

Employment protection in South Africa – 2008

Item 1 Notification procedures in the case of individual dismissal of a workers with a regular contract	<p>Poor work performance: After giving appropriate warning to the employee, notice must be given in writing, except when it is given to an illiterate employee.</p> <p>Operational reasons: The employer must issue a written notice inviting relevant parties to engage in consultation. Consulting parties are the workplace forum and/or trade union if applicable, or any other parties mentioned in a collective agreement. If there is no workplace forum or trade union, the employer must consult with the employee/s likely to be affected or their nominated representative. After consultation, the employer must select the employees to be dismissed according to selection criteria agreed between the consulting parties. If no criteria have been agreed, the criteria must be fair and objective. Notice of dismissal must then be given in writing, except when it is given to an illiterate employee.</p>
Item 2 Delay involved before notice can start	<p>Poor work performance: After the end of the probationary period, an employee should not be dismissed for unsatisfactory performance unless the employer has (i) given the employee appropriate evaluation, instruction, training, guidance or counselling; and (ii) after a reasonable period of time for improvement, the employee continues to perform unsatisfactorily. The procedure leading to the dismissal should include an investigation to establish the reasons for the unsatisfactory performance and the employer should consider other ways, short of dismissal, to remedy the matter. In the process, the employee should have the right to be heard and to be assisted by a trade union representative or fellow employee. Notice is then given in writing.</p> <p>Operational reasons: The employer must issue a written notice inviting relevant parties to engage in consultation. Consulting parties are the workplace forum and/or trade union if applicable, or any other parties mentioned in a collective agreement. If there is no workplace forum or trade union, the employer must consult with the employee/s likely to be affected or their nominated representative. During consultation period (typically between one week and one month duration), the employer and consulting party should try to reach consensus on appropriate measures to avoid/minimise dismissals, change the timing of dismissals or mitigate their adverse affects, the method for selecting employees to be dismissed and severance pay for dismissed employees. The employer must consider and respond to the representations made by other consulting parties and, if the employer does not agree with them, the employer must state the reasons for disagreeing. The employer must select the employees to be dismissed according to selection criteria agreed between the consulting parties. If no criteria have been agreed, the criteria must be fair and objective. Notice of dismissal must then be given in writing, except when it is given to an illiterate employee.</p>
Item 3 Length of notice period at different tenure durations	Notice must be not less than: (i) one week if the employee has been employed for four weeks or less; (ii) two weeks if the employee has been employed for more than four weeks but not more than one year; (iii) four weeks if the employee has been employed for a year or more or is a farm or domestic worker who has been employed for more than four weeks.
Item 4 Severance pay at different tenure durations	An employer must pay an employee who is dismissed for reasons based on the employer's operation requirements severance pay equal to at least one week's remuneration for each completed year of continuous service.
Item 5 Definition of unfair dismissal	<p>Fair: Dismissals related to the employee's conduct or capacity or the employer's operational requirements and effected in accordance with a fair procedure.</p> <p>Unfair: dismissals for discriminatory reasons, based on participation in lawful industrial action are automatically unfair. Also unfair if the employer cannot prove that the dismissal was fair.</p>
Item 6 Length of trial period	No limit set in law. The length of the probationary period should be determined with reference to the nature of the job and the time it takes to determine the employee's suitability for continued employment.
Item 7 Compensation following unfair dismissal	Compensation for unfair dismissal limited to 12 months' salary, except in the case of automatically unfair dismissal (e.g. dismissal on discriminatory grounds), where compensation is limited to 24 months. Additional compensation may be awarded based on provisions in an employment contract or collective agreement.
Item 8 Reinstatement option for the employee following unfair dismissal	Reinstatement is possible if the dismissal is found to be substantively, as opposed to procedurally, unfair, although compensation orders are more common.
Item 9 Maximum time period after dismissal notification up to which an unfair dismissal claim can be made	Within 30 days from the date of dismissal.
Item 10 Valid cases for use of fixed term contracts	Fixed-term contracts are widely used and possible for all types of employment. No objective reason is required.
Item 11 Maximum number of successive FTCs (initial contract plus renewals and/or prolongations)	No limitation, but if renewed 3-4 times and the employee had a reasonable expectation that the contract would be renewed again and it is not renewed, then this may constitute dismissal. The onus is on the employee to show that he or she had a reasonable expectation of the contract being renewed.
Item 12 Maximum cumulated duration of successive FTCs	No limit.

Item 13 Types of work for which temporary work agency (TWA) employment is legal	Generally allowed.
Item 14 Are there restrictions on the number of renewals and/or prolongations of TWA contracts?	No.
Item 15 Maximum cumulated duration of TWA contracts	No limit.
Item 16 Does the set-up of a TWA require authorisation or reporting obligations?	A temporary employment service is required to register with the Department of Labour.
Item 17 Do regulations ensure equal treatment of regular workers and agency workers at the user firm?	TWA workers are the employees of the agency and are bound by any collective agreement, sectoral determination or legislation that binds the agency.
Item 18 Definition of collective dismissal	Special provisions apply to collective dismissals for operational requirements by employers employing more than 50 employees who consider dismissing: 10 employees if the employer employs up to 200; 20 employees if the employer employs between 200 and 300; 30 employees if the employer employs between 300 and 400; 40 employees if the employer employs between 400 and 500; and 50 employees if the employer employs over 500.
Item 19 Additional notification requirements (compared to Item 1) in cases of collective dismissal	None.
Item 20 Additional delays involved (compared to Item 2)	If requested by the employer or employee representatives, the Commission for Conciliation, Mediation and Arbitration must appoint a facilitator within 15 days of the retrenchment notice. If a facilitator has been appointed, the employer may give notice of termination after 60 days of the appointment of the facilitator. If a facilitator has not been appointed, the employer may give notice of termination after 48 hours.
Item 21 Other special costs to employers in case of collective dismissals	None, although the negotiation of social plans is common in the public service or state enterprises.

This summary was produced by the OECD using national labour legislation, secondary legal sources and advice from legal experts at the ILO. It describes the situation current as at 1 January 2008 and is the basis for calculating the OECD employment protection indicators. To find out more about the methodology used to calculate the OECD employment protection indicators, see www.oecd.org/employment/protection.