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A Snapshot of Recent Changes in Kenya's Labour Laws

The laws governing the employment relationship are constantly evolving to meet the demands and changes in the employment space and society in general. Below is a snapshot of some of the changes/developments that have taken place in the last two years.

1. National Social Security Fund (NSSF) Act, 2013: Employment & Labour Relations Court declares mandatory contributions to NSSF unconstitutional.

On 19th September 2022, the Employment & Labour Relations Court nullified section 20 of the NSSF Act, 2013 which made it mandatory for all employers and employees to register and contribute to the NSSF. The court held that there was no constitutional justification to deny members, who have adequate alternative pension and social security schemes and are already under private existing contributory schemes, their choice of a pension scheme by requiring them to subscribe to the NSSF.

The court also held that the NSSF Act, 2013 was null and void ab initio (from the beginning) because it was not tabled before the Senate prior to its enactment. Statutes that have implications on county finances must be tabled before the Senate.

Under the previous Act the employer and employee were each required to contribute KES 200 towards the Fund. The NSSF Act, 2013 had increased those contributions from this sum to sums on a sliding scale based on the wages earned.

The nullification of the NSSF Act, 2013 means that for the moment, the contributions revert to the previous sum of KES 400 in total per month. It is likely that this will not remain the case for long.

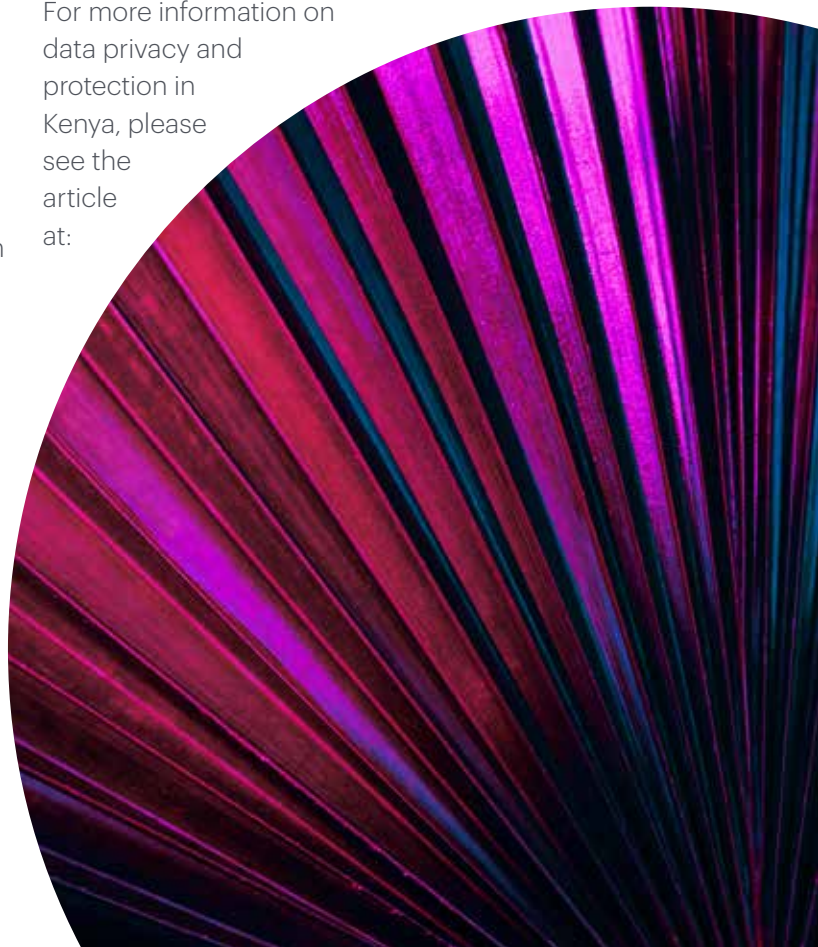
2. Flexibility in background checks: Employment (Amendment) Act, 2022

Prior to an amendment to the Employment Act, 2007, some employers required all job applicants to provide clearance and compliance certificates from various government bodies as a pre-requisite to being interviewed. This presented hardship and expense to many potential employees.

By an amendment to the Act which came into force on 22nd April 2022, employers can only now require such certificates from prospective employees once the employers have granted an offer of employment. For more information please see the detailed article at: <https://www.dentonshhm.com/en/insights/articles/2022/april/12/employment-law-updates>.

This provision should be read together with the Data Protection Act, 2019 which governs how personal data can be obtained and processed.

For more information on data privacy and protection in Kenya, please see the article at:



<https://www.dentonshhm.com/en/insights/alerts/2021/march/16/recent-developments-on-data-privacy-and-protection-in-kenya> and <https://www.dentonshhm.com/en/insights/articles/2022/january/27/the-data-protection-regulations-202-key-points-to-note>

3. Validity of termination of employment on medical grounds

On 22nd October 2021, the Supreme Court of Kenya delivered a judgment where it outlined the procedure that an employer should observe before terminating an employee's contract on account of incapacity. It held that an employer must demonstrate that they provided reasonable accommodation to a sick or incapacitated employee or that they would incur undue hardship in providing such accommodation before terminating an employee's contract on medical grounds/incapacity. It also held that the employer must show that they investigated the extent of the employee's incapacity and explored alternatives short of dismissal. Finally, an employee ought to be given an opportunity to defend themselves.

... there is no distinction between a probationary contract and a permanent or fixed term contract

employment and that the procedure for terminating those other contracts applied to the termination of a probationary contract. The court held that an employer must observe the substantive and procedural fairness requirements set by law when terminating a probationary contract. The effect of this judgment is that there is no distinction between a probationary contract and a permanent or fixed term contract and employers must be vigilant to ensure that the procedures are updated to ensure compliance.

For more information, please see the article at: <https://www.dentonshhm.com/en/insights/alerts/2021/august/4/court-rules-on-validity-of-termination-process-in-probationary-contracts>

5. Introduction of pre-adoptive leave in Kenya

An employee who adopts a child is now entitled to one month's pre-adoptive leave with full pay from the date of the placement of the child. This follows an amendment to the Employment Act, 2007 which came into force on 15th April 2021.

For more on the requirements to be met before an employee is granted pre-adoptive leave and for a copy of the Act, please read the article at: <https://www.dentonshhm.com/en/insights/alerts/2021/april/9/amendments-to-the-employment-act-2007>

4. Validity of the termination process in probationary contracts

A three judge Bench of the Employment and Labour Relations Court delivered a judgment on 30th July 2021 where it held that a probationary contract was no different from any other contract of



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