




Advocates, Commissioners  
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# LEGAL ALERT

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## A COMMENTARY ON **THE EMPLOYMENT (AMENDMENT) ACT NO.15 OF 2022**

## Introduction

Over the years employers have required prospective employees to provide clearance or compliance certificate (s) including a certificate of good conduct from the Director of Criminal Investigations, a certificate from the Ethics and Anti-corruption Commission, a tax compliance certificate from the Kenya Revenue Authority, a certificate from the Credit Reference Bureau; and a clearance certificate from the Higher Education Loans Board.

The Courts have viewed the requisition of clearance certificates as handmaidens in determining an Applicant's integrity as enshrined in the Chapter Six of the Constitution as seen in **Trusted Society of Human Rights Alliance & 3 others v Judicial Service Commission & another [2016] eKLR**, where the Court pronounced itself as follows:

### IN MY VIEW

*"...the clearances from Kenya Revenue Authority, Higher Education Loans Board, Law Society of Kenya, Directorate of Criminal Investigations, Advocates Complaints Commission, Ethics and Anti-Corruption Commission and a recognised Credit Reference Bureau are meant for the purposes of determining the applicant's integrity which according to Regulation 13 encompass demonstrable consistent history of honesty and high moral character in professional and personal life; Respect for professional duties arising under the codes of professional and judicial conduct; and Ability to understand the need to maintain propriety and the appearance of propriety."*

Unfortunately, not all prospective employees are able to obtain the requisite clearance certificates within the strict job application timelines from the various institutions due to the cost and time implications. To balance the employers and prospective employees interests the National Assembly deemed it fit to amend Section 9 of the **Employment Act, No. 11 of 2007** by inserting the following amendments immediately after subsection (4) thereof:

(5) *An employer shall not require an employee to submit any clearance or compliance certificate unless such employer intends to enter into a contract of service with the employee: Provided that an applicant for a state office shall provide compliance or clearance certificates at such times in the recruitment or approval process as they may be required.*

(6) *An employer who intends to enter into a written contract of service may, in compliance with chapter six of the Constitution, request an employee to submit mandatory clearance certificates from the relevant entities.*

(7) *Notwithstanding subsection (6), an employer may, where an employee does not satisfy the requirements under subsection (6), withdraw an offer of contract of service.*

(8) A relevant public entity shall—

(a) *not charge a fee for the issuance of a clearance or compliance certificate under this section or any other written law;*

(b) *issue an applicant with the clearance or compliance certificate or reject the application within seven days of receipt of the application.*

From the above amendment, it is clear that at the point of making an application for employment, a prospective employee will not be required to submit clearance or compliance certificates as condition for consideration for employment.

The amendment further allows an employer to request for compliance certificates however such certificates are to be requested for when the employer intends to enter into a contract of service with the employee. The Amendment further stipulates that the failure of a prospective employee to furnish the employer with the compliance certificates upon his/her request, an employer is at liberty to withdraw the contract of service. On the contrary, the Amendment mandates an applicant for a State Office to provide compliance certificates as required in the recruitment process.

Unfortunately, one of the greatest challenge an employee will have is to procure the compliance certificate within reasonable time despite the amendment requiring public entities to issue certificates of compliance within **7 days** of such an application being made. For instance the

Directorate of Criminal Investigations may require more time to verify the Applicant's particulars in order to issue a certificate of compliance as was held in: **G.B.M. Kariuki v Director of Criminal Investigations & 3 others [2016] eKLR**, *wherein the Petitioner wished to apply for the position of the Chief Justice as advertised by the Judicial Service Commission. Unfortunately, the Petitioner was not able to apply for the position for the Chief Justice for reasons that the 1<sup>st</sup> Respondent, DCI, delayed in issuing him with a compliance certificate despite him applying for the same 10 days before the stipulated deadline of 8<sup>th</sup> July 2016. Consequently, the petitioner filed an application alleging that the delay in issuing him with the said certificate of good conduct was a denial of his right to fair administrative action to expeditious service and to apply for the job of Chief Justice besides being discriminatory because all other judges were issued with the certificate of good conduct. The Court however held that the 1<sup>st</sup> respondent, DCI, does not merely exist to issue out clearance certificates but to issue such clearance certificates, after verification of an applicant's particulars.*

Considering the amendments made to the Employment Act, there is great need for employers to review their current recruitment policies to take consideration the new provisions.

We remain at your full disposition should you have any questions or need any further information on any necessary amendments and changes that need to be undertaken in recruitment policies to ensure compliance with the law.

#### DISCLAIMER

*This alert is for informational purposes only and should not be taken or construed as a legal opinion. If you have any queries or need clarifications, please get in touch with Linda Kamuya at [linda@asadvocates.co.ke](mailto:linda@asadvocates.co.ke) or your usual contact in our firm for legal advice.*