

Approved for tabling. *Bat SNA 3/7/19*


REPUBLIC OF KENYA



TWELFTH PARLIAMENT - THIRD SESSION - 2019

THE NATIONAL ASSEMBLY

DEPARTMENTAL COMMITTEE ON LABOUR AND SOCIAL WELFARE
REPORT ON THE EMPLOYMENT (AMENDMENT) BILL, 2019 (NO.15 OF 2019)

 THE NATIONAL ASSEMBLY PAPERS LAID	
DATE: 03 JUL 2019	DAY: Wednesday
TABLED BY:	Hon. Ali Wario
CLERK-AT-THE-TABLE:	Halima Ahmed

Directorate of Committee Services,

Clerk's Chambers

Parliament Buildings,

NAIROBI

JULY, 2019

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LIST OF ABBREVIATIONS AND ACRONYMS

AFAC	Adoptive Families Association of Kenya
Hon	Honourable
KBA	Kenya Bankers Association
KLRC	Kenya Law Reform Commission
MP	Member of Parliament
MSMEs	Micro, Small and Medium Enterprises
NA	National Assembly

LIST OF ANNEXURES

- Annexure 1:** Minutes of Committee sittings on the consideration of the Bill
- Annexure 2:** Adoption Schedule
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CHAIRPERSON'S FOREWORD

The Employment (Amendment) Bill (National Assembly Bill No. 15), underwent First Reading on 3rd April, 2019. Thereafter, the Bill was committed to the Committee on Labour and Social Welfare to review and report to the House pursuant to the provisions of Standing Order 216(5) (c).

Consequently, the Committee, pursuant to Article 118 of the Constitution and Standing Order 127 (3), invited submissions from members of the public on the above Bill via advertisements in national dailies on 10th April, 2019. The Departmental Committee on Labour and Social Welfare received submissions on the Bill and upon lapse of the twenty-one days period prescribed under Standing Order 127(4) for presentation of the Committee's report, the Committee sought for extension of time which was granted by the Hon. Speaker. Thereafter, the Committee retreated to consider the submissions, deliberate on the provisions in the Bill and production of this report.

May I take this opportunity to commend the Committee Members for their devotion and commitment to duty in the consideration of the Bill and express gratitude to the Offices of Speaker and Clerk of the National Assembly for providing technical and logistical support.

On behalf of the Departmental Committee on Labour and Social Welfare and pursuant to the provisions of Standing Order 199 (6), it is my pleasant privilege and duty to present to the House a report of the Committee on the Employment (Amendment) Bill (National Assembly Bill No. 15).

A handwritten signature in blue ink, appearing to read 'Ali Wario', followed by the date '3rd July 2019'.

HON. ALI WARIO, M.P.,

Chairperson, Departmental Committee on Labour and Social Welfare.

CHAPTER ONE

1.1 Mandate of the Committee

1. The Departmental Committee on Labour and Social Welfare is established in accordance with the provisions of Standing Order 216 of the National Assembly. Its mandate as provided for in S.O. 216(5) is to *inter-alia*:-
 - i. *To investigate, inquire into, and report on all matters relating to the mandate, management, activities, administration, operations and estimates of the assigned ministries and departments;*
 - ii. *To study the programme and policy objectives of ministries and departments and the effectiveness of the implementation.*
 - iii. *To study and review all legislation referred to it;*
 - iv. *To study, assess and analyse the relative success of the ministries and departments as measured by the results obtained as compared with their stated objectives;*
 - v. *To investigate and inquire into all matters relating to the assigned ministries and departments as they may deem necessary and as may be referred to them by the House;*
 - vi. *To vet and report on all appointments where the Constitution or any law requires the National Assembly to approve, except those under Standing Order 204 (Committee on Appointments); and*
 - vii. *To make reports and recommendations to the House as often as possible, including recommendation of proposed legislation.*
2. The Committee is mandated to consider the following subjects: -
 - i. Labour,
 - ii. Labour relations,
 - iii. Manpower or Human Resource Planning,
 - iv. Gender,
 - v. Youth,
 - vi. Social Welfare and Security,
 - vii. Children`s Welfare,
 - viii. And Persons Living with Disabilities.

1.2 Oversight

3. In executing its mandate, the Committee oversees the following government Ministries, departments and or agencies, namely:

- i. The State Department for Labour
- ii. The State Department for Social Protection
- iii. The State Department for Gender
- iv. The State Department for Youth
- v. The State Department for Arid and Semi-Arid Lands
- vi. National Gender and Equality Commission

1.3 Committee Membership

4. The Committee comprises of the following members -

1. **The Hon. Ali Wario, MP - Chairperson**
2. **The Hon. Joyce Korir, MP- Vice Chairperson**
3. The Hon. Gladys Wanga, MP
4. The Hon. Janet Marania Teyiaa, MP
5. The Hon. Janet Nangabo Wanyama, MP
6. The Hon. Ronald Kiprotich Tunoi, MP
7. The Hon. James Onyango Koyoo, MP
8. The Hon. Rose Museo, MP
9. The Hon. Alfred Kiptoo Keter, M.P
10. The Hon. Charles Kanyi Njagua, MP
11. The Hon. Catherine Wambilyanga, MP
12. The Hon. Fabian Kyule Muli, MP
13. The Hon. Abdi Mude Ibrahim, MP
14. The Hon. Michael Mwangi Muchira, MP
15. The Hon. Safia Sheikh Adan, MP
16. The Hon. Tom Odege, MP
17. The Hon. Omboko Milemba, MP
18. The Hon. Ole Sankok David, MP
19. The Hon. Wilson Sossion, MP

1.4 Committee Secretariat

1. Mr. Adan Gindicha - Clerk Assistant 1
2. Mr. John Mugoma - Clerk Assistant III
3. Ms. Doreen Karani - Legal Counsel I
4. Mr. Said Osman - Researcher Officer
5. Ms. Amran Mursal - Fiscal Analyst

CHAPTER TWO

PART A: OVERVIEW OF THE EMPLOYMENT (AMENDMENT) BILL (NATIONAL ASSEMBLY BILL NO. 15 OF 2019)

5. The Employment (Amendment) Bill, sponsored by Hon. Martha Wangari, M.P was referred to the Departmental Committee on Labour and Social Welfare on 15th March, 2019 for public participation.
6. The Principal Objective of this Bill is to amend various provisions of the Employment Act No. 11 of 2007 to enable parents adopting take pre-adoptive leave at least three months akin to the maternity leave taken by mothers after childbirth.
7. The Bill contains three clauses. Clause 1 of the Bill sets out the short title. Clause 2 of the Bill seeks to define the term “exit certificate” which is the authority given to a prospective adoptive parent by a registered adoption society to take an adopted child in the adoptive parents’ custody. Clause 3 of the Bill seeks to insert a new section in the Employment Act to provide for pre-adoptive three consecutive months leave to prospective adoptive parents who unlike their counterparts who are accorded three months leave when they naturally bring forth a child are not provided with an opportunity to bond with and understand their new child.
8. The Bill does not limit rights and fundamental freedoms in the Bill of Rights and it does not delegate legislative powers.
9. The enactment of this Bill shall occasion additional expenditure of public funds.

PART B: PUBLIC PARTICIPATION

10. Through an advertisement on 10th April, 2019(annexure 3), the Committee invited the public to present submissions on the Employment (Amendment) Bill, No. of 15 of 2019.

11. The Committee received written submissions on the Bill from the following stakeholders-

- (i) The Adoptive Families Association of Kenya; and
- (ii) The Kenya Bankers Association.

12. The details of the submissions are annexed to this report as annexure 4. The Committee extensively considered the contents of the submissions on the 20th May 2019 and 20th June 2019 and the details of the deliberations and the Committee's observations and resolutions as relates to specific clauses are contained in Part C of this Chapter.

2.1 Submissions by the Adoptive Families Association of Kenya

13. The Adoptive Families Association of Kenya supports the amendments for the following reasons-

- (a)the amendments are in the best interests of children freed for adoption. Article 53(2) provides that a child's best interests are of paramount importance in every matter concerning the child while section 4(2) of the Children Act states that in all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, admin authorities or legislative bodies, the best interests of the child shall be a primary consideration;
- (b) Section 29 of the Employment Act is discrimination towards children whose right to parental care is jeopardized by abandonment, abuse, neglect or relinquishment and are freed for adoption.it also discriminates employees who wish to create a family through adoption.
- (c) research shows that placing children aged below 3 years has detrimental effects on the cognitive, social and intellectual development of children due to structural neglect associated with high child to care giver ratio, staff turnover and lack of individualized care. The rule of thumb is that for every three months a child below age three stays in a children's home, they lose one month of development. These adverse effects may be reserved through adoption hence underscoring the critical importance of the initial

bonding period that precedes adoption. The amendments not only ensure that the process of healing of the child is safeguarded but also helps mitigate cases of failed bonding which seriously compromise the attachment pattern of the child; and

- (d) while the proposed pre-adoptive leave applies before the adoption is legally sanctioned, the socio-emotional relationship between the child and parent starts way earlier and is in fact a mandatory requirement for legalization of the process

2.2 Submissions by the Kenya Bankers Association

14. The Kenya Bankers Association submitted that-

- (a) Pre-adoption leave is a duplication of the proposed adoption leave in the draft employment (amendment) bill by the Kenya Law Reform Commission. The draft bill proposes one month's adoption leave once the full adoption process is complete. The leave shall only apply where the child is below the age of two years. It also applies to children born out of surrogate motherhood agreement where an employee is entitled to two months leave from the date when the child is born
- (b) The proposal for three months pre-adoptive leave has significant financial implications due to engagement of alternative temporary personnel. It also negates the government's ease of doing business and makes employment very expensive. MSMEs are not incentivized to formalize business so as to avoid the added costs. One month is sufficient. Three months leave is granted for maternity leave to enable a mother recover physically and exclusively breastfeed a child which is not the case for adoption leave.
- (c) The adoption process in Kenya takes more than one year and an adoption certificate and confirmation of adoption are not automatic thus adoption leave should only be granted once the adoption process is complete to avoid undue benefit to employees who do not eventually adopt a child or leave be the subject of abuse by some employees to secure three months paid leave.
- (d) When maternity leave was extended to three months the Government was to provide subsidies to employers in the form of social protection as is the case in some developed countries where the government pays for full maternity period or shares equally the cost with enterprises.

(e) Compliance with the Act will lead to added costs to Kenyans since the Employment Act applies to all employers, including micro and small enterprises, households and large institutions yet no incentives are given to MSMEs and households.

15. The Kenya Bankers Association also submitted a draft Employment (Amendment) Bill which seeks to make various amendments to the Employment Act.

PART C: CLAUSE BY CLAUSE CONSIDERATION OF THE BILL

16. This part deals with the clause by clause consideration of the Bill by the Committee after taking into consideration the views of the aforementioned stakeholders.

- **CLAUSE 1- SHORT TITLE**

17. Clause provides for the short title.

- **Committee observations and recommendation on clause 1**

18. The Committee observed that –

(a) There were no stakeholder comments received on this provision; and

(b) Article 116(2) provides for coming into force of Acts of Parliament on the fourteenth day after publication in the *Gazette* unless the Act stipulates a different date on or time at which it will come into force. In this case, the Act shall come into force in accordance with the provisions of Article 116(2).

19. The Committee recommends that the Clause be agreed to as it appears in the Bill.

- **CLAUSE 2- AMENDMENT OF SECTION 2 OF THE EMPLOYMENT ACT**

20. Clause 2 provides –

The Employment Act in this Act referred to as the “principal Act” is amended by inserting the following new definition immediately after the definition of the term “employer” –

“exit certificate” means a written authority given by a registered adoption society to a prospective adoptive parent to take the child from the custody of the adoptive society;

- **Committee observations and recommendation on clause 2**

21. The Committee observed that –

- (a) There were no stakeholder comments received on this provision;
- (b) The definition is necessary as it explains the meaning of the term ‘exit certificate’ for users of the law.

22. The Committee recommends that Clause 2 be agreed to as it appears in the Bill.

▪ CLAUSE 3- INSERTION OF A NEW SECTION 29A INTO THE EMPLOYMENT ACT

23. Clause 3 provides –

The principal Act is amended by inserting the following new section immediately after section 29—

Pre-adoptive leave. 29A. (1) Where pursuant to section 157 of the Children Act, a child is to be placed in the continuous care and control of an applicant who is an employee under this Act—

(a) the employee shall be entitled to three consecutive months pre-adoption leave with full pay from the date of the placement of the child;

(b) in the case of a female employee who is married, the employee shall be entitled to three consecutive months pre-adoption leave with full pay from the date of the placement of the child; and

(c) in the case of a male employee who is married, the employee shall be entitled to two weeks pre-adoption leave with full pay.

(2) An employee eligible for leave under subsection (1) shall notify the employer in writing of the intention of the adoption society to place the child in the custody of the employee at least fourteen days before the placement of the child.

(3) A notice under subsection (2) shall be accompanied by documentation evidencing the intention of the adoption society to place the child in the custody of the employee, including a custody agreement between the employee and the adoption society and an exit certificate.

(4) Subsection (2), (3) and (7) of section 29 shall, with necessary

modifications, apply to an employee eligible to leave under subsection (1).

▪ **Stakeholder Views**

24. **The Adoptive Society of Kenya** supported the proposal for three months pre-adoptive leave as it is important for purposes of parent-child bonding. Further, there is need to ensure that adopting parents who are employees are supported in order to comply with the statutory requirements under the Children Act (No.8 of 2001) which requires that a child to be adopted be under the continuous care and control of the applicant for a period of at least three consecutive months preceding the filing of the application. To that end, section 157 of the Children Act stipulates as follows—

“(1) Any child who is resident within Kenya may be adopted whether or not the child is a Kenyan citizen, or was or was not born in Kenya:

Provided that no application for an adoption order, shall be made in respect of a child unless the child concerned has been in the continuous care and control of the applicant within the Republic for a period of three consecutive months preceding the filing of the application and both the child and the applicant or applicants, as the case may be evaluated and assessed by a registered adoption society in Kenya.

(2) Any person who contravenes the provision of subsection (1) of this section shall be guilty of an offence and liable to imprisonment for a term not exceeding one year or to a fine not exceeding twenty thousand shillings or to both such imprisonment and such fine.”

25. **The Kenya Bankers Association** was of the view that the period of one month leave once the adoption process is complete should suffice and that the Committee should retain the provisions contained in the draft KLRC Bill.

