1. Do you have a plant closing law in your jurisdiction and if so, what does it require?

Yes. The South African Labour Relations Act, 1995 (“the LRA”) prescribe a process of consultation with a collective bargaining partner, or where there is no such partner, the potentially affected employees, before
any contemplated retrenchments (i.e. dismissals for the operational requirements of the employer) may take
place. “Operational requirements” are defined as the technological, structural, economic or similar needs of
an employer. A plant closure may in appropriate circumstances justify a dismissal for operational
requirements.

In terms of section 189(2) of the LRA the consulting parties must “engage in a meaningful joint consensus-
seeking process”, and employers are obliged to consult on issues such as ways to avoid retrenchment, ways
to minimise the number of retrenchments, ways to change the timing of retrenchments, ways to mitigate the
adverse effects of the retrenchment, selection criteria and severance pay. An employer may not make a
decision to retrench before the consultation process has been completed. The duty to consult arises when an
employer has identified or contemplates the possible need for retrenchment and before a final decision to
retrench is reached.

In order to make the consultation process meaningful, section 189(3) of the LRA obliges an employer,
before consulting on the issues outlined above, to issue a written notice inviting all the potentially affected
employees to consult with it and to disclose to the other consulting party, in writing, all relevant
information relating, inter alia, to the reasons for the proposed retrenchments, alternatives that the
employer has considered, the proposed criteria according to which the retrenches may be selected and the
severance pay proposed to be paid to those employees who are retrenched.

Where an employer employs more than 50 employees and contemplates the retrenchment of a certain
threshold number of employees or more (normally about 5% to 10% of the workforce or more), a minimum
consultation period of 60 days is prescribed. The consulting parties may, however, agree to shorten this
time period.

2. Are there special rules on releases/waivers in your jurisdiction?

Yes. A waiver will generally only be enforceable where the employee is paid an amount in addition to
her/his minimum legal entitlement (i.e. by virtue of statute or contract). Furthermore, if the employee can
show that s/he was unduly influenced into entering into the waiver or that material facts were
misrepresented to her/him when waiving her/his rights, the waiver will not be enforceable.

3. What are the equal employment opportunity/non-discrimination categories in your jurisdiction?

The Employment Equity Act, 1998 (“the EEA”) prohibits direct or indirect discrimination against an
employee in any employment policy or practice on grounds including race, sex, gender, age, marital status,
HIV status, family responsibility, pregnancy, ethnic or social origin, colour, sexual orientation, disability,
religion, conscience, belief, political opinion, culture, language and birth.

The EEA furthermore obliges all designated employers (i.e. amongst others employers who employ more
than 50 employees or who employ less than 50 employees but have a total annual turnover above the
prescribed threshold for the particular industry) to implement affirmative action measures. Affirmative
action measures are measures that are designed to ensure that suitably qualified people from designated
groups (i.e. women, people with disabilities and Blacks, which are in turn defined as Africans, Indians and
Coloureds) have equal employment opportunities and are equitably represented in all occupational
categories and levels in the workplace.

4. What are the minimum wage and overtime rules (and exceptions) in your jurisdiction?
Minimum wages

In some sectors, minimum wages are determined by wage determinations made in terms of the Basic Conditions of Employment Act.

Another method for the determination of minimum wages is in terms of the Bargaining Council system which divides industry into its specific sectors, i.e. building, motor manufacturing, engineering, etc. Legislation encourages employers, either directly or through employer associations, and trade unions representing employees in their specific industry, to form “Bargaining Councils” and wage bargaining and bargaining over conditions of employment in those sectors where such Councils exist occur under the auspices of these Councils.

The collective agreements concluded in the Bargaining Council only bind the parties to the Bargaining Council in the first instance. The collective agreements can, however, be extended (and usually are extended) to apply to non-parties who fall within the registered scope of a particular Bargaining Council provided the employers and trade unions who are members of the Bargaining Council represent the majority of employers and employees in the sector.

Wage bargaining is otherwise dealt with on a voluntary basis at plant level or at a level on a basis agreed between the employer and its employees’ collective bargaining agent.

Working hours and overtime

The Basic Conditions of Employment Act, 1997 (“the BCEA”) contains provisions in relation to normal working hours and overtime rates. These sections do not apply to employees who earn more than R115 000 (approximately $572.00) per annum, senior managerial employees and employees engaged as sales staff who travel to the premises of customers and who regulate their own hours of work.

The BCEA limits ordinary working hours to 45 hours per week – where the employee works a five-day week, s/he may not work more than 9 ordinary hours per day, and where the employee works a six-day week, s/he may not work more than 8 ordinary hours per day.

