



THE EMPLOYMENT CODE (Exemption)

Regulations Promulgated
by The Minister of Labour

**The Employment Code
Act No. 3 Of 2019**

12th May, 2020

MMLP

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Executive Summary

The legislature in Zambia enacted the Employment Code Act No. 3 of 2019 (the “Employment Code”) which came into effect on 9th May, 2019. The Employment Code repealed and replaced the Employment Act, Chapter 268 of the laws of Zambia, the Employment (Special Provisions) Act, Chapter 270 of the laws of Zambia, the Employment of Young Persons and Children Act, Chapter 274 of the laws of Zambia and the Minimum Wages and Conditions of Employment Act, Chapter 276 of the laws of Zambia. The effect of this legislation is that all employment law legislations in Zambia is now codified into one piece of legislation being the Employment Code.

On 8th May, 2020 the Minister of Labour and Social Security (the “Minister”) following consultations with the Tripartite Consultative Labour Council, promulgated the Employment Code (Exemption) Regulations, Statutory Instrument No. 48 of 2020 (the “Exemption Regulations”) via Gazette Notice No. 394 of 2020. The Minister exercises her power under section 2(2) of the Employment Code which permit the Minister to exempt any person or class of persons or any trade, industry or undertaking from any of the provisions of this Act after consulting the Tripartite Consultative Labour Council.

The purpose of the Exemption Regulations is to exempt specific groups of employees listed in the schedule to the Exemption Regulations from certain provisions of the Employment Code. We have reviewed the Exemption Regulations and we note that they affect the provisions of the Employment Code relating to the following;

- Annual leave and Annual leave benefits formula;
- Forced leave and Redundancy;
- Severance pay and payment of gratuity; and
- Overtime.

Reliance on this Memorandum

This Memorandum is not to be relied upon in making any legal decisions relating to your business as a result of the enactment of the Exemption Regulations. Further, this Memorandum does not address the legality of the enactment of the Exemption Regulations. Any decisions to be made should be made after seeking professional legal advice relating to the Exemption Regulations and their application which legal advice, we are available to provide.

Annual Leave and Annual Leave Benefits

Section 36 of the Employment Code entitles an employee, other than a temporary or casual employee, who remains in continuous employment with the same employer for a period of twelve consecutive months, to annual leave at a rate of at least two days per month during each subsequent period of twelve months. Section 36 also provides for annual leave plans specifying when the employee is to



take leave and the payment of wages instead of leave where the employee has outstanding leave days at the end of the year. Further, section 37 of the Employment Code entitles an employee to be paid annual leave benefits and provides a formula as to how they are to be calculated.

The Schedule to the Exemption Regulations has, however, exempted all employees from the provisions of sections 36 and 37 of the Employment Code. Section 2 of the Employment Code defines an employee as a person who, in return for wages, or commission, enters into a contract of employment and includes a casual employee and a person employed under a contract of apprenticeship made in accordance with the Apprenticeship Act, but does not include an independent contractor or a person engaged to perform piece work.

The effect of the provisions in the Exemption Regulations above is that employers are exempt from following the provisions on annual leave and benefits with respect to their employees. Therefore, the operations of sections 36 and 37 of the Employment Code has been temporarily suspended with respect to employees. Further, we hasten to point out that annual leave days may however still be

granted and managed by the employer at either the employer's own discretion or in accordance with the individual contracts of employment and the underlying conditions of service of employment applicable to the employees where the same envisage annual leave days.

Forced Leave and Redundancy

Section 48 (1) of the Employment Code provides for forced leave and requires an employer to pay an employee who has been sent on forced leave, basic pay during the period of the forced leave. The term 'basic pay' is defined as the standard rate of pay before additional payments such as allowances and bonuses for a period of one month. Therefore, an employer who sends an employee on forced leave is still obligated to pay an employee basic pay as defined above.

Further, section 55 (2) of the Employment Code requires an employer who intends to terminate the contracts of employees by reason of redundancy to follow the following procedure before terminating the employees:-

FORCED LEAVE AND REDUNDANCY



- (a) give notice to the Labour Commissioner of the impending redundancies at least sixty (60) days before the date of termination;
 - (b) give notice to the affected employees (or their representative where the employees are unionised) of the impending redundancies at least thirty (30) days before the date of termination; and
- © The employer must afford the employee (or representative of the employees) an opportunity to consult on the measures to be taken to minimise the termination and the adverse effects on the employee.

The schedule to the Exemption Regulations, has however exempted employers in financial distress from paying basic pay after sending employees on forced leave, provided an assessment is carried out by an authorised officer from the Ministry of Labour determining that an employer is financially distressed. Further and with respect to redundancy, the Exemption Regulations have exempted employers who intend to terminate the contract of employees by reason of redundancy from adhering to the notice requirements and other redundancy procedures as envisaged under section 54 (2) of the Employment Code. This exemption, however, may only be achieved following an assessment by an authorised officer

confirming that the employer is either financially distressed or is under circumstances warranting immediate termination of the contracts of employment.

Furthermore, we hasten to point out that the Exemption Regulations do not define what amounts to 'financial distress', however, they provide for the guiding principles for the application of this exemption to forced leave or redundancy which are as follows: -

- (a) review current quarterly tax returns and check extent of reduction in turnover in comparison with last return, and consider amended tax returns taking into consideration reduction in projected turnover;
- (b) assess documents showing suspension or reduction of business and impact on turnover;
- (c) assess cash flow projections and verify cash stress or financial constraints on employer;
- (d) review past audited financial statements to check profitability and extent of reserves from previous years; and
- (e) review staff payroll and compare staff costs with projected income.

Severance Pay and Payment of Gratuity

Section 54 (1) (b) and (c) of the Employment Code requires an employer to pay an employee a severance pay where the employee's contract of employment is terminated or has expired, in the following manner;

- (b) where a contract of employment is for a fixed duration, severance pay shall either be a gratuity at the rate of not less than twenty-five percent of the employee's basic pay earned during the contract period or the retirement benefits provided by the relevant social security scheme that the employee is a member of, as the case may be;
- (c) where a contract of employment of a fixed duration has been terminated, severance pay shall be a gratuity at the rate of not less than twenty-five percent of the employee's basic pay earned during the contract period as at the effective date of termination.

event that such contract is terminated or to retirement benefits provided for under a social security where such a contract has expired.

Furthermore, section 73 of the Employment Code entitles employees engaged on long-

term contracts to gratuity at a rate not less than 25% of the basic pay earned during the contract duration following the termination or expiration of the contract.

With respect to severance pay, the Exemption Regulations have exempted expatriate employees and employees in management from claiming severance pay at the end of the contracts of fixed duration. Further and with respect to gratuity, the Exemption Regulations proscribe the following types of employees from receiving gratuity at the end of their long-term contracts;

- Expatriate employees;
- Employees in management with a written contract providing for gratuity;
- Employees in the agricultural sector; and
- Employees in the domestic sector.

Over time

Section 75 of the Employment Code entitles all employees who have worked in excess of 48 hours in a week, to a payment equal to one and half times the employee's hourly rate of pay. The Exemption Regulations have exempted expatriate employees and employees in management from claiming over time for having worked in excess of 48 hours in a week.

OUR LIMITATIONS

Kindly note that this brief is not exhaustive and does not constitute legal advice. In the event that you would like us to render a comprehensive legal opinion, kindly contact our

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