

Government Gazette No 21407
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GENERAL EXPLANATORY NOTE:

[] Words in bold type in square brackets indicate omissions from existing enactments

_____ Words underlined with a solid line indicate insertions in existing enactments.

BASIC CONDITIONS OF EMPLOYMENT AMENDMENT BILL, 2000

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

Amendment to section 1 of Act 75 of 1997

1. Section 1 of the principal Act is hereby amended by amending the definition of 'employment law' as follows –
 - '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, 1966 (Act 30 of 1966);
 - (b) **[the Manpower Training Act, 1981 (Act 56 of 1981)]** the Skills Development Act 97 of 1998;
 - (c) **[the Guidance and Placement Act, 1981 (Act 62 of 1981)]** the Employment Equity Act 55 of 1998;
 - (d) the Occupational Health and Safety Act, 1993 (Act 85 of 1993);
 - (e) the Compensation for Occupational Injuries and Diseases Act, 1993 (Act 130 of 1993);'

Amendment to section 10 of Act 75 of 1997

2. Section 10 of the principal Act is hereby amended –
 - (a) by the deletion of sub-paragraph (1)(b)(ii) -
 - “(1) Subject to this Chapter, an employer may not require or permit an employee –
 - (a) to work overtime except in accordance with an agreement;
 - (b) to work more than [–
 - (i) **three hours' overtime a day; or**
 - (ii)] **ten hours' overtime a week.”**
 - (b) by inserting a new subsection (1A) -
 - “(1A) An agreement in terms of subsection (1) may not require or permit an employee to work more than 12 hours on any day.”
 - (c) by inserting a new subsection (6) –
 - “(6) A collective agreement may increase the maximum permitted overtime to fifteen hours a week.”

Amendment of section 16 of Act 75 of 1997

3. Section 16 of the principal Act is hereby deleted in its entirety.

[16 Pay for work on Sundays

(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'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.]

Amendment of section 15 of Act 75 of 1997

4. Section 15 of the principal Act is hereby amended by the substitution for subsection (1) of the following subsection -

(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].**

Amendment of section 27 of Act 75 of 1997

5. Section 27 of the principal Act is hereby amended by the substitution of subsection (5) with the following subsection -
 - (5) Before paying an employee for leave in terms of this section, an employer may require proof of an event contemplated in subsection (2) [1] for which the leave was required.

Amendment of section 35 of Act 75 of 1997

6. Section 35 of the principal Act is hereby amended by the deletion of subsection (5) and its substitution with the following subsection -
 - “(5) (a) The Minister, after consulting the Commission, may by notice in the Gazette determine whether a particular category of payment, whether in money or in kind, forms part of employees’ 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;
 - (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 in the Gazette a draft of the proposed notice; and
 - (ii) invite interested parties to submit written representations on the draft notice within a reasonable period.”

Amendment of section 37 of Act 75 of 1997

7. Section 37 of the principal Act is hereby amended by the substitution of subsection (1) with the following subsection -
 - “(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 **[four weeks]** or less;
- (b) two weeks, if the employee has been employed for more than six months **[four weeks]** 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 or domestic worker who has been employed for more than six months **[four weeks]**.”

Amendment of section 49 of Act 75 of 1997

- 8. Section 49 of the principal Act is hereby amended by the substitution of subsection (1) with the following subsection -
 - “(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 section[s] 7 [,] **[9]** and any regulation made in terms of section 13;”

Amendment of section 50 of Act 75 of 1997

- 9. Section 50 of the principal Act is hereby amended by -
 - (a) the deletion of subsection 50(2) in its entirety; and
 - (b) the re-numbering of the existing subsections (3), (4), (5), (6), (7), (8), (9) and (10) to read (2), (3), (4), (5), (6), (7), (8) and (9).

Amendment of section 55 of Act 75 of 1997

- 10. Section 55 of the principal Act is hereby amended by -
 - (a) the deletion of subsection 55(6); and
 - (b) the re-numbering of the existing subsection (7) to read (6).

