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THE PRESIDENCY

No. 847 24 June 2002

It is hereby notified that the President has assented to the following Act, which is hereby published for general information:—

No. 11 of 2002: Basic Conditions of Employment Amendment Act, 2002.



AIDS HELPLINE: 0800-123-22 Prevention is the cure

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.

(English text signed by the President.)
(Assented to 18 June 2002.)

ACT

To amend the Basic Conditions of Employment Act, 1997, so as to—
 substitute certain definitions;
 make certain textual alterations;
 regulate the extension of overtime by collective agreement;
 regulate the payment of contributions to benefit funds;
 provide for the determination of categories of payment to calculate remuneration;
 provide for employees whose contracts of employment terminate due to insolvency to receive severance pay;
 specify circumstances under which ordinary hours of work can be varied;
 provide for the appointment of alternate members from organised labour and business to the Employment Conditions Commission;
 make further provision regarding the issuing of compliance orders;
 clarify the basis for the calculation of interest;
 confer specific powers on the Labour Court;
 create a presumption as to who is an employee;
 deem wage determinations to be sectoral determinations; and
 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

1. Section 1 of the Basic Conditions of Employment Act, 1997 (hereinafter referred to as the principal Act), is amended by the substitution for the definition of “employment law” of the following definition: 5

- “**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 Manpower Training Act, 1981 (Act No. 56 of 1981)]** the Skills Development Act, 1998 (Act No. 97 of 1998); 10
 - (c) **[the Guidance and Placement Act, 1981 (Act No. 62 of 1981)]** the Employment Equity Act, 1998 (Act No. 55 of 1998);
 - (d) the Occupational Health and Safety Act, 1993 (Act No. 85 of 1993);
 - (e) the Compensation for Occupational Injuries and Diseases Act, 1993 (Act No. 15 130 of 1993);”.

Substitution of section 8 of Act 75 of 1997

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

“Interpretation of day

8. For the purposes of sections 9 [, 10 and 11,] to 16, ‘day’ means a period of 24 hours measured from the time when the employee normally commences work, and ‘daily’ has a corresponding meaning.” 5

Amendment of section 10 of Act 75 of 1997

3. Section 10 of the principal Act is amended by—

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

“(1) Subject to this Chapter, an employer may not require or permit an employee to work— 10

(a) overtime except in accordance with an agreement;

(b) more than [-

(i) **three hours’ overtime a day; or**

(ii)] **ten hours’ overtime a week.”;** 15

(b) the insertion after subsection (1) of the following subsection:

“(1A) An agreement in terms of subsection (1) may not require or permit an employee to work more than 12 hours on any day.”; and

(c) the addition of the following subsection:

“(6) (a) A collective agreement may increase the maximum permitted overtime to 15 hours a week. 20

(b) A collective agreement contemplated in paragraph (a) may not apply for more than two months in any period of 12 months.”.

Amendment of section 27 of Act 75 of 1997

4. Section 27 of the principal Act is amended by the substitution for subsection (5) of the following subsection: 25

“(5) Before paying an employee for leave in terms of this section, an employer may require reasonable proof of an event contemplated in subsection [1](2) for which the leave was required.”.

Amendment of section 28 of Act 75 of 1997

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5. Section 28 of the principal Act is amended by the deletion of subsection (2)(b).

Insertion of section 34A in Act 75 of 1997

6. The following section is inserted after section 34 of the principal Act:

“Payment of contributions to benefit funds

34A. (1) For the purposes of this section, a benefit fund is a pension, provident, retirement, medical aid or similar fund. 35

(2) An employer that deducts from an employee’s remuneration any amount for payment to a benefit fund must pay the amount to the fund within seven days of the deduction being made.

