

BASIC CONDITIONS OF EMPLOYMENT AMENDMENT BILL, 2012

[Words in bold type indicate omissions from existing enactments]

Words underlined indicate insertions in existing enactments

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

To amend the **Basic Conditions of Employment Act, 1997 (Act 75 of 1997)** to prohibit employers requiring employees to make payments to secure employment and requiring employees to purchase goods, services or products in certain circumstances, to extend the prohibition on work by children to children engaged to work as independent contractors; to adjust the powers of the Minister of Labour in respect of making sectoral determinations; to revise and streamline the system for enforcement by labour inspectors; to increase the penalties that can be imposed for offences involving child labour or forced labour; to adjust that maximum fines that can be imposed for breaches of the Act not involving underpayments.

Amendment of section 1 of Act 75 of 1997

1 The Basic Conditions of Employment Act, 1997 (Act No 75 of 1997) (hereafter 'the Principal Act') is hereby amended by the substitution:

(a) For the definition of 'sector' of the following definition –

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

(b) For the definition of 'serve' of the following definition –

“**serve**’ means to send by registered post, telegram, [telex] electronic mail, telefax or deliver by hand or any prescribed method of service;”.

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Insertion of section 33A in Act 75 of 1997

2 The Principal Act is hereby amended by the insertion after section 33 of the following section –

“(33A) Prohibited conduct

(1) An employer may not –

(a) require or accept any payment by or on behalf of an employee in respect of the employment of, or the allocation of work to, any employee;

(b) require an employee to purchase any goods, products or services from the employer or from any business or person nominated by the employer.

(2) Subsection (1)(b) does not preclude a provision in a contract of employment or collective agreement in terms of which an employee is required to participate in a scheme involving the purchase of specific goods, products or services, if –

(a) the employee receives a financial benefit from participating in the scheme;

(b) the price of any goods, products or services provided through the scheme is fair and reasonable; and

(c) the purchase is not prohibited by any other statute.”

Amendment of section 43 of Act 75 of 1997

3 The Principal Act is hereby amended by the substitution for section 43 of the following section –

“43 Prohibition of [employment of] work by children

(1) No person may [employ] require or permit a child to work, whether as an employee or as an independent contractor, if the child –

(a) [who] is under 15 years of age; or

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(b) **[who]** is under the minimum school-leaving age in terms of any law, if this is 15 or older.

(2) No person may **[employ]** require or permit a child **[in employment]** to perform any work or provide any services –

(a) that **[is]** are inappropriate for a person of that age;

(b) that place**[s]** at risk the child's well-being, education, physical or mental health, or spiritual, moral or social development.

(3) A person who **[employs]** requires or permits a child to work in contravention of subsection (1) or (2) commits an offence.”

Amendment of section 44 of Act 75 of 1997

4 The Principal Act is hereby amended by the substitution for section 44 of the following section –

“44 [Employment of] Regulations on work by children [of 15 years or older]

(1) Subject to section 43(2), the Minister may, on the advice of the commission, make regulations to prohibit or place conditions on **[the employment of] work by** children who are at least 15 years of age and no longer subject to compulsory schooling in terms of any law.

(1A) The Minister may, on the advice of the Commission, make regulations to give effect to South Africa's international law obligations dealing with work by children.

(2) A person who **[employs]** requires or permits a child to work in contravention of any regulation made in terms of this [sub]section [(1)] commits an offence.”

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Amendment of section 45 of Act 75 of 1997

5 The Principal Act is hereby amended by the substitution for section 45 of the following section –

“45 Medical Examinations

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

Amendment of section 46 of Act 75 of 1997

6 The Principal Act is hereby amended by the substitution for section 46 of the following section –

“46 Prohibitions

It is an offence to –

- (a) assist **[an employer to employ]** any person to require or permit a child to work in contravention of this Act; or
- (b) discriminate against a person who refuses to permit a child to **[be employed]** work in contravention of this Act.”

Amendment of section 47 of Act 75 of 1997

7 The Principal Act is hereby amended by the substitution for section 47 of the following section –

“47 Evidence of age

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

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Amendment of section 55 of Act 75 of 1997

8 Section 55 of the Principal Act is hereby amended by:

(a) The substitution for subsection (1) of the following subsection –

“(1) After considering the report and recommendations of the Commission contemplated in section 54 (4), the Minister may make a sectoral determination for one or more sector and area or as contemplated by subsection (8).”

(b) The substitution for paragraph (b) of subsection (4) of the following paragraph -

“(b) provide for the adjustment of remuneration by way of -

(i) minimum rates; or

(ii) minimum increases of remuneration;”

(c) The substitution for paragraph (g) of subsection (4) of the following paragraph –

“(g) prohibit or regulate task-based work, piecework, home work, sub-contracting and contract work;”

(d) The insertion after paragraph (n) of subsection (4) of the following subsections –

“(o) taking into account the considerations set out in section 21 (8) of the Labour Relations Act, 1995 set a threshold of representativeness within a sector at which a trade union automatically has the organisational rights contemplated in sections 12 and 13 of the Labour Relations Act, 1995 in respect of all workplaces covered by the sectoral determination regardless of their representativeness in any particular workplace.

(p) establish for the purpose of section 4(3) of the Land Reform (Labour Tenants) Act, 1996 (Act No. 3 of 1996), one or more methods for determining the value for labour tenants of a right to occupy or use part of a farm as contemplated in section 3 of that Act.”