Amendment of section 70 of Act 75 of 1997

11. Section 70 of the principal Act is hereby amended by the substitution of paragraph (d) with the following paragraph –

“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 if –

- (a) ...
- (b) ...
- (c) ...
- (d) that amount has been payable by the employer to the employee for longer than 12 months from 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 obtain an undertaking from the inspector in terms of section 68.”

Amendment of section 73 of Act 75 of 1997

12. Section 73 of the principal Act is hereby amended by the deletion of subsection (3).

Amendment of section 74 of Act 75 of 1997

13. Section 74 of the principal Act is hereby amended by the substitution of subsection (2) with the following subsection –

“(2) If an employee institutes proceedings for unfair dismissal, the Labour Court or arbitrator may also determine any amount that is owing to that employee in terms of this Act if –

- (a) the claim is referred in compliance with section 191 of the Labour Relations Act, 1995;
- (b) the claim had [has] 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 75 of Act 75 of 1997

14. Section 75 of the principal Act is hereby amended by the substitution for section 75 of the following section –

“75. **[An employer must pay interest]** Interest accrues on any amount due and payable in terms of this Act 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”].

Amendment to section 77 of Act 75 of 1997

15. Section 77 of the principal Act is hereby amended by the addition of the following section –

Powers of Labour Court

“(77A) Except where this Act provides otherwise, the Labour Court may make any appropriate order including -

- (a) on application by the Director-General, in terms of section 73(1) or 73(2), making a compliance order issued in terms of this Act an order of the Labour Court;
- (b) subject to the provisions of this Act, condoning the late filing of any document with, or the late referral of any dispute to, the Labour Court;
- (c) on appeal in terms of section 72, confirming, varying or setting aside all or part of an order made by the Director General in terms of section 71 (3);
- (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) in terms of Section 77(3), making a determination that it considers reasonable on any matter concerning a contract of employment, 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 of the 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.”

Amendment of section 83 of Act 75 of 1997

16. Section 83 of the principal Act is hereby amended by the addition of the following section –

“(83A) Until the contrary is proved, a person who works for, or provides services to, any other person is presumed to be an employee, if any one or more of the following factors are 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 organisation, the person forms part of that organisation;
- (d) the person has worked for that person for an average of at least 40 hours per month over the last three months;
- (e) that person is economically dependant on the person for whom he or she works or provides services;
- (f) the person is provided with his or her tools of trade or work equipment by another person;
- (g) the person only works or supplies services to one person.”

Amendment of section 87 of Act 75 of 1997

17. Section 87 of the principal Act is hereby amended by inserting a new subsection (4) –

“(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.”

Amendment of Schedule 3 of Act 75 of 1997

18. Schedule 3 of the principal Act is hereby amended by the substitution of items 9 and 10 thereof with the following items –

“9 **Wage determinations**

- (1) Any wage determination and any amendment to a wage determination made in terms of section 15 of the Wage Act,

1957, in force immediately before the commencement of **[this Act]** the Amendment Act (hereafter referred to as a 'wage determination') is deemed to be a sectoral determination made in accordance with section 55 of this Act **[remains in force for the period of its operation in terms of section 18 of that Act, and may be extended or amended as if that Act has not been repealed].**