▪ **Committee observations and recommendation on clause 3**

26. The Committee observed that-

- (a) Article 53(2) guides that a child's best interests are of paramount importance in all matters concerning the child. It is in the best interests of a child who is to be adopted to be afforded adequate time to bond with a potential parent and to allow the adoption society and the Court, an opportunity to observe the relationship between the potential parent and child for a certain duration before granting an adoption order in order to ascertain that the prospective parent can afford the child the requisite parental care and protection;
- (b) there is need to support employees who intend to adopt children for them to be able to comply with the statutory requirements under Section 157 of the Children Act (No.8 of 2001) which requires that a *child to be adopted be under the continuous care and control of the applicant for a period of at least three consecutive months* preceding the filing of the application. In view of the foregoing, applicants who are employees may be awarded pre-adoptive leave to enable them provide the requisite care and control in order to meet the statutory obligations under Section 157 of the Children Act.
- (c) granting the leave after finalization of the adoption process, as proposed by some stakeholders, would not have a similar effect as what is intended in the proposed Bill. The purpose providing pre-adoptive leave is to enable an applicant to comply with the provisions of section 157 of the Children Act which requires a child to be under the care of the applicant for at least three months before even filing the adoption application;
- (d) the provisions of Section 157 of the Children Act stipulate that the child to be adopted be under continuous 'care and control' of the applicant for a period of three months. The plain dictionary meaning of the word 'care' is "*the provision of what is necessary for the health, welfare, maintenance, and protection of someone or something*". This suggests, therefore, that an applicant for adoption, may provide the requisite care to a child without his or her physical presence. In that regard therefore, the Committee was of the view that a period of one month leave is sufficient to enable an employee intending to adopt a child be physically present with the child for at least one month in order to bond with the child and take necessary steps or put in place measures for the child to be cared for when the employee is at work;

- (e) there is need to strike a balance between the needs of the employee and employer while considering the best interests of the child. To that end, the Committee was of the view that provision of a period of one month for purposes of pre-adoptive leave is necessary
- (f) There is need to accord special consideration to parents who intend to obtain leave to enable them care for and apply for adoption of children born as a result of surrogate motherhood agreements. These agreements present a unique situation as it was noted that in Kenya, as it is presently, a commissioning mother requires to apply to the Court for adoption of her biological child born out of a surrogate motherhood agreement. This is because the birth certificate and notification indicate the name of the surrogate mother and not the commissioning mother. Ordinarily, a surrogate motherhood agreement terminates upon birth of the child whereupon the child is placed in the care of the commissioning mother. Therefore, it is the commissioning parent who provides care and exercises control of the child and therefore requires sufficient time after the child's birth in order to do so. In the circumstances, it was noted that a period of two months would enable a commissioning parent provide necessary care to the newborn child before resuming work on a full-time basis.

27. In view of the foregoing, the Committee recommends that clause 3 be amended as follows-

- a) to reduce the proposed three months leave with a period of one month;
- b) to reduce the proposed for female employees who are married, to period of one month;
- c) to allow for employees who have children through surrogates to take parental leave of at least two months from the date a child is born.

CHAPTER THREE

COMMITTEE GENERAL OBSERVATIONS AND RECOMMENDATIONS

3.1 GENERAL OBSERVATIONS

28. The Committee took note of the draft Employment (Amendment) Bill submitted by the Kenya Bankers Association. A close scrutiny of the Bill revealed that the draft Bill had been prepared by the Kenya Law Reform Commission (KLRC) and proposes to make various amendments to the Employment Act.
29. The Committee was of the view that the draft KLRC Bill has neither been presented to Parliament for consideration nor has it been enacted into law. Accordingly, the Bill under consideration cannot be subjected to the provisions of the proposed draft KLRC Bill. Further, not all the amendments in the draft KLRC Bill can be appropriately incorporated into the Bill under consideration as they deal with different subjects and would unreasonably expand the subject matter of the Bill contrary to Standing Order 133(5). In making its recommendations, the Committee however took cognizance of the KLRC proposals in respect of adoption leave.
30. The specific observations on each clause are contained in chapter two of this report.

3.2 COMMITTEE RECOMMENDATIONS

31. The Committee, having considered the Bill clause by clause proposes the following amendments-

THAT Clause 3 of the Bill be amended —

(a) in subclause (1) by—

- (i) deleting the words “three consecutive months” in paragraph (a) and substituting therefore the words “one month”;
- (ii) deleting the words “three consecutive months” in paragraph (b) and substituting therefore the words “one month”;

(b) by inserting the following new subclauses immediately after subclause (3)—

“3A. Despite subsection (1), where a child is born as a result of a surrogate motherhood agreement, an employee who is a commissioning parent –

- (a) shall be entitled to parental leave of two consecutive months from the date the child is born;
- (b) in the case of a female employee who is married, the employee shall be entitled to two consecutive months parental leave with full pay; and
- (c) in the case of a male employee who is married, the employee shall be entitled to two weeks paternal leave with full pay.

3B. An employee who is eligible for leave under subsection (3A) shall give the employer not less than seven days’ written notice in advance or a shorter period as may be reasonable in the circumstances of the intention to proceed on parental or paternal leave, as the case may be, on a specified date and to return to work thereafter.

3C. A notice under subsection (3B) shall be accompanied by documentation evidencing the surrogate motherhood agreement between the employee and the

surrogate mother, and if required by the employer, a certificate as to the medical condition of the surrogate mother from a qualified medical practitioner or midwife.”

(c) in subclause (4) by deleting the words “subsection (1)” and substituting the words “this section”

Signed  Date 3rd July 2019.

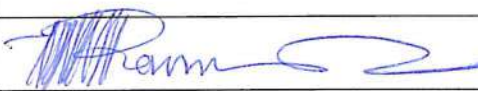

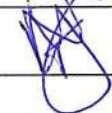
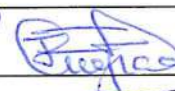
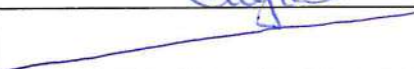
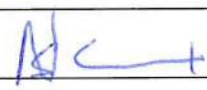
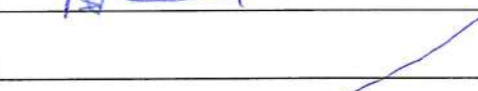


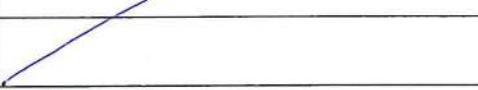
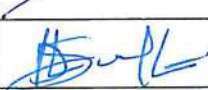
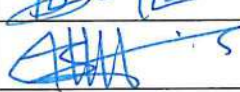
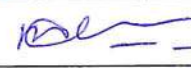





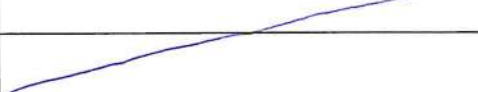
HON. ALI WARIO, M.P.

CHAIRPERSON,

DEPARTMENTAL COMMITTEE ON LABOUR AND SOCIAL WELFARE.

KENYA NATIONAL ASSEMBLY – 12TH PARLIAMENT
DEPARTMENTAL COMMITTEE ON LABOUR & SOCIAL WELFARE
REPORT ADOPTION SCHEDULE
EMPLOYMENT (AMENDMENT) BILL, 2019

DATE: 20-06-2019.

No.	NAME	SIGNATURE
1.	The Hon. Ali Wario, MP – Chairperson	
2.	The Hon. Joyce Korir Chepkoech, MP – Vice Chairperson	
3.	The Hon. Gladys Wanga, MP	
4.	The Hon. Janet Marania Teyiaa, MP	
5.	The Hon. Alfred Kiptoo Keter, MP	
6.	The Hon. Janet Nangabo Wanyama, MP	
7.	The Hon. Ronald Kiprotich Tonui, MP	
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18.	The Hon. Omboko Milemba, MP	
19.	The Hon. Wilson Sossion, MP	

REPUBLIC OF KENYA



THE NATIONAL ASSEMBLY TWELFTH PARLIAMENT - THIRD SESSION

In the Matter of consideration of:
Employment (Amendment) Bill (National Assembly Bill No.15 of 2019)
SUBMISSION OF MEMORANDA

Article 118(1) (b) of the Constitution provides that, *“Parliament shall facilitate public participation and involvement in the legislative and other business of Parliament and its Committees.”* Standing Order 127(3) provides that, *“the Departmental Committee to which a Bill is committed shall facilitate public participation through appropriate mechanism, including inviting submission of memoranda and holding public hearing and shall take into account views and recommendations of the public when the Committee makes its report to the House.”*

The Employment (Amendment) Bill, 2019 seeks to amend the Employment Act, 2007 in order to afford pre-adoptive leave to parents who apply for the adoption of children who are not their natural children born to them by birth.

The Bill has undergone First reading and stands committed to the **Departmental Committee on Labour and Social Welfare** for consideration and reporting to the House, pursuant to Standing Order 127(1)

Pursuant to Article 118(1) (b) of the Constitution of Kenya and Standing Order 127(3) of the National Assembly Standing Orders, the Committee invites interested members of the public to submit any presentations they may have on the aforementioned Bill, copy of which may be accessed from the Parliamentary Website at www.parliament.go.ke. The representations or written submissions may be forwarded to the **Clerk of the National Assembly, P.O. Box 41842-00100, Nairobi**; hand-delivered to the Office of the Clerk, Main Parliament Buildings, Nairobi; or emailed to the clerk@parliament.go.ke; to be received by Close of Business on Wednesday 17th April, 2019.

MICHAEL. R SIALAI, EBS
CLERK OF THE NATIONAL ASSEMBLY

Adoptive Families Association of Kenya

P.O. Box 54039 00200 Nairobi – Kenya

Tel: 0724841245/0722659692

Email: adoptivefamilieskenya@gmail.com

ADOPTIVE FAMILIES ASSOCIATION OF KENYA

MEMORANDUM

ON

THE EMPLOYMENT (AMENDMENT) BILL, 2019

Adoptive Families Association of Kenya

P.O. Box 54039 00200 Nairobi – Kenya

Tel: 0724841245/0722659692

Email: adoptivefamilieskenya@gmail.com

Introduction

The Employment Act Cap 226 of the Laws of Kenya is an Act of Parliament that declares and defines the fundamental rights of employees, to provide basic conditions of employment of employees, to regulate employment of children.

Section 29 of the Act provides for a three-month maternity leave for all female employees and a two weeks paternity leave for male employees. These provisions only apply to persons who get their children naturally. The provisions do not apply to employees who get children through the legal adoption process.

The Employment (Amendment) Bill 2019, herein referred to as the Bill seeks to introduce amendments to Section 29 by introduction of Section 29A which provides for **Pre-adoptive Leave** for male and female employees who are in the process of adopting a child. It proposes a three-month pre-adoptive leave for female employees and two weeks pre-adoptive leave for male employees in line with maternity and paternity leaves for those who get children naturally, respectively.

It is our informed position that Bill is in the best interest of children freed for adoption and should therefore be passed without any amendments.

Justification

Article 53(2) of the Constitution of Kenya 2010 provides that a child's best interests are of paramount importance in every matter concerning the child. Section 4(2) of the Children Act 2001 reiterates this position by stating that, "In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration. We believe the Bill

Adoptive Families Association of Kenya

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concerns children and therefore the best interest of the child should be the overriding principle governing its deliberation.

Articles 27(4) and (5) of the Constitution of Kenya and Section 5 of the Children Act 2001 provide that no person should be discriminated by the state or any person based on among other things, social origin. **We submit that Section 29 of the Employment Act of 2007 is discriminatory towards children who have whose right to parental is jeopardized by abandonment, abuse neglect or relinquishment and are consequently freed for adoption.** The provisions are a direct affront to the right of every child to parental care. Further, the provisions are discriminatory towards employees who wish to create a family through adoption.

Children who are freed for adoption fall under the category of children in need of care and protection. They would have had traumatic experiences ranging from abandonment, abuse and neglect. **Research demonstrates that abandonment of a child at a very young age has an adverse effect on their brain development and could potentially lead to lifelong trauma.** Severe neglect and abuse have similar implications on the developmental wellbeing of the child.

In addition, children who are freed for adoption are normally placed in charitable children's institutions or children's homes. Evidence shows care in a children's home especially for children below the age of three has severe detrimental effects on the cognitive, social and intellectual development of children due structural neglect associated with high child-carer ratio, staff turnover and lack of individualized care. **The rule of thumb is that for every three months a child below the age of three stays in a children's home, they lose one month of development.** Further, studies have demonstrated that when placed for adoption, the above-mentioned detrimental effects can be reversed especially when adoptive parents adopt attachment-based parenting.

The above underline the critical importance of the initial bonding period that precede adoption and for which the proposed amendments recommend that

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the prospective mother be on leave to ensure uninterrupted bonding process. Consequently, the proposed amendments do not only ensure that the process of healing of the child is safeguarded but also help mitigate cases of failed bonding which seriously compromise the attachment pattern of the children in question.

It would be argued that the proposed amendments would have adverse effects on employers as the proposal potentially takes away work hours. We contend that this argument is faulty on several grounds. First, it completely ignores the centrality of the principle of the best interest of the child in this matter and is purely focused on the economic implications of the amendments. The argument is also discriminative. Why would an economic argument be applied to the case of adoption and not applied to a case of natural birth?

As demonstrated above, parenting of an adopted child demands more involvement of the parent and requires extra emotional parent-child relationship. A parent whose child is having psychosocial problems cannot be a productive employee. **The employer may not loose work-hours in terms of the pre-adoptive leave, but they will ultimately loose in the output per hour if the employee is distracted for long periods.** Pre-adoptive leave will ensure that the parenting process commences on a solid foundation and minimizes chances of disruption along the way consequently ensuring productivity of the parents in the long-run.

Lastly, whereas the proposed pre-adoptive leave applies before the adoption is legally sanctioned, **we hold that the socio-emotional relationship between the parent and the child starts way earlier and is in fact a mandatory prerequisite for the legalization of the process.** Any contrary argument is therefore an affront on the best interest of the child in an adoption process.

Grace Wanunda



Chairperson

16/04/2019

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Your Ref: TBA

16th April 2019

The Clerk of The National Assembly
1st Floor, Parliament Buildings
P. O. Box 41842 - 00100
NAIROBI



Dear Mr. Michael R. Sialai, EBS,

RE: EMPLOYMENT ACT (AMENDMENT) BILL 2019

We refer to the above matter and to your notice requesting for submission of memoranda on the Draft Employment Act (Amendment) Bill, 2019 regarding the proposed Pre-Adoptive Leave.

The Kenya Bankers Association [KBA] is an association of 46-member banks in the Republic of Kenya established on 16th July 1962 with the mandate to champion the banking industry's development through innovation, advocacy and promotion of "fair play" among commercial banks.

Having consulted our membership, we wish to submit that the banking industry objects to the proposed Pre-Adoptive Leave in the Employment Act (Amendment Bill) 2019 on the following grounds:

1. That the proposed Pre-Adoption Leave is a duplication of the Adoption Leave that has been proposed in the Draft Employment Act (Amendment Bill) 2019 by the Kenya Law Reform Commission (copy attached) providing for one (1) month Adoption Leave which the Industry agrees once the full adoption process is complete.
2. That the proposed Pre-Adoptive Leave has significant financial implications to enterprises with the requirement for fully paid Leave of up to three (3) months. The enterprises must engage alternative personnel temporarily in place of the adopting employee with full pay.
3. That the three (3) months Maternity Leave as provided presently in the Employment Act is aimed at assisting the mother recover physically and exclusively breast feed the child which is not the case in adoption thus the rationale for one (1) month adoption leave.

4. That section 157 (1) of the Children Act, 2001 on adoption provides that before an applicant for adoption submits the application for adoption, the child MUST have *"been in the continuous care and control of the applicant within the Republic for a period of three consecutive months preceding the filing of the application and both the child and the applicant or applicants, as the case may be evaluated and assessed by a registered adoption society in Kenya."* Therefore, no applicant for adoption can make the application for adoption before the child is at least 3 months old. Biological mothers resume work when the child is 3 months thus there is no reason for an extended leave for adopting parents since the adoption application commences when the child is at least 3 months already in the custody of the adoption applicant.
5. That the adoption process in Kenya takes not less than one (1) year before the applicant gets the adoption certificate and confirmation of adoption is not automatic thus the Adoption Leave should only be granted once the adoption process is complete to avoid undue benefit to staff who may not eventually adopt the child or the leave be subject of abuse by employees who wish to secure the 3 months paid leave.
6. That at the time when the maternity leave was extended from 2 months to 3 months with the employee also being entitled to annual leave (which was not the practice previously), the Government was to provide subsidies to businesses in the form of social protection as is the case in the developed countries where Government pays for full maternity period or shares equally the costs with enterprises. This is not the case in Kenya and our economy driven largely by SMEs will struggle to finance the extended pre-adoption leave.
7. That the proposed leave negates the Government's ease of doing business and makes employment very expensive.
8. That the Employment Act applies to all employers in Kenya irrespective of the size; thus, employers engaging a single staff like a house servant, farm worker or large corporates are all subject to this Employment Act thus the proposed amendment would lead to MSMEs not being incentivized to formalize their business to avoid the added costs.

