

YOUR POCKET GUIDE TO THE EMPLOYMENT LAWS OF KENYA



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(c) Conversations With Wendy



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Sources of Labour Laws of Kenya

a) Statutes

- Employment [Act](#)
- Labour Relations [Act](#)
- Labour institutions [Act](#)
- Occupational Safety and Health [Act](#)
- Work Injury Benefits [Act](#)
- National Social Security Fund [Act](#)
- National Hospital Insurance Fund [Act](#)
- Industrial Training [Act](#)
- Housing [Act](#)
- Retirement Benefits [Act](#)
- Pensions [Act](#)
- Provident Fund [Act](#)
- Contracts in Restraint of Trade [Act](#)
- Data Protection [Act](#)
- Persons with Disabilities [Act](#)
- Health [Act](#)
- Employment and Labour Relations Court [Act](#)

b) Exceptions contained in the statutes above

c) Associated legislation

- The [Constitution](#) of Kenya contains provisions on fundamental rights and freedoms of an individual. Take note of Article 27 on freedom from discrimination, Article 30 on protection from slavery, servitude and forced labour, Article 36 on freedom of Association, Article 41 on right to fair labour practices and Article 162 (2) (a) that provides for the Employment and Labour Relations Court.
- *The International Labour Organization* is a membership organization that seeks to advance social and economic justice through setting international labour standards. Kenya is a member of ILO, and has given formal consent to about

50 ILO conventions. Currently, 37 are in force in Kenya; having consented to 7 of the 8 fundamental conventions (International Labour Organization, 2021).

d) *Best practice.* These are standards of practice that are generally accepted and used within the framework of labour laws. They are both national and international.

e) *Internal regulations.* These are the rules that are applicable in an organizational internal structure mainly; employee handbook and or HR manual, code of conduct, finance, and procurement manuals among others.

f) *Membership organizations that regulate relations between an employer and employees, i.e. trade unions.* Employers are obliged to recognize trade unions for purposes of allowing the representatives of the union and management to negotiate, in good faith, the terms and conditions of employment, i.e., collective bargaining.

g) *Common law/ Case law.* These are laws as established by the outcome of former cases.

Pre-employment Information

a) Application data

Employers should be careful to ensure that the data collected during a recruitment process is used for the purpose it was meant to be used and not any other purpose. A prospective employee should remain informed of the purpose and use of the data collected by a prospective employer.

b) Employee background checks

There is no law prohibiting these checks whether done by an employer or through a third party. The key is to ensure that the rights to privacy of an applicant or employee is not infringed upon. Always comply with the constitutional provisions on privacy and the obligations put on the employer by the Data Protection Act.

c) Pre-employment medical checks

The rule of the thumb is to not order these unless the information is directly relevant to the job of an employee. Keep in mind that the Constitution of Kenya protects any individual's right to privacy. Further, where such information is necessary, an employer need only receive a 'certificate of fitness' for the relevant staff and not necessarily their full medical history.

d) Preferential hiring or discrimination

The principle here is to eliminate discrimination in all employment practices and to promote equal opportunities in employment. It is however, not discriminatory to select competent candidates for a role based on skill and ability, carry out affirmative action in recruitment and to prefer to hire Kenyan citizens in accordance with national employment policy.

e) Hiring a foreign national

Follow the directions of Kenyan Citizenship and Immigration [Act](#) on acquiring a legal status for a foreign national to work in Kenya either through special pass (ideal for contracts of less than 185 days) or work permit (for longer term engagements) before offering any type of employment to a foreign national.

f) Withdrawing an employment offer

Employers are advised to take time before offering employment to any applicant. Ensure that background and or reference checks are done before offering employment to any applicant.

Potential employees are advised to be honest with the representations that they make that cause a potential employer to offer them employment. Information discrepancy is a good ground to rescind an employment offer.

To be on the safe side, if an employment offer needs to be rescinded, follow the process of terminating an ongoing employment especially after the offer for employment has been accepted.

Contract types

a) Verbal or written contract

All contracts that exceed a period of two months should be in writing. EA s.9 (1)

b) Employee or consultant

Even though your employment agreement reads consultant, you are an employee when:

- The organization has control of who supervises you, determines what should be done, when and how (control test);
- You are subject to all the internal policies and procedures like the employee handbook among other internal policies (integration test);
- You do not hold the ultimate responsibility of profit and or loss of the business (entrepreneur test); and
- You receive benefits like annual leave, medical insurance, housing allowance etc., your tools of trade are provided by the organization.

c) Fixed term or open-ended contract

The laws recognize two contracts types; a contract of service (one entered by an employer and employee) and a contract for service (one entered between an employer and a contractor and or a consultant).

