



CONSOLIDATED  
EMPLOYERS  
ORGANISATION

**BASIC CONDITIONS  
OF EMPLOYMENT ACT NO 75 OF 1997**

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As amended by Act No 7 and 10 of 2018 which came into operation on 23 November 2018 (**red font**)

To amend the Basic Conditions of Employment Act, 1997, so as to substitute and insert certain definitions; to provide for daily wage payments applicable to certain employees; to repeal certain provisions dealing with sectoral determinations and to disestablish the Employment Conditions Commission; to extend the jurisdiction of the Commission for Conciliation, Mediation and Arbitration; to extend the provisions for monitoring and enforcement by the labour inspector; to include enforcement of the provisions of the National Minimum Wage Act, 2018, the Unemployment Insurance Act, 2001 and the Unemployment Insurance Contributions Act, 2002; to provide for claims for underpayment; to provide for transitional arrangements; to regulate sectoral determinations currently in force; to strengthen collective bargaining in respect of the sectors regulated by those sectoral determinations; and to provide for matters connected therewith.

**BE IT ENACTED** by the Parliament of the Republic of South Africa as follows:-

Amendment of section 1 of Act 75 of 1997, as amended by section 1 of Act 11 of 2002, section 25 of Act 52 of 2003, section 53 of Act 11 of 2013 and section 1 of Act 20 of 2013

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## CHAPTER ONE

### DEFINITIONS, PURPOSE AND APPLICATION OF THIS ACT

#### Definitions

1. In this Act, unless the context indicates otherwise-

'adoption order' means an adoption order as envisaged in the Children's Act, 2005 (Act No. 38 of 2005);

'adoptive parent' has the meaning assigned to it in section 1 of the Children's Act, 2005 (Act No. 38 of 2005);";

"agreement" includes a collective agreement;

"area" includes any number of areas, whether or not contiguous;

"bargaining council" means a bargaining council registered in terms of the Labour Relations Act, 1995, and, in relation to the public service, includes the bargaining councils referred to in section 35 of that Act;

"basic conditions of employment" means a provision of this Act or sectoral determination that stipulates a minimum term or condition of employment, and includes the national minimum wage;";

"child" means a person who is under 18 years of age'

"code of good practice" means a code of good practice issued by the Minister in terms of section 87 of this Act;

"collective agreement" means a written agreement concerning terms and conditions of employment or any other matter of mutual interest concluded by one or more registered trade unions, on the one hand and, on the other hand-

- (a) one or more employers;
- (b) one or more registered employers' organisations; or
- (c) one or more employers and one or more registered employers' organisation;

" Commission" means the National Minimum Wage Commission established by section 8 of the National Minimum Wage Act, 2018;";

"compliance order" means a compliance order issued by a labour inspector in terms of section 69(1);

"Constitution" means the Constitution of the Republic of South Africa, 1996 (Act No. 108 of 1996);

"council" includes a bargaining council and a statutory council.

"Department" means the Department of Labour;

"Director-General" means the Director-General of Labour;

"dispute" includes an alleged dispute;

"domestic worker" means an employee who performs domestic work in the home of his or her employer and includes-

- (a) a gardener;
- (b) a person employed by a household as driver of a motor vehicle; and
- (c) a person who takes care of children, the aged, the sick, the frail or the disabled, but does not include a farm worker;

"employee" means-

- (a) any person, excluding an independent contractor, who works for another person or for the State and who receives, or is entitled to receive, any remuneration; and
- (b) any other person who in any manner assists in carrying on or conducting the business of an employer, and

"employed" and "employment" have a corresponding meaning;

"employers' organisation" means any number of employers associated together for the purpose, whether by itself or with other purposes, of regulating relations between employers and employees or trade unions;

“ employment law” includes this Act, any other Act the administration of which has been assigned to the Minister, and any of the following Acts:

- (a) the Unemployment Insurance Act, 2001 (Act No. 63 of 2001);
- (b) the Employment Services Act, 2014 (Act No. 14 of 2014);
- (c) the Employment Equity Act, 1998 (Act No. 55 of 1998);
- (d) the Occupational Health and Safety Act, 1993 (Act No. 85 of 1993);

(e) the Compensation for Occupational Injuries and Diseases Act, 1993 (Act No. 130 of 1993); and

(f) the National Minimum Wage Act, 2018;

"farm worker" means an employee who is employed mainly in or in connection with farming activities, and includes an employee who wholly or mainly performs domestic work in a home on a farm;

"Labour Appeal Court" means the Labour Appeal Court established by section 167 of the Labour Relations Act, 1995;

"Labour Court" means the Labour Court established by section 151 of the Labour Relations Act, 1995;

footnote 1. "Employee" is given a specific meaning in section 82(1).

"labour inspector" means a labour inspector appointed under section 63, and includes any person designated by the Minister under that section to perform any function of a labour inspector;

"Labour Relations Act, 1995" means the Labour Relations Act, 1995 (Act No. 66 of 1995);

"medical practitioner" means a person entitled to practise as a medical practitioner in terms of section 17 of the Medical, Dental and Supplementary Health Service Professions Act, 1974 (Act No. 56 of 1974);

"midwife" means a person registered or enrolled to practise as a midwife in terms of section 16 of the Nursing Act, 1978 (Act No. 50 of 1978);

"Minister" means the Minister of Labour

"month" means a calendar month;

**"national minimum wage" means the national minimum wage envisaged in section 4 of the National Minimum Wage Act, 2018;"**

"NEDLAC" means the National Economic, Development and Labour Council established by section 2 of the National Economic, Development and Labour Council Act, 1994 (Act No. 35 of 1994);

"ordinary hours of work" means the hours of work permitted in terms of section 9 or in terms of any agreement in terms of sections 11 or 12;

"overtime" means the time that an employee works during a day or a week in excess of ordinary hours of work;

"prescribe" means to prescribe by regulation and "prescribed" has a corresponding meaning;

'prospective adoptive parent' means a person who complies with the requirements set out in section 231(2) of the Children's Act, 2005 (Act No. 38 of 2005);".

"public holiday" means any day that is a public holiday in terms of the Public Holidays Act, 1994 (Act No. 36 of 1994);

"public service" means the public service referred to in section 1(1) of the Public Service Act, 1994 (Proclamation No. 103 of 1994), and includes any organisational component contemplated in section 7(4) of that Act and specified in the first column of Schedule 2 to that Act, but excluding-

- (a) the members of the National Defence Force;
- b) the National Intelligence Agency; and
- (c) the South African Secret Service;

"registered employers' organisation" means an employers' organisation registered under section 96 of the Labour Relations Act, 1995;

"registered trade union" means a trade union registered under section 96 of the Labour Relations Act, 1995;

"remuneration" means any payment in money or in kind, or both in money and in kind, made or owing to any person in return for that person working for any other person, including the State, and

"remunerate" has a corresponding meaning;

"sector" means an industry or a service or part of an industry or a service and in respect of a sectoral determination made in terms of section 55(8), means the employers and employees covered by that determination;

"sectoral determination" means a sectoral determination made under Chapter Eight.

"senior managerial employee" means an employee who has the authority to hire discipline and dismiss employees and to represent the employer internally and externally;

"serve" means to send by electronic mail, registered post, telegram, telefax or deliver by hand or any prescribed method of service;

"statutory council" means a council established under Part E of Chapter III of the Labour Relations Act, 1995;

"temporary employment service" means any person who, for reward, procures for, or provides to a client, other persons-

- (a) who render services to, or perform work for, the client; and
- (b) who are remunerated by the temporary employment service;

"this Act" includes the Schedules and any regulation made under this Act, but does not include the headings or footnotes;

"Trade union" means an association of employees whose principal purpose is to regulate relations between employees and employers, including any employers' organisations;

"trade union official" includes an official of a federation of trade unions;

"trade union representative" means a trade union representative who is entitled to exercise the rights contemplated in section 14 of the Labour Relations Act, 1995;

"Unemployment Insurance Act" means the Unemployment Insurance Act, 2001 (Act No. 63 of 2001);

"Unemployment Insurance Contributions Act" means the Unemployment Insurance Contributions Act, 2002 (Act No. 4 of 2002);

footnote 2. "Remuneration" is given a specific meaning in section 35(5).

"wage" means the amount of money paid or payable to an employee in respect of ordinary hours of work or, if they are shorter, the hours an employee ordinarily works in a day or week;

"week" in relation to an employee, means the period of seven days within which the working week of that employee ordinarily falls;

"workplace" means any place where employees work

"workplace forum" means a workplace forum established under Chapter V of the Labour Relations Act, 1995.

## **Purpose of this Act**

2. The purpose of this Act is to advance economic development and social justice by fulfilling the primary objects of this Act which are-
  - (a) to give effect to and regulate the right to fair labour practices conferred by section 23(1) of the Constitution-
    - (i) by establishing and enforcing basic conditions of employment; and
    - (ii) by regulating the variation of basic conditions of employment;
  - (b) to give effect to obligations incurred by the Republic as a member state of the International Labour Organisation.

## **Application of this Act**

3. (1) This Act applies to all employees and employers except-
  - (a) members of the National Defence Force, the National Intelligence Agency and the South African Secret Service; and
  - (b) unpaid volunteers working for an organisation serving a charitable purpose.
- (2) This Act applies to persons undergoing vocational training except to the extent that any term or condition of their employment is regulated by the provisions of any other law.
- (3) This Act, except section 41, section 62A and chapters 3, 4, 5 and 6, do not apply to persons employed on vessels at sea in respect of which the Merchant Shipping Act, 1951 (Act No. 57 of 1951), applies, except to the extent provided for in a sectoral determination and the National Minimum Wage Act, 2018, read with section 62A.”.

## **Inclusion of provisions in contracts of employment**

4. A basic condition of employment constitutes a term of any contract of employment except to the extent that-
  - (a) any other law provides a term that is more favourable to the employee,
  - (b) the basic condition of employment has been replaced, varied, or excluded in accordance with the provisions of this Act; or
  - (c) a term of the contract of employment is more favourable to the employee than the basic condition of employment.

## **This Act not affected by agreements**

5. This Act or anything done under it takes precedence over any agreement, whether entered into before or after the commencement of this Act.

## CHAPTER TWO

### Regulation of working time

#### Application of this chapter

6. (1) This Chapter, except section 7, does not apply to-
  - (a) senior managerial employees;
  - (b) employees engaged as sales staff who travel to the premises of customers and who regulate their own hours of work;
  - (c) employees who work less than 24 hours a month for an employer.
- (2) Sections 9, 10(1), 14(1), 15(1), 17(2) and 18(1) do not apply to work which is required to be done without delay owing to circumstances for which the employer could not reasonably have been expected to make provision and which cannot be performed by *employees* during their *ordinary hours of work*.
- (3) The *Minister must*, on the advice of the *Commission*, make a determination that excludes the application of this Chapter or any provision of it to any category of *employee* earning in excess of an amount stated in that determination.
- (4) Before the *Minister* issues a notice in terms of subsection (3), the *Minister* must-
  - (a) publish in the *Gazette* a draft of the proposed notice; and
  - (b) invite interested persons to submit written representations on the proposed notice within a reasonable period.

#### Regulation of working time

7. Every employer must regulate the working time of each *employee*-
  - (a) in accordance with the provisions of any Act governing occupational health and safety;
  - (b) with due regard to the health and safety of *employees*;
  - (c) with due regard to the Code of Good Practice on the Regulation of Working Time issued under section 87(1)(a); and
  - (d) with due regard to the family responsibilities of *employees*.