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- (e) The substitution for paragraph (b) of subsection (7) of the following paragraph –

“(b) covering employees covered by a collective agreement concluded in a statutory council regulating any matter **[in respect of a sector and area in which a statutory council is established and]** in respect of which that statutory council has concluded a collective agreement;”

- (f) The insertion after subsection (7) of the following subsection –

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

Amendment of section 68 of Act 75 of 1997

- 9 Section 68 of the Principal Act is hereby amended by:

- (a) The substitution for subsection (1) of the following subsection –

“(1) A labour inspector who has reasonable grounds to believe that an employer has not complied with any provision of this Act **[must]** may endeavour to secure a written undertaking by the employer to comply with the provision.”

- (b) The insertion after subsection (2) of the following subsection –

“(3) If an employer fails in full or in part to comply with a written undertaking given by it in terms of this section, the Director-General may apply to the Labour Court for an order in terms of section 73 directing the employer to comply with the undertaking.”

Amendment of section 69 of Act 75 of 1997

- 10 Section 69 of the Principal Act is hereby amended by:

- (a) The deletion of paragraph (d) of subsection (2).

- (b) The insertion after subsection (2) of the following subsection –

“(2A) A compliance order may, in addition, set out –

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- (a) the date by which the employer should serve any representations it may wish to make with the Department and the Labour Court;
- (b) the date on which, if the employer does not comply with the order, application may be made without further notice to the employer to have the compliance order made an order of the Labour court in terms of section 73.”
- (c) The substitution for paragraph (a) of subsection (3) of the following paragraph –
- “(a) A [**labour inspector must serve a**] copy of the compliance order must be served on the employer named in it, and to each employee affected by it or, if this is impractical, a representative of the employees.”
- (d) the substitution for subsection (5) of the following subsection –
- (5) An employer must comply with the compliance order within the time period stated within the order [**unless the employer objects in terms of section 71**].

Amendment of section 70 of Act 75 of 1997

- 11 Section 70 of the Principal Act is hereby amended by the substitution for paragraphs (c) and (d) of the following paragraphs –
- “(c) any proceedings have been instituted for the recovery of that amount [**or, if proceedings have been instituted**], unless those proceedings have been withdrawn; or
- (d) that amount has been payable by the employer to the employee for longer than 12 months before the date on which a complaint was made to a labour inspector by or on behalf of the employee or, if no complaint was made, the date on which a labour inspector first endeavoured to secure a written undertaking by the employer in terms of section 68 or issued a compliance order in terms of section 69.”

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Deletion of sections 71 and 72 of Act 75 of 1997

12 The Principal Act is hereby amended by the deletion of sections 71 and 72.

Amendment of section 73 of Act 75 of 1997

13 Section 73 of the Principal Act is hereby amended by the substitution for subsections (1) and (2) of the following subsections –

“(1) The Director-General may apply to the Labour Court on the date specified in the compliance order in terms of section 69(2A)(b) or, with further notice to the employer, on a subsequent date for a compliance order to be made an order of the Labour Court [**in terms of section 158(1)(c) of the Labour Relations Act, 1995**] if the employer has not complied with the order [**and has not lodged an objection against the order in terms of section 71(1)**].

(2) [**The Director-General may apply to the Labour Court for an order of the Director-General in terms of section 71(3) to be made an order of the Labour Court in terms of section 158(1)(c) of the Labour Relations Act, 1995, if the employer has not complied with the order and has not appealed against the order in terms of section 72(1).**] After considering any representations made to it, the Labour Court may issue an order in terms of subsection (1) requiring –

(a) the employer to comply with any provision of this Act;

(b) subject to section 70(d), the payment of any amount owing to an employee;

(c) the payment of a fine calculated in terms of Schedule 2 of this Act.”

Amendment of section 74 of Act 75 of 1997

14 Section 74 of the Principal Act is hereby amended by the substitution for subsection (2) of the following subsection –

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

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not prescribed. No compliance order may be issued or enforced and no other legal proceedings may be instituted or enforced in respect of any claim that has been determined in terms of this subsection [–

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

Amendment of section 77 of Act 75 of 1997

15 Section 77 of the Principal Act is hereby amended by:

- (a) The substitution for subsection (1) of the following subsection –

“(1) Subject to the Constitution and the jurisdiction of the Labour Appeal Court, and except where this Act provides otherwise, the Labour Court has exclusive jurisdiction in respect of all matters in terms of this Act[, **except in respect of an offence specified in sections 43, 44, 46, 48, 90 and 92.**]”

- (b) The insertion after section 1 of the following subsection –

“(1A) The Labour Court has exclusive jurisdiction to grant civil relief arising from a breach of sections 33A, 43, 44, 46, 48, 90 and 92. “

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Amendment of section 93 of Act 75 of 1997

- 16 Section 93 of the Principal Act is hereby amended by the substitution for the table in the section of the following table -

“OFFENCES AND PENALTIES

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

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Amendment of Schedule 2 of Act 75 of 1997

- 16 The Principal Act is hereby amended by the substitution for Table One of the following table –

“TABLE ONE: MAXIMUM PERMISSIBLE FINE NOT INVOLVING AN UNDERPAYMENT

No previous failure to comply	[R100] <u>R300</u> per employee in respect of whom the failure to comply occurs
A previous failure to comply in respect of the same provision	[R200] <u>R600</u> per employee in respect of whom the failure to comply occurs.
A previous failure to comply within the previous 12 months or two previous failures to comply in respect of the same provision within three years.	[R300] <u>R900</u> per employee in respect of whom the failure to comply occurs
Three previous failures to comply in respect of the same provision within three years	[R400] <u>R1200</u> per employee in respect of whom the failure to comply occurs
Four previous failures to comply in respect of the same provision within three years.	[R500] <u>R1500</u> per employee in respect of whom the failure to comply occurs”