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Risks of Unwritten Employment Contracts to Both the Employer and Employee

Introduction

In Kenya, the terms and conditions of employment are governed by the Employment Act of 2007 ("**The Act**"). The Act sets out the rights and obligations of employers and employees, provides the basic conditions of employees, outlines the procedure for termination of employment, and generally governs the scope of employment.

While having a written employment contract in Kenya is not mandatory, it is highly recommended to have one. The Act provides that employment contracts may be oral or written. Indeed section 2 of the Act defines the term "contract of service" to mean an agreement, whether oral or in writing to employ or to serve as an employee for a period of time.

While most people in the formal economy prefer written contracts, most employers, more so in the informal sector, prefer unwritten or verbal. These informal arrangements may seem convenient due to a myriad of reasons, such as the simplicity of engaging the employees, the desire of the employers not to pay the legal minimum wages or salary and other employee's related benefits and statutory deductions, and the perceived inconveniences and costs of engaging a lawyer to draft a contract. Still, they come with a host of risks for both parties. Since most Kenyan economy is still informalized, these informalities often permeate even the formal sector.

This article delves into the potential pitfalls of unwritten employment contracts under the Employment Law of Kenya, highlighting the importance of formalizing employment agreements in writing. An unwritten employment contract can pose several risks for the employer and the employee, as illustrated below.

Difficulty in Enforcement

Without a written contract, it can be difficult to prove the terms and conditions of employment. This can lead to disputes between the employer and employee over issues such as salary, benefits, and termination. In the event of a dispute, it may be difficult for either party to prove their case without a written contract.

Furthermore, the enforceability of unwritten employment contracts is questionable. In the event of a dispute, verbal agreements often rely on witness testimonies, which can be challenging to substantiate and may lead to conflicting accounts. The lack of written evidence can hinder the resolution of disputes through legal channels, leaving both parties vulnerable to uncertainties and protracted legal battles.

Inability to provide adequate protection to the parties

An oral or unwritten contract may not provide adequate protection for either party to it. The Employment Act in Sections 9 and 10 sets certain minimum standards for all employment contracts, such as minimum wage, working hours, sick leave, paternity, and maternity leave, annual leave, employee benefits and allowances, and termination notice. Without a written contract, an employee may find it difficult to enforce these rights.

Notwithstanding, parties may orally agree on all those terms but ambiguities, and misunderstandings would reign high between them on what exactly they had agreed. Oral agreements do not have a reference point and thus adversely affect the interests of both the employer and the employee.

An unwritten contract also injures the employer's interests hugely. For example, if an employee is terminated without cause, they may be entitled to damages for wrongful dismissal. Without a written contract setting out the grounds for termination, an employer may find it difficult to prove the termination was justified.

Does not reflect the intentions of the parties

A contract is a legal document expressing the agreed intentions and expressions of the parties executing it. The unwritten agreements will often give rise to implied terms due to the parties' difficulty in explicitly defining their intentions in a manner that can be referenced in the future. These implied terms may not align with the actual intentions of the parties or with the statutory obligations prescribed by the Employment Act. As a result, employers' and employees' rights and responsibilities may become uncertain.

Shifting the Burden of Proof to the Employer

The default rule of evidence is that whoever alleges must prove. Thus, whoever desires any court to give judgment as to any legal right or liability, dependent on the existence of a fact that he/she asserts, must prove that those facts exist. However, section 10(7) of the Employment Act 2007 makes an exception in employment proceedings. It provides that in if in any legal proceedings, an employer fails to produce a written contract or the written particulars, the burden of proving or disproving an alleged term of employment stipulated in the contract shall be on the employer.

Where a dispute arises, and an employee institutes legal proceedings, the law places the burden on the employer to disprove any allegation on a term of an unwritten contract by the employees. As such, if an employee makes an allegation about a contract term on oral-based employment contracts, the employer must provide evidence to disapprove the employee's allegation. In ordinary cases, it would be the employee who would be required to prove their allegations.

Courts in Kenya are generally thought to be pro-employee and have consistently upheld this provision. If it were that salary payments are informally made, leave days are informally taken, and no proper records are kept, disproving an allegation of a term can be both difficult and expensive. It is, therefore, advisable that employees reduce terms of employment in writing or keep written particulars.

Conclusion

While the convenience of unwritten employment contracts might seem tempting, the risks associated with such agreements under Kenyan Employment Law outweigh any perceived benefits. Employers and employees are encouraged to formalize their employment relationships through written contracts, which provide clarity, protection, and enforceability.

Under Kenyan law, employers are required to furnish employees with written particulars of employment, and this practice should be adhered to diligently. Seeking legal advice and drafting comprehensive employment contracts can help safeguard the interests of both parties and foster a transparent and legally compliant employment relationship. By doing so, employers can avoid potential disputes and penalties, while employees can enjoy the protection of their rights and benefits as enshrined in the Employment Act.

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