#### Interpretation of day

8. For the purposes of sections 9 to 16, "day" means a period of 24 hours measured from the time when the *employee normally* commences work, and daily has a corresponding meaning. **(s8 substituted by Act 11 of 2002)**

## Ordinary hours of work

9. (1) Subject to this chapter, an employer may not require or permit an *employee* to work more than-
  - (a) 45 hours in any *week*; and
  - (b) nine hours on any day if the *employee* works for five days or fewer in a *week*; or
  - (c) eight hours in any day if the *employee* works on more than five days in a *week*.
- (2) An employee's ordinary hours of work in terms of subsection (1) may by agreement be extended by up to 15 minutes a day but not more than 60 minutes in a week to enable an employee whose duties includes serving members of the public to continue performing those duties after the completion of ordinary hours of work.
- (3) Schedule 1 establishes procedures for the progressive reduction of the maximum ordinary hours of work to a maximum of 40 ordinary hours of work per week and 8 ordinary hours of work per day.

## Daily wage payment

- 9A. (1) An employee or a worker as defined in section 1 of the National Minimum Wage Act, 2018, who works for less than four hours on any day must be paid for four hours work on that day.
- (2) This section applies to employees or workers who earn less than the earnings threshold set by the Minister in terms of section 6(3)."

## Overtime

10. (1) Subject to this Chapter, an employer may not require or permit an *employee to work*-
  - (a) *overtime* except in accordance with an *agreement*;
  - (b) more than ten hours' overtime a week.
- (1A) An agreement in terms of subsection (i) may not require or permit an employee to work more than 12 hours on any day;
- (2) An employer must pay an *employee* at least one and one-half times the *employee's wage* for *overtime* worked.
- (3) Despite subsection (2), an *agreement* may provide for an employer to-

- (a) pay an *employee* not less than the *employee's* ordinary *wage* for *overtime* worked and grant the *employee* at least 30 minutes' time off on full pay for every hour of *overtime* worked; or
  - (b) grant an *employee* at least 90 minutes' paid time off for each hour of *overtime* worked.
- (4) (a) An employer must grant paid time off in terms of subsection (3) within one month of the *employee* becoming entitled to it; or
  - (b) An *agreement* in writing may increase the period contemplated by paragraph (a) to 12 months.
- (5) An *agreement* concluded in terms of subsection (1) with an *employee* when the *employee* commences employment, or during the first three months of employment, lapses after one year.
- (6) (a) A collective agreement may increase the maximum permitted overtime to 15 hours a week.
  - (b) A collective agreement contemplated in paragraph (a) may not apply for more than two months in any period of 12 months.

### **Compressed working week**

- 11. (1) An *agreement* in writing may require or permit an *employee* to work up to twelve hours in a day, inclusive of the meal intervals required in terms of section 14, without receiving *overtime* pay.
- (2) An *agreement* in terms of subsection(1), may not require or permit an *employee* to work-
  - (a) more than 45 *ordinary hours of work* in any *week*;
  - (b) more than ten hours' *overtime* in any *week*; or
  - (c) on more than five days in any *week*.

### **Averaging of hours of work**

- 12. (1) Despite sections 9(1) and (2) and 10(1)(b), the *ordinary hours of work* and *overtime* of an *employee* may be averaged over a period of up to four months in terms of a *collective agreement*.
- (2) An employer may not require or permit an *employee* who is bound by a *collective agreement* in terms of subsection (1) to work more than-
  - (a) an average of 45 *ordinary hours of work* in a *week* over the agreed period;

- (b) an average of five hours' *overtime* in a *week* over the agreed period.
- (3) A *collective agreement* in terms of subsection (1) lapses after 12 months.
- (4) Subsection (3) only applies to the first two *collective agreements* concluded in terms of subsection (1).

### **Determination of hours of work by Minister**

- 13. (1) Despite this Chapter, the *Minister*, on grounds of health and safety may prescribe by regulation the maximum permitted hours of work, including *overtime*, that any category of *employee* may work-
  - (a) daily, weekly or during any other period specified in the regulation; and
  - (b) during a continuous period without a break.
- (2) A regulation in terms of subsection (1) may not prescribe maximum hours in excess of those permitted in sections 9 and 10.
- (3) A regulation in terms of subsection (1) may be made only-
  - (a) on the advice of the chief inspector appointed in terms of section 27 of the Occupational Health and Safety Act, 1993 (Act No. 85 of 1993) or the chief inspector appointed in terms of section 48 of the Mine Health and Safety Act, 1996 (Act No. 29 of 1996); and
  - (b) after consulting the *Commission*.

### **Meal intervals**

- 14. (1) An employer must give an *employee* who works continuously for more than five hours a meal interval of at least one continuous hour.
- (2) During a meal interval, the *employee* may be required or permitted to perform only duties that cannot be left unattended and cannot be performed by another *employee*.
- (3) An *employee* must be *remunerated*-
  - (a) for a meal interval in which the *employee* is required to work or is required to be available for work; and
  - (b) for any portion of a meal interval that is in excess of 75 minutes, unless the *employee* lives on the premises at which the *workplace* is situated.

- (4) For the purposes of subsection (1), work is continuous unless it is interrupted by an interval of at least 60 minutes.
- (5) An *agreement* in writing may-
  - (a) reduce the meal interval to not less than 30 minutes;
  - (b) dispense with a meal interval for an *employee* who works fewer than six hours on a day.

### Daily and weekly rest period

- 15. (1) An employer must allow an *employee*-
  - (a) a daily rest period of at least twelve consecutive hours between ending and recommencing work; and
  - (b) a weekly rest period of at least 36 consecutive hours which, unless otherwise agreed, must include Sunday.
- (2) a daily rest period in terms of subsection (1)(a) may by written agreement be reduced to 10 hours for an *employee*-
  - (a) who lives on the premises at which the *workplace* is situated; and
  - (b) whose meal interval lasts for at least three hours.
- (3) Despite subsection (1)(b), an *agreement* in writing may provide for-
  - (a) a rest period of at least 60 consecutive hours every two *weeks*; or
  - (b) an *employee's* weekly rest period to be reduced by up to eight hours in any *week* if the rest period in the following *week* is extended equivalently.

### Pay for work on Sundays

- 16. (1) An employer must pay an *employee* who works on a Sunday at double the *employee's wage* for each hour worked, unless the *employee* ordinarily works on a Sunday, in which case the employer must pay the *employee* at one and one-half times the *employee's wage* for each hour worked.
- (2) If an *employee* works less than the *employee's* ordinary shift on a Sunday and the payment that the *employee* is entitled to in terms of subsection (1) is less than the *employee's* ordinary daily *wage*, the employer must pay the *employee* the *employee's* ordinary daily *wage*.

- (3) Despite subsections (1) and (2), an *agreement* may permit an employer to grant an *employee* who works on a Sunday paid time off equivalent to the difference in value between the pay received by the *employee* for working on the Sunday and the pay that the *employee* is entitled to in terms of subsections (1) and (2).
- (4) Any time worked on a Sunday by an *employee* who does not ordinarily work on a Sunday is not taken into account in calculating an *employee's ordinary hours of work* in terms of section 9(1) and (2), but is taken into account in calculating the *overtime* worked by the *employee* in terms of section 10(1)(b).
- (5) If a shift worked by an *employee* falls on a Sunday and another day, the whole shift is deemed to have been worked on the Sunday, unless the greater portion of the shift was worked on the other day, in which case the whole shift is deemed to have been worked on the other day.
- (6)
  - (a) An employer must grant paid time off in terms of subsection (3) within one month of the *employee* becoming entitled to it;
  - (b) An *agreement* in writing may increase the period contemplated by paragraph (a) to 12 months.

### **Night work**

17. (1) In this section, "night work" means work performed after 18:00 and before 06:00 the next day.
- (2) An employer may only require or permit an *employee* to perform night work, if so agreed, and if-
  - (a) the *employee* is compensated by the payment of an allowance, which may be a shift allowance, or by a reduction of working hours; and
  - (b) transportation is available between the *employee's* place of residence and the *workplace* at the commencement and conclusion of the *employee's* shift.
- (3) An employer who requires an *employee* to perform work on a regular basis after 23:00 and before 06:00 the next day must-
  - (a) inform the *employee* in writing or orally if the employee is not able to understand a written communication, in a language that employee understands-
    - (i) of any health and safety hazards associated with the work that the *employee* is required to perform; and

- (ii) of the employees right undergo a medical examination in terms of paragraph (b)
- (b) at the request of the employee, enable the employee to undergo a medical examination, for the account of the employer, concerning those hazards -
  - (i) before the *employee* starts, or within a reasonable period of the *employee* starting, such work; and
  - (ii) at appropriate intervals while the *employee* continues to perform such work; and
- (c) transfer the *employee* to suitable day work within a reasonable time if-
  - (i) the *employee* suffers from a health condition associated with the performance of night work; and
  - (ii) it is practicable for the employer to do so.
- (4) For the purposes of subsection (3) an *employee* works on a regular basis if the *employee* works for a period of longer than one hour after 23:00 and before 06:00 at least five times per month or 50 times per year.
- (5) *The Minister* may, after consulting the *Commission*, may make regulations relating to the conduct of medical examinations for *employees* who perform night work.

## Public holidays

18. (1) An employer may not require an *employee* to work on a *public holiday* except in accordance with an *agreement*.
- (2) If a *public holiday* falls on a day on which an *employee* would ordinarily work, an employer must pay-
- (a) an *employee* who does not work on the *public holiday*, at least the *wage* that the *employee* would ordinarily have received for work on that day;
  - (b) an *employee* who does work on the ~~a~~-*public holiday*-
    - (i) at least double the amount referred to in paragraph (a); or
    - (ii) if it is greater, the amount referred to in paragraph (a) plus the amount earned by the *employee* for the time worked on that day.

- (3) If an *employee* works on a *public holiday* on which the *employee* would not ordinarily work, the employer must pay that *employee* an amount equal to-
  - (a) the *employee's* ordinary *daily wage*; plus
  - (b) the amount earned by the *employee* for the work performed that day, whether calculated by reference to time worked or any other method.
- (4) An employer must pay an *employee* for a *public holiday* on the *employee's* usual pay day.
- (5) If a shift worked by an *employee* falls on a *public holiday* and another day, the whole shift is deemed to have been worked on the *public holiday*, but if the greater portion of the shift was worked on the other day, the whole shift is deemed to have been worked on the other day.

**Notes:**

- (4) Section 90 protects the confidentiality of any medical examination conducted in terms of this Act.
  - (5) In terms of section 2 (2) of the Public Holidays Act, 1994 (Act No. 36 of 1994), a public holiday is exchangeable for any other day which is fixed by agreement or agreed to between the employer and the employee.
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## CHAPTER THREE

### LEAVE

#### Application of this Chapter

19. (1) The provisions of this Chapter do not apply to an *employee* who works less than 24 hours a month for an employer.
- (2) Unless an *agreement* provides otherwise, the provisions of this Chapter do not apply to leave granted to an *employee* in excess of the *employee's* entitlement under this Chapter.

#### Annual leave

20. (1) In this Chapter, "annual leave cycle" means the period of 12 months' employment with the same employer immediately following-
  - (a) an *employee's* commencement of employment; or
  - (b) the completion of that *employee's* prior leave cycle.
- (2) An employer must grant an *employee* at least-
  - (a) 21 consecutive days' annual leave on full *remuneration* in respect of each annual leave cycle; or
  - (b) by *agreement*, one day of annual leave on full *remuneration* for every 17 days on which the *employee* worked or was entitled to be paid.
  - (c) by *agreement*, one hour of annual leave on full *remuneration* for every 17 hours on which the *employee* worked or was entitled to be paid.
- (3) An *employee* is entitled to take leave accumulated in an annual leave cycle in terms of subsection (2) on consecutive days.
- (4) An employer must grant annual leave not later than six months after the end of the annual leave cycle.
- (5) An employer may not require or permit an *employee* to take annual leave during-
  - (a) any other period of leave to which the *employee* is entitled in terms of this Chapter; or
  - (b) any period of notice of termination of employment.