Employees may only be required to work overtime in accordance with an agreement and overtime is limited to 10 hours’ overtime per week. Furthermore, an employee may not work more than 12 hours (ordinary plus overtime hours) on any day. Where the employee is required to work overtime, the employer must pay the employee at least one and a half times the employee’s wage for overtime worked. The parties may, however, agree that instead of being paid for overtime worked, the employee will be given time off.

In addition to overtime, the BCEA also regulates work on Sundays and public holidays as well as payment in respect of work on these days.

5. Is there employment-at-will, or some other rule, in your jurisdiction? What are the exceptions?

There is no employment-at-will in South Africa. In terms of section 185 of the Labour Relations Act, all employees, regardless of their seniority, are entitled not to be unfairly dismissed. A fair dismissal is one that is substantively and procedurally fair. The substantive fairness of a dismissal relates to the reason for the dismissal and procedural fairness to the manner in which the dismissal is effected.

Our law recognises four reasons that may justify a dismissal, namely misconduct, incapacity due to poor work performance, incapacity due to ill health and the operational requirements of the employer. The
procedural requirements differ depending on the reason for the dismissal. However, generally speaking, the procedural requirements are aimed at ensuring that the employee is given an opportunity to make representations before a decision to dismiss is taken.

Reinstatement is the primary remedy that may be ordered in respect of an employee who successfully contends that her/his dismissal is substantively unfair. Where reinstatement is not reasonably practicable, or where the employee does not wish to be reinstated, or where the dismissal is only procedurally unfair, compensation may be awarded up to a maximum of 12 months’ remuneration, and in certain circumstances, 24 month remuneration.

6. What are the obligations upon terminating an employee in your jurisdiction?

As mentioned above, in terminating the services of an employee, an employer should act substantively and procedurally fairly.

If the dismissal is a summary dismissal (which may be the case in instances of serious misconduct or gross poor performance) the employer is required to pay the employee her/his accrued annual leave pay.

If the dismissal is on notice (which is normally the case in a dismissal for operational requirements or ill health) and the employer does not require the employee to work her/his notice period, the employer is required to pay the employee’s accrued annual leave pay and notice pay. The amount of notice pay is determined with reference to the notice period contained in the employee’s contract of employment. If the contract of employment does not contain a notice period, the minimum notice periods as set out in the BCEA will apply. For employees working longer than one year, the minimum notice period is 4 weeks.

In the event that the dismissal is for the operational requirements of the employer, the employee is, in addition to accrued annual leave and notice pay, entitled to severance pay. This amount is determined with reference to the employer’s severance pay policy or if there is no such policy, the minimum severance pay prescribed by the BCEA. This minimum is one week’s remuneration for every completed year of service with the employer. If the employee is entitled to any other amounts in terms of her/his contract of employment, the employee should be paid these amounts on termination. In addition, if the employee participates in a retirement scheme, the employee is normally entitled to receive benefits in terms of the rules of the scheme on termination of employment.

7. Are there family and medical leave laws in your jurisdiction and state under what circumstances they pertain?

The BCEA provides for family responsibility leave and sick leave.

If the employee has been in employment with the employer for at least 4 months and works for the employer on at least 4 days per week, the employee is entitled to 3 days’ paid family responsibility leave per year in respect of the birth or illness of the employee’s child, or the death of the employee’s spouse/life partner, parent, adoptive parent, grandparent, child, adopted child, grandchild or sibling. Family responsibility leave may not be accumulated and any unused family responsibility leave lapses at the end of the annual leave cycle in which it accrues.

In every sick leave cycle of 3 years’ continued employment with the employer, the employee is entitled to an amount of paid sick leave equal to the number of days that the employee normally works in a six-week period. Employees who work a five-day week are accordingly entitled to 30 days’ paid sick leave in a 3-year sick leave cycle.

8. Please list any miscellaneous, interesting or oddball laws in your jurisdiction and state under what circumstances they pertain.
The transfer of a business as a going concern

Section 197 of the LRA, which contains provisions similar to the UK TUPE Regulations and the European Acquired Rights Directive 77/187, regulates the employment consequences of a transfer of a business as a going concern.

The principal employment consequence of the transfer of a business, or a part thereof, or a service, as a going concern is that the new employer is automatically substituted in the place of the old employer in respect of all contracts of employment in existence immediately before the date of the transfer. All the rights and obligations between the old employer and an employee at the time of the transfer accordingly continue in force as if they had been rights and obligations between the new employer and the employee. Importantly, a transfer does not interrupt an employee’s continuity of services and the employees’ length of service with the old employer has to be recognised by the new employer.

In practice, this means that the employees in the business of being transferred are automatically transferred to the new employer and must be employed by the new employer on the same terms and conditions that they enjoyed with the old employer, or at least on terms and conditions that are “on the whole not less favourable” than the old employer’s. It is, however, possible for the old and/or the new employer to contract out of the employment consequences set out by above. Such an agreement must be entered into between the old employer or the new employer, or the old employer and the new employer acting together on the one hand, and the employee(s) on the other hand.

