (or a single incident), which is serious and demeans, humiliates, or creates a hostile or intimidating work environment. This conduct includes a wide range of insulting, demeaning or intimidating behaviours that lower the self-esteem or self-confidence of an employee. Some examples of workplace bullying include harassing; offending, professionally or socially excluding someone, or negatively affecting their work tasks.

Protected disclosures

The Code sets out when a whistle-blower should be protected. This is determined using four stages of the Protected Disclosure Act, namely: (1) whether the disclosure includes information regarding one of the categories of impropriety; (2) whether the disclosure is protected; (3) whether the whistle-blower suffered an occupational detriment; and (4) what remedy should be awarded.

What should employers do?

Employers should take heed of the possible implementation of quotas on employing foreign nationals when considering workforce planning and consider the implications of the impending change on existing foreign employees.

Employers must also ensure that their policies and practices are compliant with the Code of Good Practice (which is already in force) and the Covid Code (soon to be in force). Forward thinking employers of the modern workforce have already implemented, or are in the process of updating, policies that comprehensively outline Covid-19 health and safety guidelines for employees, as well as procedures that ensure all employees feel safe and protected from all forms of harassment and bullying in the work environment.

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