



ADVOCATES

STRENGTHENING WORKPLACE RELATIONSHIPS





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LETTER FROM THE EDITOR

Greetings,

I am thrilled to welcome you to the Quarter 3 Edition of Legal Take, that focuses on Employment and Labor Relations. In this edition, we have a collection of thought-provoking articles put together by the dedicated team at FMC Advocates that revolves around a theme of Strengthening Workplace Relationships.

In today's dynamic legal landscape, where employment and labor relations are constantly in flux, understanding the nuances of fostering robust workplace relationships is nothing short of essential. It's not just a matter of legal compliance, it is a cornerstone for organizational success, productivity, and employee well-being.

We commence our journey by addressing a topic often overlooked- Mental health- which is a pivotal aspect of human experience and deserves attention at the workplace. We highlight emerging jurisprudence in this area and emphasize the need for mental wellbeing in the workplace. In our second article, we explore the intricate dance between different generations at the workplace. Discover how the wisdom of the experienced can blend harmoniously with the fresh perspectives of the young, creating a symphony of innovation.

In the third article, we dive into the world of Artificial Intelligence and Human Resource Management and explore how AI is not just changing the game but also enhancing the human touch in HR. This sets the stage for the fourth article that examines what the future of work holds in this fast-paced world and trends shaping the essence of how and where we work. Thereafter, we examine the urgent need to address sexual harassment and promote respectful workplaces by embracing diversity, equity, and inclusion.

The sixth article unlocks the secrets to fostering clear and empathetic communication amongst team members. Thereafter, we unravel the intricacies of Intellectual Property in the employment relationship. Our final piece, addresses a fundamental aspect of workplace relationships—fairness and commitment to a healthy work environment.

As you delve into these articles, we invite you to reflect on the evolving nature of employment relationships in our world today. Let these insights serve as a compass guiding you through the labyrinth of employment law, labor relations and best practices.

Thank you for choosing Legal Take as your source of legal knowledge and insights. Your feedback and engagement are invaluable to us as we strive to provide you with the most relevant and thought-provoking content.

Here's to Strengthening Workplace Relationships and navigating the legal landscape with confidence.

Warm regards,

Diana Wariara

Editor,

October 2023

MIND MATTERS

Cultivating a Culture of Mental Health Wellness in the Kenyan Workspace

By Diana Wariara

As the workplace dynamics continue to evolve, the boundary between work and personal life blurs. Consequently, the impact of mental health on Employees and their productivity has gained significant attention. Recently, there has been an upsurge of Employees committing suicide and most of these cases point to underlying mental illnesses. According to the Kenya Mental Health Policy (2015–2030), mental disorder cases in Kenya are on the rise rapidly. Government statistics indicate that at least 1 in every 4 Kenyans suffer from a mental illness at one point in their lives.

Taking into account the foregoing, much remains to be done to create awareness on mental health in the workplaces. Key challenges when tackling mental health is the lack of awareness and stigma surrounding mental health. As such, this brings us to the question- what is mental health and what is mental illness and are the two terms interchangeable? The World Health Organization has defined Mental health as a concept just like physical health and it refers to a state of well-being. Mental health includes our emotions, thoughts, feelings of connection to others and the ability to manage life's highs and lows. On the other hand, mental illnesses are diagnosable mental health conditions such as depression or anxiety. Therefore, mental illness is a facet of mental health, and the presence or absence of a mental illness is not a predictor of mental health- someone without a mental illness could have poor mental health, just as a person with a mental illness could have excellent mental health.

LEGAL CONSIDERATIONS

Due to the impact of mental health on Employees, there are a few legal provisions related to the employment relationship that would need to be examined and reconsidered. These legal provisions essentially aim to protect Employees' mental well-being, ensure a safe and supportive work environment, and prevent discrimination based on mental health conditions. Below we highlight the key legal aspects to consider:

1. **Mental Health Act of 2022**- The Act seeks to promote the mental health and well-being of all persons and reduce the incidences of mental illness. Further the Act also seeks to reduce the impact of mental illness, including the effects of stigma on individuals, family and the community and promote recovery from mental illness and enhance rehabilitation and integration of person with mental illness into the community. The Act also seeks to safeguard the rights of a persons with mental illness. While this is a recent legislation it provides a basis on how Employers should identify and handle cases of mental illnesses within their organizations. Further, Organizations may consider amending their internal human resource policies to align with the principles of the Mental Health Act and ensure compliance.
2. **Occupational Safety and Health Act, 2007 (OSHA)**- OSHA requires Employers to provide a safe and healthy work environment for Employees. This includes addressing issues that affect the psychological and emotional well-being of their Employees. Employers are required to identify and mitigate workplace hazards, including those that could cause a mental strain or negatively impact an Employee's mental health. Some of these factors may include constantly working under tight deadlines and heavy workloads which can lead to stress, anxiety, and burnout for Employees.
3. **Employment Act of 2007**- The Act provides a general framework for various aspects of the employment relationship. Some provisions such as, working hours, rest periods, and sick leave etc. correlate to mental health provisions. In addition to this, it is worth noting that the Act strictly prohibits discrimination or harassment based on an Employee's mental health condition. As such, they should not be denied opportunities, promotions, or benefits due to their mental health status.

Further, Employees experiencing mental health challenges might require time off for treatment and recovery. Employers may accommodate such Employees by extending to them the sick leave provisions, flexible working hours and/or allowing them to work remotely.

4. **Data Protection Act 2020** - Employers are legally bound to maintain the confidentiality of an Employee's medical and mental health information. This includes not disclosing such information to colleagues or other parties without the Employee's explicit consent. Further, Employers should only request medical certificates when necessary and ensure that the information shared is relevant to the Employee's ability to perform their job. Lastly, access to such information should be limited to those who genuinely need it to make informed decisions, such as Human Resource personnel or supervisors.
5. **Employment (amendment) Bill 2022** - On 1 August 2023, the Senate passed the Bill for consideration in the National Assembly that creates an Employee's right to disconnect. Essentially, the amendment would seek to restrict Employers from contacting Employees outside working hours save in the case of an emergency. This, proposed amendment has been necessitated by the need to reduce instances of Employee burnt out and promote progressive mental health practices in the workplace. Should the Bill be passed into law, Employer's would need to re-examine their internal processes and policies to ensure they are aligning with the Right to Disconnect.

Noting the foregoing, we note emerging case law from South Africa - **Sanlam Life Insurance Ltd v Mogomatsi and Others** where an Employee claimed for constructive dismissal against their Employer. The claim was dismissed at the arbitration proceedings, on the basis the Employee had failed to prove that he was constructively dismissed. On review at the Labour Court, the Employee alleged that the commissioner failed to consider relevant evidence, such as that he was given an ultimatum to apologise to his colleague or resign and that he was mentally ill at the time of his resignation. The Labour Court found that no weight was given to the Employee's mental health during the arbitration and that, although the Employer attempted to show that the Employee's conduct was unacceptable, no mention was made of the Employee's anxiety and depression and ordered the Employer to pay the Employee an amount equivalent to four months' salary as compensation. On appeal of the matter to the Labour Appeal Court, the court noted that the issues of the mental illness was not brought up at the arbitration proceedings and the Employer was only made aware of the Employees condition after they resigned. The Court found that the Employer, must be aware of the Employees mental infliction before a duty can be placed on the Employer to act in one way or the other. There was no evidence that the Employer was aware of the Employee's mental ill health. As such the appeal was upheld. Employers must always be vigilant and act sensitively when they become aware or ought to be aware of a particular susceptibility or vulnerability of an Employee.

CULTIVATING A CULTURE OF MENTAL HEALTH WELLNESS

Employers play a pivotal role in fostering a positive work environment that supports mental health. Research has shown that work environments that foster mental wellness amongst their Employees have increased productivity levels from their work force and experience fewer cases of quiet quitting. It is therefore important to foster a culture of understanding, empathy, and open communication that involves destigmatizing mental health issues, providing resources, and ensuring that Employees feel safe discussing their challenges without fear of repercussions or retaliation. Below are a few avenues that Organizations can consider when cultivating a culture of mental health wellness:

1. **Employee Assistance Programs (EAPs)**: EAPs are workplace initiatives designed to support Employees' well-being by providing confidential counseling, resources, and services to help them navigate personal and work-related challenges. These programs offer short-term counselling sessions to address immediate concerns or arising issues. Such programs are ideal in a Kenyan context where mental health stigma persists, as they provide a platform for Employees to confidentially discuss their mental health challenges with trained professionals.