- (2) Any provision in a wage determination stipulating a minimum term or condition of employment is deemed to be a basic condition of employment as defined in section 1 of this Act.
- (3) Despite section 57 of this Act, if a matter regulated in terms of this Act is also regulated in terms of a wage determination, the provision in the Act prevails.
- (4) A wage determination is deemed to be varied by Ministerial Determination No. 1: Small Business Sector of 5 November 1999 in respect of employers who conduct businesses employing less than ten employees and their employees.
- (5) The Minister may amend, cancel, suspend, clarify or correct any wage determination in accordance with Chapter Eight of the Act.
- (6) The provisions of a wage determination may be enforced in accordance with Chapter Ten of the Act.
- (7) Any prosecution concerning a contravention of, or failure to comply with, a binding wage determination or licence of exemption during the period from 1 November 1998 until the commencement of the Amendment Act commenced prior to, or within three months of, the commencement date of the Amendment Act must be dealt with in terms of the Wage Act as if that Act had not been repealed.
- (9) The Director of Public Prosecutions having jurisdiction is deemed to have issued a certificate in terms of section 23(3)(a) of the Wage Act in respect of any contravention or failure contemplated in sub-item (7) in respect of which no prosecution is commenced within three months of the commencement date of the Amendment Act.

10 Exemptions to wage determination

Any licence of exemption granted to a wage determination in terms of section 19 of the Wage Act, 1957 in force immediately before the commencement of this Act is deemed to be withdrawn three months after the commencement date of the Amendment Act **[remains in force for the period of the determination, or until withdrawn in terms of section 19(5) of that Act, as if that Act had not been repealed.]**"

Short title and commencement

- 19.** This Act will be called the Basic Conditions of Employment Amendment Act, 2000, and will come into operation on a date determined by the President by proclamation in the *Gazette*.

**BASIC CONDITIONS OF EMPLOYMENT AMENDMENT BILL,
2000
EXPLANATORY MEMORANDUM**

This memorandum sets out the rationale for amendments in the attached Basic Conditions of Employment Amendment Bill, 2000.

1. Definition of employment law - Amendment to section 1

The definition of the term 'employment law' is amended to reflect the enactment of new labour legislation since the BCEA came into effect.

2. Regulation of overtime - Amendments to section 10

2.1 Section 10 regulates overtime work by setting the maximum overtime hours that may be worked daily or weekly. In terms of section 10(1) an employee may agree to work up to three hours overtime a day and ten hours overtime a week.

2.2 The daily limit of three hours is intended to limit the maximum overtime an employee can work on an ordinary working day. However, it has the unintended consequence of preventing an employee working for more than three hours on days that the employee does not normally work. The effect is that an employee who normally works from Monday to Friday cannot work longer than three hours on a Saturday or Sunday as overtime.

2.3 It is proposed to remedy this by removing the daily limit on overtime in section 10(1). A new subsection 10(1A) will provide that an agreement to work overtime may not result in an employee working more than a total of twelve hours (both ordinary and overtime) on any day.

2.4 The weekly limit on the working of overtime is ten hours. 68% of applications for variation determinations made by employers to the Department of Labour in terms of section 50(1) of the BCEA are to extend the weekly limits on overtime. In the majority of cases, these applications are supported by the trade union representing the employees concerned.

2.5 It is therefore proposed that an employer and a trade union should be able to conclude a collective agreement extending the weekly limit on permissible overtime to 15 hours. This amendment will create greater capacity at plant-level for regulating hours of work by collective agreement and will reduce the administrative burden on the Department of Labour.

3. **Weekly rest period - Amendment to section 15**

- 3.1 Section 15 provides that employees must have a 36-hour rest period which must be on a Sunday unless otherwise agreed. A significant portion of the workforce in sectors such as retail, hotel and catering, transport and public services are required to work on Sundays.
- 3.2 Accordingly, it is proposed to repeal the qualification that the rest period must be on a Sunday unless otherwise agreed. This amendment will not reduce the entitlement of employees to a 36-hour weekly rest period. The day on which the rest period will fall will be determined by collective or individual agreement.
- 3.3 This amendment should be considered together with the following amendment to section 16 which regulates payment for work on Sundays.

