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INTRODUCTION

This Enforcement Manual for Labour Inspectors comprises of Labour Inspection Enforcement Policy, Principles and Practices of Labour Inspectors and a Code of Ethical Behaviour. It provides three basic tools necessary for a modern labour inspection that is both efficient and effective.

The main role of labour inspection is the promotion of compliance with labour legislation as well as good labour practises, to achieve basic workers’ rights, balanced socio-economic development, and sound and effective industrial relations as a basis for constructive social dialogue and thus a positive investment climate. Labour inspectorates are expected to assist management and workers in developing good labour practises and achieving social justice and decent work for all.

THE LABOUR INSPECTION ENFORCEMENT POLICY

The Labour Inspection Enforcement Policy has been designed to facilitate and ensure more effective implementation of an integrated approach to labour inspection, in line with the principles of the International Labour Organisation Conventions and practices, the South African Constitution and the spirit of our Labour laws. The main objective of the model policy is to ensure that all employers and workers comply with the requirements of our Labour law; and that the Government must assist with, and enforces, such compliance through a combination of advisory and enforcement measures to ensure decent work for all.

All serving and newly recruited labour inspectors should be thoroughly trained in the effective implementation of the Enforcement Policy.

PREAMBLE

The Department of Labour is charged with the responsibility to promote good labour practices including sound labour relations, improved conditions at work and minimum wages, fair labour practices and a healthy and safe working environment, through advice, enforcement and other suitable measures.

For this purpose the Department of Labour has Inspection and Enforcement Services which ensures that the Department provides information and advice as well as ensure compliance with our Labour laws by providing and monitoring Labour Inspectors who deal on daily basis with the employees and employers.

This Labour Inspection Enforcement Policy document sets out the general principles that all Provincial Offices, Labour Centres and individual inspectors are expected to follow.
2 VISION

We will deliver a world class service that is effective and efficient and that promotes a labour market that is characterized by:

- Rising equity
- Sound labour relations
- Respect for employment standards
- Workers rights and
- Occupational health and safety

3. MISSION

The staff of the Department of Labour will serve the workers in the formal and informal sector, those working in the vulnerable sectors as well as those employed in sectors that are more vulnerable (and not protected by Sectoral Determinations and similar legislation) and people of the Republic of South Africa by:

- promoting a culture of prevention ad voluntary compliance
- improving the working conditions of workers in the vulnerable worker sectors, high risk sectors, designated employers and repeat violators
- securing strategic partnership and co-operation with all social partners/ role players
- encouraging and promoting self/co-regulation
- ensuring improved access to services
- developing a professional service within the Department of Labour

4 STRATEGIC OBJECTIVES

The Inspection and Enforcement Services and all its Labour Inspectors are committed to the following strategic objectives:

- **To promote good labour practices** including sound labour relations, improved conditions at work and minimum wages, fair labour practices and a healthy and safe working environment. We are enforcing the law to achieve these objectives.

- **To provide information and advice on our labour laws**: The Department is the initiator and guardian of our labour laws. It has the responsibility to inform clients about the laws and where appropriate to educate them. However, the Department does not act as a legal advisor.

- **To ensure compliance with our labour laws**: We will be ensure that conduct both re-active (i.e. when dealing with complaints and incidents) and pro –active (identified areas of non-compliance and advise on corrective action) inspections to ensure that our laws are complied with.
5. **OUR VALUES**

The Department of Labour has adopted a number of values which include:

- **Client centered service**: This means that the problems the clients face needs to be dealt with in a manner that will benefit the particular client the most.

- **Efficiency and effectiveness**

- **Transparency**

- **Accountability**

5.1 Other values are particularly important in the context of enforcement, namely:

- **Consistency**: similar cases should be treated in similar fashion

- **Equality**: equal protection of workers in comparable situation.

- **Coherence**: clear guidelines for a common intervention approach for all inspectors including exercise of authority, discretion, and judgment.

5.1.1 The Public Service Code of Conduct, which embraces the principles of Batho Pele, also includes aspects, which would be particularly relevant in respect of enforcement.

5.1.2 The Department of Labour has recently approved a Service Charter which incorporates our key values.

6. **ROLE OF THE INSPECTOR**

6.1. **Inspection procedures**

Labour inspection is based on agreed, written procedures that have also been laid down in the Operations Manual, which all inspectors in all field offices are required to follow, after having received appropriate training.

**The main elements of these new labour inspection procedures with regard to a first enterprise inspection visit are defined as follows:**

- On the occasion of the first visit to any enterprise in a given year, inspectors will make a full assessment of the state of compliance with labour legislation, covering all relevant social relations and social protection provisions, and also assessing the employer’s ability and apparent willingness to comply with these regulations.

- If the violations are not evidently serious, and if the inspector has grounds to believe that the employer will correct them by a given deadline and be reasonably co-operative in future, **advocacy** (structured information and advice on the best way of complying) will be the **primary means of intervention**, together with clear, written instructions on how to comply, and in what time-frame to do so.
• If the inspector decides to prosecute the employer, structured advocacy on the reasons for doing so will be given. This will include information on the employer’s legal obligations, on the consequences of continued non-compliance, and on the time-frame for rectification. The reasons for prosecution will be laid down in writing for him or her.

• As far as is reasonably possible, the inspector will also take the size and economic circumstances of the enterprise into consideration when deciding on prosecution. Whilst the law applies to all, inspectors can be more flexible towards small enterprises, in particular regarding deadlines for compliance with minor violations.

• As far as possible, the inspector will consult with any workers’ or trade union representatives in the enterprise and inform them of any violations of labour legislation encountered and what further action he/she intends to take.

• In the event that the inspector detects violations but decides to give advice or information only (always together with written compliance instructions and a time-frame), possibly combined with a written warning (structured advocacy), a follow-up visit no later than one month after the compliance deadline has elapsed, is in principle obligatory, unless “force majeure” prevents it from taking place in time.

• If, on the occasion of a such follow-up visit, the inspector finds that the employer, in spite of previous assurances, has taken no significant steps towards compliance and rectification of the violations noted earlier, the inspector will as a matter of strict policy initiate prosecution measures, again combined with structured advocacy, to inform the employer once more of his legal obligations, and of the reasons for now prosecuting.

• Only in exceptional, clearly justified cases, when the employer shows valid reasons and documentary evidence for having had to delay compliance (“force majeure”) will the inspector once more give only structured advocacy, combined with a written warning to comply, and a further, final deadline for doing so.

• Employers who are generally in conformity with the law, having shown evidence of their willingness to comply, which inspectors must document in their reports, will not be inspected again for a period of at least twelve months, unless a complaint has been received or an accident has occurred.

• Inspectors will document all the above steps, depending on their decision, in writing and submit their first inspection visit report to the field office director for discussion and approval in principle no later than 10 days after the visit.

*d. Productivity of labour inspectorates*

Productivity is the relationship between what is produced and the resources required to produce it. It is concerned with inputs, outputs, and the relationship between inputs and outputs.

It is possible to check a labour inspectorate’s productivity by:

• Measuring inputs and outputs;

• Relating inputs and outputs to a definite time-frame.
One measure of productivity, or performance, is the number of inspections an inspector undertakes per month or per year. This measure of productivity does not indicate the quality of inspection work and has the usual distortions of the average as a statistical measure. But it provides a useful starting point for examining the inspectorate’s performance.

Therefore, the inspectorate (national and field office) management should set specific, realistic performance standards binding on all inspectors:

**Example:**

- Each inspector must carry out a minimum of 18 (*for example*) regular inspections per month;
- Each inspector must investigate and report on a given percentage of notified accidents per month;
- Each inspector must deal with a given percentage of complaints regarding employment or relations issues per month.

*Raising the level of productivity should not be at the expense of quality.* For example, it may appear easier to increase the number of inspections by taking short cuts, not undertaking detailed inspections of workplaces, and not writing proper reports. Therefore, **fixed time limits** should be set for each type of inspection. Routine or regular inspections of small enterprises should be done in not more than one hour.

Inspections of medium-sized enterprises should not take more than half a day; and **no inspection** of any enterprises— even a very large one— **should take more than one day.** Large enterprises must be inspected in teams,

**It is best to increase productivity by:**

- Better work planning and programming;
- Improved transport for inspectors;
- More and better training; and
- Better office facilities and support equipment.
- Improving resource management means giving greater attention to:
  - Setting inspection targets;
  - Making proper work plans;
  - Monitoring inspectors’ performance;
  - Evaluating performance to determine why targets have not been met.
Even where inspectorate staff resources are declining, it is possible to increase productivity by better planning and resource management, and by adopting new methods and approaches for inspection visits, such as integrated labour inspection.

e. Technological developments

New technological developments make many new demands on labour inspection. Examples are: industrial robots, computerized technology, genetic engineering, new chemicals, new substances, new forms of work organization, etc. Particularly these latter are of growing concern as they are a primary reason for stress and other occupational diseases, particularly in transition countries, incurring sometimes significant, often “hidden” losses and production on-costs.

New technologies require inspectorates to adapt to a range of new situations, including: new work processes, different types of hazards, new and unfamiliar working conditions, and new types of work accidents. New technologies – with the potential of major hazards – as used, for instance, in chemical and nuclear plants, not only affect workers in the immediate working environment, but often also the population in surrounding areas. In their advisory role, inspectors must therefore also always keep in mind what the effects of any ongoing work might be on the general public.

Examples of consequences of technological developments for labour inspection:

- Which strategies should inspectorates adopt to keep well informed about technological changes and their expected impact?
- How should inspectors’ recruitment and training be organized to accommodate new developments?

**How should the inspectorate structure and organization be developed to keep abreast of new technology?**

The complexity of new technologies and the need for specialist assistance may involve greater use of external consultants to support mainstream inspectorate staff. It also requires placing greater emphasis on labour protection through prevention at the earliest possible stage. Extensive consultations are usually needed before new plant, processes, and chemical substances— which might pose a threat to the safety and health of workers and the wider community is introduced.

Attention should be given to (for example):

- The study and approval of factory plans and processes before construction;
- The centralized inspection of imported machinery and equipment;
- Consultation with employers and workers on enterprise safety and health prevention policies;
- The increased participation of all parties in developing a national safety and health policy;
- The development of an inspection strategy concentrating on priority industries and enterprises, preferably in an integrated approach.
7. THE NEW INSPECTION MODEL

7.1 Introduction

This model has been designed to facilitate and ensure more effective implementation of an integrated approach to labour inspection, in line with the principles of ILO Conventions. The central objective of the model is to make certain that all employers and workers comply with the requirements of a country’s Labour Law, and that the Government assist with, and enforces, such compliance through a combination of advisory and supervisory measures to ensure decent work for all.

Compliance must be enforced not merely for the sake of public order, but also so that all workers in our country and their families are protected, that employers who invest in decent work are not undercut by non-compliant competitors, that a level playing field is created for all, and that the economy and society continue to enjoy opportunities for growth in which all citizens have a fair share.

7.2 New approaches to inspection

Changes in the world of work and the speed at which they occur require different, often new, even unfamiliar, approaches to inspection work. Secondly, our approach in the past seven years tended to focus more on quantity rather than quality. The focus also was on ensuring that there’s improvement in the number of workplaces visited. This in a way improved the productivity of the inspectors as more and more workplaces were visited.

Productivity is the relationship between what is produced and the resources required to produce it. It is concerned with inputs, outputs, and the relationship between inputs and outputs. One measure of productivity, or performance, is the number of inspections an inspector undertakes per month or per year. This measure of productivity does not indicate the quality of inspection work and has the usual distortions of the average as a statistical measure. But it provides a useful starting point for examining the inspectorate’s performance. Therefore, the inspectorate (national and field office) management should set specific, realistic performance standards binding on all inspectors:
There’s a need for us to change the way we do things in order to maximize the limited resources we have. What does the new inspection entail? Before we can respond to this question, it will important to first define what an inspection is and its intended outcome.

An inspection is the activity carried out by an inspector, which is aimed at ensuring that the person or entity inspected complies with the legislation. In other words, an inspection is carried out with a purpose of achieving a specific goal, which is compliance with the law using the enforcement procedures as stipulated in departmental directives. From this definition, it is clear that an inspection must have an outcome, which is compliance. What then do we mean when we talk about compliance? In 2008/9 we conducted 150 000 inspections achieving 82% compliance level. What did these workplaces comply with? Did they comply with all the laws that we administer? The answer is a resounding NO.

What then should be an acceptable way of defining compliance? Well, a company can only be said to be complying only if the company complies with all legislations (not some). How can we then achieve this considering the limited resources at our disposal? Well, even where inspectorate staff resources are declining, it is possible to increase productivity by better planning and resource management, and by adopting new methods and approaches for inspection visits, such as integrated labour inspection.

**What it is integrated labour inspection?** This means that a team (usually five) of inspectors comprising of inspectors with variable competencies such as OHS, EE, BCEA, etc conduct an inspection at a particular target as a team. This team is lead by a Team Leader. It is only when the whole team is satisfied with the level of compliance that a pronouncement could be made that company A is in full compliance. This type of inspection is referred to as “Full Audit”.

For this approach to yield positive results, proper planning will be very crucial. Planning should not be seen as something that might be done if time allows. **Planning is of fundamental importance if inspectorates are to improve their overall performance.** Planning means preparing for the future. It involves preparing for action at some given point in time the next day, next week, next month, next year. Planning is the opposite of chaos and crisis. It attempts to transform chaos into order and reduce uncertainty to a more manageable level. Planning requires considering priorities. **Planning is a tool to transform the possible into reality.**
Resources are scarce – through good planning it is possible to establish priorities for their most effective use. What is important is that everyone has to plan.

7.3 Preparing for the Inspection Visit

Collecting background information

Once inspection priorities have been established, action plans formulated, and detailed work programmes agreed, it is possible to prepare to conduct the inspection visit itself. Inspectors must check files and records on the enterprise to be inspected concerning:

• Location of the enterprise and the name of the contact person;
• Total number of workers, number of women workers, young workers, apprentices, and Foreign workers, skill levels, etc;
• Nature of the work process and its final products and services;
• Raw materials and equipment used, particularly if chemicals are involved;
• Previous violations of the law and the action taken. This will provide an insight into the general commitment of the enterprise to meeting statutory labour standards;
• Employer’s general attitude to the inspectorate (hostile, indifferent, cooperative);
• work accidents and diseases over the last five years, and in particular fatalities;
• Complaint letters from workers against management, and the action taken to address complaints;
• Existence of a trade union in the enterprise, and whether there is a collective agreement between the union and management. Much of this information can eventually be stored in an electronic database and easily accessed before inspection visits. With electronic reporting the information can be expanded and updated continuously.
8 PRACTICE OF LABOUR INSPECTION

8.1 Enforcement

Laws to protect workers’ conditions of employment and working environment are meaningless if the legal provisions are not respected and enforced. There can be no good labour legislation without good labour inspection.

Labour law enforcement, that is ensuring compliance with rules and regulations, is the primary responsibility of labour inspectors.

Inspectors can improve their performance by making better use of existing resources. This requires that inspection work be carefully planned to ensure that enterprises “at risk” receive priority attention, and those where non-compliance is rare are given lower priority.

In addition to this careful planning of inspection work, particularly the arrangements for unannounced routine inspection visits, the conduct of each inspection visit is very important.

- Proper preparation is required for each visit.
- The visit should follow a set standard procedure.
- Follow-up activities should be provided for, particularly submission of inspection reports and check-ups.

A properly conducted inspection visit can have an impact beyond the immediate concern of law enforcement and compliance. Inspectors play a front-line role in the work of Ministries of Labour. Through general observation and questioning they can identify problem areas which might lead to industrial conflicts and disputes, as well as potential hazards which might cause workplace accidents. Thus, well-executed inspection visits can play an important preventive role in the wider area of labour-management relations.

Routine inspection can also encourage workers and their organizations, and management to take greater responsibility for matters that were traditionally handled by labour inspectors.

The more inspectors can rely on workers and management to take responsibility for their rights and obligations under the law, the more time they can devote to enterprises where this type of responsibility is lacking.

Inspectors must make every effort to involve union representatives and senior management representatives in each inspection visit.

There is an increasing trend to set quantitative standards for labour inspectors, often in the form of a set number of inspection visits to be completed each month. This is to be encouraged, to improve the inspectorate’s productivity, but care should be taken not to increase the number of inspections at the expense of quality.
Quantity and quality inspection performance improvements should go hand in hand.

8.2 Planning Inspections

   a. The importance of planning

Labour inspectorates’ work should be properly planned if policy objectives and obligations under the labour laws are to be met. Policy directives, to be effective, have to be translated into action plans. Law enforcement should be systematically planned if the best use is to be made of the scarce resources available to inspectorates.

Planning should not be seen as something that might be done if time allows. **Planning is of fundamental importance if inspectorates are to improve their overall performance.**

   b. What is planning?

Planning means preparing for the future. It involves preparing for action at some given point in time the next day, next week, next month, next year. Planning is the opposite of chaos and crisis. It attempts to transform chaos into order and reduce uncertainty to a more manageable level. Planning requires considering priorities

**Planning is a tool to transform the possible into reality.** Resources are scarce – through good planning it is possible to establish priorities for their most effective use. What is important is that **everyone has to plan:**

   c. The planning process

Planning involves:

- taking stock of the existing situation;
- Establishing a broad vision of the future;
- Setting objectives for achieving that vision;
- Fixing targets reflecting the results to be achieved;
- Setting standards indicating the quality of outputs to be achieved;
- Relating objectives and targets to a definite time-frame;
- Comparing **expected** costs and benefits **before** implementing the plan;
- Considering monitoring arrangements when implementing the plan;
- Considering the evaluation arrangements required at the end of the plan period.
Planning requires action strategies to ensure that objectives, targets, and standards are achieved. When making plans it is crucial that all concerned are clear about their responsibilities, the performance standards to be met, the target indicators, and the time-frame.

**d. Action planning**

**Action planning involves deciding who will do what and when.** It is likely to be of most concern to labour inspection headquarters staff and to field office managers or their deputies.

*Before inspectorates prepare detailed action plans, the following questions must be addressed:*

✓ What is the legal definition of an enterprise?
✓ How many enterprises are liable to inspection under that definition?
✓ Is it necessary to inspect all enterprises legally liable to inspection?
✓ How frequently should enterprises liable to inspection be visited?
✓ Should a distinction be made between large and small enterprises (SMEs)?
✓ Which sectors should be given priority?

**e. Work programmes**

Each inspector’s work programme will require preparation based on the labour inspectorate’s national, sectoral or district (in future perhaps also zonal) action plans. Each inspector should know which enterprises to inspect **weekly and monthly**, and how often.

Each inspector’s work programme must take account of his or her duties (as well as public holidays, training and other absences, and annual leave).

Individual work programmes should provide time for unforeseen situations. Individual work programmes should be prepared in consultation with inspectors, superiors, and colleagues.

The individual work programme is also an important tool to monitor and evaluate inspectors’ performance on an ongoing basis. Timely implementation should therefore be carefully checked by field office and headquarter supervisors.

**8.3 Preparing for the Inspection Visit**

**a. Collecting background information**

Once inspection priorities have been established, action plans formulated, and detailed work programmes agreed, it is possible to prepare to conduct the inspection visit itself.

Inspectors must check files and records on the enterprise to be inspected concerning:

✓ Location of the enterprise and the name of the contact person;
✓ Total number of workers, number of women workers, young workers, apprentices, and foreign workers, skill levels, etc;

✓ Nature of the work process and its final products and services;

✓ Raw materials and equipment used, particularly if chemicals are involved;

✓ Previous violations of the law and the action taken. This will provide an insight into the general commitment of the enterprise to meeting statutory labour standards;

✓ Employer’s general attitude to the inspectorate (hostile, indifferent, cooperative);

✓ Work accidents and diseases over the last five years, and in particular fatalities;

✓ Complaint letters from workers against management, and the action taken to address complaints;

✓ Existence of a trade union in the enterprise, and whether there is a collective agreement between the union and management.

✓ If the employer is known to be uncooperative and aggressive towards inspectors, additional preparation may be required.

Example: It may be desirable for a senior, experienced inspector to undertake the inspection, or for a more experienced colleague to accompany a less experienced inspector. It will also be necessary to consider carefully whether inspection should be on appointment or by surprise.

b. Types of inspection visit
The background information to be collected for each inspection visit will depend on the type of inspection.

There are normally three types of inspections:

✓ Routine Inspections

✓ Follow-up Inspections

✓ Re-active Inspections.

Routine (or regular or standard) inspection visits are concerned with checking compliance with the law and advising enterprises on how to comply with legal provisions. Such visits usually cover the full range of matters covered by the mandate of the inspectorate.

Example: As the inspectorate is responsible for terms and conditions of employment. The visit will concentrate at least on: wages, hours of work, overtime, rest periods, leave, maternity benefits, minimum age regulations, welfare facilities, and amenities.

As the inspectorate is also responsible for safety and health, and the working environment, the same visit will include checking of: machine safety, materials handling, chemicals and hazardous substances, electrical installations and wiring, scaffolding on construction sites, as well as safety of ladders, equipment operation, fire safety, and general housekeeping.
In an integrated inspection service, inspectors must be competent to deal with basic issues in both these major areas of labour protection.

All routine visits require follow-up by a return visit of an inspector. But some will, particularly where the inspector has given a deadline for rectifying problems or shortcomings, or issued a warning letter, an improvement notice, or prohibition notice.

Follow-up visits are undertaken to determine the extent to which the enterprise has responded to the outcome of an earlier routine visit. Inspectors have a degree of discretionary power, not for the content of the law they are required to enforce, but for the time given to enterprises to address shortcomings.