There is no limit to the number of fixed term contracts an employer can give an employee and there is no time within which a fixed term contract can be automatically considered to convert into an open-ended contract unless in writing between both parties.

It should be understood however, that continuous employment for purposes of severance pay is calculated from the first day of the fixed term contract and the first day of the open-ended contract.

d) Probation contracts

Probationary contracts are allowed but with a time limit of six months. This contract can be extended for a maximum period of a further six months. A probationary contract should expressly state so for it to function as one. This is governed by EA s.42.

e) Causal employment

These can be verbal or in writing. Remain advised that if you work as a causal for the same employer for a period exceeding one month or for works that take more than three months to complete, you are entitled to a month's notice in the event of termination.

A casual contract for a worker that works more than two consecutive months is converted automatically into an employment contract and thus, such a worker is entitled to all the terms and conditions available to other regular employees. This is guided by EA s.37.

f) Sub-contracting and or secondment of employees

There is currently no specific law that governs this. However, employers should be careful to ensure that the staffing and seconding agencies they are collaborating with are legally mandated to do so. An employer should further ensure that seconded staff are not reclassified as its employee. The employment letter, payroll source, performance management and discipline of sub-contracted and or seconded staff should be handled by the hiring agency and or seconding organization.



The Employment Contract

a) The contents EA s. 10 (2) and (3)

- Employee particulars (name, age, permanent address; get both postal and physical address, sex of employee)
- Employer's name
- Job description
- Date of commencement of employments
- Details of type of contract (probationary, casual, etc.)
- Duration of contract
- Place of work
- Remuneration
- Intervals that remuneration will be paid
- Terms and conditions (hours of work, annual leave, housing allowance, sick leave entitlement and sick leave pay, water,

food, and medical attention)

- Duties of employer
- Duties of employee
- Any applicable CBAs
- Disciplinary procedures
- End date for fixed term contracts
- Termination and applicable notices

b) Other documents annexed to the contract

- Employee Handbook/ Internal Staff Regulations/HR manual
- Code of Conduct

c) Regulation of Wages (General) Order

This is an order that is still in effect by virtue of s.63(2) of the Labour Institutions Act. The key is to remember that all provisions in this Order should comply with the minimum provisions of the Employment Act. Where this Order has enhanced provisions from those in the Employment Act, the enhanced provisions shall prevail.

Item	Provision
Hours of work	A working week for a person working during daytime hours should consist of not more than 52 hours of work spread over six days of the week. The normal working week of a person employed for night work should consist of not more than 60 hours of work per week. Any deviation should be stated as a clause in the contract or employee handbook. EA s. 27, Regulation of Wages (General) Order Article 6 (1)
Rest day	Each employee is entitled to at least one rest day in each week. Regulation of Wages (General) Order
Overtime calculations where applicable	One-and-a-half times the normal hourly rate for time worked more than the normal number of hours per week; or twice the normal hourly rate for time worked on the employee's normal rest day or a public holiday. Regulation of Wages (General) Order Article 6 (2)
Acting Allowance	The Regulation of Wages (General) Order provides that after a month of acting in a position with a higher pay than an employee's current pay, an acting allowance should be made in the amount equivalent to the difference between the salaries

Annual leave	21 days after every 12 consecutive months of service. EA s.28
Sick pay	7 days with full pay and 7 days with half pay after 2 months of service for every 21 months A maximum provision is given by the Regulation of Wages (General) order as 30 days with full pay and 15 days with half pay. EA s.30, Regulation of Wages (General) Order Article 12
Maternity leave	90 calendar days. EA s.29
Paternity leave	14 calendar days. EA s.29 (9)
Housing, food, and water	Must be provided for in the remuneration or an employer can simply state that the salary is gross consolidated EA s.31, 32, 33
Medical care	Catered for by NHIF
Social security	Catered for by NSSF

d) Summary of statutory minimum conditions of work

e) Burden of proof

It is the responsibility of an employer to show that an employee remained aware of all the documents that govern their employment and the contents therein. It is advisable to have employees imprint or sign an acknowledgement for all documents that govern their employment. EA s.9 (2) and (3)

In the event of a dispute, an employer should produce a written and fully executed contract. In its absence, it is the duty of an employer to prove or otherwise of the terms and conditions of the contract. EA s. 10 (7)

f) Employee records

Each employer is required to keep the particulars of employment of an employee for five years after termination of employment. EA s.10 (6)

g) Other clauses that you could include in a contract

- Confidentiality
- Non-Compete
- Other employment
- Non-solicitation
- Intellectual property

- Training bond
- Conflict of interest among others

Protection of wages

The EA has in s.17, s.18, s.19 s. 20, s.21 and s.25 provided that wages should be paid in full and in a manner prescribed in law. Note the following as guiding principles.

