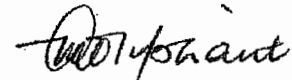

GENERAL NOTICE

NOTICE 1112 OF 2010**DEPARTMENT OF LABOUR****LABOUR RELATIONS AMENDMENT BILL, 2010****BASIC CONDITIONS OF EMPLOYMENT AMENDMENT BILL, 2010****EMPLOYMENT EQUITY AMENDMENT BILL, 2010****EMPLOYMENT SERVICES BILL, 2010**

1. I, **NELISIWE MILDRED OLIPHANT**, Minister of Labour, hereby publish proposed amendments to the Labour Relations Act, 1995, the Basic Conditions of Employment Act, 1997, the Employment Equity Act, 1998 and an Employment Services Bill, 2010, for general information and comment.
2. I will also be tabling these bills at NEDLAC for consideration.
3. Submission of representations:
 - a. All interested parties are invited to submit written comments on the draft bills.
 - b. Such comments should be addressed to: **Mr. Thembinkosi Mkalipi**, Department of Labour, Private Bag X117, Pretoria, 0001, or faxed to 012 309 4156 or e-mailed to Thembinkosi.Mkalipi@labour.gov.za or Maria.Briedenhann@labour.gov.za
 - c. Comments should reach the Department of Labour not later than 17 February 2011.



N M OLIPHANT, MP
MINISTER OF LABOUR

08/12/2010

REPUBLIC OF SOUTH AFRICA

BASIC CONDITIONS OF EMPLOYMENT AMENDMENT BILL

*(As introduced in the National Assembly (proposed section 75); explanatory
summary of Bill published in Government Gazette No. 33873 of 17 December 2010)
(The English text is the official text of the Bill)*

(MINISTER OF LABOUR)

GENERAL EXPLANATORY NOTE

[] **Words in bold type in square brackets indicate omissions from existing enactments.**
_____ **Words underlined with a solid line indicate insertions in existing enactments.**

BILL

To amend the Basic Conditions of Employment Act, 1997 so as to substitute or insert certain definitions; to provide benefits for contract workers; to prohibit certain conduct of employees; to provide for the prohibition of work by children as employees or independent contractors; to further provide for the adjustment of remuneration; to provide for the Minister to publish a sectoral determination for employees and employers who are not covered by any other sectoral determination; to delete or repeal certain obsolete provisions; to provide for a convicted employer to repay an employee amounts which are due to the employee; to provide for the prohibition of certain exploitative practices by employers; and to provide for certain offences and penalties; to increase the penalties for certain offences; and to provide for matters connected therewith.

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

Amendment of section 1 of Act 75 of 1997, as amended by section 40 of Act 65 of 2001, section 26 of Act 68 of 2002 and section 25 of Act 52 of 2003

1. Section 1 of the Basic Conditions of Employment Act, 1997 (hereafter referred to as the principal Act) is amended by—

(a) the insertion after the definition of "Constitution" of the following definition—

" 'contract of employment' means—

(a) a common law contract of employment; or

(b) any other agreement or arrangement under which a person agrees to work for an employer but excluding a contract for work as an independent contractor;"

(b) the insertion after the definition of "farmworker" of the following definition:

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

(c) **"forced labour"** means all work or service which is exacted from any person under the menace of any penalty and for which the said person has not offered himself voluntarily

(d) the substitution for the definition of "sector" of the following definition:

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

(e) the substitution for the definition of 'serve' of the following definition:

"serve' means to send by registered post, telegram, telex, telefax or to deliver by hand and—

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

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

Amendment of section 32 of Act 75 of 1997

2. Section 32 of the principal Act is hereby amended by the addition of the following subsection:

"(5) Employers must contribute benefits of similar or equal value to employees employed on a fixed term contract as the benefits afforded to permanent employees."

Insertion of section 33A in Act 75 of 1997

3. The following section is hereby inserted in the principal Act after section 33:

33A. "Prohibited conduct

An employer must not—

(a) require or accept any payment by or on behalf of an employee or prospective employee;

- (b) require an employee or prospective employee to purchase any goods from the employer, any business or person nominated by the employer;
or
- (c) accept or seek benefit of any kind;
in respect of the employment of, or the allocation of work to, an employee or prospective employee."