- (6) Despite subsection (5), an employer must permit an *employee*, at the *employee*'s written request, to take leave during a period of unpaid leave.
- (7) An employer may reduce an *employee's* entitlement to annual leave by the number of days of occasional leave on full *remuneration* granted to the *employee* at the *employee's* request in that leave cycle.
- (8) An employer must grant an *employee* an additional day of paid leave if a *public holiday* falls on a day during an *employee's* annual leave on which the *employee* would ordinarily have worked.
- (9) An employer may not require or permit an *employee* to work for the employer during any period of annual leave.
- (10) Annual leave must be taken-
  - (a) in accordance with an *agreement* between the employer and *employee*; or
  - (b) if there is no *agreement* in terms of paragraph (a), at a time determined by the employer in accordance with this section.
- (11) An employer may not pay an *employee* instead of granting paid leave in terms of this section except-
  - (a) on termination of employment; and
  - (b) in accordance with section 40(b) and (c).

### **Pay for annual leave**

21. (1) An employer must pay an *employee* leave pay at least equivalent to the *remuneration* that the *employee* would have received for working for a period equal to the period of annual leave, calculated-
  - (a) at the *employee's* rate of *remuneration* immediately before the beginning of the period of annual leave; and
  - (b) in accordance with section 35.
- (2) An employer must pay an *employee* leave pay-
  - (a) before the beginning of the period of leave; or
  - (b) by *agreement*, on the *employee's* usual pay day.

### **Sick leave**

22. (1) In this Chapter, "sick leave cycle" means the period of 36 months' employment with the same employer immediately following-

- (a) an *employee's* commencement of employment; or
  - (b) the completion of that *employee's* prior sick leave cycle.
- (2) During every sick leave cycle, an *employee* is entitled to an amount of paid sick leave equal to the number of days the *employee* would normally work during a period of six *weeks*.
- (3) Despite subsection (2), during the first six months of employment, an *employee* is entitled to one day's paid sick leave for every 26 days worked.
- (4) During an *employee's* first sick leave cycle, an employer may reduce the *employee's* entitlement to sick leave in terms of subsection (2) by the number of days' sick leave taken in terms of subsection (3).
- (5) Subject to section 23, an employer must pay an *employee* for a day's sick leave----
- (a) the *wage* the *employee* would ordinarily have received for work on that day; and
  - (b) on the *employee's* usual pay day.
- (6) An *agreement* may reduce the pay to which an *employee* is entitled in respect of any day's absence in terms of this section if-
- (a) the number of days of paid sick leave is increased at least commensurately with any reduction in the daily amount of sick pay; and
  - (b) the *employee's* entitlement to pay-
    - (i) for any day's sick leave is at least 75 per cent of the *wage* payable to the *employee* for the ordinary hours the *employee* would have worked on that day; and
    - (ii) for sick leave over the sick leave cycle is at least equivalent to the *employee's* entitlement in terms of subsection (2).

### **Proof of incapacity**

23. (1) An employer is not required to pay an *employee* in terms of section 22 if the *employee* has been absent from work for more than two consecutive days or on more than two occasions during an eight-*week* period and, on request by the employer, does not produce a medical certificate stating that the *employee* was unable to work for the duration of the *employee's* absence on account of sickness or injury.

- (2) The medical certificate must be issued and signed by a *medical practitioner* or any other person who is certified to diagnose and treat patients and who is registered with a professional council established by an Act of Parliament.
- (3) If it is not reasonably practicable for an *employee* who lives on the employer's premises to obtain a medical certificate, the employer may not withhold payment in terms of subsection (1) unless the employer provides reasonable assistance to the *employee* to obtain the certificate.

### **Application to occupational accidents or diseases**

24. Sections 22 and 23 do not apply to an inability to work caused by an accident or occupational disease as defined in the Compensation for Occupational Injuries and Diseases Act, 1993 (Act No. 130 of 1993), or the Occupational Diseases in Mines and Works Act, 1973 (Act No. 78 of 1973), except in respect of any period during which no compensation is payable in terms of those Acts.

### **Maternity leave**

- 25
- (1) An *employee* is entitled to at least four consecutive months' maternity leave.
  - (2) An *employee* may commence maternity leave-
    - (a) at any time from four weeks before the expected date of birth, unless otherwise agreed; or
    - (b) on a date from which a *medical practitioner* or *midwife* certifies that it is necessary for the *employee's* health or that of her unborn child.
  - (3) No *employee* may work for six weeks after the birth of her child, unless a *medical practitioner* or *midwife* certifies that she is fit to do so.
  - (4) An *employee* who has a miscarriage during the third trimester of pregnancy or bears a stillborn child is entitled to maternity leave for six weeks after the miscarriage or stillbirth, whether or not the *employee* had commenced maternity leave at the time of the miscarriage or still birth.
  - (5) An *employee* must notify an employer of the date on which the *employee* intends to -
    - (a) commence maternity leave; and
    - (b) return to work after maternity leave.
  - (6) Notification in terms of subsection (5) must be given-

- (a) at least four weeks before the *employee* intends to commence maternity leave; or
  - (b) if it is not reasonably practicable to do so, as soon as is reasonably practicable;
- (7) The payment of maternity benefits will be determined by the Minister subject to the provisions of the Unemployment Insurance Act, 2001 (Act No 63. of 2001)

### Parental leave

- 25A. (1) An employee, who is a parent of a child, is entitled to at least ten consecutive days parental leave.
- (2) An employee may commence parental leave on—
- (a) the day that the employee's child is born; or
  - (b) the date—
    - (i) that the adoption order is granted; or
    - (ii) that a child is placed in the care of a prospective adoptive parent by a competent court, pending the finalisation of an adoption order in respect of that child, whichever date occurs first.
- (3) An employee must notify an employer in writing, unless the employee is unable to do so, of the date on which the employee intends to—
- (a) commence parental leave; and
  - (b) return to work after parental leave.
- (4) Notification in terms of subsection (3) must be given—
- (a) at least one month before the—
    - (i) employee's child is expected to be born; or
    - (ii) date referred to in subsection 2(b); or
  - (b) if it is not reasonably practicable to do so, as soon as is reasonably practicable.

- (5) The payment of parental benefits will be determined by the Minister, subject to the provisions of the Unemployment Insurance Act, 2001 (Act No. 63 of 2001).

### **Adoption leave**

- 25B. (1) An employee, who is an adoptive parent of a child who is below the age of two, is subject to subsection (6), entitled to—
- (a) adoption leave of at least ten weeks consecutively; or
  - (b) the parental leave referred to in section 25A.
- (2) An employee may commence adoption leave on the date—
- (a) that the adoption order is granted; or
  - (b) that a child is placed in the care of a prospective adoptive parent by a competent court, pending the finalisation of an adoption order in respect of that child, whichever date occurs first.
- (3) An employee must notify an employer in writing, unless the employee is unable to do so, of the date on which the employee intends to—
- (a) commence adoption leave; and
  - (b) return to work after adoption leave.
- (4) Notification in terms of subsection (3) must be given—
- (a) at least one month before the date referred to in subsection (2); or
  - (b) if it is not reasonably practicable to do so, as soon as is reasonably practicable.
- (5) The payment of adoption benefits will be determined by the Minister, subject to the provisions of the Unemployment Insurance Act, 2001 (Act No. 63 of 2001).
- (6) If an adoption order is made in respect of two adoptive parents, one of the adoptive parents may apply for adoption leave and the other adoptive parent may apply for the parental leave referred to in section 25A: Provided that the selection of choice must be exercised at the option of the two adoptive parents.

- (7) If a competent court orders that a child is placed in the care of two prospective adoptive parents, pending the finalisation of an adoption order in respect of that child, one of the prospective adoptive parents may apply for adoption leave and the other prospective adoptive parent may apply for the parental leave referred to in section 25A: Provided that the selection of choice must be exercised at the option of the two prospective adoptive parents.

### **Commissioning parental leave**

- 25C. (1) An employee, who is a commissioning parent in a surrogate motherhood agreement is, subject to subsection (6), entitled to—
- (a) commissioning parental leave of at least ten weeks consecutively; or
  - (b) the parental leave referred to in section 25A.
- (2) An employee may commence commissioning parental leave on the date a child is born as a result of a surrogate motherhood agreement.
- (3) An employee must notify an employer in writing, unless the employee is unable to do so, of the date on which the employee intends to—
- (a) commence commissioning parental leave; and
  - (b) return to work after commissioning parental leave.
- (4) Notification in terms of subsection (3) must be given—
- (a) at least one month before a child is expected to be born as a result of a surrogate motherhood agreement; or
  - (b) if it is not reasonably practicable to do so, as soon as is reasonably practicable.
- (5) The payment of commissioning parental benefits will be determined by the Minister, subject to the provisions of the Unemployment Insurance Act, 2001 (Act No. 63 of 2001).
- (6) If a surrogate motherhood agreement has two commissioning parents, one of the commissioning parents may apply for commissioning parental leave and the other commissioning parent may apply for the parental leave referred to in section 25A: Provided that the selection of choice must be exercised at the option of the two commissioning parents.
- (7) In this section, unless the context otherwise indicates— ‘commissioning parent’ has the meaning assigned to it in section 1 of the Children’s Act,

2005 (Act No. 38 of 2005); and 'surrogate motherhood agreement' has the meaning assigned to it in section 1 of the Children's Act, 2005 (Act No. 38 of 2005).”.

### Protection of employees before and after birth of a child

26. (1) No employer may require or permit a pregnant *employee* or an *employee* who is nursing her child to perform work that is hazardous to her health or the health of her child.
- (2) During an *employee's* pregnancy, and for a period of six months after the birth of her child, her employer must offer her suitable alternative employment on terms and conditions that are no less favourable than her ordinary terms and conditions of employment, if-
- (a) the *employee* is required to perform night work, as defined in section 17(1) or her work poses a danger to her health or safety or that of her child; and
  - (b) it is practicable for the employer to do so.

### Family responsibility leave

27. (1) This section applies to an *employee*-
- (a) who has been in employment with an employer for longer than four months; and
  - (b) who works on at least four days a week for that employer.
- (2) An employer must grant an *employee*, during each annual leave cycle, at the request of the *employee*, three days' paid leave, which the *employee* is entitled to take-
- (a) *repealed*;
  - (b) when the *employee's* child is sick; or
  - (c) in the event of the death of-
    - (i) the *employee's* spouse or life partner; or
    - (ii) the *employee's* parent, adoptive parent, grandparent, child, adopted child, grandchild or sibling.
- (3) Subject to subsection (5), an employer must pay an *employee* for a day's family responsibility leave-
- (a) the *wage* the *employee* would ordinarily have received for work on that day; and
  - (b) on the *employee's* usual pay day.

- (4) An *employee* may take family responsibility leave in respect of the whole or a part of a day.
- (5) Before paying an *employee* for leave in terms of this section, an employer may require reasonable proof of an event contemplated in subsection (2) for which the leave was required. **(s s 5 substituted by Act 11 of 2002)**
- (6) An *employee's* unused entitlement to leave in terms of this section lapses at the end of the annual leave cycle in which it accrues.
- (7) A *collective agreement* may vary the number of days and the circumstances under which leave is to be granted in terms of this section.