2. **Mindfulness and Wellness Programs:** These programs focus on stress reduction, fostering a healthy work-life balance, and cultivating a positive workplace culture. It is important for wellness programs to encompass multiple dimensions of well-being that recognize physical, mental, emotional, and social health are interconnected. By addressing both physical and mental well-being, organizations can create a supportive culture that values Employees' holistic health.
3. **Mental Health Leave and Accommodations:** Mental Health Leave and Accommodations will soon form critical aspects of workplace policies that support Employees facing mental health challenges. Organizations may need to warm-up to allowing Employees to use their sick leave days when struggling with their mental health. Doing so acknowledges the fact that mental health issues may adversely impact an Employee's ability to carry out their duties and the leave allows Employees to prioritize their mental well-being and seek the necessary treatment and support. Further, organizations may be required to make reasonable accommodation or adjustments to enable Employees with mental health conditions to perform their job duties effectively. Such adjustments may include changes to work arrangements, tasks, or the work environment.
4. **Peer Support Networks:** Peer support networks are informal groups of Employees who come together to provide each other with emotional, practical, and social support in the workplace. These networks- that may form organically- play a crucial role in promoting a sense of belonging, reducing isolation, and enhancing overall well-being among Employees. By encouraging peer support networks, Organizations can harness the power of community ties to enhance Employees' emotional resilience, promote well-being, and create a workplace where individuals feel supported and valued.
5. **Crisis Management and Intervention:** Employers should have a well-defined crisis management plan in place that outlines the strategies and actions aimed at promptly addressing and supporting individuals facing acute mental health challenges. Crisis management and intervention for mental health crises should be culturally aware, well-prepared, and focused on providing immediate support and long-term solutions to ensure the well-being of individuals in crisis.

In today's fast-paced and demanding work environments, the importance of mental health cannot be overstated. Addressing mental health concerns in the workplace is not only a moral imperative but also essential for creating a productive and harmonious work atmosphere. By fostering understanding, offering support, and implementing effective strategies, Employers can create an inclusive workplace that prioritizes mental health and contributes to a healthier, happier, and more productive workforce.

Author Profile



Diana Wariara is a Partner at the firm with a keen interest in employment and labor relations matters. She has advised clients through contentious and non-contentious employment matters and provides a holistic approach when tackling employment and labour and relations issues. Through her writing and legal practice, she endeavors to break down barriers, de-stigmatize mental health conversations, and empower organizations to prioritize the welfare of their workforce.



EMBRACING GENERATIONAL DIVERSITY IN THE WORKPLACE TO BUILD AN INCLUSIVE WORK CULTURE

By Faith Linda

Often, we find that organizations have diverse generations within the work force that range from an older to younger generation. It is important to understand each generation the workplace as it informs how you will communicate deal with them. The Pew Research Center, has categorized different generations as follows:

- a. **Boomers** – They fall under between 1940–1960, Boomers are the oldest generation in the workforce today. They have a strong work ethic, being goal oriented and working hard on everything they set out to do. They are loyal and very knowledgeable. They have been in the workplaces for quite some time making them experts in the roles they occupy.
 - b. **Generation X**– They fall under 1960–1980. This generation is well exposed and adapting to new technologies is faster and easier for them. Their work ethic is usually good and they are experienced, skilled and independent in their approach to work and growing their career. They are more proactive and prefer in-person communication. Often, Generation Xers are likely to prefer to focus on quality time and efficiency at work rather than long hours. They also tend to be more self-reliant and less interested in collaborative work, preferring a more independent and self-directed approach.
 - c. **Millennials** – They fall under 1980–1996. They are the most adaptive creative generation and progressive generation. Members of this generation have strong personal goals and are looking for positions that cater to and help achieve these goals. It is important that their work is judged not by the hours in office, but by the end quality. To keep a Millennials happy, aid them in achieving personal goals and provide them with work and life balance by creating possibilities for working remotely.
 - d. **Generation Z**– They fall under 1996–2010. This generation has been raised on the internet and social media, with some of the oldest Gen-Zer's graduating from tertiary institutions by 2020 and entering the workforce. They grew up with technology, the internet, and social media, which sometimes causes them to be stereotyped as tech-addicted, anti-social, or social justice warriors. They are more wary of risk when it comes to certain activities, more conscious of dangerous situations and their consequences and also use internet to access information.
1. **Communication**– Older generations often prefer calling on the phone to shooting off an email while Gen-Zer's might panic when someone calls out of the blue. This generation gap may sometimes complicate communication. As such, it is important to be cognizant of different communication styles amongst each generation and be respectful– applying the right tone, grammar and avoiding any slang familiar with only one generation. This will ensure all members of the team feel seen and included.
 2. **Work-life balance**– Work-life balance can mean different things to different generations. Understanding the different generations is key as it will lay a platform to know what to do as an employer. Values change from generation to generation, so it's important to stay up to date on what new generations want out of an employee benefits package this can be achieved by listening Employees on what matters to them.
 3. **Technology**– Since each generation do not have the same knowledge of technology as the other, understanding what aspect of technology each generation is good at is a plus, as it will create room for teaching and learning sessions among the generations. The younger ones are more likely than not, going to be better at using technology as they are well versed with technology.
 4. **Career Progression**– Generation Z attaches more value on money and rapid career advancement and salary rate is a potential source of labour dispute for them. Generation Y has a relatively high desire for career advancement in the company, they feel that their academic education qualify them for adopting more managerial roles.
 5. **Management styles**– How one manages the different generations is different from each other. Create a psychological safe environment and avoid generalization since everyone is not the same. Customize how you manage each employee, use several communication styles and always improve employee retention with a flexible working environment as an employer.

MANAGING DIFFERENT GENERATIONS IN THE WORKPLACE

Given the different generations in the workplace, managing them requires different approaches noting they all have different attitudes, approaches, experiences and work styles. Understanding them is vital. A few of the areas in which they are different:

BENEFITS OF HAVING DIFFERENT GENERATIONS

When different generations work together, it brings experience and creative problem-solving skills to the Company. Despite the differences across the generations, their inclusion in an organization's workforce has numerous benefits some of which are noted below



Baby boomers



Generation X



Millenials



Gen Z

- a. **Diverse perspectives:** When you have people of different generations working together, they will be able to bring their own unique perspectives to the table. For example, someone who is 20 years old will have a completely different perspective from someone who is 60 years old, simply because of their life experiences. These diverse perspectives ensure inclusivity of diverse groups when developing products, services or solutions.
- b. **Problem-solving skills:** Having people of different generations and different perspectives work together means you can solve problems uniquely. With their different perspectives, your multigenerational workforce will be able to come up with innovative ways of solving issues. An organization benefits from diverse skills that all generations bring to the table, ensuring problems are considered and addressed from all angles.
- c. **Mentoring programs:** Organizations can create mentoring programs that benefit younger generations from the knowledge and experience of older generations. For example, you can have the more experienced employees' mentor the younger employees new to the company on career development and ways in which they can enhance their careers and skills. For the younger generation, they can help mentor older workers on new trends and technology that they might not have training on.
- d. **Knowledge transfer and retention:** When you have a workforce that comes from multiple generations, you will have people at the end of their careers working alongside people at the beginning of their careers. This creates a vertical exchange of knowledge and skills, going two-way between the younger and older generations.
- e. **Unique relationships:** When people in different age brackets work together, they create special bonds that can often turn into unique friendships. By nurturing professional relationships between employees from different generations, you can contribute to a positive working environment, which can increase job satisfaction.
- f. **Growth:** Accommodating all generations in a workforce creates a dynamic atmosphere that encourages growth.
- g. **Better Reputation:** Having different generations in the workplace creates a good image and reputation for the Company. In this case the Company is not biased in terms of age where they hire Employees from one generation to the exclusion of another.

HARNESSING THE GENERATIONAL DIVERSITY

Josefa Iloilo, said "We need to reach that happy stage of our development when differences and diversity are not seen as sources of division and distrust, but of strength and inspiration." To achieve this reality, one must have a deep understanding of their workforce. This can be achieved through one-on-one meetings and quarterly reviews to learn more about your employees individually.

This knowledge can be applied to get the best from them. Further, Companies can also adopt the following aspects to manage differences in the workplace effectively:

1. Respecting each other boundaries.
2. Fostering Open Communication.
3. Discussing communication options.
4. Being clear about expectations.
5. Encouraging mentoring and learning from the different generations.

As workplaces continue to be dynamic, it calls for cooperation between the various generations of workers in a bid to ensure efficiency in the delivery of work. This also promotes seamless operations within the Company.

Author Profile



Faith Linda is an Office Administrator at the Firm holder of a certificate in Human Resource at from The College of Human Resource Management. Faith assists the Projects team by ensuring that investors receive their documents in good order and they are up to date on their legal fee payments. She also provides support in preparation and execution of legal documents.

HUMAN RESOURCE AND ARTIFICIAL INTELLIGENCE

Integrating Tech in the Workplace

By Lewis Ndonga

Artificial Intelligence and the general tech revolution has created a stir in the day-to-day operations of mankind. Artificial Intelligence (AI) has brought about a new age of task management and operational ease in the continuous running of the workplace. Businesses that have learnt how to properly integrate AI into their operations have significantly benefited from the juggernaut force in the AI. From the provision of services within the organization to administrative tasks, businesses can utilize AI to benefit and grow their sales exponentially.

AI is the simulation of human intelligence operations by software and machines, with the intention of optimizing operations. In this piece, we interrogate how organizations can integrate AI in their daily operations, the benefits and disadvantages of such integration for human resource departments as well other departments.

1. WAYS OF INTEGRATION OF AI FOR HUMAN RESOURCE DEPARTMENTS

As time goes by, the use of AI tools by human resource departments to ease their daily tasks and management is slowly becoming a common occurrence particularly in the developed countries.

AI tools assist with automation of a variety of tasks such as:

- a. **Hiring and recruitment-** A usual recruitment process involves a lot of labour in preparing recruitment advertisements which involves specifying job requirements, qualifications and expertise. The process of recruitment also involves screening of potential candidates, issuing out recruitment tests. Finally, the process ends with conducting interviews of prospective candidates which may occur in various stages. Needless to say, this can be a very engaging, tedious as well as time-consuming process for human resource departments.

