[

LABOUR LEGISLATION GUIDELINE

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1 INTRODUCTION

1.1 The purpose of this document is to help training officers ensure that they act fairly and in line with the provisions of applicable labour legislation in their employment relationship with trainee accountants at all times.

1.2 Although the enclosed guidelines were prepared in line with South African labour legislation, they are not intended to take the place of professional legal advice. Therefore, the training officer must use the document as a guideline only, and when in doubt, consult with an appropriate expert.

1.3 This guideline does not consider the impact of the SAICA Training Regulations or By-laws on the employment relationship. These must be considered by employers entering into employment contracts with individuals in their capacity as trainee accountants.

2 TERMINOLOGY

In this Labour Legislation Guideline, the following words bear the following meanings:

2.1 "**BCEA**" refers to the Basic Conditions of Employment Act 75 of 1997;

2.2 "**CCMA**" refers to the Commission for Conciliation, Mediation and Arbitration;

2.3 "**Constitution**" refers to the Constitution of the Republic of South Africa, Act 108 of 1996 as amended from time to time;

2.4 "**EEA**" refers to the Employment Equity Act 55 of 1998, as amended to time to time;

2.5 "**Fit and Proper**" in relation to members; associates and Trainee Accountants means compliance with the requirements set out in Part A of the Code of Professional Conduct for Chartered Accountants which are:

2.5.1 adherence to ethical standards based on the 5 (five) fundamental principles;

2.5.2 adherence to professional standards and relevant legislation and regulations;

2.5.3 behaviour in professional and personal life so as not to discredit themselves;

2.5.4 the Institute or the profession of accountancy; and

2.5.5 financial integrity, being honest and reliable in professional and personal financial dealings;

2.6 "**LAN**" refers to local area network;

2.7 "**LRA**" refers to the Labour Relations Act 66 of 1996 as amended from time to time;

2.8 "**Month**" means a calendar month commencing on the first day of the month;

2.9 "**PC**" means a "personal" Desktop computer.

2.10 "**SAICA**" refers to the South African Institute of Chartered Accountants, a body corporate not for gain, established in terms of its own Constitution and incorporated in accordance with the laws of the Republic of South Africa;

2.11 "**Trainee Accountant**" means a Training Accountant as defined in the SAICA Training Regulations;

2.12 "**Training Officer**" means a Training Officer as defined in the SAICA Training Regulations;

3 GOLDEN RULES FOR GOOD WORKING RELATIONSHIPS

3.1 In terms of best practice, the following golden rules should be observed in all working environments:

3.1.1 Set a good personal example;

3.1.2 Ensure that your rules are reasonable and kept up to date;

3.1.3 Check that everyone knows the rules and what is expected of them;

3.1.4 Create a work climate in which your subordinates feel free to approach you;

3.1.5 Do not take action until you have all the facts;

3.1.6 Never rely on hearsay – stick to the facts;

3.1.7 Ask for and be prepared to take into account the other person's side of the story;

3.1.8 Take time to find the real problem and the cause of the problem;

3.1.9 Listen actively − do not interrupt − give your full attention − check your understanding of the facts/situation;

3.1.10 Focus on the problem, not the individual;

3.1.11 Be consistent and follow up on any commitments made;

3.1.12 Make sure your subordinates have sufficient training, tools and support to perform their duties; and

3.1.13 Keep your cool.

4 THE TEN COMMANDMENTS OF INDUSTRIAL RELATIONS[1]

4.1 The employer

The employer has a duty to create and maintain a safe and healthy working environment for employees, which is free from any hazards, abuse or any circumstances which may affect employees' ability to do their work.

4.1.1 You may not dismiss an employee without just cause or reason, nor may you dismiss or treat an employee unfairly i.e. in a manner at variance with the standard of fairness and equity laid down by the Labour Court or labour legislation.

4.1.2 You may not dismiss an employee without having given him an opportunity to be heard and to make representations in his defence.

4.1.3 You may not impose a severe penalty upon an employee without first having considered such employee's work record as well as other relevant factors in mitigation, nor may you impose a penalty that is out of proportion to the alleged offence.

4.1.4 You may not retrench an employee except in accordance with the guidelines set out in the decisions of the Labour Court from time to time and the Labour Relations Act.

4.1.5 You may not prevent an employee from joining any trade union of his choice, nor may you victimise an employee because he is a member of a trade union.

4.1.6 You may not make any unauthorised deductions from the remuneration of an employee, nor may you compel an employee to do overtime work unless such overtime work is previously agreed on, in the employment contract or commit a breach of the BCEA to the employee's detriment.

[1] Bulbulia, Member of the Industrial Court. (These "Ten commandments of industrial relations" were handed down by a senior member of the then Industrial Court, today known as the Labour Court.)

4.1.7 You may not make derogatory remarks about an employee, nor insult or humiliate him in the workplace.

4.1.8 You may not disobey or frustrate any order or judgment obtained against you by an employee in the Labour Court

4.2 **The employee**

The employee has a duty to be loyal towards the employer, to take all reasonable instructions and to render a service to the employer.

4.2.1 You may not breach the terms of your employment relationship.

4.2.2 You may not be disloyal to your employer or betray him or give away his trade or business secrets.

4.2.3 You may not be disobedient or disrespectful to your employer nor indulge in unbecoming or unruly conduct in the workplace.

4.2.4 You may not engage in work stoppages or strikes, except in accordance with LRA.

4.2.5 You may not intimidate any co-employee who refuses to join a trade union or who is unwilling to participate in industrial action against your employer.

4.2.6 You may not remain absent from work or be late for work without good reason and without notifying your employer at the earliest possible opportunity.

4.2.7 You may not gossip or spread false rumours at work, as this may impair sound employment relationships.

4.2.8 You may not be careless or do anything to endanger the lives and safety of persons during the course and scope of your duties.

4.2.9 You may not quit your employment without first having given your employer the requisite contractual notice.

5 LEAVE POLICY, PRINCIPLES AND PROCEDURES

5.1 Annual Leave

5.1.1 "Annual leave cycle" means the period of 12 months' employment with the employer immediately following–

5.1.1.1 an employee's commencement of employment, or

5.1.1.2 the completion of that employee's prior leave cycle. The employer must grant the employee at least-

5.1.1.2.1 21 consecutive days' annual leave on full remuneration in respect of each annual leave cycle, or

5.1.1.2.2 By agreement, one day of annual leave on full remuneration for every 17 days on which the employee worked or was entitled to be paid; or

5.1.1.2.3 By agreement, one hour of annual leave on full remuneration for every 17 hours on which the employee worked or was entitled to be paid.

5.1.2 The employee is entitled to take leave accumulated in an annual leave cycle on consecutive days. The employer must grant annual leave not later than six months after the end of the annual leave cycle. The employer may not require or permit an employee to take annual leave during:

5.1.2.1 Any other period of leave to which the employee is entitled e.g. sick leave, study leave, family responsibility leave or maternity leave; or

5.1.2.2 Any period of notice of termination of employment.

5.1.3 However, the employer must permit the employee, at the employee's written request, to take leave during the period of unpaid leave.

5.1.4 The employer may reduce an employee's entitlement to annual leave by the number of days of occasional leave on full remuneration granted to the employee at the employee's request in that leave cycle.

5.1.5 The employer must grant an employee an additional day of paid leave if a public holiday falls on the day during an employee's annual leave on which the employee would ordinarily have worked.

5.1.6 The employer may not require or permit an employee to work for the employer during any period of annual leave.

5.1.7 Annual leave must be taken-

5.1.7.1 In accordance with an agreement between the employer and an employee, or

5.1.7.2 If there is no agreement in terms of the above clause, at a time determined by the employer.

5.1.8 The employer may not pay an employee instead of granting paid leave except on termination of employment.

5.1.9 The employer must pay an employee leave pay at least equivalent to the remuneration that the employee would have received for working for a period equal to the period of annual leave, calculated at the employee's rate of remuneration immediately before the beginning of the period of annual leave.