*Note (6) In terms of section 187 (1) (e) of the Labour Relations Act, 1995, the dismissal of an employee on account of her pregnancy, intended pregnancy, or any reason related to her pregnancy, is automatically unfair. The definition of dismissal in section 186 of the Labour Relations Act, 1995, includes the refusal to allow an employee to resume work after she has taken maternity leave in terms of any law, collective agreement or her contract.*

*Note (7) Section 34 and 37 of the Unemployment Insurance Act, 1966 (Act No. 30 of 1996), provide for the payment of maternity leave. Legislative amendments will be proposed to Cabinet to improve these benefits and to provide that the payment to an employee of maternity benefits does not adversely affect her right to unemployment benefits.*

*Note (8) The Minister must issue a Code of Good Practice on the Protection of Employees during Pregnancy and after the Birth of a Child in terms of section 87 (1) (b).*

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## CHAPTER FOUR

### PARTICULARS OF EMPLOYMENT AND REMUNERATION

#### Application of this Chapter

28. (1) The provisions of this Chapter do not apply to an *employee* who works less than 24 hours a month for an employer.
- (2) The provisions of sections 29(1)(n), (o) and (p), 30, 31 and 33 do not apply to -
- (a) an employer who employs fewer than five *employees*; and

#### Written particulars of employment

29. (1) An employer must supply an *employee*, when the *employee* commences employment, with the following particulars in writing-
- (a) the full name and address of the employer;
- (b) the name and occupation of the *employee*, or a brief description of the work for which the *employee* is employed;
- (c) the place of work, and, where the *employee* is required or permitted to work at various places, an indication of this;
- (d) the date on which the employment began;
- (e) the *employee's ordinary hours of work* and days of work;
- (f) the *employee's wage* or the rate and method of calculating *wages*;
- (g) the rate of pay for *overtime work*;
- (h) any other cash payments that the *employee* is entitled to;
- (i) any payment in kind that the *employee* is entitled to and the value of the payment in kind;
- (j) how frequently *remuneration* will be paid;
- (k) any deductions to be made from the *employee's remuneration*;
- (l) the leave to which the *employee* is entitled;
- (m) the period of notice required to terminate employment, or if employment is for a specified period, the date when employment is to terminate;
- (n) a description of any *council or sectoral determination* which covers the employer's business;
- (o) any period of employment with a previous employer that counts towards the *employee's period of employment*;
- (p) a list of any other documents that form part of the contract of

employment, indicating a place that is reasonably accessible to the *employee* where a copy of each may be obtained.

- (2) When any matter listed in subsection (1) changes-
  - (a) the written particulars must be revised to reflect the change; and
  - (b) the *employee* must be supplied with a copy of the document reflecting the change.
- (3) If an *employee* is not able to understand the written particulars, the employer must ensure that they are explained to the *employee* in a language and in a manner that the *employee* understands.
- (4) Written particulars in terms of this section must be kept by the employer for a period of three years after the termination of employment.

### **Informing employees of their rights**

30. An employer must display at the *workplace* where it can be read by *employees* a statement in the *prescribed* form of the *employee's* rights under *this Act* in the official languages which are spoken in the *workplace*.

### **Keeping of records**

31. (1) Every employer must keep a record containing at least the following information-
  - (a) the *employee's* name and occupation;
  - (b) the time worked by each *employee*;
  - (c) the *remuneration* paid to each *employee*;
  - (d) the date of birth of any *employee* under 18 years of age; and
  - (e) any other *prescribed* information.
- (2) A record in terms of subsection (1) must be kept by the employer for a period of three years from the date of the last entry in the record.
- (3) No person may make a false entry in a record maintained in terms of subsection (1).
- (4) An employer who keeps a record in terms of this section is not required to keep any other record of time worked and *remuneration* paid as required by any other *employment law*.

## Payment of remuneration

32. (1) An employer must pay to an *employee* any *remuneration* that is paid in money-
- (a) in South African currency;
  - (b) daily, weekly, fortnightly or monthly; and
  - (c) in cash, by cheque or by direct deposit into an account designated by the *employee*.
- (2) Any *remuneration* paid in cash or by cheque must be given to each *employee*-
- (a) at the *workplace* or at a place agreed to by the *employee*;
  - (b) during the *employee's* working hours or within 15 minutes of the commencement or conclusion of those hours; and
  - (c) in a sealed envelope which becomes the property of the *employee*.
- (3) An employer must pay *remuneration* no later than seven days after-
- (a) the completion of the period for which the *remuneration* is payable; or
  - (b) the termination of the contract of employment.
- (4) Subsection (3)(b) does not apply to any pension or provident fund payment to an *employee* that is made in terms of the rules of the fund.

## Information about remuneration

33. (1) An employer must give an *employee* the following information in writing on each day the *employee* is paid -
- (a) the employer's name and address;
  - (b) the *employee's* name and occupation;
  - (c) the period for which the payment is made;
  - (d) the *employee's remuneration* in money;
  - (e) the amount and purpose of any deduction made from the *remuneration*;
  - (f) the actual amount paid to the *employee*; and
  - (g) if relevant to the calculation of that *employee's remuneration*-
    - (i) the *employee's* rate of *remuneration* and *overtime* rate;
    - (ii) the number of ordinary and *overtime* hours worked by the *employee* during the period for which the payment is made;
    - (iii) the number of hours worked by the *employee* on a Sunday

- or *public holiday* during that period; and
    - (iv) if an *agreement* to average working time has been concluded in terms of section 12, the total number of ordinary and *overtime* hours worked by the *employee* in the period of averaging.
- (2) The written information required in terms of subsection (1) must be given to each *employee*-
  - (a) at the *workplace* or at a place agreed to by the *employee*; and
  - (b) during the *employee's* ordinary working hours or within 15 minutes of the commencement or conclusion of those hours.

### **Prohibited conduct by employer**

- 33A.** (1) An employer must not-
- (a) require or accept any payment by or on behalf of an employee or potential employee in respect of the employment of, or the allocation of work to, any employee; or
  - (b) require an employee or potential employee to purchase any goods, products or services from the employer or from any business or person nominated by the employer.
- (2) Subsection (1)(b) does not preclude a provision in a contract of employment or collective agreement in terms of which an employee is required to participate in a scheme involving the purchase of specific goods, products or services, if the purchase is not prohibited by any other statute
- and-
- (a) the employee receives a financial benefit from participating in the scheme; or
  - (b) the price of any goods, products or services provided through the scheme is fair and reasonable.

### **Deductions and other acts concerning remuneration**

- 34 (1) An employer may not make any deduction from an *employee's remuneration* unless-
- (a) subject to subsection (2), the employee in writing agrees to the deduction in respect of a debt specified in the *agreement*; or

- (b) the deduction is required or permitted in terms of a law, *collective agreement*, court order or arbitration award.
- (2) A deduction in terms of subsection (1)(a) may be made to reimburse an employer for loss or damage only if-
- (a) the loss or damage occurred in the course of employment and was due to the fault of the *employee*;
  - (b) the employer has followed a fair procedure and has given the *employee* a reasonable opportunity to show why the deductions should not be made;
  - (c) the total amount of the debt does not exceed the actual amount of the loss or damage; and
  - (d) the total deductions from the *employee's remuneration* in terms of this subsection do not exceed one-quarter of the *employee's remuneration* in money.
- (3) A deduction in terms of subsection 1(a) in respect of any goods purchased by the *employee* must specify the nature and quantity of the goods.
- (4) An employer who deducts an amount from an *employee's remuneration* in terms of subsection (1) for payment to another person must pay the amount to the person in accordance with the time period and other requirements specified in the *agreement*, law, court order or arbitration award.
- (5) An employer may not require or permit an *employee* to-
- (a) repay any *remuneration* except for overpayments previously made by the employer resulting from an error in calculating the *employee's remuneration*; or
  - (b) acknowledge receipt of an amount greater than the *remuneration* actually received.

### **Payment of contributions to benefit funds.**

- 34A (1) For the purposes of this section, a benefit fund is a pension, provident, retirement, medical aid or similar fund.
- (2) An employer that deducts from an employee's remuneration any amount for payment to a benefit fund must pay the amount to the fund within seven days of the deduction being made.

- (3) Any contribution that an employer is required to make to a benefit fund on behalf of an employee, that is not deducted from the employee's remuneration, must be paid to the fund within seven days of the end of the period in respect of which the payment is made.
- (4) This section does not affect any obligation on an employer in terms of the rules of a benefit fund to make any payment within a shorter period than that required by subsection (2) or (3).

### Calculation of remuneration and wages

- 35
- (1) An *employee's wage* is calculated by reference to the number of hours an *employee* ordinarily works.
  - (2) For the purposes of calculating the *wage* of an *employee* by time, an *employee* is deemed ordinarily to work-
    - (a) 45 hours in a *week*, unless the *employee* ordinarily works a lesser number of hours in a *week*;
    - (b) nine hours on a day, or seven and a half hours in the case of an *employee* who works on more than five days a *week*, or the number of hours that an *employee* works in a day in terms of an *agreement* concluded in accordance with section 11, unless the *employee* ordinarily works a lesser number of hours on a day.
  - (3) An *employee's* monthly *remuneration* or *wage* is four and one-third times the *employee's* weekly *remuneration* or *wage*, respectively.
  - (4) If an *employee's* *remuneration* or *wage* is calculated, either wholly or in part, on a basis other than time or if an *employee's* *remuneration* or *wage* fluctuates significantly from period to period, any payment to that *employee* in terms of *this Act* must be calculated by reference to the *employee's* *remuneration* or *wage* during-
    - (a) the preceding 13 *weeks*; or
    - (b) if the *employee* has been in employment for a shorter period, that period.
  - (5)
    - (a) The Minister may, by notice in the Gazette, after consultation with the Commission and NEDLAC, determine whether a particular category of payment, whether in money or in kind, forms part of an employee's remuneration for the purpose of any calculation made in terms of this Act.
    - (b) Without limiting the Minister's powers in terms of paragraph (a), the Minister may-

- (i) determine the value, or a formula for determining the value, of any payment that forms part of remuneration;
  - (ii) place a maximum or minimum value on any payment that forms part of remuneration; and
  - (iii) for the purposes of any calculation, differentiate between different categories of payment and different sectors.
- (c) Before the Minister issues a notice in terms of paragraph (a), the Minister must-
- (i) publish a draft of the proposed notice in the Gazette ; and
  - (ii) invite interested parties to submit written representations on the draft notice within a reasonable period.
-

## CHAPTER FIVE

### TERMINATION OF EMPLOYMENT

#### Application of this Chapter

36. This Chapter does not apply to an *employee* who works less than 24 hours in a month for an employer.

#### Notice of termination of employment

37. (1) Subject to section 38, a contract of employment terminable at the instance of a party to the contract may be terminated only on notice of not less than-
- (a) one *week*, if the *employee* has been employed for six months or less;
  - (b) two *weeks*, if the *employee* has been employed for more than six months but not more than one year;
  - (c) four *weeks*, if the *employee*-
    - (i) has been employed for one year or more; or
    - (ii) is a *farm worker* or *domestic worker* who has been employed for more than six months.
- (2) (a) A *collective agreement* may not permit a notice period shorter than that required by subsection (1).
- (b) Despite paragraph (a), a collective agreement may permit the notice period of four weeks required by subsection (1)(c)(i) to be reduced to not less than two weeks.
- (3) No *agreement* may require or permit an *employee* to give a period of notice longer than that required of the employer.
- (4) (a) Notice of termination of a contract of employment must be given in writing, except when it is given by an illiterate *employee*.
- (b) If an *employee* who receives notice of termination is not able to understand it, the notice must be explained orally by, or on behalf of, the employer to the *employee* in an official language the *employee* reasonably understands.

