



BASIC CONDITIONS OF EMPLOYMENT

INTRODUCTION

A number of Amendment Bills have been signed into law and published for general interest.

This Newsflash looks at the recent amendments to the [BASIC CONDITIONS OF EMPLOYMENT ACT 75 OF 1997](#), brought about a result of the Basic Conditions of Employment Amendment Act, 20 of 2013, (BCE Amendment Act2013) which the President assented to late in December 2013.

PURPOSE OF THE ACT

The BCE Amendment Act 2013 has amended the Basic Conditions of Employment Act, 1997, in the following respects:

- Definitions have been amended and / or substituted;
- employers are prohibited from requiring employees to make payments to secure employment;
- employers are prohibited from requiring employees to purchase goods, services or products;
- no one may employ a child under the age of 15 years;
- it will now be an offence for anyone to require or permit a child to perform any work or provide any services that place at risk the child's well-being;
- the Minister has the right to publish a sectoral determination for employees and employers who are not covered by any other sectoral determination;
- the Director-General may apply to the Labour Court for an employer to comply with a written undertaking by the employer;
- an Inspector or the Director-General may issue a compliance order; a
- the Labour Court will have exclusive jurisdiction in respect of certain matters; and
- offences have been restated and penalties have been increased twofold.

APPLIES TO

These amendments will apply to all employees and employers in South Africa.

PROHIBITED CONDUCT BY EMPLOYER-

No requirement to pay for employment

A new section 33 A has been inserted which prohibits any employer from requiring or accepting any payment by or on behalf of an employee or potential employee in respect of the employment of, or the allocation of work to, any employee.

May now require any employee to purchase employer's goods and / or services

Section 33 A also prohibits any employer from requiring an employee or potential employee to purchase any goods, products or services from that employer or from any business or person nominated by the employer.

The above prohibition however, does not preclude a provision in a contract of employment or collective agreement in terms of which an employee is required to participate in a scheme involving the purchase of specific goods, products or services, if the purchase is not prohibited by any other statute and the employee

- receives a financial benefit from participating in the scheme; or
- the price of any goods, products, or services provided through the scheme is fair and reasonable.

EMPLOYMENT OF CHILDREN

No employment of children under 15 years of age

A number of amendments have been made to the Act, which concerns the employment of children.

In terms of these amendments,

- a child under 15 years of age, alternatively a child who is under the minimum school-leaving age in terms of any law may **not** be employed or used in an employment environment.
- the **employment of a child over the age of 15 or who is over the minimum school-leaving age in terms of any law may be employed** provided that the person employing that person must ensure that such person is not placed in any employment situation or provides any services which are inappropriate for a person of that age or which place the child's well-being, education, physical or mental health, or spiritual, moral or social development at risk.

Conditions and Regulations

The Minister may, in this regard and on the advice of the Commission, make regulations to prohibit or place conditions on work by children who are at least 15 years of age and who are no longer subject to compulsory schooling in terms of any law. Furthermore, 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; and
- relating to the conduct of medical examinations of children who perform work.

Offence

A person who requires or permits a child to work in contravention of the above provisions commits an offence.

Onus to show child was over age

Where any person is prosecuted for contravening this prohibition, and where the age of any person is a relevant factor for which insufficient evidence is available, and it is alleged that the employee is in fact under age, then in such an event, the onus will be on the employer to show that it believed after investigation, that the person who it has employed, was over the age of 15 or that such person was no longer subject to compulsory schooling in terms of any law.

SECTORAL DETERMINATIONS

Sectoral determinations for one or more sectors

The Act gives the right to make sectoral determinations to the Minister. In this regard, the Minister may after considering the report and recommendations of the Commission make a sectoral determination for one or more sector and area. On the other hand where the Minister does not accept a recommendation of the Commission the Minister must refer the matter to the Commission for its reconsideration indicating the matters on which the Minister disagrees with the Commission. After considering the further report and recommendations of the Commission, the Minister may make a sectoral determination.