(3) Any contribution that an employer is required to make to a benefit fund on behalf of an employee, that is not deducted from the employee’s remuneration, must be paid to the fund within seven days of the end of the period in respect of which the payment is made. 40

(4) This section does not affect any obligation on an employer in terms of the rules of a benefit fund to make any payment within a shorter period than that required by subsections (2) or (3).” 45

Amendment of section 35 of Act 75 of 1997

7. Section 35 of the principal Act is amended by the substitution for subsection (5) of the following subsection:

“(5) (a) The Minister may, by notice in the *Gazette*, after consultation with the Commission and NEDLAC, determine whether a particular category of payment, whether in money or in kind, forms part of an employee’s remuneration for the purpose of any calculation made in terms of this Act.

(b) Without limiting the Minister’s powers in terms of paragraph (a), the Minister may—

(i) determine the value, or a formula for determining the value, of any payment that forms part of remuneration;

(ii) place a maximum or minimum value on any payment that forms part of remuneration; and

(iii) for the purposes of any calculation, differentiate between different categories of payment and different sectors.

(c) Before the Minister issues a notice in terms of paragraph (a), the Minister must—

(i) publish a draft of the proposed notice in the *Gazette*; and

(ii) invite interested parties to submit written representations on the draft notice within a reasonable period.”

Amendment of section 37 of Act 75 of 1997

8. Section 37 of the principal Act is amended by the substitution for subsection (1) of the following subsection:

“(1) Subject to section 38, a contract of employment terminable at the instance of a party to the contract may be terminated only on notice of not less than—

(a) one week, if the employee has been employed for **[four weeks] six months** or less;

(b) two weeks, if the employee has been employed for more than **[four weeks] six months** but not more than one year;

(c) four weeks, if the employee—

(i) has been employed for one year or more; or

(ii) is a farm worker or domestic worker who has been employed for more than **[four weeks] six months**.

(2) (a) A collective agreement may not permit a notice period shorter than that required by subsection (1).

(b) Despite paragraph (a), a collective agreement may permit the notice period of four weeks required by subsection (1)(c)(i) to be reduced to not less than two weeks.”

Amendment of section 41 of Act 75 of 1997

9. Section 41 of the principal Act is amended by the substitution for subsection (2) of the following subsection:

“(2) An employer must pay an employee who is dismissed for reasons based on the employer’s operational requirements or whose contract of employment terminates or is terminated in terms of section 38 of the Insolvency Act, 1936 (Act No. 24 of 1936), severance pay equal to at least one week’s remuneration for each completed year of continuous service with that employer, calculated in accordance with section 35.”

Amendment of section 50 of Act 75 of 1997

10. Section 50 of the principal Act is amended by—

(a) the substitution for subsection (2) of the following subsection:

“(2) A determination in terms of **[section] subsection (1)**—

(a) may not be made in respect of sections 7, **[9,] 17(3) and (4), 25, 43(2), 44 or 48** or a regulation made in terms of section 13; and

- (b) may only be made in respect of section 43(1) to allow the employment of children in the performance of advertising, sports, artistic or cultural activities.”; and
- (b) the insertion after subsection (2) of the following subsection:
- “(2A) A determination in terms of subsection (1) may only be made in respect of section 9 if—
- (a) the employees’ ordinary hours of work, rest periods and annual leave are on the whole more favourable to the employees than the basic conditions of employment in terms of sections 9, 10, 14, 15 and 20; and
- (b) the determination—
- (i) has been agreed to in a collective agreement;
- (ii) is necessitated by the operational circumstances of the sector in respect of which the variation is sought and the majority of employees in the sector are not members of a registered trade union; or
- (iii) applies to the agricultural sector or the private security sector.”.

Amendment of section 55 of Act 75 of 1997

11. Section 55 of the principal Act is amended by the substitution for subsection (6) of the following subsection—

- “(6) A sectoral determination in terms of subsection (1):
- (a) May not be made in respect of ~~section~~ section 7, 43(2), ~~or~~ 44 or 48;
- (b) may only be made in respect of section 43(1) to allow the employment of children in the performance of advertising, sports, artistic or cultural activities;
- (c) may not reduce the protection afforded to employees by sections ~~9 and~~ 17(3) and (4) ~~and~~ 25 or a regulation made in terms of section 13; ~~and~~
- (d) may vary the basic conditions of employment in section 9 in the circumstances contemplated by section 50(2A).”.

