

International Labour and Employment Compliance Handbook



the global voice of
the legal profession

Edited by Salvador del Rey and Robert J. Mignin

Labour and Employment Compliance in South Africa

Susan Stelzner
Stuart Harrison
Brian Patterson
Zahida Ebrahim



Wolters Kluwer
Law & Business

International Bar Association

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International Bar Association

The Global Voice of the Legal Profession

The International Bar Association (IBA), established in 1947, is the world's leading organization of international legal practitioners, bar associations and law societies. The IBA influences the development of international law reform and shapes the future of the legal profession throughout the world. It has a membership of over 40,000 individual lawyers and almost 200 bar associations and law societies spanning all continents. It has considerable expertise in providing assistance to the global legal community.

Grouped into two divisions – the Legal Practice Division and the Public and Professional Interest Division – the IBA covers all practice areas and professional interests, providing members with access to leading experts and up-to-date information. Through the various committees of the divisions, the IBA enables an interchange of information and views among its members as to laws, practices and professional responsibilities relating to the practice of business law around the globe. Additionally, the IBA's high-quality publications and world-class conferences provide unrivalled professional development and network-building opportunities for international legal practitioners and professional associates.

The IBA's Bar Issues Commission provides an invaluable forum for IBA member organisations to discuss all matters relating to law at an international level.

The IBA's Human Rights Institute (IBAHRI) works across the Association, to promote, protect and enforce human rights under a just rule of law, and to preserve the independence of the judiciary and the legal profession worldwide.

Other institutions established by the IBA include the Southern Africa Litigation Centre and the International Legal Assistance Consortium.

Employment and Industrial Relations Law Committee

The aims of the committee are to develop and exchange knowledge of employment and industrial relations law and practice. Members support each other through the provision of innovative ideas and practical assistance on day-to-day issues. In addition, through its journal and through presentations, conferences, the committee ensures the dissemination of up-to-date law and practice in this highly important business area.

International Bar Association Global Employment Institute

The IBA Global Employment Institute (IBA GEI) was formed in early 2010 for the purpose of developing for multinationals and worldwide institutions a global and strategic approach to the key legal issues in the human resources and human capital fields.

Drawing on the resources and expertise of the IBA membership, the IBA GEI will provide a unique contribution in the field of employment, discrimination and immigration law, on a diverse range of global issues, to private and public organizations throughout the world. The IBA GEI is designed to enhance the management, performance and productivity of these organizations and help achieve best practice in their human capital and management functions from a strategic perspective.

The IBA GEI will become the leading voice and authority on global HR issues by virtue of having a number of the world's leading labour and employment practitioners in its ranks, and the support and resource of the world's largest association of international lawyers.

Further information

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About the International Labour and Employment Compliance Handbook

From 1976 through 1988, the International Bar Association and Kluwer Law International published the groundbreaking International Handbook on Contracts of Employment. This Handbook provided one of the first global overviews of the law of the international employment relationship.

Since publishing the first edition, globalization of business has created an increased demand for knowledge of labor and employment laws throughout the world. Therefore, along with Kluwer, we decided to publish an updated Handbook which we have titled the International Labour and Employment Compliance Handbook.

This new Handbook was intended to be a practical guide by providing a general overview of key labor and employment issues in multiple jurisdictions. Each chapter was written so that it is easy to understand by lawyers and non-lawyers alike. Each country author has also followed a standard outline to assist readers in analysing employment issues in each country.

The first edition of this new Handbook included nineteen (19) different countries.

This Handbook would not have been possible without the help and assistance of many people. Most importantly, the individual country authors are all distinguished legal practitioners who spent considerable time drafting and revising their country reports to meet difficult deadlines. We thank each of them. Our friends at Kluwer, especially Ewa Szkatula, have done a wonderful job in keeping the editors and the authors on schedule. Finally, we want to also express our gratitude to Cuatrecasas, Gonçalves Pereira, and Baker& McKenzie LLP for their valuable assistance in the coordination and organization of this project. Our warmest thanks to each of them.

ABOUT THE INTERNATIONAL LABOUR AND EMPLOYMENT COMPLIANCE HANDBOOK

Because of the success of the Handbook, Wolters Kluwer Law & Business decided to publish each country report also as a separate book to give a choice in obtaining the information. We hope this new format will be a helpful and useful resource just like the Handbook. Both formats are available in print and online.

The Editors

Salvador del Rey Guanter
Robert J. Mignin

March 2013

AUTHORS

Susan Stelzner

Susan Stelzner was a long-standing practising attorney and director in the employment law department of Edward Nathan Sonnenbergs. She tragically passed away on 5 January 2011 but this chapter continues to reflect her prior invaluable contribution and it is dedicated to her memory.

Stuart Harrison

Stuart is the national head of the employment law department of Edward Nathan Sonnenbergs Inc., the largest law firm in South Africa (and Africa), with offices in Cape Town, Johannesburg, Durban and Stellenbosch. Stuart has over seventeen years of experience in all aspects of employment law.

Stuart has advised employers in managing discipline, poor performance, absenteeism and other forms of incapacity and rooting out theft rings operating within workforces. He has also led large-scale retrenchment exercises for employers to successful conclusions. Stuart also regularly advises on the employment law issues that arise in transactions involving the disposal or acquisition of businesses, conducts due diligences in relation thereto and drafts the employment related provisions in the transaction agreements.