5.1.10 The employer must pay an employee leave pay-

5.1.10.1 Before beginning of the period of leave; or

5.1.10.2 By agreement, on the employee's usual pay day.

5.2 **Study Leave (please refer to SAICA's Study Leave Guidelines)**

5.2.1 The BCEA makes no stipulation on employers concerning the granting of study leave.

5.2.2 Employees whose study leave is relevant to the needs and requirements of an employer may, at the discretion of the employer, be granted one day of study leave to sit for the examination. However, it is recommended that companies grant at least the time off to sit for an examination, as failure to do so could create the perception of the employer's unfairness.

5.2.3 However, an employer could argue, plausibly, that there is no legal obligation to grant study leave and the employer is not standing in an employee's way in taking a half day's leave to write an examination. Generous companies could even consider granting an employee a day off before the examination as well as on the day of the examination itself. Such companies could thereby retain the loyalty of those who wish to improve their skills and qualifications.

5.2.4 Employees must both apply for and be granted study leave before taking it. Companies could institute a policy limiting study leave to a maximum of ten days per annum.

5.2.5 Overtime provisions should not be confused with study leave and the two should be treated as separate concepts.

5.2.6 Employees will be fully remunerated during periods of approved study leave.

5.2.7 Study leave granted in lieu of overtime worked

5.2.7.1 Two aspects should be borne in mind: Firstly an employer may not require or permit an employee to work overtime except in accordance with an agreement and secondly that, in terms of the BCEA, an agreement may provide for an employer to grant an employee at least 90 minutes paid time off for each hour of overtime worked.

5.3 **Maternity Leave**

5.3.1 The employer must grant female employees at least four consecutive months of unpaid maternity leave and the right to return to work after such a period of leave.

5.3.2 The following general conditions are proposed with regard to maternity leave:

5.3.2.1 All maternity leave will be regarded as authorised unpaid maternity leave; however, some companies have adopted the practice of paying employees who are on maternity leave;

5.3.2.2 In terms of the BCEA, 4 (four) months maternity is granted to all female employees (an employer could therefore, at its own discretion, consider anything from four to 12 month's maternity leave).

5.3.2.3 An employee wishing to take maternity leave should give the employer one calendar months' notice in writing, both of her intention to do so and her intention to return to work after the four months have lapsed, if possible.

5.3.2.4 In order to comply with the provisions of SAICA's Training Regulations, the employee's Training Contract will be extended by four months in order to accommodate the training lost during maternity leave.

5.3.3 Where maternity leave covers the period when the annual bonus is normally payable in December and where annual bonuses are not discretionary, she may be paid a *pro rata* bonus before taking the leave. If an employee takes maternity leave during the course of the year and returns to work before the annual bonus is paid in December, she may receive a *pro rata* bonus calculated on the number of months worked during the course of the year.

5.3.4 Subject to the rules of the fund, for the purposes of pension and medical benefits, maternity leave will not usually be deemed to constitute a break in service.

5.3.5 An employee who is a member of the employer's medical aid society and who takes maternity leave, should be given the opportunity to continue contributing the employee's portion of the medical aid contributions. Should she elect to do so, the employer will continue to contribute the employer's portion of the contributions to the medical aid society. Members who opt not to pay the medical contributions will cease to qualify for benefits from this scheme for the period of maternity leave.

5.3.6 The same provisions hold with regard to the pension fund. However, if the employee elects not to continue contributing to the fund, she will still to be considered as a member and be entitled to all the benefits of the fund during the period of maternity leave, but the period will not constitute pensionable service.

5.3.7 The employer will guarantee re-employment after the expiry of the maternity leave period at the same rate of pay and job grade that was applicable immediately prior to commencement of maternity leave.

5.3.8 Any temporary employee engaged to fill the position of an employee on maternity leave will be advised, on commencement of employment, of the period he will be employed and will be given one week's notice of termination of such employment.

5.3.9 Any employee promoted to fill the position of an employee on maternity leave will be advised of the period he / she will be employed in that position and thereafter will have to return to his / her previous position. Such employee will be paid the minimum rate for the job to which he / she is temporarily promoted.

5.3.10 Should an employee not return to work after the agreed maternity leave period, her services will be terminated as if the employee had resigned (but only after a proper disciplinary enquiry has been convened) and she will be paid all the monies that may be owing to her as at the last day of her maternity leave period.

5.4 **Parental Leave**

5.4.1 Employees, who are parents of a child, are entitled to 10 (ten) consecutive days parental leave when their partners give birth to a child, where an adoption order

has been granted or the child has been placed in the care of the prospective adoptive parent.

5.4.2 Parental leave will be treated specially and will not be deducted from annual vacation leave.

5.4.3 Application for Parental Leave

5.4.3.1 Parental leave must be applied for and the employee must give the employer 1 (one) month's calendar notice. The application must be supported by either a medical certificate indicating the expected date of birth, or official documentation relating to the adoption, and must be authorised by management.

5.5 **Adoption / Commissioning Parental Leave**

5.5.1 Employers will provide its' employees adoption leave and commissioning parental leave, where commissioning leave is in respect of commissioning parents to a surrogacy motherhood agreement.

5.5.2 Where the adoptive child is below the age of 2 (two), the employee, who is an adoptive parent of the child, is entitled to 10 (ten) consecutive weeks adoption leave.

5.5.3 Adoption leave will commence on the date on which the adoption order is granted, or the date on which the child is placed in the care of the employee by a competent court, pending finalization of an adoption order in respect of that child, whichever comes first.

5.5.4 Where the child is older than the age of 2 (two), the employee, who is the adoptive parent of the child, will be entitled to paternal leave.

5.5.5 An employee who is a commissioning parent in a surrogacy motherhood agreement, is entitled to 10 (ten) consecutive weeks commissioning parental leave or 10 (ten) consecutive days paternal leave. The employee may commence with commissioning parental leave on the date their child is born as a result of a surrogacy motherhood agreement.

5.5.6 Where there are 2 (two) adoptive or commissioning parents, only 1 (one) of the commissioning or adoptive parents may take adoption or commissioning

parental leave and the other must take parental leave. The choice of which leave to take shall be the sole choice of the employee.

5.5.7 Adoption or Commissioning paternal leave must be applied for with one month's notice and must be supported by either a medical certificate indicating the expected date of birth, or official documentation relating to the adoption, and must be authorised by the employer.

5.5.8 In the case of 2 (two) adoptive or commissioning parents, an application for adoption or commissioning parental leave must be accompanied by a letter from the co-parent's employer confirming that the employees' co-parent has been granted paternal or adoption or commissioning parental leave, whichever is applicable. In absence of such confirmation, the employer may refuse an application for adoption or commissioning paternal leave.

5.5.9 Adoption or Commissioning Paternal Leave shall be unpaid.

5.5.10 When exercising this leave entitlement, employees may elect to apply for unemployment benefits from the Unemployment Insurance Fund.

5.6 **Family Responsibility Leave**

5.6.1 Companies will make every reasonable effort to accommodate a request for family responsibility leave to facilitate the emergency care of an immediate family member.

5.6.2 Family Responsibility Leave may be granted in the following instances:

5.6.2.1 when the employee's child is sick; or

5.6.2.2 in the event of the death of the employee's spouse, life partner; the employee's parent, adoptive parent, grandparent, child, adopted child, grandchild or sibling.

5.6.3 A maximum of 3 (three) days family responsibility leave is permitted per annum.

5.6.4 <u>Application for Family Responsibility Leave</u>

5.6.4.1 Application for family responsibility leave must be noted on the employer's leave application form,

5.6.4.2 Employees will be fully remunerated during family responsibility leave.

5.7 Sick Leave

5.7.1 Companies understand that there are times when employees fall ill. In recognition of this fact, sick leave is provided, subject to the guidelines provided below.

