

LEGAL ALERT

NEW EMPLOYMENT CODE
ACT - 10 KEY CHANGES TO BE
AWARE OF



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We highlight 10 key changes to the law, which employers, employees, labour consultants and legal advisers should be aware of.

1. The Code introduces standard conditions of service, applicable to all categories of employees, whether protected employees (PEs) or non-protected employees (NPEs). However, as earlier stated, notwithstanding that the Act which gives the SIs legal basis has been repealed, the provisions of the SIs applicable to PEs will still be in force. This raises a question of interpretation, whether provisions in the SIs which are inconsistent with the Code will still be applicable. It is our understanding that the provisions in the SIs which are more favourable to PEs (in comparison with the Code) will remain in force, as this would be in line with the purpose of prescribing minimum requirements for PEs. The Code generally provides improved conditions of service for NPEs, reflecting a shift from the previous regime which provided more favourable conditions of employment for PEs in comparison with NPEs. Employers have 1 year to comply with the Code. Any new contracts however, will have to be compliant with the Code.

2. The Code codifies the principle of unilateral variation of a contract. This is to the effect that if an employer varies in any "adverse way" a basic condition or basic conditions of employment without the consent of the employee, then the contract of employment stands terminated and the employee is deemed to have been declared redundant or early retired and therefore, entitled to a redundancy or retirement package, as may be appropriate (per *National Milling Company Ltd v Simataa & Ors*, SCZ No. 21 of 2000). The Code now provides that an employee will be considered to have been declared redundant and therefore, entitled to a redundancy package where there is an "adverse alteration" of the employee's conditions of service which the employee has not consented to.

3. The Code dilutes the dichotomy in the repealed Act between oral and written contracts in two respects. Firstly, it codifies the principle of natural justice that every employee (whether on a written or oral contract) must be given an opportunity to be heard before termination. Under the repealed Act, this statutory provision applied only to oral contracts (per *Bank of Zambia v ZUFLAW*, SCZ No.17 of 2007). The Code now makes it a statutory obligation for employers to accord employees an opportunity to be heard before termination relating to either conduct or performance of the employee. Secondly, under the repealed Act, the provisions on termination by redundancy cover only employees on oral contracts (per *Chilanga Cement v Singogo*, SCZ No. 13 of 2009). This has previously caused problems for the employee on a written contract with no redundancy provision, but who suffers redundancy, for instance - what procedures should be followed? What

Introduction

The new Employment Code Act, No. 3 of 2019 (the "Code") attempts to consolidate and in some respects, codify employment law principles, thereby altering the employment law landscape in Zambia.

Has the Code become law?

The Minister of Labour and Social Security has issued a Statutory Instrument (SI) - the Employment Code Act (Commencement) Order, SI No. 29 of 2019, which provides that the Code shall come into operation on the date of publication of the SI. The SI was published in the Government Gazette on 10th May 2019. Based on this provision, it is our understanding that the Code has become operative (per section 19(1)(a) of Cap 2 of the Laws of Zambia).

The Code repeals and replaces the Employment Act (the "repealed Act"), Cap 268 of the Laws of Zambia, as well as the Minimum Wages and Conditions of Employment Act (the "repealed Minimum Wages Act") of 1982. Notwithstanding the repealing of these Acts, all the Statutory Instruments (the "SIs") issued pursuant to the repealed Minimum Wages Act (i.e. minimum wages and conditions of employment for protected employees such as clerks, receptionists, cleaners, guards, domestic workers etc) will remain in force, provided they are consistent with the Code or until replaced with new SIs.

critterion should be used to calculate the redundancy package? The Code resolves this problem by providing standard redundancy provisions which apply to employees engaged on both oral as well as written contracts.

4. The Code makes payment of overtime applicable to NPEs as well. Under the repealed Act, overtime was payable only to PEs who worked beyond 48 hours a week, except watchmen or guards. The Code provides that overtime is now payable to NPEs as well, at the rate of 1 and half times the employee's hourly rate of pay, and double the employee's hourly rate of pay, if the employee works on a public holiday or weekly rest day, as long as these days do not form part of the working week. This is the same rate as the PEs. Notably, unlike under the repealed regime, watchmen or guards are now entitled to overtime as well, if the guard or watchman works in excess of 60 hours a week, at the rate of one and half times the watchman or guard's pay.

5. The Code introduces mandatory employee benefits being housing and medical attention.

These benefits were optional for NPEs under the repealed Act. Under the Code however, employers are mandated to provide either housing allowance or to facilitate some form of arrangement to aid the employee in securing housing. Employers are further mandated to provide medical attention and medicine to employees and where necessary, transport to a health facility.

