

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. 35212 of 5 April 2012)
(The English text is the official text of the Bill)*

(MINISTER OF LABOUR)

[B 15—2012]

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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 certain definitions; to prohibit employers from requiring employees to make payments to secure employment and from requiring employees to purchase goods, services or products; to prohibit anyone from requiring or permitting a child under the age of 15 years to work; to make it 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; to provide for the Minister to publish a sectoral determination for employees and employers who are not covered by any other sectoral determination; to provide for the Director-General to apply to the Labour Court for an employer to comply with a written undertaking by the employer; to provide for a compliance order; to delete certain obsolete provisions; to provide the Labour Court with exclusive jurisdiction in respect of certain matters; 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 2002, 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 (hereinafter referred to as the principal Act) is hereby amended—

- (a) by the substitution for the definition of “sector” of the following definition:
“ ‘sector’ means an industry or a service or part of an industry or a 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) by the substitution for the definition of “serve” of the following definition:
“ ‘serve’ means to send by electronic mail, registered post, telegram, [telex,] telefax or deliver by hand or any prescribed method of service;”.

Insertion of section 33A in Act 75 of 1997

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

“Prohibited conduct by employer

33A. (1) An employer must not—

- (a) require or accept 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; or
 - (b) require an employee or potential 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.”.

Substitution of section 43 of Act 75 of 1997

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

“Prohibition of [employment of] work by children

43. (1) [No] A person [may employ] must not require or permit a child to work, 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] A person [may employ] must not 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 [places] place 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

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

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

44. (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 are 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 [subsection (1)] any regulation made in terms of this section commits an offence.”.

Substitution of section 45 of Act 75 of 1997

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

“Medical examinations

45. 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. Section 46 of the principal Act is hereby amended by the substitution for paragraphs (a) and (b) of the following paragraphs, respectively:

- “(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.”.

Substitution of section 47 of Act 75 of 1997

7. The following section is hereby substituted for section 47 of the principal Act: 15

“Evidence of age

47. 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 of 2002

8. Section 55 of the principal Act is hereby amended—

- (a) by the substitution for subsection (1) of the following subsection: 25
 “(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) by the substitution in subsection (4) for paragraph (b) of the following paragraph: 30
 “(b) provide for the adjustment of remuneration by way of—
 (i) minimum rates **[of remuneration]**; or
 (ii) minimum increases;”;
- (c) by the substitution in subsection (4) for paragraph (g) of the following paragraph: 35
 “(g) prohibit or regulate task-based work, piecework, home work, sub-contracting and contract work;”;
- (d) by the deletion of the word “and” at the end of paragraph (m) and the addition of the following paragraphs: 40
 “(o) 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 45
 (p) 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), for the purpose of section 4(3);” 50

- (e) by the substitution in subsection (7) for paragraph (b) of the following paragraph:
 “(b) covering employees covered by a collective agreement concluded in a statutory council regulating any matter **[in a sector and area in which a statutory council is established and]** in respect of which that statutory council has concluded a collective agreement;”; and 5
- (f) by 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.”. 10

Amendment of section 68 of Act 75 of 1997, as amended by section 13 of Act 11 of 2002

9. Section 68 of the principal Act is hereby amended—
- (a) by 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.”; and 15
- (b) by the addition of the following subsection:
 “(3) If an employer fails to comply with a written undertaking given by the employer 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.”. 20

Amendment of section 69 of Act 75 of 1997, as amended by section 14 of Act 11 of 2002 25

10. Section 69 of the principal Act is hereby amended—
- (a) by the deletion in subsection (2) of paragraph (d);
- (b) by the insertion after subsection (2) of the following subsection:
 “(2A) A compliance order may also set out the date—
 (a) by which the employer should serve any representations it may wish to make with the Department and the Labour Court; and 30
 (b) 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.”; 35
- (c) by the substitution in subsection (3) for paragraph (a) 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 on each employee affected by it **[unless]** or, if this is impractical, **[and]** on a representative of the employees.”; and 40
- (d) by the substitution for subsection (5) of the following subsection:
 “(5) An employer must comply with the compliance order within the time period stated in the order **[unless the employer objects in terms of section 71]**.”. 45

Amendment of section 70 of Act 75 of 1997, as amended by section 15 of Act 11 of 2002

11. Section 70 of the principal Act is hereby amended by the substitution for paragraphs (c) and (d) of the following paragraphs, respectively:
- “(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 50
- (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 55

undertaking by the employer in terms of section 68 or issued a compliance order in terms of section 69.”.

