

LEGAL ALERT

EMPLOYMENT CODE EXEMPTION REGULATIONS



Introduction

The Minister of Labour (the “Minister”) issued the Employment Code (Exemption) Regulations, Statutory Instrument No. 48 of 2020 (the “Exemption Regulations”) on 11 May 2020 pursuant to section 2(2) of the Employment Code Act No. 3 of 2019 (the “ECA”).

This section of the **ECA** allows the **Minister**, following consultation with the Tripartite Consultative Labour Council and by statutory instrument, to exempt any person or class of persons or any trade, industry or undertaking from any of the provisions of the Act.

Below is a summary of provisions in the **ECA** which have been exempted:

S.36-Annual leave (Employee)

This section entitles an employee who remains in continuous employment with the same employer for a period of twelve consecutive months to be granted, during each subsequent period of twelve months while the employee remains in continuous employment, annual leave on full pay at a rate of at least two days per month.

The section further entitles an employee who has accrued but untaken leave days at the end of a leave cycle to be paid in lieu of the days not taken.

“**The Minister of Labour (the “Minister”) issued the Employment Code (Exemption) Regulations, Statutory Instrument No. 48 of 2020 (the “Exemption Regulations”)**

The section equally entitles an employee whose contract of employment has terminated or expired to be paid in lieu of any accrued but untaken leave days at contract termination.

Our Analysis

The exemption unfortunately raises a range of possible interpretations. Using the literal interpretation, an employee is exempt from application of section 36 in its entirety. Seeming to suggest therefore, that an employee does not under the **ECA** accrue annual leave, which entitlement is the anchor to all other provisions under section 36. As the **ECA** is the principal statute which regulates employer/employee relations, it is not certain whether the exemption of section 36 in its entirety was the intention of the drafters.

Our view of the exemption of this section in its entirety is that it creates an absurdity. We would therefore caution employers from adopting a literal interpretation of the exemption until such a time that further clarity is provided.

S.37-Annual Leave benefit formula (Employee)

An employee shall be paid annual leave benefit based on the formula as set out in

the Fifth Schedule which is (FP x D) 26 day

Where:

FP = full pay

D = number of accrued leave days

Our Analysis

Implementation of this section has always been problematic due to the ambiguity created by a literal application of the formula provided in the Fifth Schedule.

Further, it is unclear whether the section creates an additional benefit (somewhat like a holiday allowance) to employees or not. The **Exemption Regulations** now exempt application of this section.

S.48-Forced Leave (Employer)

Where an employer sends an employee on forced leave, the employer shall pay the employee basic pay during the period of the forced leave.

Our Analysis

Employers assessed to be in financial distress by the Labour Commissioner or a labour officer have been exempted from application of section 48.

Our understanding of this exemption is that an employer who is financially distressed can place employees on unpaid leave i.e.



no statutory obligation to pay basic pay. An employer is required to demonstrate financial distress by submitting financial information required in the notes to the **Exemption Regulations**.

S.54(1)(b) and (c)-Severance pay (Expatriate and management employees)

The employer shall at the end of the fixed term contract pay an employee a severance pay in the form of gratuity at the rate of 25% or a retirement benefit provided by the relevant social security scheme and where a contract of fixed duration is terminated, gratuity shall be paid at a prorated rate.

Our Analysis

The provision on payment of gratuity in section 54(1)(b) and (c) deals with short term contracts (being fixed term contracts for a period not exceeding twelve months).

This provision does not apply to a casual employee, a temporary employee, an employee engaged on a long-term contract (being a fixed term contract for a period exceeding twelve months) or an employee serving a period of probation.

The **Exemption Regulations** exempt expatriate employees on short term contracts from a statutory entitlement to gratuity. It also further exempts management employees on short term contracts.

An employee in management has been defined as a person:

- (a) who is the head of an institution or undertaking and has authority to hire, suspend, promote or demote an employee of the institution or undertaking;
- (b) who is the head of a department in an institution or undertaking and has authority in the financial, operational, human resource, security or policy matters of the institution or undertaking;
- (c) with decision-making authority in the financial, operational, personnel or policy matters of an institution or undertaking and who represents and negotiates on behalf of the institution or undertaking in collective bargaining or negotiations with any trade union; or
- (d) with written institutional authority to perform the functions referred to (a), (b) or (c) above.

S.73-Payment of gratuity (Expatriate employees, employees in management with a written contract providing for gratuity, employees in the agricultural sector, employees in the domestic sector)

An employer shall at the end of a long-term contract period, pay an employee gratuity at a rate of not less than 25% of the employee's basic pay earned during the period of the contract.

Our Analysis

The **Exemption Regulations** exempt expatriate employees, employees in the agricultural sector, employees in the domestic sector and employees in management with written contracts providing for gratuity from application of this section. Application of this section is restricted to fixed term contracts whose duration exceeds twelve months.

Our understanding is that these employees, except for employees in management, are not entitled to gratuity as of right. With respect to employees in management, we understand that management employees with written contracts of employment providing for gratuity are entitled to gratuity although the quantum would be subject to contract and not regulated by the **ECA**. Our further understanding is that employees in management whose contracts do not expressly provide for gratuity would still be entitled to gratuity at 25% of the employee's basic pay earned during the contract period.

S.55(2)-Termination by redundancy (Employer)

An employer shall at the end of a long-term contract period, pay an employee gratuity at a rate of not less than 25% of the employee's basic pay earned during the period of the contract.

Our Analysis

Our understanding is that the **Exemption Regulations** exempt an employer who has been assessed by either the Labour Commissioner or a labour officer to be financially distressed, from application of the redundancy notice periods (i.e. 60 days' notice to labour office and 30 days' notice to the employee).

S.54(1)(b) and (c)-Severance pay (Expatriate and management employees)

An employer shall pay an employee who works in excess of 48 hours in a week overtime at the rate of one and half times the employee's hourly rate of pay.

An employer shall pay a watchperson or guard who works in excess of sixty hours a week one and half times the watchperson's or guard's hourly rate of pay.

An employer shall pay an employee who works on a public holiday or on a weekly rest day, where the public holiday or weekly rest day does not form part of the employee's normal working week, double the employee's hourly rate of pay.

Our Analysis

The **Exemption Regulations** exempt expatriate and management employees from over time entitlement.

Implication of the Exemption Regulations to current contracts of employment

Our view is that the **Exemption Regulations** do not affect terms (whether express or implied by the **ECA**) in contracts of employment executed prior to 11 May 2020. These terms can either be express terms which are found in the contract or implied terms found/drawn from the statute. The implied terms are incorporated and become entrenched contractual terms of the contract of employment and therefore binding on the parties.

Should an employer seek to amend current contracts of employment to align with exemptions in the regulation e.g. on gratuity, overtime or leave entitlement, such employer would firstly have to obtain the consent of the employees affected prior to implementing the change as these benefits are already entrenched in their contracts of employment. This position is premised on the view that the **Exemption Regulations** do not apply in retrospect.

Consequently, the terms of a contract cannot be later varied by another statute to the detriment of the employee unless the employee consents to the variation.

It is also worth noting that an adverse alteration of an employee's conditions of service which the employee has not consented to would automatically terminate that contract by way of redundancy.

An employer can however align future contracts of employment with the **ECA** as modified by the **Exemption Regulations**.

We hope you found this Alert useful. Please do not hesitate to contact our Corporate Advisory Partner, Jackie Jhala at JJhala@corpus.co.zm if you have any questions or require guidance relating to the application of **Exemption Regulations**.



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