

CONSIDERING THE RISKS ATTACHED TO EMPLOYERS

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Few people will deny the fact that running a company, no matter its size, is not for the faint at heart. Irrespective of whether the business is established in South Africa or abroad, there's no doubt that more CEOs are becoming concerned about their increasing exposure regarding employment practices. Whilst it's difficult to ascertain the exact number of commercial employers in South Africa, it was last estimated by the World Bank that approximately 555,000 companies are registered in South Africa. Considering this relatively small number of companies, the fact that the CCMA (Commission for Conciliation, Mediation and Arbitration) and various bargaining councils handle over 150,000 employee-related cases per annum, is good reason for concern. Over the last two decades, the South African workplace has seen a number of far-reaching changes which is evidenced by a more modern Companies Act (2008) that aligns South Africa more closely with the *modus operandi* of companies in developed countries, not least the introduction of a host of employee protective legislation such as the Compensation for Occupational Injuries and Diseases Act (1993), the Basic Conditions of Employment Act (1997), the Employment Equity Amendment Act (2013), the Labour Relations Act (1995), the Broad-Based Black Economic Act (2003), the Occupational Health and Safety Act (1993) and the soon to be released Women Empowerment and Gender Equality Bill (2014).

In ordinary conditions, the introduction of laws such as these would usually be introduced over a much longer time span; however this has not been the case in South Africa since the dawn of our democracy in 1994. Given these newly implemented pieces of onerous legislation, one can't help but wonder whether companies operating in South Africa will be able to keep up with the implementation of the necessary changes that are required to protect the various stakeholders, not least also for the purposes of compliance. Adding to this complexity, employers must also not forget the manner in which citizens (including employees and consumers) have been further empowered regarding the Bill of Rights in the South African Constitution, and which has further been bolstered by legislation such as the Consumer Protection Act (2008), the National Credit Act (2005) and the Protection of Personal Information Act (2013) to name a few.

"In today's increasingly litigious business environment, employing staff is inherent with legal exposures and employers need cover against allegations of unfair labour practices. According to the Labour Relations Act, employers can be taken to the CCMA, Bargaining Council or Labour Court for various labour practices. Frighteningly, courts may award as much as 24 months' salary to the aggrieved employee."

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Evidently by not complying with these laws, companies and their leaders will feel the effect of harsh punitive measures which will not only lead to a great deal of financial discomfort, but indeed may also collapse many companies in the process. In some cases, non-compliance with some of these draconian laws could lead to a director or the company's Chief Executive Officer being jailed for up to five years. Of course any civil (and criminal) conviction is also -- in most instances -- grounds for future directorship disqualification.

As one begins to ponder the 'credentials' required to direct or manage a company, leaders of companies in these times have to be multi-talented and disciplined in so many respects; on the one hand they must be outstanding strategists, excellent risk-takers, knowledgeable of the law and brilliant marketers with technological savvy that sustains the company. On the other hand, these leaders also need to understand and apply the necessary skill that improves the profitability as well as the 'health' of the company's workforce, whilst also preserving the bio-diversity components which may be affected through the company's operations.



The days of simply focussing on bottom-line profits and outsourcing any matters pertaining the human capital and environmental issues, or other 'inconvenient matters', have long time ended. Managing the direct and indirect risks in the immediate and extended supply chains of a company has become one of the most single critical factors that define whether or not a company will survive within the complex, interwoven global economy. And such is the case with most companies; the success of a company is most often found within its leadership and their ability to lead, motivate and protect the company's single biggest asset which is found in its workforce and their employment practices.

Expectedly, as employees continue to become much more informed regarding their personal rights in the workplace, employers will need to continuously evolve and improve their human capital policies in order to ensure there is a complete alignment between the company's operations, practices and legal expectations expected by employees. Whilst such an alignment may be somewhat easier to achieve when the employee works at the employer's physical place of employment, it becomes a lot more difficult to achieve when (for example) the employee works remotely, or in even worse situations, the employee is considered a 'virtual employee' and operates completely off-site.

Undoubtedly, whilst unfair employee labour practices are still exposed, regulators across the world will continue to write more legislation to improve the conditions of employment. To this extent, employers in South Africa are increasingly becoming exposed to the term *Employment Practices Liability* ('EPL') and this term is essentially the reason for the mounting legislation which is re-shaping employment law not only in South Africa, but indeed across the globe. EPL originated in the United States of America and generally means that employers are liable to their employees for any incident that occurs during the general course of employment. There is no reason to doubt that EPL is not set to continue, particularly as employees' rights in the workplace strengthen. Accordingly, companies need to also ensure that their systems and procedures are compliant with relevant legislation and accepted business practices to avoid potential disputes and the significant costs of defending claims. Companies are becoming increasingly liable for damages as well as having to pay compensation to employees in respect of matters such as, unfair dismissal, sexual harassment, discrimination, invasion of privacy, workplace incidents, etcetera. Companies are at risk of being sued by current, past and potential employees, and even the most efficient Human Capital departments (HR) could fall victim to employee claims at the dispute resolution forums. Expectedly, defending an employee's claim against the company can be expensive as well as time consuming, not least also the reputational damage and cost attached to such matters when they become publicised.

As these additional forms of liability become known by companies who employ people in any capacity, it is advisable that employers ensure that they have adequate EPL insurance cover in place, and that this insurance is geared towards managing, mitigating and migrating critical business risks associated with Employment Practices Liability.

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