

BASIC CONDITIONS OF EMPLOYMENT AMENDMENT BILL, 2010

[Words in bold type indicate omissions from existing enactments]

Words underlined indicate insertions in existing enactments

To amend the Basic Conditions of Employment Act, (75 of 1997) by amending certain definitions in the Act so as to align with other employment laws and to provide for the prohibition of employment of children. To provide for the prohibition of certain exploitative practices by employers.

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

Amendment of section 1 of Act 75 of 1997

1 Section 1 of the Basic Conditions of Employment Act (hereafter referred to as the principal Act) is amended by –

(a) the insertion after the definition of “Constitution” of the following definition -

“contract of employment” means –

- (a) a common law contract of employment; or
- (b) any other agreement or arrangement under which an individual works for another, but excluding a contract for work as an independent contractor;”

(b) Substitution for paragraph (17) of the definition of an “employee”

“Employee” means any person who is employed by or who works for an employer and who receives or is entitled to receive any remuneration and who works under the direction and supervision of an employer.

(c) Insertion after the definition of employee of the definition of an “employer”

“Employer” means any person, institution or organisation, including government who employs and provides work to an employee, directly supervises, remunerates

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or tacitly or expressly undertakes to remunerate such employee for services rendered by such employee.

(d) the insertion after the definition of “farmworker” of the following definition-

“independent contractor’ means a person who works for or supplies services to a client or customer as part of the person’s business, undertaking or professional practice;”

(e) the substitution for the definition of ‘sector’ of the following definition:

“sector’ means an industry or a service or part of an industry or service and in respect of a sectoral determination made in terms of section 55(8) means the employers and employees covered by that determination.”

(f) the substitution for the definition of ‘serve’ of the following definition –

“serve’ means to send by registered post, telegram, telex, telefax or to deliver by hand and –

(a) in respect of the Labour Courts, any other method of service specified in the Rules of the Labour Courts;

(b) in respect of the Commission, any other method of service specified in the Rules of the Commission;”

2 Insertion of subsection (5) of section 32 of the principal Act:

(5) “Employers must contribute the same benefits and afford the contract workers the same rights as enjoyed by permanent employees”

Insertion of section 33A

3 The following section is inserted after section 33 of the principal Act:

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“33A Prohibited conduct

No employer must—

- (a) require or accept any payment by or on behalf of an employee in respect of the employment of, or the allocation of work to, any employee;
- (b) require an employee to purchase any goods from the employer or from any business or person nominated by the employer.”

Amendment of section 43 of Act 75 of 1997

4 The following section is substituted for section 43 of the principal Act:

“43 Prohibition of [employment of] work by children

- (1) No person may **[employ]** require or permit a child to work as an employee or independent contractor if the 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]** require or permit a child **[in employment]** to perform any work or provide services—
 - (a) that **[is]** are inappropriate for a person of that age;
 - (b) that **place[s]** at risk the child’s well-being, education, physical or mental health, or spiritual, moral or social development.
- (3) Non-compliance from any provisions of this section may only be allowed where there are sectoral determinations.
- (4) A person who **[employs]** requires or permits a child to work in contravention of subsection (1) or (2) commits an offence.

Amendment of section 44 of Act 75 of 1997

5 The following section is substituted for section 44 of the principal Act:

“[Employment of] Regulations of work by 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 of **[the employment of] work by** children who are at least 15 years of age and no longer subject to compulsory schooling in terms of any law.

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- (2) The Minister may, on the advice of the Commission, make regulations to give effect to South Africa's international law obligations in terms of the International Labour Organisation Convention (No.182) on the Worst Forms of Child Labour and any other international instrument dealing with work by children.
- (3) A person who **[employs]** requires or permits a child to work in contravention of any regulation made in terms of this [sub]section [(1)] commits an offence.”

Amendment of section 45 of Act 75 of 1997

6 The following section is substituted for section 45 of the principal Act:

“Medical examinations

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

Amendment of section 46 of Act 75 of 1997

7 The following section is substituted for section 46 of the principal Act:

“Prohibitions

46. It is an offence to—
- (a) assist **[an employer to employ]** 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 **[be employed]** work in contravention of this Act.”

Amendment of section 47 of Act 75 of 1997

8 The following section is substituted for section 47 of the principal Act:

“Evidence of age

47. In any proceedings in terms of this Act, if the age of **[an employee]** 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 **[employment]**

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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.”

Amendment of section 55 of Act 75 of 1997

9 Section 55 of the principal Act is hereby amended by:

(a) the substitution for subsection (1) of the following subsection:

“(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 subsection (8).”

(b) the substitution for paragraph (b) of subsection (4) of the following paragraph:

“(4)(b) provide for the adjustment of remuneration by way of –
(i) minimum rates; or
(ii) minimum increases of remuneration;”

(c) the insertion in subsection (4) after paragraph (n) of the following paragraphs:

“(o) subject to the provisions of the Labour Relations Act, set a threshold of representativeness for a registered trade union to have the organizational rights contemplated in sections 12 and 13 of the Labour Relations Act in respect of all workplaces covered by the sectoral determination;

(d) the insertion in subsection (4) after paragraph (o) of the following paragraphs:

“(p) any matter necessary to determining the conditions of a labour tenant as contemplated in section 4 of the Land Reform (Labour Tenants) Act 3 of 1996.