Re-active Inspections may be in response to, or investigation of a specific complaint from a worker in an enterprise. They may concern a particular problem relating to the inspectorate's priorities (fire safety, illegal employment, asbestos, etc.), or may involve investigating a particular problem, for example a serious work accident. Such visits relate to a specific issue and to collecting information to assist in decision making on that issue.

c. Preparing materials
The inspector should put together the materials and items required for conducting the inspection efficiently.

These include:
✓ The Inspection Service Instructions setting out inspection procedures;
✓ The labour laws and related regulations; these documents must be kept up to date with recent amendments;
✓ An official identification card verifying the inspectors’ credentials;
✓ A copy of any collective agreement (sector or enterprise) between management and the relevant trade union;
✓ The prescribed inspection forms;
✓ Checklists to assist in dealing with certain issues such as basic OSH, and for collecting information;
✓ If possible, the factory floor plan;
✓ Any available promotional material for awareness raising and educational purposes.

A floor plan will assist the inspector in accessing areas where machines are located, identifying storage areas (particularly for chemicals), examining internal traffic flows, and the general flow of raw materials and products. This is particularly valuable for visits to large establishments.

Information is an important resource, just as staff, vehicles, and finance is resources.

Without a proper records management system inspectors will be wasting valuable time in collecting information from various sources and locations, and in subsequently processing it.
d Confirming the visit

It is necessary to decide whether a visit will be announced, thus by appointment, or unannounced, thus by surprise.

Example:

If an inspection visit is announced, the inspector will make a firm appointment to visit the enterprise at a particular time on a particular day. The appointment should be confirmed the day before the visit. The labour law usually provides for inspectors to make surprise visits at any reasonable hour. For special visits, an appointment is usual, while follow-up visits may be announced or unannounced.

Should regular or routine inspection visits be announced or unannounced? The decision should be based on the type of intervention most likely to improve workplace protection.

The main **advantages of an announced visit** are that it gives the enterprise time to:

- Get together relevant information;
- Alert managers and workers to the timing of the visit;
- Arrange meetings to facilitate the inspector’s visit.
- It also gives greater assurance that senior managers will be present. In the final analysis,
- They have the responsibility for compliance; they have to “get it right” on a sustainable basis even when the inspector is not there.

The main **disadvantages of an announced visit** are that it provides the enterprise an opportunity for:
- Window dressing (e.g. borrowing safety equipment such as fire extinguishers from other enterprises);
- Senior management to be deliberately absent;
- Documents to be “missing”.

**The unannounced visit enables the inspector to observe actual and true conditions in the enterprise.**

A surprise visit should therefore be made if the inspector has reason to believe that an announced visit would allow time for concealing irregularities. An inspection visit resulting from a formal complaint should also normally be **unannounced** to prevent documents and evidence from being concealed, and to protect complainants from harassment and discriminatory behavior before inspection.
e Mobility

As part of the preparation for an inspection visit it is necessary to ensure that transport is available at the required time. It is preferable for the inspectorate to have its own transport, but this is not always the case.

f The uncooperative manager

Some managers may refuse to cooperate with the inspector, or provide the least possible assistance, or be outright hostile and, in some cases, even aggressive. In such circumstances the inspector should first rely on a combination of technical power and person power. This would mean explaining to management their obligations as duty holders under the law, but also some of the benefits to be derived from the visit.

Example:

- Improved safety and health, and better motivation of the workers;
- Better work practices, better quality and higher productivity;
- Solution of problems before they escalate into major disputes.

The inspector should outline, persuasively and convincingly, how his or her work can contribute to improved labour relations in the above sense, since good health (and good conditions) for the workers is good business (and thus profitable) for the employer. The actual message is important, but so is the way in which it is presented. It is very important to remember that inspections should always be non-confrontational. If an inspector reaches an impasse, it is better to break off the visit, return to the office and discuss immediately with the field office/district director (or, in his/her absence, with senior colleagues) what steps to take next.

However, the case should not be dropped. An immediate, swift reaction to such – illegal – obstruction is imperative, if necessary and as a last resort, with assistance from the police.

If technical power and person power fail to obtain cooperation from management, the inspector should resort to his or her position power, i.e. the authority provided by the law. This requires that the inspector be fully conversant with his or her powers conferred by national regulations. These should be brought to management’s attention. Finally, the inspector may indicate that he/she will initiate legal proceedings against the employer for obstruction.

Before commencing the inspection visit the inspector should indicate that he or she wishes to be accompanied by a representative of management and/or of the workers. This is to be encouraged for normal inspections, not only to promote cooperation between the parties (mainly management) and the inspectorate, but also to access information that might otherwise be difficult to obtain. By having informed persons present throughout the inspection, the inspector will have many of his or her questions answered on the spot.
In some cases it might be preferable for the visit to proceed without a representative of management present, for example where the inspector wishes to ask questions of workers who may be reluctant to respond when a management or a worker representative is present.

**Inspectors should, where necessary, insist on their right to talk to workers alone, that is, in the absence of any management staff.**

**g. The shop floor visit**

Once the inspector has completed the formalities with management, the actual inspection can commence. Where should the inspector start? There are no fixed rules for the order to follow; it will depend on the nature of the inspection, its objectives, and information obtained during preparations and preliminary discussions. The inspector may wish to see first the work premises. If this is the priority, the inspection should be conducted systematically, preferably by following the production process, from the arrival and storage of raw material to the final product stage.

For a first inspection, it is desirable for the inspector to have a comprehensive overview of the enterprise’s work and learn about its raw materials, processes, machinery, storage facilities, power supply, and general technology level, as well as its wages registry, collective agreements, time sheets, and other legally required documentation, etc.

Before visiting the production area, the inspector may prefer first to examine such documents and records on wage scales, overtime worked, rest periods, leave arrangements, and other matters relating to the terms and conditions of employment, as well as, for example, on chemical safety (data sheets), accident records, etc. Such an examination would be done alone, not in the presence of any worker or management representative, although it may be necessary to request accounts or finance clerks to respond to specific queries, or safety engineers or similar personnel to give additional information. Examining various records can provide useful insight on how the enterprise conducts its affairs.

**Example:** Poorly kept financial records, missing information, and outstanding payments are a signal that management is weak and uncaring, thereby alerting the inspector to the possibility of deficiencies in other areas (such as occupational safety and health) as well.

The inspector may decide to go immediately and directly to a section of the factory if he or she has reason to believe that there is a particular problem there. For example, if illegal labour is thought to be prevalent in the factory; or an unsafe machine, or toxic substances constituting an immediate danger are being used, the inspector would adjust his or her programme accordingly.

**Regular (general, standard) inspection**

The items to be covered in a regular inspection of the terms and conditions of employment as well as the working environment (integrated inspection) will depend on specific regulations and requirements of the current Labour Law and the Safety and Health Acts and regulations. Inspection will involve examining books and records, as well as observing the physical conditions under which work takes place.

Regulations usually require that a register of overtime be kept and that the wages register, payroll or wages book and individual pay slips show the hours worked. If such records are accurately
maintained, the inspector can readily check whether the hours of work comply with the law, and whether overtime has been worked and paid for at the correct rates.

If there is no such register, or proper records have not been kept, the inspector will have to make specific checks, such as the actual time employees enter and leave the enterprise, or the duration of meal breaks, and may question individuals as to the number of hours used for calculating wages for their last pay period. He/she will also interview several workers to establish the facts – typically in the absence of any management representative and in such a manner as to avoid subsequent victimization. Unauthorized overtime could be checked by an unannounced visit outside normal working hours.

ii) Safety and health issues

Supervising safety, health and welfare standards is a principal function of all labour inspectors. It is part and parcel of every regular inspection.

There is no set sequence for safety and health-related inspection work. Again, it is normal to follow the production flow, checking machinery, equipment, and processes as raw materials are progressively transformed into finished products. Both employment and OHS concerns can in this way be very conveniently combined.

While moving through the enterprise, the inspector should note the building’s condition, location of and free access to (emergency) exits, electrical wiring, general housekeeping, sanitary conditions, water outlets, fire-detection and fire-fighting equipment, internal traffic movement, including warnings of dangerous sectors, proper posting of signs, and the provision of proper fencing between work areas and traffic flow areas, and proper marking of the latter. Checklists can be very useful in this context.

The inspector can significantly reduce risks by ensuring that obvious safety regulations are strictly observed.

iii) Investigating complaints

Inspection visits are often undertaken in response to a particular complaint. In such cases the inspector should not disclose the reasons for his or her presence, or the name of the informant, and when interviewing workers for purposes of investigation, should talk to as many as possible to avoid inadvertently disclosing the source of the complaint or information.

The inspector will act as though a normal inspection is being undertaken, but will ensure that the subject matter of the complaint is addressed during the course of inspection.

iv) Follow-up visits

Follow-up visits are required to check whether an instruction or order from a previous visit to rectify a shortcoming (improvement notice) has been complied with within a timeframe set by the inspector. Inspection should be undertaken shortly after the time given to rectify the problem has expired. Follow-up visits need not be announced and should normally concentrate on a particular issue or set of issues raised during or after the initial visit. The inspector can go directly to the part of the enterprise to be inspected or call for documentary evidence on the particular subject.
v) Investigating work accidents

An accident is a sudden, unintended occurrence, normally causing bodily harm or injury or material damage. Unfortunately, accidents occur all too frequently and have to be investigated by inspectors to **determine causes** and **establish preventive measures**. The main purpose of investigation is to learn how similar accidents can be prevented by such means as mechanical or organizational improvements, such as through improved supervision or more and better training of workers.

Such investigations should also be used to publicize a particular hazard among workers and supervisors (and fellow inspectors), to draw attention to accident prevention in general and, in some cases, to determine the facts concerning legal liability or worker’s compensation.

The investigation should attempt to answer at least these questions:

- **When** did the accident occur?
- **Where** did it occur?
- **Who** was injured?
- **What** happened (cause and effect)?
- **What** were the contributory factors? And
- **How** can similar accidents be prevented?

Investigation should always be conducted on the spot, and will be made easier if the inspector comes to the site as soon as possible. After an accident, the site should therefore to the extent possible be left undisturbed, unless special measures have to be taken to ensure the safety of the injured or other persons, or to prevent further property damage.

It is necessary to inspect the accident site carefully and interview witnesses, preferably individually and not in the presence of the employer or his representative. In doing so, the inspector should question persons without apportioning blame. The aim is to determine the facts to prevent another accident rather than to establish guilt. Injured persons should be interviewed as soon as possible after the accident, either at the workplace, hospital, or home. If possible, photographs should be taken of the accident site, and sketches made of the layout and the machines involved, showing the movement of goods and people.

The **inspector should attempt to find out four main things:**

- The immediate cause (such as a broken cable as a result of it being overloaded, old, or frayed; a broken step or no handrail; an oily floor);

- Not immediately apparent but equally important factors, such as fatigue (suggested by the time of the accident), inadequate training, and alcohol abuse;

- Failures in organization and the OHS management system of the enterprise; and

- Failure to abide by the law or regulations.

Once the facts have been determined, the inspector will have to decide what to do.
**d. Closing meeting**

After the inspector has visited the premises, spoken with employees and examined the records, a closing meeting should be held with management representatives and, where possible, also with representatives of the workers or trade union officials. In fact, the inspector should encourage the employer to invite worker representatives to this meeting. That is the time for an open discussion of the problems found during inspection, and on the best way of complying with legal requirements, and it should not be rushed.

The closing meeting should not be used as an opportunity to intimidate the employer, and should not become a confrontation. Heated exchanges should be avoided.

**The inspector has to balance the dual functions of enforcing the law and providing advice and information.**

He or she should clearly and objectively state what needs to be done, and the likely repercussions of failure to comply with legal provisions within a clear time-frame. However, if the situation warrants it, the deadline for implementing measures required or proposed by the inspector can be discussed or “negotiated” in return for the employer’s firm commitment to comply. This process is called “negotiated compliance”. It has to be fully based on prevailing legal standards and requirements, but it does increase the level of acceptance of measures imposed by the labour inspectorate.

**During the closing meeting, the inspector should address the key issues. For example:**

- **Summarize** the general standard of working conditions in the enterprise, including the state of housekeeping, emphasizing what is satisfactory, but clearly pointing out what needs improvement to ensure compliance with the law;

- **Discuss** the unfair, unsafe, and unhealthy or otherwise unlawful conditions observed, outlining all apparent violations and possible legal consequences;

- **Propose** priorities for improving working conditions and the working environment by identifying three or four important issues;

- **State** those measures which have to be implemented without delay;

- **Inform** the employer of the period allowed for implementing time-consuming measures;

- **Inform** those present of the role and purpose of labour inspection, indicating the services it can provide to the employer and the workers; and

- **Present** all findings in a balanced, impartial manner, highlighting also the good points.

**e. Key Factors**

In conducting the inspection the inspector should be aware of a set of important issues:

**These key factors are:**

- The real purpose of inspection should be kept in mind. It is not to show the inspector’s superiority and position power, or to initiate legal proceedings, or indeed to “punish”, but to ensure a fair, safe, healthy and productive working environment;
• Inspection must be conducted systematically and follow a routine procedure;

• The employer or employer’s representative and employees should be involved during inspection, most importantly at a closing meeting;

• The enterprise and its working environment, not an individual employer or manager, are being inspected. The inspector should put aside personal likes and dislikes and proceed with the job;
• The inspector, not the employer (or manager), is in charge of inspection. The inspector has the support of the law in conducting inspection. This should be pointed out firmly to an uncooperative employer or his representative.
In addressing these key factors, inspectors must show good communication skills. How the inspector relates to people is important in determining whether his or her message will be acted upon. It is important not only what an inspector says, recommends, or orders, but also how he or she gets that message across.

2.5 Follow-up

a. After the inspection visit
Once the inspector has left the enterprise and prepares to write the inspection report, certain steps may be necessary.

Inspectors should:

• **Consult** technical colleagues and check relevant legal texts, guidelines and publications to ensure that recommendations proposed or instructions given are correct;

• **Consult** the notes taken during the inspection visit and the issues raised at the closing meeting;

• **Re-examine** the problems identified and confirm, through personal reflection, that they are, in fact, the priority ones;

• **Decide** what action to take on each problem. This will depend on an assessment of its seriousness, the inspector’s powers under the law and, most importantly, what is likely to improve the workplace situation in a sustainable manner.

The inspector could decide to confine action to advising on how best to comply with the law or, if the problem is not, or not entirely, covered by legal provisions, advising on how to rectify the situation.

Where a problem relates to certain sections of the law or regulations, the sections should be referred to in any notification to the enterprise. Where advice or a recommendation is based on a standard or technical norm not specified by law, the distinction should be made clear.

b. Record keeping

The outcome of the inspection visit is part of the inspectorate’s “institutional memory”. The inspection report must be added to the file on the enterprise. It is desirable to file also the inspector's working notes and comments for future reference. Information on each visit becomes part of the inspectorate's statistical database.
2.6 Reporting on the Inspection Visit

a. Format of inspection reports

The inspection report format should generally consist of:

- A standard format in which the inspector provides information in response to a series of questions on a prescribed form; and
- A narrative format in which the inspector presents information in full sentences and paragraphs under a series of broad headings.

The report format must relate to the inspection report’s purpose. The report is a tool for action as well as an important source of information. The format should provide all relevant data for decision making.

b. Preparing to write the report

The prime purpose of inspection work is to convey information as a basis for sustainable improvement action by the enterprise, and by the inspectorate (the inspector and the inspectorate hierarchy).

It is important to consider to whom the report is addressed. If it is an internal document solely for the inspectorate’s use, its content and style will be different from a report meant for other parties.

The normal practice is for the inspection report to be kept in the inspectorate, with the enterprise and other parties concerned being notified of relevant matters by letter. In this way the confidentiality of the information collected from enterprises can be maintained.

The inspector always should distinguish between fact and opinion. Information presented as facts should be verified for accuracy; that which is subjective should not be presented as final, definitive statements, but should reflect sound judgment based on competence and experience. If necessary, senior colleagues or specialists should be consulted.

c. Writing the report

Writing the report will depend on the different elements of the format used. For the narrative part of the report, the material will have to be arranged in logical sequence leading to a series of: findings; conclusions; and recommendations.

The report should be completed as soon as possible after the inspection, preferably the same day. There should be binding deadlines throughout the inspectorate with clear, achievable performance standards. For example, a routine inspection report should be submitted to the supervisor no later than one week after the visit. Keeping deadlines and then taking timely action and providing feedback – must be closely monitored by supervisors at district levels.

d. Content

The report of a first or regular inspection visit will normally cover at least the following items:
**General information on the enterprise:**
– Name;
– Legal status (company, partnership);
– Relation to other entities and companies (e.g. subsidiaries);
– Nature and description of business;
– Location and address;
– Contact person, and telephone and fax numbers;
– Number of employees (disaggregated by sex, young workers, occupational categories);
– Special processes (e.g. use of chemicals);
  – If it is a “special conditions” (high risk/hazardous) enterprise or not.

**Working conditions:**
– Hours of work;
– Minimum wages and allowances paid;
– Weekly rest periods and holidays;
– Other legal conditions of employment requirements;
– Safety conditions;
– Health conditions;
– Medical and welfare services;
– General state of “house keeping”;
– Rating of enterprise in terms of work hazards;
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– Rating of enterprise management’s ability and willingness to at least maintain, if possible improve, existing standards.

**Industrial relations:**
– Existence of a trade union;
– Collective agreement applicable or not;
– Number and function of workers’ representatives;
– Existence of a functioning consultative committee, such as: works council, workers’ committee, OHS committee;
  – Frequency of strikes, if any.

**Inspection details:**
– Nature of inspection (routine, special, follow-up, investigation);
– Nature of all contraventions;
– Priority areas for attention;
  – Action to be taken on each priority area.

**Any other information or data considered useful.**
The report should indicate the inspector’s name, all parties to whom it is addressed, and should be dated and signed.
Reports of any subsequent visits would update information on general matters, working conditions, industrial relations, as well as basic safety and health, and concentrate on the nature of contraventions, the action proposed to remedy them, and whether the employer has complied or not. If not, what were the reasons given, and does the inspector judge them valid or not.
9 THE CRIMINAL CONSEQUENCES OF NON-COMPLIANCE WITH EMPLOYMENT LAWS

SECTION 1 of the Basic Conditions of Employment Act, 1997 contains the definition of employment laws,

“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 No. 30 of 1966);

(b) the Employment Equity Act, 1998 (Act No. 55 of 1998)

(c) the Occupational Health and Safety Act, 1993 (Act No. 85 of 1993);

(d) The Compensation for Occupational Injuries and Diseases Act, 1993 (Act No. 130 of 1993)
[Definition of “employment law” substituted by s. 1 of Act 11/2002]

Basic Conditions of Employment Act, 1997
Minimum conditions of employment.
(Including Sectoral- and Ministerial- Determinations, but excluding Collective Agreements).

Section 93. (1) Any magistrates' court has jurisdiction to impose a penalty for an offence provided for in this Act.

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✓ Unemployment Insurance Act, 63 of 2001

To establish the Unemployment Insurance Fund; to provide for the payment of benefits to certain persons from the fund; to provide for the establishment of the Unemployment Insurance Board, the functions of the Board and the designation of the Unemployment Commissioner; and to provide for matters connected therewith.
General prohibited conduct

(1) No person may-

(a) Knowingly make a statement or cause a statement to be made which is materially false or which results in an incorrect payment of benefits in an application for benefits in terms of this Act;

(b) wilfully make any false entry on a contributor’s record card or any other book, record or document relating to either a contributor’s employment history or to a contributor’s claim for benefits; or

(c) Contravene, or refuse or fail to fully comply with any provision of this Act or of any regulation or notice issued in terms of this Act.

(2) Any person who contravenes subsection (1) (a), (b) or (c) is guilty of an offence.

Penalties

Any person convicted of an offence in terms of this Act is liable to a fine or to imprisonment, or to both a fine and imprisonment.

Employment Equity Act, 1998

(To provide for employment equity and matters incidental thereto.)

61. Obstruction, undue influence and fraud.

(1) No person may –

(a) Obstruct or attempt to improperly influence any person who is exercising a power or performing a function in terms of this Act; or

(b) Knowingly give false information in any document or information provided to the Director-General or a labour inspector in terms of this Act.

(2) No employer may knowingly take any measure to avoid becoming a designated employer.

(3) A person who contravenes a provision of this section commits an offence and may be sentenced to a fine not exceeding R10 000, 00.

(4) The Minister may, with the concurrence of the Minister of Justice and by notice in the Gazette, amend the maximum amount of the fine referred to in subsection (3) in order to counter the effect of inflation.
Occupational Health and Safety Act, 1993
To provide for the health and safety of persons at work and for the health and safety of persons in connection with the use of plant and machinery; the protection of persons other than persons at work against hazards to health and safety arising out of or in connection with the activities of persons at work; to establish an advisory council for occupational health and safety; and to provide for matters connected therewith.

Whenever the employee or mandatory of an employer is convicted of an offence consisting of a contravention of section 23, the court shall, when making an order under section 38(4), make such an order against the employer and not against such employee or mandatory.

