

**J.B. Ong'anya & Co.
Advocates**

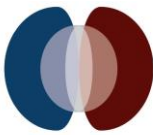
Newsletter

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Employment Act, 2007 of the Laws of Kenya: Termination

Introduction

Termination of employment occurs in various forms, which should be conducted as per the law. A well conducted separation reduces chances of legal action by any party to the just terminated agreement. We are highlighting some of the bare minimum conditions that the Employment Act, 2007 of the Laws of Kenya (the “Act”) provide.

Termination Notice

There will be no notice to terminate services if the service rendered is paid for on a daily basis; if the service offered is paid for at an interval of less than a month, it will be terminated through a written notice that will take effect when the next interval is to start; and where a person offers services on a monthly basis or more, will have his contract terminated through a written notice of at least twenty-eight days.

Where the employer provides favourable terms to those mentioned above, those terms will take priority.

It does not apply to certain employees, particularly those who are members of certain Schemes that offer favourable terms, and National Social Security Fund.

Payment in lieu of the Notice

When terminating a contract, a party can issue a notice that takes effect immediately and should provide the salary that covers the notice period.

Conversion of casual employment to term contract

It occurs when one is offering a service that is paid on a daily basis but last longer than a month, and the services rendered seem not to end in three months' time or more.

Waiver of notice by the employer

Occurs when the employee issues a notice but

the employer waives it in whole or part. If that happens, the employer will pay the employee for the time not served unless the employer and employee agree otherwise.

Contract expiring on a journey may be extended

The employer, at their own discretion, can extend a contract that has expired while the person hired is on a journey – in line of duty – and that extension should not be more than a month.

Termination on account of Redundancy

Redundancy is the termination of an employee's services without whatsoever fault, which can be due to restructuring, financial constraints, or duplication of services.

The employer, before effecting the termination on account of redundancy, should inform the employee or the union representing the employee and the labour officer at least a month prior to the termination.

The employer should have assessed seniority, skills, abilities of the employees available at various classes of employees.

If there is any collective agreement between the employer and employee, the arrangement should not disadvantage a unionized over a nonunionized employee or vice versa.

Where leave is due, it should be settled in cash, the notice should be in lieu of the salary. In addition, the employee should be given severance pay of not less than fifteen days for every complete year served.

The law on redundancy does not apply when an employer is subjected to insolvency mechanisms.

Notification and hearing before termination on grounds of misconduct

The employer will issue an employee with a notice for administrative action concerning the



conduct of the employee. It primarily applies to issues of misconduct, poor performance or physical incapacity. The employer will explain the reasons for the intended termination in a manner the employee can best understand and allow the employee to be accompanied by someone of their choice.

Termination of Probationary contracts

Probations will be six months or less but can be extended by another six months if the employee is agreeable to such terms.

Termination of the probationary contract can be done through a seven days' notice or notice with the wages in lieu. In addition, there is no option for administrative action prior to termination of a probationary contract.

***note:** there is a case challenging such measures as it is deemed to contravene the Constitution.*

Proof of reason of termination

The employer is required to give reasons' as to why the employee's service is being terminated, failure to do that, it will be regarded as unfair termination.

Summary Dismissal

Occurs when an employer terminates the services without notice or less notice as per the law or contract, and this only happens when the employee breaches fundamental provisions of the contract.

Some of the reasons that an employer can rely on include unauthorised absenteeism, intoxication or inability to perform during working hours, willfully neglects or carelessly and improperly performs the task, use of insulting language, knowingly refuses to follow instructions, arrest for a cognizable offence punishable by imprisonment and no bail/bond issued within fourteen days, or committing an offence against the employer.

Unfair Termination

Termination will be deemed as unfair termination if the employer fails to establish that the reason for termination is valid; relates to the employees conduct, capacity or compatibility; or is based on the operational requirements of the employer; and was done in accordance with the law.

Any employee who has served at least thirteen months prior to the termination have the right to claim unfair termination.

Reasons for termination or discipline

The following do not constitute fair reason for dismissal or for the imposition of disciplinary penalty:

A female employee's pregnancy or issues related to it; going on or intending to take leave; membership or intent to join a trade union; participating in trade union outside working hours or within working hours, if the employer consents; seeking office as an officer in a trade union or workers representative; refusal to join or exit a trade union; employee's race, colour, tribe, sex, religion, political opinion/ affiliation, national extraction, nationality, social origin, marital status, HIV status, or disability; owing to the employee's intention to initiate legal action against the employer, save where the claim lacks foundation; or employee participating in lawful strike.



Foreign Investment in Kenya

Introduction

The Republic of Kenya has legislations that address the interests of Foreign Investors, and that is through general Acts of Parliament, Gazette Notices or through Treaties between Governments. In this issue, we will address several factors that fall under Foreign Investment.

Registration of Foreign Companies

The basic documents required to register a company as a foreigner investor include, but not limited to: a certified copy of the certificate of the foreign company; its constitution; list of directors and their identifiers; if some directors live in Kenya, a memorandum or document highlighting their powers; charge on property that will need to be registered under the Companies Act, if any; notice of address at the origin and that of Kenya.

The name will be the same or an alternative name. When registering a representative office, a foreign company needs a local representative.

Shareholding?

We addressed this in our **First Issue** that a foreigner can register a company in Kenya as a sole shareholder, and director. The amendment was through s 85 of the Finance Act No. 38 of 2016, it amended the Companies Act No. 17 of 2015 by deleting s 975 (2) (b). In addition, despite the amendment, there are certain laws that require foreign investors to have local shareholders.

Tax Laws

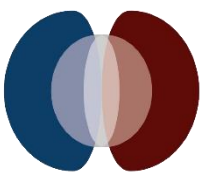
There are several factors to consider, which include the Kenyan Tax Laws or Regulations, Double Taxation Agreements (DTAs), and Bilateral Treaties between Kenya and other Countries for purposes of enhancing the Foreign Direct Investment in Kenya.

Approvals

It is important to assess whether the investment requires certain licenses that will make it easy for the foreign investor to operate swiftly as well as the types of permits needed.

Business Entities

Other than company limited by liability, there are other models of business entities that an investor can opt to use as the investment vehicle.



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