5.7.2 Companies will grant 30 (thirty) days leave in an unbroken 3 (three) year employment cycle with the employer or 1 (one) day of sick leave for every 26 (twenty-six) days worked during your first six months of employment with the employer.

5.7.3 After a 3 (three) year period of continuous employment with the employer a new term starts under the same conditions as above, on the anniversary of the day of the employee joining the employer.

5.7.4 In the event that an employee is absent from work due to ill health, the employer must be notified of the employee's absence on the same day, preferably before 09h00.

5.7.5 If an employee is absent from the office for 2 (two) consecutive days or more, a medical certificate must support the sick leave application form, all sick leave forms must be authorised by the employer.

5.7.6 Sick leave not taken during any 3 (three) year cycle may not be accumulated.

5.7.7 The 30 (thirty) days sick leave provided during any 3 (three) years of continuous employment is granted at full remuneration subject to the aforementioned conditions. Any days exceeding this provision are granted without pay; alternatively, an employee may request that accumulated annual leave be applied in lieu of unpaid sick leave.

5.7.8 If an employee falls ill before or after Public Holidays and on a Monday or Friday, a medical certificate from a registered medical practitioner must be submitted together with the sick leave application form.

6 SUBSTANCE ABUSE POLICY

6.1 Purpose

A substance abuse policy is intended to increase awareness of an employer’s zero tolerance policy towards alcohol and drug use during working hours and to ensure

an alcohol and drug free working environment, which will help ensure a safe and productive workplace for all employees.

6.2 **Objectives**

6.2.1 To ensure that all employees understand that the employer has a zero-tolerance rule concerning the Unauthorised use of alcohol and/or drugs during working hours or on the employer's premises, which include all premises of all the employer's clients.

6.2.2 To provide a drug- and alcohol-free environment for all workers.

6.2.3 To maintain a safe and healthy workforce, free from the influence of substance abuse.

6.2.4 To create awareness and therefore prevent substance abuse and misuse.

6.2.5 To identify and encourage employees affected by substance abuse, to get assistance.

6.3 **Definitions for the purposes of this section**

6.3.1 "**Abuse**": Using a substance in a way that is not intended or recommended, or because you are using more than prescribed;

6.3.2 "**Substances**": This can include alcohol and other drugs (illegal or not) as well as some substances that are not drugs at all;

6.3.3 "**Under the Influence**": Working, or reporting to work, conducting business or being on the employer's premises (including client premises) while in an impaired condition under the influence of alcohol, marijuana or illegal drugs, is prohibited; and

6.3.4 "**Unauthorised use**": Except when specifically, authorised, the use or possession of alcohol, marijuana or illegal drugs for work-related purposes, is strictly forbidden. Specific authorisation means with the prior permission of the employer's Management.

6.4 **Substance Abuse / Misuse on the Employer Premises**

6.4.1 Employees are forbidden to report to work or to perform work while Under the Influence of any drugs or alcohol.

6.4.2 The consumption of alcohol is strictly prohibited, except for certain special functions, and if it is approved by the employer's management.

6.4.3 Poor performance or misconduct arising from Substance Abuse will result in disciplinary action being taken against the offending employee.

6.4.4 It is unlawful to manufacture, distribute, dispense or use any prohibited substance in the workplace while on duty or on stand-by.

6.4.5 Only medication that is prescribed by a registered healthcare provider may be brought onto premises, but if misuse is suspected, each case will be dealt with on its own merits.

6.4.6 A breach of these rules will be treated as misconduct, which may lead to dismissal.

6.4.7 Employees must abide by the terms as a condition of employment and are to be informed of the consequences of any violation of the policy.

6.5 **Symptoms of Intoxication / Narcotics**

6.5.1 Under the Influence of alcohol / narcotics shall mean that the person displays one or more of the following symptoms:

6.5.1.1 Abnormal Behaviour;

6.5.1.2 Unusually loud / aggressive / familiar / sleepiness;

6.5.1.3 Euphoria (joking, giggling);

6.5.1.4 Excessively emotional (depressed, crying);

6.5.1.5 Erratic, illogical behaviour (e.g. memory loss);

6.5.1.6 Appearance – dilated pupils, dazed, unfocused, bloodshot or red eyes, unclean, unshaven, untidy appearance;

6.5.1.7 Smell – breath smells of alcohol, poor personal hygiene;

6.5.1.8 Coherence – thick, slurred, in-coherent speech; and

6.5.1.9 Co-ordination – unstable, uncoordinated, unsteady on feet, unable to work properly.

6.5.2 Physical test: - walking in a straight line; picking up a pin; touching nose with index finger; writing.

6.6 **Identifying Substance Abuse**

6.6.1 Should the employer have reasonable evidence that an employee may be Under the Influence of alcohol or drugs, or that the employee is consuming alcohol or drugs on employer's premises the following steps should be followed:

6.6.2 3 (three) options are available for an employer to conduct a test:

6.6.2.1 Allow a test to be conducted at the nearest registered practitioner;

6.6.2.2 Allow a test to be conducted at the nearest pharmacy; and

6.6.2.3 Allow a test to be conducted at the nearest police station.

6.6.3 The cost of the test shall be borne by the employer.

6.6.4 Before testing an explanation shall be given as to why the testing needs to be done and also the consequences of a positive test shall be explained.

6.6.5 Testing shall take place under specific circumstances and when certain behaviour is displayed.

6.6.6 2 (two) employees have to agree on the condition of the suspected employee.

6.6.7 The behavioural and physical characteristic symptoms check list must be used to assist to identify employees who are suspected to be Under the Influence of an intoxicating substance.

6.6.8 Any employee identified to be intoxicated shall be suspended with immediate effect on full pay, the disciplinary procedure shall then apply accordingly.

6.6.9 Random breathalyser testing will be done on employer's premises, by the security company employed by employer using the blowing method or any other method that may be used at that time.

6.6.10 Should the employee’s test indicate that he is Under the Influence of alcohol; a field sobriety test will be conducted.

6.6.11 Results of tests will be reduced to writing and should be signed by the employee and a witness.

6.6.12 A search may be conducted when there is a suspicion of possession of alcohol or any other substance that can be abused. No consent is necessary for a search. Any substance of abuse found on the employee shall be confiscated and submitted as proof of possession. Searches shall be conducted on an employee by a person of the same gender.

6.7 **Marijuana in the workplace**

6.7.1 It is recognised that the private use and possession for private use of marijuana has been decriminalised in South Africa. Notwithstanding this, the prohibitions related to alcohol and other Substances are similarly applicable to marijuana. The workplace is not a private space.

6.7.2 Employees are prohibited from being in possession of and/or consuming and/or using marijuana and/or being Under the Influence of marijuana in the workplace or during the course and scope of carrying out the duties of an employee during working hours.

6.7.3 Failure to abide by the above may result in disciplinary action being taken against the employee.

7 COMPUTER SECURITY AND INTERNET POLICY

7.1 The following policies and procedures must be adhered to with regard to PCs, laptops and related items and will be deemed to be part of the conditions of employment of any employee.

7.2 PCs, laptops and related items within the employer are the property of the employer and should therefore be treated in the same way as any other employer property.

7.3 The following points must be adhered to at all times:

7.3.1 PC's and laptops issued to employees are restricted to business purpose only. Employees shall not, under any circumstances, lend, donate, off, sell and/or exchange PC's and laptops to any third party.

7.3.2 Neither PCs nor parts of the PC may be taken home, unless prior permission has been received;

7.3.3 PCs may not be moved from their initial place of installation without prior arrangement (this includes between offices and buildings);

7.3.4 When transporting laptop computers via a motor vehicle, it must be stored in the locked boot of the vehicle;

7.3.5 Due care must be taken with laptop computers when taken out of the work environment;

7.3.6 Employees must, at all times, take measures to protect confidential information contained in the PC's or laptops. This can be done by ensuring that the PC's and laptops are locked in order to restrict access by third parties.