Offences, penalties and special orders of court

38. (1) Any person who-

(a) Contravenes or fails to comply with a provision of section 7, 8, 9, 10(1), (2) or (3), 12, 13, 14, 15, 16(1) or (2), 17(1), (2) or (5), 18(3), 19(1), 20(2) or (4), 22, 23, 24(1) or (2), 25, 26, 29(3), 30(2) or (6), 34 or 36;

(b) Contravenes or fails to comply with a direction or notice under section 17(6), 19(4) or (7), 21(1) or 30(1) (a), (b) or (c) or (3), (4) or (6);

(c) Contravenes or fails to comply with a condition of an exemption under section 40(1);

(d) in any record, application, statement or other document referred to in this Act willfully furnishes information or makes a statement which is false in any material respect;

(e) Hinders or obstructs an inspector in the performance of his functions;

(f) Refuses or fails to comply to the best of his ability with any requirement or request made by an inspector in the performance of his functions;

(g) Refuses or fails to answer to the best of his ability any question which an inspector in the performance of his functions has put to him;

(h) Willfully furnishes to inspector information which is false or misleading;

(i) Gives himself out as an inspector;

(j) having been subpoenaed under section 32 to appear before an inspector, without sufficient cause (the onus of proof whereof shall rest upon him) fails to attend on the day and at the place specified in the subpoena, or fails to remain in attendance until the inspector has excused him from further attendance;

(k) Having been called under section 32, without sufficient cause (the onus of proof whereof shall rest upon him) -

(i) refuse to appear before the inspector;
(ii) refuses to be sworn or to make affirmation as a witness after he has been directed to do so;

(iii) Refuses to answer, or fails to answer to the best of his knowledge and belief, any question put to him; or

(iv) Refuses to comply with a requirement to produce a book, document or thing specified in the subpoena or which he has with him;

(l) Tampers with or discourages, threatens, deceives or in any way unduly influences any person with regard to evidence to be given or with regard to a book, document or thing to be produced by such a person before an inspector under section 32;

(m) Prejudices, influences or anticipates the proceedings or findings of an inquiry under section 32 or 33;

(n) tampers with or misuses any safety equipment installed or provided to any person by an employer or user;

(o) fails to use any safety equipment at a workplace or in the course of his employment or in connection with the use of plant or machinery, which was provided to him by an employer or such a user;

(p) willfully or recklessly does anything at a workplace or in connection with the use of plant or machinery which threatens the health or safety of any person, shall be guilty of an offence and on conviction be liable to a fine not exceeding R50 000 or to imprisonment for a period not exceeding one year or to both such fine and such imprisonment.

(2) Any employer who does or omits to do an act, thereby causing any person to be injured at a workplace, or, in the case of a person employed by him, to be injured at any place in the course of his employment, or any user who does or omits to do an act in connection with the use of plant or machinery, thereby causing any person to be injured, shall be guilty of an offence if that employer or user, as the case may be, would in respect of that act or omission have been guilty of the offence of culpable homicide had that act or omission caused the death of the said person, irrespective of whether or not the injury could have led to the death of such person, and on conviction be liable to a fine not exceeding R100 000 or to imprisonment for a period not exceeding two years or to both such fine and such imprisonment.

(3) Whenever a person is convicted of an offence consisting of a failure to comply with a provision of this Act or of any direction or notice issued hereunder, the court convicting him may, in addition to any punishment imposed on him in respect of that offence, issue an order requiring him to comply with the said provision within a period determined by the court.

(4) Whenever an employer is convicted of an offence consisting of a contravention of a provision of section 23, the court convicting him shall inquire into and determine the amount which contrary to the said provision was deducted from the remuneration of the employee concerned or recovered from him and shall then act with respect to the said amount mutatis mutandis in accordance with sections 28 and 29 of the Basic Conditions of
Employment Act, 1983 (Act No. 3 of 1983), as if such amount is an amount underpaid within the meaning of those sections.

✓ Compensation for Occupational Injuries and Diseases Act, 1993

(To provide for compensation for disablement caused by occupational injuries or diseases sustained or contracted by employees in the course of their employment, or death resulting from such injuries or diseases; and to provide for matter connected therewith.)

Threats and compulsion

Any person who threatens an employee or in any manner compels or influences an employee to do something resulting in or directed at the deprivation of that employee’s right to benefits in terms of this Act shall be guilty of an offence.

Failure to pay Assessment or other monies

An employer who refuses or fails to pay any assessment, instalment or fine referred to in this section or any other money payable in terms of this Act, shall be guilty of an offence.

Penalties

Any person who is convicted of an offence in terms of this Act shall be liable to a fine, or to imprisonment for a period not exceeding one year.

✓ CHILD LABOUR

Preamble

In 1999, Statistics SA conducted a Survey into the Activities of Young People. The survey provides an extensive overview of the economic and non-economic activities of children, some of which constitute child labour.

Arising out of the survey results as well as other research, a number of target groups or areas have been identified where action needs to be taken, both in respect of addressing the problem of child labour as well as more broadly addressing the rights of children and protecting and promoting their future development.

The survey on the Activities of Young People identifies the following vulnerable groups of children/situations where children are most at risk as a result of being involved in work activities:

- Long hours fetching wood and water
- Agriculture (commercial plus subsistence agriculture)
- Children who do unpaid domestic work inside their homes
- Unpaid work in family businesses
- Paid domestic work
• Illegal activities, most prominently commercial sexual exploitation
• School labour

The Department of Labour in consultation with other government and non-government stakeholders has drawn up a Programme of Action (Child Labour Action Programme (CLAP)) to address the problems of children at risk as well as act decisively against the worst forms of child labour.

However, the Department of Labour also has a statutory obligation to enforce the provisions of the Basic Conditions of Employment which address child labour.

The first section of this document looks at the areas of risk and suggests appropriate responses by Department of Labour officials.

9.2 LEGAL PROCEDURES TO BE FOLLOWED IF CHILD LABOUR IS DETECTED

Section 43 of the Basic Conditions of Employment Act prohibits child labour. Below are recommended steps which a labour inspector must follow in the prosecution of child labour.

(i) STEP ONE: REPORTING OF CHILD LABOUR

There are various ways through which child labour may come to the attention of inspectors for prosecution purposes.

An employee may report the problem of child labour to the nearest office of the Department of Labour.

The problem of child labour may come to the attention of the inspector when he/she is conducting routine investigations through interviewing employees at the workplace.

An official of the Department or any citizen of SA may report child labour anonymously.

PLEASE NOTE:

The identity of the person reporting the incident of child labour may not be disclosed to the employer.

The inspector must need to investigate further and formulate an independent opinion from the source of the complaint.

Once the problem of child labour has been identified, the relevant inspector should do the necessary preparatory work and take appropriate steps that may, depending on the circumstances, lead to child labour prosecution.

According to the Basic Conditions of Employment Act, proof of a child’s age rests with the employer.
(ii) **STEP TWO: PREPARING A STATEMENT**

The inspector should make a written statement from information given by the person who reports child labour. Investigations will be based on the information provided.

An annexure CLA (child labour affidavit), as well as Annexure CLI (inspector’s affidavit) are to be completed by the inspector and be utilized for the purpose of prosecution.

This statement should not be confused with the statement to be made at a local police station at a later stage.

Every child labour case should be registered on CLB form.

(iii) **STEP THREE: INVOLVEMENT OF HEALTH SERVICES.**

This step is only relevant if a child is injured on duty. In the event that the child worker is injured on duty the said child would then have to be taken to the nearest medical facility for proper medical care and also to generate proper medical records for later use as evidence. Depending on the situation, the labour inspector would have to:

1. Request the employer to take the injured child worker to the nearest medical facility; or
2. Request the employer to call for medical assistance if the injured child worker cannot be treated away from the scene of the injury lest his/her condition is aggravated.
3. Where the employer refuses to co-operate, the labour inspector would have to devise some reasonable means to offer assistance.

The purpose is to get an official medical report on the injury suffered by the child worker and to make prosecution easier because of documented medical evidence.

In instances of injury on duty, the Occupational Health and Safety Act and Compensation for Occupational Injuries Diseases Act apply in the same manner as it would in the case of adults. Depending on the seriousness of the injury, the police will have to be involved as well.

(iv) **STEP FOUR: REPORTING AT THE S.A.P.S. CHARGE OFFICE**

This involves opening a police docket. The facts captured in the statement referred to in step two here above should be repeated here for the sake of consistency. In terms of a child labour prosecution, the statement made at the S.A.P.S. charge office would carry more weight than the statement referred to in step two.

A parent or guardian should sign the statement on behalf of the child.

N.B. It is standard policy that if an inspector investigates child labour, s/he should inform the police.
(v) STEP FIVE:  POLICE REFERENCE NUMBER

In terms of statutory requirements, police keep the records of all lodged complaints. These complaints generate a police reference number which serves as proof that indeed, a complaint was lodged at the police station in question.
Once a charge of child labour has been laid at the police station and it is obvious that a violation of the Basic Conditions of Employment Act has occurred, a police docket is then opened. The police docket will have a CR number. This therefore implies that the matter is more likely to end up in court. The labour inspector, in his/her dealings either with the police or the prosecutor, will have to use the allocated CR number generated by a docket.

(vi) STEP SIX: REPORTING AT SOCIAL DEVELOPMENT OFFICES

The inspector to report the detected child labour matter. Inspector/ social worker to fill form 4 for removal of the child to a home or place of safety. In case there is suspected physical injuries or trauma the child has to be taken within 24 hours to Magistrate for his ruling.

(vii) STEP SEVEN: PRESENTATION OF THE CASE TO THE PROSECUTOR

In order to enable an inspector to institute criminal proceedings the following documents should be submitted to the prosecutor:
Three copies of the indictment, including
1. A copy of the inspector’s report;
2. Annexure CLA (affidavit completed by the child);
3. Annexure CLI (inspector’s affidavit), and
4. Copy of the statement made by the child at the police station.

(viii) STEP EIGHT:  APPEARANCE IN COURT

On the allocated and given court date, the child labour case will be heard before a Magistrate. The evidence on behalf of the State and in favour of conviction for violation of child labour will be led by the Prosecutor. On the strength of a file thoroughly prepared by a labour inspector, the Magistrate will weight the evidence and decide whether the employer is guilty as charged or not. Please bear in mind that either the Department or the employer has the right to appeal the decision of the Magistrate.

N.B. Summons to be served by the police.
10 LAWS COVERED BY THE INSPECTION AND ENFORCEMENT SERVICES: BUSINESS UNIT

The Inspection and Enforcement Services: Business Unit is required to administer all or certain aspects of the following labour laws:

- Basic Conditions of Employment Act, 1997 (Act No. 75 of 1997) as amended
- Compensation For Occupational Injuries and Diseases Act, 1993 (Act No. 103 of 1993) as amended
- Unemployment Insurance Fund, 2001 (Act 63 of 2001)
- Skills Development Levies Act, 2001 (Act No. 9 of 2001)

11. ENFORCEMENT OF BASIC CONDITIONS OF EMPLOYMENT ACT, 1997 (ACT NO. 75 OF 1997)

11.1 INTRODUCTION

The purpose of the Basic Conditions of Employment Act, 1997 (Act No 75 of 1997) ("BCEA") is to give effect to the right to fair labour practices referred to in section 23(1) of the South African Constitution by establishing and making provisions for the regulation of the basic conditions of employment.

The BCEA amongst other things provides a procedure to be followed in an event of non-compliance with labour laws. The enforcement pyramid below graphically illustrates the increasing severity of enforcement actions; the more severe the enforcement action the less of it should occur.

Normally enforcement action would commence at level 2 (two) of the pyramid and progress upward. However, in some occasions, enforcement action may start at any point above the base line. This will depend on the severity of the case and the employer’s attitude and/or cooperation.

For the purpose of this procedure the severity of enforcement has been graded into four levels as shown.
11.1.1 LEVEL ONE ENFORCEMENT

11.1.1 (a) HOW TO DEAL WITH BCEA COMPLAINTS

This is lowest level of enforcement. It will generally involve employers’ voluntarily complying after advice and information has been provided by the inspector.

Note: The assumption here is that the complaint has been correctly identified as a BCEA complaint. The complaint must have arisen out of failure to comply with the BCEA or a Sectoral determination. In other words the jurisdiction has been established and the complainant is not covered by a bargaining council, for example.

The procedure for an individual complaint should be as follows:

11.1.1 (b) STEP ONE: ACCEPTING A COMPLAINT

(a) The complaint can only be accepted by personal representation or in writing.

(b) The client service officer or inspector, with the complainant, must complete the Notification of Complaint Form (IES 1).

(c) The inspector or the client services officer should, on the basis of the nature of the complaint, clearly explain to the complainant, the function, benefits and costs of taking their complaints to one of the following forums:
- Small Claims Court (only for money claims)
- CCMA (in event of dismissal)
- Civil court
- Department of Labour

Below this is described in more detail:

(i) SMALL CLAIMS COURT

Only claims for underpayment of wages of not more than R 7,000.00 (Seven Thousand Rand) or the amount as determined from time to time in terms of the Small Claims Act, 1984 (Act No. 61 of 1984) as amended can be taken to the Small Claims Court. The complainant can defend himself/herself but may incur a small cost.

Depending on how the Small Claims Court functions in a particular area, it could be quicker for the complainant to go to the Small Claims Court.

NB. It must be noted that once a case has been referred to Small Claims Court the Department of Labour cannot deal with the matter anymore due to lack of jurisdiction.

(ii) COUNCIL FOR COMMISSION MEDIATION AND ARBITRATION (CCMA)

If an employee alleges that he/she has been unfairly dismissed and also has a wage complaint in terms of the BCEA, he/she should be advised that he/she has the option to refer the complaint to the CCMA. In terms of section 74(1) of the BCEA, the CCMA may also determine any wages claim for an amount that is owing to that employee whilst dealing with unfair dismissal.

The employee must be informed to refer his/her complaint within the 30 days period to the CCMA (unless there is a good reason for the delay where the employee can apply for condonation), by completing the LR 7.11 form and the employee must be referred to the CCMA offices.

The complainant may choose not to pursue the unfair dismissal with the CCMA so the remaining matters (of unpaid wages) can be handled by the inspector.
(iii) CIVIL COURT

If an employee can afford an attorney, he/she can also be advised of the option to approach the civil court.

11 1.1 (b) STEP TWO: TAKING UP OF A COMPLAINT BY THE DEPARTMENT OF LABOUR

(a) When completing the notification of complaint form, the inspector must attach a Case History (IES 11) and Progress Report (IES 12) These forms must be used to record all actions taken in relation to the complaint.

(b) An inspector should establish whether or not a complainant has already referred his/her case to the CCMA, Small Claims Court, civil court and/or any other institution. If so, the Department of Labour should not be assisting them hence the Department will not have jurisdiction in terms of Section 70 (c) of the BCEA.

(c) The client services officers or inspector taking the complaint should:
   (i) Consult the legislation or Sectoral determination(s) relevant to the complaint and draft a preliminary claim;
   (ii) Telephone the employer (if possible with the complainant present);
   (iii) Put to the employer the substance of the complaint and listen to his/her response;
   (iv) Endeavor to negotiate a settlement over the telephone. If this is achieved, arrange the time and place of payment, either:
      • directly to the DOL accounts section in the presence of the inspector, or
      • pay as described in the treasury instruction, or
      • directly to the complainant or in the bank account of the complaint and provide the Department with a proof of the said payment.

NB. It must be noted that client service officers and inspectors are not allowed to accept or collect monies on behalf of the employees.

(d) If voluntary settlement is achieved, this must be clearly recorded on the notification of complaint form and case history form before case can be considered finalized.

(e) If it is not possible to contact the employer by phone, the inspector should:
   (i) Obtain an affidavit from the complainant (IES 1A);
   (ii) Check the signatures in the IES 1 form;
   (iii) Declare if its an Oath or affirmation
(iv) Send a 14 day letter to employer seeking a response and voluntary settlement of the matter. (IES3)

(v) Arrange for the complainant to return to the office or contact the inspector after the 14 days has elapsed;

(vi) Provide the complainant with the case number generated by the official.

(f) If the employer responds and voluntarily settles the matter, the file should be noted and arrangements made for payment to be made to the complainant.

(g) The matter must be forwarded to the inspector (if it was with the client service officer) for an undertaking to be signed by the employer in line with the agreement made.

(h) If the employer does not respond, the complainant should be informed and the file referred for inspection.

(i) It must be noted that Registration Services only has a period of Fourteen days (14) to deal with the complaint irrespective if the Employer does not comply with the issues raised by Registration Services.

11.1.2 LEVEL TWO ENFORCEMENT: ISSUING A WRITTEN UNDERTAKING

Level 2 (two) procedure always involves workplace visits, investigations and inspections.

For continuity the following procedures will assume that money (wages) is owed to the complainant. The procedure will be the same for any other types of investigations and inspections.

The procedure is as follows:

(i) **STEP ONE: INSPECTION**

The inspector should depending on the circumstances send a “notice of visit” letter (IES 2) to the employer, notifying him/her of the date of visit which should take place within 7 days of receiving the complaint.

(a) The inspector should visit the premises on the nominated day and:

(b) Contact the shop steward/employee representative and employer;

(c) Using the IES comprehensive checklist, where appropriate the inspector must conduct a complete inspection and not just concentrate on those issues which are the subject of the complaint;
(i) Take statements from at least two employees if a general problem is identified and verify allegations;

(ii) After the inspector has done the inspection and/or addressed the complaint, he/she will have to decide whether or not the BCEA has been complied with;

(iii) The inspector may need to refer to the following documents when applying the BCEA:

- Relevant sectoral determinations.
- Circulars that may be issued by the Department of Labour
- Establish Labour Court Cases (Precedents)* if any.

(ii) STEP TWO: SECURING AN UNDERTAKING

(a) Section 68(1) of the BCEA states that “a labour inspector who have reasonable grounds to believe that an employer has not complied with any provisions of this Act must endeavor to secure a written undertaking by the employer to comply with the provision”.

(b) Note: When dealing with forced and child labour cases, a labour inspector must not secure an undertaking but proceed with criminal procedures.

(c) Section 68(2) says that in endeavoring to secure the undertaking, the inspector may seek to obtain an agreement as to any amount owed may arrange for payment, may receive payment on behalf of an employee and must provide a receipt. It must be noted that inspectors are no longer allowed to receive monies on behalf of the employee due to administrative reasons.

(d) When an inspector is trying to secure an undertaking he/she needs to carry out the following steps:

(i) Hear the ‘story’ from both the employer and employee, attempting to gain as much clarity as possible;
(ii) Attempt to get the employer and employee to share a common understanding of the problem;
(iii) Undertake an inspection to establish further information;
(iv) Discuss the results of the inspection with the employer and employees.

(e) It may be necessary to listen to the parties separately and then bring them together.

(f) If an inspector can secure a common understanding of the problem and a commitment from the employer to solve the problem, then the agreement should be recorded in writing, using form BCEA 9.
(g) Where appropriate and possible, ask a representative of each party to sit with you while you draft the agreement and read each clause back to the representative to check understanding and consensus.

(h) When completing the undertaking (BCEA9):

(i) record in writing the agreement in respect of each issue;
(ii) state clearly who will do what, and by when, in respect of each issue;
(iii) ensure the undertaking is in line with the BCEA;
(iv) avoid the use of ambiguous words, e.g. ‘soon’, ‘reasonable’ and ‘practical’;
(v) use simple, clear, plain language and avoid use of legal terms;
(vi) be explicit;
(vii) use short sentences;
(viii) make the undertaking a self-contained document (i.e. reduce references to other documents to the minimum);
(ix) clearly state the implementation date and where possible specify the calendar date e.g. ‘2 December 1996’, rather than leaving it to the parties to interpret e.g. ‘3 weeks after signature’;
(x) ensure implementation targets are realistic and the undertaking is workable;
(xi) clarify and resolve any uncertainties with the parties;
(xii) ensure common understanding of the undertaking through further explanation where necessary;
(xiii) obtain confirmation of the undertaking; and
(xiv) ask an authorized employer representative to sign the undertaking.

(i) When the undertaking is signed:

(i) keep the original document for the departmental file;
(ii) make a copy for each party;
(iii) explain the legal status of the undertaking; and
(iv) explain the consequences of non-compliance with the undertaking.

(j) The inspector should endeavor to ensure compliance within seven days of the undertaking being secured. However, individual circumstances may mean that the time period may need to be reduced or increased. The time period should be clearly spelt out in the written undertaking.

(k) If the employer does not comply with the written undertaking and/or the employer refuses to sign the written undertaking, the inspector must move to Level Three Enforcement. The inspector can move directly to issuing a Compliance Order if an employer is not willing to undertake.

(l) A written undertaking can be secured in a personal meeting with the employer concerned but can also be served such as by sending a fax or in the post (it must be noted that there must an original copy of the signed undertaking by the employer) after the process of negotiations has been completed.
7.1.3 LEVEL THREE ENFORCEMENT: ISSUING A COMPLIANCE ORDER

Section 69 of the BCEA states that “A labour inspector who has reasonable grounds to believe that an employer has not complied with a provision of this Act may issue a compliance order”. This is in a BCEA 12 form.

An inspector may not issue a compliance order as a result of a failure to comply with a provision of the Act if:

- the employee is covered by a collective agreement that provides for resolution by arbitration of disputes concerning amounts owing in terms of the Act;

- the employee is employed in a category of employees mentioned in section 6(1)(a) of the BCEA, senior managerial employees or in respect of which a notice has been issued in terms of section 6(3) exceed the earnings threshold amount;

- any claims have been instituted through the CCMA, Civil Courts etc. The complainant must be questioned in this regard.

- If complainants failed to lodge a complaint regarding outstanding monies within 12 months from the date of dispute.

- The non-compliance is in respect of child labour/forced labour. Criminal procedures should be initiated for such cases.

- If the employer refuses to sign written undertaking, the following procedures can be initiated:

(i) STEP ONE: ISSUING A COMPLIANCE ORDER

(a) The inspector compiles the compliance order (Form BCEA 12) and then it is checked by his/her supervisor. An inspector can issue a compliance order at the workplace if the employer’s attitude warrants this and the employer refuses to undertakings after a contravention has been identified by the inspector.

(b) An inspector may not determine or recommend a fine, but must refer the employer to the schedule when serving the compliance order. The schedule of fines is contained on the BCEA 12 form.

(c) The inspector must then serve the compliance order. Depending on the circumstances, the order can be served by:

- personally delivering the notice to the employer and obtaining a signed receipt from him/her.
- Sending it by fax and keeping the fax receipt.
- Sending it by registered post and keeping the Post Office receipt.
- An inspector must prepare a proof of service affidavit confirming the manner of service of the compliance order.
All records of service must be kept in the Department’s file.

