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EMPLOYEE HEALTH CARE IN ZAMBIA

WHAT DOES YOUR EMPLOYER OWE YOU?

Employment Code
Act No. 3 of 2019

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Executive Summary

The legislature in Zambia has enacted the Employment Code Act No. 3 of 2019 ("the Employment Code") was enacted on May 9th 2019. The main purpose of the Employment Act is to regulate the employment of workers in Zambia and provide for basic conditions of employment. The Act sets standard practices which employers should follow from the creation of the employment relationship, during period of service and at termination. The Act also provides a supervisory and administrative machinery to ensure compliance with set standard practices.

The Act introduces several new basic conditions of employment that, in some instances mirror those already provided for under other legislation in Zambia. The purpose of this brief is to highlight the duplication of these benefits and the practical effect of having multiple laws regulating the health care of employees in Zambia.

The National Health Insurance Act creates a compulsory National Health Insurance Scheme. This new scheme will be part of the effort to move towards universal health coverage, achieve better health outcomes and develop a sound and sustainable health care financing strategy for Zambian citizens. All citizens and established residents above the age of eighteen (18) years old in Zambia are obliged to register as members of the National Health Insurance Scheme.

Members of the National Health Insurance Scheme who are in possession of a valid membership card are entitled to access insured health care from accredited health care providers anywhere in Zambia and receive benefits, that shall be prescribed. The Act does not explicitly outline the nature of these benefits but provides that the Minister shall prescribe the benefit packages after consulting the Authority. We shall keep you updated once it comes into effect.

It should be noted that section 94 of the Employment Code Act provides that employers shall provide employees with medical attention and medicines and where necessary, transport to a health facility during the illness of the employee. This statutory right co-exists together with any benefits under the National Health Insurance Act. This is because section 4(1) of the Employment Code does not to relieve any person, employer, employee, pension scheme or health care provider of any duty or liability imposes on the, by any other written law or limit any powers conferred on a public officer by any written law.

Further, the Workers Compensation Act provides that an employer or the Workers Compensation Fund shall defray expenses incurred by an employee as a result of an accident arising out of an in the course of employment. These rights accrue to employees together with the right an employee has to access health care from an accredited health care provider in Zambia.

Both the obligations under the National Health Insurance Act and section 94 of the Employment Code Act are couched in mandatory terms. Both use the word “shall” in relation to the obligations of the employer. In Gift Luyako Chilombo v. Biton Manje Hamaleke Appeal No. 2 of 2016, the Constitutional Court provided that:-

In its ordinary usage, “shall" is a word of command and is normally given a compulsory meaning because it is intended to show obligation and is generally mandatory; It has a potential to exclude the idea of discretion and impose an obligation which would be enforceable particularly if it is in the public interest.

Of particular interest from the Gift Luyako Chilombo case is the phrase “if it is in the public interest”. Applying the court’s interpretation to impose an obligation if it is in the public interest, it would seem that the duplication of benefits alluded to above, particularly in relation to medical care are to ensure the widest ambit of social protection to Zambian employees to give effect to ILO Conventions No. 102 and 202 on Social Security (Minimum Standards) and Social Protection Floors.

Crucially, it should be noted that based on the above, it is clear that the enactment of both legislation create separate obligations on the parties. Section 4(1) (a) of the Employment Code Act expressly provides that:-

Subject to the other provisions of this Act, this Act shall not—

(a) relieve an employer or employee of any duty or liability imposed on the employer or employee by any other written law;

By virtue of this provision, employers who contribute to the National Health Insurance Scheme are not discharged from their obligations under section 94 of the Employment Code Act. In Steven Katuka and the Law Association of Zambia v. Attorney General and Ngosa Simbyakula and 62 Others 2016/CC/0011:

Where the words of the Constitution or statute are precise and unambiguous in their ordinary and natural meaning, then no more is required to expound on them

Looking at the plain and ordinary meaning of section 4(1)(a) of the Employment Code, it would seem that because section 4(1) of the

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Employment Act does not relieve employers from any duty or liability in any other written law, employers are under a duty to remit contributions to the National Health Insurance Authority as well as fulfil obligations under section 94.

In Sanhe Mining Zambia Limited v. Andrew Mazimba and Tirumala Balaji (Z) Limited CAZ Appeal No. 83/2017 the Court of Appeal provided as follows:

The courts now adopt a purposive approach which seeks to give effect to the true purpose of legislation and are prepared to look at much extraneous material that bears on the background against which the legislation was enacted.

Based on the above, it would seem that the purpose of section 4(1) (a) of the Employment Code Act is to give sufficient protection to workers in the country in the form of medical attention, supplemented by the National Health Insurance Scheme.

Employers are free to offer medical allowance or additional medical schemes for their employees. It should however, be noted as was confirmed in John Munsanje v Family Health Trust Registered Trustees SCZ Appeal No. 23/2012 this allowance is ordinarily dependant on the employee getting sick and/or fulfilling additional criteria set out.

Therefore, where an employer has its own medical scheme or allowance system, they would have fulfilled their obligation under section 94 of the Employment Code Act. However, by virtue of section 4(1) of the Employment Code Act, this would not extinguish the obligation on employers to remit contributions in terms of the National Health Insurance Act.

It is important to note that in Matilda Mutale v. Emmanuel Munaile SCZ Judgment No. 14 of 2007 the Supreme Court held that

"If the words of the statute are precise and unambiguous, then no more can be necessary than to expand on those words in their ordinary and natural sense. Whenever a strict interpretation of a statute gives rise to an absurdity and unjust situation, the judges can and should use their good sense to remedy it by reading words in it, if necessary, so as to do what Parliament would have done had they had the situation in mind." (Our emphasis)

The above provides that where the interpretation of a statute gives rise to an absurdity and unjust situation, the court has a role to remedy the situation to deduce what the legislators had in mind when drafting the legislation.

It is submitted that by virtue of section 4(1)(a) of the Employment Code Act, a

potential unjust situation has been created where employers are having to fulfil multiple obligations with respect to the same duty i.e. health care, medical discharge and death benefits. Further, in General Nursing Council of Zambia v. Ing'utu Milambo Mbagweta (2008) Z.R. 105 (S.C.), the Supreme Court provided that:-

The primary rule of construction or interpretation of statutes is that enactments must be construed according to the plain and ordinary meaning of the words used, unless such construction would lead to some unreasonable result, or be inconsistent with, or contrary to the declared or implied intention of the framers of the law, in which case the grammatical sense of the words may be extended or modified.

From the above, it is clear that section 4(1)(a) of the Employment Code would lead to an unreasonable result. For these reasons, it is submitted that if a challenge is brought before the Court, the duplication of duties on employers could be reviewed for being unjust and unreasonable.

The Constitutional court in Noel Siamoondo, Kelly Kapianga and the Young African Leaders Initiative Limited v. The Electoral Commission of Zambia and the Attorney General Selected Judgment No. 24/2016 provided that the provisions of legislation must be construed according to the plain and ordinary meaning of the words and they must be in consonance with other related provisions when read as a whole.

The Constitutional Court did not highlight whether or not the ordinary meaning of words must be in consonance with related provisions in other legislation. One could argue it would possible for the reasoning of the Constitutional court to be extended to ensure consonance on all obligations on the employer in related employment legislation to avoid an absurd result such as the one outlined above in relation to the duties on employers.

The above notwithstanding, it would seem that at least for the time being, the obligation on employers to pay contributions to the National Health Insurance Scheme subsists simultaneously with the employers' duty to