

THE PERSONS WITH DISABILITIES ACT, 2025 TAKES EFFECT:

Major Shift in Employment Law and Disability Protections?

Issued by the Employment, Pension Schemes, and Benefits Practice Group at CM Advocates LLP

The Persons with Disabilities Act, 2025 ("the PWD Act") came into force on 27th May 2025, ushering in a new era of protections for persons with disabilities (PWDs) in Kenya. This legislation significantly strengthens disability rights and employer obligations, with potential implications on employment contracts, termination practices, and workplace structures across sectors.

Under **Section 5 of the Employment Act**, all employers, labour officers, and the Employment and Labour Relations Court are required to promote equality and eliminate discrimination in employment. The section expressly prohibits direct and indirect discrimination on grounds including disability, in all aspects of employment, from recruitment and training to promotion and termination.

Complementing this, **Section 22 of the PWD Act** stipulates that no employee shall be dismissed or demoted on account of their disability, the acquisition of a disability, or its effects. Where a disability places an employee at a disadvantage, the employer is required to either support the employee in their current position or redeploy them to an equivalent role with equal pay and benefits. If no such role exists, the employee may be retained in a temporary (supernumerary) post until a suitable position arises or until retirement.

Section 22 of the PWD Act has often been interpreted to mean that an employee with a disability cannot be dismissed from employment, even where they are incapable of discharging their duties. This, however, raises the question: what happens when an employee is unable to perform

their duties due to physical incapacity? It is therefore important to differentiate **physical incapacity** from **disability**.

Physical incapacity, although not expressly defined in law, refers to a medically assessed inability of an employee to perform job functions in the foreseeable future due to illness or injury. This ground is recognized under **Section 41 of the Employment Act**, which sets out procedural safeguards for termination based on incapacity. Courts have interpreted this narrowly. For instance, in ***Kennedy Nyanguncha Omanga v Bob Morgan Services Limited [2013] KEELRC 810 (KLR)***, the court emphasized that before dismissing an employee for medical reasons, the employer must: support the employee's recovery, conduct a specific medical evaluation regarding their ability to resume work, and provide explicit notice of the impending termination. Similarly, in ***Thuku v Mini Bakeries Limited (Cause 950 of 2018) [2024] KEELRC 1349 (KLR)***, the court upheld termination on incapacity grounds after confirming the employer complied with the outlined procedure in *Kennedy Nyangucha* above.

On the other hand, **disability** is defined under **Section 2 of the Employment Act** as including any physical, sensory, mental or other impairment affecting a person's economic and social participation. The **PWD Act** (Section 2) further expands the definition to include impairments perceived to have a substantial or long-term impact on daily activities and clarifies that discrimination includes denial of reasonable accommodation.

Courts have drawn a clear line between incapacity and disability. In ***Kenya Plantation and Agricultural Workers Union v Rea Vipingo Plantations Ltd & Dr. JJ Ashraph [2015] KEELRC 27***, the court faulted the employer for failing to accommodate an employee recovering from hernia surgeries, despite medical recommendations for light duties. The court held that termination without attempting reassignment or modification of duties constituted unfair discrimination under Article 27 of the Constitution and Section 5 of the Employment Act.

A similar conclusion was reached in ***AWW (Suing as Next Friend and Mother of GWW) v Central Bank of Kenya (Cause E888 of 2022) [2024] KEELRC 13585 (KLR)***, where an employee with known mental health issues was dismissed following a disciplinary hearing held without confirming her mental fitness. The court found this to be discriminatory and emphasized that for any disciplinary process to be valid under Section 41 of the Employment Act, the employee must be in a mental state capable of understanding and defending themselves. The employer's failure to provide reasonable accommodation violated constitutional and statutory obligations.

The Supreme Court in ***Gichuru v Package Insurance Brokers Ltd (Petition 36 of 2019) [2021] eKLR*** held that the employer's decision to suspend and later dismiss the employee without investigating his medical condition or adjusting his duties violated Article 27 of the Constitution. Reasonable accommodation is not discretionary but a legal obligation unless the employer can demonstrate that accommodation would result in undue hardship.

The distinction between incapacity and disability is therefore pivotal. While termination on grounds of disability is prohibited by law, termination for incapacity is only lawful where strict procedural requirements have been satisfied. Section 22 of the PWD Act reinforces the protection provided in the Constitution against discrimination, ensuring employees with disabilities are not denied equal opportunities or terminated from employment without justification and due process.

WHAT EMPLOYERS MUST DO IMMEDIATELY

In light of the evolving legal landscape, employers should take the following urgent, proactive steps:

Update Employment Policies and Contracts

- Revise termination clauses and incapacity policies to reflect the new legal risks.
- Integrate disability accommodations into HR manuals and codes of conduct.

Re-evaluate Disability and Mental Health Policies

- Expand workplace definitions of disability to align with the expansive definition in the PWD Act.
- Formulate clear guidelines on mental and psychological health accommodations.

Adopt a Structured Accommodation Framework

- Document all efforts made to support employees with disabilities, including workplace adjustments, flexible work arrangements, and support services.

Conduct Legal and Risk Audits

- Audit their employment practices, especially redundancy, medical exits, and performance procedures, for compliance and legal defensibility under both the Persons with Disabilities Act and the Employment Act.

Train Their HR and Legal Teams

- Enhance internal capability to navigate disability-related disputes and regulatory inquiries.
- Build capacity for compliance with the Employment and Labour Relations Court's evolving jurisprudence.

CM Advocates LLP will be publishing a detailed guidance note outlining the legal, practical, and compliance implications of the Persons with Disabilities Act, 2025. This will cover:

- Reasonable accommodation obligations
- Redesigning disciplinary and termination procedures
- Aligning mental health policies with legal standards
- Risk mitigation and litigation preparedness
- Workforce governance and compliance reforms

For immediate support on compliance, policy reviews, or representation in disability-related disputes, please contact our Employment, Pension Schemes, and Benefits Practice Group.

CONTACT OUR TEAM FOR STRATEGIC SUPPORT

If your organization requires immediate advice on workforce impact, policy updates, or representation in disability-related disputes:

Head Office Nairobi
I&M Bank House, 7th Floor, 2nd Ngong Avenue
Nairobi, Kenya
T: +254 20 2210978 or +254 716 209673
P.O. Box 22588 – 00505, Nairobi Kenya
E: law@cmadvocates.com

Mombasa Office
Links Plaza, 4th Floor, Links Road, Nyali
Mombasa, Kenya
T: +254 041 447 0758 / +254 41 447 0548
P.O. Box 90056 – 80100, Mombasa Kenya
E: mombasaoffice@cmadvocates.com

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