(d) A copy of the Compliance Order should also be served on the affected employees, and if this is impractical on a representative of the employees. If such a service is not possible, the Compliance Order is still valid.

(e) The employer now has 21 days to comply or object to the compliance order.

(f) The inspector must inform the employer about the objection procedure referred to in terms of section 71 of the BCEA and should advise the employer to submit the objection to the Provincial Office within the prescribed 21 days. The employer may use Form BCEA 13 to object to a compliance order. The employer can object without using the BCEA 13 form but the representation made by the employer must be in writing.

(ii) POSSIBLE STEP TWO: DEALING WITH OBJECTIONS AGAINST A COMPLIANCE ORDER

The employer against whom a compliance order has been issued has a right to object to it. The responsibility to object lies with the employer. However, the employer does not necessarily have to object.

The employer has twenty one days to lodge the objection to a compliance order. The period of twenty one days is counted from the day the employer received the Compliance Order and is consecutive calendar days including weekends and public holidays.

The employer who has not objected to a Compliance Order within twenty one days, has another opportunity to object to a Compliance Order provided that employer has good reasons for not objecting within the original twenty one days. This is called condonation.

The employer can advance any reasonable explanation for the delay in lodging an objection within the prescribed time limit and each case will be dealt with on its own merits.

The process to be followed in considering the representation by the employer is as follows:

(a) The Department, through the office of the Deputy Director: Inspection and Enforcement Services as delegated by the Director General, is under a statutory duty to consider and give a written response to any objection by the employer.

(b) The Department has to:
   (i) Study all the evidence on records;
   (ii) Study the reasons given by the inspector for issuing the compliance order;
(iii) Study the reasons on which the employer objects; and
(iv) Weigh all the evidence and decide on which reasons are likely to be credible and correct.

(c) After deciding on which reasons to uphold; the Business Unit Manager: IES may make the following discretionary decisions to:

(i) To confirm the original compliance order as issued by the labour inspector; or
(ii) To amend the original compliance order for it to read differently so that it should be acceptable; or
(iii) Cancel the whole compliance order; and/or
(iv) Cancel any part of the compliance order.

(d) In the event that the compliance order is not cancelled, the Deputy Director: IES must indicate to the employer what steps to take to comply with the Act and within what time limit.

(e) If the compliance order is not cancelled and not complied with, the inspector must proceed to Level Four of the enforcement procedures.

7.1.4 LEVEL FOUR ENFORCEMENT: REFERING A CASE TO THE LABOUR COURT

Section 73 of the BCEA state that the Director General may apply to the Labour Court for a compliance order to be made an order of the Labour Court. The role of the Director General has been delegated to the provincial office.

Note: Due to the complexities and procedures in dealing with referrals to the Labour Court, no case may be referred to Labour Court without the approval of the Assistant Manager: IES.

The following steps are involved. Please note that not all steps will be necessary in all cases. For example, an employer may not oppose an application.

(i) STEP ONE: APPLICATION FOR A CASE NUMBER

(a) An application for a case number is made on a form known as form 1 of the Labour Court.
(b) When fully completed, a form 1 has to contain:

(i) Full contact particulars of the Applicant who is the person acting on behalf of the Director General of the Department of Labour;
(ii) Full contact particulars of the labour liaison officer or responsible official dealing with the case;
(iii) Full contact particulars of the employer;
(iv) Full contact particulars of the representative of the employer, if such representative is known;
(v) Nature of the litigation that is launched, for our purposes this will be an “Application for making a compliance order an order of the Court; and
(vi) The relevant/applicable Act as well as the empowering section under which the application is brought (Section 77 A (a) of the BCEA).

(c) The fully completed form 1 has to be transmitted/ taken to the Registrar of the Labour Court. It can be faxed.

(d) Once the Registrar has received form 1, as an application for case number, he/she will allocate a case number, which must be used in all future correspondence to Labour Court in respect of that particular case.

(ii) STEP TWO: NOTICE OF MOTION

(a) Once the Registrar of the Labour Court has communicated the allocated case number back to the labour liaison officer, he/she should prepare a notice of motion.

(b) The notice of motion should contain the following information:

(i) Information to the employer that Labour Court will, on a given date, consider converting a compliance order into an order of the Labour Court; (see below, Step Three)
(ii) Information indicating who is to deal with the case on behalf of the Applicant;
(iii) Information indicating which communication correspondence address, for purposes of legal action, should be used;
(iv) Information that the affidavit of the inspector, who did the inspection, will be used as a supporting document. The affidavit of the inspector who conducted the inspection will have to be commissioned by a Commissioner of Oaths who is not an official of the Department of Labour;
(v) At the end page, the notice of motion should indicate the full physical address of:

- The responsible Department of Labour official (labour court liaison officer);
- The Registrar of Labour Court;
- The employer or his/her representative, if any.
(iii) STEP THREE: SERVICE/DELIVERY OF THE NOTICE OF MOTION TO THE EMPLOYER

(a) Once the notice of motion has been fully completed and properly signed, it has to be delivered/served on the employer or his/her representative.

(b) To do this, the responsible Department of Labour official/labour court liaison officer has the following alternative options:
   - Fax;
   - Registered mail; or
   - Personal delivery
   to the employer or a person employed by the employer and that person looks to be over sixteen (16) years of age and of sound mind in the employ or responsible for the operations of the employer.

(c) The responsible Department of Labour official/ labour court liaison officer must retain proof of having effected delivery/ service of the notice of motion.

(d) The responsible Department of Labour official/ labour court liaison officer must then prepare an affidavit indicating the method used to effect service of the notice of motion on the employer or his/her representative.

(e) This affidavit, like that by the labour inspector, has to be commissioned by someone other than an employee of the Department of Labour i.e. South African Police Service and/or Magistrate Offices.

(iv) STEP FOUR: NOTICE OF OPPOSITION BY THE EMPLOYER

(a) The employer has a right to answer or defend himself/herself either personally or through his/her representative.

(b) The employer has ten (10) working days, excluding the first day but including the last day, to file an opposition. The opposition of the employer must also be in the form of an affidavit.

(c) The employer has to direct his/her notice of opposition to the Labour Court Liaison Officer as well as the Registrar of the Labour Court.

(d) The notice opposition by the employer is on the basis of the well known administrative law principle of “audi alteram partem”
(v) STEP FIVE: REPLY TO THE EMPLOYER'S OPPOSITION

(a) Once the employer has filed an opposition, the whole file consisting of:
   - Notice of Motion
   - Inspector affidavits
   - Affidavit by Labour Court Liaison Officer (for Eastern Cape, Western Cape and
     Kwazulu Natal)
   - Employer’s notice of opposition should immediately be sent to Legal Services.

(c) The Department of Labour has five (5) working days to file any counter argument
   to notice of opposition by the employer.

(d) The Legal Administrative Officer responsible for enforcement will prepare an
   affidavit, the third by the Department, clarifying issues or countering allegation(s)
   made by the employer.

(e) The Legal Administrative Officer responsible for enforcement will liaison with the
   relevant official on the details of the affidavit.

(f) The affidavit will then be referred back to the responsible official/labour court
   liaison officer for signature and commissioning.

(g) It will then need to be filed at the Labour Court and another copy given to the
   employer.

(vi) STEP SIX: HEADS OF ARGUMENT

(a) Immediately having prepared the replying affidavit to the employer, the Legal
   Administrative Officer responsible for enforcement together with the responsible
   official at a provincial will have to prepare heads of argument that will be used in
   court to support the argument of the Department.

(b) Once completed, these Heads of Argument will have to be filed with the Registrar
   of Labour Court and another copy be given to the employer.

(c) The Heads of Argument should contain arguments why the Compliance Order
   should be made an order of Court as well as what fine, if any should be imposed.
(vii) STEP SEVEN: ALLOCATION OF A HEARING DATE

(a) Once the heads of argument have been filed, the Registrar of Labour Court will allocate the date on which the case will be heard. (notice of set down)

(b) The Registrar will fax the notice of set down to the Applicant who is the Department of Labour. The applicant will, though not so technically required, have to transmit the same information to the employer.

(c) On the allocated date both the Applicant’s representative (if applicable) and the employer’s representative dressed formally will assemble at an allocated court room.

(d) The case number will be called and the Applicant will start explaining why a Compliance Order should be converted to an Order of the court.

(e) Then the employer will put up a contrary argument.

(f) The Judge will then make his/her decision. Should the Judge be persuaded to believe the version of the Department of Labour, the Compliance Order will be endorsed and/or a fine will be imposed.

(g) The Registrar will then have to sign the conversion formally making it an official Court Order.

(viii) STEP EIGHT: CONSEQUENCES OF MAKING A COMPLIANCE ORDER AN ORDER OF COURT

(a) The complete file (including the Court papers) must be referred back to the Provincial Office and responsible inspector should be informed of the decision and given a copy of the Court Order.

(b) The inspector must now go to the employer with the Order of the Labour Court and demand payment (money owed and fine if any) forthwith.

(c) If the employer agrees and pays, a receipt is to be given and normal Department of Labour practices followed in relation to the collection of money.

(d) If the employer refuses to pay, the inspector must notify the responsible official/labour court liaison officer that the employer refused to pay.

(e) The responsible official/labour court liaison officer must complete the Writ of Execution and send it to the Labour Court to process.
The responsible official/labour court liaison officer must then send the Writ of Execution and copy of Order back to the responsible official, who will have to forward it to the local Sheriff for execution.

The Sheriff will attach goods and arrange for goods to be sold and money paid over to the Department. Each Provincial Office/ Labour Centre will have to contact local Sheriff to discuss process as some Sheriffs may require indemnification.

8. APPEALS BY EMPLOYERS

Section 72 (1) of the BCEA provides that “an employer may appeal to the Labour Court against an order of the Director-General within 21 days of receipt of that order”. In an event the employer lodges an appeal against the decision of the Deputy Director such documentation must be sent immediately to Legal Services for attendance and proper guidance on whether to oppose or not the said appeal.


12.1 Introduction and scope

This document provides the guidelines and procedures used to conduct employment equity inspections. The focus of this document is on specific employment equity inspections. For more general guidelines regarding inspectors and the administrative issues involved in the inspection function, please refer to “Internal procedure for enforcement of BCE Act”, issued by the Minimum Standards Directorate.

12.2 Approach to employment equity enforcement

“We should maximise compliance by consolidating a culture of prevention. It is preferable to prevent non-compliance with the law than have to deal with non-compliance after it has happened. Therefore we are available to give information, advice and provide education to workers and employers.” – IES Strategy Document (2001)

The Employment Equity Act differs from other Labour legislation in that employers have to submit reports to a Registry, which becomes a public document. The Act provides a number of monitoring mechanisms to prevent non-compliance. These mechanisms include:

- The empowerment of employees or their representatives to be consulted (Section 16) and to monitor (Section 34) employment equity progress in organisations.
- The public registry of employers that reported to the Department of Labour. By publishing this registry, all stakeholders (employees, trade unions, etc.) will have immediate insight into whether an employer has complied with the administrative or procedural requirements of the Act.
Section 53 of the Act, which is not promulgated yet, makes provision for employers to be certified as being compliant with the Act.

All government tender bodies are being encouraged to incorporate Employment Equity compliance (either certification or listing in the public registry) as part of the tender requirements. This is not a provision in the Employment Equity Act, but part of Government procurement policy. Indeed most large corporates have adopted similar policies.

Public companies have to publish a summary of their employment equity reports with the annual financial report.

Government departments also report to Parliament on employment equity.

It is the Department of Labour’s policy to adopt a multi-faceted approach to the enforcement of labour laws. This policy requires that advocacy be the primary enforcement mechanism applied by labour inspectors. It is only when this approach does not show the required results that the inspector embarks on legal proceedings.

Figure 1 shows the compliance model that underpins the Employment Equity Act. All employers in South Africa have to comply with Chapter II of the Act (prohibiting discrimination in the workplace). Designated employers (more than 50 employees or those meeting the turnover criteria in Schedule 4 of the Act).

Non-compliance is monitored through a variety of mechanisms, including:

- Complaints by any employee or trade union representative
- The employment equity registry
- Labour inspections
- DG Reviews

The model below shows the various compliance statuses that an employer may experience.
The first action by a labour inspector is always advocacy (to ensure the employer has a clear understanding of its obligations). Employers who prove un-cooperative will be issued with a written undertaking to comply with the Act. Should the employer ignore this undertaking, a compliance order is issued. Failure to comply with this order will lead to a labour court case, where a fine will be imposed in line with Schedule 1 of the Act.

The objective of the Department of Labour for all legislation is to prevent non-compliance, rather than to maximise the use of legal proceedings. The above model shows the gradual application of enforcement mechanisms to afford the employer every opportunity to become compliant before the Labour Court is involved.

12.3.1 Employment Equity enforcement model

During the initial implementation of the Act, the focus is more on the distribution of information and advising employers on compliance issues. This is considered to be the first level of enforcement and the aim is to ensure high compliance levels. The enforcement activities include ‘structured advocacy’ which basically follows the same procedures as a normal inspection, but with the aim to educate employers about their obligations under the Act and to ensure that they are prepared to comply. Advocacy must also ensure that all employees and their representatives are aware of their rights as bestowed by the Employment Equity Act, and also to ensure that employers are fully aware of their obligations under the Act.

The second level of enforcement is the Employment Equity Registry. The registry is a database of all employers who reported to the Department of Labour, or those employers that requested an extension to the report date. This database will eventually form part of a much larger employer database at the Department and will incorporate all employers that currently resides on the systems used by the Unemployment Insurance Fund (UIF), the Compensation Commissioner (CC) and Skills Development. The integrated database of employers will be used to identify procedural non-compliance.
The registry contains all information (forms EEA 2 and EEA 4 of the EE regulations) reported by employers. These workforce profiles are analysed to identify priorities for pro-active inspections and DG reviews. The registry is used in the planning of all enforcement activities and ensures that the Department’s resources are applied effectively. The registry is managed centrally from the Employment Equity Directorate, but the information contained in the registry is available to all provincial offices and labour centres (either manually by requesting information from the registry manager, or via the Department’s network).

The third level of enforcement involves procedural inspection of employers. There are two types of inspections: re-active (in response to complaints received) and pro-active (planned inspections, informed by the registry information). These inspections will follow much the same procedure as those conducted for other labour legislation and will indeed be covered by a portion of the integrated checklist for inspections. Non-compliance following an inspection will lead to advocacy, a written undertaking issued, followed by a compliance order and finally the Labour Court where an employer could be fined; or the scheduling of a Director General (DG) Review which will lead to a full scale investigation of the employer’s employment equity implementation.

![Diagram](image)

Figure 2: Employment Equity Enforcement Model

The fourth level of enforcement focus on substantive compliance and for this purpose a DG Review is conducted. The DG Review relates only to employment equity and will be a thorough investigation of all the compliance issues. The DG Review includes interviews with all stakeholders and the objective is to establish whether the employer is making real progress towards employment equity, over and above procedural compliance. DG Reviews can also be re-active, in response to non-compliance detected during a procedural inspection, or pro-active as part of a planned DG Review schedule. In the case of a DG Review, should the employer not comply with the recommendations of the review, these recommendations can become a court order through the Labour Court.
12.3.2 Advocacy

Two advocacy levels have been identified:

- General employment equity advocacy
- Structured advocacy

(i) General advocacy

General advocacy is aimed at employers, trade unions, employee representatives and employees. This type of advocacy programmes aim to reach the widest audience possible, in order to prevent non-compliance. The purpose of these sessions is to disseminate information and not skills development.

(ii) Role of the Labour Centre:

- Marketing the Department’s services
- Education of stakeholders
- Distribution of information
- Interaction with stakeholders
- Assist CEE and ECC with public hearings and interaction
- Inquiries and information

(iii) Role of the Provincial Office:

- Marketing the Department’s services
- Public awareness campaigns
- Liaison with stakeholders
- Assist CEE with public hearings and interaction
- Education of provincial stakeholders
- Inquiries and information
- Provincial help line

(iv) Role of the Head office:

- Communication department to handle national media
- Developing and resourcing public awareness campaigns
- Arranging and co-ordinating an 086 number

(v) What advocacy should be done?

The following information should be distributed via the Department’s advocacy efforts:

- The Employment Equity Act
- Regulations to the EEA
- Codes of good practice
- Users guide to EE plans
(vi) **Who should be conducting these advocacy programmes?**

Any Department of Labour official with the required knowledge and communication skills may be involved in general advocacy programmes. Labour centre heads, Provincial directors and IES Business Unit heads will generally decide which employees or inspectors are best suited to conduct advocacy programmes.

(vii) **When to conduct general advocacy programmes?**

Provinces will schedule advocacy events in line with the head office advocacy programme, but will also schedule local awareness campaigns. These should include all forms of advocacy, with the aim to reach as many employers and employees as possible. Examples include:

- Radio interviews
- Addressing employer organisations
- Addressing employee representatives
- Public speeches

Labour centres should use every opportunity to educate individual employers in their day-to-day interaction with them. The initial interaction with an employer on employment equity issues should always be used as an opportunity to educate the employer on their obligations, as well as the rights of employees and their representatives. However, if an employer acts in an uncooperative manner, the inspector may immediately start legal proceedings.

In response to complaints, the inspector should first make sure that the employer clearly understands his obligations and the rights of employees and their representatives. It is only when the employer refuse to co-operate that the inspector will escalate his investigation to include an inspection.

Improving compliance should be an ongoing activity by the Employment Equity Directorate, Provincial offices and labour centres. While conducting routine inspections, inspectors should be equipped to provide employers with all the necessary information and forms that they would need in order to comply with the Employment Equity Act.

The Department of Labour head office will schedule national advocacy event during the first week of September every year to coincide with the report date of 1 October. An employment equity week will be announced in the press and the aim will be to raise awareness and thus ensure high levels of compliance. The head office will also arrange similar national events to coincide with the launch of new regulations, codes of good practice, the public registry and reports by the Commission for employment equity.
(viii) Structured advocacy

Structured advocacy is done to prepare labour inspectors as well as employers for future enforcement activities. This kind of advocacy will simulate an inspection done by a labour inspector, but with the aim to educate employers and employee representatives about the standards that will be applied by the Department of Labour to determine non-compliance. Structured advocacy is much more focussed than the general advocacy measures and employers are dealt with on an individual basis.

The Department of Labour will use structured advocacy to train inspectors on the enforcement procedures for employment equity. Teams consisting of inspectors with experience of employment equity inspections, and inspectors will conduct these inspections.

Because of the nature of structured advocacy, it will only be conducted by Labour Centres. The advocacy team at Provincial offices will provide the necessary support to these inspection/advocacy teams.

(ix) How is structured advocacy conducted?

a) For training purposes the advocacy should be done by a team led by an experienced labour inspector with specialist knowledge of the employment equity Act.

b) Employers who will be targeted for structured advocacy programmes could be identified by:

- Complaints received by the Labour Centre
- Information received from the EE Registry
- Selecting employers based on the National Inspection Plan

c) The team leader contacts the identified employer and arrange for a date and time when the advocacy will take place. The purpose of the meeting should be clearly stated to the employer. The arrangements include appointments with management and employee representatives. The first point of contact should always be the Employment Equity Manager of the employer, unless the employer did not assign responsibility for employment equity to a senior manager. In this case the Human Resources manager should be used as the contact person.

d) The nature and objectives of the structured advocacy programme should be clearly explained to the employer and employee representatives.

e) The advocacy sessions should be led by a labour inspector with specialist EE knowledge and include:

- Going through the inspection checklist and checking compliance to these items
- Explaining the enforcement process and likely outcomes in terms of fines
- Explaining the obligations, roles and responsibilities of employers and employees
- Answering any questions by employers and employees
- Obtaining commitment from the employer to comply with all employment equity requirements
- User’s Guide on EE Plan
f) On completion of the structured advocacy session, the team leader should record the name of the employer and all other relevant company details, date of the session, any concerns raised by the employer, complaints by employees or their representatives.

g) If any non-compliance is found, and the employer is unwilling to cooperate with the Department of Labour to implement remedial measures, the findings of the structured advocacy session may be used to issue a written undertaking (form EEA 5, Annexure 2).

(x) Employment Equity Registry

The employment equity registry plays an important role in the enforcement of employment equity legislation. The registry function support enforcement efforts in the following ways:

- By publishing the names of employers who complied with the reporting requirements of the Act in a Government Gazette. This list of companies is a public document and will be used by organs of state as a reference for eligibility of employers to participate in government procurement activities. It will also assist employees and their representatives to determine if their employers have complied with the Act. Enforcement staff may also refer to the register in order to determine if an employer being inspected has complied with the Act.

- The registry consists of a database of all employer details, including the data submitted by employers on form EEA 2 and 2 A. A history of report submissions, requests for an extension to the reporting date and queries on reports received will be recorded on the system. This data will be available online to all enforcement staff in the future, but even now information can be requested from the registry manager in order to prepare for an inspection.

- The registry manager will assist enforcement staff in their efforts by identifying non-compliant employers from the database. This will be done in a number of ways:
  - By comparing the companies on the registry to the UIF and Skills Development databases, those companies who failed to report will be identified. The registry manager will contact these companies directly by issuing electronic reminders of their obligation to report. These lists of employers will also be made available to the provincial offices for their information. If any of these employers fail to report, the details will be forwarded to the relevant provincial office for further enforcement action. The provincial office will decide which labour centre should take the case further and assign it accordingly.
  - The registry manager will deal directly with employers who does not meeting the reporting requirements by:
    - Not submitting a complete report
    - Reports not signed by the CEO
    - Employers requesting an extension to the reporting date, but then do not report anyway
    - Employers who submit plans instead of EEA 2 reports
    - Employers who submit reports in the wrong format
  - The registry manager also manages the employment equity help line and therefore can deal with issues such as:
Complaints by employees or their representatives. Depending on the nature of the complaint, the registry manager may deal with it himself, or refer the matter either to the Director Employment Equity or to the relevant Provincial Office. Where complaints relate directly to the submission of reports, the registry manager will deal with these. If any other matter relating to employment equity or other Labour Law is the subject of the complaint, it will be referred to the relevant Provincial Office. If the complaint deals with a national employer or an entire industry sector, the Director for Employment Equity will be responsible for the matter.

