



## **KEPSA MEMORANDUM ON THE EMPLOYMENT AMENDMENT BILL 2022 (SENATE BILLS NO. 11 OF 2022) TO BE SUBMITTED ON 07TH SEPTEMBER 2023**

### **Introduction**

KEPSA is the umbrella body of the private sector for all sizes of local and foreign businesses, Trade Associations and Chambers of Commerce from all the sectors of the economy to enable them speak with one voice when engaging government and other stakeholders on cross cutting policy issues affecting private sector development. Through the International Chamber of Commerce- Kenya, which we host, and direct membership of corporates, SMES and business associations, we reach to over two million business in Kenya. We are also the focal point of the East Africa Business Council (EABC) which brings us all private sector umbrella associations in the East African Region. KEPSA is a member of the Africa Business Council – the body of all Umbrella Associations and Chambers of Commerce in Africa. By hosting the ICC Kenya, and membership to the Africa Business Council, KEPSA has access to all the world Chambers of Commerce and Business Associations giving us access to over 45 million business globally. We support businesses with information and merging trends affecting investments and competitiveness, support training, B2B and opportunities to network for business, financial linkages, mentoring, access to markets, value chains and access to investment opportunities

The ease of doing business and competitiveness index is key in ensuring business make their contribution to sustainable economic development of the country.

### **KEPSA Position on the proposed Amendments**

The Kenya Private Sector Alliance (KEPSA) has carefully considered the proposals in the Employment (Amendment) Bill, 2022. KEPSA recognizes the Bill's objective to give Employees the right to disconnect. With the rise of technology, employees are increasingly connected to their work outside of their normal working hours. This blurs the line between work and personal time and can lead to burnout and decreased productivity. The right to disconnect will ensure that employees have the right to personal time and privacy, which is essential for their overall well-being. It will also ensure that employers have clear guidelines on when they can contact employees outside of their normal working hours and helps to promote a healthy work-life balance.



While we appreciate the need to respect employees' personal time and privacy, we believe that the proposed changes will have significant negative impacts on the private sector, particularly small and medium-sized enterprises (SMEs).

Following the call for submission of memorandum from the public on the Employment Amendment Bill 2022 from the Senate, that seeks to provide for the right to disconnect in the digital age, we as KEPSA submit as follows:

Clause	Proposed Amendment	Rationale for Amendment and Recommendations
<p>Insertion of a new Section 27A(2)</p> <p>27A. (2) An employer shall, for the purposes of subsection (1)(a) put in place a policy regarding the —</p> <p>(i) circumstances under which an employer may contact an employee during out of work hours;</p> <p>(ii) use of electronic devices to send or receive information, messages or any digital work related communication during out of work hours; and</p>	<p>Regulations should give further and more detailed guidance on this such as:</p> <ul style="list-style-type: none"> <li>-differences in time zones</li> <li>-what constitutes an emergency</li> <li>-time bound assignments beyond the control of the employer</li> <li>-client demands</li> </ul> <p>-Subject to technological interferences like network delays or cloud hitches where emails take longer to leave the outbox.</p>	<p>The regulations can expound on the contents of the policy for uniformity and clarity of scope. This can be reviewed from time to time.</p> <p>The bill is too prescriptive by suggesting that employers should be required to develop policies to regulate phone usage by employees outside work hours. An employee has the right to keep their phone on or off if it is a personal phone. If the phone is an official one, then the employee is under obligation to use it as required by the enterprise. If the nature of the business requires such shift system or extension of working time to meet the business demands, then such prescriptive nature will kill enterprises.</p>