4. **Payment for work on Sundays - Amendments to section 16**

- 4.1 Currently work on Sunday is remunerated at premium rates. The rate is time and a half if the employee ordinarily works on a Sunday and double time if the employee works occasionally.
- 4.2 The proposed amendments seek to remove the legal right to a premium for three reasons. Firstly, these premium rates place a considerable economic cost on public services such as health care which operate around the clock and business in service sectors such as retail, tourism and catering as well as continuous operations that are required to provide full services on Sundays.
- 4.3 Secondly, in many sectors such as nursing, mining and retail employees and employers have already agreed through collective agreement or by approaching the Minister for a determination to forfeit the premium for work on Sunday. Our law needs to be aligned to the current reality.
- 4.4 Thirdly, the proposed amendment strengthens the constitutional position of the BCEA. It could be argued that both the requirement that a worker's rest period fall on a Sunday unless otherwise agreed and that premium rates be paid for Sunday work could raise constitutional issues in the light of the Constitution's recognition of freedom of religion.
- 4.5 It is proposed to regularise work on Sundays by removing the legal requirement for a premium. However, workers who work on Sunday can still agree through an individual or collective agreement to receive a premium or additional time off for working on a Sunday.

5. **Family responsibility leave - Amendment to section 27**

This is a technical amendment to rectify the incorrect reference in section 27(5) to subsection (1) instead of subsection (2).

6. **Calculation of remuneration in BCEA - Amendment to section 35**

- 6.1 The Basic Conditions of Employment Act (BCEA) sets rules for calculating benefits such as overtime pay, leave pay, sick leave pay, notice pay and severance pay. The calculation of leave pay, notice pay and severance pay is based on the statutory definition of 'remuneration'.
- 6.2 The concern has been raised that the application of the term 'remuneration' can give rise to uncertainty in its practical application when calculating payments. The Department accepts that there are always borderline cases which give rise to differences of interpretation. For instance, does a travel or car allowance form part of an employee's remuneration. The value to be placed on benefits such as accommodation or food supplied by an employer to an employee is also a frequent cause of dispute.
- 6.3 It is proposed that the Minister should have the power to make an administrative determination as to whether particular types of payment should be included in or excluded from the calculation of remuneration. The Minister will only be able to issue the notice after advice from the Employment Conditions Commission and after receiving public comment.
- 6.4 In the proposed notice, the following kinds of items are most likely to be included in the definition of remuneration:
- Service increment;
 - Merit increment;
 - Car allowance;
 - Housing allowance, housing subsidy or housing received as a benefit in kind;
 - Shift work allowance if worked regularly;
 - Standby allowance if received regularly;
 - Acting allowance if received regularly;
 - Overtime pay if overtime is worked regularly;
 - Food and accommodation allowance or value of food and accommodation provided
 - Discretionary payments related to an employee's hours of work if received regularly e.g. an attendance bonus;
 - Discretionary payments related to an employee's work performance if received regularly e.g. production bonus based on the employee's output;
 - Employer's contributions to medical and provident fund scheme;

- Employer's contributions to death benefit scheme;
- Employer's contributions to UIF and any other statutory insurance cover;
- Employer's contributions to personal accident insurance cover;
- Transport/bus to enable employee to travel to and from work provided as an in kind benefit or as an allowance;
- Long service allowance if received regularly; and
- Thirteenth cheque if not discretionary.

6.5 In the proposed notice, the following items are likely to be excluded from the definition of remuneration:

- Relocation allowance;
- Gratuities e.g. a gold watch given as a long service award, or a farewell gift on termination of employment;
- Discretionary payments not related to an employee's hours of work or work performance e.g. profit-sharing scheme;
- Entertainment allowance;
- Phone allowance;
- Danger pay;
- Underground allowance;
- Inconvenience allowance;
- Dog allowance; and
- Education and schooling allowance

6.6 The proposed amendments will make the calculation of remuneration benefits more certain. It will be quicker and cheaper for all concerned than resolving those disputes by litigation. The composition of remuneration packages change regularly and the Minister will have the ability to revise the relevant notice in line with changing circumstances.

7. **Notice of termination of employment - Amendment to section 37**

7.1 Currently, a contract of employment may be terminated on one week's notice during the first four weeks of employment and on two weeks notice for the remainder of the first year of employment.