Section 197 imposes certain obligations on the old employer and provides for the joint and several liability of the old and the new employer in certain circumstances.

Automatically unfair dismissals

South African employment law recognises that the dismissal of an employee may, in certain circumstances, be automatically unfair. Such circumstances would exist, for example, where the employee is dismissed as a result of unfair discrimination or where the reason for the dismissal is that the employee participated in a lawful strike, or where the reason for the dismissal is a going concern transfer.

An employee, who that successfully contends that her/his dismissal was automatically unfair may be reinstated into the workforce of the employer (i.e. the primary remedy), or may be awarded compensation up to a maximum of 24 months’ remuneration.

The compensation that may be awarded to an employee whose dismissal was automatically unfair is therefore double the compensation that may be awarded to an employee whose dismissal is merely substantively or procedurally unfair. In the latter instances, the maximum amount of compensation that may be awarded is 12 months’ remuneration.

Electronic Surveillance of Communications
The Regulation of INTERCEPTION of Communications and Provision of Communication-Related Information Act, 2002 ("RICA") governs the interception of both direct oral communications and indirect communications made via a "telecommunications system" (such as telephone, voicemail, e-mail and the internet) or a postal service (including an organisation’s internal mail system).

RICA applies to interception during transmission (i.e. “bugging” offices or telephones to listen to – and record – conversations) as well as to accessing stored communications, such as e-mail or voicemail after they have been sent or received.

There is a general prohibition on the intentional interception (or attempted interception) of any communication. Interception in this context means accessing the content of a communication and not simply obtaining information that a communication was made/sent, e.g. by reference to an itemised telephone bill. The latter is not prohibited.

There are a number of exceptions to the general prohibition, which allow persons to intercept communications in certain limited circumstances without having to resort to the courts for permission, namely:

- A person who is a party to a communication may intercept that communication. Accordingly, a manager may record a meeting or telephone call with an employee without the employee’s consent (s4 of RICA);
- A person may intercept a communication if one of the parties has given her/his prior written consent to such interception (s5 of RICA). In the employment context, an employer wanting to rely on this exception needs to obtain the written agreement of the employees to intercept their communications. Such written agreement is normally contained in the employees’ employment contracts.
- A person may, in the course of the carrying on of its business, intercept any indirect communication by means of which a transaction is entered into in the course of that business, which relates to that business, or which takes place in the course of the carrying on of that business, and which is made via a telecommunications system (s6 of RICA), subject to certain conditions. This exception is accordingly not available in the case of direct communications and so would not allow covert recording of face to face conversations without the written consent of one of the parties. Nor is this exception available in the case of indirect communications sent via a postal system.

To rely on this section 6 exception, an employer would have to have a written policy in place, which explains that communications over the office communication systems may be intercepted. The policy would have to be publicised and made available to all employees and should make it clear to all employees that they should not have any expectation of privacy of communications made via office systems.

Non-compliance with the provisions of RICA is a criminal offence punishable by stringent penalties including a fine and/or imprisonment.

Criminal history in job applications

It is a common practice for employers to conduct criminal record checks on job applicants.

The draft Protection of Personal Information Act, which is not yet in force, aims to regulate the processing of the criminal history of job applicants. In terms of the draft Act, the criminal history...
of an individual is regarded as sensitive personal information and the processing of such information may only occur with the consent of the individual concerned. Processing without the consent of the individual may, however, occur if the processing is performed by a responsible party (such as an employer) who processes the information for its own purposes with a view to assessing an application in order to make a decision about the applicant. This includes an appointment decision.

A separate question is whether an employer may take into account the criminal history of the applicant when making the appointment decision. A blanket exclusion of persons with a criminal record will probably not be justifiable and an employer should therefore consider the job applicant’s criminal record only where it is related to the person’s suitability or ability to do the job.

**Temporary Assignment for Injured Workers**

The Code of Good Practice: Dismissal provides that incapacity on the grounds of ill health or injury may be temporary or permanent. If the employee is temporarily unable to work, the employer is required to investigate the extent of the ill health/injury. If the employee is likely to be absent for a time that is unreasonably long in the circumstances, the employer should investigate all possible alternatives short of dismissal. Relevant factors in this regard include the nature of the job, the period of absence, the seriousness of the illness or injury and the possibility of securing a temporary replacement for the ill or injured employee. During this investigation process, the employee should be given the opportunity to state a case and to be assisted by a fellow-employee or trade union representative. If the period of absence is likely to be unreasonably long and there is no suitable alternative position available for the employee or her/his work circumstances cannot be adapted to accommodate her/his ill health/injury, the employee’s services may be terminated on account of ill health or injury. The degree of incapacity will be relevant to the fairness of such a dismissal and the cause of the incapacity or injury may also be relevant. In the case of alcoholism or drug abuse, counselling and rehabilitation may be appropriate steps for an employer to consider. Furthermore, particular consideration should be given to employees who are injured at work. The duty to accommodate the incapacity/injury of the employee is more onerous in these circumstances.