- Wages should be paid on a working day during business hours away from any form of intoxication.
- Payment of wages should be made once it becomes due. Failure to do this constitutes an offense.
- An employer cannot make a deduction on pay that is more than two thirds of the total remuneration (Gross pay).
- An itemized statement of wages (pay slip) must be provided by an employer to an employee.

End of employment relationship

a) Fixed term end date

In the event that an employer wishes not to renew a fixed term contract past its stated end date, it is prudent to issue the affected employee with a non-renewal notice at least one month to the end date of the fixed term contract. This is good practice.

b) Voluntary termination of contract with notice

An employee while observing the required notice contained in their employment contract, can terminate their employment with any employer without the obligation of giving a reason. The employer has no legal right to decline a resignation notice from an employee. This notice is deemed to start running from the date the notice was given.

c) Termination of contract with cause

An employer is not allowed to end a contract without a valid reason, the reason should be fair (fair reasons for terminating a contract can arise from the conduct, performance or compatibility of the employee or operational requirements that necessitate a redundancy), fair process and that the dismissal is in accordance with justice and equity. A full proof process of termination is one

Request for explanation

Response satisfactory	Request for explanation	Unsatisfactory response
Close the matter in writing		Respond and explain why response is unsatisfactory
		Invite for disciplinary hearing
		Hold hearing (allow for representation of employee)
		Capture minutes and have parties present sign them
		Adjourn to consider a decision
	Hearing explained allegation well	Communicate the decision in writing but explained to staff
	Close the process in writing	Allow room for appeal
		Enforce the decision

described below and guided by EA s.41, s.43, s.45 and s.46:

d) Involuntary termination of contract with notice

After due process has been followed, an employer may terminate an employee by giving them notice as per the contractual requirements. Such cases arise from offenses that are serious to warrant termination but are not too serious to fall within the category of summary dismissal.

Other types of dismissal with notice could arise from dismissals on medical grounds or physical incapacity though the procedure is not like the one stated above.

e) Summary dismissal

Otherwise known as dismissal without notice; this is reserved for misconduct that is termed as gross misconduct. The Employment Act gives a good description of what those may be. An employer could describe further actions of gross misconduct than those in the Employment Act within its internal regulations. EA section 44 guides this.

f) Redundancy

This is governed by section 40 of the Employment Act. It is the involuntary loss of employment for an employee at the instigation of an employer at no fault of the employee. The employer must show that the services of an employee are superfluous and not the result of an employee's performance, conduct or actions.

There are two areas to take note of while declaring a redundancy:

- Rationale (economic downturn, ceasing or diminishing of work, commercial judgement and or business strategic redirection or restructure of business operations.)
- Procedural steps (Notice of intention, 30-day notice to labour office, consultation with staff, selection procedures, serve personally affected employees with one-month notice and final termination.)

g) Retirement

There is currently no retirement age for the private sector employees provided in law, however, internal regulations and guidance from social security plans (pensions and provident funds) can guide. The government sector has a retirement age of 60 years.

h) Mutual Agreement

An employer and employee can agree to mutually terminate employment. This option can be very tricky especially for the employer in the event an employee claims undue influence.

h) Death

An employer is required to report to the labour office; as soon as practicably possible, the demise of its team member. Any person making claims on the benefits of the deceased must prove that they have the capacity to make such claims as required by law. Once this claim is launched on behalf of a deceased, an employer is required to make payment within seven days and file proof of such payments with the labour office.

If after three months there has been no claim on the benefits of a deceased person or the claim made is in dispute, an employer should deliver the benefits to the labour office for the law of succession to kick in. This is provided for in EA s.24

i) Benefits accruing from termination

Item	Legal minimum	Other provisions
Resignation	<ul style="list-style-type: none"> • Pay to last working day • 30 days' Notice given or paid in lieu • Accrued and unused leave days • Any other amounts owed to the staff by employer 	Should there be an enhanced provision either in contract, internal regulations, or enforceable CBA, then the enhanced provision should apply
Termination with notice	<ul style="list-style-type: none"> • Pay to last working day • 30 days' Notice given or paid in lieu as per contract • Accrued and unused leave days • Any other amounts owed to the staff by employer 	Should there be an enhanced provision either in contract, internal regulations, or enforceable CBA, then the enhanced provision should apply
Summary dismissal	<ul style="list-style-type: none"> • Pay to last working day • Accrued and unused leave days • Any other amounts owed to the staff by employer 	Avoid making any other payments to summarily dismissed employees to avoid opening an organization up for litigation
Retirement	No stated legal minimums	Should there be an enhanced provision either in contract, internal regulations, or enforceable CBA, then the enhanced provision should apply
Redundancy	<ul style="list-style-type: none"> • Pay to last working day • 1-month notice given or paid in lieu • Severance pay at the rate of 15 days of pay for each year of service • Any other amounts owed to staff by employer 	Should there be an enhanced provision either in contract, internal regulations, or enforceable CBA, then the enhanced provision should apply