<p>(iii) circumstances under which the right to disconnect may be waived.</p> <p>(b) specify the nature of compensation for employees who work during out of work hours.</p>	<p>The list of essential services needs expansion, the Covid essential services list is a good guide as it includes crucial sectors such as security services that are incapable of being bound by the traditional 8 hour working model.</p> <p>-It can be amended to state that compensation can be in the form of hours off and not just monetary compensation.</p> <p>-In terms of work done outside of working hours, there is already provision for overtime pay, can the Bill refer to this model of compensation?</p> <p>The Bill should also provide clear guidelines on what constitutes fair compensation.</p>	<p>The proposed amendments not only present radical changes to the Employment Act 2007 but also introduces new stringent measures that will curtail the prerogative to manage enterprises by the owners. This will automatically pose a challenge to Industrial Relations in Kenya. The changes proposed negates the very essence of managing enterprises freely to meet the demands and challenges posed by the market.</p> <p>Section 81 of the Labour Relations Act is limited to a few sectors considered essential services.</p> <p>Youths are nowadays moving away from the</p>
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		<p>traditional 8-5 model. Should employees choose to work outside work hours, the employer should respect their autonomy and, in such instances, compensation should be excluded. The Bill should factor in productivity-based output and Flexitime arrangements.</p> <p>The Bill should consider that compensation can be flexible. It need not be monetary. For example, an employee can work over and above work hours and be given an out of office day or a leave day.</p> <p>Monetary compensation may prove difficult to implement in terms of computation of monies. For example, will the Employer pay for the Employee accepting the call, or the quantity of work done?</p> <p>The Bill fails to meet the simple threshold of the ILO conventions. The bill, if passed, will create two centers of managerial power and ultimately disharmony and indiscipline at workplaces. ILO has provided instruments which have been successful in managing working hours.</p>
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<p>(3) Where an employer has employed more than ten employees, such employer shall, in formulating a policy under subsection (2), consult the respective employees or, where applicable, trade union.</p>	<p>It should apply to all employers, not just those with more than ten employees.</p>	<p>Public participation breeds ownership, as the employee is part and parcel of the process. They own it and are therefore more likely to comply.</p>
<p>(6) Subject to subsection (5), an employee shall not be reprimanded, punished, or subjected to disciplinary action if the employee disregards a work related communication during out of work hours.</p>	<p>Add a clause below this stating:  Any dismissal arising out of this shall be deemed to be <b>unfair dismissal as per Section 45 and 46</b> of the Employment Act 2007.</p>	<p>While prohibiting employers from reprimanding, punishing or subjecting employees to disciplinary action if they disregard work-related communication during out of work hours could lead to employees abusing the right to disconnect and not being held accountable for their actions, we can also further protect employees from dismissal as proposed.</p>
<p>7) Where an employer contacts an employee during the period when there is no mutually agreed out of work hours, the employee —  (a) shall not be obliged to respond and shall have the right to disconnect; and  (b) may choose to respond, for which the employee shall be entitled to get compensation.</p>	<p>Add a Clause immediately after Clause 7 that speaks to the reverse, <b>where an employee refuses to respond during emergency</b> situations, especially because the preceding Clause 6 expressly prohibits the employer from taking any action against the employee.</p>	<p>As the Bill exempts emergency cases, and there ought to be clear provisions on what happens to employees who refuse or neglect to respond to employers during such situations.  Flexibility is important for the Labour sector to thrive in the new normal following the covid-19 pandemic outbreak. The emerging new normal emphasizes more on results (output). The employer and the employee should be allowed to agree among themselves what arrangements work for them.</p>



		<p>The Bill also needs to consider the reverse where an employee uses company hours to do personal stuff e.g. going to the bank for personal errands.</p> <p>These changes touch on employers' administrative prerogatives that should not be curtailed by legislation. These changes, in our view, infringe on the employer's right to manage the enterprise on day-to-day basis.</p> <p>The Bill fails to recognize that the concept of Work, Workspace and work hours have changed, and we must all adapt to it. It is a Bill stuck in the past against the reality of the New Normal! This is not cured by passing impractical amendments to an already onerous Employment Act.</p>
<p>(8) The provisions of this section shall not apply to the provision of essential services specified under Section 81 of the Labour Relations Act.</p>	<p>Section 81 of the Labour Relations Act can be amended through this Amendment Bill and updated to cover current and emerging sectors.</p>	<p>It may be worth considering if other industries or job types should also be exempted, such as those that require 24-hour coverage or emergency response. The right to disconnect will be difficult to implement across all sectors of the economy.</p>
<p>(9) A person who contravenes this section commits an offence and is liable, on conviction, to a fine not exceeding five hundred thousand shillings or to imprisonment for a term not exceeding one year or to</p>	<p>We propose for a reduction in the proposed fine to a <b>maximum of KES 100,000</b> and the imprisonment to a term not exceeding six months.</p>	<p>The proposed fine and imprisonment is too punitive and may be detrimental to businesses and employers just trying to grow their business, or discourage the employment of persons outside of essential services for fear of contravening the right to disconnect. This will work against job</p>



<p>both.</p>	<p>We further propose to amend the proposed subsection (9) to clarify specifically <b>who will be liable to pay the fine and go to prison.</b></p>	<p>creation targets and economic growth.</p> <p>On liability, the Bill is unclear who will specifically be held culpable. Is it the immediate <b>supervisor of the employee, the senior management, or the Board of Directors?</b></p> <p>If managers are to be responsible, this might create a steep responsibility on managers and not the Company, yet the Company is the owner of the policy, thus creating enforceability issues.</p>
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Looking at best practices around the globe, the common trait is that of emphasis on this being implemented through **negotiation between employer and employee.** For instance:

1. **France’s El Khomri law (2016)**-Employers must negotiate with employees on the use of digital tools outside of working hours; employees have the right to disconnect and cannot be penalized for not responding to work communications outside of working hours.
2. **Italy’s Dignity Decree (2018)**-Employers cannot require employees to respond to work communications outside of working hours, except in cases of emergency or with prior agreement;
3. **Spain’s Organic Law on Data Protection (2018)**- Employees have the right to disconnect from digital tools outside of working hours; employers must negotiate with employees on the use of such tools.
4. **Germany’s Teleworking Act (2020)**- Employers must ensure that employees working from home have the right to disconnect and cannot be penalized for not responding to work communications outside of working hours.