- (5) Notice of termination of a contract of employment given by an employer must-
  - (a) not be given during any period of leave to which the *employee* is entitled in terms of Chapter Three; and
  - (b) not run concurrently with any period of leave to which the *employee* is entitled in terms of Chapter Three, except sick leave.
  
- (6) Nothing in this section affects the right-
  - (a) of a dismissed *employee* to dispute the lawfulness or fairness of the dismissal in terms of Chapter VIII of the *Labour Relations Act 1995* or any other law; and
  - (b) of an employer or an *employee* to terminate a contract of employment without notice for any cause recognised by law.

### **Payment instead of notice**

- 38. (1) Instead of giving an *employee* notice in terms of section 37, an employer may pay the *employee* the *remuneration* the *employee* would have received, calculated in accordance with section 35, if the *employee* had worked during the notice period.
  
- (2) If an *employee* gives notice of termination of employment, and the employer waives any part of the notice, the employer must pay the *remuneration* referred to in subsection (1), unless the employer and *employee* agree otherwise.

### **Employees in accommodation provided by employers**

- 39. (1) If the employer of an *employee* who resides in accommodation that is situated on the premises of the employer or that is supplied by the employer terminates the contract of employment of that *employee*-
  - (a) before the date on which the employer was entitled to do so in terms of section 37; or
  - (b) in terms of section 38;

the employer is required to provide the *employee* with accommodation for a period of one month, or if it is a longer period, until the contract of employment could lawfully have been terminated.
  
- (2) If an *employee* elects to remain in accommodation in terms of subsection (1) after the employer has terminated the *employee's* contract of employment in terms of section 38, the *remuneration* that the employer is

required to pay in terms of section 38 is reduced by that portion of the *remuneration* that represents the agreed value of the accommodation for the period that the *employee* remains in the accommodation.

### Payments on termination

40. On termination of employment, an employer must pay an *employee*-
- (a) for any paid time off that the *employee* is entitled to in terms of section 10(3) or 16(3) that the *employee* has not taken;
  - (b) *remuneration* calculated in accordance with section 21(1) for any period of annual leave due in terms of section 20(2) that the *employee* has not taken; and
  - (c) If the *employee* has been in employment longer than four months, in respect of the *employee's* annual leave entitlement during an incomplete annual leave cycle as defined in section 20(1)-
    - (i) one day's *remuneration* in respect of every 17 days on which the *employee* worked or was entitled to be paid; or
    - (ii) *remuneration* calculated on any basis that is at least as favourable to the employee as that calculated in terms of sub-paragraph (i).

### Severance pay

41. (1) For the purposes of this section, "operational requirements" means requirements based on the economic, technological, structural or similar needs of an employer.
- (2) An employer must pay an *employee* who is dismissed for reasons based on the employer's operational requirements or whose contracts of employment terminates or is terminated in terms of section 38 of the Insolvency Act, 1936 (Act No. 24 of 1936), severance pay equal to at least one *week's remuneration* for each completed year of continuous service with that employer, calculated in accordance with section 35. **(s41 substituted by Act 11 of 2002)**
- (3) The *Minister* may vary the amount of severance pay in terms of subsection (2) by notice in the Gazette. This variation may only be done after consulting *NEDLAC* and the Public Service Co-ordinating Bargaining Council established under Schedule 1 of the labour relations act, 1995.

- (4) An *employee* who unreasonably refuses to accept the employer's offer of alternative employment with that employer or any other employer, is not entitled to severance pay in terms of subsection (2).
- (5) The payment of severance pay in compliance with this section does not affect an *employee's* right to any other amount payable according to law.
- (6) If there is a *dispute* only about the entitlement to severance pay in terms of this section, the *employee* may refer the *dispute* in writing to-
  - (a) a *council*, if the parties to the *dispute* fall within the registered scope of that *council*; or
  - (b) the *CCMA*, if no *council* has jurisdiction.
- (7) The *employee* who refers the *dispute* to the *council* or the *CCMA* must satisfy it that a copy of the referral has been served on all the other parties to the *dispute*.
- (8) The *council* or the *CCMA* must attempt to resolve the *dispute* through conciliation.
- (9) If the *dispute* remains unresolved, the *employee* may refer it to arbitration.
- (10) If the *Labour Court* is adjudicating a *dispute* about a dismissal based on the employer's operational requirements, the Court may inquire into and determine the amount of any severance pay to which the dismissed *employee* may be entitled and the Court may make an order directing the employer to pay that amount. (

### **Certificate of service**

42. On termination of employment an *employee* is entitled to a certificate of service stating-
    - (a) the *employee's* full name;
    - (b) the name and address of the employer;
    - (c) a description of any council or sectoral employment standard by which the employer's business is covered;
    - (d) the date of commencement and date of termination of employment;
    - (e) the title of the job or a brief description of the work for which the *employee* was employed at date of termination;
    - (f) the *remuneration* at date of termination; and
    - (g) if the *employee* so requests, the reason for termination of employment.
-

## CHAPTER SIX

### PROHIBITION OF EMPLOYMENT OF CHILDREN AND FORCED LABOUR

#### Prohibition of employment of children

43. (1) No person may employ a *child*-
- (a) who is under 15 years of age; or
  - (b) who is under the minimum school-leaving age in terms of any law, if this is 15 or older.
- (2) No person may employ a child in employment-
- (a) that is inappropriate for a person of that age;
  - (b) that places at risk the *child's* well-being, education, physical or mental health, or spiritual, moral or social development.
- (3) A person who employs a child in contravention of subsection (1) commits an offence.

#### Employment of children of 15 years or older.

44. (1) Subject to section 43(2), the minister may, on the advice of the commission, make regulations to prohibit or place conditions on the employment of children who are 15 years of age and no longer subject to compulsory schooling in terms of any law.
- (2) A person who employs a *child* in contravention of subsection (1) or (2) commits an offence.

**NOTE 9 Section 31(1) of the South African Schools Act,1996 (Act No. 84 of 1996), requires every parent to cause every learner for whom he or she is responsible to attend a school until the last school day of the year in which the learner reaches the age of 15 or the ninth grade, whichever is the first.**

#### Medical examinations

45. The *Minister* may, after consulting the *Commission*, make regulations relating to the conduct of medical examinations of children who perform work.

## Prohibitions

46. It is an offence to-
- (a) assist any person to require or permit a *child* to work in contravention of *this Act*, or
  - (b) discriminate against a person who refuses to permit a *child* to work in contravention of *this Act*.

## Evidence of age

47. In any proceedings in terms of *this Act*, if the age of any person is a relevant factor for which insufficient evidence is available, it is for the party who alleges that the work by that person complied with the provisions of this Chapter to prove that it was reasonable for that party to believe, after investigation, that the person was not below the permitted age in terms of section 43 or 44.

## Prohibition of forced labour

48. (1) Subject to the *Constitution*, all forced labour is prohibited.
- (2) No person may for his or her own benefit or for the benefit of someone else, cause, demand or impose forced labour in contravention of subsection (1).
- (3) A person who contravenes subsection (1) or (2) commits an offence.
-

## CHAPTER SEVEN

### VARIATION OF BASIC CONDITIONS OF EMPLOYMENT

#### Variation by agreement

49. (1) A *collective agreement* concluded in a *bargaining council* may alter, replace or exclude any *basic condition of employment* if the collective agreement is consistent with the purpose of this Act and the collective agreement does not-
- (a) reduce the protection afforded to employees by sections 7, 9 and any regulation made in terms of section 13;
  - (b) reduce the protection afforded to employees who perform night work in terms of section 17(3) and (4);
  - (c) reduce an employee's annual leave in terms of section 20 to less than two weeks;
  - (d) reduce an employee's entitlement to maternity leave in terms of section 25;
    - (dA) reduce an employee's entitlement to parental leave in terms of section 25A;
    - (dB) reduce an employee's entitlement to adoption leave in terms of section 25B;
    - (dC) reduce an employee's entitlement to commissioning parental leave in terms of section 25C;".
  - (e) reduce an employee's entitlement to sick leave in terms of sections 22 to 24;
  - (f) conflict with the provisions of chapter 6.
- (2) A *collective agreement*, other than an agreement contemplated in subsection (1), may replace or exclude a *basic condition of employment*, to the extent permitted by *this Act* or a *sectoral determination*.
- (3) An employer and an *employee* may agree to replace or exclude a *basic condition of employment* to the extent permitted by *this Act* or a *sectoral determination*.
- (4) No provision in this Act or a *sectoral determination* may be interpreted as permitting-
- (a) contract of employment or agreement between an employer and an employee contrary to the provisions of a collective agreement;
  - (b) collective agreement contrary to the provisions of a collective agreement concluded in a bargaining council.

**Note 10 Section 90 (3) protects the confidentiality of any medical examination conducted in terms of this Act**

**Variation by the Minister**

50. (1) The Minister may, if it is consistent with the purpose of this Act, make a determination to replace or exclude any basic condition of employment provided for in this Act in respect of-
- (a) a category of employees or category of employers; or
  - (b) any employer or employee in respect of whom an application is made by-
    - (i) the employer;
    - (ii) the registered employers' organisation;
    - (iii) the employer and any registered employers' organisation.
- (2) A determination in terms of subsection (1)-
- (a) may not be made in respect of sections 7, 17 (3), and (4), 25, 43 (2), 44 or 48 or a regulation made in terms of section 13; and
  - (b) may only be made in respect of section 43(1) to allow the employment of children in the performance of advertising, sports, artistic or cultural activities.
- 2(A) A determination in terms of subsection (1) may only be made in respect of section 9 if –
- (a) the employees' ordinary hours of work, rest periods and annual leave are on the whole more favourable to the employees than the basic conditions of employment in terms of section 9, 10, 14, 15 and 20; and
  - (b) the determination –
    - (i) has been agreed to in a collective agreement;
    - (ii) is necessitated by the operational circumstances of the sector in respect of which the variation is sought and the majority of employees in the sector are not members of a registered trade union; or
    - (iii) applies to the agricultural sector or the private security sector.
- (3) A determination in terms of subsection 1(a) must-
- (a) be made on the advice of the commission; and
  - (b) be issued by a notice in the gazette

- (4) The minister may request the commission-
- (a) to advise on any application made in terms of subsection 1(b);
  - (b) to prepare guidelines for the consideration of applications made in terms of subsection 1(b);
- (5) A determination in terms of subsection (1) that applies to the public service must be made by the Minister in consultation with the Minister for the Public Service and Administration.
- (6) If a determination in terms of subsection (1) concerns the employment of children, the Minister must consult with the Minister of Welfare and Population Development before making the determination.
- (7) (a) A determination in terms of subsection (1)(b) may be issued if the application has the consent of any registered trade union that represents the employees in respect of whom the determination is to apply.
- (a) if no consent contemplated in paragraph (a) has been obtained, a determination in terms of subsection(1)(b) may be issued if-
    - (i) the employer or employers' organisation has served a copy of the application, together with a notice stating that representations may be made to the Minister, on any registered trade union that represents employees affected by the application; and
    - (ii) in the case where the majority of employees are not represented by a registered trade Union, the employer or employers` organisation has taken reasonable steps to bring the application and the fact that representations may be made to the Minister, to the attention of those employees.
- (8) A determination made in terms of subsection (1)(b)-
- (a) may be issued on any conditions and for a period determined by the *Minister*;
  - (b) may take effect on a date earlier than the date on which the determination is given, but not earlier than the date on which application was made;
  - (c) must be issued in a notice in the *prescribed* form if the determination is made in respect of an application made by an employer;
  - (d) must be published in a notice in the *Gazette* if the determination is made in respect of an application made by an *employers' organisation*.