Areas covered under a sectoral determination

A sectoral determination may in respect to the sector and area concerned cover or manage the following areas:

- set minimum terms and conditions of employment, including minimum rates of remuneration;
- regulate the manner, timing and other conditions of payment of remuneration;
- prohibit or regulate payment of remuneration in kind;
- require employers to keep employment records;
- require employers to provide records to their employees;
- prohibit or regulate task-based work, piecework, home work, sub-contracting and contract work;
- provide for the adjustment of remuneration by way of— (i) minimum rates or (ii) minimum increases
- set minimum standards for housing and sanitation for employees who reside on their employers' premises;
- regulate payment of traveling and other work-related allowances;
- specify minimum conditions of employment for trainees;
- specify minimum conditions of employment for persons other than employees;
- regulate training and education schemes;
- regulate pension, provident, medical aid, sick pay, holiday and unemployment schemes or funds;
- regulate any other matter concerning remuneration or other terms or conditions of employment;
- taking into account the provisions of section 21(8) of the Labour Relations Act, 1995, set a threshold of representativeness at which a trade union will automatically have the organisational rights contemplated in sections 12 and 13 of the Labour Relations Act, 1995, in respect of all workplaces covered by the sectoral determination; and
- establish one or more methods for determining the conditions of service for labour tenants who has a right to occupy and to use a part of a farm as contemplated in section 3 of the Land Reform (Labour Tenants) Act, 1996 (Act No. 3 of 1996).

Not covered under a sectoral determination

It is important to note that the Minister may not make or publish a sectoral determination, which concerns:-

- the regulation of working time;
- children, or children of 15 years or older, save that a sectorial determination may be made which concerns and covers the the employment of children in the performance of advertising, sports, artistic or cultural activities;
- the protection afforded to employees who work work at night, or who have the right to maternity leave, the basic conditions of employment in section 9, concerning working times in the circumstances where same may be varied by the Minister under 50(2A);
- employees and employers who are bound by a collective agreement concluded at a bargaining council;
- employees covered by a collective agreement concluded in a statutory council regulating any matter in respect of which that statutory council has concluded a collective agreement; and
- any matter regulated by a sectoral determination for a sector and area, which has been in effect for less than 12 months.

Application

Any provisions of a sectoral determination may apply to all or some of the employers and employees in the sector and area concerned.

General application

The recent amendments also allow the Minister to publish a sectoral determination that applies to employers and employees who are not covered by any other sectoral determination.

LABOUR INSPECTORS SECURING AN UNDERTAKING

Labour inspector may obtain an undertaking from employer

An additional provision has been inserted under the Act which allows a labour inspector, who has reasonable grounds to believe that an employer has not complied with any provision of the Act, to obtain a written undertaking from the employer to comply with that provision. This will be done in one of two ways: either by meeting with the employer or a representative of the employer or serving a document, in the prescribed form, on the employer.

Conciliation

In endeavouring to secure the undertaking, the labour inspector may try and encourage the employer and employee to reach some sort of settlement as to any amount owed to the employee in terms of this Act by the employer and in this regard may even arrange for payment to be made by the employer to the employee; and / or may even at the written request of an employee, receive payment on behalf of the employee from the employer; provided the labour inspector issues a receipt for any such payment.

Directive to comply

If an employer fails to comply with this written undertaking then 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.

COMPLIANCE ORDER BY LABOUR INSPECTOR

Compliance order

In addition to the rights of a labour inspector to secure an undertaking, the labour inspector also has the right to issue a compliance order against any employer where such labour inspector has reasonable grounds to believe that an employer has not complied with a provision of the Act.

Details of the order

The compliance order must set out—

- the name of the employer, and the location of every workplace, to which it applies;
- any provision of this Act that the employer has not complied with, and details of the conduct constituting non-compliance;
- any amount that the employer is required to pay to an employee;
- any steps that the employer is required to take including, if necessary, the cessation of the contravention in question and the period within which those steps must be taken; and
- the maximum fine that may be imposed upon the employer in accordance with Schedule Two for a failure to comply with a provision of this Act.

Right to make Representations

The compliance order may also set out the date by which the employer has the right serve any representations it may wish to make with the Department and to the Labour Court.