Amendment of section 60 of Act 75 of 1997

12. Section 60 of the principal Act is amended by the substitution for subsection (2) of the following subsection:

- “(2) The Minister must, in addition, appoint **[two more members]** to the Commission—
- (a) one **[of whom must be]** member and one alternate member nominated by the voting members of NEDLAC representing organised labour;
- (b) one **[of whom must be]** member and one alternate member nominated by the voting members of NEDLAC representing organised business.”.

Amendment of section 68 of Act 75 of 1997

13. Section 68 of the principal Act is amended by the insertion after subsection (1) of the following subsection:

- “(1A) A labour inspector may endeavour to secure a written undertaking by the employer to comply with subsection (1) either by—
- (a) meeting with the employer or a representative of the employer; or
- (b) -serving a document, in the prescribed form, on the employer.”.

Amendment of section 69 of Act 75 of 1997

14. Section 69 of the principal Act is amended by the substitution for subsection (3) of the following subsection:

- “(3) (a) A labour inspector must **[deliver]** serve a copy of the compliance order **[to]** on the employer named in it, and **[to]** on each employee affected by it **[or, if this is]** unless this is impractical, and on a representative of the employees.

(b) The failure to serve a copy of a compliance order on any employee or any representative of employees in terms of paragraph (a) does not invalidate the order.”.

Amendment of section 70 of Act 75 of 1997

15. Section 70 of the principal Act is amended by the substitution for paragraph (d) of the following paragraph: 5

“(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.” 10

Amendment of section 73 of Act 75 of 1997

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

Amendment of section 74 of Act 75 of 1997

17. Section 74 of the principal Act is amended by the substitution for subsection (2) 15 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— 5
(a) the claim is referred in compliance with section 191 of the Labour Relations 20 Act, 1995;
(b) the amount [has] had 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 25 instituted to recover the amount.”.

Substitution of section 75 of Act 75 of 1997

18. The following section is substituted for section 75 of the principal Act:

“Payment of interest

75. An employer must pay interest on any amount due and payable in terms of this Act at the rate of interest prescribed in terms of section 1 of the Prescribed Rate of Interest Act, 1975 (Act No. 55 of 1975), to any person to whom a payment should have been made.” 30

Insertion of section 77A in Act 75 of 1997

19. The following section is inserted after section 77 of the principal Act:

“Powers of Labour Court

77A. Subject to the provisions of this Act, the Labour Court may make any appropriate order, including an order—

- (a) making a compliance order issued in terms of this Act, an order of the Labour Court, on application by the Director-General in terms of section 73(1) or 73(2); 40
- (b) condoning the late filing of any document with, or the late referral of any dispute to, the Labour Court;
- (c) confirming, varying or setting aside all or part of an order made by the Director-General in terms of section 71(3), on appeal by the employer in terms of section 72; 45
- (d) reviewing the performance or purported performance of any function provided for in terms of this Act or any act or omission by any person or body in terms of this Act, on any grounds permissible in law;

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- (e) making a determination that it considers reasonable on any matter concerning a contract of employment in terms of section 77(3), which determination may include an order for specific performance, an award of damages or an award of compensation;
- (f) imposing a fine in accordance with Schedule 2 to this Act or for any contravention of any provision of this Act for which a fine can be imposed; and
- (g) dealing with any matter necessary or incidental to performing its functions in terms of this Act.”.

Amendment of section 83 of Act 75 of 1997

20. Section 83 of the principal Act is amended by the substitution for subsection (1) of the following subsection:

“(1) The Minister may, on the advice of the Commission and by notice in the *Gazette*, deem any category of persons specified in the notice to be—

- (a) employees for purposes of the whole or any part of this Act, any other employment law other than the Unemployment Insurance Act, 1966 (Act No. 30 of 1966), or any sectoral determination;
- (b) contributors for purposes of the whole or any part of the Unemployment Insurance Act, 1966.”.