AI tools have been developed to allow for certain processes such as job advertisements, screening and even interviews. HR departments would only need to specify the requirements needed for a particular job and the AI tools would prepare a job advertisement to suit the required criteria for the particular job opening. Integration with features such as LinkedIn's Easy Apply helps to screen applicants and identify the applicants who meet the qualifications specified in the advert. While conducting interviews will require human interaction, AI can still be used in initial interviews to determine suitable candidates to move to the next phase of the recruitment process.

- b. **Administrative tasks-** On a regular basis, there are administrative tasks such as invoicing for services, payroll, preparation of accounts and organizing leave schedules that take HR and finance teams countless hours to prepare. These tasks are crucial in any organization and using AI to ease these tasks helps HR departments save a lot of time.

AI tools such as Vic.AI and Indy save accounts team time by managing accounting systems, invoicing and making payments. These AI tools maximize efficiency by ensuring the most output with the least possible human intervention.

- c. **Employee performance evaluation-** Organizations consistently monitor their employees' performance to ensure optimal productivity, a practice that's standard yet can pose significant challenges, particularly for large companies. The task of monitoring and conducting performance reviews is a pivotal responsibility for HR departments, demanding ongoing evaluation of employees over specific timeframes. To streamline the performance review process, innovative AI tools have been developed to categorize assessments based on distinct criteria like leadership abilities, cultural alignment and communication skills. They facilitate self-evaluations, as well as reviews by supervisors, managers, and in some cases, even clients. Leveraging AI systems can pinpoint valuable insights for reviewers and identify precise areas requiring improvement for employees.

This is meant to appraise the performance of employees and determine if there is a need to consider a performance improvement plan to assist the employees in improving their work performance. The integration of AI tools in this context eliminates the necessity for managers to dedicate time to sit down with each employee individually for performance evaluations.

- d. **Training and Development-** Continuous learning is very beneficial to organizations and businesses prefer to have frequent training and development sessions for their employees. Skills attained in such training can be used to improve an employee's output. However, determining the topics and skills that require development is a daunting task for any HR department. This requires an assessment of the skill level of employees and determining the best possible way to improve employee skills and knowledge. It also needs an assessment of the best development platforms or topics to assist employees.

AI tools come in handy in such situations to provide assistance by creating online classes within problematic areas in an organization, allowing for easy and convenient sharing of information within an organization. AI can also allow for employee feedback, specifying what an employee needs improvement on and determining what topics would work to improve the knowledge base of employees. Integration of AI can thus ensure that specific employees get the training they need, giving more personalized learning experience.

- e. **Internal Mobility-** This concept synergizes seamlessly with the AI-driven solutions implemented for processes like recruitment and training. Internal Mobility encompasses the dynamic re-assignment of employees within the organizational framework, encompassing scenarios ranging from promotions to re-allocations of duties. This approach allows for the strategic deployment of personnel onto novel projects and diverse departments, fostering a holistic workforce development strategy.

AI-powered talent solutions are designed to intricately analyze an employee's skill set, proficiency in specific responsibilities, availability, and overall qualifications. By gauging these factors, these solutions ascertain the potential advantages that the organization could accrue from promoting an employee or facilitating a shift in their roles. This automated assessment spares HR departments the effort of manual evaluation and decision-making in these aspects.

2. THE PROS AND CONS OF INTEGRATION OF AI IN THE WORKPLACE

Organizations use AI with the intention of optimizing the operations of the business. While this is usually achieved, there are certain downsides to using AI to optimize operations.

i. Pros of AI

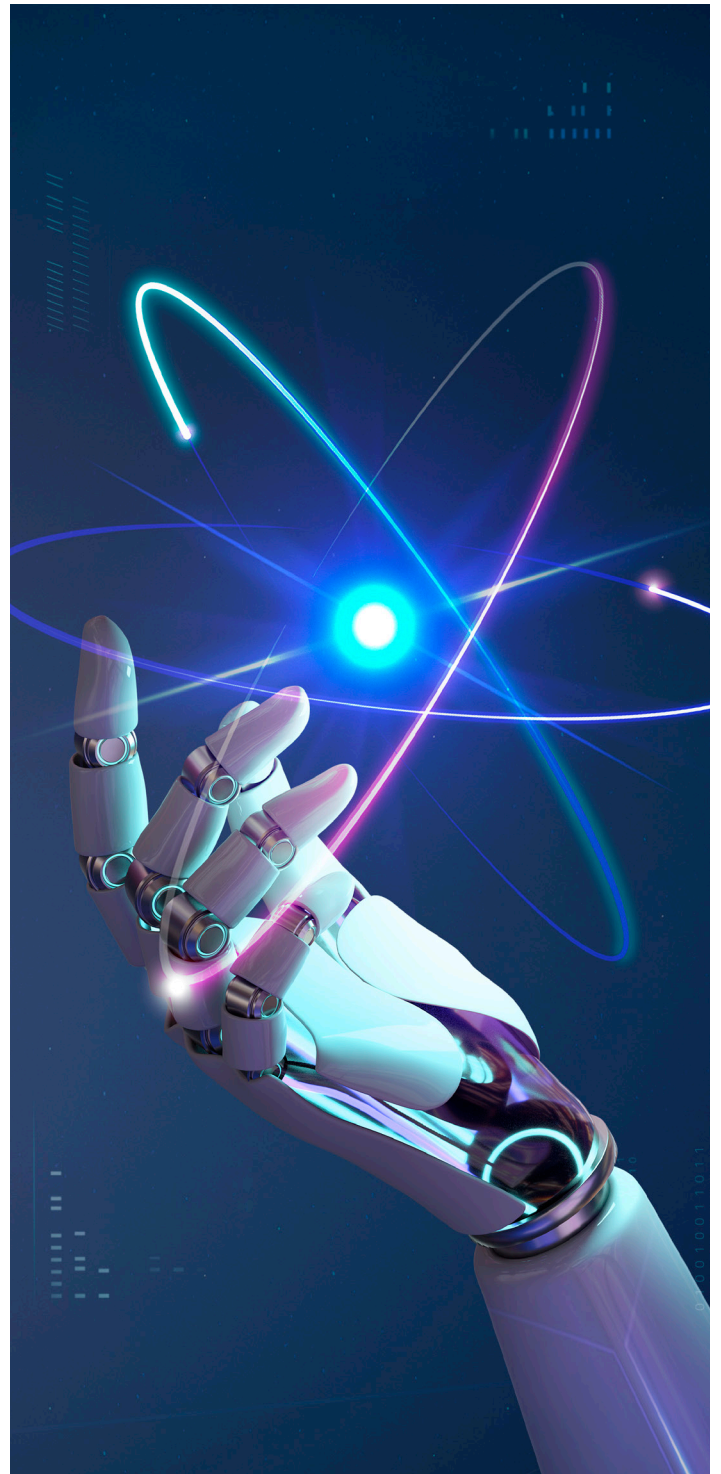
- a. **Efficient** – AI saves HR departments a lot of time by automating processes that would otherwise be done manually. HR personnel can then refocus their energies to tasks that may not be easily automated by AI.
- b. **Reduced human errors** – in exercising their duties, people will inevitably make mistakes – this is human. However, automation by AI greatly reduces the risk of these errors ensuring the most optimum and accurate result at the end.
- c. **Problem solving** – AI relies on learning and acquiring as much information as possible. With access to information on the internet, AI can make use of all information at its disposal to solve complex problems presented to it. What would take an individual an hour to solve a problem can take AI a few seconds to solve.

ii. Cons of AI

- a. **Algorithm Bias** – while AI does reduce human error, it does create a new challenge with errors such as bias in recruitment. As stated earlier, AI relies on the information fed to it by human beings. Any existing biases that organizations may have in their hiring or internal mobility processes will be clear to the AI and the AI may not discern such biases as being errors. Such biases can be avoided by evaluation of data to be an unbiased representation from the source. Testing AI can also go a long way to assist HR departments to determine potential results from the AI.
- b. **Cybersecurity risk** – by integrating AI in systems such as payroll, invoicing and payment systems, organizations run the risk of having their payment systems infiltrated by malicious persons. While existing systems such as banks do have preventive measures against such attacks, smaller organizations may be ill-equipped in handling cybersecurity threats and may find themselves vulnerable. AI tools are now integrating cybersecurity options to ensure they are secure. Organizations can also input internal cybersecurity options within the organization to better secure their operations.
- c. **Unemployment** – the inverse of the efficiency of AI is the potential loss of jobs. The work being done by AI was once being done by people – large HR teams would be involved in combing through information to determine recruitment methods, internal mobility and training. With the advent of AI, such tasks can easily be done by one or two HR personnel. However, AI has created jobs within the AI development, data science and machine learning space, with such jobs being more and more important in organizations.
- d. **Cost**– proper AI talent and HR systems are quite costly to acquire and maintain, depending on whether these are subscription services or custom AI solutions. Organizations will have to part with a pretty penny to get the very best out of AI. However, a case has been made that in the long run, the costs of obtaining and running AI talent solutions save organizations more money per hire than it would if large HR teams were involved in recruitment and onboarding.