7.3.7 PCs may not be disconnected from the LAN without prior arrangement; and

7.3.8 Printers connected to any PC or LAN may not be moved or exchanged with other printers without the prior approval.

7.4 No private software and/or hardware may be loaded on, downloaded from the Internet or connected to, any employer PC without prior permission. Please note that the employee will be held responsible for the payment of any fines or other penalty if private software is loaded onto a PC without a valid license. Proof of private ownership must be available in the form of the original diskettes, manuals and any relevant licensing information.

7.5 No application software belonging to the employer on an employer PC or file server may be copied for private use.

7.6 No data files may be used for other than official work purposes or to be taken off the employer’s premises other than for work purposes, without the necessary permission.

7.7 Any discs being copied onto an employer PC or file server must be checked for viruses.

7.8 No third party is allowed to work on any PC or printer without prior approval. This includes, but is not limited to, loading of software, installation of cards, repairs and upgrades.

7.9 No e-mail messages or e-mail attachments that are offensive, derogatory, defamatory or demeaning may to be sent internally or externally via the Internet.

7.10 Access to the Internet is primarily for official employer use. The employer reserves the right to monitor individual usage of the Internet, both with regard to e-mail and World Wide Web access.

7.11 No pornographic, sexist, racist, illegal or improper information may be downloaded from the Internet or viewed using employer computing and communication equipment. This information or type of access may expose the employer to liability.

7.12 All employer information is to be treated with the utmost confidentiality.

7.13 Authority must be obtained prior to external e-mail messages being sent under the auspices of the employer.

7.14 E-mail correspondence sent as a formal means of communication should be filed in the departmental filing system.

7.15 Violation of this policy may result in disciplinary action and possible dismissal.

7.16 Employees may be held personally liable for any loss of or damage to PC's or laptops that attributed to negligent and/or reckless conduct on the part of the employee. Each employee is responsible to report to the employer any theft of PC's or laptops with a South African Police Case Number within 24 (twenty four) hours of loss in order for the employer to comply with any insurance procedures.

7.17 Personal liability regarding damage, theft or loss of PC's or laptops will be investigated and a determination made by the employer as to whether an employee can be held personally liable.

8 SEXUAL HARASSMENT POLICY

8.1 Definition

8.1.1 Sexual harassment should not be confused with gender/sex discrimination. Sexual harassment is the infringement of the "victim's" dignity and respect by an alleged "perpetrator".

8.1.2 Sexual harassment is unwanted conduct of a sexual nature. The unwanted nature of sexual harassment distinguishes it from behaviour that is welcome and mutual.

8.1.3 Sexual attention becomes sexual harassment if –

8.1.3.1 the behaviour is persistent in nature, although a single incident of harassment can constitute sexual harassment; and/or

8.1.3.2 the recipient has made it clear that the behaviour is considered offensive; and/or

8.1.3.3 the perpetrator should have known that the behaviour would be regarded as unacceptable.

8.2 **Forms of Sexual Harassment**

8.2.1 Sexual harassment may include unwelcome physical, verbal or non-verbal conduct, but is not limited to the following examples:

8.2.1.1 Physical conduct of a sexual nature includes all unwanted physical contact, ranging from touching to sexual assault and rape, and includes a strip search.

8.2.1.2 Verbal forms of sexual harassment include unwelcome innuendoes, suggestions and hints, sexual advances, comments with sexual overtones, sex-related jokes or insults or unwelcome and inappropriate enquiries about a person's sex life, and unwelcome whistling at a person or group of persons.

8.2.1.3 Non-verbal forms of sexual harassment include unwelcome gestures, indecent exposure, and the unwelcome display of sexually explicit pictures and objects.

8.2.2 *Quid pro quo* harassment occurs where an owner, employer, supervisor, member of management or co-employee undertakes or attempts to influence the process of employment, promotion, training, discipline, dismissal, salary increments or other benefits of an employee or job applicant in exchange for sexual favours.

8.3 **Advising the Complainant of Workplace Procedures to deal with Sexual Harassment**

8.3.1 When an incident of sexual harassment is brought to the attention of an employer, such employer should:

8.3.1.1 advise the employee that there are formal and informal procedures which could be followed to deal with the problem;

8.3.1.2 explain the formal and informal procedures to the employee;

8.3.1.3 advise the employee that she/he may choose which procedure should be followed by the employer, except that in certain limited circumstances, as set out in clause 8.5.1, the employer may choose to follow a formal procedure even if the complainant does not wish to do so;

8.3.1.4 re-assure the complainant that she/he will not face job loss or any adverse consequences if she/he chooses to follow either the formal or informal procedure;

8.3.1.5 advise the complainant that the matter will be dealt with confidentially if the complainant so chooses.

8.4 **Informal Procedure for the Handling of Sexual Complaints**

8.4.1 A complainant of sexual harassment may choose to follow either of the following informal procedures:

8.4.1.1 the complainant or another appropriate person explains to the perpetrator that the conduct in question is not welcome, that it offends the complainant, makes him or her feel uncomfortable and that it interferes with his or her work; or

8.4.1.2 an appropriate person approaches the perpetrator, without revealing the identity of the complainant, and explains to the perpetrator that certain forms of conduct constitute sexual harassment, are offensive and unwelcome, make employees feel uncomfortable, and interfere with their work.

8.4.2 An employer should consider any further steps, which can be taken to assist in dealing with the complaint.

8.5 **Formal Procedure for the Handling of Sexual Complaints**

8.5.1 In the event that a complainant chooses not to follow a formal procedure, the employer should still assess the risk to other persons in the workplace where formal steps have not been taken against the perpetrator. In assessing such risk, the employer must take into account all relevant factors, including the severity of the sexual harassment and whether the perpetrator has a history of sexual harassment. If it appears to the employer after a proper investigation that there is a significant risk of harm to other persons in the workplace, the employer may follow a formal procedure, irrespective of the wishes of the complainant, and advise the complainant accordingly.

8.5.2 Any employee, applicant or former employee who feels they have been sexually harassed may raise this as a grievance, as follows:

8.5.2.1 By discussing his/her complaint with the supervisor, department head, human resources department or equity development director.

8.5.2.2 Any employee may bring the possibility of discrimination, in the form of sexual harassment, to the attention of management.

8.5.2.3 Colleagues/co-workers who know of a person who feels sexually harassed may bring this to the attention of a supervisor or department head.

8.5.3 Employees should discuss their concerns with their immediate supervisors, or any other member of staff they feel is appropriate. This should be done in an attempt to mutually review and resolve the concerns of the individual. If no satisfactory solution is reached and the employee is not satisfied, the individual should contact the human resources director or equity development director.

8.5.4 The human resources director or equity development director must immediately report all complaints of unfair conduct to the relevant department head. The department head should conduct a thorough investigation. The aim of this investigation will be to establish all facts and find a fair and acceptable solution.

8.5.5 It is an accepted principle that due to the private nature of a complaint, all information will be treated in an appropriate manner and considered personal and confidential.

8.5.6 Supervisors, department heads and managers/partners are expected to assist in the investigation by making available all relevant documents, records and information. The human resources director should co-ordinate the investigation of all complaints and keep a register of all complaints and its nature, origin, outcome and solutions.

8.5.7 No employee who filed a bona fide complaint will be harassed, victimised or have their employment terminated.

8.6 **Remedy and Reporting**

Because of the sensitive nature of sexual harassment, it has to be treated in a more sensitive manner than other disciplinary offences.

8.6.1 <u>The Disciplinary Procedure</u>

8.6.1.1 The disciplinary procedure may be invoked as an alternative to and/or following the conclusion of the grievance proceedings. The investigation and

the disciplinary hearing should be handled with great sensitivity and held with as much privacy as possible so as not to place the "victim"/grievant" on trial.

