

LEGAL ALERT

EMPLOYMENT CODE ACT NO. 3 OF 2019

Introduction

The Employment Code Act No. 3 of 2019 (the “Act”) was enacted into law on 12 April, 2019.

On 13 March 2019, we published an Alert highlighting the changes introduced in the Employment Code Bill as presented before Parliament. A few further changes have been introduced as a result of the parliamentary deliberations.

We set out below an updated and consolidated version of some of the key changes introduced by Parliament. The additional changes, following our Alert dated 13 March 2019, appear in **bold**.

The Act provides for amongst other things, the employment of persons, the form and enforcement of contracts of employment, employment entitlements and other benefits, the protection of wages of employees, prohibition of discrimination at an undertaking, the protection of wages of employees, registration of employment agencies, and constitutes the Skills and Labour Advisory Committees and their functions. Further, the Act repeals and replaces the Employment Act, the Employment (Special Provisions) Act, the Employment of Young Persons and Children Act and the Minimum Wages and Conditions of Employment Act.

Status

The Act will come into operation when Minister of Labour and Social Security (the “Minister”) issues a statutory instrument bringing it into force.



Definitions

The Act has replaced the term “Fixed Term Contract” with “Long Term Contract”. However, the content of the definition remains the same, which is; a contract of service for a period exceeding twelve months, renewable for a further term or the performance of a specific task or project to be undertaken over a specified period of time, and whose termination is fixed in advance by both parties.



Transitional provisions

All benefits which may have accrued prior to the enactment of the Act will be computed under the provision of the prior Acts. Any application which may have been pending before the Labour Commissioner will be deemed to have been made pursuant to the Act once enacted and must comply with the provisions in the Act.

Contracts of employment entered into before the enactment of the Act will be deemed to have been entered into under the Act if the contracts are not inconsistent with the

provisions of the Act. However, if any contracts of employment that were made before the enactment of the Act have provisions materially inconsistent with the Act, compliance is required within one (1) year of commencement of the Act, once enacted.



Probation and annual leave

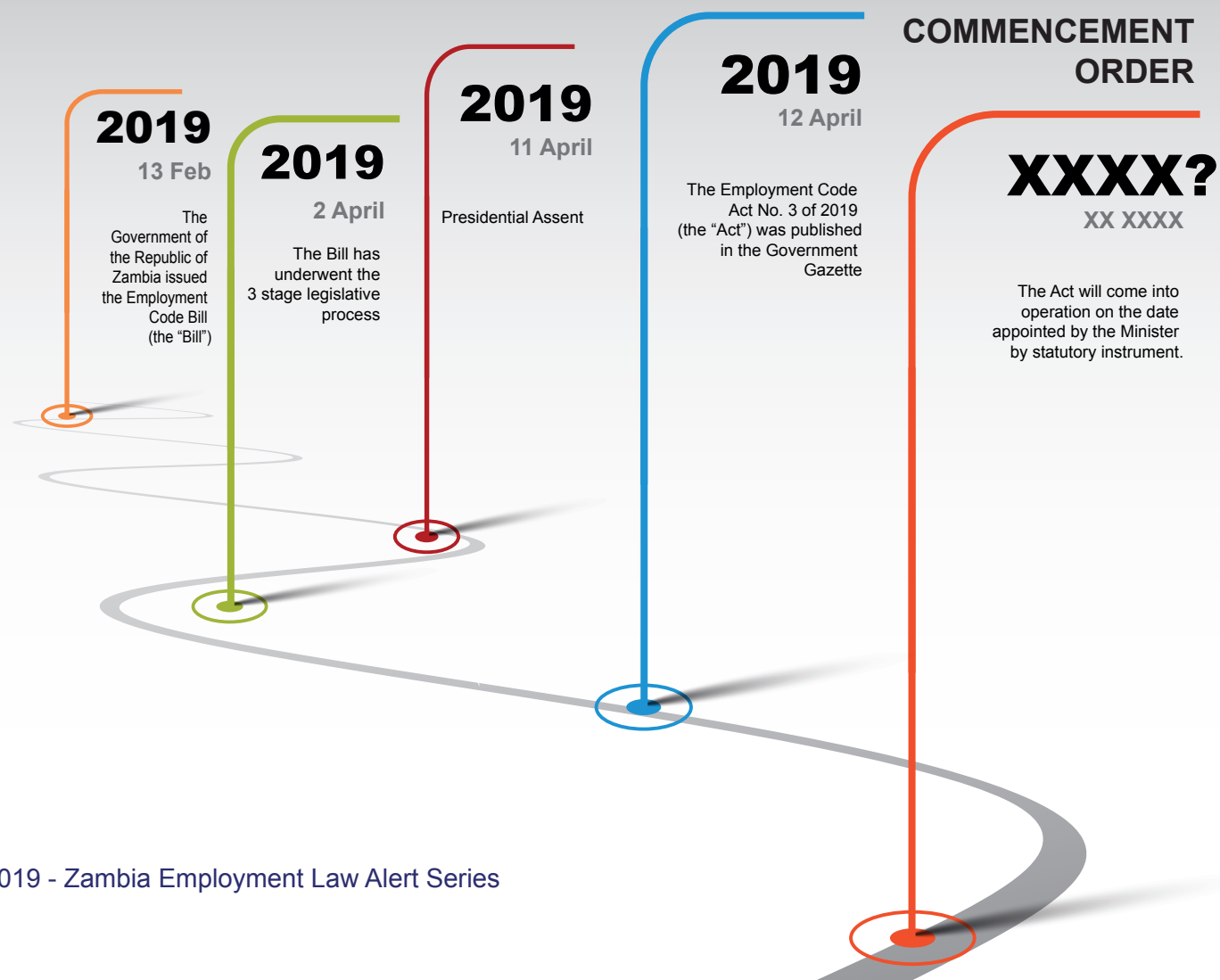
The Act has expressly provided for probation and set the maximum probation period at six months. Where an employer does not notify the employee in writing, of their confirmation following the probation period, the employee will be deemed confirmed in the position from the date of expiry of the probation period. An employee who is re-employed by the same employer for the same job within a period of two years from the date of termination of the contract of employment shall not be subject to probation, where the termination was not performance related.