Advocacy, where employers request assistance from the Department of Labour. Employers will be made aware of the materials on the website and will also be referred to their nearest Labour Centre if they require the services of a labour inspector.

- The analysis of report data and subsequent benchmarking of employer data will be done by the registry system. This information will be used to prioritise enforcement efforts per industry, geographical region, size of employer or any other demographic and will be used to inform the national inspection plan.

The registry is a supporting function to assist labour inspectors with the enforcement of the Act. This role will become more prominent once every Labour Centre has access to the registry system.

(xi) Inspections

This section describes the procedures to follow for procedural inspections, both re-active and pro-active.

It is very important for inspectors to prepare properly before conducting an inspection. All relevant compliance information of the employer to be inspected should be obtained before the inspection takes place. This will ensure that the inspector knows which questions to ask and what areas to concentrate the inspection on.

(a) Employment Equity inspection administration

A number of new administrative procedures will be introduced to produce the information required to manage employment equity enforcement. These include:

- Employment Equity inspection notification: Form EEA 12 – this form will assist inspectors when making the arrangements to conduct an inspection.
- An employment equity inspection register: Form EEA 13 – a record of every employment equity inspection conducted and the outcome of the inspection.

Every Labour Centre will be required to keep a centralised filing system per employer for employment equity inspection purposes. The file should contain copies of all documentation used in the preparation for the inspection, the documents supplied by the employer, the completed inspection checklist and the inspection report. Any further enforcement actions, like a written undertaking or compliance order should also be included in this file. These files could be held separately or integrated with current employer records, depending on the administrative system in operation at each Labour Centre.
(b) Preparation for an inspection

A labour inspector preparing to conduct a procedural inspection should follow the guidelines presented here to ensure a successful outcome.

(c) Obtain information

Before contacting the employer, the inspector requests the following information from the EE Registry:

- Employer contact details
- Reporting history: dates reported, extensions requested, any queries on the reports received
- Copy of the latest report (EEA 2)

In addition to the registry, the inspector then checks the IRIS system or inspection register (EEA 13) to ascertain when the employer was previously inspected or reviewed. The inspector must examine the records to determine the outcomes of previous inspections or reviews. If a compliance order was previously issued, the inspector should note the reason for this order and add it to his inspection list as a follow-up item.

In the case of a complaint the inspector must obtain full details regarding the complaint from the employer. If there are any issues, which are not clear, the inspector should follow up with the complainant and clarify the nature and details of the complaint. This is crucial in deciding whether to conduct a procedural inspection or to conduct a DG Review.

(d) Determine the scope of the inspection

The inspector must decide whether the inspection or review will involve only one, local, workplace or many regional workplaces within a province, or multiple workplaces nationally. The scope of the inspection will determine the resources required to complete an inspection. For a regional inspection, the Provincial Office must be notified in order to co-ordinate such an inspection as it may involve inspectors from more than one labour centre, or require a labour inspector to operate beyond the borders of his labour centre’s jurisdiction.

In the case of a national inspection, the Provincial Office where the employer’s head office is situated must be notified via the local Provincial Office. A decision on whether only the head office itself should be inspected, or whether to include all workplaces of the employer must be taken. This decision should be taken in conjunction with the Employment Equity Director at head office, who will co-ordinate all national level inspections. The Provincial Office where the head office of the employer is situated should generally take this decision, based on the compliance track record of the employer. This decision could be influenced by complaints received at a local Labour Centre. In such a case the inspection should be extended to include the workplace in question.
This approach will require the co-ordination of national and regional inspections amongst Labour Centre’s as well as the sharing of compliance information across Labour Centres and Provincial Offices. In the case of pro-active inspections the Provincial Office where the head office of the employer is situated should coordinate the inspection and make decisions regarding the scope of the inspection.

In the case of a re-active inspection, the Labour Centre where the complaint was lodged should initiate the inspection and determine the scope of the inspection. In some cases the monthly inspection register reports received by the Department of Labour’s head office will be used to trigger a national inspection, where non-compliance of the same employer across provincial borders is noticed. The head office will then bring the matter to the attention of the relevant Provincial Office where the employer’s head office is situated.

**e) Make an appointment**

Having gathered all relevant information, the inspector should contact the employer to make an appointment. In the case of a pro-active inspection the employer may be sent a letter, fax or e-mail (Form EEA 12 in Annexure B) to set a preliminary date. This should be done at least one month before the actual inspection date. This letter requires the employer to confirm the date or to make alternative arrangements for the inspection date if there is a valid reason to do so.

In the case of a complaint, it is imperative that an inspector contacts the employer as soon as possible regarding the complaint. If the time lapse after the complaint is too long, the circumstances leading up to the complaint might have changed and this could render the inspection ineffective. As a guideline, such an inspection should be completed within seven workdays from receiving the complaint to the finalisation of the inspection. It is compulsory for the inspector to provide the complainant with feedback on the outcome of the inspection as soon as the inspection is completed.

An appointment must be confirmed telephonically with the employment equity manager of the employer and the nature of the complaint stated. This will ensure that all relevant information regarding the complaint is available when the inspection takes place.

To ensure a successful inspection, the following logistical arrangements must be made with the employer:

- Establish who the **current** employment equity manager is, and obtain all contact details – if this is not known; the Human Resources manager of the company should be contacted regarding the inspection. If the inspection is conducted at a local workplace, but the employer has a national, centralised employment equity function, the employer may choose to have the national employment equity manager present for the inspection.
- Request the following information from the employment equity manager:
  - The type of organisation: national employer, geographically spread, number of workplaces
  - Name and contact details of the Human Resources Director
  - How many people responsible for employment equity in the organisation and their contact details and designation
  - Number of workplaces and their locations
• How many employment equity forums in the organisation and contact details for the chairperson of the forum/s
• Number of trade unions active in the organisation
• Contact details of trade union representatives

- Make an appointment with each of the representatives who will be involved in the inspection. Set specific times for these interviews and allow enough time between interviews if it is to be conducted in a different location.
- Obtain detailed directions to the place where the inspection will be conducted. If more than one workplace is involved, all details, as well as travelling time should be confirmed with the employer.
- If one or more of the representatives cannot attend the inspection, make alternative arrangements. These could include that the representative meet inspectors at the Labour Centre offices.
- If the inspection will involve a number of representatives and a number of workplaces, make arrangements up front for lunch and tea breaks. Where feasible lunch breaks should be taken off-site.
- It is advisable to start inspections as early as possible in the morning. Should there be any unplanned delay in the proceedings, it will still be possible to complete the inspection on the same day.

If unforeseen circumstances make it impossible for the inspector to conduct the inspection, alternative arrangements with the employer should be made as early as possible.

(f) Register the inspection

If it is the first time that an employer will be inspected, a new employer file should be opened for the inspection. A copy of the notification of the inspection (Form EEA 12) must be filed.

A register (Form EEA 13) of all employment equity inspections must be kept by every inspector. Depending on the resources available at the labour centre, this register may be paper-based, on a spreadsheet or an entry into the case management system (IRIS). Annexure B shows the required information to be entered into the inspection register (EEA 13). This register will be used as the basis to compile management information reports on employment equity inspections or DG Reviews and their outcomes.

In addition to the register, the inspector must compile an inspection preparation list which includes all the inspection activities to be performed. The list could include the following:

- Advocacy materials and information for the employer and employees
- General inspection checklist
- Complaints to address
- Issues to follow up from previous inspections
(xii) Conducting a procedural inspection

These inspections are called procedural, because the inspector will determine the procedural compliance of employers during such an inspection. Procedural compliance refers primarily to the administrative obligations of employers.

(a) Objectives of a procedural inspection

The objective of a procedural inspection is to determine whether an employer has met all the administrative requirements of the Act. These requirements are mainly contained in Section 36 of the Act:

“36. Undertaking to comply.--A labour inspector must request and obtain a written undertaking from a designated employer to comply with paragraphs (a) to (j) within a specified period, if the inspector has reason to believe that the employer has failed to--

a) consult with employees as required by section 16;
b) conduct an analysis as required by section 19;
c) prepare an employment equity plan as required by section 20;
d) implement its employment equity plan;
e) submit an annual report as required by section 21;
f) publish its report as required by section 22;
g) prepare a successive employment equity plan as required by section 23;
h) assign responsibility to one or more senior managers as required by section 24;
i) inform its employees as required by section 25; or
j) Keep records as required by section 26. “

Where non-complying employers is found regarding any of the above matters, the inspector should follow up and, if they do not respond to advice and information, take action against them as discussed in the procedures below.

(xiii) When to embark upon a procedural inspection

Procedural inspections on employment equity related issues are not conducted on an ad-hoc basis. The Labour Centre’s normal inspection activities provide opportunities to enforce the EEA. These include:

- Re-active inspections

This is an inspection in response to a complaint. When an inspector conducts such an inspection he should not only restrict himself to the complaint but also do a full labour inspection when appropriate. A checklist (Annexure A) of employment equity related compliance issues were developed to assist inspectors with a full inspection. The initial inspection must be followed up by the inspector to ensure that all remedies have been implemented. If the subject of the complaint is not included in the general checklist, this issue should be addressed by the inspector as well.
- **Pro-active inspection**

  This is a planned inspection that forms part of the normal inspection routine as determined by the national inspection plan. The inspector must also inform workers and employers of their rights and obligations in terms of the EEA. This type of inspection could form part of an identified campaign to target a specific problem area or sector.

  The procedure to follow for a re-active or a pro-active inspection is exactly the same, except that in the case of a complaint, the subject of the complaint will be added to the standard inspection checklist, where appropriate. Should the complaint involve a discrimination issue (Chapter II of the EEA), the matter must be referred to the CCMA.

(xiv) **Conducting the inspection**

  The standard inspection checklist (annexure A) is used to conduct the inspection. An inspection has three components:

  a. **Employer details:** the inspection checklist contains a section for the full contact details and other relevant demographic information regarding the employer. This data is crucial for the continued enforcement of labour legislation and should always be completed in full.

  b. **Documentation audit:** the inspector requests a copy of the relevant documents as per the inspection checklist.

  c. **Interviews:** the extent of the interview, the parties interviewed and the issues discussed will vary from case to case, depending on the state of the documentation provided under point (b.). The objective of the interview is to clarify the nature of non-compliance and the employer’s willingness to correct the situation. In the case of a complaint, the interview is used to obtain information from all stakeholders involved in the complaint and to try and obtain agreement from all parties on the required remedy.

(xv) **Criteria for compliance**

  Sections 13 to 16 of the standard inspection checklist refer to employment equity related issues. The inspector should address all inspection questions in the first instance at the senior manager assigned with responsibility for employment equity in the company. Where a person was not assigned, the CEO or Human Resources manager of the employer should be interviewed.

  The preparation for the inspection may uncover some non-compliance issues not specifically dealt with in the standard inspection checklist, for instance if the employer did not appoint an employment equity manager. The employer should be able to produce some documentation to substantiate the appointment of an employment equity manager. This may include a letter of appointment, minutes of an employment equity forum meeting or any other written notification.

  - **Who needs to supply the information:** Employee representatives, Human Resources Manager or CEO

  - **Non-compliance:** An employer who did not assign responsibility for employment equity to one or more senior managers in the organisation.
Appropriate action:
- Written Undertaking (EEA 5): Secure a written undertaking (Annexure 2) for the employer to appoint an employment equity manager.

Section 13 of the checklist is about unfair discrimination in the workplace and pertains to all employers (designated or not). The inspector should enquire whether a dispute regarding unfair discrimination in the workplace has been lodged. This could be for a specific workplace or for many workplaces, depending on the scope of the inspection. If such a dispute exists, the inspector will enquire whether it has been referred to the CCMA and if so, whether it has been resolved. The response from the employer is noted in the ‘comments’ portion of this section.

If the dispute has not been referred to the CCMA, the reason for this should be obtained. It could be that an internal dispute resolution mechanism is being followed by the employer.

Who needs to supply the information: Employee representatives, Employment Equity Manager or Human Resources Manager

Non-compliance: An employer who refuses to act on such a dispute or is actively preventing the employee or trade union to lodge the dispute with the Department of Labour or CCMA. The employer may not disclose this information to the inspector; therefore the same question should also be directed at the trade union representatives and employment equity forum members.

Appropriate action:
- Advocacy: Chapter II of the Act. CCMA procedures and contact details.

Section 14 of the checklist is used to check whether the employer is designated or not. If the number of employees exceeds 50, or the specified annual turnover is exceeded, the employer is designated. If there is any uncertainty about the sector or sub sector of the employer for the turnover clause, request the UIF registration certificate of the employer. This should state the Standard Industrial Classification (SIC) and can be used as a guide.

This section is used to determine whether the inspector must continue with sections 15 and 16 of the checklist. Only designated employers have to comply with sections 15 and 16.

Who needs to supply the information: Employment Equity Registry, Employment Equity Manager or Human Resources Manager

Non-compliance: An employer who did not report to the Department of Labour because it deemed itself non-designated, when in fact the employer is designated.

Appropriate action:
- Written Undertaking (EEA 5): Secure a written undertaking (Annexure B) for the employer to comply with the obligations as stated in Chapter III of the Act. These would include: developing and implementation of an employment equity plan and reporting to the Department of Labour. This is a long process and the employer should be allowed up to six months to comply.

Section 15.1 checks whether an employer has an employment equity plan. The plan should not be confused with the standard forms (EEA 2 and 4) used to report to the Department of Labour on employment equity.
The inspector must request a copy of the plan from the employer. A plan contains at least the following information:

a) the objectives to be achieved for each year of the plan;
b) the affirmative action measures to be implemented as required by section 15 (2);
c) where under-representation of people from designated groups has been identified by the analysis, the numerical goals to achieve the equitable representation of suitably qualified people from designated groups within each occupational category and level in the workforce, the timetable within which this is to be achieved, and the strategies intended to achieve those goals;
d) the timetable for each year of the plan for the achievement of goals and objectives other than numerical goals;
e) the duration of the plan, which may not be shorter than one year or longer than five years;
f) the procedures that will be used to monitor and evaluate the implementation of the plan and whether reasonable progress is being made towards implementing employment equity;
g) the internal procedures to resolve any dispute about the interpretation or implementation of the plan;
h) The persons in the workforce, including senior managers, responsible for monitoring and implementing the plan.

There is no prescribed format for the employment equity plan and the only criteria are that all the information required by the Act is contained in the plan.

❖ **Non-compliance:** An employer who is not able to produce such a plan, or an employer who does have a plan, but it does not cover all the issues required by the Act.

❖ **Who needs to supply the information:** Employment Equity Manager

❖ **Appropriate action:**
  o **Advocacy:** Chapter III of the Act, Code of Good Practice: “Preparation, implementation and monitoring of employment equity plans” and Employment Equity User’s Guide issued by the Department of Labour.
  o **Written Undertaking (EEA 5):**
    - If there is no plan: Secure a written undertaking (EEA 5, Annexure 2) for the employer to prepare and implement a plan as described in the Code of Good Practice. A period of 90 days should be allowed for this process. Several milestones can be specified for follow-up in the written undertaking. These include: consultation with employee representatives about the plan, analysis of workplace policies, procedures and practices, analysis of the workplace profile, affirmative action measures, numerical goals and a final plan.
    - If the plan is incomplete, the inspector should use his own discretion to decide how much time an employer is allowed to comply. Consulting with employee representatives requires a lot of time, while something more administrative like dispute resolution procedures can be done much more quickly.

**Section 16** of the checklist deals with the employment equity report (form EEA 2) and has several sub-sections.
Section 16.1 and 16.2 of the checklist determines whether the employer has submitted an employment equity report (EEA 2/A and EEA 4/A) to the Department of Labour. In terms of the preparation required for an inspection, the inspector should already have obtained this information from the Employment Equity Registry. There are several non-compliance issues to consider:

- The employer is designated, but did not submit a report.
- The employer requested an extension to the reporting date. Non-compliance will depend on whether the extension has been granted (a letter from the Employment Equity Registry) and whether the extension deadline has expired yet – refer to question 16.4 of the checklist.
- The employer submitted an incomplete report or a report, which does not conform to the regulated format of EEA 2 and EEA 4.
- The employer submitted form EEA 2, but not EEA 4.

The proof of compliance is a valid letter, issued by the employment equity registry, acknowledging receipt of the report and a registry record, which shows no outstanding query on the employer’s report.

- **Non-compliance:** Failure to produce an acknowledgement of receipt, or a query on the registry system. The employer may be able to produce a copy of the report, but if this was not submitted to the employment equity registry, the employer is still non-compliant.
- **Who needs to supply the information:** Employment Equity Manager
- **Appropriate action:**
  - **Advocacy:** Chapter III of the Act, Regulations and standard forms.
  - **Written Undertaking (EEA 5):** The reason for non-compliance will determine the time frames allowed by the inspector for compliance. If the employer has a report, but did not submit it to the registry, seven days will be sufficient. If the employer has not yet conducted the workforce profile analysis which forms the basis of the information required to complete EEA 2 and 4, more time would be need – probably 30 days.

Section 16.4 checks whether the employer applied for and received an extension from the employment equity registry and the date of this extension.

The proof of compliance is a valid letter, issued by the employment equity registry, granting an extension up to a specified date.

- **Non-compliance:** Failure to produce a letter granting an extension to the reporting date or if the extension date has already expired and the employer did not submit the report (EEA 2 or 4).
- **Appropriate action:**
  - **Advocacy:** Chapter III of the Act, Regulations and standard forms
Written Undertaking (EEA 5): The reason for non-compliance will determine the time frames allowed by the inspector for compliance. If the employer has a report, but did not submit it to the registry yet, seven days will be sufficient. If the employer has not yet conducted the workforce profile analysis which forms the basis of the information required to complete EEA 2 and 4, more time would be need probably 30 days.

Section 17 checks whether employers have informed their employees of the relevant sections of the Act.

Section 17.1 checks whether a summary of the Employment Equity Act is displayed in the workplace. This may be done in many different formats:

- A paper copy or poster available on workplace notice board
- An electronic copy on the company’s intranet
- Incorporated in advocacy materials distributed to the employees
- Workshops or focus groups held to inform employees of the contents of the report in their own language
- Pamphlets or booklets explaining the Act to employees

The proof of compliance is that any of the above materials or methods is used to communicate the contents of the Act to all employees.

- **Non-compliance:** Failure to communicate the contents of the Act to employees, or providing incomplete information to employees.

- **Appropriate action:**
  - **Advocacy:** The Employment Equity Act, information where to obtain copies (Government printers, Website, etc.)
  - **Written Undertaking (EEA 5):** Normally 14 days would be sufficient time for the employer to make available the summary to all employees, but this will depend on the size and geographical spread of the employer’s workplaces.

Section 17.2 checks whether an employer has made a copy of the employment equity plan available to all employees. This may be done in a variety of ways, including:

- Copies of the plan provided for every employee
- A summary of the plan made available to every employee
- An intranet website where employees can view the plan
- E-mail of the plan to all employees
- Workshops or focus groups which explained the contents of the plan to all employees in their language of choice

- **Non-compliance:** An employer who did not communicate the plan or the availability of the plan to all employees and their representatives. In some cases the method of communication could also be ineffective, for example where the plan is made available on an intranet, but not all employees have access to a computer.

- **Appropriate action:**
  - **Advocacy:** Chapter III of the Act, Code of Good Practice: “Preparation, implementation and monitoring of employment equity plans” and Employment Equity User’s Guide issued by the Department of Labour.
Written Undertaking (EEA 5): The preferred method of communicating the plan to all employers should be discussed with the employer. This may also form part of the employer’s consultation with employee representatives. Depending on the type of communication, the communication process decided upon, the size of the employer and the geographical spread of workplaces, the written undertaking should allow an appropriate time for the employer to comply with this section. There are no guidelines for an appropriate time frame, and the inspector should use his discretion on this matter.

Section 17.3 checks whether the report to the Department of Labour (form EEA 2 only) is displayed in the workplace. This may once again be done in many different formats:

- A paper copy available on workplace notice board
- An electronic copy on the company’s intranet
- A summary contained in advocacy materials distributed to the employees
- Workshops or focus groups held to inform employees of the contents of the report
- Pamphlets or booklets explaining the contents of the report to employees

The proof of compliance is any of the above materials used to communicate the contents of the report to employees.

- **Non-compliance:** Failure to communicate the contents of the report to employees

- **Appropriate action:**
  - Advocacy: Chapter III of the Act, Regulations and standard forms.
  - Written Undertaking (EEA 5): Normally 14 days would be sufficient time for the employer to make available to the contents of form EEA 2 to all employees, but this will depend on the size and geographical spread of the employers workplaces.

Section 18 Every designated employer that is a public company must publish a summary of its employment equity report (EEA 2) in the employer’s annual financial report.

The proof of compliance is a summary the of the information contained in the employment equity report, published in the company’s annual financial report.

- **Non-compliance:** Failure to publish a summary of the employment equity report.

- **Appropriate action:**
  - Advocacy: Chapter III of the Act, Section 22.
  - Written Undertaking (EEA 5): 60 days would be sufficient time for the employer to publish this information.