KBA, therefore recommends that the proposed amendments be withdrawn and instead have one Adoption Leave for one (1) month when the employee has been issued with the final adoption order as proposed in the Draft Employment Act (Amendment Bill) 2019 by the Kenya Law Reform Commission (copy attached).

Yours Sincerely



Dr. Habil Olaka
CHIEF EXECUTIVE OFFICER

Encls

Cc: Federation of Kenya Employers

	<ul style="list-style-type: none"> (ii) "Contract for service" means contract for a specified piece rate of work; (iii) "piece rate work" means any form of employment in which a worker is paid a fixed piece rate for each unit or product produced irrespective of the time occupied in its performance; (iv) "part-time employee" means an employee whose normal hours of work, are less than the normal hours of work of a comparable full-time employee and who is not a full-time employee with reduced hours; (v) "term contract" means contractual relationship between an employee and an employer for a specified period; and (vi) "overtime" means any hours of work in excess of the normal hours of work.
Amendment of No. 11 of 2007	<p>3. The principal Act is amended by deleting the word "Minister" wherever it appears and substituting therefor with the expression "Cabinet Secretary"</p>
Amendment to Section 3 of No. 11 of 2007	<p>4. Section 3 of the principal Act is amended –</p> <ul style="list-style-type: none"> (a) in subsection (2) by— <ul style="list-style-type: none"> (i) deleting paragraph (a) and substituting therefor with the following new paragraph— <ul style="list-style-type: none"> (a) "Kenya Defence Forces established under Article 241(1) of the Constitution;" (ii) deleting paragraph (b) and substituting thereof with the following new paragraph – <ul style="list-style-type: none"> (b) "National Intelligence Service established under Article 242 (1) of the Constitution; (iii) deleting paragraph (c) and substituting thereof with the following new paragraph— <ul style="list-style-type: none"> (c) "National Police Service" established under Article 243 (1) of the Constitution; (iv) inserting the following new paragraph immediately after paragraph (d)— <ul style="list-style-type: none"> (e) volunteers. (b) in subsection (4) by deleting the expression "after consultation with the Board and" appearing immediately after the expression

	<p>“Minister may,” and</p> <p>(c) in subsection (5) by deleting the expression “after consultation with the Board and” appearing immediately after the expression “Minister may”.</p>
Amendment to Section 4 of No. 11 of 2007	<p>5. Section 4 of the Principal Act is amended in subsection 3 by deleting the expression “five hundred thousand shillings or to imprisonment for a term not exceeding two years” and substituting therefor with the expression “five million shillings or to imprisonment for a term not exceeding five years”.</p>
Amendment to Section 5 of No. 11 of 2007 No. 12 of 2011	<p>6. Section 5 of the Principal Act is amended—</p> <p>(a) in subsection (1) by—</p> <p>(i) inserting the word “and” immediately after the word “Minister”; and</p> <p>(ii) by deleting the expression “and the industrial court” appearing immediately after the word “officers”;</p> <p>(b) by introducing the following new subsection (2a) immediately after subsection (2)—</p> <p>(2a) An employer shall not employ a foreign national whose residency status in the country has not been regularised in accordance with the Kenya Citizenship and Immigration Act or any other relevant law.</p> <p>(c) in subsection (3) by deleting paragraph (a) substituting therefor with the following new paragraph—</p> <p>“(a) On grounds of race, sex, pregnancy, marital status, health status, ethnic or social origin, colour, age, disability, religion, conscience, belief, culture, dress, language or birth.”</p>
Amendment to Section 6 of No. 11 of 2007	<p>7. Section 6 of the Principal Act is amended—</p> <p>(a) in subsection (2) by deleting the word “twenty” and substituting with the word “five”;</p> <p>(b) by inserting the following new subsection immediately after subsection (4)—</p> <p>“(5) An employer who contravenes subsection (2) commits an offence.”</p>
Amendment to Section 9 of No. 11 of 2007	<p>8. Section 9 of the Principal Act is amended –</p> <p>(a) in subsection (4) by deleting the expression “is illiterate or” appearing immediately after the word “employee”;</p> <p>(b) by inserting the following new subsections immediately after subsection (4)—</p>

	<p>(5) A provision in a contract of service whose effect is to restrain an employee from exercising a lawful profession or occupation or use of knowledge and skills gained during employment upon termination of such contract of service is void.</p> <p>(6) Despite of subsection (5), a contract of service may limit an employee from disclosing any confidential information or trade secrets acquiring in the course of engagement for a reasonable period.</p>		
Amendment to Section 10 of No. 11 of 2007	<p>9. Section 10 of the Principal Act is amended—</p> <p>(a) in subsection (2) paragraph (a) by—</p> <p>(i) deleting the word “permanent” and substituting therefor with the word “contact”; and</p> <p>(ii) deleting the word “age” and words “and sex”;</p> <p>(b) in subsection (3)—</p> <p>(i) in paragraph (a) by inserting the following new subparagraph immediately after subparagraph (iii) —</p> <p>“(iv) Education leave”; and</p> <p>(ii) in paragraph (f) by deleting the word “Kenya” wherever it appears in the paragraph and substituting therefor with the expression “East Africa Community”.</p>		
Amendment of section 11 of No. 11 of 2007	<p>10. Section 11 of the Principal Act is amended in subsection (5) by deleting the word “Kenya” wherever it appears in the subsection and substituting thereof with the expression “East Africa Community”.</p>		
Amendment of section 12 of No. 11 of 2007	<p>11. Section 12 of the Principal Act is amended by deleting subsection (3).</p>		
Amendment of section 13 of No. 11 of 2007	<p>12. Section 13 of the Principal Act is amended in subsection (3) paragraph (b) by deleting the word “Kenya” and substituting thereof with the expression “East Africa Community”.</p>		
Amendment of section 15 of No. 11 of 2007	<p>13. The Principal Act is amended by inserting the following new sections immediately after section 15 —</p>		
	<table border="1"> <tr> <td>Transfer of undertakings</td> <td> <p>15A. (1) In this section —</p> <p>“affected employee” means any employee of the transferor who may be affected by a transfer of an undertaking or any measures taken in connection with such a transfer;</p> </td> </tr> </table>	Transfer of undertakings	<p>15A. (1) In this section —</p> <p>“affected employee” means any employee of the transferor who may be affected by a transfer of an undertaking or any measures taken in connection with such a transfer;</p>
Transfer of undertakings	<p>15A. (1) In this section —</p> <p>“affected employee” means any employee of the transferor who may be affected by a transfer of an undertaking or any measures taken in connection with such a transfer;</p>		

		<p>“transfer” means disposition of an undertaking as a going concern and effected through a sale, merger, or operation of law; and</p> <p>“undertaking” includes any trade or business</p> <p>(2) If an undertaking or part of an undertaking is transferred from one person to another —</p> <ul style="list-style-type: none">(a) such transfer shall not operate to terminate the contract of service of any employee employed by the transferor in the undertaking;(b) the contract of service shall have effect after the transfer as if such contract was originally made between the employee and the transferee with the same terms and conditions of service; and(c) the transfer shall not break the continuity of the period of employment. <p>(3) Without prejudice to subsection (2), on completion of a transfer—</p> <ul style="list-style-type: none">(a) all the transferor’s rights, powers, duties and liabilities in connection with any contract of service shall be transferred by virtue of this section to the transferee;(b) any act or omission done before the transfer by the transferor in respect of that contract of service shall be taken to have been done by the transferee; and(c) any act or omission done before the transfer by an employee of the undertaking in relation to the transferor shall be deemed to have been done in relation to the transferee. <p>(4) As soon as it is reasonable and before a transfer of an undertaking takes place, to enable consultations between transferor and affected employees or their representatives if any, the transferor shall notify the affected employees of the —</p> <ul style="list-style-type: none">(a) fact that the transfer is to take place, the approximate date on which it is to take place and the reasons for the transfer;(b) implications of the transfer and the measures that the transferor envisages will be taken in
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	No 18 of 2015	<p>relation to the employees, if any; and</p> <p>(c) measures that the transferee envisages to take in relation to employees if any.</p> <p>(5) Any recognition or collective agreement entered into between the transferor and the trade union of the affected employees and in force immediately before the transfer shall continue in force between the transferee and the trade union of the affected employees for a period of 12 months after the date of the transfer or until the date of its expiry, whichever is the earlier.</p> <p>(6) This Section shall not apply to any transfer of an undertaking where the transferor is the subject of any insolvency proceedings.</p> <p>(7) If either before or after the transfer, an employee of the transferor is dismissed, it will amount to unfair dismissal if the principal reason for such dismissal is in connection with the transfer.</p> <p>(8) The Cabinet Secretary may make regulations to give effect to this section.</p>
	Death of employer	<p>15(B) (1) Where the employer's personal position formed the basis of the employment relationship with the employee, the contract of service with the employee shall terminate upon death of the employer.</p> <p>(2) Despite of subsection (1), employee's right of itemised pay statements, wages, leave and any other right shall be claimed against the personal representatives of the deceased employer.</p> <p>(3) Where the contract of service was in relation to a business, and such business does not carry on after the death of the employer, the employee shall be taken to have been dismissed for reason of redundancy and will entitled to appropriate payment from a personal representative.</p> <p>(4) If on death of the employer the business carries on, the employee shall continue to be employed by the personal representatives and continuity of employment is preserved.</p>
Amendment of section 16 of No.	<p>14. The Principal Act is amended by repealing Section 16 and substituting thereof with the following new section—</p>	

11 of 2007	<p>16. Where an employer does not give an employee a statement as required by section 10, 12, 13, and 20, or the employee is dissatisfied with any decision by the employer, the employee may refer their grievance as a dispute for settlement in accordance with the mechanisms established under Part XII of this Act.</p>
Amendment of section 17 of No. 11 of 2007	<p>15. Section 17 of the Principal Act is amended—</p> <p>(1) in subsection (1)—</p> <p>(a) by deleting the word “of” appearing immediately after the word currency and substituting thereof with the expression “recognised in”; and</p> <p>(b) in paragraph (c) by deleting the expression “cheque, postal order or money order” and substituting thereof with the expression “any payment instrument recognised under the National Payment Systems Act”</p> <p>(2) by deleting subsection (9)</p>
Amendment of Section 18 of No. 11 of 2007	<p>16. Section 18 of the Principal Act is amended in subsection (3) by deleting the expression “an order, judgement or award of the industrial court or”</p>
Amendment of section 19 of No. 11 of 2007	<p>17. Section 19 of the Principal Act is amended by deleting subsection (6) and substituting therefor with the following new subsection—</p> <p>(6) Where proceedings are brought in respect of failure by the employer to remit deductions from an employee’s remuneration, the court may in addition to fining the employer order the employer to —</p> <p>(a) refund the employee the money deducted from the employee’s wages; or</p> <p>(b) to pay the intended beneficiary on behalf of the employee with the employer’s own funds.”</p>
Amendment of section 22 of No. 11 of 2007	<p>18. Section 22 of the Principal Act is amended by deleting the expression “on the advise of the Board”</p>
Amendment to Section 24 of No. 11 of 2007	<p>19. Section 24 of the principal Act is amended by deleting the expression “district commissioner” wherever it appears in the section and substituting thereof the expression “county commissioner”</p>
Amendment of section 24 of No. 11 of 2007	<p>20. Section 25 of the Principal Act is amended by deleting the expression “one hundred thousand shillings” and substituting thereof with expression “one million”.</p>
Amendment to Section 27 of No. 11 of 2007	<p>21. The Principal Act is amended by inserting the following new sections immediately after section 27—</p>

	Overtime	<p>27A (1) An employer shall not require an employee to work overtime except in accordance with an agreement.</p> <p>(2) An agreement shall not require an employee to work more than twelve hours on any day.</p> <p>(3) An employer shall pay an employee at least one and one-half times the employee's normal wage for overtime worked.</p> <p>(4) Overtime shall be payable at the following rates -</p> <p>(a) for time worked in excess of the normal number of hours per week at one and one-half times the normal hourly rate; and</p> <p>(b) for time worked on the employees normal rest day or public holiday at twice the normal hourly rate.</p>
	Night work	<p>27B (1) In this section, night work means work performed between 10:00 pm and 06:00 am.</p> <p>(2) An employer may only require an employee to perform night work, if so agreed, and if—</p> <p>(a) the employee is compensated by the payment of an allowance, which may be a shift allowance, or by a reduction of working hours; and</p> <p>(b) transportation is available between the employee's place of residence and the workplace at the commencement and conclusion of the employee's shift.</p> <p>(3) An employer who requires an employee to perform night work on regular basis must—</p> <p>(a) inform the employee—</p> <p>(i) of any health and safety hazards associated with the work that the employee is required to perform; and</p> <p>(ii) of the employee's right to undergo a medical examination in terms of paragraph (b);</p> <p>(b) at the request of the employee, enable the employee to undergo a medical examination, for the account of the employer, concerning those hazards—</p> <p>(i) before the employee starts, or</p>

		<p>within a reasonable period of the employee starting, such work; and</p> <p>(ii) at appropriate intervals while the employee continues to perform such work; and</p> <p>(c) transfer the employee to suitable day work within a reasonable time if—</p> <p>(i) the employee suffers from a health condition associated with the performance of night work; and</p> <p>(ii) it is practicable for the employer to do so.</p> <p>(4) The Cabinet Secretary may make regulations on performance of night work.</p>
	Flexible working time	<p>27C (1) Despite of Section 13 of this Act, an employee may apply to the employer for a change in terms and conditions of employment relating to—</p> <p>(a) the times when the employee is required to work;</p> <p>(b) where, as between employee's home and a place of business of the employer, the employee required to work, or</p> <p>(c) such other aspect the Cabinet Secretary may prescribe.</p> <p>(2) An application under this section shall specify the change applied for and the date on which it is proposed to become effective;</p> <p>(3) An employer to whom an application is made under this Section shall—</p> <p>(a) notify the employee of the decision on the application within reasonable period; and</p> <p>(b) only refuse the application on one or more of the following grounds—</p> <p>(i) the burden of additional costs;</p> <p>(ii) detrimental effect on ability to meet customer demand;</p> <p>(iii) inability to re-organise work among existing staff;</p> <p>(iv) inability to recruit additional staff;</p> <p>(v) detrimental impact on quality;</p> <p>(vi) detrimental impact on performance;</p> <p>(vii) insufficiency of work during the</p>

		<p>periods the employee proposes to work, (viii)planned structural changes; and (ix)such other grounds as may be prescribed.</p> <p>(4) The Cabinet Secretary may prescribe guidelines on flexible working hours</p>
Amendment to Section 29 of No. 11 of 2007		<p>22. Section 29 of the principal Act is amended by—</p> <p>(a) deleting subsection 8 and substituting thereof with the following new subsection—</p> <p>(8) In the event where a female employee who has been granted a leave under this section suffers a stillbirth, such employee shall be entitled to one month leave.</p> <p>(b) introducing new sections 29A, 29B and 29C immediately after section 29, as follows—</p>
	Paternity Leave	<p>29A. (1) A male employee shall, immediately after the delivery of his child, have a right to a paternity leave for a period of 14 days with full pay.</p> <p>(2) The leave under subsection (1) shall be granted only upon production of a notification of birth issued in accordance with law relating to registration of births.</p>
	Adoption Leave	<p>29B. (1) An employee who is an adoptive parent of a child who is below the age of two, is entitled to an adoption leave of one month.</p> <p>(2) An employee may commence adoption leave on the date—</p> <p>(a)the adoption order is granted; or</p> <p>(b) a child is placed in the care of a prospective adoptive parent by a competent court, pending the finalisation of an adoption order in respect of that child, whichever date occurs first.</p> <p>(3) An employee shall notify an employer in writing, unless the employee is unable to do so, of the date on which the employee intends to—</p> <p>(a)commence adoption leave; and</p> <p>(b)return to work after adoption leave.</p> <p>(4) Notification in terms of subsection (3) must be given—</p>