Under the current regime, annual leave can be taken after an employee has been in continuous employment with an employer for 6 months. However, the Act has increased the qualification period for annual leave to 12 months. In addition, an employee is required to be paid in lieu of any leave days accrued but not taken at the end of the year.



Sick leave

Under the current regime, non-protected



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employees are entitled to sick leave of 26 days in a year at full-pay.

However, the Act now provides that all employees are entitled to sick leave. In addition, employees on short term contracts, defined as a contract of service for a period not exceeding twelve months, are entitled to a total of 52 working days sick leave with the first 26 working days at full pay and last 26 working days at half pay.

Further, employees on long term contracts are entitled to a total of 6 months sick leave with the first 3 months on full pay and the last 3 months at half pay.

 Additional leave entitlements

The Act proposes the introduction of new forms of leave entitlements and these are:

Compassionate leave: an employee is entitled to compassionate leave with full pay for up to twelve (12) days in a calendar year for losing a spouse, child, parent, dependant or on justifiable compassionate grounds. Justifiable compassionate grounds are not defined.

Family responsibility leave: an employer who has worked for more than six (6) months is entitled to family responsibility leave (to enable the employee to nurse a sick spouse, child or dependant) not exceeding seven (7) days in a calendar year. The spouse, child or dependant need not be hospitalised. In addition, an employee is entitled to three paid leave days per year for any responsibilities relating to the care, health or education of the employee's child, spouse or dependant.

Paternity leave: all male employees who have worked for more than twelve (12) months immediately before the beginning of paternity leave are entitled to paternity leave of at least five (5) working days which is to be taken within seven (7) days of a child's birth.

 Maternity leave and nursing care benefits

Under the current regime, an employee is entitled to maternity leave after 2 years continuous service with an employer. **The Act has revised the qualification period of entitlement to paid maternity leave from the proposed 1 year which was in the Bill to 2 years, which is the position under the current regime.** In addition, maternity leave for non-protected employees is currently at twelve (12) weeks. However, the Act has increased maternity leave to fourteen (14) weeks. The maternity leave period can be extended either (i) for a further period of four (4) weeks, where an employee gives birth to more than one baby (i.e. twins or triplets) or (ii) for a further period recommended by a doctor, where an employee has given birth to a premature baby. The Act further proposes that if an employee suffers a miscarriage in the third trimester of pregnancy or gives birth to a still born, the employee is entitled to six (6) weeks leave, on being certified by a medical

officer.