6. The Code makes the payment of Gratuity and Severance Pay mandatory.

There was no provision for gratuity or severance pay under the repealed Act, as this was generally a subject of contractual agreement in the labour market. The Code requires the payment of gratuity to an employee on a long-term contract (i.e. a fixed term contract exceeding one year), at the end of the contract period, at the rate of 25% of the employee's basic earnings. If the contract is terminated prior to expiry of the contractual period, the employee is entitled to gratuity calculated on a prorated basis. Further, the Code has introduced severance pay which is payable to all employees except those on long-term contracts, temporary employees, casual employees and employees on probation. It appears that the entitled employees are employees engaged on short-term contracts (i.e. fixed term contracts not exceeding 12 months) and permanent employees (i.e. employees not on a fixed term contract). The entitlement to severance pay is triggered in 5 specific situations including, upon medical discharge at the rate of 3 months basic pay for each completed year of service. Employees engaged on a permanent basis, as well as short-term contract employees also enjoy a severance pay at the rate of 2 months basic pay,

plus a redundancy package of 2 months' basic pay for each year served, in the case of termination by redundancy. It appears that PEs would also be entitled to gratuity and severance pay if they meet the criteria set out in the Code, seeing that the SIs do not make provision for payment of gratuity and severance pay.

7. The Code codifies probation, which was previously not provided by law but merely best practice. The Code provides for a period of 3 months probation, which may be extended for a further period of not more than 3 months. Where the employer does not inform the employee in writing on whether or not the employee is confirmed, the employee shall be deemed to be confirmed from the date of the expiry of the probation period. The contract of employment may be terminated during probation by either party giving 24hrs notice of termination. An employee who is re-employed by the same employer for the same job within a period of 2 years from the date of termination of the contract of employment with that employer shall not be subject to probation, where the termination was not performance related.

8. The Code introduces 4 new leave entitlements

not previously provided under the repealed Act, namely: (a) compassionate leave – of 12 days in a year where the employee has lost a spouse, parent, child or dependant on a justifiable compassionate ground (which term is not defined in the Code). PEs will now also be entitled to compassionate leave, considering it is not provided under the SIs: (b) Family responsibility leave – of 7 days in a year to enable the employee to nurse a sick spouse, child or dependant. In addition, an employee is entitled to 3 paid leave days per year to cover responsibilities related to the care, health or education for the employee's child, spouse or dependant. NPEs are therefore, entitled to 10 days in total as family responsibility leave. Notably, PEs will continue to enjoy this benefit as they are already entitled to this leave under the SIs, although the leave is for 15 working days: (c) Paternity leave – of 5 working days to be taken within 7 days of the birth of the child, provided that the employee is the father of the child and has submitted a birth record to prove this. PEs are already entitled to paternity leave under the SIs, except there is no requirement for it to be taken within 7 days of the birth of the child: (d) Weekly rest days and health breaks - a weekly rest day of 24 consecutive hours in every 7 days, to be taken on any day when the employee is not required to work under the contract. In addition, the employee is entitled to a mandatory lunch break of 1 hour and a health break of at least 20 minutes every working day. PEs will now also be entitled to this, considering that the SIs do not make such provision.

9. The Code has altered current leave benefits as follows:

a) Annual leave - the Code has increased the qualification period for taking leave from after 6 months to after 12 months from the date of employment. The employee is entitled to be paid wages for any leave accrued but not taken at the end of the year.

b) Sick leave - the Code provides that all employees are entitled to sick leave and specifically, employees on short-term contracts are entitled to a total of 52 days sick leave, with the first 26 days at full pay and the next 26 days at half pay. Employees on long-term contracts are entitled to up to 6 months of sick leave, with the first 3 months at full pay and the next 3 months at half pay. These provisions reflect the sick leave entitlements for PEs under the SIs, which will continue to be in force.

c) Maternity leave - this has been increased from 12 weeks to 14 weeks after delivery. The leave can be extended for an additional 4 weeks in the case of a multiple birth and in the case of a premature birth, the leave may be extended as recommended by a medical officer. Where the employee suffers a miscarriage during the third trimester of pregnancy or bears a stillborn child, the employee is entitled to 6 weeks leave on full pay immediately after the birth or miscarriage. PEs will also be entitled to these benefits as they are not provided under the law. PEs will continue to be entitled to 16 weeks maternity leave as this is more favourable than the provision in the Code.

10. The Code makes it mandatory for employers to have and maintain Policies

pertaining to HIV/AIDs, Health and Wellness, Harassment, Performance Management, Grievances and a Code of Conduct, which should be brought to the attention of each employee. Failure to comply with these provisions may attract an administrative penalty which may be in the form of inter alia, a financial penalty, restriction/suspension of specified business activities or a reprimand or caution not to repeat the non-compliance. Notably, these new provisions reflect Zambia's attempt to implement elements of the ILO's Decent Work Agenda for Africa.

In order to ensure compliance, please contact our firm and ask to speak to any member of the Labour Law expert team below:



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