		<p>(a) at least one month before the date referred to in subsection (2); or</p> <p>(b) as soon as it is reasonably practicable.</p> <p>(5) Despite of subsection (1), where a child is born as a result of a surrogate motherhood agreement, an employee who is a commissioning parent shall be entitled to parental leave of two months from the date a child is born.</p>
	Compassionate leave	29C (1) An employee who has exhausted their annual leave may be granted compassionate leave for up to five days with full pay in a leave year in case of death of a parent, spouse, child or sibling.
Amendment to Section 30 of No. 11 of 2007		<p>23. Section 30 of the Principal Act is amended by deleting subsection (1) section and substituting therefor with the following new subsection—</p> <p>(1) An employee shall be entitled to a sick leave of up to a maximum of 30 days with full pay and thereafter to up to a maximum of 15 days sick leave with half pay in each period of 12 consecutive months of service.</p>
Amendment of section 31 of No. 11 of 2007		24. Section 31 of the Principal Act is amended in subsection (2) by deleting the expression “on the recommendation of the Board”
Amendment of section 34 of No. 11 of 2007		25. The principal Act is amended by introducing a new section immediately after section 34, as follows—
	Education Leave	34A. An employee who is enrolled for a course in a recognised learning institution, which the employee has notified the employer, shall be entitled to an education leave of up a maximum of ten days in a leave cycle with full pay, for purpose of enabling such employee take any course evaluations.
Amendment to Section 35 of No. 11 of 2007		<p>26. Section 35 of the principal Act is amended—</p> <p>(1) in subsection (4) by inserting the following new paragraph immediately after paragraph (b)—</p> <p>(c) of an employee to be provided by the employer with written statement giving particulars of the reasons for dismissal.</p> <p>(2) in subsection (5) by—</p> <p>(a) deleting the expression “the terms of which shall be fixed”;</p> <p>(b) inserting the following new subsections immediately after subsection (5) —</p>

	<p>“(5a) Upon termination of contract of service, an employee shall be entitled to gratuity as provided in the contract it is not less than equivalent to 15 days pay for each completed year of service;</p> <p>(5b) Where an employee who works on a contract, has worked for an aggregate of 1 year, irrespective of payment of wages, the employee shall be entitled to service pay for every year worked calculated on the basis of the last earned basic salary.”</p> <p>(3) in subsection (6) by deleting the expression “this Section” and substituting thereof with the expression “subsection 5”; and</p> <p>(4) By inserting the following new subsection (7) immediately after subsection (6) —</p> <p>(7) Where an employee is retired whether under normal retirement or on medical grounds, the employer shall provide the employee with a certificate of retirement.</p>
<p>Amendment of section 40 of No. 11 of 2007</p>	<p>27. Section 40 of the principal Act is amended—</p> <p>(a) in subsection (1) paragraph (e) by deleting the expression “in cash”; and</p> <p>(b) in subsection (3) by inserting the expression “or technological unemployment” immediately the word redundancy.</p>
<p>Amendment to Section 44 of No. 11 of 2007</p>	<p>40 Section 44 of the Principal Act is amended by—</p> <p>(a) inserting the following new subsections immediately after subsection (3)—</p> <p>(3a) An employer shall before taking any action under subsection (3)—</p> <p>(a) Inform the employee of the nature of charge against the employee in sufficient details;</p> <p>(b) offer the employee an opportunity to be heard and state their case; and</p> <p>(c) inform the employee of any right of appeal against the decision made.</p> <p>(3b) An employer who fails to follow the procedure outlined in subsection 3a shall render any dismissal to be unfair dismissal.</p> <p>(b) inserting the following new subsection immediately after subsection (4)—</p> <p>(5) Where an employee is summarily dismissed for lawful cause, the employee shall on such dismissal be paid all wages, accrued allowances due to him up to the date of the dismissal and any other monetary obligations paid into a pension scheme.</p>

<p>Amendment to Section 45 of No. 11 of 2007</p>	<p>41 Section 45 of the Principal Act is amended—</p> <p>(a) by deleting subsection (3);</p> <p>(b) in subsection (4) by inserting the following new paragraph immediately after paragraph (b)—</p> <p>(c) an employee is compelled to terminate the contract of service in a circumstance where the employer conducts themselves in a manner calculated to make working conditions of an employee intolerable, and disregards essential terms of service, which seriously damages the relationship of trust and confidence between the employer and the employee.</p>	
<p>Amendment of section 46 of No. 11 of 2007</p>	<p>42 Section 46 of the Principal Act is amended by deleting paragraph (g) and substituting thereof with the following paragraph—</p> <p>(g) An employee's race, sex, marital status, health status, ethnic or social origin, colour, age, disability, religion, conscience, belief, culture, dress, language or birth;</p>	
<p>Amendment to Section 47 of No. 11 of 2007</p>	<p>43 Section 47 of the principal Act is amended by deleting subsection (6).</p>	
<p>Repeal of section 48 of No. 11 of 2007</p>	<p>44 The principal Act is amended by repealing section 48 and substituting thereof with the following new section—</p> <p>48. In any complaint under section 47, any party may be assisted or represented by an advocate, an official of a trade union or an official of an employer's organisation.</p>	
<p>Amendment to section 48 of No. 11 of 2007</p>	<p>45 The Principal Act is amended by inserting the following new section immediately after section 48—</p>	
	<p>Precautionary Suspension</p>	<p>48A An employer may suspend an employee for a maximum period of 14 days with full pay where the employer opts to conduct an inquiry which the employer has reason to believe may reveal a cause for dismissal of an employee.</p>
<p>Amendment to Section 53 of No. 11 of 2007</p>	<p>46 Section 53 of the principal Act is amended—</p> <p>(a) by deleting subsection(1) and substituting thereof with the following new subsection—</p> <p>(1) No person may employ a child in employment that—</p> <p>(a) is inappropriate for a person of that age; and</p> <p>(b) places at risk the child's well-being, education, physical or mental health, or spiritual, moral or social development;</p>	

	<p>(b) in subsection (2) by deleting the expression “shall in consultation with the Board” and substituting thereof with the word “may”;</p> <p>(c) by inserting the following new subsection immediately after subsection (2) —</p> <p style="text-align: center;">(3) A person who employs a child in contravention of this section commits an offence.</p>
Amendment to Section 54 of No. 11 of 2007	<p>47 Section 54 of the principal Act is amended—</p> <p>(a) in sub-section (1) by</p> <p>(i) deleting the words “of the rank of an inspector and above”; and</p> <p>(ii) deleting the expression “constituting worst forms of child labour” and substituting thereof with “in contravention of section 53 (1).”;</p> <p>(b) in sub-section (2) by inserting the expression “children officer” immediately after the expression “labour officer”; and</p> <p>(c) in sub-section (4) by deleting the words “constituting worst forms of child labour” and substituting with “in contravention of section 53.”</p>
Repeal of section 66 of No.11 of 2007	<p>48 The Principal Act is amended by repealing section 66.</p>
Amendment of section 67 of No. 11 of 2007 No 18 of 2015 No..... of 2015	<p>49 Section 67 of the Principal Act is amended—</p> <p>(a) in paragraph (a) –</p> <p>(i) subparagraph (ii) by deleting the words “the Law of Succession Act” and substituting thereof with the words “an order made under the Insolvency Act, 2015”</p> <p>(ii) by introducing a new subparagraph (iii) immediately after subparagraph (ii), as follows—</p> <p>(iii) a moratorium period under a debt relief order applies.</p> <p>(b) in paragraph (b) –</p> <p>(i) by deleting the word “company” wherever it appears in the paragraph and substituting thereof with the words “corporate entity”; and</p> <p>(ii) by introducing a new subparagraph (iii) immediately after subparagraph (ii), as follows—</p> <p>(iii) voluntary arrangement has been proposed in accordance with the Insolvency Act, 2015.</p>
Amendment of	<p>50 Section 69 of the principal Act is amended—</p>

<p>section 69 of No 11 of 2007</p>	<p>(a) in subsection (1)(a) by deleting the word “ten” and substituting thereof with the word “fifty”; and</p> <p>(b) in subsection (2) by deleting the expression “on advise of the board”</p>
<p>Amendment of section 70 of No. 11 of 2007</p>	<p>51 Section 70 of the principal Act is amended—</p> <p>(a) in subsection (4)(a) by –</p> <p>(i) deleting the expression “or a permanent” appearing immediately after the word “bankruptcy”; and</p> <p>(ii) deleting the expression “Bankruptcy Act” and substituting thereof with the expression “Insolvency Act,2015”.</p>
<p>Repeal of section 71 of No. 11 of 2007</p>	<p>52 The Principal Act is amended by repealing section 71.</p>
<p>Repeal of section 72 of No. 11 of 2007</p>	<p>53 The Principal Act is amended by repealing section 72.</p>
<p>Repeal of section 73 of No. 11 of 2007</p>	<p>54 The Principal Act is amended by repealing section 73.</p>
<p>Amendment to section 75 of No. 11 of 2007</p>	<p>55 The Principal Act is amended by introducing a new Part IXA immediately after section 75 with the following new sections 75A, 75B, 75C, 75D, 75E, 75F, 75G consecutively numbered—</p>
<p>PART IXA – PROTECTION OF EMPLOYEES PERSONAL DATA</p>	
<p>Principles of employee protection</p>	<p>75A In this Part—</p> <p>“personal data” means any information related to an identified or identifiable employee, former employee, or an applicant to employment;</p> <p>“processing” includes collection, storage communication, or any other use of personal data; and</p> <p>“monitoring” includes the use of electronic devices or any other communication equipment, for purpose of establishing identity and location, or any other method of surveillance.</p> <p>(2) An employer shall process personal data lawfully and fairly, and use it only for reasons directly relevant to the employment and for the</p>

		<p>purposes in which such personal data was originally collected.</p> <p>(3) If personal data is to be processed for purposes other than those for which it was collected, the employer shall ensure that it is not used in a manner incompatible with the original purpose.</p> <p>(4) Personal data collected in connection with technical or organisational measures to ensure the security and proper operation of automated information systems shall not be used to control the behaviour of employees.</p> <p>(5) No decisions concerning an employee shall be made based solely on the automated processing of that employee's personal data.</p> <p>(6) Personal data collected by electronic monitoring shall not be the only factor in evaluating an employee's performance.</p> <p>(7) Every employer has a duty to regularly assess their data processing practices to –</p> <p>(a) reduce as far as possible the kind and amount of personal data collected; and</p> <p>(b) Improve ways of protecting the privacy of employees.</p> <p>(8) An employer shall keep the employees informed of any data collection process, the rules that govern that process, and their rights.</p> <p>(9) The processing of personal data should not have the effect of unlawfully discriminating in employment or occupation.</p>
	<p>Collection of employee's personal data</p>	<p>75B (1) All personal data shall be obtained from the individual employee.</p> <p>(2) Where it is necessary to collect personal data from third parties, the employee shall be informed in advance and give explicit consent.</p> <p>(3) Where third party collection is used as outlined in subsection (2), the employer shall indicate the purpose of the processing, type of data to be gathered, and the consequences, if any, of refusing consent.</p>

		<p>(4) An employer shall not collect or process personal data concerning an employee's sex life or sexual orientation; political, religious or other beliefs and membership in a trade union, unless such personal data is directly relevant to an employment decision and in conformity with any national legislation.</p> <p>(5) No employer shall use polygraphs, truth-verification equipment or any other similar testing procedure in the context of employment</p> <p>(6) Where an employee is monitored, the employee has a right to be informed in advance of the reasons for monitoring, the time schedule, the methods and techniques used, the nature of data to be collected.</p> <p>(7) Secret monitoring of an employees is permitted only if—</p> <ul style="list-style-type: none"> (a) it is in conformity with a national legislation; or (b) there is reasonable grounds to believe commission of a criminal activity. <p>(8) Continuous monitoring of an employee is permitted only if required for health and safety or the protection of property.</p>
	Security of personal data	<p>75C Every employer shall ensure personal data is protected by such security safeguards as are reasonable in the circumstances to guard against loss and unauthorized access, use, modification or disclosure.</p>
	Storage of personal data	<p>75D (1) Any storage of personal data shall be limited to data gathered consistent with the principles on the collection of personal data outlined this Part.</p> <p>(2) Personal data covered by medical confidentiality shall be stored only by personnel bound by rules on medical secrecy and maintained apart from all other personal data.</p> <p>(3) Every employer shall provide general information, regularly reviewed, listing types of personal data held on individual employees and on the processing of that data.</p> <p>(4) Employer shall verify periodically that the personal data stored is accurate, up to date and</p>

		<p>complete.</p> <p>(5) Personal data shall be stored only for justified and specific purposes for which it has been collected, unless—</p> <p>(a) an employee wishes to be on a list of potential job candidates for a specific period;</p> <p>(b) the personal data is required to be kept by a national legislation; or</p> <p>(c) the personal data is required by an employer or employee for any legal proceedings to prove any matter to do with an existing or former employment relationship.</p>
	Use of personal data	<p>76E Personal data shall be used only in consistent with the principles in this part in accordance with the national law relating to data protection.</p>
	Communication of personal data	<p>75F (1) Personal data shall not be communicated to a third party without employee's explicit consent, unless the communication is—</p> <p>(a) necessary to prevent serious and imminent threat to life or health;</p> <p>(b) required or authorized by law;</p> <p>(c) necessary for the conduct of the employment relationship; or</p> <p>(d) required for the enforcement of criminal law.</p> <p>(2) Personal data shall not be communicated for commercial or marketing purposes without the employee's informed and explicit consent.</p> <p>(3) The limitation as to communications to third parties shall apply to the communication of personal data between employers in the same group and between different agencies of government.</p> <p>(4) Personal data should be internally available only to specifically authorized users, who shall have access only to such as needed for the fulfilment of their particular tasks.</p> <p>(5) An employer shall adopt procedures for monitoring the internal flow of personal data and for ensuring that the processing complies with this Part.</p>
	Employment agencies	<p>75G Where an employer uses employment agencies for purpose of recruitment, the employer shall expressly require a retained employment agency to process personal data consistent with the provisions of this part or a national law</p>

		relating to data protection.
Amendment of section 76 of No. 11 of 2007	56	Section 76 of the Principal Act is amended in— (a) subsection (1) by deleting the expression “twenty-five” and substituting thereof with the word “five”; and (b) Subsection (2) by deleting the word “Director” wherever it appears in the subsection and substituting thereof with the word “Authority”.
Amendment of section 77 of No. 11 of 2007	58.	Section 77 of the Principal Act is amended by deleting the word “Director” and the expression “the employment service office” and in both cases substituting thereof with the word “Authority
Amendment of section 78 of No. 11 of 2007	59.	Section 78 of the Principal Act is amended by deleting the expression “employment service office” and substituting thereof with the word “Authority
Amendment of section 79 of No. 11 of 2007	60.	Section 79 of the Principal Act is amended by deleting the word “Director” and substituting thereof with the word “Authority”
Amendment to Section 87 of No. 11 of 2007	61.	Section 87 of the Principal act is amended by the introducing a new subsection immediately after sub-section (3), as follows- “(4) The Director of Public Prosecutions may appoint such number of officers to act as prosecutors for purposes of this Act.”
Amendment of section 87 of No. 11 of 2007	62.	Section 87 of the Principal Act is amended— (a) in sub-section (1) by— (i) inserting the expression “or any other mediator conciliator or arbitrator the parties may agree upon or appointed by the Commission”. immediately after the expression “labour officer”. (ii) inserting the word “Commission” immediately before the words “Industrial Court”. (b) deleting subsection (2) and substituting thereof with the following new subsections- (2). Where an agreement is reached through the labour officer, a mediator or an arbitrator, such agreement may be recorded by the Court as an order of the Court.
Amendment of section 89 of No. 11 of 2007	63.	Section 88 of the Principal Act is amended in subsection by deleting the expression “fifty thousand” and substituting thereof with the expression “five hundred thousand”
Amendment of section 89 of No. 11 of 2007	64.	Section 89 of the Principal Act is amended by deleting subsection (3)

Amendment of section 91 of No. 11 of 2007	<p>65. Section 91 of the Principal Act is amended—</p> <ul style="list-style-type: none">(a) in subsection (1) by deleting the expression “after consultation with the board”.(b) by deleting the word “rules” wherever it appears and substituting thereof with the word “Regulations”.(c) by deleting subsection (3) and substituting thereof with the following new subsection— “Any regulation made under this section may distinguish between children of different ages in relation to their localities, occupations or circumstances”
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KLRC Draft April 2017

241 (3) Amendment
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FA

THE NATIONAL ASSEMBLY
RECEIVED
24 APR 2019
DIRECTOR COMMITTEE SERVICES
Time:.....