8.6.2 Cautionary Note

8.6.3 Great care must be taken when accusing an alleged perpetrator of sexual harassment. To accuse a person of sexual harassment is to accuse such a person of committing a criminal offence and knowledge of that accusation, whether proved or unproved, impinges upon such person's name and status both in the workplace, community and domestic environment. For this reason, accusations of sexual harassment must be properly, and sensitively, investigated to determine its substance.

8.6.4 Unsubstantiated accusations of sexual harassment will be regarded as unacceptable and may in turn lead to disciplinary action against the "accuser".

9 GUIDELINE ON CRIMINAL OFFENCES COMMITTED BY EMPLOYEES

When an employee is alleged to have committed a criminal offence, either within or outside the working environment, problems frequently arise in considering whether management should take any disciplinary action. In this regard it, is important to note the distinction between what the Court and management would be attempting to establish. The Court would be attempting to establish beyond all reasonable doubt whether the employee committed the alleged offence, whereas management would be attempting to establish on a balance of probabilities whether the employee has committed a serious breach of his terms of employment. Although each case would have to be treated on its merits, the guidelines set out below will assist management in these situations.

9.1 Criminal Offences Within the Working Environment

9.1.1 Where an employee is alleged to have committed a criminal offence within the working environment (e.g. during working hours, on employer premises) this would normally be investigated within the employer irrespective of whether any criminal action is instituted, to determine what effect the offence may have on the employee's continued employment. This determination should normally be made irrespective of the outcome of any criminal proceedings instituted against the employee and, if warranted, disciplinary action should be taken against him in accordance with the employer's normal disciplinary procedures.

9.1.2 Management should exercise its discretion in deciding whether to lay a complaint with the police in respect of the alleged offence, taking into account the nature and magnitude of the offence and other relevant factors. Management may decide that the employee would be sufficiently penalised by disciplinary action against him and that a criminal prosecution would be inappropriate in the circumstances, or alternatively management may decide that the circumstances of the case support a criminal charge being laid against the employee. Such action may also deter other employees from similar conduct in the future.

9.2 **Criminal Offences Outside the Working Environment**

9.2.1 Where an employee is alleged to have committed a criminal offence outside the working environment, a decision will have to be made as to whether, if proved, it would constitute sufficient grounds for taking disciplinary action. This will depend on the nature of the offence and the extent to which it affects the employment relationship, the job held by the employee and other material factors. (For example, the conviction of a bookkeeper for theft could constitute sufficient grounds, whereas his conviction for negligent driving would not; similarly the conviction of a labourer for theft may in the circumstances be far less significant than the conviction of the bookkeeper for that same offence.)

9.2.2 If management decides that the offence, if proven, would not constitute sufficient grounds for disciplinary action, then obviously no action should be taken against the employee irrespective of whether he is convicted or not.

9.2.3 If the offence could constitute sufficient grounds for disciplinary action, management would have to decide whether it is feasible to consider the matter independently of any criminal prosecution against the employee. If management has reasonable grounds for believing that the employee did commit the alleged offence, it may proceed against the employee independently of the criminal proceedings.

9.2.4 However, in cases where the alleged offence was committed outside the working environment, management will not normally have sufficient access to information to consider the matter properly and would normally have to abide by the Court's decision. Only then would management be able to determine what disciplinary action should be taken. It may consider suspending the employee on full pay pending the outcome of the criminal case, and the nature

of the alleged offence, the employee's position and other material factors should be taken into account in considering the question of suspension.

9.3 Criminal Offences Generally

9.3.1 If an employee is being held in custody pending his appearance in Court, a hearing should be held at the earliest opportunity that the employee is available for the hearing.

9.3.2 An employee's continued absence from work because of being held in jail either awaiting trial or in terms of his sentence (having been convicted of the offence) may however be sufficient on its own to justify his dismissal, but this would depend on the circumstances of the case.

9.3.3 If an employee has been dismissed and is subsequently found not guilty in a criminal court of the alleged misconduct, this will not as a matter of course render the initial dismissal unfair. The essential question remains whether the evidence and information known to the employer at the time of the dismissal was sufficient to justify it. The reasoning for this is that different standards of proof are required by the employer in the disciplinary inquiry and by the criminal trial.

10 DISCIPLINARY GUIDELINES FOR MANAGEMENT

10.1 Disciplinary Procedure

10.1.1 The objective of the disciplinary procedure is to provide a fair and equitable process that could be applied when the work performance or behaviour of an employee is unacceptable.

10.1.2 All employees are expected to carry out their duties and conduct themselves in a reasonable manner. Any breach by an employee of conditions of employment will be dealt with in accordance with this procedure (the exception is industrial action, where it would not be appropriate).

10.1.3 This procedure is not intended as a substitute for good management and should not interfere with the informal corrective disciplinary measures applied by management in the day to day running of the employer. The precise nature of the disciplinary action to be taken by management will depend upon the circumstances in each case and in order to ensure the fair and consistent

application of discipline, the circumstances of each case will be considered before the disciplinary action is taken.

10.1.4 Every employee has a responsibility to familiarise himself/herself with all the disciplinary codes. All members of management are responsible for ensuring that these rules and standards are explained, understood and maintained.

10.1.5 The disciplinary code provides a framework and guide to management for applying the procedure. It lists the more common types of misconduct that may occur and aims at ensuring a just and consistent application of discipline.

10.1.6 Disciplinary action should only be taken after clear evidence of misconduct has been established. Thus, the first step should be to prove that the employee has committed an offence, followed by consideration of the appropriate disciplinary action that should be taken.

10.2 **Disciplinary Action Records**

10.2.1 Verbal warnings are recorded and shall be placed on the employee's personnel file.

10.2.2 A copy of each written warning shall be placed on the employee's personnel file.

10.2.3 Warnings do not remain effective indefinitely, but have certain expiry dates: —

10.2.3.1 A verbal warning is valid for 6 (six) months;

10.2.3.2 A written warning shall remain effective for a period of 6 (six) months; and

10.2.3.3 A final written warning for a period of 12 (twelve) months.

10.2.4 Although a written warning may have expired, it remains on the employee's personnel file and may be taken into account by any chairperson at a disciplinary hearing in assessing the general conduct, attitude and appearances of the employee at the workplace.

10.3 **Verbal Warnings**

10.3.1 In the event of minor misconduct on the part of an employee, the disciplinary action will take the form of a verbal reprimand coupled with an instruction from the employee's superior to correct the behaviour.

10.3.2 Management must point out the undesirable behaviour or unacceptable performance, explain why it is a problem, and discuss ways to avoid this happening again.

10.3.3 It is important that the employee, at this stage, be made aware that further misconduct or non-compliance with employer standards could lead to formal disciplinary action being taken against him/her, with the possibility of dismissal.

10.4 **Written Warnings**

10.4.1 A written warning is issued if the work performance or behaviour of an employee has not improved following a verbal warning or warnings, or where the misconduct requires more severe disciplinary action than a verbal warning.

10.4.2 Any member of management may give an employee under his control a written warning.

10.4.3 The employee must have been informed beforehand that he is entitled to have an employee from his department present as his representative, who will be entitled to speak on his behalf.

10.4.4 The management must inform the employee and his representative of all the evidence of the misconduct and give them an opportunity to respond. He must advise them that they are entitled to produce any evidence or call any witnesses in support of the employee’s case.

10.4.5 After having heard all the evidence, the management must decide whether or not to give the employee a written warning.

10.4.6 A written warning could constitute a first, second or final written warning, dependent on the circumstances of each case.

10.4.7 A warning must be issued on the appropriate form in the presence of the employee and his representative. The management issuing the warning as well as the employee and his representative must sign the form. The warning form must be filed with the employee's personnel record file and must be treated as confidential. The employee must also receive a copy.

10.4.8 Where the employee refuses to sign the warning, the person issuing the warning must sign the warning and witnesses must witness to the fact that the employee

refused to sign the warning. In this way failure by the employee to sign the warning will not affect the validity of the warning.