7.2 The Labour Relations Amendment Bill, 2000, proposes that there should be a probationary period of six months during which time if a dismissal takes place, the employer only has to prove that the dismissal was effected in accordance with a fair procedure.

7.3 To align the BCEA with the proposed amendments to the LRA, it is proposed to set the notice period at one week during the first six months of employment. In all other respects, the required notice periods remain the same.

8. **Variation by agreement - Amendment to section 49**

- 8.1 The BCEA seeks to achieve a balance between reducing the long hours, particularly overtime hours, that many workers in South Africa work and increasing the ability of employers and employees to negotiate working time arrangements appropriate to their circumstances.
 - 8.2 One of the provisions introduced to limit hours of work was the entrenchment in section 49 of the limits on working time in section 9 as 'core' rights. This means that collective agreements, whether concluded at plant level or at a bargaining council established for a particular sector, cannot permit employees to work more than 45 hours a week or to exceed the limits on the length of an ordinary working week set in section 9.
 - 8.3 The Department is concerned that this provision has led to a number of unintended consequences. For example, employers and trade unions in the maritime sector have indicated their support for the establishment of a bargaining council. However, such a council could not operate effectively at present because the 45-hour weekly limit and other limits on working time in section 9 are inappropriate for work at sea. The ILO Convention in respect of this sector allows for a 72-hour week.
 - 8.4 It is proposed to remove section 9 from the list of 'core' rights that cannot be varied by bargaining council collective agreements. This amendment will not effect the limitation on other collective agreements (i.e. those not concluded in a bargaining council) that cannot vary these rights without a ministerial variation order. It is unlikely that this amendment will lead bargaining councils to negotiate inappropriate increases in working hours. There are several other mechanisms in the Act to prevent unreasonable increases in hours of work being introduced. These include the duty on employers to arrange working time with due regard to the health, safety and welfare of employees and the Minister of Labour's powers to make a determination limiting working hours in the interests of health and safety.
9. **Variation of 'core' rights by Ministerial determination - Amendments to section 50 and section 55(6)**
 - 9.1 The basic conditions of employment set out in the BCEA can be varied by the Minister of Labour in two circumstances: a variation determination in terms of section 50 of the BCEA and a sectoral determination in terms of section 55.
 - 9.2 The BCEA limits the extent to which these variations can vary basic conditions of employment. Presently, the Minister may not vary certain of the 'core' rights set out in section 49 by either a variation determination [section 50(2)] or a sectoral determination [section 55(6)]. The 'core' rights that cannot be varied include the limits on ordinary working time set in section 9.

- 9.3 The consequences of the limitation on the Minister having the power to vary 'core' rights is best illustrated by the limits on ordinary hours of work set in section 9. There are many circumstances in which either the circumstances of a sector or the public interest requires that these limits be varied. These include a sector such as maritime discussed previously, as well as emergency and other public service such as fire-fighting and emergency medical services which have to be provided on a round-the-clock basis. It is essential that the Minister should have the power to consider applications to vary the application of 'core' rights to these sectors and to grant variations in appropriate cases.
- 9.4 Parliament recently had to make an amendment to the Transitional Schedule to the BCEA dealing with the reduction of hours for security guards in the private security sector. This was required because the Minister did not have the power to vary the 45-hour week in terms of section 50.
- 9.5 Sectoral determinations are designed to set conditions that differ from those in the BCEA but are appropriate to the circumstances of a particular sector. The limitation of varying hours of work prevents sectoral determinations from being able to accommodate sectoral diversity in respect of hours of work.
- 9.6 It is therefore proposed to repeal section 50(2) and 55(6) which limit the capacity of the Minister to vary core rights by variation and sectoral determinations respectively. There are sufficient safeguards in the Act to prevent a variation or sectoral determination resulting in an inappropriate reduction of 'core' rights. These include the fact that the Minister must consult with the Employment Conditions Commission before issuing a sectoral determination or a variation determination applicable in a category of employees as well as the fact that all determinations are subject to review by the Labour Court.
- 9.7 The proposed amendment enables the Minister to vary all the conditions of employment in the Act by sectoral determinations or variation determinations.
10. **Variation of 'core' rights by sectoral determination - Amendment to section 55(6)**
- This amendment is discussed in paragraph 9 above.
11. **Issue of compliance orders - Amendment to section 70(d)**
- 11.1 The BCEA envisages that a compliance order may only be issued for claims arising in the preceding year. Questions have been raised as to how that period is calculated.

