



Alert

Bermuda Seeks to Amend Employment Act

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An Overview of the Employment Amendment (No. 2) Act 2020 - Part 1: Termination Procedures

UPDATE: On 13 January 2021, the Employment Amendment (No. 2) Act 2020 and the Trade Union and Labour Relations (Consolidation) Act 2020 were passed in the Senate. While there are further formalities that will need to take place, the two Acts are expected to commence on 1 June 2021.

On 28 November 2020, the Government of Bermuda introduced two Bills, one entitled Employment Amendment (No. 2) Act 2020 (the “Bill”) and one entitled the Trade Union and Labour Relations (Consolidation) Act 2020 (the “Consolidation Bill”). While they are still to make their way through the legislative journey, and may be amended during that process, the Acts are anticipated to come into force on 1 June 2021.

Both the Bill and the Consolidation Bill seek to amend the Employment Act 2000 (the “Act”). In a press release, the Ministry of Labour explained that the Bill “*seeks to strengthen the rights and obligations of employers and employees in Bermuda’s labour force as well as modernise and clarify areas of the existing legislation to ensure it is in line with international best practices*”. The proposed amendments both elaborate and amend existing provisions and introduce new provisions including the requirement of meal breaks and the provision of anti-bullying and sexual harassment policies.

In a two-part series, we will be providing an overview of the proposed amendments to the Act. In this alert, we focus on the proposed amendments to termination procedures (including requirements related to probationary periods). In the second alert we will provide an overview of the amendments and additions to employee entitlements, new obligations on employers and the miscellaneous other provisions. [To read Part 2 click here.](#)

It should be noted that the Act applies only to ‘employees’ within the meaning of the Act, being employees who work at least 15 hours a week, wholly or mainly in Bermuda, and who do not fall within one of the exceptions e.g. a casual worker or a student employed in their vacation period.

We note that the Consolidation Bill also seeks to consolidate the various pieces of labour legislation into a single code. This series, however, concentrates solely on the amendments to the Act.

1. Termination procedure for repeated misconduct

The Bill proposes to repeal and replace the existing section regarding termination for repeated misconduct, providing for a more detailed procedure.

Under the existing Act, to terminate for repeated misconduct an employer must first provide a written warning to the employee. Any such disciplinary action taken must be reasonable in the circumstances, taking into account factors such as the nature of the conduct in question and the procedure followed by the employer. If within six months of the date of the warning, the employee is again guilty of the misconduct, an employer is entitled to terminate without notice and without any payment in lieu of notice. If the employee only commits further misconduct *after* the expiry of the six month notice period, the employer loses the right to terminate and must begin the process again.

The Bill proposes the following:

- 1) If within a *six month period*, an employee is guilty on *two* separate occasions of misconduct and receives (in respect of the first occasion of misconduct) a written warning, the employer may, after the second further occasion of misconduct and within 14 days after having knowledge of it, terminate the employee's contract of employment without notice or the payment of any severance.
- 2) If within a *twelve month period*, an employee is guilty on *four* separate occasions of misconduct and receives (in respect of the first three occasions of misconduct) a written warning, the employer may, after the fourth further occasion of misconduct and within 14 days after having knowledge of it, terminate the employee's contract of employment without notice or the payment of any severance.

In both procedures, the misconduct must directly relate to the employment relationship and the written warning must set out the misconduct complained of and appropriate instructions as to how to improve their conduct.

2. Termination procedure for unsatisfactory performance

The Bill proposes only a minor change to the procedure for termination for unsatisfactory performance, being that the written warning must now also set out the unsatisfactory performance complained of. While most employers will already be intuitively including this in their warning letters, the Act currently in force doesn't strictly require it, only that the employer set out instructions as to how to improve the performance.

3. Termination for redundancy

The Act currently provides that, prior to terminating an employee for reason of redundancy and as soon as is practicable, the employer must inform and consult with an employee's trade union or other representative, if any.

The proposed amendments in the Bill provide that the employer must also inform and consult with the employee, providing for such procedure for non-unionised employees.

The Bill also provides that instead of undertaking this process "as soon as is practicable", it must do so not less than 14 days prior to the date the employer gives notice of termination to the employee.

These changes bring Bermuda's redundancy process more in line with UK processes (and those of other similar jurisdictions).

4. Giving notice of termination to an employee on sick leave

Currently, an employer shall not give a notice of termination during an employee's absence on sick leave, *unless* the period of sick leave extends beyond *four* weeks. The Bill seeks to extend the exception to where the period of sick leave extends beyond *six* weeks.

5. Payments on termination

The Bill seeks to clarify when payments are due following termination (including when terminated by way of a payment in lieu of notice). The proposed amendments provide that such payments must be made within seven days of termination or at the next interval at which the employee would have been paid had the contract of employment not been terminated, whichever period is the longer.

6. Probationary periods

If passed, the Bill will repeal section 19 of the Act, concerning probationary periods, and replace it with a new, more detailed, provision. Currently, employers can provide that the employee serves a probationary period during which either party can terminate the contract of employment for any reason and without any notice. As a result, the more strict termination provisions do not apply until the employee has successfully completed their probationary period. This allows for a "trial period", for both the employer and employee. In some instances, an employer (or the employee, although this would be unusual) may seek to extend the probationary period.

There are three main amendments proposed by the Bill:

- 1) On or before the completion of one half of the original probationary period, employees are entitled to receive from their employer a review of the employee's performance. There is no such requirement currently.
- 2) Restrictions on (i) the length of the original probationary period – it must not be more than six months – and (ii) the employer's right to extend the probationary period – it can only do so for a period not exceeding three months and only if it conducted the aforementioned performance review. Employers would therefore need to diarise performance reviews to ensure they comply

with the Act and, in particular, to retain the option to extend an employee's probationary period. Certain categories of employees are excluded from these period limits and there is a carve out to allow for the Minister to pass regulations to add new categories.

- 3) While the employer would still be able to terminate without notice, it would no longer be able to terminate for any reason. The employer would need to show that the reason related to the employee's performance review, performance, conduct, or operational requirements of the employer's business. While the reason for terminating an employee during their probationary period is often for reason e.g. of their performance or conduct, the employee would have a basis to challenge the termination and the employer would need to prove the stated reason.

Conclusion

Many of these proposed changes clarify existing termination procedures or make what is good practice compulsory. If implemented, they will require compliance with the more specific termination requirements. As the Bill passes through the legislative procedure and closer to the implementation date, employers may want to consider how their internal termination procedures are impacted by the amendments and what updates are required to their employment documentation. In the second part of this series, we will provide an overview of the amendments and additions to employee entitlements, new obligations on employers and the Bill's miscellaneous provisions. If you would like to receive a copy of that alert and any future employment-related alerts, please complete [this form](#).

How Can We Help?

If you would like to discuss the amendments in more detail or our analysis thereof, or need assistance in relation to any employment related matter, please contact one of those listed below.

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