Female employees would be entitled to a minimum of one (1) hour break, in addition to lunch breaks, to nurse unweaned children. The nursing break is for a period of 6 months from the date of delivery.

An employer is prohibited from requiring an employee to resume work within six weeks of the date of the delivery of the employee's child, unless a medical doctor certifies that the employee is fit to resume work.

An employer if further prohibited from requiring an employee to perform work in excess of a normal day's work, two months before the employee's estimated date of delivery.

Where the work performed by a pregnant or nursing employee is detrimental to their health or that of their unborn child, an employer is required to offer the employee suitable alternative employment, if practicable, on terms and conditions that are not less favourable than that employee's terms and conditions of employment.

Employers are further required to exempt female employees from working in the night if the employee is in the third trimester of their pregnancy or nursing a child who is aged six months or below.

 Termination and severance pay

The Act has introduced the entitlement to a severance pay where a contract of employment is terminated or expires in the following circumstances:

- where an employee has been medically discharged from employment in line with the Act;
- where a contract is for a fixed duration, severance pay shall either be a gratuity at the rate of not less than 25% of the employees' basic pay earned during the contract period as at the effective date of termination or the retirement benefits provided by the relevant social security scheme that the employee is a member of as the case may be;
- where a contract has been terminated by redundancy, severance pay shall be 2 months basic pay for each year served; or
- where an employee dies in service, severance pay shall be 2 months basic pay for each year served.

To note that casual employees, temporary employees, long term contract employees and employees on probation are not entitled to severance pay.

Considering the foregoing exclusion, it is our understanding that the provisions on severance may only apply to employees on short term and permanent contracts, when the relevant event is triggered. In addition, the provisions seem to suggest that employees on short term and permanent contracts whose

contracts of employment are terminated by way of redundancy would, in addition to a redundancy pay of 2 months basic pay for each year served, be entitled to severance pay of 2 months basic pay for each year served under the contract. Meaning that, such an employee would essentially be entitled to 4 months basic pay for each year served, plus other entitlements under the contract of employment. In addition, an employer is prohibited from terminating an employee's employment based on conduct or performance, without according the employee an opportunity to be heard.

Further, an employer who declares an employee redundant is prohibited, within nine months from the date when the notice of termination of employment takes effect, from filling the vacancy occasioned by the redundancy without first offering the former employee the position.

Under the Act, an employer can apply to the Labour Commissioner to make the redundancy payments in instalments where the employer is not financially able to pay it on the last day of employment of the employee.

 Payment of gratuity

Whereas under the current employment regime, payment of gratuity is usually at an employer's discretion, the Act makes payment of gratuity mandatory for all employees on fixed term contracts, at a rate of not less than 25% of an employee's basic pay. If the contract is terminated prior to the expiration of the fixed term, the employee is entitled to receive gratuity on a prorated basis.

 Hours of work and overtime

Normal working hours for full time employees is 8 hours per day. Overtime under the current regime is only mandatory for protected employees who work beyond 48 hours a week. However, under the Act, payment of overtime will be mandatory for all employees, whether protected or not, who work beyond 48 hours per week. The rate is at one and half times an employee's hourly rate of pay and double the employees' hourly rate of pay where the employee work on a public holiday or on a weekly rest day, where both days not form part of the employee's normal working week.

 Weekly rest days and health breaks

An employee is entitled to a day's rest in every period of seven (7) consecutive days. The weekly rest will be any day when an employee is not required to work under a contract of employment. The Act has also introduced health breaks of at least 20 minutes per day, in addition to the mandatory meal break of at least one hour.

 Housing

The Act requires employers to provide all employees with either housing, or a loan or an advance towards the purchase or construction of a house, a guarantee facility for a mortgage or

house loan on behalf of the employee or pay the employees a housing allowance. The amount of housing allowance has not been specified in the Act as is the case for protected employees. Under the current regime, employers are obliged to provide housing only to protected employees.

 Medical Attention

The Act has made it mandatory for employers to provide medical attention, medicines and where necessary, transport to a health facility during the illness of an employee. It is our understanding that this requirement seems to now place an obligation on employers to provide medical cover for its employees.

 Employment policies, procedures and codes

The Act makes it mandatory for employers to have in place an employment policy, procedure and code, including an HIV and AIDS policy, a health and wellness policy, harassment policy, performance management policy, grievance procedure and code of conduct, which should be shared with each employee.