- 11.2 Section 70(d) is amended to clarify how the period is calculated.

12. Status of compliance order - Deletion of section 73(3)

- 12.1 Section 73(3) provides that a compliance order issued in terms of the BCEA has the same status as an arbitration award issued in terms of the LRA.

- 12.2 The Labour Relations Amendment Bill, 2000, proposes that arbitration awards should have the same status as orders of the Labour Court. If this amendment is made, the cross-reference created by section 73(3) will be inappropriate.

13. Claims for amounts owing in terms of the Act - Amendment to section 74(1)(b)

- 13.1 Section 74 regulates the circumstances in which a claim under the BCEA can be brought jointly with a claim for unfair dismissal.

- 13.2 In line with the proposed amendment to section 70(d), section 74(1)(b) is to be amended to clarify that a claim may only be instituted in such proceedings in respect of claims arising in the year before the dismissal.

14. Payment of interest - Amendment to section 75

This is a technical amendment to clarify the meaning of this section as originally drafted.

15. Power of Labour Court to issue fines - New section 77A

- 15.1 Section 77 regulates the jurisdiction of the Labour Court in terms of the BCEA but does not confer specific powers on the court in the same manner as, for example, section 58 of the LRA or section 50 of the Employment Equity Act. The proposed amendment addresses this shortcoming.

- 15.2 The proposed amendment to the BCEA clarifies the Labour Court's power in terms of the BCEA, including an express power to issue fines for failure to comply with the Act. The proposed draft follows the formulation of section 50 of the Employment Equity Act and seeks to give greater substance to the jurisdiction of the Labour Court as set out in section 77 of the BCEA.

16. **Presumption as to who is an employee - insertion of a new section 83A**

- 16.1 The BCEA, like the LRA, defines an employee as any person, excluding an independent contractor, who is in paid employment and who in any manner assists in carrying on or conducting the business of an employer. The term 'independent contractor' is not defined. The distinction between an 'employee' and an 'independent contractor' reflected in the definition of an employee has its origins in Roman law which distinguished between the contract of service (employee) and the contract for services (independent contractor).
- 16.2 The definition of an 'employee' does not specify criteria that should be used to distinguish employees from independent contractors. This is left for the courts to determine. The court's approach is that a contract must be classified on the basis of the 'dominant impression' gained from examining its terms. This approach has been criticised for offering little guidance in practice to employers and employees. The view has also been expressed that the court's approach involves a formalistic consideration of the differences between a contract of service and a contract for services rather than examining whether it is appropriate that the worker should be protected by labour legislation.
- 16.3 It is possible to distinguish two categories of workers who do not receive the protection of labour law –
- (a) those who fall within the definition of an employee but who are in practice unable to assert their rights as employees;
 - (b) those who the courts classify as independent contractors but are nevertheless in a position of dependence on the organisations or the persons to whom they provide services.
- 16.4 Many vulnerable workers employed in forms of employment such as part-time work, homework or casual work fall into the former category. They are in fact excluded from the protection of labour legislation even though the courts regard them as employees. Both the lack of guidance in the definition of 'employee' and the manner of its interpretation by the courts undermine the effectiveness of protection offered to these vulnerable workers.
- 16.5 Often their employers advise these employees that they are independent contractors. Organisations such as Confederation of Employers of South Africa (COFESA) advise employers that they can avoid labour legislation merely by stipulating in contracts that the workers are independent contractors without any fundamental change in the employment relationship. The consequences of this approach are not limited to excluding these workers from legislation such as the LRA and the BCEA. These employers do not register with or contribute to the unemployment insurance and worker's compensation funds or meet their obligations in terms of health and safety legislation. This weakens these funds

and imposes the costs of ill health and occupational accidents on the workers, their families and the state.