① Dennis replied

Your Ref: TBA

16th April 2019

The Clerk of The National Assembly
1st Floor, Parliament Buildings
P. O. Box 41842 - 00100
NAIROBI

RECEIVED
23 APR 2019
CLERK'S OFFICE

② Amendment
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FA
24/4/19

Dear Mr. Michael R. Sialai, EBS,

RE: EMPLOYMENT ACT (AMENDMENT) BILL 2019

We refer to the above matter and to your notice requesting for submission of memoranda on the Draft Employment Act (Amendment) Bill, 2019 regarding the proposed Pre-Adoptive Leave.

The **Kenya Bankers Association [KBA]** is an association of 46-member banks in the Republic of Kenya established on 16th July 1962 with the mandate to champion the banking industry's development through innovation, advocacy and promotion of "fair play" among commercial banks.

Having consulted our membership, we wish to submit that the banking industry objects to the proposed Pre-Adoptive Leave in the Employment Act (Amendment Bill) 2019 on the following grounds:

1. That the proposed Pre-Adoption Leave is a duplication of the Adoption Leave that has been proposed in the Draft Employment Act (Amendment Bill) 2019 by the Kenya Law Reform Commission (copy attached) providing for one (1) month Adoption Leave which the Industry agrees once the full adoption process is complete.
2. That the proposed Pre-Adoptive Leave has significant financial implications to enterprises with the requirement for fully paid Leave of up to three (3) months. The enterprises must engage alternative personnel temporarily in place of the adopting employee with full pay.
3. That the three (3) months Maternity Leave as provided presently in the Employment Act is aimed at assisting the mother recover physically and exclusively breast feed the child which is not the case in adoption thus the rationale for one (1) month adoption leave.
4. That **section 157 (1) of the Children Act, 2001** on adoption provides that before an applicant for adoption submits the application for adoption, the child **MUST** have **"been in the continuous care and control of the applicant within the Republic for a period of three consecutive months preceding the filing of the application and both the child and the applicant or applicants, as the case may be evaluated and assessed by a registered adoption society in Kenya."** Therefore, no applicant for adoption can make the application for adoption before the child is at least 3 months old. Biological mothers resume work when the child is 3 months thus there is no reason for an extended leave for adopting parents

since the adoption application commences when the child is at least 3 months already in the custody of the adoption applicant.

5. That the adoption process in Kenya takes not less than one (1) year before the applicant gets the adoption certificate and confirmation of adoption is not automatic thus the Adoption Leave should only be granted once the adoption process is complete to avoid undue benefit to staff who may not eventually adopt the child or the leave be subject of abuse by employees who wish to secure the 3 months paid leave.
6. That at the time when the maternity leave was extended from 2 months to 3 months with the employee also being entitled to annual leave (which was not the practice previously), the Government was to provide subsidies to businesses in the form of social protection as is the case in the developed countries where Government pays for full maternity period or shares equally the costs with enterprises. This is not the case in Kenya and our economy driven largely by SMEs will struggle to finance the extended pre-adoption leave.
7. That the proposed leave negates the Government's ease of doing business and makes employment very expensive.
8. That the Employment Act applies to all employers in Kenya irrespective of the size; thus, employers engaging a single staff like a house servant, farm worker or large corporates are all subject to this Employment Act thus the proposed amendment would lead to MSMEs not being incentivized to formalize their business to avoid the added costs.

KBA, therefore recommends that the proposed amendments be withdrawn and instead have one Adoption Leave for one (1) month when the employee has been issued with the final adoption order as proposed in the Draft Employment Act (Amendment Bill) 2019 by the Kenya Law Reform Commission (copy attached).

Yours Sincerely

Dr. Habil Olaka

CHIEF EXECUTIVE OFFICER

Encls

Cc: Federation of Kenya Employers

(3) G. M. M. M.
pls note
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(2) G. M. M. M.
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① D. M. S.

THE EMPLOYMENT ACT (AMENDMENT) BILL, 2019

A Bill for -

AN ACT of Parliament to amend the Employment Act, 2007 and for connected purposes.

24/4

ENACTED by the Parliament of Kenya as follows—

Short title	
	1. This Act may be cited as the Employment Act (Amendment) Act, 2019.
Amendment to Section 2 of No. 11 of 2007	2. The Employment Act, 2007, hereinafter referred to as the “Principal Act”, is amended in section 2 by— (a) deleting the words “or medical officer” in the definition of “authorised officer”; (b) inserting at the end of the definition of “casual employee” the words “but excludes piece rate work”; (c) deleting the word “juveniles” and substituting therefor with the word “children” in the definition of “worst forms of child labour”; (d) deleting the definition of “disability” and substituting therefor with the following new definition— “disability” has the meaning assigned to it in the Persons with Disability Act, 2003;
No 14 of 2003	(e) deleting the definitions of “employee” and substituting therefor with the following new definition— “employee” means a person works in the service of the employer under an express or implied contract of service, under which the employer has right to direct and control the details of work performance and excludes contract for services.
No. 3 of 2016	(f) deleting the definition of “labour officer” and substituting therefor with the following new definition— “labour officer” means a person appointed as a labour officer”; (g) deleting the definition of “HIV” (h) inserting the following new definitions in their proper alphabetical sequence— (i) “Authority” means the National Employment Authority established under the National Employment Authority Act, 2016;

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	<ul style="list-style-type: none"> (ii) "Contract for service" means contract for a specified piece rate of work; (iii) "piece rate work" means any form of employment in which a worker is paid a fixed piece rate for each unit or product produced irrespective of the time occupied in its performance; (iv) "part-time employee" means an employee whose normal hours of work, are less than the normal hours of work of a comparable full-time employee and who is not a full-time employee with reduced hours; (v) "term contract" means contractual relationship between an employee and an employer for a specified period; and (vi) "overtime" means any hours of work in excess of the normal hours of work.
Amendment of No. 11 of 2007	<p>3. The principal Act is amended by deleting the word "Minister" wherever it appears and substituting therefor with the expression "Cabinet Secretary"</p>
Amendment to Section 3 of No. 11 of 2007	<p>4. Section 3 of the principal Act is amended –</p> <p>(a) in subsection (2) by—</p> <ul style="list-style-type: none"> (i) deleting paragraph (a) and substituting therefor with the following new paragraph— <ul style="list-style-type: none"> (a) "Kenya Defence Forces established under Article 241(1) of the Constitution;" (ii) deleting paragraph (b) and substituting thereof with the following new paragraph – <ul style="list-style-type: none"> (b) "National Intelligence Service established under Article 242 (1) of the Constitution; (iii) deleting paragraph (c) and substituting thereof with the following new paragraph— <ul style="list-style-type: none"> (c) "National Police Service" established under Article 243 (1) of the Constitution; (iv) inserting the following new paragraph immediately after paragraph (d)— <ul style="list-style-type: none"> (e) volunteers. <p>(b) in subsection (4) by deleting the expression "after consultation with the Board and" appearing immediately after the expression</p>

	<p>“Minister may,” and</p> <p>(c) in subsection (5) by deleting the expression “after consultation with the Board and” appearing immediately after the expression “Minister may”.</p>
Amendment to Section 4 of No. 11 of 2007	<p>5. Section 4 of the Principal Act is amended in subsection 3 by deleting the expression “five hundred thousand shillings or to imprisonment for a term not exceeding two years” and substituting therefor with the expression “five million shillings or to imprisonment for a term not exceeding five years”.</p>
Amendment to Section 5 of No. 11 of 2007 No. 12 of 2011	<p>6. Section 5 of the Principal Act is amended—</p> <p>(a) in subsection (1) by—</p> <p>(i) inserting the word “and” immediately after the word “Minister”; and</p> <p>(ii) by deleting the expression “and the industrial court” appearing immediately after the word “officers”;</p> <p>(b) by introducing the following new subsection (2a) immediately after subsection (2)—</p> <p>(2a) An employer shall not employ a foreign national whose residency status in the country has not been regularised in accordance with the Kenya Citizenship and Immigration Act or any other relevant law.</p> <p>(c) in subsection (3) by deleting paragraph (a) substituting therefor with the following new paragraph—</p> <p>“(a) On grounds of race, sex, pregnancy, marital status, health status, ethnic or social origin, colour, age, disability, religion, conscience, belief, culture, dress, language or birth.”</p>
Amendment to Section 6 of No. 11 of 2007	<p>7. Section 6 of the Principal Act is amended—</p> <p>(a) in subsection (2) by deleting the word “twenty” and substituting with the word “five”;</p> <p>(b) by inserting the following new subsection immediately after subsection (4)—</p> <p>“(5) An employer who contravenes subsection (2) commits an offence.”</p>
Amendment to Section 9 of No. 11 of 2007	<p>8. Section 9 of the Principal Act is amended –</p> <p>(a) in subsection (4) by deleting the expression “is illiterate or” appearing immediately after the word “employee”;</p> <p>(b) by inserting the following new subsections immediately after subsection (4)—</p>

	<p>(5) A provision in a contract of service whose effect is to restrain an employee from exercising a lawful profession or occupation or use of knowledge and skills gained during employment upon termination of such contract of service is void.</p> <p>(6) Despite of subsection (5), a contract of service may limit an employee from disclosing any confidential information or trade secrets acquiring in the course of engagement for a reasonable period.</p>		
Amendment to Section 10 of No. 11 of 2007	<p>9. Section 10 of the Principal Act is amended—</p> <p>(a) in subsection (2) paragraph (a) by—</p> <p>(i) deleting the word “permanent” and substituting therefor with the word “contact”; and</p> <p>(ii) deleting the word “age” and words “and sex”;</p> <p>(b) in subsection (3)—</p> <p>(i) in paragraph (a) by inserting the following new subparagraph immediately after subparagraph (iii) —</p> <p>“(iv) Education leave”; and</p> <p>(ii) in paragraph (f) by deleting the word “Kenya” wherever it appears in the paragraph and substituting therefor with the expression “East Africa Community”.</p>		
Amendment of section 11 of No. 11 of 2007	<p>10. Section 11 of the Principal Act is amended in subsection (5) by deleting the word “Kenya” wherever it appears in the subsection and substituting thereof with the expression “East Africa Community”.</p>		
Amendment of section 12 of No. 11 of 2007	<p>11. Section 12 of the Principal Act is amended by deleting subsection (3).</p>		
Amendment of section 13 of No. 11 of 2007	<p>12. Section 13 of the Principal Act is amended in subsection (3) paragraph (b) by deleting the word “Kenya” and substituting thereof with the expression “East Africa Community”.</p>		
Amendment of section 15 of No. 11 of 2007	<p>13. The Principal Act is amended by inserting the following new sections immediately after section 15 —</p>		
	<table border="1"> <tr> <td style="vertical-align: top;">Transfer of undertakings</td> <td> <p>15A. (1) In this section —</p> <p>“affected employee” means any employee of the transferor who may be affected by a transfer of an undertaking or any measures taken in connection with such a transfer;</p> </td> </tr> </table>	Transfer of undertakings	<p>15A. (1) In this section —</p> <p>“affected employee” means any employee of the transferor who may be affected by a transfer of an undertaking or any measures taken in connection with such a transfer;</p>
Transfer of undertakings	<p>15A. (1) In this section —</p> <p>“affected employee” means any employee of the transferor who may be affected by a transfer of an undertaking or any measures taken in connection with such a transfer;</p>		

		<p>“transfer” means disposition of an undertaking as a going concern and effected through a sale, merger, or operation of law; and</p> <p>“undertaking” includes any trade or business</p> <p>(2) If an undertaking or part of an undertaking is transferred from one person to another —</p> <ul style="list-style-type: none">(a) such transfer shall not operate to terminate the contract of service of any employee employed by the transferor in the undertaking;(b) the contract of service shall have effect after the transfer as if such contract was originally made between the employee and the transferee with the same terms and conditions of service; and(c) the transfer shall not break the continuity of the period of employment. <p>(3) Without prejudice to subsection (2), on completion of a transfer—</p> <ul style="list-style-type: none">(a) all the transferor’s rights, powers, duties and liabilities in connection with any contract of service shall be transferred by virtue of this section to the transferee;(b) any act or omission done before the transfer by the transferor in respect of that contract of service shall be taken to have been done by the transferee; and(c) any act or omission done before the transfer by an employee of the undertaking in relation to the transferor shall be deemed to have been done in relation to the transferee. <p>(4) As soon as it is reasonable and before a transfer of an undertaking takes place, to enable consultations between transferor and affected employees or their representatives if any, the transferor shall notify the affected employees of the —</p> <ul style="list-style-type: none">(a) fact that the transfer is to take place, the approximate date on which it is to take place and the reasons for the transfer;(b) implications of the transfer and the measures that the transferor envisages will be taken in
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	No 18 of 2015	<p>relation to the employees, if any; and</p> <p>(c) measures that the transferee envisages to take in relation to employees if any.</p> <p>(5) Any recognition or collective agreement entered into between the transferor and the trade union of the affected employees and in force immediately before the transfer shall continue in force between the transferee and the trade union of the affected employees for a period of 12 months after the date of the transfer or until the date of its expiry, whichever is the earlier.</p> <p>(6) This Section shall not apply to any transfer of an undertaking where the transferor is the subject of any insolvency proceedings.</p> <p>(7) If either before or after the transfer, an employee of the transferor is dismissed, it will amount to unfair dismissal if the principal reason for such dismissal is in connection with the transfer.</p> <p>(8) The Cabinet Secretary may make regulations to give effect to this section.</p>
	Death of employer	<p>15(B) (1) Where the employer's personal position formed the basis of the employment relationship with the employee, the contract of service with the employee shall terminate upon death of the employer.</p> <p>(2) Despite of subsection (1), employee's right of itemised pay statements, wages, leave and any other right shall be claimed against the personal representatives of the deceased employer.</p> <p>(3) Where the contract of service was in relation to a business, and such business does not carry on after the death of the employer, the employee shall be taken to have been dismissed for reason of redundancy and will entitled to appropriate payment from a personal representative.</p> <p>(4) If on death of the employer the business carries on, the employee shall continue to be employed by the personal representatives and continuity of employment is preserved.</p>
Amendment of section 16 of No.	14. The Principal Act is amended by repealing Section 16 and substituting thereof with the following new section—	