Stuart generally runs his litigation himself and has appeared in the Labour Court, the High Court and the CCMA, and conducted matters in the Labour Appeal Court and the Land Claims Court.

He has particular experience in restraints of trade and in employee benefits and pension law, including acting as an independent trustee for a group of five commercial umbrella pension, provident, preservation and retirement annuity funds. He has also worked extensively on issues around

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restructuring in the public sector and the employment law consequences of mergers and acquisitions. Some of his more unusual experience includes dealing with and litigating on interesting aspects of discrimination law, drafting unusual employment contracts (including split employment contracts for employees working partially in SA and partially in foreign countries, agreements with temporary employment services/service providers, constitutions for employers' organizations and bargaining councils, and bargaining council main agreements.

He also specializes in litigation involving the eviction of dismissed former employees and other occupiers under the onerous Security of Tenure legislation. He has contributed the chapter on pension law in the Juta's annual labour law publication since 2002. He has contributed to Labour Law for Managers: A Practical Handbook and to the chapter on South African Labour Law in various international publications on comparative labour law. He is also a regular presenter at seminars, training courses and workshops for clients and a speaker at public seminars and conferences on numerous issues, including white collar crime, pension law and ensuring legal and tax compliance in employment contracts and policies. He practices out of Cape Town and Johannesburg.

Stuart also has extensive experience in international employment law and has been involved with the International Bar Association (IBA) in this regard for a number of years. He has attended numerous international employment law conferences and has been a moderator and speaker at these events. He is currently the secretary of the IBA's Discrimination Law Committee.

Qualifications

- BA (University of Cape Town).
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Brian Patterson is a director and joint head of the Johannesburg employment law department at ENS (Edward Nathan Sonnenbergs) and has twenty-five years experience as an employment attorney. He specializes in all aspects of employment law with particular emphasis on integrated employment solutions, international split executive contracts, executive terminations, restructuring and retrenchments, employment equity and unfair discrimination, collective bargaining and strategies, employment-related pension law matters, the drafting and enforcement of restraint of trade agreements and the law relating to confidentiality and privacy.

He has acted for local and international clients as well as many overseas law firms. Brian has provided advice to corporate clients in most sectors including the financial services, retail, hospitality, pharmaceutical, mining, metal engineering and the chemical industries in all matters relating to employment and labour law, including adapting foreign contracts and policies for local law. He has dealt with the South African aspects of restructuring/mergers of multinationals in respect of a number of jurisdictions and has assisted clients over many years with changes in South African employment law legislation.

Brian specializes in giving tactical and strategic individual and collective employment law advice and he has extensive litigious and corporate employment law experience. He engages in alternative dispute resolution mechanisms when the need arises. Brian has been involved with some of the leading employment law cases reported in Southern Africa since the inception of employment law and has personally argued many matters in the Labour Court and the Labour Appeal Court and conducted matters in the Constitutional Court, the Supreme Court of Appeals the High Court and all employment law tribunals. Brian has acted as a Judge of the Labour Court on several occasions and was an assessor of the erstwhile Labour Appeal Court. Brian has passed his Qualified Lawyer Transfer Test (QLTT) to be admitted as a solicitor in England and Wales.

Brian was previously the national head of the Employment and Labour Law division of another well known South African law firm and Brian is a co-author of the South Africa chapter of a book entitled 'International Labour and Employment Law Compliance Handbook' and 'International Employment Law' and has contributed articles in many local and international publications and newspapers. He is a regular speaker on employment and labour law issues and has appeared in many television programmes over the years. Brian keeps up to date with international trends and has significant international employment law contacts. Brian does significant international employment law work arising from the UK, US and within Africa. Brian has been recognized as a leading and/or recommended

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employment and labour lawyer by many international publications over the years.

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Zahida Ebrahim

Zahida Ebrahim is a director of ENS and heads up the firm's Immigration Unit. She has eight years experience and specializes in immigration law, with a particular emphasis on the immigration requirements of multinational companies.

Zahida earned numerous merit awards at university, after which she practiced in insurance and commercial litigation before commencing practice in Immigration Law. Zahida has written the chapter on immigration issues for Labour Law for Managers: A Practical Handbook, PLC Cross Border Handbook on Labour and Employee Benefits, as well as for Getting the Deal Through's Labour and Employment Law publication, in addition to publishing a number of articles in South African media on the issue of immigration. She has presented at numerous seminars on immigration issues.

She represents a number of top-tier South African and international companies in their dealings with the Department of Home Affairs and foreign consular offices.

In 2005 and again in January 2011, she presented to the Parliamentary Portfolio Committee charged with oversight of the Department of Home Affairs in regard to changes to immigration legislation.

She has contributed the South African chapter to a number of international publications including the and Getting the Deal Through: Labour and Employment.

Zahida's specialist immigration knowledge and experience enables her to offer an all encompassing range of immigration and civic services including temporary residence applications, permanent residency applications; applications to the Director General of the Department of Home Affairs for

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waiver of regulatory requirements; applications to the Department of Trade and Industry for reduction or waiver of capital investment amount for foreigners wishing to operate businesses in South Africa; applications to the Department of Labour for salary confirmation; applications to the South African Qualifications Authority for evaluation of foreign tertiary qualifications; assistance with drafting business plans for business permit applications; citizenship related matters; liaison with the Department of Home Affairs and foreign missions and advisory work on compliance and risk assessment in immigration matters.

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