10.4.9 In the event of a final written warning being issued, the management shall ensure that the employee and where applicable his/her representative, are made aware of the fact that should the employee commit any other offence during the 12 (twelve) month period of its validity, the subsequent offence or breach may be subject to the disciplinary sanction of dismissal, after a disciplinary hearing has been conducted.

10.4.10 The purpose of the warnings contemplated in 10.3 and 10.4 hereof is to give notice to an employee that he/she needs to take serious note of the contravention and/or needs to improve his/her conduct and that failure to do so may result in further disciplinary proceedings.

10.5 **Disciplinary Enquiries**

10.5.1 For a dismissal to be fair it must comply with the requirements of both procedural fairness and substantive fairness. This means that not only must the decision to dismiss be fair, but that it must also be carried out in accordance with fair procedure.

10.5.2 A disciplinary enquiry will be held by management for misconduct or deliberate unsatisfactory performance, without any previous warning, in the event of a serious breach of any of the employer's or SAICA's codes, policies, procedures and or rules or in the event of an accumulation of transgressions.

10.5.3 The following rights would be available during a disciplinary hearing: the right to be informed of charges, the right to prepare for the hearing, the right to call witnesses, the right to cross-examine any witnesses the employer may call, the right to be heard and an opportunity to state the case, the right to be represented a fellow employee (no external representation will be allowed), the right to have an interpreter as well as an opportunity to present any evidence in mitigation.

10.5.4 The disciplinary enquiry must be conducted by an independent chairperson, who may be an employee of the same employer.

10.5.5 The chairperson must ensure that all persons who are required to be present are indeed present.

10.5.6 The enquiry must be held as soon as possible after the alleged offence, but the following conditions must be adhered to. The employee who allegedly committed the offence must be informed of all the facts of the case to be brought against him, be given a reasonable time to prepare and must be present at all times during the enquiry when evidence is being led. If the employee and/or his representative unreasonably refuse to attend the enquiry, the enquiry may be held it in their absence and may use whatever evidence is available to come to a decision.

10.5.7 The following people may be present:

10.5.7.1 General manager/ senior partner (or his equivalent);

10.5.7.2 Employee's supervisor;

10.5.7.3 Employee concerned;

10.5.7.4 Employee representative (if requested);

10.5.7.5 An interpreter (where necessary); and

10.5.7.6 Witnesses (only while giving evidence).

10.5.8 The employee is entitled to present his case and must be given an opportunity to do so. Both the employee and his representative may question any witnesses called and may themselves call any other employees as witnesses.

10.5.9 After having heard all the evidence, the chairperson must make a decision on whether the employee is guilty or not and on what disciplinary action, if any, will be taken. This decision may be taken immediately at the enquiry or proceedings may be adjourned to consider the matter before making a decision.

10.5.10 If there is reasonable doubt, the employee should be given the benefit of that doubt.

10.5.11 Having decided that the employee is guilty of misconduct, the management conducting the enquiry must take the following factors into account in considering the appropriate disciplinary action:

10.5.11.1 The seriousness of the offence;

10.5.11.2 The consequences of the offence, both actual and potential;

10.5.11.3 The extent to which the offence was caused by a lack of training or any duty or responsibility of management which was not fulfilled;

10.5.11.4 The level of responsibility and authority of the employee;

10.5.11.5 The effect of the charges on the future employment relationship;

10.5.11.6 The previous disciplinary and service record of the employee; and

10.5.11.7 Mitigating / extenuating circumstances and also any other abnormal, aggravating or extenuating circumstances which may apply.

10.5.11.8 After hearing all factors in mitigation, the chairperson should decide on an appropriate sanction and make the appropriate recommendation to the employer. The employer shall have the power to accept, reject or vary the recommendation.

10.5.11.9 The disciplinary action could include one of the following:

10.5.11.9.1 written warning;

10.5.11.9.2 final written warning;

10.5.11.9.3 demotion;

10.5.11.9.4 dismissal with notice or payment in lieu of notice; and

10.5.11.9.5 summary dismissal.

10.5.12 If it is decided that the employee is guilty, consider what disciplinary action would be appropriate in the circumstances. Take into account –

10.5.12.1 the employee's service;

10.5.12.2 his past behaviour and performance;

10.5.12.3 the seriousness of the offence;

10.5.12.4 any legal requirements;

10.5.12.5 how similar offences have been treated in the past;

10.5.12.6 the extent to which the problem was caused by mismanagement;

10.5.12.7 the effect of the charges on the future employment relationship; and

10.5.12.8 all other relevant factors.

10.5.13 An employee can only be demoted if it has been clearly established that he is not capable of performing his work to the required standard.

10.5.14 An employee may only be dismissed if he had previously received a final written warning that is still operative or is found guilty of serious misconduct. A final written warning will normally only be given if the employee has previously received a written warning, which in turn is normally given only after the employee has previously received a verbal warning. The misconduct of an employee may, however, by itself be sufficient to warrant a written warning or a final written warning or a dismissal, as the case may be.

10.5.15 The employee must be notified of the decision personally and as soon as possible and the management, the employee concerned, and his representative must all sign the disciplinary form.

10.5.16 It is important that the employee understands the reasons for the disciplinary action. If the employee thus receives a final written warning it should be made clear to him that any further misconduct on his part, whilst the final written warning is operative, may result in his dismissal.

10.5.17 The disciplinary form must be filed on the employee's personnel record file and must be treated as confidential. He must also receive a copy of the completed form.

10.5.18 If the employee despite the appeal still feels aggrieved by the decision taken at the disciplinary enquiry, he may refer the matter to the CCMA.

10.6 **Oral representations, without the need to refer to documents or witnesses**

If the employee makes an admission of wrongdoing, the disciplinary hearing may proceed on the basis of oral representations only. Clause 11 must be referred to for further guidance, with the changes required by the context.

11 **Written representations**

11.1 Where the misconduct committed is common cause, manifest, not in dispute or where the employee makes an admission of wrongdoing, the employer may invite the employee to make written representations in relation to the misconduct as opposed to holding a disciplinary hearing.

11.2 This procedure may also be followed for: senior employees; when the employer is comfortable that both parties will still be afforded an opportunity to state their case; or if there is a general allegation regarding a breakdown in trust.

11.3 The employee is entitled to the assistance of an employee representative in making the submissions.

11.4 The employer shall also request the employer's representative to make representations on the appropriate sanction.

11.5 No formal disciplinary hearing need be convened. The chairperson may invite and consider written representations only, without the need for oral submissions or appearances in person.

11.6 The chairperson shall consider the representations made by the employer and the employee.

11.7 The sanction shall be communicated in writing to both parties.

11.8 **Dismissal**

Where a sanction of dismissal is issued the employee shall be provided with written reasons for the dismissal and reminded of the right to refer a dispute regarding the fairness of the dismissal to the CCMA.

11.9 **Suspension**

11.9.1 An employee may be suspended from work pending the enquiry, this is to allow for the investigation of the offence or where the employees' presence may obstruct the investigation of the offence or where his presence would constitute a danger at the workplace.

11.9.2 Suspension is not to be used as a form of disciplinary action (sanction) and should be seen as a precautionary measure.

11.9.3 An employee who is suspended will be paid basic earnings for the period of suspension.

12 **DISMISSAL**

The development of labour law in South African industrial relations in recent years has resulted in a significant shift in emphasis from legality to fairness. For a dismissal to be valid, it must be both lawful and fair. For a dismissal to be fair, it must comply

with the requirements of both procedural fairness and substantive fairness. In other words, not only must the decision to dismiss be fair, but it must also be carried out in accordance with a fair procedure.

12.1 **Procedural Fairness**

In order to consider whether or not to dismiss an employee, the alleged breach of the employer's rules must be investigated. This takes the form of the abovementioned enquiry.

12.2 **Substantive Fairness**

The employer must have a valid reason to dismiss an employee, and the onus of proving this lies with management. A "valid reason" may be considered under three main headings, namely misconduct, incapacity and operational requirements.