Final date of compliance

The compliance order may also disclose the date on which an application will be made by the Labour Inspector to have the compliance order made an order of the Labour Court in terms of section 73, should the employer choose not comply with the order.

Served on employer

A copy of the compliance order must be served on the employer named in it, and on each employee affected by it or, if this is impractical, on a representative of the employees. The failure to serve a copy of a compliance order on any employee or any representative of employees does not invalidate the order.

Order to be displayed in the workplace

The employer must display a copy of the compliance order prominently at a place accessible to the affected employees at each workplace named in it.

May not issue a compliance order under the following conditions

It is however important to note that a labour inspector may not issue a compliance order in respect of any amount payable to an employee as a result of a failure to comply with a provision of this Act if—

- the employee is covered by a collective agreement that provides for resolution by arbitration of disputes concerning amounts owing in terms of this Act;
- the employee is a senior managerial employee; or an employee engaged as sales staff who travel to the premises of customers and who regulate their own hours of work; or employees who work less than 24 hours a month for an employer;
- a notice has been issued in terms of section 6 (3) in terms of which the Minister on the advice of the Commission, has made a determination that excludes the application of the Act or any provision of it to any category of employees earning in excess of an amount stated in that determination;
- any proceedings have been instituted for the recovery of that amount unless those proceedings have been withdrawn; or
- 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.

Comply within time stated

An employer must comply with the compliance order within the time period stated in the order, failing which the compliance order will be made an order of the Labour Court in terms of section 73. Where the order is not complied with, the Director-General may apply to the Labour Court on the date specified in the compliance order or, with further notice to the employer, on a subsequent date, for the compliance order to be made an order of the Labour Court .

Order of Labour Court

After considering any representations made to it, the Labour Court may issue an order requiring—

- the employer to comply with the provisions of this Act;
- the employer to make payment of any amount owing to an employee; or
- the employer to make payment of a fine calculated in terms of Schedule 2 of the Act.

No right to object to or appeal a compliance order

Sections 71 and 72 of the Act have been repealed, taking away an employers' right to

- object to a compliance order; or
- lodge an appeal to the Labour Court,

in respect of a compliance order, which has been served on it.

LABOUR COURTS AND DISPUTES

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. This however does not prevent any person relying upon a provision of this Act to establish that a basic condition of employment constitutes a term of a contract of employment in any proceedings in a civil court or an arbitration held in terms of an agreement.

Where any proceedings concerning any such matter are instituted in a court that does not have jurisdiction in respect of that matter, that court may at any stage during proceedings refer that matter to the Labour Court.

The Labour Court has exclusive jurisdiction to grant civil relief arising from a breach of those sections concerning

- the employment of children;
- confidentiality; and
- obstruction of justice.

The Labour Court may review the performance or purported performance of any function provided for in this Act or any act or omission of any person in terms of this Act on any grounds that are permissible in law.

The Labour Court has concurrent jurisdiction with the civil courts to hear and determine any matter concerning a contract of employment, irrespective of whether any basic condition of employment constitutes a term of that contract.

Any dispute concerning a contravention of this Act may be instituted jointly with proceedings instituted by an employee including a dispute concerning any amount that is owing to an employee as a result of the employer contravening this Act.

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 and following this no other compliance order may be issued or enforced and no other legal proceedings may be instituted or enforced in respect of the same claim.

PENALTIES AND FINES

Penalties in the case of an infringement of the Act have doubled, as indicated in the table below.

"OFFENCES AND PENALTIES

<i>Section under which convicted</i>	<i>Maximum term of imprisonment</i>
Section 33A- prohibited acts	3 years
Section 43- employment of children	<u>6</u> years
Section 44- employment of children over 15	<u>6</u> years
Section 46- prohibitions	<u>6</u> years
Section 48- breach of confidentiality	<u>6</u> years
Section 90(1) and (3)	1 year
Section 92- obstruction	1 year

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

THE COMPLIANCE COMPANY THAT'S "ON LINE ALL THE TIME"