11 of 2007	<p>16. Where an employer does not give an employee a statement as required by section 10, 12, 13, and 20, or the employee is dissatisfied with any decision by the employer, the employee may refer their grievance as a dispute for settlement in accordance with the mechanisms established under Part XII of this Act.</p>
Amendment of section 17 of No. 11 of 2007	<p>15. Section 17 of the Principal Act is amended—</p> <p>(1) in subsection (1)—</p> <p>(a) by deleting the word “of” appearing immediately after the word currency and substituting thereof with the expression “recognised in”; and</p> <p>(b) in paragraph (c) by deleting the expression “cheque, postal order or money order” and substituting thereof with the expression “any payment instrument recognised under the National Payment Systems Act”</p> <p>(2) by deleting subsection (9)</p>
Amendment of Section 18 of No. 11 of 2007	<p>16. Section 18 of the Principal Act is amended in subsection (3) by deleting the expression “an order, judgement or award of the industrial court or”</p>
Amendment of section 19 of No. 11 of 2007	<p>17. Section 19 of the Principal Act is amended by deleting subsection (6) and substituting therefor with the following new subsection—</p> <p>(6) Where proceedings are brought in respect of failure by the employer to remit deductions from an employee’s remuneration, the court may in addition to fining the employer order the employer to —</p> <p>(a) refund the employee the money deducted from the employee’s wages; or</p> <p>(b) to pay the intended beneficiary on behalf of the employee with the employer’s own funds.”</p>
Amendment of section 22 of No. 11 of 2007	<p>18. Section 22 of the Principal Act is amended by deleting the expression “on the advise of the Board”</p>
Amendment to Section 24 of No. 11 of 2007	<p>19. Section 24 of the principal Act is amended by deleting the expression “district commissioner” wherever it appears in the section and substituting thereof the expression “county commissioner”</p>
Amendment of section 24 of No. 11 of 2007	<p>20. Section 25 of the Principal Act is amended by deleting the expression “one hundred thousand shillings” and substituting thereof with expression “one million”.</p>
Amendment to Section 27 of No. 11 of 2007	<p>21. The Principal Act is amended by inserting the following new sections immediately after section 27—</p>

	Overtime	<p>27A (1) An employer shall not require an employee to work overtime except in accordance with an agreement.</p> <p>(2) An agreement shall not require an employee to work more than twelve hours on any day.</p> <p>(3) An employer shall pay an employee at least one and one-half times the employee's normal wage for overtime worked.</p> <p>(4) Overtime shall be payable at the following rates -</p> <p>(a) for time worked in excess of the normal number of hours per week at one and one-half times the normal hourly rate; and</p> <p>(b) for time worked on the employee's normal rest day or public holiday at twice the normal hourly rate.</p>
	Night work	<p>27B (1) In this section, night work means work performed between 10:00 pm and 06:00 am.</p> <p>(2) An employer may only require an employee to perform night work, if so agreed, and if—</p> <p>(a) the employee is compensated by the payment of an allowance, which may be a shift allowance, or by a reduction of working hours; and</p> <p>(b) transportation is available between the employee's place of residence and the workplace at the commencement and conclusion of the employee's shift.</p> <p>(3) An employer who requires an employee to perform night work on regular basis must—</p> <p>(a) inform the employee—</p> <p>(i) of any health and safety hazards associated with the work that the employee is required to perform; and</p> <p>(ii) of the employee's right to undergo a medical examination in terms of paragraph (b);</p> <p>(b) at the request of the employee, enable the employee to undergo a medical examination, for the account of the employer, concerning those hazards—</p> <p>(i) before the employee starts, or</p>

		<p>within a reasonable period of the employee starting, such work; and</p> <p>(ii) at appropriate intervals while the employee continues to perform such work; and</p> <p>(c) transfer the employee to suitable day work within a reasonable time if—</p> <p>(i) the employee suffers from a health condition associated with the performance of night work; and</p> <p>(ii) it is practicable for the employer to do so.</p> <p>(4) The Cabinet Secretary may make regulations on performance of night work.</p>
	Flexible working time	<p>27C (1) Despite of Section 13 of this Act, an employee may apply to the employer for a change in terms and conditions of employment relating to—</p> <p>(a) the times when the employee is required to work;</p> <p>(b) where, as between employee's home and a place of business of the employer, the employee required to work, or</p> <p>(c) such other aspect the Cabinet Secretary may prescribe.</p> <p>(2) An application under this section shall specify the change applied for and the date on which it is proposed to become effective;</p> <p>(3) An employer to whom an application is made under this Section shall—</p> <p>(a) notify the employee of the decision on the application within reasonable period; and</p> <p>(b) only refuse the application on one or more of the following grounds—</p> <p>(i) the burden of additional costs;</p> <p>(ii) detrimental effect on ability to meet customer demand;</p> <p>(iii) inability to re-organise work among existing staff;</p> <p>(iv) inability to recruit additional staff;</p> <p>(v) detrimental impact on quality;</p> <p>(vi) detrimental impact on performance;</p> <p>(vii) insufficiency of work during the</p>

		<p>periods the employee proposes to work, (viii)planned structural changes; and (ix)such other grounds as may be prescribed.</p> <p>(4) The Cabinet Secretary may prescribe guidelines on flexible working hours</p>
Amendment to Section 29 of No. 11 of 2007	<p>22. Section 29 of the principal Act is amended by—</p> <p>(a) deleting subsection 8 and substituting thereof with the following new subsection—</p> <p>(8) In the event where a female employee who has been granted a leave under this section suffers a stillbirth, such employee shall be entitled to one month leave.</p> <p>(b) introducing new sections 29A, 29B and 29C immediately after section 29, as follows—</p>	
	Paternity Leave	<p>29A. (1) A male employee shall, immediately after the delivery of his child, have a right to a paternity leave for a period of 14 days with full pay.</p> <p>(2) The leave under subsection (1) shall be granted only upon production of a notification of birth issued in accordance with law relating to registration of births.</p>
	Adoption Leave	<p>29B. (1) An employee who is an adoptive parent of a child who is below the age of two, is entitled to an adoption leave of one month.</p> <p>(2) An employee may commence adoption leave on the date—</p> <p>(a)the adoption order is granted; or</p> <p>(b) a child is placed in the care of a prospective adoptive parent by a competent court, pending the finalisation of an adoption order in respect of that child, whichever date occurs first.</p> <p>(3) An employee shall notify an employer in writing, unless the employee is unable to do so, of the date on which the employee intends to—</p> <p>(a)commence adoption leave; and</p> <p>(b)return to work after adoption leave.</p> <p>(4) Notification in terms of subsection (3) must be given—</p>

		<p>(a) at least one month before the date referred to in subsection (2); or</p> <p>(b) as soon as it is reasonably practicable.</p> <p>(5) Despite of subsection (1), where a child is born as a result of a surrogate motherhood agreement, an employee who is a commissioning parent shall be entitled to parental leave of two months from the date a child is born.</p>
	Compassionate leave	29C (1) An employee who has exhausted their annual leave may be granted compassionate leave for up to five days with full pay in a leave year in case of death of a parent, spouse, child or sibling.
Amendment to Section 30 of No. 11 of 2007		<p>23. Section 30 of the Principal Act is amended by deleting subsection (1) section and substituting therefor with the following new subsection—</p> <p>(1) An employee shall be entitled to a sick leave of up to a maximum of 30 days with full pay and thereafter to up to a maximum of 15 days sick leave with half pay in each period of 12 consecutive months of service.</p>
Amendment of section 31 of No. 11 of 2007		24. Section 31 of the Principal Act is amended in subsection (2) by deleting the expression “on the recommendation of the Board”
Amendment of section 34 of No. 11 of 2007		25. The principal Act is amended by introducing a new section immediately after section 34, as follows—
	Education Leave	34A. An employee who is enrolled for a course in a recognised learning institution, which the employee has notified the employer, shall be entitled to an education leave of up a maximum of ten days in a leave cycle with full pay, for purpose of enabling such employee take any course evaluations.
Amendment to Section 35 of No. 11 of 2007		<p>26. Section 35 of the principal Act is amended—</p> <p>(1) in subsection (4) by inserting the following new paragraph immediately after paragraph (b)—</p> <p>(c) of an employee to be provided by the employer with written statement giving particulars of the reasons for dismissal.</p> <p>(2) in subsection (5) by—</p> <p>(a) deleting the expression “the terms of which shall be fixed”;</p> <p>(b) inserting the following new subsections immediately after subsection (5) —</p>

	<p>“(5a) Upon termination of contract of service, an employee shall be entitled to gratuity as provided in the contract it is not less than equivalent to 15 days pay for each completed year of service;</p> <p>(5b) Where an employee who works on a contract, has worked for an aggregate of 1 year, irrespective of payment of wages, the employee shall be entitled to service pay for every year worked calculated on the basis of the last earned basic salary.”</p> <p>(3) in subsection (6) by deleting the expression “this Section” and substituting thereof with the expression “subsection 5”; and</p> <p>(4) By inserting the following new subsection (7) immediately after subsection (6) —</p> <p>(7) Where an employee is retired whether under normal retirement or on medical grounds, the employer shall provide the employee with a certificate of retirement.</p>
<p>Amendment of section 40 of No. 11 of 2007</p>	<p>27. Section 40 of the principal Act is amended—</p> <p>(a) in subsection (1) paragraph (e) by deleting the expression “in cash”; and</p> <p>(b) in subsection (3) by inserting the expression “or technological unemployment” immediately the word redundancy.</p>
<p>Amendment to Section 44 of No. 11 of 2007</p>	<p>40 Section 44 of the Principal Act is amended by—</p> <p>(a) inserting the following new subsections immediately after subsection (3)—</p> <p>(3a) An employer shall before taking any action under subsection (3)—</p> <p>(a) Inform the employee of the nature of charge against the employee in sufficient details;</p> <p>(b) offer the employee an opportunity to be heard and state their case; and</p> <p>(c) inform the employee of any right of appeal against the decision made.</p> <p>(3b) An employer who fails to follow the procedure outlined in subsection 3a shall render any dismissal to be unfair dismissal.</p> <p>(b) inserting the following new subsection immediately after subsection (4)—</p> <p>(5) Where an employee is summarily dismissed for lawful cause, the employee shall on such dismissal be paid all wages, accrued allowances due to him up to the date of the dismissal and any other monetary obligations paid into a pension scheme.</p>

<p>Amendment to Section 45 of No. 11 of 2007</p>	<p>41 Section 45 of the Principal Act is amended—</p> <p>(a) by deleting subsection (3);</p> <p>(b) in subsection (4) by inserting the following new paragraph immediately after paragraph (b)—</p> <p>(c) an employee is compelled to terminate the contract of service in a circumstance where the employer conducts themselves in a manner calculated to make working conditions of an employee intolerable, and disregards essential terms of service, which seriously damages the relationship of trust and confidence between the employer and the employee.</p>	
<p>Amendment of section 46 of No. 11 of 2007</p>	<p>42 Section 46 of the Principal Act is amended by deleting paragraph (g) and substituting thereof with the following paragraph—</p> <p>(g) An employee's race, sex, marital status, health status, ethnic or social origin, colour, age, disability, religion, conscience, belief, culture, dress, language or birth;</p>	
<p>Amendment to Section 47 of No. 11 of 2007</p>	<p>43 Section 47 of the principal Act is amended by deleting subsection (6).</p>	
<p>Repeal of section 48 of No. 11 of 2007</p>	<p>44 The principal Act is amended by repealing section 48 and substituting thereof with the following new section—</p> <p>48. In any complaint under section 47, any party may be assisted or represented by an advocate, an official of a trade union or an official of an employer's organisation.</p>	
<p>Amendment to section 48 of No. 11 of 2007</p>	<p>45 The Principal Act is amended by inserting the following new section immediately after section 48—</p>	
	<p>Precautionary Suspension</p>	<p>48A An employer may suspend an employee for a maximum period of 14 days with full pay where the employer opts to conduct an inquiry which the employer has reason to believe may reveal a cause for dismissal of an employee.</p>
<p>Amendment to Section 53 of No. 11 of 2007</p>	<p>46 Section 53 of the principal Act is amended—</p> <p>(a) by deleting subsection(1) and substituting thereof with the following new subsection—</p> <p>(1) No person may employ a child in employment that—</p> <p>(a) is inappropriate for a person of that age; and</p> <p>(b) places at risk the child's well-being, education, physical or mental health, or spiritual, moral or social development;</p>	

	<p>(b) in subsection (2) by deleting the expression “shall in consultation with the Board” and substituting thereof with the word “may”;</p> <p>(c) by inserting the following new subsection immediately after subsection (2)—</p> <p style="text-align: center;">(3) A person who employs a child in contravention of this section commits an offence.</p>
Amendment to Section 54 of No. 11 of 2007	<p>47 Section 54 of the principal Act is amended—</p> <p>(a) in sub-section (1) by</p> <p>(i) deleting the words “of the rank of an inspector and above”; and</p> <p>(ii) deleting the expression “constituting worst forms of child labour” and substituting thereof with “in contravention of section 53 (1).”;</p> <p>(b) in sub-section (2) by inserting the expression “children officer” immediately after the expression “labour officer”; and</p> <p>(c) in sub-section (4) by deleting the words “constituting worst forms of child labour” and substituting with “in contravention of section 53.”</p>
Repeal of section 66 of No.11 of 2007	<p>48 The Principal Act is amended by repealing section 66.</p>
Amendment of section 67 of No. 11 of 2007 No 18 of 2015 No..... of 2015	<p>49 Section 67 of the Principal Act is amended—</p> <p>(a) in paragraph (a) –</p> <p>(i) subparagraph (ii) by deleting the words “the Law of Succession Act” and substituting thereof with the words “an order made under the Insolvency Act, 2015”</p> <p>(ii) by introducing a new subparagraph (iii) immediately after subparagraph (ii), as follows—</p> <p>(iii) a moratorium period under a debt relief order applies.</p> <p>(b) in paragraph (b) –</p> <p>(i) by deleting the word “company” wherever it appears in the paragraph and substituting thereof with the words “corporate entity”; and</p> <p>(ii) by introducing a new subparagraph (iii) immediately after subparagraph (ii), as follows—</p> <p>(iii) voluntary arrangement has been proposed in accordance with the Insolvency Act, 2015.</p>
Amendment of	<p>50 Section 69 of the principal Act is amended—</p>

<p>section 69 of No 11 of 2007</p>	<p>(a) in subsection (1)(a) by deleting the word “ten” and substituting thereof with the word “fifty”; and</p> <p>(b) in subsection (2) by deleting the expression “on advise of the board”</p>
<p>Amendment of section 70 of No. 11 of 2007</p>	<p>51 Section 70 of the principal Act is amended—</p> <p>(a) in subsection (4)(a) by –</p> <p>(i) deleting the expression “or a permanent” appearing immediately after the word “bankruptcy”; and</p> <p>(ii) deleting the expression “Bankruptcy Act” and substituting thereof with the expression “Insolvency Act,2015”.</p>
<p>Repeal of section 71 of No. 11 of 2007</p>	<p>52 The Principal Act is amended by repealing section 71.</p>
<p>Repeal of section 72 of No. 11 of 2007</p>	<p>53 The Principal Act is amended by repealing section 72.</p>
<p>Repeal of section 73 of No. 11 of 2007</p>	<p>54 The Principal Act is amended by repealing section 73.</p>
<p>Amendment to section 75 of No. 11 of 2007</p>	<p>55 The Principal Act is amended by introducing a new Part IXA immediately after section 75 with the following new sections 75A, 75B, 75C, 75D, 75E, 75F, 75G consecutively numbered—</p>
	<p style="text-align: center;">PART IXA – PROTECTION OF EMPLOYEES PERSONAL DATA</p>
<p>Principles of employee data protection</p>	<p>75A In this Part—</p> <p>“personal data” means any information related to an identified or identifiable employee, former employee, or an applicant to employment;</p> <p>“processing” includes collection, storage communication, or any other use of personal data; and</p> <p>“monitoring” includes the use of electronic devices or any other communication equipment, for purpose of establishing identity and location, or any other method of surveillance.</p> <p>(2) An employer shall process personal data lawfully and fairly, and use it only for reasons directly relevant to the employment and for the</p>