- (9) (a) The Minister may on application by any affected party and after allowing other affected parties a reasonable opportunity to make representations, may amend or withdraw a determination issued in terms of subsection (1).
- (b) For the purposes of paragraph (a), an affected party is-
- (i) an employer or employers' organisation that is covered by the determination;
  - (ii) a *registered trade union* representing *employees* covered by the determination, or an *employee* covered by the determination who is not a member of a *registered trade union*.
- (10) An employer in respect of whom a determination has been made, or whose employees are covered by a determination in terms of subsection (1) must-
- (a) display a copy of the notice conspicuously at the *workplace* where it can be read by the *employees* to whom the determination applies;
  - (b) notify each *employee* in writing of the fact of the determination and of where a copy of the notice has been displayed; and
  - (c) give a copy of the notice to-
    - (i) any *registered trade union* representing those *employees*;
    - (ii) any *trade union representative* representing those *employees*; and
    - (iii) any *employee* who requests a copy.
-

## CHAPTER EIGHT

### SECTORAL DETERMINATIONS

#### Sectoral determination

51. (1) The *Minister* may make a *sectoral determination* establishing *basic conditions of employment* for *employees* in a *sector* and *area*.
- (2) A *sectoral determination* must be made in accordance with the provisions of this Chapter and by notice in the *Gazette*.
- (3) If any sectoral determination at the date of the promulgation of the National Minimum Wage Act, 2018, prescribes wages that are higher than the national minimum wage, the wages in that sectoral determination and the remuneration and associated benefits based on those wages must be increased proportionally to any adjustment of the national minimum wage in terms of the National Minimum Wage Act, 2018.
- (4) Notwithstanding the provisions of any sectoral determination, an employer must pay a learner an allowance as prescribed in Schedule 2 of the National Minimum Wage Act, 2018, as is adjusted from time to time, from the date that the National Minimum Wage Act, 2018, comes into force.
- (5) For the purpose of subsection (4)— (a) ‘learner’ means a learner as defined in Schedule 2 of the National Minimum Wage Act, 2018; and (b) ‘allowance’ means an allowance as defined in Schedule 2 of the National Minimum Wage Act, 2018.”.

#### Investigation

52. (1) Before making a sectoral determination, the Minister must direct the Commission to investigate conditions of employment in the sector and area concerned.;
- (2) The Commission must, on its own accord or on the direction of the Minister, as contemplated in subsection (1), determine terms of reference for the investigation, which must include—;
- (a) the *sector* and *area* to be investigated;
- (b) the categories or classes of *employees* to be included in the

- (c) investigation; and  
the matters to be investigated, which may include any matter listed in section 55(4).
- (3) The *Commission* must publish a notice in the *Gazette* setting out the terms of reference of the investigation and inviting written representations by the public.
- (4) If an organisation representing employers or *employees* in a *sector* and *area* makes a written request to the *Minister* to investigate conditions of employment in that *sector* and *area*, the *Minister* must either-
  - (a) direct the *Commission* to conduct an investigation; or
  - (b) request the *Commission* to advise the *Minister* on whether the requested investigation ought to be conducted.

### Conduct of investigation

53. (1) For the purposes of conducting an investigation in terms of section 52(1) the *Commission* may-
- (a) question any person who may be able to provide information relevant to any investigation; or
  - (b) require, in writing, any employer or *employee* in a *sector* and *area* that is being investigated or any other person to furnish any information, book, document or object that is material to the investigation within a specified period, which must be reasonable.
- (2) A person may not refuse to answer any relevant question by the *Commission* that he or she is legally obliged to answer. Note (11)

Notes: 11. An answer by a person to a question put to him or her by a person conducting an investigation may not be used in any criminal proceedings except proceedings in respect of a charge of perjury or making a false statement (s.91)

### Preparation of report

54. (1) On completion of an investigation, and after considering any representations made by members of the public, the *Commission* must prepare a report.
- (2) A copy of the report must be submitted to the *Director-General* for his or her information and the *Minister* for consideration.

- (3) When advising the *Minister* on the publication of a *sectoral determination*, the *Commission* must consider in respect of the *sector* and *area* concerned-
- (a) the report prepared in terms of subsection (1);
  - (b) the ability of employers to carry on their business successfully;
  - (c) the operation of small, medium or micro-enterprises, and new enterprises;
  - (d) the cost of living;
  - (e) the alleviation of poverty;
  - (f) conditions of employment;
  - (g) wage differentials and inequality;
  - (h) the likely impact of any proposed condition of employment on current employment or the creation of employment;
  - (i) the possible impact of any proposed condition of employment on the health, safety or welfare of *employees*.
  - (j) any other relevant information made available to the *Commission*.
- (4) The *Commission* must prepare a report for the *Minister* containing recommendations on what matters which should be included in a *sectoral determination* for the relevant *sector* and *area*.

### **Making of sectoral determination**

55. (1) After considering the report and recommendations of the *Commission* contemplated in section 54 (4), the *Minister* may make a *sectoral determination* for one or more *sector* and *area* or as contemplated by section (8);
- (2) If the *Minister* does not accept a recommendation of the *Commission* made in terms of section 54(4), the *Minister* must refer the matter to the *Commission* for its reconsideration indicating the matters on which the *Minister* disagrees with the *Commission*.
- (3) After considering the further report and recommendations of the *Commission*, the *Minister* may make a *sectoral determination*.
- (4) A *sectoral determination* may in respect to the *sector* and *area* concerned-
- (a) set minimum terms and conditions of employment, including minimum rates of *remuneration*;
  - (b) provide for the adjustment of remuneration by way of minimum rates ; or minimum increases;
  - (c) regulate the manner, timing and other conditions of payment of *remuneration*;

- (d) prohibit or regulate payment of *remuneration* in kind;
  - (e) require employers to keep employment records;
  - (f) require employers to provide records to their *employees*;
  - (g) prohibit or regulate task-based work, piecework, home work and contract work;
  - (h) set minimum standards for housing and sanitation for *employees* who reside on their employers' premises;
  - (i) regulate payment of travelling and other work-related allowances;
  - (j) specify minimum conditions of employment for trainees;
  - (k) specify minimum conditions of employment for persons other than *employees*;
  - (l) regulate training and education schemes;
  - (m) regulate pension, provident, medical aid, sick pay, holiday and unemployment schemes or funds; and
  - (n) regulate any other matter concerning *remuneration* or other terms or conditions of employment.
  - (o) taking into account the provisions of section 21(8) of the Labour Relations Act, 1995, set a threshold of representativeness at which a trade union will automatically have the organisational rights contemplated in sections 12 and 13 of the Labour Relations Act, 1995, in respect of all workplaces covered by the sectoral determination; and
  - (p) establish one or more methods for determining the conditions of service for labour tenants who has a right to occupy and to use a part of a farm as contemplated in section 3 of the Land Reform (Labour Tenants) Act, 1996 (Act No. 3 of 1996), for the purpose of section 4(3);
- (5) Any provision of a *sectoral determination* may apply to all or some of the employers and *employees* in the *sector* and *area* concerned.
- (6) A sectoral determination in terms of subsection (1)-
- (a) may not be made in respect of section 7, 43 (2), 44 or 48;
  - (b) may only be made in respect of section 43 (1) to allow the employment of children in the performance of advertising, sports, artistic or cultural activities;
  - (c) may not reduce the protection afforded to employees by section 17 (3) and (4) and 25 or a regulation made in terms of section 13; and
  - (d) may vary the basic conditions of employment in section 9 in the circumstances contemplated by section 50(2A). (

- (7) The *Minister* may not publish a *sectoral determination* -
- (a) covering *employees* and employers who are bound by a *collective agreement* concluded at a *bargaining council*;
  - (b) covering employees covered by a collective agreement concluded in a statutory council regulating any matter [in a sector and area in which a statutory council is established and] in respect of which that statutory council has concluded a collective agreement;
  - (c) regulating any matter regulated by a *sectoral determination* for a *sector* and *area* which has been in effect for less than 12 months.

Subject to the provisions of subsection (7), the Minister may publish a sectoral determination that applies to employers and employees who are not covered by any other sectoral determination.

### **Period of operation of sectoral determination**

56. (1) The provisions of a *sectoral determination* remain binding until they are amended or superseded by a new or amended *sectoral determination*, or they are cancelled or suspended by the *Minister*.
- (2) If a *collective agreement* contemplated by section 55(6)(a) or (b) is concluded, the provisions of a *sectoral determination* cease to be binding upon employers and *employees* covered by the *agreement*.
- (3) The *Minister*, by notice in the *Gazette*, may-
- (a) cancel or suspend any provision of a *sectoral determination*, either in the *sector* and *area* as a whole or in part of the *sector* or in a specific *area*; or
  - (b) correct or clarify the meaning of any provision of a *sectoral determination* as previously published.
- (4) Before publishing a notice of cancellation or suspension in terms of subsection (3)(a) the *Minister*, by notice in the *Gazette*, must announce the intention to do so, and allow an opportunity for public comment.

### **Legal effect of sectoral determination**

57. If a matter regulated in *this Act* is also regulated in terms of a *sectoral determination*, the provision in the *sectoral determination* prevails.

## Employer to keep a copy of sectoral determination

58. Unless a *sectoral determination* provides otherwise, every employer on whom the *sectoral determination* is binding must-
- (a) keep a copy of that *sectoral determination* available in the *workplace* at all times;
  - (b) make that copy available for inspection by an *employee*; and
  - (c) give a copy of that *sectoral determination*-
    - (i) to an *employee* who has paid the *prescribed fee*; and
    - (ii) free of charge, on request, to an *employee* who is a *trade union representative* or a member of a *workplace forum*
-

## **CHAPTER NINE**

*Repealed*

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## **CHAPTER TEN**

### *Monitoring, enforcement and legal proceedings*

#### **PART A**

#### **Definitions**

62A. For the purpose of Chapter 10, an employee includes a worker as defined in section 1 of the National Minimum Wage Act, 2018

#### **Appointment of labour inspectors**

63. (1) The Minister may-
- (a) appoint any person in the public service as a labour inspector;
  - (b) designate any person in the public service, or any person appointed as a designated agent of a bargaining council in terms of section 33 of the Labour Relations Act, 1995, to perform any of the functions of a labour inspector.
- (2) Any person appointed under subsection (1) must perform his or her functions in terms of this Chapter, subject to the direction and control of the Minister.
- (3) The Minister must provide each labour inspector with a signed certificate in the prescribed form stating-
- (a) that the person is a labour inspector;
  - (b) which legislation that labour inspector may monitor and enforce; and
  - (c) which of the functions of a labour inspector that person may perform.

