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Dear *SALLR* colleague

RE: <u>SLIP AND TRIP ALERT NOTICE 9 OF 2025</u>

This is the ninth alert notice of those issues that will cause YOU to slip and definitely trip in 2025. These notifications have been compiled largely on the basis of queries that our call-centre receive, as well as the solutions provided thereto by our fast-tracking team.

Some of these alert notice issues will eventually be incorporated into our mouth-watering annual seminar workbook, as well as our delicious and spicy PowerPoint presentation compiled on an annual basis.

The scenario is as follows: the relevant workplace rule indicates that, if an employee absents himself or herself from official duties without the permission of the employer for a period exceeding 30 days, such employee will be regarded as having been dismissed, on the basis of misconduct, with effect from the day immediately following his or her last day of work, but the employer may, on good cause shown, authorise the reinstatement of such employee on such conditions as it may determine.

This alert notice deals, firstly, with very important issues identified by the constitutional court in dealing with the said scenario and, secondly, with the application of the Prescription Act where an employee becomes mentally incapacitated in the execution of his or her employment duties.

We look forward to YOU being part of the CCMA and *SALLR* continuing learning events – to secure YOUR seat, <u>kindly register by completing the attached registration form</u>.

Your hardworking CCMA and *SALLR* teams

FURTHER DETAIL OF THE IDENTIFIED TRICKY ISSUES

- The scenario is as follows: the workplace is subject to a provision that indicates that, if an employee absents himself or herself from official duty without the permission of the employer for a period exceeding 30 days, such employee will be regarded as having been dismissed, on account of misconduct, with effect from the day immediately following his or her last day of work, but the employer may, on good cause shown, authorise the reinstatement of such employee on such conditions as it may determine. This is referred to as termination by operation of law. Such provision serves the same purpose as a deeming provision which is to the effect that, if an employee is absent without permission for a certain specified time period, such employee is deemed to be discharged, but may make written representations for his or her reinstatement. With reference to the aforesaid scenario, how did the constitutional court recently deal with the following issues:
  - does such 'cut-off' period of 30 days exclude Saturdays, Sundays, public holidays and any other days on which the employee was not required to be at work?
  - does such provision confer on anyone the power to dismiss an employee who absents himself or herself contrary to the aforesaid provision?
  - under what circumstances will it not be competent for the employer to reinstate the employee?
  - with reference to *Investigating Directorate: Serious Economic Offences and Others v Hyundai Motor Distributors (Pty) Ltd and Others: in re Hyundai Motor Distributors (Pty) Ltd v Smit NO and Others* 2001 (1) SA 545 (CC), what is the approach to be adopted when interpreting any legislation?
  - if an employee is absent from work without the required authorisation for a period less than 30 days and the aforesaid provision is applicable at the workplace, is the employer nevertheless entitled to subject an employee to a disciplinary process for being absent, without the necessary authority, for such shorter period?
- In terms of s12(1) of the Prescription Act 68 of 1969 (the Prescription Act), prescription begins to run as soon as a debt is due. Section 12(3) of such Act provides that the debt is deemed to be due once the creditor has knowledge of the identity of the debtor and of the facts giving rise to the debt. The proviso to section 12(3) is to the effect that, even where such knowledge has not been acquired, the knowledge shall be deemed to have been acquired if it could have been acquired through the exercise of reasonable care. However, paragraph 13(1)(a) of such Act reads as follows: '[If] the creditor is a minor <u>or is a person with a mental or intellectual disability, disorder or incapacity</u> or is affected by any other factor that the court deems appropriate with regard to any offence referred to in section 12(4), <u>or is a person under curatorship</u> or is prevented by a superior force including any law or any order of court from interrupting the running of prescription as

contemplated in section 15(1)'. With reference to the above, and in the circumstances where, during the execution of employment duties, an employee sustained severe head injuries, resulting in mental incapacity which is permanent, how did the constitutional court recent ly deal with the following issues:

– section 13(1)(i) of the said Act reads as follows: 'the relevant period of prescription would, but for the provisions of this subsection, be completed before or on, or within one year after, the day on which the relevant impediment referred to in paragraph (a), (b), (c), (d), (e), (f), (g) or (h) has ceased to exist,

  the period of prescription shall not be completed before a year has elapsed from the day referred to in paragraph (i).' How are the impediments referred to in paragraphs (a) to (h) to be interpreted?

– on what basis was it found that, as long as the impediments referred to in paragraphs (a) to (h) exist (i e mental incapacity and being a person under curatorship), a claim will not prescribe?

– the period of prescription will only be completed upon expiry of the period stipulated in the said s13(1) – how is the stipulated period to be calculated?

– on what basis was it found that the appointment of a curator *ad litem* for a person suffering from mental incapacity does not divest such a person of the protection afforded by s13(1) for as long as the mental incapacity exists?

– with reference to the above, on what basis was it found that, as long as the employee's mental incapacity exists, the prescription period will not have been completed?