Substitution of section 35 of Act 75 of 1997

- (4) If an employee's remuneration or wage is calculated, either wholly or in part, on a basis other than time or if an employee's remuneration or wage fluctuates **[significantly]**."

Substitution of section 43 of Act 75 of 1997

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

43. "Prohibition of [employment of] work by children

- (1) No person may **[employ]** require or permit a child to work as an employee or independent contactor if the child—
- (a) **[who]** is under 15 years of age; or
- (b) **[who]** is under the minimum school-leaving age in terms of any law[, if **this is 15 or older]**.

- (2) No person may **[employ]** require or permit a child [in employment] to perform any work or provide services—
- (a) that **[is]** are inappropriate for a person of that age;
- (b) that place**[s]** at risk the child's well-being, education, physical or mental health, or spiritual, moral or social development.
- (3) A person who **[employs]** requires or permits a child to work in contravention of subsection (1) or (2) commits an offence."

Substitution of section 44 of Act 75 of 1997

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

44. "Regulations of 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 of **[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.

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

(3) The Minister may, on the advice of the Commission, make regulations to give effect to South Africa's international law obligations in terms of the International Labour Organisation Convention (No.182) on the Worst Forms of Child Labour and any other international instrument dealing with work by children.

Substitution of section 45 of Act 75 of 1997

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

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

7. Section 46 of the principal Act is hereby amended by—
- (a) the substitution for paragraph (a) of the following paragraph:
- “(a) assist **[an employer to employ]** any person to require or permit a child to work in contravention of this Act; or”; and
- (b) the substitution for paragraph (b) of the following paragraph:

"(b) discriminate against a person who refuses to permit a child to **[be employed]** work in contravention of this Act."

Substitution of section 47 of Act 75 of 1997

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

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 **[employment]** work by that person complied with the provisions of this Chapter to prove that it was reasonable for that party to believe, after investigation, that the person was not below the permitted age in terms of section 43 or 44."

Amendment of section 55 of Act 75 of 1997, as amended by section 11 of Act 11 of 2002

9. Section 55 of the principal Act is hereby amended by—

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

"(1) After considering the report and recommendations of the Commission contemplated in section 54 (4), the Minister may

make a sectoral determination for one or more sector and area or as contemplated by subsection (8).”;

(b) the substitution in subsection (4) for paragraph (b) of 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, homework, the placement of employees by temporary employment services, sub-contracting and contract work;”

(d) the deletion of the word “and” at the end of paragraph (m), the insertion of the word “and” at the end of paragraph (o) and the addition of the following paragraphs:

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

(p) any matter necessary to determine the conditions of a labour tenant as contemplated in section 4 of the Land Reform (Labour Tenants) Act No. 3 of 1996;”

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

"(a) covering employees and employers who are bound by a collective agreement concluded at a bargaining council in

respect of any matter dealt with in that collective agreement;

and

(f) the addition of the following subsection:

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

Amendment of section 64 of Act 75 of 1997

10. Section 64 of the principal Act is hereby amended by the deletion in subsection (1) of paragraph (d).

Amendment of section 65 of Act 75 of 1997, as amended by section 17 of Act 37 of 2008

11. Section 65 of the principal Act is hereby amended by—

- (a) the deletion in subsection (1) of paragraphs (b) and (c); and
- (b) the addition of the following subsection:

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

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

13. Sections 68, 69, 70, 71, 72 and 73 of the principal Act are hereby repealed.

Amendment of section 74 of Act 75 of 1997, as amended by section 17 of Act 11 of 2002

14. Section 74 of the principal Act is hereby amended by—

(a) the substitution in subsection (2) of the words preceding paragraph (a) of the following words:

"If an employee institutes proceedings for unfair dismissal, the Labour Court or the arbitrator hearing the matter may also determine any claim for an amount that is owing to that employee in terms of this Act if ~~[—]~~ the claim has not prescribed."; and

(b) the deletion in subsection (2) of paragraphs (a), (b) and (c).

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, the Labour Court has exclusive jurisdiction in respect of all matters in terms of this Act."; and

(b) the substitution of subsection (3) of the following subsection:

"(3) The Labour Court has **[concurrent]** exclusive 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.”.