An employer person who fails to comply with the foregoing would be liable to an administrative penalty, which may include a caution not to repeat the conduct which led to the non-compliance; a reprimand; a directive to take remedial action or to make specific arrangements to redress identified non-compliance; and the restriction or suspension of certain specified business activities.

 The Labour Advisory Committee

The Act constitutes an ad hoc Labour Advisory Committee which would, inter alia, inquire into the wages and conditions of employment in any undertaking or sector to recommend minimum wages and conditions of employment; and review and make recommendations, to the Minister, on the minimum wages and conditions of employment for any group of employees.

 The Skills Advisory Committee

The Act constitutes the Skills Advisory Committee whose functions will include advising the Minister on promotion of the welfare of citizens in employment and labour relations, matters concerning the engagement of expatriates and prepare a critical skills list. According to the Act, a "critical skill" means special or scarce academic or professional qualification, standards of education or skills required in Zambia.

 Enhanced powers of the Labour Commissioner

Currently, the Labour Commissioner's role in labour disputes is generally of a mediatory nature. However, the Act enhances the powers of the Labour Commissioner including, granting the Commissioner powers to direct the remedial action to be taken within a specified period and if necessary, make an order

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suspending further work by employees where s/he has reason to believe that provisions of the Act are being contravened or likely to be contravened. Whilst works are suspended, the employees are still entitled to full pay, until the remedy is complied with and approved by the Labour Commissioner. Failure to comply with the Labour

 **Commissioner's directive is an offence.**

To note also that the Labour Commissioner will be appointed by President, on recommendation of the Civil Service Commission and any assistant Labour Commissioner, labour offices and other officers will be appointed by the Civil Service Commission. Under the current regime, the Labour Commissioner and labour officers are appointed by the Minister.

 **Prioritisation of employment of Zambian citizens**

The Act makes it mandatory for employers to employ Zambian citizens where there is a job vacancy, unless the citizens do not possess the requisite skills required for the job or no citizen applies for that job. Employers are prohibited from engaging expatriates unless the expatriate qualifies as having a critical skill as identified in a list to be prepared by the Skills Advisory Committee. Should an expatriate be employed, an employer is required to have an understudy, where practical and report to the Labour Commissioner on plans and progress of training of the understudy.

 **Offences and penalties**

Administrative penalties can be imposed by the Labour Commissioner where a contravention of the Bill does not create

an offense. Some of the administrative sanctions/penalties being proposed in the Bill include caution not to repeat the conduct leading to non- compliance of the Bill, reprimand, directive to take remedial action or specific arrangements to redress identified non-compliance or restriction/suspension of certain specified business activities or imposing a financial penalty not exceeding ZMW 60,000 (approximately USD 5084.8). A person is however at liberty to appeal the Labour Commissioner's decision to the High Court within 30 days of receipt of the administrative sanction.

Where offenses are committed by body corporates or unincorporated bodies, with the knowledge, consent or connivance of the manager, director, shareholder or partner, then the foregoing persons commit an offence and would be liable, on conviction, to the penalty or term of imprisonment specified for that offence.

FINANCIAL IMPLICATIONS ON EMPLOYERS

Below is a summary on some of the financial implications employers should consider:

1

Under the proposed legislation, employees can legally take up to 46 days of paid leave in a year - excluding maternity, paternity or sick leave broken down as follows:

10

12

24

Days

Annual Compassionate Family responsibility

2

Maternity leave has been increased by two weeks under the proposed legislation so that female employees are entitled at a minimum to 14 weeks maternity leave.

A female employee could therefore take a total of 260 leave days out of an average 249 working days in a year (if calculated at 22 days a month, minus 12 standing holidays):

There is, in addition an entitlement to 6 weeks leave for a miscarriage or still birth, as well as paternity leave for male employees, which is not provided for in the current legislation- these have commercial implications.

132

12

24

12

10

70

Days

Annual Compassionate Family responsibility Maternity leave Mothers day Sick leave

3

Female Employee Absence

300

250

200

150

100

50

0

132

12

24

70

12

10

260

249

Sick

Mother's day

Annual

Maternity

Compassionate

Family resp.

Total potential leave days

Total working days

Leave

Annual

4

Male Employee Absence

300

250

200

150

100

50

0

132

24

5

12

10

183

249

Sick

Annual

Paternity

Compassionate

Family resp.

Total potential leave days

Total working days

Leave

Annual

WGet in touch with us if you wish to discuss how the Act may impact your business.

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