5. **Philippines' Alternative Work Arrangements Act (2019)**- Employees have the right to disconnect from work-related communications outside of working hours; employers must negotiate with employees on the use of such communications.
6. **Luxembourg's Labour Code (2006)**-Employees have the right to disconnect from digital tools outside of working hours; employers must negotiate with employees on the use of such tools.
7. **Ireland's Code of Practice on the Right to Disconnect (2021)**-Employers should negotiate with employees on the use of digital tools outside of working hours; employees have the right to disconnect and cannot be penalized for not responding to work communications outside of working hours.

## **Conclusion**

We believe that implementing a comprehensive framework to provide employees with the right to disconnect and prioritize personal time is crucial for promoting work-life balance and improving employee well-being. By prioritizing these initiatives, organizations can create a culture of respect for employees' personal time and ultimately foster a more productive and engaged workforce.

We are also cognizant of the limitations that some of these proposals may place on certain sectors that may hinder the ease of doing business and raise the cost of doing business and cost of compliance. For example, enforcement will be an impossible task. There will be en masse non-compliance with the law. This will lead to an overflow of claims at the Labour courts which will clog up the courts that are already suffering from a seemingly insurmountable backlog.

In light of the above concerns, we urge the National Assembly to reconsider the proposed changes to the Employment Act 2007 and our submissions herein.

Thank you for your consideration and attention.





Best Regards,

Carole Kariuki, EBS, MBS, HSC  
**Chief Executive Officer**

<b>KEPSA Business Membership Organization (BMOS)</b>	
1	<b>Africa E-Mobility Alliance</b>
2	<b>Agricultural Employers' Association</b>
3	<b>Agrochemicals Association of Kenya</b>
4	<b>American Chamber of Commerce Kenya</b>
5	<b>Association of Consulting Engineers of Kenya</b>
6	<b>Association of Gaming Operators</b>
7	<b>Association of Kenya Feed Manufacturers</b>
8	<b>Association of Kenya Insurers</b>
9	<b>Association of women in Energy and Extractives in Kenya</b>
10	<b>British Chambers of Commerce Kenya</b>
11	<b>Business Ireland Kenya Association</b>
12	<b>Business Processes Outsourcing Association of Kenya</b>
13	<b>Car Importers Association of Kenya</b>
14	<b>Chartered Institute of Arbitrators (Kenya Branch)</b>
15	<b>Delegation of German Industry &amp; Commerce in Kenya</b>
16	<b>Domain Registrars Association of Kenya</b>



17	East African Private Equity & Venture Capital Association
18	East African Tea Trade Association
19	Electricity Sector Association of Kenya
20	Environment Institute of Kenya
21	European Business Council
22	Event Managers Association of Kenya
23	Federation of Kenya Employers
24	Federation of Public Transport Sector
25	French Society of Kenya
26	Geothermal Association of Kenya
27	Institute of Surveyors of Kenya
28	Institute of Certified Public Accountants of Kenya
29	Institute of Certified Secretaries
30	Institution of Engineers of Kenya
31	Japan External Trade Organization
32	Kenya Association of Air Operators
33	Kenya Association of International Schools
34	Kenya Association of Manufacturers
35	Kenya Association of Pharmaceutical Industry
36	Kenya Association of Travel Agents
37	Kenya Association of Women Business Owners
38	Kenya Association of Women in Tourism
39	Kenya Auto Bazaar Association
40	Kenya Bankers Association
41	Kenya Forex & Remittance Association
42	Kenya Green Building Society
43	Kenya Healthcare Federation



44	Kenya Institute of Supplies Management
45	Kenya International Freight & Warehousing Association
46	Kenya Motor Industry Association
47	Kenya Oil & Gas Association
48	Kenya Private Schools Association
49	Kenya Property Developers Association
50	Kenya Renewable Energy Association
51	Kenya Ships Agents Association
52	Kenya Tea Growers Association
53	Kenya Tourism Federation
54	Kenya Transporters Association of Kenya
55	Kenya Water Industry Association
56	Kenya Women Teachers Association
57	Law Society of Kenya
58	Leasing Association of Kenya
59	Marketing Society of Kenya
60	Medical Technology Industry Association of Kenya (MEDAK)
61	National Association of Private Universities of Kenya
62	Oil & Gas Contractors Association of Kenya
63	Organization of Women in International Trade
64	Petroleum Outlets Association of Kenya
65	Protective Security Industry Association
66	Public relations society of Kenya
67	Retail Trade Association of Kenya
68	Rural Private Hospitals Associations of Kenya
69	Safaricom Dealers Association
70	Seed Trade Association of Kenya



71	<b>Shippers Council of Eastern Africa</b>
72	<b>SME Founders Association</b>
73	<b>Technology Service Providers Association of Kenya</b>
74	<b>The Architectural Association of Kenya</b>
75	<b>The Institute of Human Resource Management</b>
76	<b>The Kenya Flower Council</b>
77	<b>The SME Support Centre Limited</b>
78	<b>Town &amp; County Planners Association of Kenya</b>
79	<b>United Business Association</b>
80	<b>Water Service Providers Association</b>