		<p>purposes in which such personal data was originally collected.</p> <p>(3) If personal data is to be processed for purposes other than those for which it was collected, the employer shall ensure that it is not used in a manner incompatible with the original purpose.</p> <p>(4) Personal data collected in connection with technical or organisational measures to ensure the security and proper operation of automated information systems shall not be used to control the behaviour of employees.</p> <p>(5) No decisions concerning an employee shall be made based solely on the automated processing of that employee's personal data.</p> <p>(6) Personal data collected by electronic monitoring shall not be the only factor in evaluating an employee's performance.</p> <p>(7) Every employer has a duty to regularly assess their data processing practices to –</p> <ul style="list-style-type: none"> (a) reduce as far as possible the kind and amount of personal data collected; and (b) Improve ways of protecting the privacy of employees. <p>(8) An employer shall keep the employees informed of any data collection process, the rules that govern that process, and their rights.</p> <p>(9) The processing of personal data should not have the effect of unlawfully discriminating in employment or occupation.</p>
	<p>Collection of employee's personal data</p>	<p>75B (1) All personal data shall be obtained from the individual employee.</p> <p>(2) Where it is necessary to collect personal data from third parties, the employee shall be informed in advance and give explicit consent.</p> <p>(3) Where third party collection is used as outlined in subsection (2), the employer shall indicate the purpose of the processing, type of data to be gathered, and the consequences, if any, of refusing consent.</p>

		<p>(4) An employer shall not collect or process personal data concerning an employee's sex life or sexual orientation; political, religious or other beliefs and membership in a trade union, unless such personal data is directly relevant to an employment decision and in conformity with any national legislation.</p> <p>(5) No employer shall use polygraphs, truth-verification equipment or any other similar testing procedure in the context of employment</p> <p>(6) Where an employee is monitored, the employee has a right to be informed in advance of the reasons for monitoring, the time schedule, the methods and techniques used, the nature of data to be collected.</p> <p>(7) Secret monitoring of an employees is permitted only if –</p> <p style="padding-left: 40px;">(a) it is in conformity with a national legislation; or</p> <p style="padding-left: 40px;">(b) there is reasonable grounds to believe commission of a criminal activity.</p> <p>(8) Continuous monitoring of an employee is permitted only if required for health and safety or the protection of property.</p>
	Security of personal data	<p>75C Every employer shall ensure personal data is protected by such security safeguards as are reasonable in the circumstances to guard against loss and unauthorized access, use, modification or disclosure.</p>
	Storage of personal data	<p>75D (1) Any storage of personal data shall be limited to data gathered consistent with the principles on the collection of personal data outlined this Part.</p> <p>(2) Personal data covered by medical confidentiality shall be stored only by personnel bound by rules on medical secrecy and maintained apart from all other personal data.</p> <p>(3) Every employer shall provide general information, regularly reviewed, listing types of personal data held on individual employees and on the processing of that data.</p> <p>(4) Employer shall verify periodically that the personal data stored is accurate, up to date and</p>

		<p>complete.</p> <p>(5) Personal data shall be stored only for justified and specific purposes for which it has been collected, unless—</p> <p>(a) an employee wishes to be on a list of potential job candidates for a specific period;</p> <p>(b) the personal data is required to be kept by a national legislation; or</p> <p>(c) the personal data is required by an employer or employee for any legal proceedings to prove any matter to do with an existing or former employment relationship.</p>
	Use of personal data	<p>76E Personal data shall be used only in consistent with the principles in this part in accordance with the national law relating to data protection.</p>
	Communication of personal data	<p>75F (1) Personal data shall not be communicated to a third party without employee's explicit consent, unless the communication is—</p> <p>(a) necessary to prevent serious and imminent threat to life or health;</p> <p>(b) required or authorized by law;</p> <p>(c) necessary for the conduct of the employment relationship; or</p> <p>(d) required for the enforcement of criminal law.</p> <p>(2) Personal data shall not be communicated for commercial or marketing purposes without the employee's informed and explicit consent.</p> <p>(3) The limitation as to communications to third parties shall apply to the communication of personal data between employers in the same group and between different agencies of government.</p> <p>(4) Personal data should be internally available only to specifically authorized users, who shall have access only to such as needed for the fulfilment of their particular tasks.</p> <p>(5) An employer shall adopt procedures for monitoring the internal flow of personal data and for ensuring that the processing complies with this Part.</p>
	Employment agencies	<p>75G Where an employer uses employment agencies for purpose of recruitment, the employer shall expressly require a retained employment agency to process personal data consistent with the provisions of this part or a national law</p>

		relating to data protection.
Amendment of section 76 of No. 11 of 2007	56	Section 76 of the Principal Act is amended in— (a) subsection (1) by deleting the expression “twenty-five” and substituting thereof with the word “five”; and (b) Subsection (2) by deleting the word “Director” wherever it appears in the subsection and substituting thereof with the word “Authority”.
Amendment of section 77 of No. 11 of 2007	58.	Section 77 of the Principal Act is amended by deleting the word “Director” and the expression “the employment service office” and in both cases substituting thereof with the word “Authority
Amendment of section 78 of No. 11 of 2007	59.	Section 78 of the Principal Act is amended by deleting the expression “employment service office” and substituting thereof with the word “Authority
Amendment of section 79 of No. 11 of 2007	60.	Section 79 of the Principal Act is amended by deleting the word “Director” and substituting thereof with the word “Authority”
Amendment to Section 87 of No. 11 of 2007	61.	Section 87 of the Principal act is amended by the introducing a new subsection immediately after sub-section (3), as follows- “(4) The Director of Public Prosecutions may appoint such number of officers to act as prosecutors for purposes of this Act.”
Amendment of section 87 of No. 11 of 2007	62.	Section 87 of the Principal Act is amended— (a) in sub-section (1) by— (i) inserting the expression “or any other mediator conciliator or arbitrator the parties may agree upon or appointed by the Commission”. immediately after the expression “labour officer”. (ii) inserting the word “Commission” immediately before the words “Industrial Court”. (b) deleting subsection (2) and substituting thereof with the following new subsections- (2). Where an agreement is reached through the labour officer, a mediator or an arbitrator, such agreement may be recorded by the Court as an order of the Court.
Amendment of section 89 of No. 11 of 2007	63.	Section 88 of the Principal Act is amended in subsection by deleting the expression “fifty thousand” and substituting thereof with the expression “five hundred thousand”
Amendment of section 89 of No. 11 of 2007	64.	Section 89 of the Principal Act is amended by deleting subsection (3)

<p>Amendment of section 91 of No. 11 of 2007</p>	<p>65. Section 91 of the Principal Act is amended—</p> <ul style="list-style-type: none">(a) in subsection (1) by deleting the expression “after consultation with the board”.(b) by deleting the word “rules” wherever it appears and substituting thereof with the word “Regulations”.(c) by deleting subsection (3) and substituting thereof with the following new subsection— “Any regulation made under this section may distinguish between children of different ages in relation to their localities, occupations or circumstances”
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24/4/19

ADOPTIVE FAMILIES ASSOCIATION OF KENYA

MEMORANDUM

ON

THE EMPLOYMENT (AMENDMENT) BILL, 2019

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pls note

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THE NATIONAL ASSEMBLY
RECEIVED
24 APR 2019
DIRECTOR COMMITTEE SERVICES
Time:.....

RECEIVED
23 APR 2019
CLERK'S OFFICE

Adoptive Families Association of Kenya

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Introduction

The Employment Act Cap 226 of the Laws of Kenya is an Act of Parliament that declares and defines the fundamental rights of employees, to provide basic conditions of employment of employees, to regulate employment of children.

Section 29 of the Act provides for a three-month maternity leave for all female employees and a two weeks paternity leave for male employees. These provisions only apply to persons who get their children naturally. The provisions do not apply to employees who get children through the legal adoption process.

The Employment (Amendment) Bill 2019, herein referred to as the Bill seeks to introduce amendments to Section 29 by introduction of Section 29A which provides for **Pre-adoptive Leave** for male and female employees who are in the process of adopting a child. It proposes a three-month pre-adoptive leave for female employees and two weeks pre-adoptive leave for male employees in line with maternity and paternity leaves for those who get children naturally, respectively.

It is our informed position that Bill is in the best interest of children freed for adoption and should therefore be passed without any amendments.

Justification

Article 53(2) of the Constitution of Kenya 2010 provides that a child's best interests are of paramount importance in every matter concerning the child. Section 4(2) of the Children Act 2001 reiterates this position by stating that, "In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration. We believe the Bill

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concerns children and therefore the best interest of the child should be the overriding principle governing its deliberation.

Articles 27(4) and (5) of the Constitution of Kenya and Section 5 of the Children Act 2001 provide that no person should be discriminated by the state or any person based on among other things, social origin. **We submit that Section 29 of the Employment Act of 2007 is discriminatory towards children who have whose right to parental is jeopardized by abandonment, abuse neglect or relinquishment and are consequently freed for adoption.** The provisions are a direct affront to the right of every child to parental care. Further, the provisions are discriminatory towards employees who wish to create a family through adoption.

Children who are freed for adoption fall under the category of children in need of care and protection. They would have had traumatic experiences ranging from abandonment, abuse and neglect. **Research demonstrates that abandonment of a child at a very young age has an adverse effect on their brain development and could potentially lead to lifelong trauma.** Severe neglect and abuse have similar implications on the developmental wellbeing of the child.

In addition, children who are freed for adoption are normally placed in charitable children's institutions or children's homes. Evidence shows care in a children's home especially for children below the age of three has severe detrimental effects on the cognitive, social and intellectual development of children due structural neglect associated with high child-carer ratio, staff turnover and lack of individualized care. **The rule of thumb is that for every three months a child below the age of three stays in a children's home, they lose one month of development.** Further, studies have demonstrated that when placed for adoption, the above-mentioned detrimental effects can be reversed especially when adoptive parents adopt attachment-based parenting.

The above underline the critical importance of the initial bonding period that precede adoption and for which the proposed amendments recommend that

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the prospective mother be on leave to ensure uninterrupted bonding process. Consequently, the proposed amendments do not only ensure that the process of healing of the child is safeguarded but also help mitigate cases of failed bonding which seriously compromise the attachment pattern of the children in question.

It would be argued that the proposed amendments would have adverse effects on employers as the proposal potentially takes away work hours. We contend that this argument is faulty on several grounds. First, it completely ignores the centrality of the principle of the best interest of the child in this matter and is purely focused on the economic implications of the amendments. The argument is also discriminative. Why would an economic argument be applied to the case of adoption and not applied to a case of natural birth?

As demonstrated above, parenting of an adopted child demands more involvement of the parent and requires extra emotional parent-child relationship. A parent whose child is having psychosocial problems cannot be a productive employee. **The employer may not loose work-hours in terms of the pre-adoptive leave, but they will ultimately loose in the output per hour if the employee is distracted for long periods.** Pre-adoptive leave will ensure that the parenting process commences on a solid foundation and minimizes chances of disruption along the way consequently ensuring productivity of the parents in the long-run.

Lastly, whereas the proposed pre-adoptive leave applies before the adoption is legally sanctioned, **we hold that the socio-emotional relationship between the parent and the child starts way earlier and is in fact a mandatory prerequisite for the legalization of the process.** Any contrary argument is therefore an affront on the best interest of the child in an adoption process.

Grace Wanunda



Chairperson

16/04/2019

② Constitution
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17/5/19

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Our Ref RN/NWW/10211492
Your Ref TBA
Date 16 May 2019

① Director
8,615

The Clerk,
National Assembly of Kenya,
Parliament Building, Parliament Road,
Nairobi

③ Amendment
pls note

FA
17/5/19



Attention: Michael Sialai

Dear Sir,

THE EMPLOYMENT (AMENDMENT) BILL 2019-NEW SECTION 29A

We refer to the proposed Employment (Amendment) Bill 2019 (the **Bill**), sponsored by Hon. Martha Wangari, Member of Parliament, Gilgil. We understand that the Bill seeks to amend the Employment Act, 2007 by introducing the concept of pre-adoptive leave applicable to employees who opt to adopt children.

Anjarwalla & Khanna Advocates (the **Firm**) has a policy to contribute to the development of legislations in Kenya and to encourage strengthening of the rule of law in Kenya. It is on this note that the Firm has undertaken an internal review of the Bill and we are happy to provide the following comments with the aim of assisting the development of law in Kenya.

1 The scope of pre-adoptive leave limited to 'married' employees only

1.1 Section 29A (1) (b) & (c) of the Bill provides that pre-adoptive leave is applicable to married female and married male employees who are entitled to three (3) months and two (2) weeks pre-adoptive leave respectively. (Emphasis ours)

1.2 We note that this provision may be deemed to be discriminatory on the part of unmarried employees who may opt to adopt children. Further, section 158 (1) of the Children Act, 2001 provides that "...an adoption order may be made upon the application of a **sole applicant** or **jointly by two spouses**..." which infers that both married and unmarried persons have the liberty to adopt a child.

1.3 Further, should the provision be adopted by Parliament in its current form, it may be found to be in contravention of Article 27(4) of the Constitution of Kenya, 2010 (the **Constitution**) which provides that "...the State shall not discriminate directly or indirectly against another person on any ground including... **marital status**..." (Emphasis ours)

- 1.4 In light of the above, we propose that the section should be amended to extend the scope of pre-adoptive leave to apply to unmarried employees to read as follows:

“(29A). (1) Where pursuant to section 157 of the Children Act, a child is to be placed in the continuous care and control of an applicant who is an employee under this Act-

- (b) in the case of a female employee, the employee shall be entitled to three consecutive months pre-adoption leave with full pay from the date of the placement of the child; and*
- (c) in the case of a male employee, the employee shall be entitled to two weeks pre-adoption leave with full pay.”*

- 1.5 We note that Kenya Law Reform Commission through the Draft Employment (Amendment) Bill, 2019 has also proposed an amendment that seeks to introduce adoptive leave of one month for an employee who adopts a child below the age of two years. The two proposed amendments should be harmonized.

2 Disparity in the duration of the pre-adoptive leave periods for male and female employees

- 2.1 Section 29A (1) (b) & (c) of the Bill provides that married female employees shall be entitled to three (3) months pre-adoptive leave while married male employees shall be entitled to two (2) weeks pre-adoption leave.
- 2.2 While it may seem that the proposal seeks to make uniform both pre-adoptive and maternity/paternity leave periods, the differences in leave periods may result in constitutional claims of discrimination made by male employees who take the view that they are also entitled to an equal duration of time to spend with the newly adopted child.
- 2.3 This is reiterated in Article 27 of the Constitution of Kenya, 2010 which provides that every person is equal before the law and has the right to equal protection and equal benefit of the law and no person has the right to discriminate another on grounds of sex or gender, among others.
- 2.4 Comparatively, jurisdictions such as the United States, entitle all employees to an equal number of pre-adoptive leave days regardless of their gender. According to the United States' Family and Medical Leave Act of 1993 (the **FMLA**), eligible employees (both male and female) are entitled to twelve (12) weeks of leave during any twelve (12) month period or placement with the employee of a son or daughter for adoption or foster care.
- 2.5 In this regard, in order to promote gender equality in the workplace and the nation as a whole, we propose that both male and female employee should be entitled to an equal number of pre-adoptive leave days. This ensures that our employment laws are progressive and welcome best practices from other jurisdictions with robust jurisprudence in fields such as this of pre-adoptive leave.

3 Period within which an employee is eligible to take the pre-adoption leave

- 3.1 We note that the Bill is not clear on the period within which the pre-adoption leave must be taken by an employee. The FMLA for instance provides that “...all leave must be concluded within 12 months of your child's placement in the home...”
- 3.2 We propose that the Bill should be amended to provide for a window within which an employee is eligible to apply for pre-adoptive as is the case with the FMLA.