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(e) the substitution for subsection (7)(a) of the following subsection:

“(a) covering employees and employers who are bound by a collective agreement concluded at a bargaining council in respect of any matter dealt with in that collective agreement;”

(f) the addition after subsection (7) of the following subsection:

“(8) 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.”

Amendment of section 64 of Act 75 of 1997

10 Section 64(1) of the principal Act is hereby substituted of the following:

(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 any employment law;

(b) conducting inspections in terms of this Act;

(c) investigating labour complaints made to a labour inspector;

[(d) endeavouring to secure compliance with an employment law by securing undertakings or issuing compliance orders; and]

(d) The Labour Inspector must have all the powers and authority to issue a fine in terms of section 93 of this Act;

(e) The fine issued by the labour inspector must be paid within 21 days from the date it is issued by the inspector; and

(f) An inspector must lay criminal charges against an employer who fails to pay the fine within 21 days.

(g) performing any other function as may be prescribed.

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Amendment of section 65 of Act 75 of 1997

11 Section 65(1) of the principal Act is hereby amended by the deletion of paragraph (b) and (c)

(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) any premises used for training in terms of the Manpower Training Act, 1981 (Act No. 56 of 1981); or

(c) any private employment office registered under section 15 of the Guidance and Placement Act, 1981 (Act No. 62 of 1981).]

11 Section 65 of the principal Act is hereby amended by the insertion after subsection (4) of the following:

(5) An interpreter, a member of the South African Police or any other assistant may, when required by a labour inspector, accompany him when he performs his functions under this Act or any employment law.

Repeal of section 68, 69, 70, 71, 72 and 73 of Act 75 of 1997

10 Section 68, 69, 70, 71, 72, 73 of the principal Act are hereby repealed.

Amendment of section 74 of Act 75 of 1997

12 The following section is substituted for section 74 of the principal Act:

“(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 if the claim has not prescribed. –

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- [(a) [the claim is referred in compliance with section 191 of the Labour Relations Act, 1995;**
- (b) the amount had not been owing by the employer to the employee for longer than one year prior to the dismissal; and**
- (c) no compliance order has been made and no other legal proceedings have been instituted to recover the amount.]**

Amendment of section 77 of Act 75 of 1997

Section 77 of the principal Act is hereby amended by the substitution of subsection (1) for the following:

- (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] offences** specified in section[s] 93 of this Act **[43, 44, 46, 48, 90 and 92].**

Amendment of section 77A of Act 75 of 1997:

- 11 Section 77A of the principal Act is hereby amended by the deletion of paragraph (b) and (c) and the substitution for paragraph (d) of the following paragraph:

Subject to the provisions of this Act, the Labour Court may make any appropriate order, including an order—

[(a) making a compliance order issued in terms of this Act, an order of the Labour Court, on application by the Director-General in terms of section 73(1) or 73(2);]

(b) condoning the late filing of any document with, or the late referral of any dispute to, the Labour Court;

[(c) confirming, varying or setting aside all or part of an order made by the Director-General in terms of section 71(3), on appeal by the employer in terms of section 72;]

(d) reviewing **[the performance or purported performance of]** any administrative action **[function provided for]** in terms of this Act or any employment Act. **[or omission by any person or body in terms of this Act, on any grounds permissible in law;]**

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- (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.

Repeal of section 82 of Act 75 of 1997

14 Section 82 of the Principal Act is hereby repealed.

Amendment of section 93 of Act 75 of 1997

15 section 93 of the principal Act is hereby amended by the insertion after subsection (1) for the following subsection:

“(1A) the court must also order the convicted employer to pay to the employee the amounts and/ or any benefits, as the case may be, which are due to the employee as a result of non payment or illegal deductions within a period to be determined by the court.”

16 Section 93 of the Principal Act is amended by substituting for the Table in the section for the following Table:

“OFFENCES AND PENALTIES

<i>It is a criminal offence to contravene the following provisions</i>	<i>Minimum Applicable fines</i>	<i>Minimum term of imprisonment</i>
<u>Section 9, 10, 14, 15, 16, 17, 18, 20, 21, 22, 25, 26, 27, 32, 33, 34 and 34A</u>	<u>R10 000.00</u>	<u>12 months imprisonment</u>
<u>Section 33A</u>	<u>R10 000.00</u>	<u>12 months</u>
<u>Section 39, 40 and 41</u>	<u>R10 000.00</u>	<u>12 months imprisonment</u>
<u>Section 43</u>		<u>[3] 6 years</u>
<u>Section 44</u>		<u>[3] 6 years</u>
<u>Section 46</u>		<u>[3] 6 years</u>

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Section 48		[3] <u>6</u> years
<u>Section 65 and 66</u>	<u>R10 000.00</u>	<u>12 months imprisonment</u>
Section 90(1), (3) and 92 (a), (c), (d), (e), (f)		<u>1 year</u>
Section 92 (b)		<u>Applicable legislation must be used to determine imprisonment</u>

Amendment of section 93 of Act 75 of 1997

17 Section 93 of the principal act is hereby amended by the insertion after subsection (2) of the following subsection:

(3) The Minister may, from time to time, by notice in the Gazette review the applicable penalties.

Repeal of section 95 of Act 75 of 1997

18 Section 95 of the principal Act is hereby repealed.

Short Title

This Act is called the Basic Conditions of Employment Amendment Act of 2010