Insertion of section 83A in Act 75 of 1997

21. The following section is inserted after section 83 of the principal Act:

“Presumption as to who is employee

83A. (1) A person who works for, or renders services to, any other person is presumed, until the contrary is proved, to be an employee, regardless of the form of the contract, if any one or more of the following factors is present:

- (a) The manner in which the person works is subject to the control or direction of another person;
- (b) the person’s hours of work are subject to the control or direction of another person;
- (c) in the case of a person who works for an organisation, the person is a part of that organisation;
- (d) the person has worked for that other person for an average of at least 40 hours per month over the last three months;
- (e) the person is economically dependent on the other person for whom that person works or renders services;
- (f) the person is provided with tools of trade or work equipment by the other person; or
- (g) the person only works for or renders services to one person.

(2) Subsection (1) does not apply to any person who earns in excess of the amount determined by the Minister in terms of section 6(3).

(3) If a proposed or existing work arrangement involves persons who earn amounts equal to or below the amounts determined by the Minister in terms of section 6(3), any of the contracting parties may approach the CCMA for an advisory award about whether the persons involved in the arrangement are employees.”.

Amendment of section 87 of Act 75 of 1997

22. Section 87 of the principal Act is amended by the addition of the following subsection:

“(4) A Code of Good Practice issued in terms of this section may provide that the Code must be taken into account in applying or interpreting any employment law.”.

Amendment of Schedule 3 to Act 75 of 1997

23. Schedule 3 to the principal Act is amended by—

(a) the substitution for item 9 of the following item:

“Wage determinations

9. (1) Any wage determination and any amendment to a wage determination made in terms of section 15 of the Wage Act, 1957, in force immediately before the commencement of **[this Act remains in force for the period of its operation in terms of section 18 of that Act, and may be extended or amended as if that Act had not been repealed]** the Basic Conditions of Employment Amendment Act, 2002 (hereafter referred to as a ‘wage determination’) is deemed to be a sectoral determination made in accordance with section 55 of this Act. 5 10

(2) Any provision in a wage determination stipulating a minimum term or condition of employment is deemed to be a basic condition of employment defined in section 1 of this Act. 15

(3) The Minister may amend, cancel, suspend, clarify or correct any wage determination in accordance with Chapter Eight of this Act.

(4) The provisions of a wage determination may be enforced in accordance with Chapter Ten of this Act.

(5) Any prosecution concerning a contravention of, or failure to comply with, a binding wage determination or licence of exemption from 1 November 1998 until the commencement of the Basic Conditions of Employment Amendment Act, 2002, which prosecution commenced prior to or within three months of the commencement date of the Basic Conditions of Employment Amendment Act, 2002, must be dealt with in terms of the Wage Act, 1957, as if the Wage Act, 1957, had not been repealed. 20 25

(6) The Director of Public Prosecutions having jurisdiction is deemed to have issued a certificate in terms of section 23(3)(a) of the Wage Act, 1957, in respect of any contravention or failure contemplated in subitem (5) in respect of which no prosecution is commenced within three months of the commencement date of the Basic Conditions of Employment Amendment Act, 2002.”; and 30

(b) the substitution for item 10 of the following item:

“Exemptions to wage determination

10. Any licence of exemption granted **[to] in respect of** a wage determination in terms of section 19 of the Wage Act, 1957, in force immediately before the commencement of this Act **is deemed to be withdrawn as from a date six months after the commencement date of the Basic Conditions of Employment Amendment Act, 2002 [remains in force for the period of the determination, or until withdrawn in terms of section 19(5) of that Act, as if that Act had not been repealed.]”**. 35 40

Short title and commencement

24. This Act is called the Basic Conditions of Employment Amendment Act, 2002, and comes into operation on a date determined by the President by proclamation in the *Gazette*. 45