

Retrenchment or Restructuring Procedure

“Because retrenchment is a “no fault” dismissal and because of its human cost, the LRA places particular obligations on an employer, most of which are directed toward ensuring that all possible alternatives to dismissal are explored and that the employees to be dismissed are treated fairly.”

The Labour Relations Act 66 of 1995 (LRA) codifies the requirements for retrenchments by way of section 189 and 189A. Employers cannot achieve a fair retrenchment process without following the requirements of the LRA as it underlines the constitutional right to fairness. Section 189 therefore regulates the exercise of the competing fundamental rights of an employee not to be unfairly dismissed and that of an employer to dismiss for operational reasons.

The company must first establish the following in advance before supplying notices of possible retrenchments to employees:

1. Reason for the proposed retrenchment (These are example of reasons¹)

- Due to economic climate and the challenges to Companies to ensure sustainability and profitability, the Company has no option but to consider the possible retrenchment of certain employees.
- Due to the Company going into Business Rescue, the Company has no option but to consider the possible retrenchment of certain employees.
- Due to the loss of the Company's biggest contract and the financial impact it has had on the Company, the Company has no option but to consider the possible retrenchment of certain employees.
- Since the Contract for the _____ site is coming to an end at _____ 2019, the Company has no option but to consider the possible retrenchment of certain employees.

2. Alternatives to possible retrenchment

The list of measures to avoid dismissals is vast and dependent on the employer and the industry the employer is operating in.

Examples thereof are:

- measures to increase productivity;
- short time;
- rationalizing costs and expenditure;
- increase or decrease in shifts and length of shifts;
- decreasing the number of contractors or casual labourers;
- using employees to perform the functions performed by contractors or casual labourers;
- outsourcing a function to its own staff after the employees have formed themselves into a company;
- skills development to enable employees to move into different positions;
- stopping overtime or Sunday work;
- bumping;
- reducing wages (by agreement);
- early retirement offers or schemes;
- moratoriums on hiring new employees;
- gradual reduction of workforce by way of natural turnover;
- extended unpaid leave or temporary lay-off²

3. Number of employees to be affected

Client to advise. Large scale retrenchments will guide the process to be implemented.

4. Proposed method of selection

If one or more employees are to be selected for dismissal from a number of employees, the LRA requires that the criteria for their selection must be either agreed with the consulting parties or, if no criteria have been agreed, be fair and objective criteria. An example of fair selection criteria is “LIFO”, which means that the last employee in, therefore the one with the least amount of service, is the first employee to be chosen for retrenchment. This criterion is based on years of service and not on any subjective means such as the performance or disciplinary record of the employee, which will be unfair.

- LIFO (Last in, first out)
- Skills in the discipline for which the employee was employed
- Redundancy
- Closure of branch / relocation

5. Time / Period during which retrenchments are likely to take place

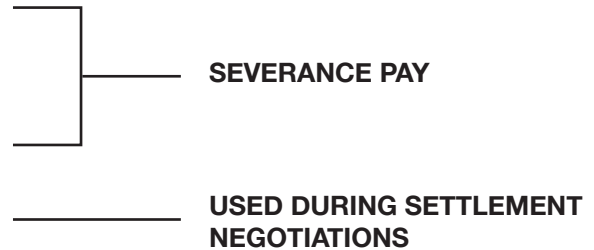
On large scale retrenchments (Section 189A) these timeframes are prescribed; a minimum consultation period of 60 days is required before dismissal. All procedural requirements must be met during this period to avoid unnecessary extensions to time frames that may impact on cash flow / future plans.

6. Calculation of severance packages and notice pay

Severance pay gross salary / 4.33 = per week salary
 1-week salary = 1 completed year of service

Pro Rata leave due to employee

Notice pay weekly salary x 4.33 (4 weeks’ notice)



Once all the above information is gathered and assessed the process can begin.

Step 1:

Issue Section 189 Notices (Notice of meeting to discuss possible retrenchment). This document is supplied to all employees of the Company and will contain some of the information in section 1 to 6 discussed above. This document is handed out to employees 48 hours before the scheduled meeting date.

NB: If your Company has Union members, the Union needs to be informed in advance of the possibility of retrenchments and the Union will be sent a Section 189 Notice in advance to allow them time to meet with their members if they so wish to do. Union representatives can be present at the 1st Consultation meeting. In the case of a Union being notified, the meeting date will be 7 – 10 days after the Union was notified to allow enough time for the Union to meet with members and not the 48 hours for non-Union Companies.

On Facilitations:

The Facilitation process in terms of the Labour Relations Act guidelines has more formalities / requirements that the Employer must meet. We guide the process and have done many successful large scales facilitated retrenchments.

Step 2:

1st Consultation.

Company representative will meet with the affected employees in a group format and the Section 189 Notice document will be discussed and explained to the affected Employees.

After the group consultation each individual Employee will be consulted at which time the Severance package will be presented to the Employee. At this time, if the company so wishes, a settlement agreement will be negotiated with the Employee. This settlement agreement will be a mutual agreement between the parties for the Employee to accept the severance package as well as 4 weeks' notice pay as full and final settlement and the retrenchment process is then finalised. The Employee will not work his notice period but will be paid for it.

If the Company do not wish to offer settlement agreements, only the severance pay will be discussed with the Employees and negotiated to sign acceptance of the package on offer. The Employee will then work 4 weeks' notice.

Step 3:

2nd Consultation or Further Consultations – Notice of meeting to discuss Final Retrenchment.

In the event that there was no acceptance of severance package or settlement agreement during the 1st Consultation, it could happen that a 2nd Consultation is called and during this Consultation the Employee will be informed that the Company has no alternative but to continue with the proposed Retrenchments and the Employees are given notice document of termination of employment. This meeting is normally called 48 hours after the 1st Consultation.

Step 4:

All statutory required documents must be ready to supply to Employees on the last day of employment. These documents included, but are not limited to:

- UI19 form
- Service Certificate
- Notice of Termination
- Original certificates or diplomas held by the Company on file
- Withdraw notices for Pension or Provident Funds
- Tax directive
- Letter to debtors (if required)