3. CONCLUSION

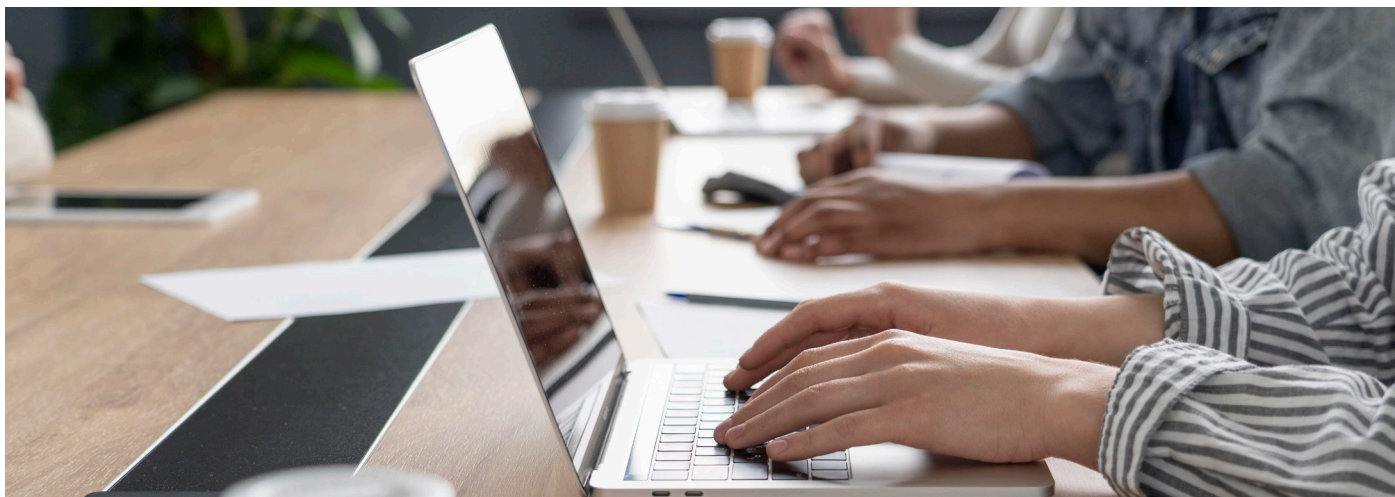
AI tools have changed the rules of the game when it comes to business operations. Organizations now have systems that can make decisions at the tap of a button, while still ensuring to get the best result for the enterprise. While AI may not be used as prevalently in the global South as it is in other developed parts of the world, the perception on AI is evolving rapidly. Organizations that jump on the bandwagon early on reap the benefits of integrating AI tools early. It is also very key for policymakers and legislators to consider policies governing AI and promoting innovation in Kenya and the larger African region to allow for the development of AI that is made for Africa to benefit Africa.



Author Profile



Lewis Ndonga is an Associate at FMC, with particular interest in tech and data protection law. He has advised clients on several matters within this space, including data privacy compliance, tech contracts such as IT services consultancy contracts and non-disclosure, cross-border transfer of data, including the transfer of sensitive personal data and data privacy obligations of international entities based in Kenya. He firmly believes in the use of the law to support technological innovation and lends his talents to advising clients on the same. He has a keen interest in cutting-edge innovations, data privacy, and emerging digital trends such as AI which drives him to stay at the forefront of legal developments. His diverse experience enables him to offer comprehensive counsel to tech companies, startups, and individuals alike, ensuring their interests are protected in an ever-evolving technological landscape.



THE WORK REVOLUTION

Trends and Strategies to Navigate the Future of Kenya's Work Landscape

By Vanessa Mugo

Over the last few years various global changes have fundamentally affected the workplace, presenting challenges to the traditional ways of working. Organizations and Employers continue to find themselves at a crossroads when it comes to Companies, businesses, and organizations have been forced to adapt to advancement in new business concepts to accommodate the said changes. Safe to say, the COVID-19 Pandemic accelerated changes that had already started re-shaping the work environment forcing Employers to action conversations such as digitization of services, remote and hybrid working, distribution in workforces, virtual collaboration, reskilling and upskilling and Employee well-being and resilience.

THE INEVITABLE SHIFT- A CASE STUDY OF TWIGA FOODS KENYA

Business Daily, reported that Twiga Foods -an E-commerce food distribution company in Kenya- has been making critical operation adjustments to improve its capacity for service delivery. These decisions consider the escalating cost of raising capital given the current business climate and the declining purchasing power of its customers.

In June this year, Twiga replaced its internal sales crew with independent contractors. The company has also done away with in-house delivery, which was supported by leased trucks, and in its place hired contractors on a per-use basis. It has also shut down 10 distribution centers in Nairobi and moved all operations to a modern 200,000-square-foot warehouse it opened officially last year. Finally, Twiga launched the 'Soko Yetu' platform, which enables vendors to buy from a list of suppliers, and 'Twiga Fresh', its flagship fresh-produce venture that seeks to solve traceability challenges, stock outs and price volatility. While these two platforms rendered salespeople redundant, they also presented opportunity for skilled tech support people to run them.

In an interview with TechCabal, Twiga's CEO addressed the operational restructuring. He explained that to ensure their organizational structure is fit for purpose, Twiga has been examining its operational model and costs to implement a lean, agile, and cost-effective organizational structure by implementing many interventions to adopt and sustain the business during trying economic times. Safe to say, in the quest to seek cost-saving opportunities, this shift will affect the work conditions, workers and quality of service and only those equipped with modern skills will survive the cut. The future presents a lot of opportunities but staying competitive and keeping up with changes in the workplace shall be more challenging than ever before and it will be more difficult for Employees with old talent to find qualified talent to fill critical job roles. What, then, can Employees and Employers do to better prepare for the inevitable shift in work?

THE DISRUPTION AND EMERGENCE OF NEW TRENDS

- a. **Reskilling and upskilling-** The World Economic Forum in 2021 tabled a report whose statistics forewarned that over half of all Employees worldwide will need to reskill or upskill by 2025. Upskilling refers to providing education and training to a person (usually an Employee) to improve their existing working skills and to further advance them to achieve better work output. Re-skilling, on the other hand, refers to providing training to help an Employee move into a different job at work altogether or to pursue a different career path.

Over the last decade the need for reskilling and upskilling at work is becoming increasingly evident. This is made so by the acute talent shortage worldwide amid development in technology. Six out of ten workers will need to reskill in the next five years, with technology literacy being the third fastest increasing core skill, according to the World Economic Forum's future of work report 2023. Having a firm knowledge of digital tools and technology is no longer a perk, whether you work in marketing, finance, or even housekeeping-it is slowly growing to be a requirement. Industry experts have therefore identified this trend as crucial in redeveloping and retooling the workforce.

Reskilling and upskilling beats talent shortage while avoiding future work disruptions. Employers will need to recognize the importance of creating a viable talent pool at their workplaces. As addressed severally, technological advances such as artificial intelligence (AI) continue to replace some jobs while creating new Employees. It is therefore to Employers' advantage to upskill to keep up with technology advancement or reskill their Employees into new roles to harness new opportunities. Reskilling and upskilling also attracts talent to the workplace. Most candidates in the future will be more open to working with and for organizations that commit to developing and supporting them.

To navigate this trend, it would be advisable for Employers to consider incorporating skills development into their corporate strategy. Upskilling and reskilling will therefore be crucial to developing a flexible workforce that can quickly adjust to both present and future needs. Companies that do not move rapidly risk falling behind.

- b. **The rise of remote and hybrid work-** Remote working involves working from one's home or another space other than the office. A hybrid work arrangement entails a combination of working from home and from the office. The advancement of digital communication, collaboration platforms and digital reality platforms have made room for and created the opportunity for team distribution allowing for both remote and hybrid working models. Such online collaboration platforms include Zoom, Trello, Google Workplace, Microsoft 365, Hive, Slack, Miro and Asana.

Remote and hybrid working has proven to increase Employee productivity because of the array of benefits it comes with including the freedom of Employees to choose the working methods that are most productive for them. Statistics have shown that Employees feel that their hybrid work environments increase their personal happiness and productivity. Along with these benefits include a better work-life balance, more effective use of time, control over working hours and location and prevention of burnout.

Even with the numerous benefits, hybrid and remote models of work present several challenges that Employers must consider before embarking on a tweaked framework. First, aligning Employer-Employee expectations at work is a big challenge. Essentially, there is the risk of performance and productivity being subjective to and influenced by individual preferences. Further, there is the risk of lower Employee engagement that might significantly affect the teamwork aspect of work and/or demand the need for new skills and behaviors within the work force.

Companies must use both internal and external resources to address these issues. While searching beyond the organization for best practices and larger trends, it is crucial to collaborate with teams inside and outside of it. The development, implementation, and adoption of hybrid work methods can benefit greatly from the expertise of consultants with experience in workplace planning and change management. Finally, in order to better grasp how to exploit technology and anticipated job trends, it may be necessary to seek outside assistance from all types of consultants and vendors.

- c. **Employee wellbeing and resilience** - Future workplaces will place a greater emphasis on holistic Employee wellbeing. This includes their physical, mental, psycho-social and financial wellness. Employers could achieve this by offering flexible work schedules, and providing a safe, ergonomic, and healthy work environment. This newfound emphasis on well-being will be essential in building a culture of health at work, attracting and retaining talent, as well as maintaining a productive and engaged workforce especially given the recent statistics by the American Psychological Association that have linked Employee well-being to higher job satisfaction and productivity. To that end, Employers continue to recognize the importance of allocating budgets to their Employees' wellbeing as an investment to ensure sustainable outcomes and maintaining a resilient workforce.