Please consider our comments and let us know if you have any questions.

We would be very pleased to meet with you to discuss ways of positively impacting the development of legislations in Kenya going forward and we would be happy to provide any other assistance that may be required.

Yours faithfully,



Rosa Nduati-Mutero
for Anjarwalla & Khanna Advocates

cc Hon. Martha Wangari, Gilgil Member of Parliament

MINUTES OF THE 24th SITTING OF THE DEPARTMENTAL COMMITTEE ON LABOUR AND SOCIAL WELFARE HELD ON MONDAY 20TH MAY, 2019 AT 2.30PM AT ENGLISHPOINT HOTEL, MOMBASA COUNTY.

PRESENT

1. The Hon. Ali Wario, MP - Chairperson
2. The Hon. Joyce Korir, MP - Vice Chairperson
3. The Hon. Gladys Atieno Wanga, MP
4. The Hon. James Onyango K'Oyoo, MP
5. The Hon. Janet Marania Teyiaa, MP
6. The Hon. Janet Nangabo, MP
7. The Hon. Ronald Kiprotich Tunoi, MP
8. The Hon. Alfred K. Keter, MP
9. The Hon. Safia Sheikh Adan, MP
10. The Hon. Abdi Mude Ibrahim, MP
11. The Hon. Catherine Wambilianga, MP
12. The Hon. Charles Kanyi Njagua, MP
13. The Hon. David Ole Sankok, MP

ABSENT WITH APOLOGY

1. The Hon. Rose Museo Mumo, MP
2. The Hon. Omboko Milemba, MP
3. The Hon. Michael Mwangi Muchira, MP
4. The Hon. Fabian Kyule Muli, MP
5. The Hon. Tom Mboya Odege, MP
6. The Hon. Wilson Sossion, MP

IN ATTENDANCE

The National Assembly Secretariat

1. Mr. Adan Sora Gindicha -Clerk Assistant I
2. Mr. John Mugoma -Clerk Assistant III
3. Ms. Doreen Karani -Legal Counsel
4. Mr. Osman Said -Research Officer
5. Ms. Sheila Chebotibin -Sergeant-At-Arms

AGENDA

1. Prayers
2. Preliminaries
 - i. Introductions
 - ii. Communication from the Chairperson

- iii. Confirmation of Minutes of previous Sittings
- iv. Matters Arising
3. **Consideration of the following Bills:-**
 - i. **National Drought Management Authority (Amendment) Bill, 2019**
 - ii. **Employment (Amendment) Bill, 2019**
 - iii. **The Industrial Training (Amendment) Bill, 2019**
 - iv. **Labour Relations (Amendment) Bill, 2019**
4. Any Other Business
5. Adjournment/Date of the next Sitting

MIN.NO. DC/LSW/122/2019:- PRELIMINARIES

The Chairperson called the meeting to order at 2.30am and thereafter a prayer was said.

MIN.NO. DC/LSW/123/2019: ADOPTION OF THE AGENDA

The agenda of the meeting was adopted having been proposed by The Hon. Safia Sheikh Adan, MP and seconded by Hon. Janet Nangabo, M.P respectively.

MIN.NO. DC/LSW/124/2019: CONFIRMATION OF THE MINUTES FROM THE PREVIOUS SITTINGS

Confirmation of the Minutes of the previous sitting was deferred to the next sitting.

MIN.NO.DC/LSW/125/2019: CONSIDERATION OF BILLS

The Committee was taken through and deliberated on the following Bills-

I. National Drought Management Authority (Amendment) Bill, 2019

- a) The Bill seeks to amend various provisions of the principal Act to, among other things, provide-
 - (i) for the repeal of the drought coordination institutional framework that is set out under section 7(2)
 - (ii) for repeal of the National Drought Emergency Fund under section 18;The Memorandum of objects and reasons of the Bill states that the amendments repealing the provisions relating to establishment and management of the National Drought Emergency Fund in the principal Act are in order to enable the enactment of the National Drought Emergency Fund Regulations under the Public Finance Management Act, 2012.

- b) **Clause 2-** The National Drought Management Authority Act, in this Act referred to as the “principal Act” is amended in section 2 (*interpretation*) by deleting the definition of the term “Fund”.
- c) **Clause 3-** Section 7 of the “principal Act” is amended in subsection 1(a), by deleting the words “establish and”; by deleting subsection (2).
- d) **Clause 4 –** The “principal Act” is amended by repealing section 18 and replacing it with the following new section *Section 18*;

The funds of the Authority shall be—

- (i) Such monies as may be appropriated by Parliament;
- (ii) Such monies as may accrue to or vest in the Authority in the course of the exercise of its powers or performance of its functions under this Act;
- (iii) Such monies including fees as may be payable to the Authority pursuant to this Act or any other written law; and
- (iv) such grants and donations, gifts or bequests as may be given to the Authority.

Committee Observations & Way Forward

- a. The Committee observed that there were no Memoranda from any key stakeholder or citizen on the Bill.
- b. Members resolved to invite NDMA, the Treasury and Leader of Majority to give their views before the Committee proceeds with consideration of the Bill.

II. Employment (Amendment) Bill, 2019 by Hon. Martha Wangari, M.P

- a) The Bill seeks to amend various provisions of the principal Act to enable parents adopting take pre-adoptive leave at least three months akin to the maternity leave taken by mothers after childbirth. This time offers an opportunity for the mother and child to bond.
- Clause 1 of the Bill is the short title
 - Clause 2 of the Bill seeks to define the term exit certificate as the authority given to a prospective adoptive parent by a registered adoption society to take a child from the adoptive society’s custody.
 - Clause 3 of the Bill seeks to provide for pre-adoptive three consecutive months’ leave to prospective adoptive parents who unlike their counterparts who are accorded three months leave when they naturally bring forth a child

are not provided with an opportunity to bond with and understand their new child.

Committee Observations & Way Forward

- i. That the leave was important but it should be reduced to one month for mothers and two weeks for fathers.
- ii. The Government should not be seen to be putting a lot of pressure on the investors through Legislation.
- iii. Caring of the Child is a requirement for adoption as per Section 157 of Children Act
- iv. That an employee may commence adoption leave on the date:-
 - The adoption order is granted for;
 - A child is placed in the care of a prospective adoptive parent by a competent court pending the finalization of adoptive order in respect of that child, whichever date occurs first.

III. National Youth Council Amendment Bill, 2019

The Committee noted that the Amendments by the Ministry of Public Service, Gender and Youth Affairs were against the provisions of Standing Orders 133(5) since the amendments will be unreasonably expanding the content of the Bill.

Way Forward

The Committee resolved to consider the two Bills separately though it was noted that the Ministry had not submitted the Bill for Consideration.

The Hon. Gideon Keter should write to the Hon. Speaker to official withdraw his amendments if he is in consensus with the Ministry.

That in case the Hon. Member fails to officially withdraw his amendments, the Committee will adopt his amendments and forward the report to the Speaker for consideration.

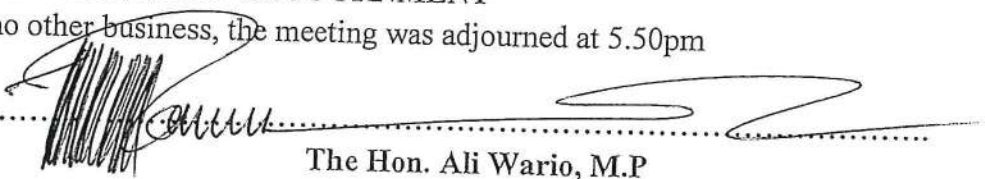
IV. Labour Relations (Amendment) Bill, 2019

Consideration of the above amendment Bill was deferred to a later date.

MIN.NO. DC/LSW/126/2019: ADJOURNMENT

There being no other business, the meeting was adjourned at 5.50pm

SIGNED:



The Hon. Ali Wario, M.P
(Chairperson)

DATE:

02.09.19

MINUTES OF THE 34TH SITTING OF THE DEPARTMENTAL COMMITTEE ON LABOUR AND SOCIAL WELFARE HELD ON THURSDAY 20TH JUNE, 2019 AT 10.30AM AT THE CPA ROOM.

PRESENT

1. The Hon. Ali Wario, MP - Chairperson
2. The Hon. Joyce Korir, MP - Vice Chairperson
3. The Hon. Gladys Atieno Wanga, MP
4. The Hon. Janet Marania Teyiaa, MP
5. The Hon. Janet Nangabo, MP
6. The Hon. Safia Sheikh Adan, MP
7. The Hon. Abdi Mude Ibrahim, MP
8. The Hon. David Ole Sankok, MP
9. The Hon. Charles Kanyi Njagua, MP
10. The Hon. Michael Mwangi Muchira, MP

ABSENT WITH APOLOGY

1. The Hon. Alfred K. Keter, MP
2. The Hon. James Onyango K'Oyoo, MP
3. The Hon. Ronald Kiprotich Tunoi, MP
4. The Hon. Rose Museo Mumo, MP
5. The Hon. Fabian Kyule Muli, MP
6. The Hon. Omboko Milemba, MP
7. The Hon. Catherine Wambilianga, MP
8. The Hon. Tom Mboya Odege, MP
9. The Hon. Wilson Sossion, MP

IN ATTENDANCE

The National Assembly Secretariat

1. Mr. John Mugoma -Clerk Assistant III
2. Ms. Doreen Karani -Legal Counsel
3. Ms. Farida Ngasura -Audio Officer
4. Ms. Sheila Chebotibin -Sergeant-At-Arms

AGENDA

1. Prayers
2. Preliminaries
 - i. Introductions
 - ii. Communication from the Chairperson
3. Consideration and adoption of reports on the following Bills:-

(i) **Industrial Training (Amendment) Bill, 2019**

(ii) **Employment (Amendment) Bill, 2019**

4. Any Other Business
5. Adjournment/Date of the next Sitting

MIN.NO. DC/LSW/164/2019:- PRELIMINARIES

Chairperson called the meeting to order at 10.38am and thereafter a prayer was said.

The Chairperson then thanked the Hon. Members for actively participating in the scrutiny of the FY 2019/20 Budget Estimates.

The Chairperson further informed the Hon. Members that there was an amendment to BAC report regarding amount allocated to NGEC. That Kshs 150,000 for Promotion of Gender Equality and Freedom from Discrimination was reallocated to NGAAF under Gender Empowerment Program.

MIN.NO. DC/LSW/165/2019: CONSIDERATION AND ADOPTION OF REPORT ON THE EMPLOYMENT (AMENDMENT) BILL, 2019 BY HON. MARTHA WANGARI, M.P

The Committee was taken through the report on the Employment (Amendment) Bill, 2019 and thereafter adopted it with the following observations and recommendations having been proposed and seconded by Hon. Joyce Korir, M.P and Hon. Ibrahim Mude, M.P respectively:-

Observations

The Committee observed that –

1. Clause 1

- (a) There were no stakeholder comments received on the provision.
- (b) Article 116(2) provides for coming into force of Acts of Parliament on the fourteenth day after publication in the *Gazette* unless the Act stipulates a different date on or time at which it will come into force. In this case, the Act shall come into force in accordance with the provisions of Article 116(2).

2. Clause 2

- (a) There were no stakeholder comments received on this provision;
- (b) The definition was necessary as it explains the meaning of the term ‘exit certificate’ for users of the law.

3. Clause 3

- (a) Article 53(2) guides that a child’s best interests are of paramount importance in all matters concerning the child. It was in the best interests of a child who is to be adopted to

be afforded adequate time to bond with a potential parent and to allow the adoption society and the Court, an opportunity to observe the relationship between the potential parent and child for a certain duration before granting an adoption order in order ascertain that the prospective parent can afford the child the requisite parental care and protection;

- (b) There was need to support employees who intend to adopt children for them to be able to comply with the statutory requirements under Section 157 of the Children Act (No.8 of 2001) which requires that *a child to be adopted be under the continuous care and control of the applicant for a period of at least three consecutive months* preceding the filing of the application. In view of the foregoing, applicants who are employees may be awarded pre-adoptive leave to enable them provide the requisite care and control in order to meet the statutory obligations under Section 157 of the Children Act.
- (c) Granting the leave after finalization of the adoption process, as proposed by some stakeholders, would not have a similar effect as what is intended in the proposed Bill. The purpose providing pre-adoptive leave is to enable an applicant to comply with the provisions of section 157 of the Children Act which requires a child to be under the care of the applicant for at least three months before even filing the adoption application;
- (d) The provisions of Section 157 of the Children Act stipulate that the child to be adopted be under continuous ‘care and control’ of the applicant for a period of three months.
- (e) There was need to strike a balance between the needs of the employee and employer while considering the best interests of the child. To that end, the Committee was of the view that provision of a period of one month for purposes of pre-adoptive leave is necessary.
- (f) There was need to accord special consideration to parents who intend to obtain leave to enable them care for and apply for adoption of children born as a result of surrogate motherhood agreements.

Recommendations

1. Clause 3 of the Bill be amended in sub clause (1) by:-
 - (i) deleting the words “three consecutive months” in paragraph (a) and substituting therefore the words “one month”;
 - (ii) deleting the words “three consecutive months” in paragraph (b) and substituting therefore the words “one month”;
 - (iii) by inserting the following new sub clauses immediately after sub clause (3)—

- “3A. Despite subsection (1), where a child is born as a result of a surrogate motherhood agreement, an employee who is a commissioning parent –
 - (a) shall be entitled to parental leave of two consecutive months from the date the child is born;
 - (b) in the case of a female employee who is married, the employee shall be entitled to two consecutive months parental leave with full pay; and
 - (c) in the case of a male employee who is married, the employee shall be entitled to two weeks paternal leave with full pay.

- 3B. An employee who is eligible for leave under subsection (3A) shall give the employer not less than seven days’ written notice in advance or a shorter period as may be reasonable in the circumstances of the intention to proceed on parental or paternal leave, as the case may be, on a specified date and to return to work thereafter.

- 3C. A notice under subsection (3B) shall be accompanied by documentation evidencing the surrogate motherhood agreement between the employee and the surrogate mother, and if required by the employer, a certificate as to the medical condition of the surrogate mother from a qualified medical practitioner or midwife.”

- In sub clause (4) by deleting the words “subsection (1)” and substituting the words “this section”

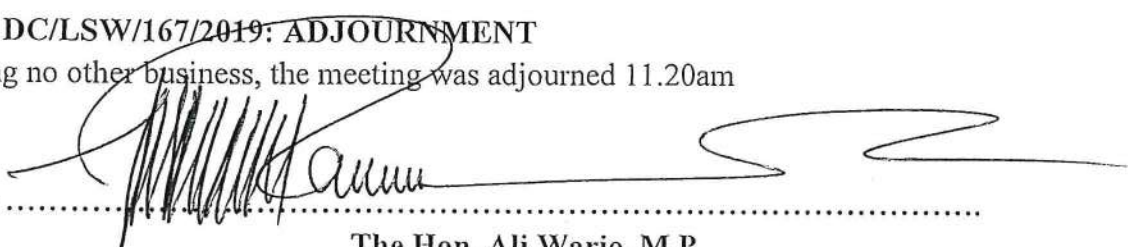
MIN.NO.DC/LSW/166/2019: MIN.NO. DC/LSW/.../2019: CONSIDERATION AND ADOPTION OF REPORT ON THE INDUSTRIAL TRAINING (AMENDMENT) BILL, 2019 BY HON. JUDE NJOMO, M.P

The agenda was deferred to the next sitting to be held on Tuesday 25th June, 2019.

MIN.NO. DC/LSW/167/2019: ADJOURNMENT

There being no other business, the meeting was adjourned 11.20am

SIGNED:



**The Hon. Ali Wario, M.P
(Chairperson)**

DATE: 02. 07. 19