- 16.6 It is also important to note that there is a constitutional dimension to clarifying which workers are protected by statutes such as the LRA and the BCEA. Section 23 of the Constitution extends the right to fair labour practices to all persons and basic labour rights such as the right to join trade unions to all workers. It is conceivable that the Constitutional Court might accept that the language used in the Constitution is broader than the statutory definition of an 'employee' and that the failure to extend protection to certain categories of workers constitutes an unreasonable and unjustifiable limitation of their constitutional rights.
- 16.7 The need to review definitions of employment and adapt these is an international phenomenon and the proposal to adjust the BCEA and the LRA in this regard are in line with international trends to clarify or adapt the scope of the regulation of the employment relationship in the country's legislation in line with current employment realities.
- 16.8 It is proposed to include a series of rebuttable presumptions in the BCEA as a new section 83A and new section 200A in the LRA. These presumptions concern proof of whether an employment relationship exists. The effect of these is to provide that where a particular factor is present in the relationship between a worker and the person for whom he or she works, the worker is presumed to be an employee unless the contrary is proven.
- 16.9 The factors listed are those commonly present in an employment relationship. They include –
 - if the manner in which the worker works is subject to supervision by another;
 - if the worker's hours of work are subject to control by another person;
 - the worker forms part of the employer's organisation or is economically dependent on the employer.
- 16.10. Where an employer adopts the attitude that, despite the presence of one of these factors, there is no employment relationship, they will be required to prove this. The employer has full knowledge of the working relationship and will therefore be in a position to present evidence to discharge the onus in appropriate cases.
- 16.11. A set of rebuttable presumptions will create greater certainty containing the existence of employment relationship while allowing for the fact that employment relationships are in practice extremely varied.
- 16.12. This proposed amendment should go together with guidelines clarifying the distinction between independent contractors and employees and determining when an employment relationship exists. Such guidelines can be in the form of a

Code of Good Practice. Both the BCRA and LRA provide provisions for NEDLAC or the Minister to issue such Codes.

- 16.13. Guidelines would promote greater certainty concerning this distinction and assist employees to assert their rights and would also assist officials such as Department of Labour officials and bargaining council agents evaluate borderline cases for the purposes of enforcement.

17. Minister's power to make Codes of Good Practice - Amendments to section 87

- 17.1 Presently, Codes of Good Practice issued in terms of labour legislation can only be taken into account for the purposes of that Act. Often, however Codes of Good Practice are relevant to several Acts. For instance, it is proposed to issue the Code of Good Practice on HIV/AIDS in the Workplace in terms of both the LRA and the Employment Equity Act.
- 17.2 It is proposed to introduce a new section 87(5) which will permit the Minister to stipulate in a Code of Good Practice, issued in terms of the BCEA, that the code should be taken into account when interpreting or applying other legislation administered by the Department of Labour.
- 17.3 A similar amendment is included in the Labour Relations Amendment Bill, 2000.

18 Wage determination - Amendment to Schedule 3

- 18.1 The transitional provisions in terms of the BCEA have created uncertainty concerning the status of wage determinations issued in terms of the Wage Act, and which remain in effect.
- 18.2 The provision has been redrafted so that wage determinations remaining in effect on the date that the Amendment Act takes effect are deemed to be sectoral determinations made under the BCEA.
- 18.3 The Minister will be able to amend, cancel or suspend a wage determination as if it were a sectoral determination in terms of section 56 of the BCEA. Likewise, the surviving wage determinations will be enforced in the same manner as sectoral determinations made under the BCEA.