A survey done by Samawati Wellness Kenya between November 2022 to January 2023 explored wellness avenues available to organizations in Kenya in order of priority as:

1. Physical wellbeing benefits- including regular team building, nutritional counselling and gym and sports club membership.
2. Financial wellbeing benefits- including savings and retirement plans and financial classes.
3. Psychosocial wellbeing benefits- including company therapists, toll-free counselling services and 24-hour coaching support.

Like other trends, navigating Employee wellness and resilience comes with challenges, key being tailoring benefits offered by the Employers to personal needs and preferences of each Employee. Ideally, different Employees might have divergent needs depending on their financial, social and health positions. Coming up with benefits that cut across these divergent needs is a question of concern among Employers and that can only be addressed by in-house assessment of their Employees. Employers will also have to be vigilant in keeping track of benefits uptake and consumption.

The future of work has immense opportunities for improving Employee wellbeing and navigating complexities that come with it requires expertise and guidance from wellness consultants. Consultants tailor wellness strategies, program development and implementation support that empower organizations to create sustainable and impactful wellness programs that meet the needs of their workforce. Internally, Employers will be required to develop policies at work that align with industry best practices and leverage technology to enhance Employee engagement and participation in wellness initiatives.

Technology advancements, flexible work schedules, and a stronger focus on work-life integration are all intriguing possibilities for the future workplace. Organizations must evolve in response to these shifts to make sure their personnel flourish in a positive, healthy and supportive work environment.

FACTORS TO CONSIDER IN FUTURE-PROOFING THE WORKPLACE

Even so, every business is tailored uniquely. Therefore, every business will action the future of work differently. The following constant factors can be used by Employers to provide holistic understanding of the forces shaping the future of their work;

1. The nature of work-Every business deals with a particular niche of services. It is therefore important for Employers to consider the impact of future advancement on how they conduct their work and how to then curtail it to benefit them. For example, an analysis of what type of work can for instance be automated or digitized informs decisions on which Employees can work from home and who should work less hours for their well-being depending on their work output.
2. Workforce-This looks at the Employees in work as the most important assets of the business. As the future of work advances, it is vital that Employees be able to adapt and sharpen their skills. The question of who can do the work is key at this point and progressively, Employers will continue to leverage the continuum of talent and skills.
3. Workplace- Finally, this factor addresses the environment that the work is being done in. Traditionally, this would involve the quality of the buildings and their environs etc. The future demands that we look at the working environment holistically- is it a healthy space to work in? Given that studies show that Employees' comfort and wellbeing (mental as well as physical) directly impact their work output, it would also be important to consider the working relationships between the workers and as much as fostering professionalism, also address openness, good communication, respect for diversity and safety at the workplace. It also involves creating easier ways to work including digitization of services where applicable and the use of technology to make work easier and more efficient for the workforce.

TIPS ON NAVIGATING THE DISRUPTION

- a. **Investment in technological advancement-** Slowly, AI and robots continue to replace the human workforce due to effectiveness. Companies should invest in technology to stand being competitive in 2023 and the years to come. Employees have to stay abreast with emerging technologies and trends, including being comfortable with different software. A better understanding of these developments makes one more prepared and qualified for future jobs in different roles.



- b. **Learning new skills and development of soft skills** – These abilities will not only help you remain competitive in your present industry, but they will also help you get ready for any upcoming changes in jobs or industries. In the future of work, soft skills like empathy, communication, and problem-solving aptitude will be even more crucial.
- c. **Analyzing skill gaps in the workforce** – this helps Employers to offer reskilling and upskilling opportunities. As an Employer, seek to find out whether abilities are lacking or will be necessary in the future by doing a skill gap analysis. Train and reskill your personnel going forward. Use resource management software to track your workforce's current skills and interests to ensure that you are providing reskilling depending on Employees' interests.
- d. **Promoting outcome-based management and self-managed teams** – Small cross-functional teams can manage their work more effectively because to this. Not only is it more human (i.e puts people first), but it also works better since it places greater faith in workers to deliver results. According to Harvard Business Review, among other advantages, Employees at high-trust organizations have benefits such as 50% higher productivity, 74% less stress, and 76% more engagement than those at low-trust organizations.

The workplace is changing at a fast rate globally, and Kenya is not immune to this transformation. Kenya's workplace is complicated and dynamic. Despite the difficulties, there are still chances for development and creativity that Employees and workers can employ to better position themselves as leaders in the new workplace and assuring a prosperous future.

Author Profile



Vanessa Mugo is a Paralegal at the firm with interest in employment and labor relations matters. Her other interests include dispute resolution, commercial transactions and tech and data privacy law. She is also passionate about research work and coming up with modern and informed solutions to legal questions and disputes, curated to serve Clients' interests. She considers research and writing an extension of service to the general public by better informing them of current affairs that affect their day to day lives in a legal way or otherwise.

TACKLING SEXUAL HARASSMENT BY FOSTERING RESPECTFUL WORKPLACES THROUGH DIVERSITY, EQUITY, AND INCLUSION

By Paula Kilusi & Fidel Mwaki

In today's ever-evolving work landscape, the call for fostering respectful workplaces resonates louder than ever before. Beyond merely being a moral imperative, it has become a strategic necessity for organizations looking to thrive in a diverse and dynamic world.

A major impediment to the promotion of respect within working environments concerns sexual harassment of employees. Such behaviour, which encompasses various forms of unwelcome conduct, poses significant challenges to the pursuit of respectful workplaces, and can erode the very fabric of proper and decent relations within an organization.

Nonetheless, there's more to this challenge than meets the eye.

The Spectrum of Sexual Harassment in the Workplace

Within the workplace, sexual harassment is often-times a complex web of behaviour that can range from the overt and explicit to the subtle and insidious.

Consider the various manifestations it can take:

1. **Overt and Subtle:** It can often lurk in subtle gestures, comments, or behaviours that erode an individual's self-esteem over time, while more overt forms include explicit advances and blatant verbal abuse, subtle forms manifest as microaggressions and exclusion, perpetuating inequality, and discomfort.
2. **Verbal:** Derogatory comments and offensive jokes can be commonplace in a hostile workplace. These verbal attacks, sometimes disguised as harmless banter, can have a profound impact on an individual's dignity and well-being.
3. **Physical:** Unwanted physical contact, no matter how seemingly innocuous, creates fear and discomfort, affecting not only the victim but also any witnesses to such behaviour.
4. **Psychological:** Emotional abuse through manipulation, intimidation, or constant belittling can cause severe psychological distress, contributing to anxiety, depression, and even post-traumatic stress.
5. **Online:** In the digital age, online harassment through email and messaging apps has become an easy route for perpetrators to take advantage of victims. Cyberbullying and explicit content or communication can blur the lines between personal and professional lives, creating new challenges for individuals and organizations.

Addressing these diverse forms of sexual harassment requires not only heightened awareness of how they can occur but a commitment to fostering a culture of respect and inclusivity. It is crucial to recognize that sexual harassment is not limited to sexual harassment alone; it encompasses a wide array of behaviours that can undermine the well-being and productivity of employees

THE IMPACT OF SEXUAL HARASSMENT IN THE WORKPLACE

Sexual harassment, in all its forms, exerts a profound and lasting impact on affected individuals and organizations. It extends far beyond the immediate moment, leaving lasting scars on both mental and emotional well-being of workers. To comprehend the urgency of addressing this issue, we must consider its pervasive consequences.



1. The toll on an individual's mental and emotional health cannot be overstated. Constant exposure to sexual harassment, whether verbal, physical, or psychological, leads to heightened stress, anxiety, and even depression. The fear of going to work and encountering this form of harassment can become a daily burden, eroding one's sense of security and sense of worth and often leaving them helpless and at the mercy of perpetrators.
2. Sexual harassment can severely hinder an individual's career progression. Victims may find themselves avoiding opportunities for advancement, fearing that drawing attention through their skills which are undervalued may attract further cause for such behaviour. This not only limits their professional growth but also robs organizations of valuable talent and resources.
3. Sexual harassment can strain interpersonal relationships both within and outside the organization. Victims may withdraw socially, isolating themselves from colleagues, friends, and family members while trust and cohesion can be eroded among employees, hindering teamwork and productivity. This isolation can further exacerbate their emotional distress.
4. Equally important, sexual harassment can shatter the dreams and aspirations of individuals. When subjected to a hostile work environment that fails to discourage such behaviour, one's belief in their potential wanes, and their ambitions may wither away. Organizations that fail to address sexual harassment cases risk stifling the creativity and innovation that arise from a potentially motivated workforce.

Considering these far-reaching effects, it is evident that effectively and consistently addressing sexual harassment is not merely an ethical concern; it is a strategic imperative for organizations. Failure to do so will not only jeopardize the well-being of employees but also threatens an organization's ability to attract and retain top talent over a long-term.

DIVERSITY, EQUITY, AND INCLUSION (DEI) AS A ROUTE TO CREATING SAFE WORKSPACES

Consider a scenario where individuals are valued for their unique contributions, irrespective of their background. In such an environment, those who might have been prone to sexual harassment of others are discouraged and face accountability.