Amendment of section 77A of Act 75 of 1997

16. Section 77A of the principal Act is hereby amended by—
- (a) the deletion of paragraphs (a) and (c); and
 - (b) the substitution for paragraph (d) of the following paragraph:
 - “(d) reviewing **[the performance or purported performance of]** any **[function provided for]** administrative action in terms of this Act **[or omission by any person or body in terms of this Act, on any grounds permissible in law]** or any employment law;”.

Repeal of section 82 of Act 75 of 1997

17. Section 82 of the principal Act is hereby repealed.

Amendment of section 93 of Act 75 of 1997

18. Section 93 of the principal Act is hereby amended by—
- (a) the insertion after subsection (1) for the following subsection:
 - “(1A) If an employer is convicted of any offence under this act, the court that imposes the sentence must consider any amounts due to the employee as a result of non payment or illegal

deductions and must make an appropriate order for the payment of amounts due to the employee.”;

- (b) the substitution for the table of the following table:

"OFFENCES AND PENALTIES

<i>It is a criminal offence to contravene the following provisions</i>	<i>Minimum Applicable fines</i>	<i>Minimum term of imprisonment</i>
<u>Section 9, 10, 14, 15, 16, 17, 18, 19, 20, 21, 22, 25, 26, 27, 32, 33, 34 and 34A</u>	<u>R10 000.00</u>	<u>12 months imprisonment</u>
<u>Section 33A</u>	<u>R10 000.00</u>	<u>12 months</u>
<u>Section 39, 40 and 41</u>	<u>R10 000.00</u>	<u>12 months imprisonment</u>
Section 43		[3] <u>6 years</u>
Section 44		[3] <u>6 years</u>
Section 46		[3] <u>6 years</u>
Section 48		[3] <u>6 years</u>
<u>Sections 65 and 66</u>	<u>R10 000.00</u>	<u>12 months imprisonment</u>
Section 90(1), (3) and 92(a), (d), (e), (f)		<u>1 year</u>
Section 92(b)		<u>Applicable legislation must be used to determine imprisonment”.</u>

- (c) the addition of the following subsection:

"(3) The Minister may by notice in the Gazette review the applicable penalties."

Repeal of section 95 of Act 75 of 1997

- 19.** Section 95 of the principal Act is hereby repealed.

Short Title

- 20.** This Act is called the Basic Conditions of Employment Amendment Act, 2010.

EXPLANATORY MEMORANDUM ON THE BASIC CONDITIONS OF EMPLOYMENT AMENDMENT BILL, 2010

1. BACKGROUND

This Bill is the second amendment since the promulgation of the Basic Conditions of Employment Act, 1997 (Act No. 75 of 1997), (Act).

2. OBJECTS OF BILL

2.1 The Bill seeks to—

- (a) address government's commitment to avoid exploitation of workers;
- (b) ensure decent work for all workers;
- (c) protect the employment relationship;
- (d) introduce laws to regulate contract work, sub-contracting and out-sourcing;
- (e) address the problem of labour broking;
- (f) prohibit certain abusive practices; and
- (g) effect certain consequential amendments as a result of the insertion of new definitions and to effect certain textual corrections.

2.2 Definitions

Clause 1 of the Bill seeks to substitute or insert certain definitions to align the Act with other legislation.

2.3 Payment of remuneration

Clause 2 of the Bill provides that employers must contribute benefits of equal or similar value to fixed term contract workers as the benefits afforded to its permanent employees.

2.4 Prohibited conduct

2.4.1 **Clause 3** of the Bill seeks to prohibit employers from seeking, requiring or accepting any benefit or payment from an employee or a prospective employee in respect of their employment or the allocation of work to the employee. There are recent reports that employees working for a company operating parking meters for the Cape Town City Council were required to make a payment to the employer in order to secure employment for the day.

2.4.2 Employers are also prevented from requiring an employee or a prospective employee to purchase any goods from a business that the employer operates or from any other business or person nominated by the employer. Clauses preventing this potentially exploitative practice are found in many bargaining council collective agreements.

