
TO: SPEAKER, SENATE
FROM: THE FEDERATION OF KENYA EMPLOYERS (FKE)

**FKE MEMORANDUM ON THE EMPLOYMENT (AMENDMENT)
BILL, 2021 (SENATE BILLS NO. 54 OF 2021)**

1. BACKGROUND

The Federation of Kenya Employers (FKE) is the most representative employers' organization in Kenya. The Federation has 4000 members who employ a total of 1.2 million employees in Kenya. This represents 60% of the formal private sector employment in Kenya. The role of the Federation is to improve the business environment for employers in Kenya through advocacy, effective representation, social dialogue, and provision of value-add services. In addition to representing employers in Kenya at local level, the Federation also represents employers at regional and international level including at East Africa Employers Organization, Business Africa Employers Confederation, International Organization of Employers (IOE), and International Labour Organization (ILO).

In taking a policy position, FKE is guided with the need to ensure a balanced and trusted policy positions that promote:

- Kenya's socio-economic development
- Accelerated job creation
- Enterprise development
- Fair labour practices
- Resilient and competitive employers
- Harmonious industrial relation.
- Social justice
- Feasibility and affordability of the costs associated with implementation of the policy

2. FKE POSITION ON THE PROPOSED AMENDMENTS

FKE Position

The Federation of Kenya Employers (FKE) does not agree with the proposed amendments in the Employment (amendment) Bill, 2021 (Senate Bills No. 54 of 2021) and therefore requests the Senate to not pass the proposed bill.

Reasons for the stated FKE Position.

1. 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.
2. 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.
3. With the concept of formalizing the informal economy, this bill introduces changes that will make it difficult to persuade the informal enterprises to join the mainstream economy for the country's general growth and decent work. Decent work agenda country programme if properly implemented will increase formalization of the informal hence increase in revenue collection for the Government to meet its needs.
4. 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. Some of them include
 - i. Hours of Work (Industry) Convention, 1919 (No. 1)
 - ii. Hours of Work (Commerce and Offices) Convention, 1930 (No. 30)

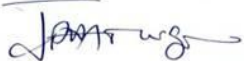
Under hours of work (Commerce & Offices) convention, 1930, there is a provision for temporary exceptions which may be granted in the following cases:

- (a) in case of accident, actual or threatened, force majeure, or urgent work to machinery or plant, but only so far as may be necessary to avoid serious interference with the ordinary working of the establishment;
- (b) in order to prevent the loss of perishable goods or avoid endangering the technical results of the work;
- (c) in order to allow for special work such as stocktaking and the preparation of balance sheets, settlement days, liquidations, and the balancing and closing of accounts;
- (d) in order to enable establishments to deal with cases of abnormal pressure of work due to special circumstances, in so far as the employer cannot ordinarily be expected to resort to other measures.

5. 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.
6. **Overtime** is already provided for in the General Order. Most CBAs provide for flexibility in management and regulation of working time. So far, to our knowledge, no Union or employee has raised such concerns.
7. The bill will have an unintended adverse consequence on employment of youths and women in this country and who are most vulnerable. The sectors and nature of work to be highly impacted on by this bill are the low to middle level skilled and service sector operations. These areas predominantly employ youth and women. Does senate want to aggravate the employment situation of youth and women in Kenya?
8. 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.
9. 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. This bill will make it hard for the employer and employee to effectively respond to challenges such as those presented by covid-19 pandemic.
10. The engagement between employer and employee during out of work hours is a management issue and should not be legislated. This should be left as it is addressed in the current practices through the Collective Bargaining Agreements (CBAs) and the Human Resource Manuals at workplaces.

3. THE WAY FORWARD

The Federation of Kenya Employers (FKE) humbly prays the Senate to not pass the Employment (amendment) Bill, 2021 (Senate Bill no. 54 of 2021). The proposed amendments are bad to the development and operations of the enterprises, the Labour market, the economy, and the Industrial Relations in Kenya.



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