(xvi) Inspection outcomes

The outcome of the inspection will be determined by many factors. As we are trying to implement a preventative approach to enforcement, inspectors should always opt for the least severe legal course of action where appropriate. Some of the factors which will determine the outcome of an employment equity inspection are:
The number of non-compliance issues detected by the inspector. If the employer did everything in the inspection checklist, but failed to display a summary of the Act in every workplace, the inspector’s only action will be to remind the employer that it is an obligation under the Act. This non-compliance will be entered in the inspection checklist ‘Comments’ section without any further action being taken at this time. However, if there are a number of areas of non-compliance, for instance the employer did not communicate the plan, employment equity report and summary of the Act to employees, this could indicate that a much bigger problem exist at the workplace. In this case the inspector will secure a written undertaking.

The severity of non-compliance by the employer. If the employer does not have an employment equity plan, it actually means that the employer has not complied with a whole range of his obligations under the Act. It would also take a long time to become compliant if the proper procedures are followed. This would then guide the inspector to issue a written undertaking, rather than relying on advocacy to solve the problem.

The attitude of the employer. This could be very subjective and care should be taken not to confuse the attitude of the person being interviewed with the attitude of the employer. If an employer refuses to prepare and implement an employment equity plan because of the time and cost involved, this would be grounds to issue a written undertaking instead of relying on advocacy to solve the problem.

Employer track record. If the historical records show other instances of non-compliance, the enforcement action should be more severe.

It is very important that inspectors use their discretion when reviewing the inspection outcome to decide whether advocacy or a written undertaking is the correct response.

(xvii) Enforcement Procedures

The decision to embark on enforcement procedures should be carefully weighted to ensure that the level of non-compliance warrants a legal approach, rather than advocacy. The inspector should also try to determine the extent of non-compliance in order to decide on an enforcement approach. If the same problem exist in all workplaces of the same employer, then it could be better to do a co-ordinated inspection first in all provinces and workplaces.

In the case of a procedural inspection, the inspector also has the option to rather schedule a DG Review, before embarking on enforcement procedures. This will allow the inspector to get a much more comprehensive insight into the levels of non-compliance and any progress achieved to date.

(xviii) Issuing a written undertaking

The Labour Inspector should explain the areas of non-compliance found as a result of the inspection and ensure that the employer understand his obligations.

Form EEA 5 (Annexure 3) should be used to issue the written undertaking. This form only pertains to section 36 of the Act:

- consulted with employees as required by section 16;
conducted an analysis as required by section 19;
prepared an employment equity plan as required by section 20;
implemented its employment equity plan;
submitted an annual report as required by section 21;
published its report as required by section 22;
prepared a successive employment equity plan as required by section 23;
assigned responsibility to one or more senior managers as required by section 24;
informed its employees as required by section 25; or
Kept records as required by section 26.

The inspector must decide which of these sections are relevant to the written undertaking, but should also write down the specific non-compliance issues on the form. The form does not make provision for a specific period in which the employer has to comply. The inspector must agree on a reasonable time frame with the employer to comply with the relevant Section of the Act. This should be noted on the undertaking form.

The inspector should try to reach agreement with the employer on the time required to become compliant on the issues listed in the written undertaking. This period should also be noted on the form.

The following guidelines should be followed in completing form EEA 5:

- Link each aspect of non-compliance to the relevant item in Section 36
- State the time allowed for the employer to become compliant
- Make sure the undertaking is signed by the authorised employer representative
- Keep the original form for the Department of Labour
- Make a copy of the undertaking for the employer
- Explain the legal status of the undertaking
- Explain the enforcement procedures to be followed if the employer fails comply

The written undertaking will only be effective if it is followed-up by the Labour Inspector. This may be done telephonically, in writing or by doing a follow-up inspection.

The type of non-compliance addressed by the written undertaking will determine the appropriate action by the inspector. If the issue is quite easy to determine, for instance by requesting a faxed or e-mailed copy of a document, the inspector may request this document telephonically.

If the follow-up requires a physical inspection, for instance whether the employer is displaying the summary of the Act in all workplaces, then the same process as described above should be followed.

The compliance of the employer must be decided in conjunction with the guidelines described in section “7.3 conducting an inspection”.

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(xiv) Issuing a compliance order

A compliance order will be issued only if the employer fails to co-operate with the written undertaking. Form EEA 6 (Annexure 3) should be used to issue the compliance order.

The labour inspector may not issue a compliance order in respect of a failure to comply with a provision of Chapter III of this Act if the employer is also in the process of a DG Review. This could be difficult to determine in the case of a national employer or an employer with more than one workplace, spread over different geographical regions. The onus is on the employer to divulge this information to the inspector.

To obtain this information, the inspector should rely on the case management system of the Department as well as feedback provided by the employer. Should the employer allege that a DG Review is already being conducted in another part of the organisation or that another Labour Centre has already issued a similar compliance order, proof should be requested from the employer. This could be in the form of a copy of the relevant compliance order. If any further action is required the Labour Centre should contact the Provincial office to co-ordinate the enforcement effort.

The compliance order is completed by the Labour Inspector in his/her office, based on the written undertaking and the findings of the follow-up inspection. The compliance order is checked and initialled by the inspector’s supervisor who is at least an Administrative Officer level. The labour inspector and his supervisor must jointly agree on the time allowed for the employer to comply with the order. The time could be anything between 7 days and three months depending on the type of non-compliance found.

The inspector then serves the compliance order in person to the employer and obtains a signed receipt from the employer. The time, place and contact person on whom the compliance order was served must be recorded in the Labour Inspectors case file. The inspector should explain the non-compliance to the employer as well as the time within which the employer has to comply with the order.

Proof of compliance should be discussed with the employer, depending on the type of non-compliance and an agreement reached on how the employer can become compliant with the order.

The employer should also be made aware of:

- the fines which will be imposed in the case of non-compliance and as stated on the compliance order
- the employer’s right to object in writing to the Director General

(xx) Objection to a compliance order

The employer should be informed of his right to object to this compliance order and the relevant form (EEA 7) to complete. The procedure for objection must be explained. The employer must complete form EEA 7 in full and then submit this to the Labour Centre head within 21 days of receiving the compliance order.
The Labour Centre head will review the objection and compile a file containing copies of all relevant documentation pertaining to the enforcement procedures followed. These will include the inspection dates and reports, written undertaking and compliance order issued to the employer. The case file will then be forwarded to the Provincial Director (PD) for his response to the objection.

If the employer shows good cause at any time, the PD may permit the employer to object after the period of 21 days has expired. After considering the designated employer's representations and any other relevant information, the PD:

- may confirm, vary or cancel all or any part of the order to which the employer objected; and
- Must specify the time period within which that employer must comply with any part of the order that is confirmed or varied.

The Provincial Director (PD) must decide whether the employer has good cause for objecting to the compliance order. Good cause may include, but are not limited to:

- Not enough time allowed for compliance. In this case he may decide to extend the time allowed on the compliance order.
- Financial circumstances of the employer. Should the employer be placed under liquidation, the PD may decide not to pursue the compliance order.
- Labour relations issues, like a union deadlock, which may prevent the employer from complying with issues of consultation. Depending on the merits of the case, the PD may decide to vary the time allowed for compliance.

If the PD is unable to make a decision on whether the employer has good cause for the objection, the case may be referred to the Employment Equity Director for further consideration. A register of all objections to compliance orders and the action taken should be kept by the Provincial Office. A copy of this register must be submitted to the Employment Equity Director on a monthly basis for reporting and review purposes.

The PD must, after making a decision, and within 60 days after receiving the employer's representations, serve a copy of that decision on the employer.

A designated employer who receives an order from the PD must either:

- comply with that order within the time period stated in it; or
- Appeal against that order to the Labour Court in terms of section 40.

If a designated employer does not comply with an order of the PD, or does not appeal against that order, the PD may apply to the Labour Court for that order to be made an order of the Labour Court.

A designated employer may appeal to the Labour Court against a compliance order of the PD within 21 days after receiving that order. The Labour Court may at any time permit the employer to appeal after the 21-day time limit has expired, if that employer shows good cause for failing to appeal within that time limit.
If the designated employer has appealed against an order of the PD, that order is suspended until the final determination of:

- the appeal by the Labour Court; or
- Any appeal against the decision of the Labour Court in that matter.

(xxi) Labour Court

For a case to be referred to the Labour Court, the inspector must ensure that:

- all other enforcement avenues have been exhausted
- there is no appeal process in motion
- the employer is unwilling to comply with the compliance order

The first step in preparing a case for Labour Court proceedings is to compile a full case history of the employer in question. Every step in the enforcement procedure must be described and details such as inspection dates and follow-up meetings. The enforcement file that an inspector is required to keep for every employer being inspected should already contain all relevant information at this point.

This file should be reviewed by the Labour Centre head for completeness and then forwarded to the Provincial Office for further action. The Provincial Director or his delegate (Assistant Manager) reviews the case in order to recommend a fine. A copy of the case file and recommended fine is forwarded to one of the Legal Administrative Officers at the Department’s Head Office for further action. The Legal Administrative Officers may not make any changes to the case file without first consulting the PD.

The Legal Administrative Officers submits the case to the Registrar of the Labour Court and processes the case through the Labour Court system.

The Legal Administrative Officers will form a close working relationship with the local Registrars of the Labour Court. They will be responsible for receiving compliance files from their own and adjacent Provinces and processing the files through the Labour Court system. Provinces will refer their files as follows:

- Johannesburg - Gauteng South
- Pretoria - Gauteng South
- Cape Town - Western Cape
- Durban - Kwazulu Natal
- Port Elizabeth - Eastern Cape
- Head Office - Free State
  - North West
  - Mpumalanga
  - Northern Province
  - Northern Cape

(a) All applications to the Labour Court must comply with the Labour Court Rules.
(b) Before an application is brought to the Labour Court, a form 1 (application for a case number) must be completed and filed with the Registrar of the Labour Court - can be faxed. The Registrar will then issue a case number, which must be used on the relevant application.

(c) The Legal Administrative Officer must prepare a Notice of Motion, one original and 2 copies (Labour Court Form). This document is the means by which the employer is informed that the Labour Court, on a certain date will consider converting the Compliance Order to an Order of the Court.

(d) The Legal Administrative Officer must serve (deliver see Labour Court Rule 4(1) and pg. 3) the Notice of Motion on the employer via fax, registered post or in person, keeping a receipt of the method in which it was served on file. The Legal Administrative Officer must also complete an affidavit form indicating the way in which the Notice of Motion was served and attach it with a copy of the receipt to the Notice of Motion form.

(e) In terms of the Labour Court Rules the employer will have 10 days in which to oppose the application. (See pg. 3 Labour Court Rules)

(f) If the application is opposed, the Legal Administrative Officer may deliver a reply affidavit within 5 days. No oral evidence will be allowed. Cases that are opposed will be sent to the Legal Services Department at Head Office for any further action. E.g. heads of argument (Rule 18). Respondent (employer) will serve opposition on the Department.

(g) The Registrar of the Labour Court will allocate a date for the hearing of the application.

(h) Proceedings in the Labour Court must be carried on in open Court (Sec 160 LRA) and will not be heard in chambers. Registrar will inform the Legal Administrative Officers of the date of the hearing. (Officials must remember to uphold dress code when attending Labour Court hearings)

(i) If the Labour Court Judge supports the inspector's recommendations, he will grant the court order which will then be signed by the Registrar.

(j) The Legal Administrative Officers will courier the complete file (including the Court papers) back to the Provincial Office. The Legal Administrative Officer will also fax the Provincial office a letter informing them that the court order has been forwarded to the inspector to be served.

(k) The inspector must now go to the employer with the Order of the Labour Court and demand payment (money owed and fine if any) forthwith.

(l) If the employer agrees and pays, a receipt is to be given and normal Department of Labour practices followed in relation to the collection of money.

(m) If the employer refuses to pay, the inspector must notify the Legal Administrative Officer that the employer refused to pay.
(n) The Legal Administrative Officer will complete the Writ of Execution and send it to the Labour Court to process (signed). Legal Administrative Officer will send Writ of Execution and copy of order to the Labour Centre, who will have to forward it to the local Sheriff for execution (Sheriff will attach goods and arrange for goods to be sold and money paid over to the Department).

(o) Each Provincial office / Labour Centre will have to contact local Sheriff to discuss process as some Sheriff's may require indemnification.

(p) Sheriff will pay in money to the Department / Labour Centre and it will be processed in normal manner (BAS).

13 DG REVIEWS

The DG Review also seeks to assess compliance with the legislation. The DG may at any time conduct this review at any selected employers’ workplace. This review aspects outlined under section 42 will also be looked at. The result of a DG Review will be in the form of recommendations made to the employer under review.

1.6. An assessment tool to implement section 36 (d) and the DG Review has been developed and is attached as ANNEXURE A.

13.1. OBJECTIVE

2.1. This document is intended to be an important tool to assist the inspectorate in ensuring effective and efficient promotion, monitoring and enforcement of the Employment Equity Act in terms of Chapter II, III and V.

13.2 LEGAL FRAME WORK

3.1 These document is prepared as a practical tool to guide in the Employment Equity Act and should be read in conjunction, including but not limited to, the following existing legal documents:

- The Constitution of South Africa, 1993
- The Skills Development Act (SDA) of 1998;
- The Basic Conditions of Employment Act (BCEA) of 1997;
- Labour Relations Act, Act 66 of 1995;
- Broad Based Black Economic Empowerment Act of 2004;
- Preferential Procurement Act of 2000; and
13.3. CHAPTER II: PROHIBITION OF UNFAIR DISCRIMINATION

The Department of Labour Inspectors do not have jurisdiction on disputes arising out of this chapter. The aggrieved party may refer alleged contraventions in writing to the CCMA or the Labour Court within six months. Inspectors can only advocate the procedure to be followed by the aggrieved party.

13.4. CHAPTERS III AND V: AFFIRMATIVE ACTION AND MONITORING, ENFORCEMENT AND LEGAL PROCEEDINGS

These Chapters entails ensuring that a designated employer meets the statutory obligations as outlined and the course of action that needs to be undertaken by the Department.

13.4.1. CONSULTATION WITH EMPLOYEES (SECTION 16)

6.1.1. All employees must be informed of the content and application of the Act, employment equity and anti-discrimination issues, the process to be followed by the employer, and the need for the involvement of all stakeholders, in preparation for their participation and consultation.

6.1.2. A consultative forum must be established or an existing forum be utilized. The forum must be representatives of employees from all levels and categories as well as employees both designated and non-designated groups.

6.1.3. Consultation must include:

- Regular meetings and feedback to employees and management; and
- Access to relevant information by employees.

6.1.4. Where a representative body or trade union refuses to take part in the consultation process,

   The employer must record the circumstances in writing. A copy of this document must be provided to the representative body or trade union concerned.

6.1.5. The forum referred to above must have a constitution which amongst other things clearly outlines the scope, objectives, composition, election processes, meetings, roles and responsibilities, powers, standing orders, interpretation and dispute resolution procedures.

   For an inspector to establish whether or not there was meaningful consultation between parties on all issues relating to the employment equity requirements, the following criteria is useful:
Were all relevant parties consulted?
What was the reason given by a party for not attending the forum meetings?
How many meetings were held?
How long did the consultation process take?
What information was disclosed?
Were all parties able to express their views fully?
Were legitimate complaints dealt with fairly?
Were parties given sufficient opportunity to caucus, give feedback and get mandates during the consultation process?
Were parties allowed to use expert advice if requested?
Were any written agreements concluded?
Were any verbal agreements concluded?
If a dispute was declared, has it been resolved?
If a declared dispute has not been resolved, what are the prospects that a finding could go against the employer?

13.5 MATTERS FOR CONSULTATION (SECTION 17)

An inspector should ensure that a designated employer is thoroughly consulting with the representative trade unions and/or nominated representatives in respect of the following activities :

6.2.1 Review and conduct of an analysis of all employment policies, practices and procedures which may either be direct or indirect forms of unfair discrimination.

6.2.2 Conduct workforce analysis to identify over representation or under-representation of designated groups in all occupational categories and levels.

6.2.3 Compilation of the EE plan which sets out clear objectives and measures to be implemented to attain equity over a reasonable timeframe.

6.2.4 Compilation of an EE Report.

13.6 DISCLOSURE OF INFORMATION (SECTION 18)

A designated employer is required to disclose relevant information that will enable (allow) the other parties to consult effectively. Relevant information an inspector may look for may include but not limited to the following:

7.1. The particular business environment and circumstances of the employer,

7.2. The economic and financial information,

7.3. The anticipated growth or reduction of the employer’s workforce,

7.4. The turnover of employees in the organization,

7.5. The internal and external availability for appointment or promotion of suitably qualified people from designated groups,
7.6. The degree of representivity in all occupational categories and levels.

Unless the EE Act provides otherwise, the provisions of Section 16 of the LRA apply to disclosure of information. This, amongst others, includes dispute resolutions by the CCMA.

13.7 COLLECTING INFORMATION AND CONDUCTING AN ANALYSIS (SECTION 19)

8.1. When a designated employer collects information about individual employees for the purpose of compiling a workforce profile to determine the degree to which employees from designated groups might be underrepresented, the employer must request each employee in the workforce to complete a declaration using the EEA1 form.

8.2. Where an employee refuses to complete the EEA1 form or provides inaccurate information, the employer may establish the designation of an employee by using reliable historical and existing data.

8.3. A designated employer must use section B of the EEA2 form to analyse the workforce profile in order to identify over or under-representation of people from designated groups within the various occupational categories and levels.

8.4. It is also important for the employer to review all company employment systems, policies, procedures and practices to assess whether they are discriminatory, either directly or indirectly.

8.5. An analysis report should be compiled by the employer for reference during planning and valuation.

8.6. Critical information for workforce analysis that may assist is the following:

- What is the current racial breakdown?
- What is the current gender breakdown?
- What is the current disability breakdown?
- How does the current profile compare to the EAP nationally and regionally?
- What factors influence this profile?
- What are retention and/or turnover rates for blacks, women and people with disabilities?
- What factors influence whether employees in each category stay or leave?
- What are the patterns and practices of recruitment?
- How is recruitment conducted for various categories and levels of employees?
- How does this impact on the employment equity?
- What are the patterns of advancement for members of designated groups?
- What factors impact in the advancement of designated groups?
Identification of barriers is a very significant part of the audit process. Barriers may relate to the organization’s policy, practice or any aspect of the work environment. The elimination of barriers is crucial to the recruitment of people with disabilities. For example, facilities and buildings need to be accessible. However, some barriers are very subtle. E.g. an organizational culture.

8.8. Employee relations policies and procedures must also be reviewed and analyzed to assess whether they;

- Contain any elements of direct or indirect discrimination,
- Contain any barriers which may adversely affect designated groups,
- Are consistent with good labour relations practices and
- Would set a positive framework for an employment equity consultation process.

N.B. An inspector conducting an inspection should request a report of the audit conducted by the employer and to check whether or not there is a plan to correct any deficiencies identified during the audit.

8.9. The Act defines the terms “Employment policy or practice” to include – but not limited to the following:-

- Recruitment procedures,
- Advertising and selection criteria,
- Appointments and the Appointment process,
- Job classification and grading,
- Remuneration,
- Employment benefits and terms and conditions of employment,
- Job assignments,
- The working environment and facilities,
- Training and development,
- Performance evaluation systems,
- Promotion,
- Transfer,
- Demotion,
- Disciplinary measures other than dismissal, and
- Dismissal.

When a designated employer conducts the analysis required by section 19(1) of the Act, the employer may refer to:-

EEA 8 for demographic data;

EEA 9 for the definitions of occupational levels; and

EEA 10 for the definitions of occupational categories.
13.8 DUTY TO PREPARE AND IMPLEMENT AN EE PLAN (SECTION 20)

9.1. A designated employer may refer to the Codes of Good Practice: Preparation, Implementation and Monitoring of Employment Equity Plans, and other relevant Codes when preparing the employment equity plan required by section 20 of the Act. An inspector must ascertain whether the plan meets requirements of section 20.

9.2. A designated employer must retain the Employment Equity plan for a period of three years after the expiry of the plan, unless the employer employs fewer than 150 employees, in which case the plan must be retained for two years.

9.3. The Employment Equity plan must contain a description of the measures taken by the designated employer to eliminate unfair discrimination in that employer’s workplace.

9.3. The EE plan can be defined as a comprehensive document structured in the same way as any detailed business strategy document. In essence the EE plan is the organization’s vehicle in the elimination of Unfair Discrimination and the implementation of Affirmative Action measures to promote employment equity.

9.4. Although there is no prescribed EE plan template in terms of the Act, it is however important that a comprehensive EE plan would reflect the following principles:

- Preamble
- Objectives
- Senior Manager responsible
- Under-representation
- Numerical Goals
- Methodology to support the attainment of these numerical goals
- Monitoring of progress
- Communication of progress
- Dispute Procedure
- EEA awareness initiatives
- Continuous Review, assessments and amendments

9.5. An inspector should ensure that Employer’s Employment Equity plan meet the following requirements:

- The EE plan is not shorter that one year or longer than five years
- The EE plan aligns objectives with the employer’s broader business strategy

9.6. The EE plan should state Affirmative Action Measures which includes but not limited to the following:

- Appointment of members from designated groups
- Increasing the pool of available candidates
- Training and development of people from designated groups
- Promotion of people from designated groups
- Retention of people from designated groups
- Reasonable accommodation for people from designated groups
- Steps to ensure that people from designated groups are appointed in positions where they are able to meaningfully participate in corporate decision-making processes.
- Steps designed to further diversity in the workplace based on equal dignity and respect for all people.

13.9 DUTY TO REPORT (SECTION 21)

10.1. Each designated employer must submit a report in terms of Section 21 of the Act using the EEA2 form. The report must be fully completed, signed by the CEO and accompanied by the income differential statement (Form EEA 4).

10.2. Large employers must submit their first report within six months of being designated, and thereafter annually on the first working day of October; and small employers must submit their first report within twelve months of being designated, and thereafter on the first working day of October of every year that ends with an even number.