12.3 **Ground for Dismissal**

12.3.1 Misconduct

This is the heading under which most dismissals take place, and common examples are theft, intoxication, dishonesty and assaults. In cases of misconduct the employee should usually have received previous warnings for the dismissal to be fair, unless the misconduct on its own justifies summary dismissal. Each case of misconduct has to be treated on its merits.

12.3.2 Incapacity

12.3.2.1 Under this heading, management would be required to show that the employee is not capable of performing his job. Management should have some objective criteria in terms of which it can be measured, and the absence of such criteria has frequently become a problem in cases where accusations of incapacity have been made against employees.

12.3.2.2 Generally, it must also be shown that an employee has received guidance, instruction, evaluation training and an opportunity to correct the situation before being dismissed.

12.3.2.3 Guidelines in cases of dismissal arising from ill health or injury:

12.3.2.3.1 In determining whether a dismissal from ill health or injury is fair, it should be considered: —

12.3.2.3.1.1 whether or not the employee is capable of performing the work; and

12.3.2.3.1.2 if the employee is not capable, what is –

12.3.2.3.1.3 the extent to which the employee is able to perform the work;

12.3.2.3.1.4 the extent to which the employee's work circumstances might be adapted to accommodate his/her disability, or, where this is not possible, the extent to which the employee's duties might be adapted; and

12.3.2.3.1.5 the availability of any suitable work.

12.3.2.3.2 As in other cases of progressive or corrective disciplinary action, management must prove, through documented records, that the correct procedures have been followed and that the dismissed employee received fair treatment.

12.3.3 Operational Requirements

12.3.3.1 The common description of dismissals under this heading is retrenchment, and it is dealt with in a separate manner compared to any other dismissals. The Labour Court has established comprehensive guidelines for the manner in which retrenchments are to be carried out. These must be scrupulously adhered to, to obviate being taken to the Labour Court by an employee.

12.3.3.2 Retrenchment Procedure in terms of the LRA:

12.3.3.2.1 Where the employer contemplates the retrenchment of employees, the employer will share, in writing, the following information with the affected employees:

12.3.3.2.1.1 the reasons for the proposed retrenchments;

12.3.3.2.1.2 the alternatives that the employer considered to prevent the adverse effects of retrenchment;

12.3.3.2.1.3 the number of employees likely to be affected and their job categories;

12.3.3.2.1.4 the selection criteria to be applied;

12.3.3.2.1.5 proposed timeframe of the retrenchments;

12.3.3.2.1.6 severance compensation, if applicable;

12.3.3.2.1.7 any assistance which the employer proposes to offer to affected employees;

12.3.3.2.1.8 the possibility of future re-employment in the case of retrenchment;

12.3.3.2.1.9 the number of employees employed by the employer; and

12.3.3.2.1.10 the number of employees retrenched by the employer within the preceding 12 (twelve) months.

12.3.3.2.2 The employer will embark on a consultation process at the point where it contemplates that it may have to effect dismissals for operational requirements.

12.3.3.2.3 The employer will consult, with the view to reaching consensus. During the consultation process the emphasis shall be on good faith and consultation sessions will be followed up with written confirmation of the content of the discussions.

12.3.3.2.4 The employer will consult the affected staff on, *inter alia*, the following matters:

12.3.3.2.4.1 The reasons and rationale for the contemplated retrenchment/ avoiding the dismissal (examples including adjusting working hours or eliminating temporary labour);

12.3.3.2.4.2 Minimizing the number and timing of dismissals;

12.3.3.2.4.3 ways to lessen the effects of the retrenchment; and

12.3.3.2.4.4 the method for selecting those employees to be retrenched.

12.3.3.2.5 In all instances where retrenchments are inevitable, employees will be entitled to severance pay.

13 NOTICE PERIODS

13.1 Introduction

There is a great deal of confusion about the period of notice from an employee who wishes to resign. Briefly, most letters of employment state whether he is required to give a month's notice or whether he is required to give 30 days' notice. The difference is quite significant.

13.2 What the Law States

13.2.1 Section 37 of the BCEA requires that any notice period contained in a written contract of employment must at least equal the minimum notice period set out in the Act, being –

13.2.1.1 one week's notice, if the employee has been employed for six months or less;

13.2.1.2 two weeks, if the employee has been employed for more than six months but not more than one year; or

13.2.1.3 four weeks, if the employee has been employed for one year or more.

13.2.2 If an employee who is covered by the BCEA terminates his employment without complying with his notice periods, he may be required to repay the employer an amount equivalent to his wages during the notice period. Before such action is taken, however, please obtain expert opinion.

14 PROLONGUED ABSENCE FROM WORK

14.1 Introduction

14.1.1 Where an employee does not perform his duties as a result of being absent from work, management has to decide what action to take in these circumstances.

14.1.2 A certain size work force is needed to achieve the production required and management will need to assess what the future circumstances of the absent employee are likely to be in order to plan its manpower requirements. Management will also need to assess whether the employee's absence from work may warrant disciplinary action, aside from any expectation of the employee's anticipated return to work. This will depend on the circumstances of each employee.

14.1.3 The reason for the employee's absence may or may not be known to management at the time, and this will obviously influence the action to be taken.

14.2 Policy

14.2.1 Where an employee does not perform his duties as a result of being absent from work on a continuous basis, management will take steps, in terms of the guidelines set out below, to consider that employee's future relationship with the employer. Management must ensure that the employee is treated fairly and

reasonably, depending on the circumstances of the case, and the operational requirements of the employer in deciding on the appropriate action. A proper enquiry must be held in all cases, prior to any action being taken.

14.3 **Guidelines**

14.3.1 Where Management has Knowledge of the Employee's Whereabouts

14.3.1.1 Management should contact the employee and ascertain the reasons for his continued absence from work. These reasons should be evaluated against any other employer policies that may be appropriate in the circumstances (e.g. employees being absent as a result of detention before trial, prolonged illness, etc.). It is stressed that it is normally the responsibility of the employee to inform his supervisor as soon as possible of the reasons and circumstances of any absence from work.

14.3.1.2 If management is not satisfied with the outcome of its investigations or feels that further action is necessary, a disciplinary enquiry may be convened, and the normal disciplinary procedures followed. The employee must be given reasonable notice of the enquiry, and the date should as far as possible be mutually agreed with him.

14.3.1.3 Where an employee unreasonably refuses to attend or is unable to attend the enquiry in the foreseeable future (e.g. imprisonment for a substantial period), the enquiry should be held in his absence in terms of the guidelines set out below. If however, he is only temporarily unavailable, management may postpone the enquiry for a reasonable period to enable him to be present.

14.3.2 Where management is not aware of the employee's whereabouts

14.3.2.1 Management must endeavour to contact the absent employee and establish the reason for his absence. The assistance of other employees and employee representatives may be sought in the process, and registered letters must be sent to the employee's last known address, asking him to return to work or contact management within a specified period of time (at least five days).

14.3.2.2 If as a result of its investigations management becomes aware of the employee's whereabouts, the reasons for his absence and the steps taken by him to inform management of his situation, these factors should be

considered. If management is not satisfied with these issues a disciplinary enquiry may be convened.

14.3.2.3 If management is unable to establish the employee's whereabouts or ascertain the reason for his absence within a reasonable period, management may convene a disciplinary enquiry in the absence of the employee. This enquiry must take place within a reasonable period. If management has still not been able to establish his whereabouts or the reason for his absence and in the absence of any evidence to the contrary at the enquiry, management may then confirm his dismissal and remove him from the payroll.

14.3.3 Enquiries held in the absence of the employee

14.3.3.1 In terms of the principle of fairness, every employee against whom disciplinary action is contemplated should have an opportunity to respond to the case against him and have an opportunity to state his views on the matter. Accordingly, every endeavour should be made to hold a disciplinary enquiry in the presence of the employee concerned. It is, however, accepted that this is not always possible.