Other useful information you should have as a player in the Kenyan labour ecosystem

a) Industry best practice

Area	Best practice principles
Prohibited employment practices	Include policies on equal employment opportunities employment, non-discrimination statements, Harassment, and bullying policies among others
Sourcing and contracting	Contracts should refer to internal company policies All contracts should be in writing
Performance Management	Have a system Apply policies as consistently as practicably possible
Discipline and grievance procedures	Have a grievance procedure Consider Alternative Dispute Resolution (ADR)-mediation, arbitration, negotiation Verbal disciplinary actions should be occasioned into writing always Include an appeal clause in your grievance and disciplinary procedures Suspension should not exceed 6 months.
Termination (involuntary)	Final dues should be calculated using available enhanced provisions rather than legal minimums. In redundancies, offer affected employees support- Counselling, CV referrals, Links with relevant persons. Work with Finance/Leadership as a team during redundancies. Redundancy letters to the Labour Office should include selection criteria; try not to be too general. Prorate the year for benefits calculation purposes. In redundancy process consider employees with special needs/cases e.g. PLWD or expectant mothers.
Voluntary Termination	Include clause on termination at will in policy, especially where voluntary retirement applies. Final dues should be calculated using available enhanced provisions rather than legal minimums. Sign off and document with employees upon exit.

b) The following policies are compulsory to have if:

- You have employed more than 20 persons: a Sexual Harassment Policy. EA s. 6 (2). The First Schedule rule 6 of the EA provides for the contents required for a Sexual harassment policy.
- It is good practice though not compulsory to have a policy on HIV and AIDS education.

c) Advocates are not allowed to be party to internal disciplinary processes of a company. EA s.48

d) Upon separation from employment, an employer must issue an employee with a Certificate of Service. EA. S.50. This includes in cases where the employee was summarily dismissed.

e) Bonds are provided for in s.23 (1) of the EA. The Employment (General) Rules of 2014 in Article.9 prescribes the form of execution and delivery of a bond.

f) The Labour Relations Act requires that all Trade Unions be registered as prescribed therein. For a Trade Union to become legitimately recognised by the management of any organization, it must have its members forming a simple majority of employees of an employer, LRA s. 54

g) Collective Agreements can only be enforceable if they are negotiated within a valid recognition agreement between employer and Trade Union. The terms and conditions of employment for all unionisable staff, is set in the LRA s. 57. The existence of a collective agreement must be included in the employment contract of an employee, LRA s. 59

h) All collective agreements should be submitted to the Industrial Court within 14 days of their conclusion for registration, LRA s. 60. Collective agreements that have not been registered are not binding.

1. The LRA in its schedules provide for rules of deduction and submission of union fees for members of different unions.
2. The Labour Institutions Act describes and gives the function and powers of a Labour Inspector, Employment Officer and Medical Officer in s. 35, s.36 and s.37 respectively.

k) The LRI in s.43 and 44 establishes wages councils, describes their functions which among them is publishing wages orders that are general and specific to the labour ecosystem s.45 and s.46. S.47 and s.48 prescribe the contents of a wages order.

l) LRI in s.55 requires for all employment agencies to be registered under the Act.

Trends and new developments

a. Housing Fund Levy

The Finance Act 2018 which was signed into law on 21 September 2018 at Section 85 amends Section 2 of the Employment Act by introducing employer and employee contributions to the National Housing Development Fund established under the Housing Act which essentially requires employers to remit contributions to the fund by deducting 1.5% of the employee's salary and contributing the other 1.5% but subject to a total maximum of Kshs. 5,000. The implementation of the Levy remains suspended until a determination by the ELRC.

b. The Employment (Amendment) Act, 2021 (the Amendment Act)

The Act came into effect on April 15, 2021 and introduces a provision on pre-adoptive leave and provides that where an employee adopts a child, the employee shall be entitled to one month's pre-adoptive leave with full pay from the date of the placement of the child. There is however, a requirement to give the employer at least Fourteen (14) days' notice before the date of placement; making sure to share all the relevant documentation supporting the adoption.

c. Working from home

With the effects of the Covid-19 pandemic, remote working is now a reality that many employers and employees are embracing. Some of the advantages of remote working are improved work-life balance, increased employee engagement, fewer distractions, and less time wasted on commuting which all mean better productivity. The trick however, remains in finding what works for the organization and for employees, so as to strike a balance, such as by having a hybrid workplace.

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