NOTICE OF TERMINATION OF EMPLOYMENT IN TERMS OF THE BASIC CONDITIONS OF EMPLOYMENT ACT

INTRODUCTION

- Giving notice of termination of employment is covered by contractual law principles. It means that one party must give the other notice of an agreed upon period before the contract will actually terminate. However, in the case of an employment contract, which is covered by both contractual law and labour law, an employer cannot just invoke the notice clause to terminate the contract – it may be lawful, but could still be unfair in terms of labour law if a proper process has not been followed.

- The period of notice to be given is usually agreed to in the contract of employment – however there are statutory minimum periods that apply in terms of the Basic Conditions of Employment Act (or in specific Bargaining Council Agreements or Sectoral determinations).

- The BCEA also states that the notice period must be the same for both parties – the employer cannot for example require a longer period of notice when an employee resigns, than what it is prepared to give if the employee is dismissed; or vice versa.

STATUTORY REQUIREMENTS AND EXPLANATIONS

Minimum notice periods

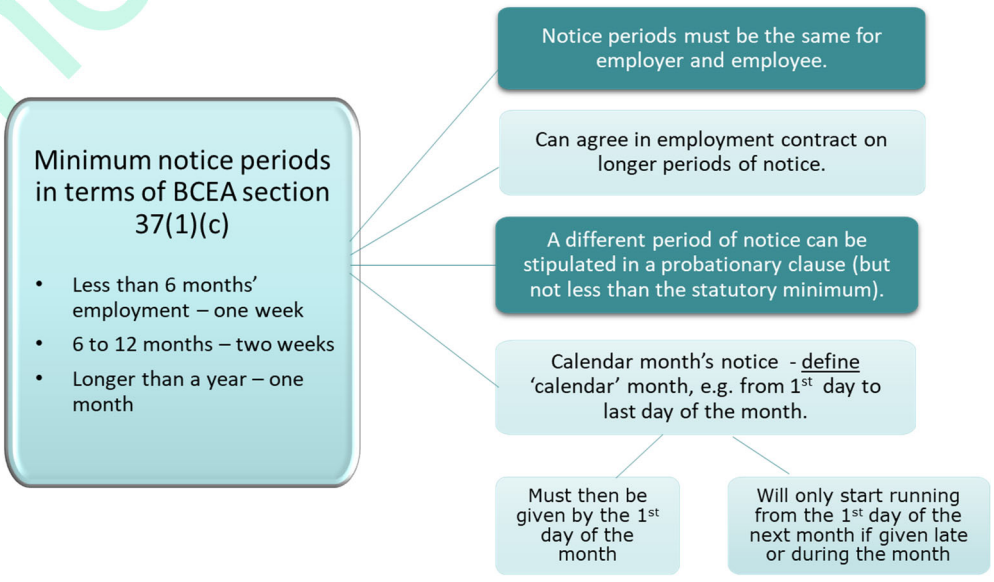
- The contract of employment may be terminated only on notice of not less than -
  - one week, if the employee has been employed for six months or less;
  - two weeks, if the employee has been employed for more than six months but not more than one year;
  - four weeks, if the employee has been employed for one year or more (or is a farm worker or domestic worker who has been employed for more than 6 months).

  The parties can however agree to a notice period of two weeks even after one year in certain circumstances.

  See further below for guidance from the courts about longer notice periods.