DEI can serve as an integral component of a workplace's social fabric. Individually, they can be defined and appreciated along the following lines:

1. **Diversity:** this goes beyond a mere representation of differences. It encompasses a myriad of aspects, including race, gender, age, religion, sexual orientation, ethnicity, nationality, socioeconomic status, language, disability, and more. In essence, it is a celebration of individual uniqueness and the richness it brings to an organization.
2. **Equity:** This is the cornerstone of a just workplace. It ensures fairness in all aspects, from hiring practices to resource allocation and opportunities for growth. It is a commitment to impartiality and justice, striving to remove systemic biases that may hinder certain groups.
3. **Inclusion:** This is about creating an environment where every individual feels welcomed and valued. It is not just about diversity representation; It is about actively engaging with diverse perspectives and voices. Inclusive workplaces foster a sense of belonging where everyone has an equal opportunity to contribute and thrive.

DEI, when effectively ingrained in an organization's culture, can play a pivotal role in mitigating sexual harassment. By acknowledging and respecting diverse backgrounds and perspectives, DEI helps management and employees reduce the likelihood of harassment, favouritism, and discrimination on grounds of a person's gender. It promotes a culture of respect and equality, making it harder for such incidences to take root and fester to the detriment of the team's morale.

Addressing sexual harassment effectively requires understanding and dismantling the barriers that discourage individuals from reporting incidents. In this section, we delve into the power of DEI in breaking down these barriers.

- a. DEI fosters an environment where such behaviours are recognized and condemned. By promoting transparency and accountability, DEI policies assure victims that they can come forward without fear.
- b. DEI initiatives challenge norms by actively listening to victims and providing them with a supportive platform. By doing so, DEI not only encourages reporting but also shifts the blame from the victim to the perpetrator. Furthermore, reporting harassment takes an emotional toll on victims, often leading to anxiety, depression, and post-traumatic stress. The burden of proof and uncertainty about the outcome intensify this toll.
- c. DEI policies ensure that victims receive the necessary support, making the reporting process less daunting. Moreover, by fostering a culture of empathy and understanding, DEI helps reduce the psychological impact of reporting.

Imagine a workplace where DEI is not just a policy but a way of life. In such an environment, microaggressions are swiftly addressed, victims are supported without judgment, and the emotional toll of reporting is significantly reduced. By dismantling these barriers, DEI empowers individuals to come forward and contribute to a harassment-free workplace.

LEGAL PROTECTIONS AND THE IMPERATIVE OF WORKPLACE POLICIES

Imagine a workplace where employees not only know their rights but also have the assurance that their organization takes harassment seriously, regardless of its form. Workplace policies addressing diverse aspects of harassment can act as a shield against discrimination and mistreatment. They set clear expectations for behaviour and consequences for violations, creating a safer, more equitable work environment.

While Kenya's legal framework explicitly addresses sexual harassment, it is essential to recognize that sexual harassment encompasses a broader spectrum. Kenyan laws may not comprehensively cover all facets of sexual harassment, but this should not deter organizations from creating their own policies. These policies play a crucial role in ensuring that employees are protected from all forms of harassment, fostering an environment of equality, respect, and inclusion.

In this context, employers and human resource managers should actively collaborate to draft and implement comprehensive anti-bullying and anti-harassment policies that also specifically address sexual harassment. These policies should encompass equal employment opportunities, codes of conduct promoting civility and respect, mechanisms for reporting harassment, and protection measures for whistleblowers.

FOSTERING A CULTURE OF RESPECT AND INCLUSION

Finally, leaders play a central role in shaping workplace culture. They must lead by example, showcasing their unwavering commitment to a safe and inclusive environment, which they can do in several ways:

1. Establishing forums for open dialogue, such as regular meetings and feedback sessions, encourages employees to voice concerns, seek support, and collaboratively devise solutions.
2. Embracing differences and harnessing them for collective growth.
3. Implementing policies against sexual harassment that hold every member of the organization accountable for their behaviour.
4. Safeguarding whistleblowers and encouraging reporting and a secure environment for those who muster the courage to speak out which ensures that cases of sexual harassment is exposed and addressed with diligence.

FORGING A PATH TO RESPECTFUL WORKPLACES

Our journey through the multifaceted landscape of sexual harassment underscores the urgency of proactive measures. From comprehending the diverse manifestations of such behaviour to ensuring legal compliance and nurturing a culture founded on respect and inclusion, every step contributes to the larger mission.

The imperative is clear – Act today to create the respectful workplaces for today and tomorrow.

Author Profiles



Paula Kilusi is a dedicated and passionate fourth-year law student at the esteemed University of Nairobi. With a strong focus on alternative dispute resolution (ADR), Paula has showcased exceptional skills and performance in ADR moots. As the current president of the Young Arbiters Society UoN Chapter, she actively advocates for ADR and fosters a community of aspiring arbitrators. Additionally, Paula serves as an associate editor for the prestigious University of Nairobi Law Journal and is an esteemed member of Women in ADR. Her remarkable qualities of eloquence, elegance, and excellence define her commitment to the field.



Fidel Mwaki is the Managing Partner at FMC Advocates and a member of the Firm's Employment Group where he primarily supports corporate and individual clients on commercial aspects of labour law practice including advising on structuring of HR policies and guidelines, terms of employment contracts at junior, senior and executive levels, staff retention, performance and disciplinary measures, legality of non-compete and non-solicitation restrictions, management of personal data, confidential information and trade secrets and resolution of disputes in termination claims. He has a strong belief in the role that a positive work ethic, collaborative team spirit and supportive leadership can play in ensuring safe, productive, and sustainable workplaces.

STRENGTHENING WORKPLACE RELATIONSHIPS THROUGH EFFECTIVE COMMUNICATION STRATEGIES

By Kaseyi Faith

Globally, effective communication within the workplace is a critical tool for promoting integration among various departments of organizations. Communication is the foundation of any working relationship and depending on how it is applied, can either boost or degrade an Employee's morale to work, their productivity and job satisfaction. It is also a crucial consideration for better team collaboration and co-operation and helps drive better results for individuals and teams.

CHALLENGES WHEN COMMUNICATING AMONG TEAMS

Consider this scenario – One morning, XYZ Company's senior staff were called in for a meeting and the topic for discussion touched on a hiring consideration for the Company. There was a sensitive and emotive issue among the staff regarding whether the Company should consider hiring a lady who was an expectant mother. This conundrum led to some heated arguments which painted an interesting picture of the challenges between teams when it comes to communication.

Some of the challenges that arose from such a meeting include the following:

1. Attitude – staff members may have a negative or indifferent attitude towards others regarding the topic for discussion.
2. Lack of Decorum – The team could not realize they were in a meeting, and everyone was so hell-bent on being the loudest voice in a need to making a point, thus making it difficult to continue with the discussion.
3. Lack of common values – There appeared to be limited or no common values between the members of the teams. Some staff wanted the hire to happen, while others were against it.
4. Making Assumptions – The topic brought out hard feelings amongst the team, and everyone lost the motivation for the meeting while assuming the decision would be made by the team's leader.
5. Failure to Listen – The team members were not listening to each other's opinion since everyone was only interested in getting their point across and this led them not to understand alternative viewpoints that were being discussed.
6. Body Language – The sitting posture, facial expressions and hand gestures of different staff members showed that whatever is being said by the staff and whatever is being shown are two different things. Body language always tells the true intentions and feelings of someone.

SOLUTIONS ADDRESSING THE CHALLENGES TO EFFECTIVE COMMUNICATION

For teams, it is important that workplaces have the right culture to enhance effective communication. While this can be implemented through human resource policies, each team members should also actively adopt initiatives aimed at ensuring they communicate well with their colleagues. Below are some solutions that could be used to address the above challenges.

- a. Being Respectful – It is important to be respectful and considerate even if you do not agree with your colleague's perspective.
- b. Positive Body Language and Tone – Use the correct tone while addressing people and adopt body language that can impress someone while in a conversation.
- c. Promote Open Communication – This ensures that everyone has a chance to share their opinions, ideas, complaints, questions, and feedback. At this point you will be able to understand everyone's perspectives.
- d. Get to Know your Team – Spend time talking with your colleagues and get to know an idea of their interests and preferences. Know what will make them happy.
- e. Understand the Best Approach to Connect with Others – Recognize how your colleagues prefer to communicate, e.g., whether it is by email, text message, phone call or face to face conversation and respond accordingly. Always know the best time for communicating information with them.
- f. Practice Active Listening – People respond better to those who truly listen to what they have to say, and we all want to be heard for the reason of knowing somebody values our opinion. Actively listening to what your co-workers have to say and responding respectfully helps you understand problems and collaborate better to find solutions. This makes others feel heard and emotionally supported.
- g. Ask Questions – Asking questions is a good way to engage with people, either direct business-like questions or open questions that will allow them to discuss, be creative and explore.
- h. Support others – Support your co-workers when they need help. This could include volunteering to execute a simple assignment or helping to decide on whom to hire at what time when you are really in need of an Employee.
- i. Take Responsibility – When you make a mistake admit it and hold yourself accountable. Never blame anyone for your mistakes.
- j. Be positive – Focus on being positive. Positiveness is contagious and people gravitate to those that make them feel good.
- k. Avoid Gossiping – Office gossip can ruin workplace relationships. If you are experiencing conflict with someone in your team, talk to them directly about the problem. Gossiping with other colleagues will only worsen the situation, accelerating mistrust and animosity.