2.5. Prohibition of work by children

2.5.1 **Clause 4** of the Bill seeks to prohibit and regulate the exploitation of children. Clause 4 prohibits work by children as an employee or independent contractor if the child is under the minimum school leaving age or the age of 15 years. This amendment is required to achieve full compliance with South Africa's obligations under the relevant International Labour Standards as well as to create consistency

with the Constitution and other legislation protecting the rights of children. In addition, the maximum prison term for breach of child labour provision is increased from three to six years.

2.5.2 Breach of this proposed provision is a criminal offence.

2.6. Sectoral determinations

The powers of the Minister and the Employment Conditions Commission in respect of sectoral determinations are clarified and adjusted. **Clause 9** proposed the following changes—

- (a) the Minister may issue an “umbrella” sectoral determination covering employees not covered by any other sectoral determination or by a bargaining council collective agreement;
- (b) a sectoral determination may apply to bargaining councils in respect of matters not dealt with by collective agreements concluded by the bargaining council;
- (c) a sectoral determination may prescribe minimum increases in remuneration; and
- (d) a sectoral determination may prescribe a threshold of representativeness for a registered trade union to have the organisational rights of access to employer premises and deduction of trade union subscriptions in respect of workplaces covered by the sectoral determination. Currently only a bargaining council agreement can include such a provision.

2.7 Functions of Labour Inspectors

Clause 10 of the Bill amend the functions of the labour inspector by deleting the provision that provides for a labour inspector to secure undertakings and issue compliance orders when endeavoring to ensure compliance with an employment law. This is aligned with other employment laws.

2.8 Powers of Entry

Clause 11 of the Bill seeks to provide for an interpreter, a member of the South African Police or any other assistant to accompany the labour inspector when performing his or her functions under this Act. The need for labour inspectors to be accompanied by members of the Police stems from certain incidents that the inspectors are threatened and physically assaulted and refused entry to premises to execute their mandate. In ensuring good communication between labour inspectors and employers during inspections, there is a need for interpreters to accompany the inspectors to overcome language barriers.

2.9 Repeal of sections 68; 69; 70; 71; 72 and 73

Clause 12 of the Bill seeks repeal certain sections of the Act to address the delay caused by issuing of undertakings and compliance orders by inspectors. It has been identified that the employers are abusing these provisions and use them as delaying tactics.

2.10 Joinder of BCEA claims with unfair dismissal cases

The jurisdiction of the Labour Court and the CCMA to adjudicate on matter arising from the provisions of the Act in the course of hearing an unfair dismissal case is

extended to cover a claim for an amount owing to the employee under the Act if that claim has not prescribed. Once the Court or arbitrator has determined the matter, no compliance order or other proceedings can be continued or brought in respect of the claim. This will avoid the need to “split” claims and prevent the unnecessary duplication of proceedings and will also ensure the effective use of the resources of the Labour Court, CCMA and the Department.

2.11 Jurisdiction of Labour Court

Clause 14 of the Bill seeks to amend sections 77(1) and 77(3) of the Act. Certain aspects of the jurisdiction of the Labour Court are repealed as the provisions relating to the Court’s jurisdiction are to be consolidated in amendments to section 157 of the Labour Relations Act. The jurisdiction of the Labour Court to review administrative actions in terms of the Act is aligned with the Promotion of Administrative Justice Act, 2000 (Act No. 3 of 2000).

2.12 Penalties

Clause 17 seeks to impose heavy penalties for offences and contravention of the provisions of this Act.

2.13 Repeal of section 95

Clause 18 seeks to repeal the transitional provisions in the Act which are no longer relevant.

3. CONSULTATION

None.

4. FINANCIAL IMPLICATIONS

None.

5. PARLIAMENTARY PROCEDURE

5.1 The Department of Labour and the State Law Advisers are of the opinion that this Bill must be dealt with in accordance with the procedure established by section 75 of the Constitution since it contains no provision to which the procedure set out in section 74 or 76 of the Constitution applies.

5.2 The State Law Advisers are of the opinion that it is not necessary to refer this Bill to the National House of Traditional Leaders in terms of section 18(1) (a) of the Traditional Leadership and Governance Framework Act, 2003 (Act No. 41 of 2003), since it does not contain provisions pertaining to customary law or customs of traditional communities.