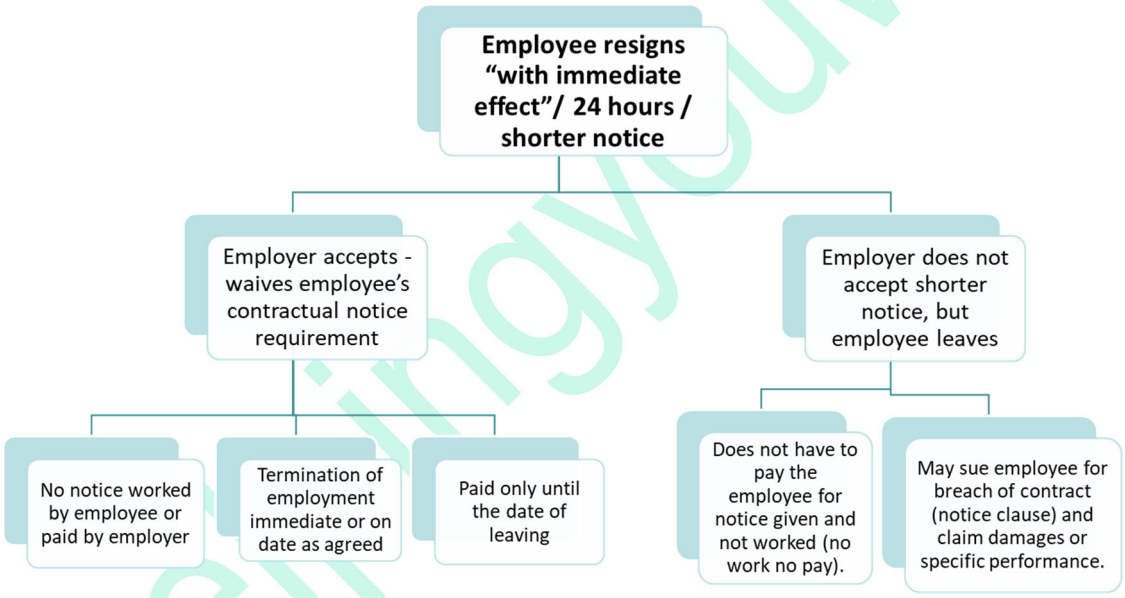
How and when must notice be given

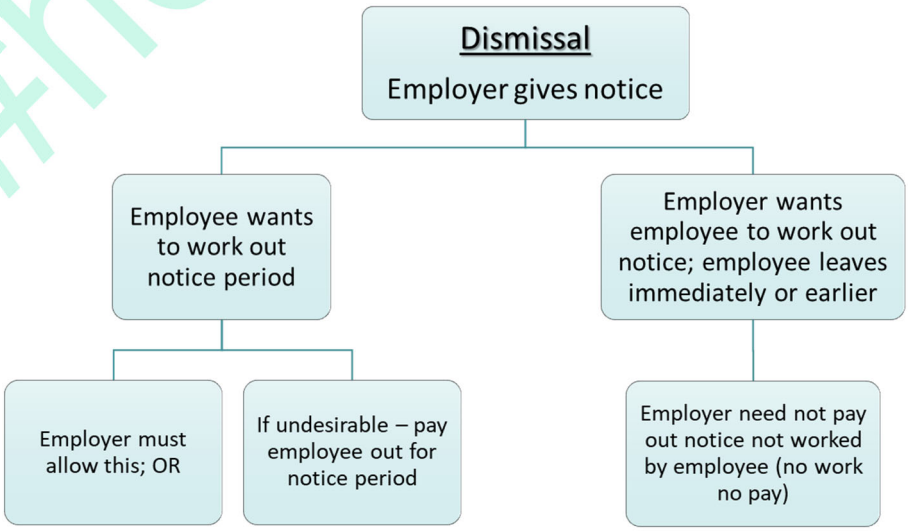
- Notice of termination of an employment contract must be given in writing, except when it is given by an illiterate employee.
    - The courts have recognised that SMS / e-mail is regarded as "in writing" and are acceptable ways of resigning. However, if the employer's policy requires a specific way of giving notice, then the policy must be complied with.
    - The employer cannot refuse to accept a resignation if the employee gives short notice – these are two separate aspects. Resignation is a unilateral act by the employee, which does not require the acceptance of the employer to be valid. The employer would however be able to sue the employee for breach of contract if the required period of notice is not given and the employer has not agreed to waive this.
    - The employee who has resigned, does however need the consent of the employer to withdraw his/her resignation.
    - Further information on resignation is available in a separate document.
- Notice of termination of a contract of employment given by an employer must-
    - not be given during any period of leave to which the employee is entitled; and
    - not run concurrently with any period of leave to which the employee is entitled, except sick leave.
- The employment contract or a policy may stipulate that notice must for example be given on a specific day (e.g. the first day of the month) or that notice must be a "calendar month". Employers should ensure that this stipulation is clearly defined to avoid confusion – there have been cases where the courts have held that a 'calendar month' does not necessarily mean from the 1st to the last day of a month, but could also mean from the 14th to the 14th, for example.



Payment in lieu of notice

- Payment in lieu of notice must be made if the employer does not require the employee to work during the notice period.
  - If the employee tenders his/her services during the notice period, but the employer does not want the employee to work during this time, then the employer must pay the employee as if he/she is at work.
  - If the employee does not want to work the notice period or part thereof, then the employer need *not* pay the employee for any time not worked.
  - If the employer agrees to the shorter notice, it means that the rest of the notice period has been waived and the contract will terminate on the earlier date as has been agreed, with no payment of the employee thereafter.





OTHER IMPORTANT POINTS

Legal principles

- As mentioned above, an employer must generally also observe the requirements of the Labour Relations Act for substantively and procedurally fair dismissals before terminating employment of an employee, and cannot just rely on the contractual notice clause.

- However, in certain circumstances recognised by law, either the employer or employee can terminate the contract without notice – but that decision will have to be legally defensible in court if challenged.

- In contractual law, when one party acts in breach of the contract and/or repudiates the contract, the other party has the right to accept the repudiation and cancel the contract. In such a case, the latter party is no longer bound to the contract and clauses such as the notice clause and can terminate the contract summarily. The courts have recognised that serious misconduct by an employee could constitute such breach of contract, which entitles the employer to dismiss the employee "summarily", i.e. without having to give notice. The employee is then only paid up until the day when the decision to dismiss is communicated to him/her. (Note – the employer still has to follow a fair process prior to dismissal.)

Longer notice periods

- The BCEA provides for <u>minimum</u> notice periods, which cannot be changed by agreement in the contract, accept where the BCEA allows for this. This is mostly for the protection of employees.

- There is however nothing in the BCEA preventing the parties from agreeing to a longer notice period in the contract – e.g. 3 months, or one school term – depending on the position of the employee and the employer's operational demands.
    - This is usually regarded as being more favourable to the employee and in excess of the required statutory minimum period.
    - The notice period must however still be the same for both parties, even if this is now a longer period.
    - If a longer notice period has been agreed upon, then one party cannot later claim that the notice periods in the BCEA must trump the contractual agreement and

cannot be validly "contracted out". This argument only applies to contractual arrangements that are *less favourable* than the protection given in the BCEA – not when it is more favourable. The fact that it may become inconvenient for the party who wants to terminate the contract to be bound to the longer notice period, does not make it any less valid. These potential inconveniences should have been considered at the start of the employment relationship before this clause was agreed to and the contract signed.

- So, unless the other party is willing to waive (part of) the notice requirement, the longer period is valid and enforceable.

- If a longer period of notice has however not been agreed to up front, giving longer notice than what is stipulated in the contract, can be risky. In terms of case law, the courts have held that, if an employee gives longer notice than what had been contractually agreed, the employer would technically be able to argue that the contract terminates once the agreed notice period has expired, and can require the employee to leave at that point.

  Example: An employee is required to give 30 days' notice and intends to finish work at the end of November. He/she hands in a resignation letter in the middle of October, informing the employer that his/her intended last day is the end of November. Strictly speaking, the employer could insist that the employee finish work in the middle of November, after the 30 days have run its course.