Communication is a great deal for any organization and without communication, any attempt to work out challenging problems and come to a mutual agreement will fall apart. Also, without effective communication the workflow will be affected as staff members will not be able to complete a given task.

Author Profile



Kaseyi Faith is a legal secretary at the firm. She plays a vital role within the legal team where she supports in drafting of legal documentation, project management and client management and appraisal. She has an eye for detail and has mastered the art of juggling complex legal matters. Beyond her remarkable skills, Faith is known for her warm and approachable demeanor.

WHO OWNS THE CREATIONS OF THE MIND? MAXIMIZING AND SECURING INTELLECTUAL PROPERTY CREATED IN EMPLOYMENT RELATIONSHIPS

By Alfred Nyaga

Undoubtedly, intellectual property (IP) is an asset for any business as it creates a competitive edge for the business in the market economy. As such, it is very crucial for organizations to harness the potential in intellectual property by promoting and protecting it. It is noteworthy that IP subsists in all creations of the mind including artistic works, literary works, musical works, dramatic work, sound recordings, broadcasts, inventions, symbols, images, names, logos, processes, designs, products, confidential information among others. Therefore, creations of the mind which amount to IP require protection from any form of infringement by unauthorized third parties. The law which covers the protection of IP includes copyright, patents, trademarks, industrial designs and trade secrets.

OWNERSHIP OF IP CREATED BY EMPLOYEES

During employment, Employees may create documents, ideas, marks, designs, processes, products or inventions that are protected as IP rights. To maximize and harness this potential, many Employers try to ensure that these IP rights will be owned and vested within their Company. This is because the owner of the IP is granted exclusive right to use it and to prohibit third parties from using it without any express authorization. Therefore, the critical question of who owns the IP often comes up for discussion once the employment contract between the Employer and Employee is terminated. This is especially so if the Employee starts using the IP for their own benefit or for the benefit of a new Employer.

The ownership of IP raises very serious concerns and controversies among Employers and Employees. Generally, the Employer will own and retain the IP created by its Employees in the course of their employment and in most cases, this is expressly stated in the employment contract. This is meant to avoid any potential dispute concerning whether works created during employment or outside the scope of employment. Notably, for the IP to accrue to the Employer, they must have directed the Employee's activities that lead to the creation of the IP.

To this end, it is worth noting that any IP created in the course of employment can only be owned by an Employer if the Employee created the IP while they were performing their duties and not outside the scope of their duties. For instance, intellectual property in the form of software developed by a Software Developer in execution of their duties are owned by the Employer.

The Copyright Act under section 31 automatically assigns authorship to Employers rather than Employee, Creators or Inventors in two specific situations that is:

- i. where an Employee develops the work within the scope of their employment under a contract of service; and
- ii. when the Employer specifically commissions the work done by the Employee.

In the above stated situations, the copyright vests in the Employer as the initial author of the work in question.

Furthermore, section 32 of the Industrial Property Act No. 3 of 2001 states that in the absence of contractual provisions to the contrary, the right to a patent for an invention made in execution of a commission or of an employment contract shall belong to the person having commissioned the work or to the Employer. This means that any patent created by the Employee in the course of their employment or commissioned by the Employer belongs to the said Employer as the initial owner.

Therefore, for IP to vest in the Employer as the first owner, the creator must be an Employee engaged under a contract of service and the work must have been created during the course of that employment.

EXCEPTIONS TO THE FIRST OWNERSHIP RULE OF IP CREATED IN EMPLOYMENT RELATIONSHIPS

The exceptions to the first ownership rule of IP are as follows:

1. Moral rights of authorship – IP, more specifically copyright, gives rise to moral and economic rights. The moral rights of an author protect both the work and the creator and arise due to the perception that the work is the “body and soul” of the author requiring protection from any form of infringement. On the other hand, economic rights permit the authors to derive financial reward or commercial gain from the use of their works by others. Unless otherwise explicitly stated in contracts of employment, Employees will retain the moral right over any literary, dramatic, musical or artistic/ cinematographic, broadcasts and recording works created in the course of their employment. This means they have paternity rights to claim authorship of the works, the right to object to any adaptations, editing, distortions of their work and right to attribution from third parties who use the work. However, the Employees have no economic rights over the IP created in the course of their employment. If an Employer wants to obtain moral rights of authorship in the IP created by the Employee, they must state this clearly in employment contracts. The Employer should set out in the employment contract there is automatic exhaustion of the Employee's moral rights in the IP they create during their employment. Further, the Employer may consider issuing waiver's to Employee which ensure that Employee's waive their moral rights over the IP created in the course of employment.
2. Outstanding benefit to the Employer– If the IP created by an Employee in the course of their employment is exceptionally outstanding and highly beneficial to the Employer, then the Employer is mandated to equitably remunerate the said Employee for the creations of their mind. To pass this test of “outstanding benefit,” the work must be significantly useful to the Employer. For instance, the Employee may create an invention that is commercially beneficial and generates significant returns to the Employer. In such kind of a scenario, the Employer is obligated to compensate or remunerate the Employee for their creations.
3. The work was created outside the scope of employment– In a case where the IP is created outside the course of employment, an Employer cannot claim the IP rights over the creation. For example, if an Employee is hired as an accountant by an organization, and they come up with formulas to solve some accounting problems outside the scope of their employment then that IP belongs to them and not the Employer. However, if the Employee's creations are made using the Employer's tools, technical know-how, processes, and other equipment belonging to the Employer then the Employee cannot claim ownership of that IP.

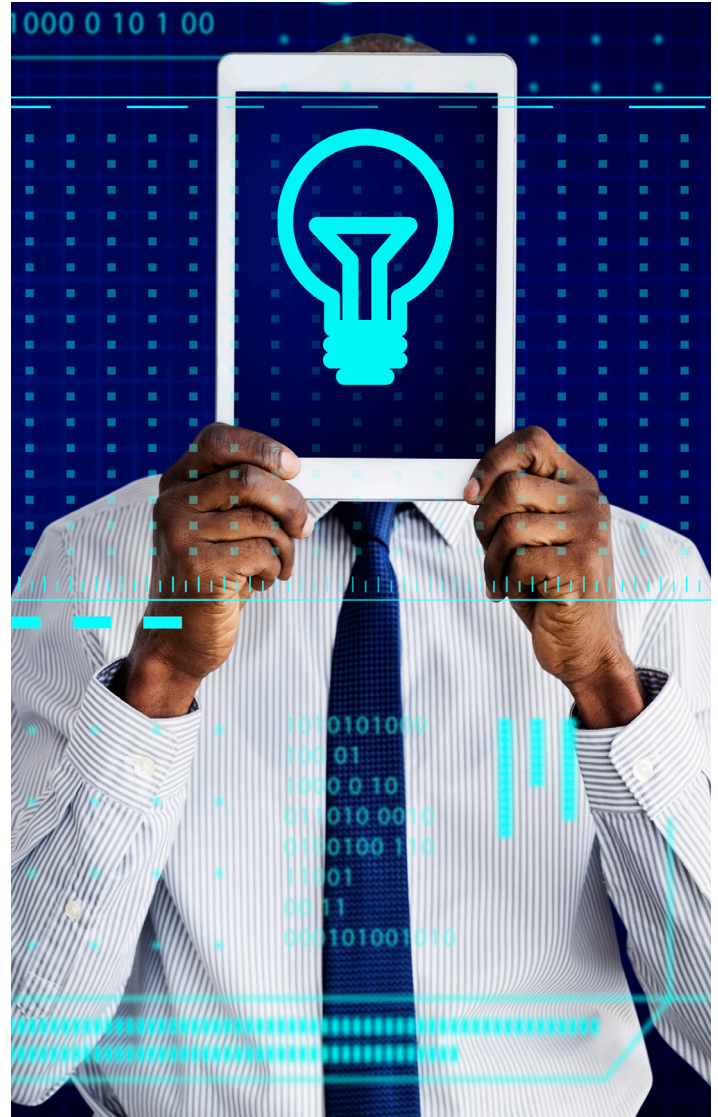
If the Employer wants to tap the benefits of the IP created and owned by Employees, the Employer can enter into arrangements with the Employees. These arrangements can be through a License Agreement where the Employer is granted the license over the IP or a Deed of Assignment where the Employee transfers their moral and economic rights to the Employer.

HOW TO SECURE IP RIGHTS IN EMPLOYMENT RELATIONSHIPS

Employers aiming protect IP created in the course of employment including limiting disclosure of such IP after termination of employment should consider putting in place the following measures:

1. HR Manuals –Employers are encouraged to ensure that they craft their Human Resource Manual (HR Manual) in a way that provides clarity on what is IP and protects the same. The HR Manual should outline:
 - i. *what is IP, which rights attach to IP and who owns the IP during the subsistence of the employment;*
 - ii. *a confidentiality clause limiting the disclosure of confidential information which amounts to trade secrets to unauthorized third parties without the consent of the Employer; and*
 - iii. *a non-compete clause which restricts the Employee from working with a competitor for a reasonable period after leaving employment.*
2. Non-Disclosure Agreements (NDAs) – NDAs may be operative for the lifetime of the Employee and seek to ensure that Employees do not disclose to third parties any confidential information such as trade secrets obtained during their employment. As such, organizations should ensure that they have in place NDAs with employees who are privy to sensitive information. .
3. Contracts of employment – Any IP created by an Employee in the course of their employment generally belongs to the Employer, however this can easily be a gray area which raise a lot of concerns and controversies if not expressly stated. As such, it is necessary for businesses to ensure there are robust provisions in Employee's contracts of employment that directly address ownership of IP rights. The contracts should also make it clear that the IP provisions survive the employment relationship.