14.3.3.2 If an employee unreasonably refuses to attend an enquiry, a letter should be addressed to him confirming the time, date and venue of the enquiry and inviting him to attend or alternatively, advise management of another date on which he would attend, if he is unable to be present on the specified date for a particular reason. The employee's employee representative should receive a copy of this letter. If he fails to respond, management should proceed with the enquiry in the absence of the employee, and every endeavour should be made to ensure that an employee representative is present. Refusal to attend should also not prevent the disciplinary enquiry from being conducted. At the enquiry management should as far as possible consider the matter in full and take appropriate action in the circumstances. The fact that the employee unreasonably refused to attend the enquiry would normally on its own be sufficient to justify his dismissal, irrespective of the initial reasons for the enquiry.

14.3.3.3 If an employee is unable to attend the enquiry because of his particular circumstances, or if management is unable to ascertain the whereabouts of the employee, every endeavour should be made to ensure that an employee

representative is present. Refusal to attend should not prevent the disciplinary enquiry from being conducted. At the enquiry management should as far as possible consider the matter in full and take appropriate action in the circumstances.

14.3.3.4 Every effort should be made to communicate the outcome of the enquiry to the employee. If the employee has been dismissed and subsequently contacts management seeking his job back, management must consider the reasons for his absence and what steps he took to inform management of his whereabouts during this period. Depending on the outcome of these investigations and the employer's operational requirements at that time, management may elect to re-employ him or offer him the prospect of re-employment when a suitable vacancy arises.

14.3.3.5 An alternative course of action would be that management waits until the employee eventually returns to work and then holding an enquiry at which he is present. Should the employee have no reasonable explanation for his prolonged absence, management can dismiss him. The principle of no work no pay will apply to employees who are absent from work for prolonged periods, without giving a justifiable reason for such absence.

14.3.3.6 Importantly, any enquiry held with the employee present is always safer than one held in his absence.

14.4 Summarised Checklist for Dealing with an Employee's Prolonged Absence

14.4.1 It sometimes happens that employees absent themselves from work for prolonged periods without informing the employer of their reason or whereabouts. It has also happened that such employees have been dismissed, only to be re-instated by the CCMA because the procedural requirements for such a dismissal were not adhered to. It is recommended that in such instances the following procedure be followed:

14.4.2 If the employee subsequently arrives for work, give him three days' or more notice of a disciplinary hearing.

14.4.3 If he does not return to work, attempt to ascertain from fellow employees where he might be. Send him a registered letter, to the effect that he should return to work as soon as possible, and if unable to do so, to contact the management as soon as possible.

14.4.4 If he still does not respond, send him a registered letter confirming the date, time and venue of a disciplinary hearing. Ask him to give an alternative date if for some reason your date is impossible for him. Give a copy of this letter to his representative.

14.4.5 If he still does not return to work, hold a disciplinary enquiry in his absence.

14.4.6 Allow him a representative in his absence, take minutes of the hearing, and if no suitable reason for his absenteeism is given, dismiss him in his absence.

14.4.7 Should you anticipate that the matter will be taken to the CCMA by the employee, a far safer alternative would be to wait until the employee does eventually return to work, and then hold the enquiry in his presence. If he has no reasonable explanation for his prolonged absence, then dismiss him. Payment will only be until his actual last workday in your employ.

15 FIXED TERM EMPLOYEES

15.1 Purpose

15.1.1 These guidelines are to be used for the management of Fixed Term Employees ("**FTEs**").

15.1.2 These guidelines set out the circumstances under which –

15.1.2.1 FTEs may be employed;

15.1.2.2 FTE contracts may be renewed;

15.1.2.3 FTE contracts may be extended; and

15.1.2.4 FTE contracts may be terminated.

15.1.3 They further set out the requirements to be complied with when undertaking each of the above.

15.2 What is a FTE contract?

15.2.1 A FTE contract is an employment contract concluded for a limited period which automatically terminates on –

15.2.1.1 the occurrence of a specified event; or

15.2.1.2 the completion of a specified task or project, or

15.2.1.3 a fixed date.

15.3 **What is the relevance of the earnings threshold?**

15.3.1 Employees earning an annual salary (total cost to company) equal to or below the Threshold set by the Minister from time to time may only be employed as FTEs for longer than three months provided that there is a justifiable reason for doing so. This is dealt with below.

15.3.2 Generally, employees earning in excess of the Threshold may be employed as FTEs for longer than three months without a justifiable reason. However, if they are so employed, this creates risk for the employer. This is discussed below. It is therefore preferable that every FTE contract (whether the employee earns above or below the Threshold) is concluded for a justifiable reason.

15.4 **When can a FTE be engaged?**

15.4.1 FTEs should only be used where the employer requires a person to work for a limited, fixed period or to work on a particular project or task or to work until the occurrence of a specified event.

15.5 **When can FTEs earning in excess of the Threshold be engaged?**

15.5.1 Any time provided there is a genuine need for use of a FTE as opposed to employing the person permanently.

15.6 **When can FTEs earning below the Threshold be engaged?**

15.6.1 Where employees earn below the Threshold, FTEs may only be engaged –

15.6.1.1 for a maximum period of three months (that is, shorter than or equal to 3 three) months; or

15.6.1.2 where there is a need to employ a person for a fixed period for longer than 3 three months, there must be a *justifiable reason* for doing so.

15.7 **What are the justifiable reasons for fixing the term of an employment contract?**

15.7.1 FTE contracts may only be concluded with persons earning below the Threshold, for periods exceeding three months if –

15.7.1.1 The employee is replacing another employee who is temporarily absent from work; or

15.7.1.2 The employee is employed on account of a temporary increase in the volume of work which is not expected to endure beyond 12 (twelve) months; or

15.7.1.3 The employee is a student or recent graduate who is employed for the purpose of being trained or gaining work experience in order to enter a job or profession; or

15.7.1.4 The employee is employed to work exclusively on a genuine and specific project that has a limited or defined duration; or

15.7.1.5 The employee is a non-citizen who has been granted a work permit for a defined period; or

15.7.1.6 The employee is employed to perform seasonal work; or

15.7.1.7 The employee is employed on an official public works scheme or similar public job creation scheme; or

15.7.1.8 The employee is employed in a position which is funded by an external source for a limited period; or

15.7.1.9 The employee has reached the normal or agreed retirement age.

15.8 **What if there is no justifiable reason?**

15.8.1 Where an employee earns below the Threshold and is employed as a FTE for longer than three months for no "*justifiable reason*", that person will be regarded as being permanently employed by the employer.

15.8.2 This, in turn, results in the increase in headcount of the employer's permanent employees.

15.9 **What must the FTE contract stipulate?**

15.9.1 All FTE contracts concluded with employees earning below the Threshold must clearly stipulate the reason which justifies fixing the term of the contract. Should the reason for fixing the term of the contract change an addendum to the contract must be issued recording the change. The addendum must be filed in the FTE's personnel file together with the original contract. Alternatively, a new FTE contract must be concluded.

15.9.2 The commencement and termination dates must also be specifically stated in the FTE contract.

15.9.3 It is preferable for FTE contracts to provide for termination upon reaching a predetermined fixed future date rather than the occurrence of a specified future event.

15.10 **FTE contracts concluded for longer than 3 months - equal treatment**

15.10.1 Employees earning below the Threshold, employed on FTE contracts for longer than 3 three months (whether or not there is a justifiable reason for fixing the term of the contract) must be treated on the whole no less favourably than their permanently employed counterparts who perform the same work.

15.10.2 Such FTEs must also be provided with equal access to opportunities to apply for vacancies.

15.10.3 However, different treatment may be justified on the grounds of –

15.10.3.1 Seniority, experience or length of service;

15.10.3.2 Merit;

15.10.3.3 The quality or quantity of work performed (performance); or

15.10.3.4 Any other objective, non-discriminatory criteria.