#### **Functions of labour inspectors**

64. (1) A labour inspector appointed under section 63(1) may promote, monitor and enforce compliance with an employment law by-
- (a) advising employees and employers of their rights and obligations in terms of an employment law;

- (b) conducting inspections in terms of this Chapter;
  - (c) investigating complaints made to a labour inspector;
  - (d) endeavouring to secure compliance with an employment law by securing undertakings or issuing compliance orders;
  - (dA) referring disputes to the CCMA concerning failure to comply with this Act, the National Minimum Wage Act, 2018, the Unemployment Insurance Act and the Unemployment Insurance Contributions Act;
  - (dB) appearing on behalf of the Director-General in any proceedings in the CCMA or Labour Court concerning a failure to comply with the legislation referred to in paragraph (dA); and
  - (e) performing any other prescribed function.
- (2) A labour inspector may not perform any function in terms of this Act in respect of an undertaking in respect of which the labour inspector has, or may reasonably be perceived to have, any personal, financial or similar interest.

### **Powers of entry**

65. (1) In order to monitor and enforce compliance with an employment law, a labour inspector may, without warrant or notice, at any reasonable time, enter-
- (a) any workplace or any other place where an employer carries on business or keeps employment records, that is not a home;
  - (b) Deleted
  - (c) any place at which any person provides or purports to provide any employment services as defined in terms of the Employment Services Act, 2014 (Act No. 4 of 2014);
- (2) A labour inspector may enter a home or any place other than a place referred to in subsection (1) only-
- (a) with the consent of the owner or occupier; or
  - (b) If authorised to do so in writing in terms of subsection 3.
- (3) The Labour Court may issue an authorisation contemplated in subsection (2) only on *written* application by a labour inspector who states under oath

or affirmation the reasons for the need to enter a place in order to monitor or enforce compliance with any employment law.

- (4) If it is practical to do so, the employer and a trade union representative must be notified that the labour inspector is present at a workplace and of the reason for the inspection.

### **Powers to question and inspect**

66. (1) In order to monitor or enforce compliance with an employment law, a labour inspector may-
- (a) require a person to disclose information, either orally or in writing, and either alone or in the presence of witnesses, on any matter to which an employment law relates, and require that the disclosure be made under oath or affirmation;
  - (b) inspect, and question a person about, any record or document to which an employment law relates;
  - (c) copy any record or document referred to in paragraph (b), or remove these to make copies or extracts;
  - (d) require a person to produce or deliver to a place specified by the labour inspector any record or document referred to in paragraph (b) for inspection;
  - (e) inspect, question a person about, and if necessary remove, any article, substance or machinery present at a place referred to in section 65;
  - (f) inspect or question a person about any work performed; and
  - (g) perform any other prescribed function necessary for monitoring or enforcing compliance with an employment law.
- (2) A labour inspector may be accompanied by an interpreter and any other person reasonably required to assist in conducting the inspection.
- (3) A labour inspector must-
- (a) produce on request the certificate referred to in section 63(3);
  - (b) provide a receipt for any record, document, article, substance or machinery removed in terms of subsection (1)(c) or (e); and

- (c) returning anything removed within a reasonable period of time.
- (4) The powers provided for in this Part are in addition to any power of a labour inspector in terms of any other employment law.

### **Co-operation with labour inspectors**

- 67. (1) Any person who is questioned by a labour inspector in terms of section 66 must answer all relevant questions lawfully put to that person truthfully and to the best of his or her ability.
- (2) Every employer and each employee must provide any facility and assistance at a workplace that is reasonably required by a labour inspector to perform the labour inspector's functions effectively.

### **Securing an undertaking**

- 68. (1) **A labour inspector who has reasonable grounds to believe that an employer has not complied with any provision of this Act, the National Minimum Wage Act, 2018, the Unemployment Insurance Act or the Unemployment Insurance Contributions Act may endeavour to secure a written undertaking by the employer to comply with the provision.**
- (1A) A labour inspector may endeavour to secure a written undertaking by the employer to comply with subsection (1) either by-
  - (a) meeting with the employer or a representative of the employer; or
  - (b) serving a document, in the prescribed form, on the employer.
- (2) In endeavouring to secure the undertaking, the labour inspector
  - (a) **may seek to obtain agreement between the employer and employee as to any amount owed to the employee in terms of this Act or the National Minimum Wage Act, 2018; and**
  - (b) may arrange for payment to an employee of any amount paid as a result of an undertaking;
  - (c) may, at the *written* request of an employee, receive payment on behalf of the employee; and
  - (d) must provide a receipt for any payment received in terms of paragraph ©.

Note 12:

An answer by a person to a question of a labour inspector may not be used in any criminal proceedings except proceedings in respect of a charge of perjury or making a false statement (s.91).

- (3) *If an employer fails to comply with a written undertaking given by the employer in terms of this section, the Director-General may request the CCMA to make the undertaking an arbitration award.*

## Compliance order

- 69 (1) *A labour inspector who has reasonable grounds to believe that an employer has not complied with a provision of this Act, the National Minimum Wage Act, 2018, the Unemployment Insurance Act or the Unemployment Insurance Contributions Act may issue a compliance order.*
- (2) A compliance order must set out-
  - (a) the name of the employer, and the location of every workplace, to which it applies;
  - (b) *the provision of this Act and any other Act referred to in subsection (1) that the employer has not complied with, and details of the conduct constituting non-compliance;*
  - (c) *any amount that the employer is required to pay to an employee, or in the case of a failure to pay the national minimum wage, the amount that the employer is required to pay to an employee in terms of section 76A;'*
  - (d) any written undertaking by the employer in terms of section 68(1) and any failure by the employer to comply with a written undertaking;
  - (e) *any steps that the employer is required to take including, if necessary, the cessation of the contravention in question and the period within which those steps must be taken; and*
  - (f) the maximum fine that may be imposed upon the employer in accordance with Schedule Two for a failure to comply with a provision of this Act.

2A Deleted

- (3) (a) A copy of the compliance order must be served on the employer named in it, and on each employee affected by it unless this is impractical, and on a representative of the employees.
- (4) The employer must display a copy of the compliance order prominently at a place accessible to the affected employees at each workplace named in it.
- (5) An employer must comply with the compliance order within the time period stated in the order unless the employer *refers a dispute concerning the compliance order to the CCMA within that period; and*
- (6) A dispute referred to the CCMA by the employer in terms of subsection (5) must be dealt with in terms of section 73.

### Limitations

70. A labour inspector may not issue a compliance order in respect of any amount payable to an employee as a result of a failure to comply with a provision of this Act or the National Minimum Wage Act, 2018, if-
- (a) Deleted
  - (b) the employee *earns in excess of the threshold prescribed by the Minister in terms of section 6(3) ;*
  - (c) any proceedings have been instituted for the recovery of that amount *in the CCMA or a court*, unless those proceedings have been withdrawn; or
  - (d) that amount has been made payable by the employer to the employee for longer than 36 months before the date on which a complaint was made to a labour inspector by or on behalf of the employee or, if no complaint was made, the date on which a labour inspector first endeavoured to secure a written undertaking by the employer in terms of section 68 or issued a compliance order in terms of section 69.

### Objections to compliance order

71. (1) Repealed

### Appeals from order of Director-General

72(1) Repealed

**Order may be made *an arbitration award***

73. (1) The Director-General may apply to the CCMA for a compliance order to be made an *arbitration award* if the employer has not complied with the order.
- (2) The CCMA may issue an arbitration award in terms of subsection (1) requiring the employer to comply with the compliance order, if it is satisfied that—
- (a) the compliance order was served on the employer; and
  - (b) the employer has not referred a dispute in terms of section 69(5).”

### **Claims for failure to pay any amount**

- 73A. (1) Despite section 77, any employee or worker as defined in section 1 of the National Minimum Wage Act, 2018, may refer a dispute to the CCMA concerning the failure to pay any amount owing to that employee or worker in terms of this Act, the National Minimum Wage Act, 2018, a contract of employment, a sectoral determination or a collective agreement.
- (2) Subsection (1) does not apply to employees or workers earning in excess of the threshold prescribed by the Minister in terms of section 6(3).
- (3) An employee or worker, other than the employee or worker referred to in subsection (1), may institute a claim concerning the failure to pay any amount contemplated in subsection (1) in either the Labour Court, the High Court or, subject to their jurisdiction, the Magistrates’ Court or the small claims court.
- (4) The CCMA must appoint a Commissioner in terms of section 135 of the Labour Relations Act, to attempt to resolve by conciliation any dispute that is referred to the CCMA in terms of subsection (1).
- (5) The CCMA must commence the arbitration of a dispute contemplated in subsection (1) immediately after certifying that the dispute remains unresolved in terms of section 135(5).

## **PART B**

### Legal proceedings

#### **Consolidation of proceedings**

- 74 (1) A dispute concerning a contravention of this Act *or the National Minimum Wage Act, 2018*, may be instituted jointly with proceedings instituted by an employee under Part C of this Chapter.
- (2) If an employee institutes proceedings for unfair dismissal, the Labour Court or the arbitrator hearing the matter may also determine any claim for an amount that is owing to that employee in terms of this Act *or the National Minimum Wage Act, 2018*.
- (3) A dispute concerning any amount that is owing to an employee as a result of a contravention of this Act *or the National Minimum Wage Act, 2018* may be initiated jointly with a dispute instituted by that employee over the entitlement to severance pay in terms of section 41(6).

#### **Payment of interest**

75. An employer must pay interest on any amount due and payable in terms of this Act *or the National Minimum Wage Act, 2018* at the rate of interest prescribed in terms of section 1 of the Prescribed Rate of Interest Act, 1975 (Act No. 55 of 1975), to any person to whom a payment should have been made.

#### **Proof of compliance**

76. (1) In any proceedings concerning a contravention of this Act *or the National Minimum Wage Act, 2018* or any sectoral determination, it is for an employer-
- (a) to prove that a record maintained by or for that employer is valid and accurate; *or*
- (b) who has failed to keep any record required by this Act *or the National Minimum Wage Act, 2018* that is relevant to those proceedings, to prove compliance with any provision of this Act.

#### **Fine for not complying with national minimum wage**

- 76A. (1) Subject to section 76, a fine that may be imposed on an employer who paid an employee less than the national minimum wage, is an amount that is the greater of—

- (a) twice the value of the underpayment; or
  - (b) twice the employee's monthly wage.
- (2) For second or further non-compliances, a fine that may be imposed on the employer is an amount that is greater of—
  - (a) thrice the value of the underpayment; or
  - (b) thrice the employee's monthly wage.
- (3) The Minister may issue guidelines on the determination of whether a non-compliance is a second or further non-compliance, as envisaged in subsection (2).
- (4) The Department must maintain and publish on its official website, on a quarterly basis, a list of all employers who were issued with compliance orders.”.

### **Jurisdiction of Labour Court**

- 77
- (1) Subject to the Constitution and the jurisdiction of the Labour Appeal Court, and except where this Act provides otherwise, the Labour Court has exclusive jurisdiction in respect of all matters in terms of this Act, except in respect of an offence specified in sections 43, 44, 46, 48, 90 and 92.
  - (1A) The Labour Court has exclusive jurisdiction to grant civil relief arising from a breach of sections 33A, 43, 44, 46, 48, 90 and 92.
  - (2) The Labour Court may review the performance or purported performance of any function provided for in this Act or any act or omission of any person in terms of this Act on any grounds that are permissible in law.
  - (3) The Labour Court has concurrent jurisdiction with the civil courts to hear and determine any matter concerning a contract of employment, irrespective of whether any basic condition of employment constitutes a term of that contract.
  - (4) Subsection (1) does not prevent any person relying upon a provision of this Act to establish that a basic condition of employment constitutes a term of a contract of employment in any proceedings in a civil court or an arbitration held in terms of an agreement.
  - (5) If proceedings concerning any matter contemplated in terms of subsection (1) are instituted in a court that does not have jurisdiction in respect of that matter, that court may at any stage during proceedings refer that matter to the Labour Court.