IP in employment is a dynamic and multifaceted area of concern in many organizations. If well utilized and maximized, it can be the driving force for businesses and can be used to identify and create a niche in the market. As such, both Employers and Employees must carefully navigate the complex web of legal, ethical, moral, technical and practical considerations of IP which arise for IP created by Employees in the course of employment.



Author Profile



Alfred Nyaga is a detail-oriented Paralegal based in Kenya with a budding interest in IP and Employment Law. His passion for legal research makes him stay up to date on the latest developments in the two areas of law. Alfred's expertise extends to assisting legal teams in IP and employment matters by providing clients with detailed legal opinions on the protection of their IP rights, undertaking registration of Trademarks for clients at the Kenya Industrial Property Institute (KIPI), advising clients seeking to commercially exploit their IP rights on the necessary contractual documents and providing advice to clients on how to effectively maximize and harness the potential created by IP in workplaces.

CAN AN ORGANIZATION PREVENT AN EMPLOYEE FROM FALLING FROM GRACE? HANDLING EMPLOYEE'S WORK-RELATED ISSUES, REAL-TIME FEEDBACK AND PERFORMANCE MANAGEMENT

By Anne Mumbi

They say no man is an island and for any organization to thrive, all employees must pull their weight at the workplace and bring their "A" game.

Poor performance by one employee or an entire team can lead to the downfall of an organization.

As an organization, it is important to manage and improve poor performance of employees through the right systems and procedures. Issuing a warning letter or firing an employee for poor performance does not cut it when an employer is trying to improve the workplace culture. An organization can gauge its employee's performance by checking how they complete their tasks so that they do their job efficiently and effectively.

WHY IS IT IMPORTANT TO MANAGE POOR PERFORMANCE?

Managing the poor performance of an employee will be seen when the organization reaps the benefits after the full potential of its employees is achieved. It is the duty of both the employee and employer to make the office environment a positive and productive one. Some of the benefits of an organization knowing how to deal with poor performance of its employees are:

- *Improves communication and trust*

Working in an organization where employees do not communicate or trust each other will translate into an employee being fearful in seeking assistance from the team when they are stuck at work which can lead to the employee performing poorly.

When you have a colleague who can help manage the poor performance of a team member, it shows the team member that they can trust their workmate and easily approach them if they are struggling at work. When other employees see how a colleague has managed a case of poor performance by being humane and not demeaning them, it makes them feel more comfortable in asking for help which fosters a collaborative team dynamic, rather than a combative or adversary one. This in turn helps boost the sales or productivity of the organization.

- *Helps the team understand what is expected of them*

More often than not during inductions, a human resource manager or supervisor will communicate to a new employee what their job description will be.

During the course of employment, where a supervisor notices that an employee's poor performance is due to lack of understanding of their job description then it is the obligation of the supervisor to help the employee improve the poor performance in a fair manner. An organization that is successful at managing an employee's poor performance, encourages other employees to do their job well. It gives them a better understanding on the expectations that the employer has for their performance.

- *Improves the team's productivity and effectiveness*

An employer who has mastered the art of managing poor performance will notice how that has positively impacted on the team's overall productivity and standard of services being delivered to clients and this can be witnessed through client feedback.

If clients give negative feedback about an organization, and an employer investigates the reason, often the reason is because the employee lacks the motivation to perform well since there may be lack of communication as to how the employer expects them to perform thus leading to negative client experiences. Organizations with an open-door policy are more likely to succeed since their employees can seek advice in producing solutions that will help better performance of the team and the delivery of services to clients.

HOW CAN AN ORGANIZATION MEASURE ITS EMPLOYEE'S PERFORMANCE?

It is paramount for an organization to measure how their employees are performing at work. This helps the organization evaluate if an employee's contribution is aligned to the organization's mission and vision. It allows the organization to track progress and identify areas for improvement.

Measuring employee performance can be measured by the following ways:

Having a Human Resource Manual

The purpose of a Human Resource Manual (HR Manual) is to establish policies and practices that govern the relationship between the employer and the employees and for the employees to know the "ins and outs" of the organization. The HR Manual can be used to measure good performance against poor performance as it highlights the principles and rules which govern the administration of employees and defines the expected quality of work from employees. The HR Manual provides the terms and conditions of an organization which helps maintain a workforce best suited to accomplish its mission and objectives effectively and efficiently.

Having a performance appraisal

Conducting performance appraisal meetings at least once a year is important as it helps an employer review an employee's job performance and overall contribution to the organization. It offers the parties an opportunity to discuss the employee's strengths, weaknesses, and areas of improvement.

During an appraisal meeting, it is imperative that both parties are honest with each other. The employer should discuss any shortcomings they have noticed and how they are affecting the productivity of the team. The employer should be open to receiving feedback as the employer may learn the current performance is due to the employee feeling uncomfortable in their role or lack of understanding of their responsibilities.

From a performance appraisal, an employer can help manage poor performance by proposing trainings, guidance or clear instructions to the employee which will help improve their performance. From the conversation, the employer should state their expectations and give steps on how to improve performance.

Training programs

For an organization to succeed, the employees need to grow and develop through employee training programs. Organizations can implement training strategies to upskill their team which is paramount to keep them abreast of changes in a fast-paced digital era. Measuring employee training effectiveness allows the employer to analyze the progress of the employees as they learn and develop. It helps the employer create an organizational culture of learning and development that will further the success of the business.

WAYS TO IMPROVE EMPLOYEE'S POOR PERFORMANCE AT THE WORKPLACE

To prevent a situation from getting out of hand, the following strategies can help in managing poor performance of an employee:

- *Investigate underperformance issues*

In the course of employment, a diligent employer will notice when an employee's performance has fallen short from what it was when they were onboarded.

As an employer, instead of shouting at the employee to get their act together or terminate their contract, they should conduct an in-depth investigation to determine the root cause for the poor performance. After investigation, the employer may discover the reason for the underperformance is due to lack of proper training.

As an employer, communicate about the unsatisfactory performance to the employee and find a way to address the performance quickly which will benefit the team's productivity when all employees' goals align.

- **Foster a positive work environment**

Working in a non-toxic work environment encourages employees to be more productive.

Employees are humans with feelings and emotions and being in a negative workspace which has a lot of "gatekeeping" and lack of communication can demoralize employees. This can be done by having team-building activities outside of work, which helps both the employer and the employees to decompress and open their minds to different ways to communication and solve problems at the office. It also helps everyone feel valued in their team.

A positive work environment encourages members of the team to support each other and ask for help when they need it. As an employer, consider having weekly, bi-weekly, or monthly meetings with the entire team to discuss their current projects, any challenges they may be facing and how the larger team can assist them. This fosters accountability among the team as they know the team is counting on their good performance to meet the organization's goal.

And bring snacks to the meeting to help lighten the mood!

- **Training does not end at onboarding**

An organization spends a lot of time and pays attention to training new employees during the onboarding process. After the probation period, the employee is released to the wild to swim with the sharks and they are expected to perform efficiently with that training for the duration of the employee's contract. This should not be the case as continuous training should be the norm of the organization. It keeps employees engaged and up to date with new technology or laws which will improve the quality of work the organization delivers to their clients. Ongoing training sessions allow employees to think creatively, helps them continue to develop their skills and improve their performance.

- **Create a Performance Improvement Plan (PIP)**

When an organization notices the mediocre performance of an employee, both parties should collectively agree on a PIP that can identify the relevant performance issues and an improvement plan which can be reviewed by the parties over a reasonable period. The PIP should identify training gaps and set clear expectations for an employee's future conduct. The employer is required to allow the employee time to improve and if no improvement is noted after a reasonable time, the employer can issue a formal warning to the employee and notify them that they may be dismissed on account of poor performance if their performance does not improve.

- **Recognize your employee's strengths**

Being motivated at work is the difference between good performance and bad performance.

Motivation does not only mean a good salary, but it can also include appreciating the employee's strengths. An employer should give their employees their flowers during the course of their employment and not wait until their retirement party to praise their accomplishments in the organization. As an employer, as you praise your employee's good performance, it should be important to provide words of encouragement to an employee who is struggling. An employer can schedule follow-up meetings with the employee to find out how they are progressing and ensure they are not falling back on their old habits. This shows them that the employer considers their improvement important which makes the employee strive to do better.

Happy employees, Happy employer!

Without a doubt, empowering and motivating employees can be achieved by fostering healthy and open communication, having a positive work environment, setting clear goals, and offering ongoing training which helps them succeed and grow in their roles.

Author Profile



Anne Mumbi is a lover of life Associate in the firm who has significant transactional experience in private client matters, intellectual property, real estate and employment matters. Anne's expertise in employment law has enabled her to identify the gaps and conduct legal audits on her clients' employment structure and human resource department as well as conducting research on the new areas of the law that assist her clients navigate the complex world of human resource which enable employers maintain a fair workplace.



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