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NOVEL EMPLOYER LIABILITY ISSUES

Issue: March 2020

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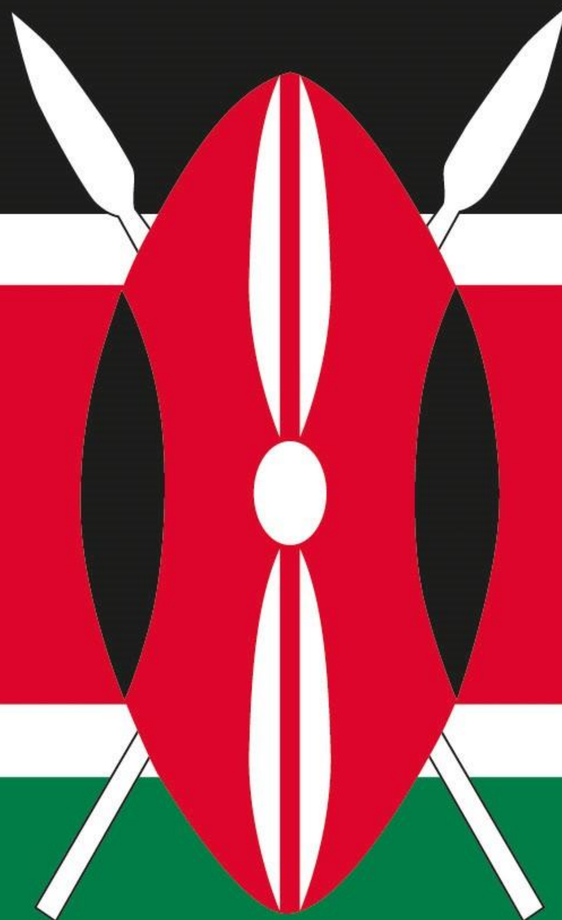

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→ Background

The Work Injury Benefits Act of 2007 (WIBA) is statute which provides for compensation to employees for work related injuries and diseases contracted in the course of their employment and for connected purposes. Of particular importance, an employer is liable to compensate an employee for personal injury, including contracting a disease, and or death if these arise while the employee is at work.

→ Novel Employer Liability Issues

WIBA came into force on 2 June 2008, a successor of the Workmen's Compensation Act (CAP 236), following a review and overhaul of Kenya's labour laws from 2001-2007 with the aim of introducing a legal framework for labour matters that was compliant with the International Labour Organisation (ILO). WIBA applies to all employees, including those employed by Government, and therefore has wide-ranging implications across the country.

Under WIBA, and particularly section 7 thereof as read together with the Court of Appeal's decision in Civil Appeal No 133 of 2011, The Attorney General v Law Society of Kenya and others, every employer in Kenya is mandated to obtain and maintain an insurance policy in respect of any liability that an employer may incur under the Act in respect of its employees. Section 10 articulates an employee's right to compensation for personal injury in the course of work (not only while at work), whether resulting in temporary disablement, permanent disablement or death. An employer is liable to compensate an employee for such injuries in the manner prescribed by the Act.

In the midst of the current global health crisis created by the novel Coronavirus, COVID-19, two similarly novel issues that Kenyan employers may need to consider are the employer's liability: first, to an employee who contracts COVID-19 while at work and therefore in the course of their employment, and second, to an employee who is injured while working from home/remote working following the employer's direction to do so.

EMPLOYER LIABILITY FOR DISEASES CONTRACTED AT THE WORKPLACE

Regarding diseases contracted while an employee is working (in the course of employment), the Act lists a number of specific diseases that may be contracted while at work, but nevertheless entitles an employee to compensation in accordance with the Act were they to contract '*any other disease that arose out of and in the course of the employee's employment*'.