10.3. Large employers, i.e. employers with 150 and more employees, must complete the entire EEA2 reporting form. Small employers, i.e. employers with fewer than 150 employees, must only complete areas of the EEA2 form that apply to them. Areas that only apply to small employers shall be made available by the Department in a separate form as well. All relevant areas of the form must be fully and accurately completed by employers. Employers who fail to observe this provision will be deemed not to have reported.

10.4. An employer who becomes a designated employer must notify the Director General in writing and provide valid reasons for not being able to report on the first working day of October. This notification must reach the Director General by no later than the last working day of August in the same year. The Director General will examine the reasons that were provided by the employer and shall decide on whether to accept or reject them, which may lead to the non-acceptance of the notification. The Director General’s decision shall be final.

10.5. If an employer alleges that notification has been sent to the DG, proof of such and a response from the Employment Equity Directorate must be produced.

10.6. A designated employer must retain a copy of the report for a period of three years after it has been submitted to the Director-General, unless the employer has fewer than 150 employees, in which case the report must be retained for two years.

13.10. PUBLICATION OF A REPORT. (SECTION 22)

Every designated employer that is a public company is required in terms of Section 22 of the Act to publish a summary of their employment equity report in that employer’s annual financial report. Every employer who is required to comply with Section 22 must follow the format outlined in the regulations (form EEA 12). However, nothing should preclude an employer to narrate any additional information, e.g. on people with disabilities.
13.11. SUCCESSIVE EMPLOYMENT EQUITY PLANS. (SECTION 23)

13.11.1. A designated employer is required to prepare a successive employment equity plan before the end of the current one, which should also have a span of one to five years.

13.11.2. An inspector may advice an employer, depending on the size of the organization that they should start with the analysis/evaluation of progress made on the previous plan and consultation at least six months before the expiry of the current plan. This will assist in ensuring that there is no vacuum after the plan has lapsed.

13.12 ASSIGNING OF A RESPONSIBLE SENIOR MANAGER(S) (SECTION 24)

13.1. Assigned senior manager(s) for employment equity must:-

- Be permanent, report directly to the Chief Executive Officer on EE matters,
- Have key employment equity outcomes incorporated into their performance contracts,
- Be given the necessary executive authority and mandate,
- Be provided with an appropriate budget and access to other required resources; and an inspector may request proof of such an assignment.

13.13. DUTY TO INFORM (SECTION 25)

14.1. An inspector should ensure the following:

- Each employer must display the notice required by Section 25(1) of the Act (i.e. the summary of the Act annexed as EEA3 in the regulations).
- If there are employees in the workplace who are unable to read this notice, the employer must inform those employees about the provisions of the Act.
- The notice referred to in clause (7.1) is annexed as EEA3 in the regulations.
- This summary can be obtained from the government printers and the Department of Labour Website. An employer may rewrite the content of the summary in their own format and/or place it on the website in case all employees have access to a computer.

14. INCOME DIFFERENTIALS (SECTION 27)

14.1. Each designated employer must submit a statement of income differentials required by section 27 of the Act in using the EEA4 form. When completing the EEA4 form, designated employers must refer to EEA9 and the EEA10 for guidance.

14.2. Designated employers must retain a copy of the statement for a period of three years after it has been submitted to the Employment Conditions Commission, unless the employer has fewer than 150 employees, in which case the statement must be retained for two years.
15. **ASSESSMENT OF COMPLIANCE (SECTION 42)**

15.1. In assessing the extent to which a designated employer is making progress in terms of section 42 and 43, an inspector should consider the following:

   a. The extent to which suitably qualified people from and amongst the different designated groups are equitably represented within each occupational category and level in that employer’s workforce in relation to the-

      I. demographic profile of the national and regional economically active population;
      II. pool of suitably qualified people from designated groups from which the employer may reasonably be expected to promote or appoint employees;
      III. economic and financial factors relevant to the sector in which the employer operates;
      IV. present and anticipated economic and financial circumstances of the employer; and
      V. the number of present and planned vacancies that exist in the various categories and levels, and the employer’s labour turnover;
      VI. progress made in implementing employment equity by other designated employers operating under comparable circumstances and within the same sector;
      VII. reasonable efforts made by a designated employer to implement its employment equity plan;
      VIII. the extent to which the designated employers has made progress in eliminating employment barriers that adversely affect people from designated groups; and
      IX. Any other prescribed factor.

15.2. In terms of sections 43 of the Act, the Director-General may conduct a review to determine whether or not an employer is complying with the requirements of the Act. The result of a DG Review is in the form of recommendations made to the employer under review.

15.3. In order to implement the DG Review system as required by sections 43-45 of the Act, the Department has developed a DG Review system. The System consists of two major components, i.e. the IT enabling tool and the Assessment and review (desktop analysis of EE plans and additional information).

15.4. The DG Review system uses 4 variables viz. Black [i.e. African, Colored, and Indian]; Women; Disability; and Africans to assess compliance of employers across the 6 occupational levels of their workforce by measuring their representation against the demographics of the Economically Active Population.

16. **STEPS FOLLOWED IN THE DG REVIEW PROCESS.**

Step 1 Receipt of Employment Equity Reports from designated employers, either electronically or hard copies by the Employment Equity Registry. The EE registry based on its database of employers will capture and compare filing employers (filers) versus non-filing employers (non-filers) per each economic sector. The non-filers will be dealt with by way of referrals to relevant provincial inspectorate for further investigation and finalization.
Once a complaint is received by the provincial inspectorate, the inspector handling the complaint will have to establish the reason(s) for the non filing contravention and ensuring that the employer fulfills the requirements of section 21 of the Act. It is also important that feedback is provided to the Employment Equity Directorate.

Step 2: Employers filing complete reports versus Employers filing incomplete reports

The EE system will automatically generates a list of employers who have submitted complete as well as incomplete reports. Employers who have submitted incomplete reports will be advised in writing to resubmit. Employers who have submitted complete reports will also be advised in writing.

Step 3, 4 and 5. Segmentation by numerical performance and progress.

The EE system will generate the segmentation and/or ranking of employers based on numerical data in the workforce profile table. This exercise will allow officers to identify those employers who are equitably representative, not equitably representative and those who are making strides towards being equitably representative.

The worst performing employers (those with unacceptable representation) will be issued with letters informing them of their score and status per designated group. At this stage any additional information deemed necessary may be requested from such employers in order to conduct a full and comprehensive desk audit. Documents which may be requested may include; The EE plan, analysis of the EE report, financial statements such as balance sheet, income statement and cash flow statement. The approach to be adopted when doing the analysis of the additional information requested should be similar to the one articulated in the next paragraph (Analysis of additional information requested).

Employers who are found to be making reasonable progress may also be advised in writing of their score, status, reasons and recommendations.

Employers who are found to be equitable will be advised that they may be considered for the Employment Equity Award and the file will be closed.

Step 6-14 (The actual DG Assessment and Review Process)

The actual DG Review process starts with step 6 onwards whereby any additional information deemed necessary may be requested from an employer in order to conduct a full comprehensive desk audit. It is important to note that the following information remains a pre-condition for conducting a comprehensive substantive and/or DG review exercise. The information includes:

The Employment Equity Report;
The Employment Equity Plan;
Financial Statements, i.e Balance sheet, Cash flow and Income;
Constitution of the consultative forum;
Minutes and attendance register of consultative forum; and
Any other relevant records.

Notwithstanding the above-mentioned information, consideration must also be given to other external factors which may have a direct and/or indirect impact on the employer such as the
demographic profile, economic and financial factors, pool of suitably qualified people and other micro and macro economic indicators.

Step 11 and 12. What should happen after the DG Review meeting and/or hearing?

If the inspector has reasonable grounds to believe that the employer is compliant following the submission of the additional information the inspector should proceed and approve the employer’s Employment Equity plan, thus closing the matter until next years’ review.

A detailed and comprehensive report with the necessary recommendations must be compiled for the attention of the employer following a review of that employer. It is also important to include timeframes within which the employer must implement the recommendations. The employer’s attention must further be drawn to the fact that in the event those recommendations are not implemented within the prescribed timeframe, the case will be referred to the Labour Court for adjudication. However, in the event that the employer complies with the recommendations, the case will be regarded as closed until the following review if necessary

An employer who is under the review process should not be inspected in respect of the Employment Equity Act only.

Step 13 Adherence to the DG Review recommendations

If the employer complies with the DG Review recommendations and there is an Agreement, the inspector should close the matter until next year’s reporting cycle.

Step 14 Non-adherence to the DG Review recommendations

If the employer does not adhere to the DG Review recommendations, the inspector must refer the matter to the Labour Court for adjudication. This employer will be automatically reviewed in the next reporting cycle.

14 OCCUPATIONAL HEALTH AND SAFETY ACT, 1993

PURPOSE

The purpose of this Directive is to standardise and, as far as possible, simplify the policy of the Department in dealing with issuing of exemptions, complaints received, issuing of notices, special powers of inspectors barricade/Rambo kits and lock out systems, procedure when recommending prosecution and incidents reported.

WHO NEEDS TO READ THIS SECTION?

All inspectors involve with Occupational Health and Safety Act matters.

REPORTED COMPLAINS

(Read with C.I. Directive 006)
• A complaint with regard to unsafe or unhealthy workplaces or machinery may be lodged verbally, in writing, by facsimile or by E-mail. (It is not mandatory for a person lodging the complaint to provide personal details)

• The registry, client support or management support services, in offices where there is no IT infrastructure, depending whether the complaint is telephonic or in person or in writing must—

• record the details of the complaint in the Complaints Register, including details of the complainant (where provided) and the employer or user and premises details about which the complaint is focused. The Complaints Register must reflect a unique number allocated to the complaint and date received.

• Forward employer’s file with the complaint to the Supervisor for allocation to an inspector and scheduling. If no file exists, a temporary file must be opened by registry, client support or management support services and the inspector must obtain the required additional information for the file, i.e. CC number, employer’s contact details, etc.

• In case there are contraventions of the Act during an inspection, the inspector must issue relevant notices.

• The inspector must report back on the findings and action taken and such report must be filed in the employer’s file.

• The registry, client support or management support services, in offices where there is IT infrastructure, must capture the complaint onto the IT system complaints entity.

• The supervisor must allocate the complaint to the relevant inspector.

• The inspector must schedule an inspection for the complaint, if no file exists, a temporary file must be opened by registry, client support or management support services and the inspector must obtain the required additional information for the file, i.e. CC number, employer’s contact details, etc.

• After inspection the inspector must report back on the outcome and actions taken. The details of which are to be captured on the IT system and any notices served to be filled on the employer file and follow paragraph 5 above.
• In cases where a notice was served and depending on the type of notice and the requirements served a follow-up inspection must be conducted.

• Reminder notices must also be sent 60 days if a contravention or improvement notice has been served.

• When the complaint is finalized, the inspector must in writing (where the details of the complainant were provided) inform the complainant of the outcome and the action taken. In the case where the complainant was verbally informed it must be noted in the file.

• Means must be devised to ensure that all information recorded manually is captured on the IT system every month.

NOTICES, OTHER LEGAL STEPS AND PROCEDURES REQUIREMENTS
(Read with C.I. Directive 007)

NOTICES
In terms of Section 30 of the Act, an inspector can serve three types of notices, i.e.—

1 **Prohibition notice**

• There are three types of prohibition notices that an inspector can serve:
  • Section 30 (1) (a) relates to acts which threaten the health or safety of a person.
  • Section 30 (1)(b) relates to the threat to the health or safety of persons using machinery, as well as any other person who is, or may come, in the vicinity thereof, in other words we are concerned with the protection of employees and the public at large; and
  • Section 30(1) (c) relates to the conditions which threaten the health or safety of an employee, in other words we are concerned solely with the protection of employees.
  • An inspector may, in order to enforce the prohibition notice served in terms of Section 30 (1)(a) or (b), block, bar, barricade or fence off that part of the workplace, plant or machinery to which the prohibition applies in terms of Section 30 (2).
  • An inspector may revoke a prohibition notice or remove any barricade, fencing, barring or blocking if he is satisfied that the threat no longer exists and it must be in writing.
• The inspector must recommend prosecution if the employer or user fails to comply with the provisions of a prohibition notice or interferes with or removes blocking, barr ing, barricading or fencing, as this is an offence in terms of section 38 (1)(a) or (b).

• An employer or user of machinery may lodge an appeal, in terms of Section 35, against the decision of an inspector as set out in the prohibition notice.

• An appeal lodged against a prohibition notice served under section 30 (1) (a) or (b). shall not suspend the operation of such prohibition – i.e. the notice remains in force until the appeal has been resolved.

• When serving a prohibition notice:

  - Inspectors must not serve prohibition notices lightly and without restriction as prohibition notices can have serious financial implication for the employer or user.

  - The inspector must describe in detail the precise nature of the act, operation, process, or type of machinery being used which he is prohibiting in order that the act, or operation of machinery, or the circumstances under which the machinery is being used, can be easily identified.

  - It must be served on the employer or user and not to a specific employee using the prohibited machinery or operating the prohibited process or performing the prohibited action.

  - It must be served summarily in handwritten form on the premises (immediately), except in cases where chief inspector must be consulted.

  - The inspector must identify the employee by name or by category, and he must further indicate the substances or conditions to which these persons are exposed and the occupational exposure limit which may not be exceeded.

  - The inspector must ensure that the situation holds an immediate danger for the health or safety of persons.

  - The inspectors must add that the employer or user is required to bring the contents of the notice to the attention of the Health and safety representative and employees concerned.

  - A typical case where a prohibition notice can be served is where an inspector comes upon a situation which holds immediate danger for the health and/or safety of persons because the provisions of a specific regulation are not being complied with.

• A prohibition notice must under no circumstance be issued to force an employer or user of plant or machinery to comply with a contravention or improvement
2 Improvement notices

- In terms of Section 30 (3), an inspector must serve an improvement notice when—
  - the safety or health of a person at the workplace or in the course of his employment, or in connection with the use of plant or machinery is threatened on account of refusal or failure of an employer or user of plant or machinery to take reasonable steps in the interests of health or safety where no specific provisions in a regulation, or
  - There is a directive from Head office relating to the threat.
  - The inspector **must** recommend prosecution if the employer or user fails to comply with the provisions of an improvement notice after a period as specified on the notice has expired, as this is an offence in terms of Section 38 (1)(b).
  - An employer or user of plant or machinery may lodge an appeal against the decision of an inspector as set out in the improvement notice.
  - The provisions of an improvement notice are temporarily suspended as soon as an appeal is lodged. If the appeal does not succeed, the provisions of the improvement notice again become operative as from the date on which the decision on the appeal was given.
  - When serving an improvement notice:
    - The inspector must specify the true nature of the threat, and he/she must describe exactly the level of health or safety to be attained, however, he or she must not describe the manner in which the desired level of health or safety can be achieved.
    - The inspector must lay down the period of time during which the action specified in the notice, must take place, the period is laid down by the chief inspector to be 60 days, however the inspector may at his discretion extend this period – this is permitted but must be in terms of the definition of reasonably practicable.
    - It must be served in handwritten form on the premises before leaving.
    - The period set for an improvement notice is 60 days, when a condition is so unsafe that the inspector is of the opinion that 60 days is excessive; he may consider issuing a prohibition notice only as it relates to the applicable section – “immediate danger”.
• Inspectors must only accept written request for an extension of time/period and it must indicate the consultation with health and safety committee or representatives or employees concern.

• Whenever a condition is so unsafe that the inspector is of the opinion that an immediate danger exist he or she must serve a **prohibition notice instead of an improvement notice** on the employer or the user of plant or machinery.

3 **Contravention notices**

• In terms of Section 30 (3), an inspector must serve a contravention notice when the employer or user of plant or machinery does not comply with a specific provision of a regulation or section.

• The inspector must recommend prosecution if the employer or user fails to comply with the provisions of a contravention notice after a period as specified on the notice has expired, as this is an offence in terms of Section 38 (1)(b).

• An employer or user of plant or machinery may, in terms of Section 35, lodge an appeal against the decision of an inspector as set out in the contravention notice.

• The provisions of a contravention notice are temporarily suspended as soon as an appeal is lodged in terms of Section 35. If the appeal does not succeed, the provision of the contravention notice again become operative as from the date on which the decision on the appeal was given.

• When serving a contravention notice:
  • The inspector must specify the nature of the non-compliance and prescribed steps required to be taken in order to comply with the regulation.
  • The inspector must specify the period within which the action specified in the notice must take place, the period is laid down by the chief inspector to be 60 days, however the inspector may at his discretion extend this period.
  • Inspectors must summarily serve notices on the employer or user. In cases of doubt regarding the threat, the inspector should rather consult the head of his/her office before serving such notice.
  • Inspectors must ensure that notices are handwritten on the premises.
• Inspectors must only accept written request for an extension of time/period and it must indicate the consultation with health and safety committee or representatives or employees concern.

• The period set for a contravention notice is 60 days, when a condition is so unsafe that the inspector is of the opinion that 60 days is excessive, he may consider issuing a prohibition notice.

• The three types of notices are printed on a standard form. These forms must be used and under no circumstances must notices be served by way of letters.

• Notices may not be posted.

• A reminder notice (in a case of a contravention and an improvement notice) must be sent to the employer or user of machinery concerned, 60 days after the date appearing on an improvement or contravention notice, unless the employer or user of machinery has indicated in writing that he or she has complied with the requirements of the notice or if he or she applied for an extension.

• Whenever a follow-up inspection is undertaken to determine whether notices have been complied with, with a view to the possible institution of a prosecution, no notice of such inspection must be given.

**B CONTRAVENCTION OF SECTIONS OF THE ACT:**

The Act obliges an inspector to recommend prosecution when a contravention of a provision of the Act comes to his notice, but for practical purposes the Department may adopt a more lenient approach.

The following three provisions of the Act, must without exception receive the special attention of inspectors during routine and follow-up inspections:

1. **Section 17 and 19 (Health and Safety Representatives and Committees)**

   The designation of health and safety representatives and the establishment of health and
safety committees is one of the most important provisions in the Act and are aimed at co-regulation as far as occupational health and safety is concerned. Prosecution for a contravention of this clause must be instituted immediately.

2. **Section 24: Reporting of Incidents**

Reporting of incidents go hand in hand with the principle that an employee is entitled to the protection of the Act. Where his/her health and safety is prejudiced through an incident, contraventions of this provision of the Act must not be overlooked.

A prosecution for contravening this provision of the Act, read with regulation of the General Administrative Regulation 8, must accordingly be recommended in all cases, which come to notice.

3. **Section 38: Offences and Penalties**

This section lays down which offences or acts are punishable. All these offences or wrongful acts are important, but for the purpose of this directive, special attention must be given to actions as set out in Section 38 (1) (n), (o) & (p) and relating to the willful conduct by a person and Section 38 (2) which deals particularly with negligence by an employer.

Where a person is affected by an incident to such an extent that the incident becomes reportable in terms of Section 24 and the incident can be ascribed to an action referred to in the above-mentioned sections, a prosecution must be recommended.

**SPECIAL POWERS OF INSPECTOR, BARRICADE/RAMBO KITS AND LOCK-OUT SYSTEMS.**
*(Read with C.I. Directive 008)*

- During an inspection of machinery or premises, an inspector may issue a prohibition notice in respect of unsafe machinery or an unsafe process if he deems it necessary in terms of Section 30(1) (a) and (b).
• If the inspector wishes to enforce the prohibition notice as per section 30(2), he may resort to the following measures to ensure the safety of persons.

• The defective machine or an unsafe process must be barricaded by the use of the hazard tape and by one or more of the following:
  • Display a warning sign at the machine or the process.
  • Electrically lock-out by means of a mechanical lock-out clamp.

• A photograph should be taken to indicate the contravention or danger and the warning sign, tape, etc. put in place to enforce the prohibition notice.

• The prohibition notice must be revoked by an inspector and the barricades and any similar devices and the like must immediately be removed once the conditions of the prohibition notice have been complied with.

• A prosecution should be recommended every time it is found that a prohibition notice was ignored.

• Prosecution must be recommended in the following instances:
  • Person(s) who have interfered with or removed any blocking, barring, barricade or fence (refer to Section 30(2)); or
  • Where it can be proved beyond reasonable doubt that the blocking or barring methods used by the inspector were damaged by person(s).

• Replacement articles such as hazard tape, warning signs etc. used for barricading and lock-out must be obtained from the Provincial Executive Manager.