## **Powers of the Labour Court**

77A. Subject to the provisions of this Act, the Labour Court may make any appropriate order, including an order-

- (a) Deleted
- (b) condoning the late filing of any document with, or the late referral of any dispute to, the Labour Court;
- (c) Deleted
- (d) reviewing the performance or purported performance of any function provided for in terms of this Act or any act or omission by any person or body in terms of this Act, on any grounds permissible in law;
- (e) making a determination that it considers reasonable on any matter concerning a contract of employment in terms of section 77(3), which determination may include an order for specific performance, an award of damages or an award of compensation;
- (f) imposing a fine in accordance with Schedule 2 to this Act or for any contravention of any provision of this Act for which a fine can be imposed; and
- (g) dealing with any matter necessary or incidental to performing its functions in terms of this Act.

## **PART C**

### Protection of employees against discrimination

#### **Rights of employees**

- 78 (1) Every employee has the right to-
- (a) make a complaint to a trade union representative, a trade union official or a labour inspector concerning any alleged failure or refusal by an employer to comply with this Act or the *National Minimum Wage Act, 2018*;
  - (b) discuss his or her conditions of employment with his or her fellow employees, his or her employer or any other person;
  - (c) refuse to comply with an instruction that is contrary to this Act or the *National Minimum Wage Act, 2018* or any sectoral determination;
  - (d) refuse to agree to any term or condition of employment that is contrary to this Act or the *National Minimum Wage Act, 2018* or any sectoral determination;
  - (e) inspect any record kept in terms of this Act or the *National Minimum Wage Act, 2018* that relates to the employment of that employee;
  - (f) participate in proceedings in terms of this Act;
  - (g) request a trade union representative or a labour inspector to inspect any record kept in terms of this Act and that relates to the employment of that employee.
- (2) Every trade union representative has the right, at the request of an employee to inspect any record kept in terms of this Act or the *National Minimum Wage Act, 2018* that relates to the employment of that employee.

#### **Protection of rights**

- 79 (1) In this section, "employee" includes a former employee or an applicant for employment.
- (2) No person may discriminate against an employee for exercising a right conferred by this Part and no person may do, or threaten to do, any of the following:

- (a) Require an employee not to exercise a right conferred by this Part;
  - (b) prevent an employee from exercising a *right* conferred by this Part; or
  - (c) prejudice an employee because of a past, present or anticipated-
    - (i) failure or refusal to do anything that an employer may not lawfully permit or require an employee to do;
    - (ii) disclosure of information that the employee is lawfully entitled or required to give to another person; or
    - (iii) exercise of a right conferred by this Part.
- (3) No person may favour, or promise to favour, an employee in exchange for the employee not exercising a *right* conferred by this Part. However, nothing in this section precludes the parties to a dispute from concluding an agreement to settle the dispute.

#### **Procedure for disputes.**

- 80 (1) **If there is a dispute about the interpretation or application of this Part, any party to the dispute may refer the dispute in writing to-**
- (a) a council, if the parties to the dispute fall within *the* registered scope of that council; or
  - (b) the CCMA,
- (2) The party who refers a dispute must satisfy the CCMA that a copy of the referral has been served on all the other parties to the dispute.
- (3) The CCMA must attempt to resolve a dispute through conciliation.
- (4) If a dispute remains unresolved, any party to the dispute may refer it to the *CCMA for arbitration*.
- (5) In respect of a dispute in terms of this Part, the relevant provisions of Part C of Chapter VII of the Labour Relations Act, 1995, apply with the changes required by the context.
- (6) *For the purposes of this section, a party to a dispute includes a labour inspector.*

## **Burden of proof**

81. In any proceeding in terms of this Part-

- (a) an employee who alleges that a *right* or protection conferred by this Part has been infringed, must prove the facts of the conduct said to constitute such infringement; and
- (b) the party who allegedly engaged in the conduct in question must then prove that the conduct did not infringe any provision of this Part.

## CHAPTER ELEVEN

### General

#### Temporary employment services

- 82 (1) For the purposes of this Act, a person whose services have been procured for, or provided to, a client by a temporary employment service is the employee of that temporary employment service, and the temporary employment service is that person's employer.
- (2) Despite subsection (1), a person who is an independent contractor is not an employee of a temporary employment service, nor is the temporary employment service the employer of that person.
- (3) The temporary employment service and the client are jointly and severally liable if the temporary employment service, in respect of any employee who provides services to that client, does not comply with this Act or a sectoral determination.

#### Deeming of persons as employees

- 83 (1) **The Minister may, on the advice of the Commission and by notice in the Gazette, deem any category of persons specified in the notice to be—**
- (a) **employees for purposes of the whole or any part of this Act, any other employment law other than the Unemployment Insurance Act, 2001 (Act No. 63 of 2001), or any sectoral determination; or**
- (b) **contributors for purposes of the whole or any part of the Unemployment Insurance Act 2001 (Act No. 63 of 2001)."**
- (2) Before the Minister issues a notice under subsection (1), the Minister must-
- (a) publish a draft of the proposed notice in the *Gazette*; and
- (b) invite interested persons to submit written representations on the proposed notice within a reasonable period.
- 83A. (1) A person who works for, or renders services to, any other person is presumed, until the contrary is proved, to be an employee, regardless of the form of the contract, if any one or more of the following factors is present:

- (a) The manner in which the person works is subject to the control or direction of another person;
  - (b) the person's hours of work are subject to the control or direction of another person;
  - (c) in the case of a person who works for an organization, the person is a part of that organization;
  - (d) the person has worked for that other person for an average of at least 40 hours per month over the last three months;
  - (e) the person is economically dependent on the other person for whom that person works or renders services;
  - (f) the person is provided with tools of trade or work equipment by the other person; or
  - (g) the person only works for or renders services to one person.
- (2) Subsection (1) does not apply to any person who earns in excess of the amount determined by the Minister in terms of section 6(3).
- (3) If a proposed or existing work arrangement involves persons who earn amounts equal to or below the amounts determined by the Minister in terms of section 6(3), any of the contracting parties may approach the CCMA for an advisory award about whether the person involved in the arrangement are employees.

### **Duration of employment**

- 84 (1) For the purposes of determining the length of an employee's employment with an employer for any provision of this Act, previous employment with the same employer must be taken into account if the break between the periods of employment is less than one year.
- (2) Any payment made or any leave granted in terms of this Act to an employee contemplated in subsection (1) during a previous period of employment must be taken into account in determining the employee's entitlement to leave or to a payment in terms of this Act.

### **Delegation**

85. (1) The Minister may in writing delegate or assign to the Director-General or any employee in *the* public service of the rank of assistant director or of a higher rank, any power or duty conferred or imposed upon the Minister in

terms of this Act, except the Minister's powers in terms of sections 6(3), 55(1), 60, 83, 87 and 95(2) and the Minister's power to make regulations.

- (2) A delegation or assignment in terms of subsection (1) does not limit or restrict the Minister's authority to exercise or perform the delegated or assigned power or duty. (3) Any person to whom a power or duty is delegated or assigned in terms of subsection (1) must exercise or perform that power or duty subject to the direction of the Minister.
- (4) The Minister may at any time-
  - (a) withdraw a delegation or assignment made in terms of subsection (1); and
  - (b) withdraw or amend any decision made by a person exercising or performing a power or duty delegated or assigned in terms of subsection (1).
- (5) The Director-General may in writing delegate or assign any power or duty conferred or imposed upon the Director-General by Chapter Ten of this Act to any employee in the Department of the rank of assistant director or of a higher rank.
- (6) Subsections (2), (3) and (4) apply with changes required by the context to any delegations or assignments by the Director-General under subsection (5).

## **Regulations**

- 86 (1) The Minister may by notice in the Gazette, after consulting the Commission, make regulations regarding any matter that may be necessary or expedient to prescribe in order to achieve the objects of this Act.
- (2) A regulation regarding state revenue or expenditure may be made only with the concurrence of the Minister of Finance.

## **Codes of Good Practice**

- 87 (1) The Minister, after consulting NEDLAC-
- (a) must issue a Code of Good Practice on the Arrangement of Working Time;
  - (b) must issue a Code of Good Practice on the Protection of Employees during Pregnancy and after the Birth of a Child;

- (c) may issue other codes of good practice; and
  - (d) may change or replace any code of good practice.
- (2) Any code of good practice or any change to or replacement of a code of good practice must be published in the *Gazette*.
  - (3) Any person interpreting or applying this Act must take into account relevant codes of good practice.
  - (4) A Code of Good Practice issued in terms of this section may provide that the Code must be taken into account in applying or interpreting any employment law.

### **Minister`s power to add and change footnotes**

88. The Minister may, by notice in the *Gazette*, add to, change or replace any footnote in this Act.

### **Representation of employees or employers**

- 89
- (1) A registered trade union or registered employers' organisation may act in any one or more of the following capacities in any dispute to which any of its members is a party:
    - (a) In its own interest;
    - (b) on behalf of any of its members;
    - (c) in the interest of any of its members.
  - (2) A registered trade union or a registered employers' organisation is entitled to be a party to any proceedings in terms of this Act if one or more of its members is a party to these proceedings.

### **Confidentiality**

- 90.
- (1) It is an offence for any person to disclose information which that person acquired while exercising or performing any power or duty in terms of this Act and which relates to the financial or business affairs of any other person, except if the information is disclosed in compliance with the provisions of any law-
    - (a) to enable a person to perform a function or exercise a power in terms of an employment law;

- (b) for the purposes of the proper administration of this Act;
  - (c) for the purposes of the administration of justice.
- (2) Subsection {1) does not prevent the disclosure of any information concerning an employer's compliance or non-compliance with the provisions of any employment law.
- (3) The record of any medical examination performed in terms of this Act must be kept confidential and may be made available only-
  - (a) in accordance with the ethics of medical practice;
  - (b) if required by law or court order; or
  - (c) if the employee has in writing consented to the release of that information.

### **Answers not to be used in criminal prosecutions**

91. No answer by any person to a question by a person conducting an investigation in terms of section 53 or by a labour inspector in terms of section 66 may be used against that person in any criminal proceedings except proceedings in respect of a charge of perjury or making a false statement.

### **Obstruction, undue influence and fraud**

92. It is an offence to -
- (a) obstruct or attempt to influence improperly a person who is performing a function in terms of this Act;
  - (b) obtain or attempt to obtain any prescribed document by means of fraud, false pretences, or by presenting or submitting a false or forged document;
  - (c) pretend to be a labour inspector or any other person performing a function in terms of this Act;
  - (d) refuse or fail to answer fully any lawful question put by a labour inspector or any other person performing a function in terms of this Act;
  - (e) refuse or fail to comply with any lawful request of, or lawful order by, a labour inspector or any other person performing a function in terms of this Act;

- (f) hinder or obstruct a labour inspector or any other person performing a function in terms of this Act.

### **Penalties**

- 93 (1) Any magistrates' court has jurisdiction to impose a penalty for an offence provided for in this Act.
- (2) Any person convicted of an offence in terms of any section mentioned in the first column of the table below may be sentenced to a fine or imprisonment for a period not longer than the period mentioned in the second column of that table opposite the number of that section.

### *OFFENCES AND PENALTIES*

<b>Section under which convicted</b>	<b>Maximum term of imprisonment</b>
Section 33A	3 years
Section 43	6 years
Section 44	6 years
Section 46	6 years
Section 48	6 years
Section 90 (1) and (3)	1 year
Section 92	1 year

### **This Act binds the State**

94. This Act binds the State except in so far as criminal liability is concerned.