Though the Coronavirus was not contemplated in the Act's 2nd Schedule as being an 'occupational disease', by virtue of the Act entitling an employee to compensation for an employee contracting any disease in the course of employment, it is possible that the Director of Occupational Safety and Health Services, could make a finding that an employee who contracts Coronavirus while carrying out their work (such as from a client or a colleague) is liable to compensation for resulting temporary disability, permanent disability or death. This may apply, for example, to a person employed as a driver, who contracts the virus from their employer whilst carrying out his driving duties.

A causal connection ought to exist between the injury or disease, and a risk connected with the employee's employment. In the case of the driver in the example, this causal connection is apparent, though may not be quite so apparent in every employment situation, and is therefore a matter of fact in particular circumstances.

To mitigate the risk that an employee contracts a disease, such as Coronavirus, while at work, and the consequent potential liability of an employer under WIBA, it would be advisable for an employer to carefully assess the risks to the health and safety of their employees in the context of their workplace, and satisfy itself that the/any 'occupational disease' risk posed to an employee by virtue of being at the workplace is eliminated, reduced, limited and or mitigated. For COVID-19, measures to eliminate, reduce, limit and or mitigate the risk may include: providing staff with necessary personal protective equipment- such as disposable masks, latex gloves, disinfectants-; daily cleaning and periodic sanitization of premises, workstations, common areas and

common utilities (door handles, light switches, microwave handle and buttons); providing soap and water for hand cleaning; restricting access to particular rooms and areas in order to maintain the recommended 'social distance' within the workplace.

EMPLOYER LIABILITY FOR INJURIES TO AN EMPLOYEE WHO IS WORKING FROM HOME

Injuries sustained by an employee whilst they are working from home, when sanctioned by the employer, present a similar novel challenge. WIBA is express that injuries covered and subject to compensation by an employer are those that are sustained in the course of employment, without limiting it to workplace injuries. In fact, the Act specifically makes mention of the fact that an employee's travel time ('conveyance' to work) is part of an employee's employment if such travel is by means of a '*vehicle provided by the employer for the purpose of conveying employees*', suggestive of the intention not construe working or carrying on employment duties to a particular place (the workplace/employer's premises) but rather to carrying out those duties as instructed or sanctioned by employer, irrespective of the location.

We surmise that just like the case of an employee contracting a disease in the course of employment, with injuries while working from home, the determinant ought to be whether an employee's injury has arisen or resulted from a risk connected to the nature of work that employee is carrying out.

In a 2011 US case which went to appeal, *Sandberg v JC Penney* the courts of Oregon had to consider whether the claimant employee, who sustained injuries while working from home, was entitled to compensation from her employer. Though arguable Ms Sandberg's situation and peculiar circumstances are removed from a majority of Kenyan employees who may in recent days have started to work from home (Ms Sandberg worked from home in her home studio, had most of her materials in the garage and injured herself after tripping over her dog while going to her garage), we can nevertheless glean that the courts in Kenya may not automatically dismiss employees' claims for compensation for injuries sustained when working from home, where the employer has instructed the employee to carry out their employment duties at their home premises.

The Court of Appeals of Oregon, in finding in favour of Ms Sandberg, held: ...*If, as a condition of employment, an employer exposes workers to risks outside of the employer's control, injuries resulting from the risks can be compensable... Thus, those areas constitute claimant's work environment when she is working, and injuries suffered as a result of the risks of those environments, encountered when claimant is working, arise out of her employment...*

Accordingly, we deduce that it is important for employers in Kenya, particularly at this time when many are authorising or even requiring their staff to work from their homes, to have well laid out work from home/remote working/home office policies and guidelines that employees are required to adhere to in order to limit potential liability for injuries arising thereat. Such policies may, for example, prescribe that employees must ensure they are not 'in harms way', have no hazards or physical obstructions etc while working from home, and where this is not guaranteed, then the employee may be required to altogether stop working and inform their employer. Such policies will likely go a long way to limit potential injury claims in such instances where an employer essentially has no control over the environment an employee is in or exposed to when carrying out their work.

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This is a general guideline tax and legal alert and should not be a substitute for proper advice. For queries and clarification, kindly get in touch with Rödl & Partner

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