**PROCEDURE WHEN RECOMMENDING PROSECUTION**

(Read with C.I Directive 009)

• There are two types of prosecutions:
  • Prosecutions ex-inspection
    A prosecution resulting from contraventions of the Act and/or Regulations noted during audits, inspections;

  • Prosecutions ex-inquiry
    A prosecution resulting from an investigation of incidents
The following procedures must be followed when recommending prosecution:

- **PROSECUTION EX-INSPECTION**

  - Before drawing up an affidavit recommending a prosecution, the inspector concerned should first ensure that:
    - There is a section or regulation covering the contravention;
    - The contravention is an offence in terms of the Act;
    - There is a penalty attached to the contravention; and
    - The affidavit contains and clearly identifies all the elements of the offence (See Pro-forma 1A and 1B).
  - The affidavit is then submitted to the inspector in charge or supervisor who after having satisfied himself or herself that the format and contents of the affidavit are correct, issues instructions to the inspector to:
    - Enter the particulars of the proposed prosecution in the IT System and where there is no IT system, enter the particulars in prosecution register (See pro-forma 2);
    - Forward a letter to the registrar of companies (each province to obtain access to database from CIPRO for easy access to information), in the case of an employer being a registered company, requesting the names and addresses of the directors of the company (See pro-forma 3); and
    - In the case of an employer being a private person or partnership, the I.D. number, name and address must be obtained in a sworn declaration.
  - After the information requested in paragraph 2.2; 2.1.1 and 2.2.2 has been received, the inspector must:
    - Make the necessary entries in the IT System or prosecution register;
    - Draft a letter, on behalf of the Provincial Executive Manager to the Senior Public Prosecutor (See Pro-forma 4);
    - Draw up an Annexure to the charge sheet (See Pro-forma 5)
      - The drawing up of charge sheet is the function of the Senior Public Prosecutor, but to expedite legal proceedings it is recommended that inspectors perform these functions where required.
    - Draw up the charge sheet (See Pro-forma 6)
    - Make copies of all relevant documents pertaining to the case. These documents must all be certified as being true copies of the original.
• Forward the file through the supervisor, for submission to the Senior Public Prosecutor.
• As soon as the hearing date has been made known, the inspector in charge or supervisor must ensure that the date is noted in the IT System or the prosecution register
• If there is no need for an inspector to give evidence, pend the file for a date 30 days after the date of hearing in expectation of receiving a verdict; and
• If the inspector is to give evidence, refer the file to the inspector concerned
• The inspector, who is to give evidence, must make arrangements with the prosecutor handling the case, to discuss the charges before the date of the hearing.
• Inspectors **must not take the original file to court** but must make copies of the relevant documentation.
• As soon as the verdict has been made known, the supervisor must ensure that the particulars are entered into the IT system or prosecution register.

**PROSECUTIONS EX-INQUIRY:**

• The investigating inspector must submit his report, consisting of all evidence and confidential summary to the supervisor who in turn after he or she has satisfied himself or herself as to the correctness of the format and the content of the document ensure that:
• The particulars of the proposed prosecutions are entered in the IT System or prosecution register;
• The required number of copies of the inspector’s report together with a covering letter signed by the supervisor are sent to the Director Public Prosecution (DPP);
• A copy to the chief inspector (C.I) is dispatched at the end of each month together with all other incident reports;
• Record the date of hearing in IT System or prosecution register, as soon as it has been made known; and
• Act further in accordance with paragraph 2.4.2-2.7.
• The verdict must be forwarded to the chief inspector as soon as it is received.

• The wording of pro-formas and of all relevant documents **attached hereto serve only as examples** and the supervisor in charge of the office, may amend these documents in accordance with local practice.

Copies of documentation must be certified as true copies of the originals.
15 ENFORCING COMPENSATION FOR OCCUPATIONAL INJURIES AND DISEASES ACT, 1993 (ACT NO. 103 OF 1993) (AS AMENDED)

15.1 PREAMBLE

The Department of Labour as a custodian of the Compensation for Occupational and Diseases Act, 1993 (Act No. 130 of 1993) as amended (“COIDA”) seeks to provide clear and consistent guidelines to its officials responsible for enforcement of COIDA whilst empowering them to ensure that they enforce COIDA. Further to ensure compliance with the requirements of COIDA.

15.2 PRINCIPLES

The Department of Labour will strive to improve compliance of COIDA by adhering to the following principles:

2.1 Developing and improving programs and procedures to ensure compliance with the applicable laws and regulations.

2.2 Ensuring that officials are properly trained and provided with the appropriate resources.

2.3 Encourage and ensure that the employers, employees and medical health providers comply with COIDA and its policies.

2.4 Take appropriate action to correct non-compliance with COIDA.

2.5 Ensuring that the defaulting employers are making their contribution to the fund.

15.3 MANDATES

3.1 Basic Conditions of Employment Act, 1997 (Act No. 75 of 1997) as amended

3.2 Compensation for Occupational Injuries and Diseases Act, 1993 (Act No. 130 of 1993) as amended

3.3 Circular instruction No. 61 of COIDA

3.4 National Archives of South Africa Act, 1996 (Act No. 43 of 1996)

3.5 Occupational Health and Safety Act, 1993 (Act No. 85 of 1993) and applicable regulations

3.6 Promotion of Access to Information Act, 2000 (Act No.2 of 2000)

3.7 Promotion of Administration Justice Act, 2000 (Act No.3 of 2000)

3.8 Public Finance Management Act, 1999 (Act No. 1 of 1999)

3.9 Public Service Act, 1994 (Act. No. 38 of 1994) as amended
3.10 Recognition of Customary Marriage Act, 1998 (Act No. 120 of 1998)

15.4 DOCUMENTS

4.1 Relevant prescribed forms in terms of COIDA
4.2 Inspectors report
4.3 Covering letter
4.4 Subpoena (W.G.28)
4.5 Inspectors affidavit (W.C.L 41)
4.6 Employees affidavit (W.C.L 3 for injury case or W.C.L 14 for occupational diseases.
4.7 Notice of accident forms (WCL 1 or 2)
4.8 Statements
4.9 Medical report
4.10 Registration of the Employer
4.11 Return of earnings

15.5 OBJECTIVES

5.1 To ensure consistency and uniformity in application of enforcement policy.
5.2 To take all necessary measures to ensure that the requirements in terms of the COIDA are complied with by the employees, employers and medical health providers.
5.3 To take appropriate action against defaulting employers.
5.4 To ensure development and uniformity in application of enforcement tools.
15.6 DISCUSSION

15.6.1 RESPONSIBILITIES OF EMPLOYER

Every employer must provide and maintain as far as reasonably practical a working environment that is safe and without risk to health of his employees as contemplated in Occupational Health and Safety Act, 1993.

Other responsibilities are as following:-

6.1.1 To register the business in a prescribed manner and furnish the Commissioner with the particulars.

6.1.2 To keep records of the earnings and any other prescribed records

6.1.3 To furnish the returns of earnings in a prescribed form.

6.1.4 Report an accident within seven (7) days and 14 days for occupational disease in terms of COIDA and Section 24 Occupational Health and Safety Act, 1993.

6.1.5 To pay assessment to the Commissioner.

15.6.2 RESPONSIBILITIES OF EMPLOYEES

6.2.1 To take reasonable care for the health and safety of him/herself and of any other persons who may be affected by his/her omissions.

6.2.2 Report an accident to the employer or any authorised person by the employer and to his/her health and safety representative.

6.2.3 Notify the employer of occupational disease contracted.

6.2.3 The employee has the responsibility to provide his/her information or documentation
15.6.3 RESPONSIBILITIES OF MEDICAL HEALTH PROVIDER

Medical Health Practitioner shall report to both Commissioner and Chief Inspector within a prescribed period in a prescribed manner.

15.6.4 POWERS AND APPOINTMENT OF INSPECTORS

Section 7(1) of COIDA provides that “The Director-General may authorize any assessor, any officer or employee referred to in section 1 of the Public Service Act, 1984 (Act NO. 111 of 1984) as amended. An authorized person may:-

6.4.1 Without previous notice, at all reasonable times enter any premises, and take an interpreter or other assistant or a police officer with him onto the premises.

6.4.2 While he is on premises, or at any time thereafter, question any person.

6.4.3 Order any person who has control over or custody of any book, document to produce forthwith to him relating to the business at such time and place determined by him.

6.4.4 Seize any book, document or thing which in his opinion may serve as evidence in any matter in terms of this Act.

6.4.5 Any person who hinders or obstructs an authorized person in the performance of his functions shall be guilty of an offence.

15.6.5 UNREPORTED ACCIDENTS / OCCUPATIONAL DISEASES

In terms of Section 39 (1) of COIDA the employer has a responsibility to report to the commissioner in the prescribed manner within seven days after having received notice of an accident or having learned in some way that an employee has met with an accident. When an employer fails to report accident/ occupational disease in line with Section 39 (1) of COIDA that becomes an unreported accident.
15.6.7. ROLE OF INSPECTORS IN INVESTIGATING UNREPORTED ACCIDENTS

Case is referred to IES for allocation to inspectors.

6.6.1 The inspector will have to verify information on IT system / any other source whether the employer complies with all legal requirements including but not limited to reporting of accidents.

6.6.2 To prepare a toolkit including comprehensive COIDA checklist.

6.6.3 To conduct a comprehensive inspection.

6.6.4 To provide the employer with notice of accident forms (WCL 1 or 2).

6.6.5 To compile a report with recommendations that highlight non compliance that recommends prosecution in the criminal court.

6.6.6 Also make recommendations to compensation fund for imposing fine in terms of section 39(8) of COIDA in line with Instruction 61 as amended.

6.6.7 There must be five copies of recommendations prepared. The said copies must be for the following offices:
   (a) Business Unit Manager: Inspection and Enforcement Services;
   (b) Business Unit Manager: Beneficiary Services;
   (c) Senior Public Prosecutor; and
   (d) Chief Inspector
15.7 PROSECUTION

The following process should precede the prosecution of employer

6.7.1 Subpoena- Where an appointment could not be secured with an employer after two visits, a subpoena (WG. 28) will be issued.

6.7.2 Anyone who has been subpoenaed must be allowed at least 14 days to appear including the date of summons and the date of appearance.

6.7.3 Where an inspector happens to visit an employer or anyone who must comply with the provisions of COIDA, the inspector must get an affidavit from that person to comply within 14 days.

6.7.4 Such documentation should be referred to the prosecutor by the Provincial Office/Labour Centre since the final decision in respect of prosecution is taken by the prosecutor.

15.8 OFFENCES

The contravention of the following sections of COIDA will constitute an offence:- Sections 7 (5), 37, 7.3, 39 (6),40 (4),47 (3)(c),64(1),68(3),72(3), 77(1), 80(6), 81(3), 82(6), 87(3), 96(2) and 98.

15.9 PENALTIES

In terms of section 99 of COIDA any person who is convicted of an offence shall be liable of a fine, or to imprisonment for a period not exceeding one year.
16. PRINCIPLES AND PRACTICE OF LABOUR INSPECTION:

(i) INTRODUCTION

It does happen that when Labour Inspectors join the Department training is not available on a systematic basis within labour inspectorate. There may not be systematic induction, refresher or specialized training, no comprehensive training on modern labour inspection practises, such as work planning, setting priorities, inspection methods, prevention techniques, on discipline and order, or ethical behaviour. New recruits are usually merely put under the guidance of a senior colleague. Such guidance is able to assist to a greater extent but it is difficult for it to succeed without proper training and terms of reference.

This manual is meant to serve as that “Term of Reference“. It sets out the principles and practice of integrated labour inspection in line with International Labour Standards and best practice in high –performance market economy countries like South Africa.

16.1 PRINCIPLES OF LABOUR INSPECTION

The Inspection and Enforcement Services: Business Unit has adopted a set of principles that have specific set of principles that have relevance with regard to ensuring compliance through advocacy (structured advice, information and education) and enforcement (warnings, instructions, notices and prosecution). They include:

- Compliance with labour standards and labour laws is not an imposition on employers, but a contribution to quality, efficiency, health and safety of both employees and customers.

- High quality products and services for successful completion in national and international markets can’t be produced with low quality production methods, poor working conditions and an unhealthy and unsafe working environment.

- Good labour practices, and safe working environments, no discrimination and employment equity means good business.

- We should maximize compliance by consolidating a culture of prevention. It is preferable to prevent non-compliance with the law than have to deal with non-compliance after it has happened. Therefore we are available to give information, advice and provide education to workers and employers.

- We should focus on what Government and the Department of Labour is good at doing and co-operate with others, form partnership and outsource things which we are not good at doing.
• All social partners should be responsible for monitoring of compliance. If social partners were to do this, the role of the Department could be more focused on ensuring compliance, especially in the smaller enterprises.

• We treat employers and employees equally. When visiting workplaces we will engage both representatives of management workers.

• We observe the Bill of Rights in the Constitution.

16.2. A CODE OF ETHICAL BEHAVIOUR

A code of professional ethics represents a means of establishing clear and ethical parameters for regulating the behavior of employees within a certain profession. Honesty, justice and courtesy form the moral basis, which, along with a mutual interest within the profession, constitutes the foundation of ethics. As the links between professional attitude and ethical behaviour are strong, it is impossible to have any profession without ethics, nor ethics without professionalism.

In an attempt to promote the notion of “putting people first” and to provide a framework for the transformation of public service delivery, government introduced the concept of Batho Pele, people first and the eight principles of Batho Pele principles are:

• **Consultation:** Citizens should be consulted about the level and quality of the public services they receive and, wherever possible, should be given a choice about the services that are offered.

• **Service Standards:** Citizens should be told what level and quality of public service they will receive so that they are aware of what to expect.

• **Courtesy:** Citizens should be treated with courtesy and consideration.

• **Information:** Citizens should be given full, accurate information about the public services they are entitled to receive.

• **Openness and Transparency:** Citizens should be told how national and provincial governments are run, how much they cost and who is in charge.

• **Redress:** If the promised standard of service is not delivered, citizens should be offered an apology, a full explanation and a speedy and effective remedy; and when complaints are made, citizens should receive a sympathetic, positive.

• **Value for Money:** Public services should be provided economically and efficiently in order to give citizens the best possible value for money.

Professionals, including labour inspectors, should recognize such a Code of ethical behaviour not in passive observance but as a set of dynamic principles guiding their conduct. It is their duty to practice their profession in accordance with such a Code of ethics. As the keystone of professional conduct is integrity, inspectors should discharge their duties with impartiality and fairness. It is their duty to interest themselves in the welfare of vulnerable citizens (the workers) and enterprises and be prepared to apply their specialist knowledge for the benefit of all.
Provisions of a Code of Ethical Behaviour for labour inspectors, as a general principle of appropriate professional conduct, will contribute to the improvement of socio-economic development through overcoming difficulties and finding solutions in conflict situations and disputes and through inspecting enterprises with the aim of improvements. They would also go some way to promoting anti-corruption behaviour. Existing codes are rather general and they do not give many elements for relevant anti-corruption measures to apply. A model Code of Ethical Behaviour therefore follows – for labour inspectorates to consider for use or adaptation to their own national circumstances. But the successful fight against corruption cannot be led only through such a set of firm institutional frameworks if they go against the interests of the profession. It is important, above all, to engage and mobilize all the members of the profession in the fight against corruption within the profession. A Code of Ethical Behaviour, therefore, has to be accompanied by mechanisms, such as those outlined above, for identification and sanctioning of corruptive behaviour of members of a profession, including that of labour inspection.

16.3 GUIDING PRINCIPLES OF ETHICAL BEHAVIOUR FOR LABOUR INSPECTORS

As a member of the Labour Inspection Service and of my profession, I recognize the following principles on which ethical behaviour is based and I accept to follow and promote them in my work as a labour inspector.

(i) Guiding principles:

1. I shall perform my work to the highest professional standards and ethical principles at all times.

2. I shall perform all professional tasks in accordance with the law and international standards that the state has ratified, and with the rules and values of the inspection services.

3. I shall always act in good faith towards employers and serve the right to decent working conditions, safety and health and well-being of workers individually and collectively.

4. I shall enjoy full professional independence in the execution of my duties. To this end I have acquired and will strive to maintain the competences necessary for continuing improvement of my work and to meet any challenges the profession of labour inspection may bring.

(ii) Duties and obligations:

5. I shall be guided in my duties by the requirements set down in the labour inspection enforcement policy.

5.2 shall enforce all regulations objectively, that is in a consistent, fair, equitable and transparent manner, without regard to the national or ethnic origin, race, gender, language, political or religious beliefs or social position of the person to which the law is applied.
5. 3 shall recognize and abide by the basic aim of good inspection practice that is to promote the establishment and maintenance of a decent, productive, safe and healthy working environment. Labour inspection is essentially preventive and should therefore help the enterprise in ensuring good working conditions which prevent impairments arising out of employment. A clear priority shall be given to high risk enterprises and vulnerable groups of workers.

5. 4 shall recognize and attempt to reconcile potentially conflicting collective and individual rights and needs (such as the right to protection of employment and the right to protection of health, the right to information and the right to confidentiality) with responsibility for improvements in working conditions and safety and health at the workplace.

5. 5 shall make decisions independently and objectively, in keeping with my knowledge and personal experience. Whenever needed, I shall consult with colleagues and other professionals who have the appropriate knowledge of the issues in question.

(iii) Principles of ethical behaviour:

10. I shall oppose any act of attempted corruption.

11. I shall always perform my duties as a disinterested third party. I shall not use the inspection process to accept nor make available commissions, services, allowances, goods or other favours directly or indirectly.

12. I shall not engage in activities that are incompatible with my official job description and the provisions of this Code and which could lead to the violation of the reputation of the inspection services I work for and of my profession.

13. I shall make a full disclosure of any financial or personal interests I may have in my activities as a labour inspector in regard to a particular inspection and which could be legitimately interpreted as a conflict of interest by clients, officials, the public or colleagues.

14. I shall use all material resources rationally, for the best interest of the public, for the purpose of my work and the inspection services I work for. I shall not use them for the realization of my own personal interests and gain.

15. I shall not use my knowledge, position or influence to cause any damage to the public interest, the inspection services, my profession, colleagues or clients.

16. I shall not disclose any industrial or commercial secrets or data I collect during inspection visits or information given in confidence during such visits, without prior approval of the client and persons involved. However, should the concealment of any such information endanger the life and health of workers or the community, I shall be obliged to disclose it, whilst protecting confidentiality as far as possible.

17. I shall refrain from taking part in any group of colleagues or members of my profession who would further their own personal interests, or who would violate the provisions of this Code, against the interests of the inspection services, and whereby the rights and
interests of the public would be undermined, or the reputation of my profession be put at risk.

18. I shall disclose any such act to a higher level official, whose responsibility it is to take appropriate action, or to the relevant institution that monitors the application of these rules. I understand that should I do so in good faith I am protected against reprisals or sanctions.

19. I shall disclose any act of attempted corruption on the part of clients to the other employees of the inspection services, and to the relevant institution that monitors the application of these rules.

20. I shall, if so requested, give to the relevant institution all the data and information I possess on the concrete cases of corruption that I have disclosed.

(iv) Furthering the institution of labour inspection:

21. I shall at all times be aware of the fact that I represent a profession which has a public image of trust, honesty and courtesy to build and maintain. I will, by my attitudes and behaviour, set an example to colleagues and the public in this respect.

22. I shall always emphasize professional values at my place of work, work closely with my colleagues for the purpose of better understanding and cooperation, for the benefit of the inspection services, and for the clients we work with and for.

23. I shall strive to be an active member of the inspection services, making proposals where appropriate and participating in activities that are aimed at improvement of performance of the institution.

24. I shall try, personally and with my colleagues and through the work of our professional association, to transfer my experience, knowledge and ideas for the purpose of their application in practice and for the benefit of all.

25. I shall advance in my profession through the acquisition and adoption of new skills and knowledge, and I shall seek promotion only on the basis of my skills and knowledge.

26. I shall do my best to promote objective criteria for the recruitment of new employees, for the evaluation of work performance, and for decisions related to promotion or demotion of employees.

27. I shall actively seek the support of employers, workers and their organizations and other relevant organizations for implementing the highest standards of ethics in the labour inspection services and the profession.

The three components of the IES Client Service, namely Help Desk, Front Line and Back-up Support the “first port of call” for both walk-in clients as well as telephonic inquiries. Because first impressions are lasting impressions, IES officials stationed at this section should:

- Have a basic knowledge of all employment laws;
- Adhere to the dress code;
- Adhere to the Batho Pele principles of the State
• Be well-mannered and articulate;
• Maintain excellent telephone etiquette;
• Be prompt in answering incoming calls;
• Be at their station timeously and for the entire duration of their stint;
• Be civil, friendly and approachable;
• Be responsible for their actions;
• Maintain a neutral, unbiased and equitable position on issues;
• Be able to easily get to the core of the problem and be mindful of issues that are interlinked;
• Be able to identify priority matters, such as fatal accidents, UI benefits, threatened work stoppages, strikes etc.
• Maintain confidentiality;
• Recluse themselves from cases in which they have personal, financial or similar interests.

(v) Labour Inspectors

Inspectors are expected to perform certain tasks. Supervisors are expected to monitor performance, do quality checks and so on. Labour Centre heads are responsible to ensure that the systems are in place and resources are available.

• Labour Inspectors should:
• Adhere to the dress code;
• Maintain confidentiality;
• Recluse themselves from cases in which they have personal, financial or similar interests;
• Wear protective clothing when conducting inspections;
• Adhere to the Batho Pele principles of the State
• Be well-mannered and articulate;
• Be responsible for their actions;
• Be neutral, fair, flexible and unbiased during investigation but resolute when reaching a decision on a specific case;
• Said decision should be based solely on the applicable legislation;
• The inspector should be resolute and steadfast after he/she has taken a decision which is deemed to be correct in terms of the applicable legislation;
• The inspector should be able to defend his/her decision in a court of law.

During inspections the following guidelines should be observed:

a) Although the legislation allows for unannounced visits, it is the Department of Labour’s general procedure that the employer should be contacted telephonically to make an appointment and confirm the business/residential address of employer. The inspector may go unannounced if it is the only way to achieve successful compliance. When entering a business premises unannounced the inspector should immediately notify the employer or an authorized person of his/her presence;

b) Where possible, a written confirmation to the employer and shop steward at the enterprise indicating the date of the visit should be sent;

c) The inspector should not reveal any secret processes and information which may harm the employer’s competitive situation;
d) The inspector should also maintain confidentiality concerning the source of complaints against the employer;

e) Labour inspection identity cards should be produced upon request;

f) The responsible person representing the employer and the shop steward should be contacted on arrival;

h) The inspection should include meetings with the shop steward(s) and relevant representative of the employer e.g. human resources or industrial relations manager;

i) In instances where no shop stewards are present, at least two employees should be interviewed during the visit. This will depend on the size and diversity of the activities that are conducted at the workplace;

In all cases an opportunity must be provided to speak to employees and/or the shop steward without the employer or their representative being present.

In order to convey a professional and business-like image of the Department of Labour. IES officials should be dressed presentably when executing their official tasks.