**Meal or rest breaks**

Section 14 of the Basic Conditions of Employment Act provides that an employer must give an employee who works continuously for more than 5 hours a meal interval of least one continuous hour. An agreement may, however, reduce a meal interval to half an hour. Where the employee works fewer than 6 hours per day, the parties may agree to dispense with a meal interval.

During a meal interval the employee may be required to perform duties that cannot be left unattended or performed by another employee. An employee who is required to work or is required to be available for work during a meal interval, must be remunerated accordingly.

An employer must grant an employee a daily rest period of at least 12 consecutive hours between ending and recommencing work, and a weekly rest period of at least 36 consecutive hours which, unless otherwise agreed, must include Sunday. The parties may, by agreement, reduce the weekly rest period to 8 hours in any week provided that the rest period in the following week is extended equivalently.

**Breast-feeding and expressing breast milk**
Our law does not contain express provisions in relation to breast-feeding and expressing breast milk. The BCEA provides, however, that an employer may not permit pregnant or breast-feeding employees to perform work that is hazardous to their health or the health of the child. In this regard the Code of Good Practice on the Protection of Employees during Pregnancy and After the Birth of a Child prescribes certain measures an employer should take in order to protect pregnant and/or breast-feeding employees.

**Weekly payment of wages**

The intervals within which an employer pays its employees (i.e. weekly, fortnightly or monthly) are normally determined by agreement between the employer and the employee/collective bargaining partner. Apart from sectoral determinations that may prescribe the payment interval, there are no legislative requirements in this regard.

9. **Does your jurisdiction have a law requiring employers to give employees access to, or a copy of, their personnel records?**

   Generally speaking, there is no reason why an employee would not be allowed access to the information contained in her/his personnel records. Furthermore, in terms of the draft Protection of Personal Information Act, an employee will be entitled to obtain from the employer confirmation that it holds personal information about her/him and has communicated to her/him the particulars of the personal information held. In addition, this draft Act proposes that an employee would be entitled to request the correction of personal information held by a responsible party such as the employer.

   “Personal information” includes information relating to personal characteristics, such as the race, gender, sex, pregnancy, and marital status of the person, the education or the medical, financial, criminal or employment history of the person, as well as any identifying number, symbol or other particular assigned to the person, and the address, fingerprints or blood type of the person.

   Accordingly, insofar as the personnel records of an employee contain personal information about the employee, the employee will be entitled to request information about such records.

10. **Does your jurisdiction outlaw or restrict drug tests, alcohol tests, genetic tests or any other kind of testing?**

    The Employment Equity Act regulates the medical testing of an employee. In terms of section 7 of the EEA, the medical testing of an employee is prohibited unless legislation permits or requires the testing or if it is justifiable in the light of medical facts, employment conditions, social policy, the fair distribution of employee benefits or the inherent requirements of the job.

    Generally speaking, medical testing (including alcohol tests and genetic tests) may not occur without the employee’s informed consent. The draft Protection of Personal Information Act furthermore classifies information about a person’s health as sensitive personal information and reiterates that such information may only be processed with the consent of the individual concerned, unless very specific circumstances apply.

11. **Does your jurisdiction have any special rules on the payment of sales commissions?**

    No. However, the tax treatment of commission-earners differs from that of salary-earners in certain respects.

12. **What are the basic rules on enforcing non-competes and related agreements in your jurisdiction**
The general rule in our law is that restraint agreements are enforceable regardless of whether or not specific compensation is paid to the restrained individual. The onus lies on the restrainee seeking to be released from a restraint to show that the restraint is unreasonable (as regard geographical area, duration and content), and also offends against public policy. In determining whether a restraint offends against public policy, a court will look at the facts and circumstances at the time that the restrainer is attempting to enforce the agreement against the restrainee, and weigh up two main considerations. The first is that public interest requires, in general, that parties should comply with their contractual obligations even if these are unreasonable or unfair. The second consideration is that all persons should, in the interests of society, be permitted as far as possible to engage in commerce or professions or, expressing this differently, that it is detrimental to society if an unreasonable fetter is placed on a person’s freedom of trade or a person’s freedom to pursue a profession.

In our law, a restraint is only valid if there is a proprietary interest which justifies protection. Those interests are usually in the nature of trade secrets, know-how, pricing or customer connection. The mere prevention of competition for skilled labour is not a proprietary interest which justifies protection in a restraint.