Repeal of sections 71 and 72 of Act 75 of 1997

12. Sections 71 and 72 of the principal Act are hereby repealed.

Substitution of section 73 of Act 75 of 1997, as amended by section 16 of Act 11 of 2002 5

13. The following section is hereby substituted for section 73 of the principal Act:

“Order may be made order of Labour Court

73. (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)].** 10 15

(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— 20

- (a) the employer to comply with the provisions of this Act;
- (b) subject to section 70(d), the payment of any amount owing to an employee; or
- (c) the payment of a fine calculated in terms of Schedule 2 to this Act.” 25

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—

- (a) by the substitution in subsection (2) for the words preceding paragraph (a) of the following words: 30

“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.” 35

- (b) by the deletion in subsection (2) of paragraphs (a), (b) and (c); and

- (c) by the insertion after subsection (2) of the following subsection:

“(2A) 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 (2).” 40

Amendment of section 77 of Act 75 of 1997

15. Section 77 of the principal Act is hereby amended—

- (a) by 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.**” 45

- (b) by the insertion after subsection (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.” 50

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 of the following table:

“OFFENCES AND PENALTIES

<i>Section under which convicted</i>	<i>Maximum term of imprisonment</i>
Section 33A	<u>3</u> years
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

Amendment of Schedule two to Act 75 of 1997

17. 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

Short title

18. This Act is called the Basic Conditions of Employment Amendment Act, 2012.

MEMORANDUM ON THE OBJECTS OF THE BASIC CONDITIONS OF EMPLOYMENT AMENDMENT BILL, 2012

1. MAIN OBJECTS OF BILL

The main objective of the Bill is to provide for the prohibition of certain exploitative practices by employers, such as requiring employees to make payments to secure employment and requiring employees to purchase goods, services or products in return for employment; to substitute certain definitions; to prohibit anyone from requiring or permitting a child under the age of 15 years to work; to make it 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; to provide for the Minister to publish a sectoral determination for employees and employers who are not covered by any other sectoral determination; to provide for the Director-General to apply to the Labour Court for an employer to comply with a written undertaking by the employer; to provide for a compliance order; to delete certain obsolete provisions; to provide the Labour Court with exclusive jurisdiction in respect of certain matters; to provide for certain offences and penalties; and to increase the penalties for certain offences.

2. OBJECTS OF BILL

The Bill seeks to—

- (a) address the government's commitment to avoid exploitation of workers;
- (b) ensure decent work for all workers;
- (c) protect the employment relationship;
- (d) bring the provisions regulating child labour in line with international standards;
- (e) improve the mechanisms for enforcement of basic conditions of employment;
- (f) prohibit certain abusive practices; and
- (g) effect certain consequential amendments.

3. DISCUSSION OF BILL

3.1 Definitions

Clause 1 of the Bill seeks to substitute certain definitions.

3.2 Prohibited conduct by employer

Clause 2 of the Bill seeks to prohibit employers from seeking, requiring or accepting any benefit or payment from an employee or a prospective employee as a result of the employment of or the allocation of work to the employee. 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.

3.3 Prohibition of work by children

3.3.1 Clauses 3, 4, 5, 6 and 7 of the Bill seek to prohibit the exploitation of children. Section 43 of the Basic Conditions of Employment Act (the Act) prohibits certain employment of a child but not work performed by children. Clause 3 of the Bill seeks to amend section 43 of the Act in order to prohibit work by children under the age of 15 years. Clause 3 also makes it an offence for any person to require or permit a child to perform any work or provide any services that places at risk the child's well-being.

- 3.3.2 Section 28 of the Constitution provides for the rights of children and states that the best interest of a child is of paramount importance in every matter concerning the child. The proposed amendment in clause 3 seeks to mirror section 28 of the Constitution that prohibits work and services of children that are inappropriate for a child and places a risk on the child's well-being. Section 93 of the Act is also amended to extend the penalties for the offences of employment of children and forced labour to six years.
- 3.3.3 These amendments are 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 a child labour provision is increased from three to six years. Breach of this proposed provision is a criminal offence.

3.4 Sectoral determinations

The powers of the Minister and the Employment Conditions Commission in respect of sectoral determinations are clarified and adjusted. Clauses 8, 9, 10 and 11 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 of 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.

3.5 Functions of Labour Inspectors

Clause 10 of the Bill also seeks to amend the functions of the labour inspector by deleting the provision that provides for a labour inspector to secure undertakings and serve compliance orders on the employer and relevant employees.

3.6 Repeal of sections 71 and 72

Clause 12 of the Bill seeks to repeal sections 71 and 72 of the Act. These sections provide for an employer to object to a compliance order and for an employer to appeal to the Labour Court against an order of a Director-General. The Department of Labour (the Department) has identified that employers are abusing these provisions and using them as delaying tactics.

3.7 Jurisdiction of Labour Court

- 3.7.1 Clause 15 of the Bill seeks to amend section 77 of the Act in order to extend the exclusive jurisdiction of the Labour Court to grant civil relief arising from certain matters provided for in the Act, such as prohibited conduct by employers; the prohibition of employment of children and forced labour; obstruction, undue influence and fraud and confidentiality.

- 3.7.2 The proposed amendment to section 77 of the Act seeks to provide the Labour Court with exclusive jurisdiction in respect of all matters in terms of the Act, and exclusive jurisdiction to grant civil relief arising from a breach of sections 33A, 43, 44, 46, 48, 90 and 92. Legal proceedings regarding a labour dispute may consist of one or more matters emanating from different employment laws.
- 3.7.3 The Labour Court was established to provide for a coherent legal framework within which all labour disputes might be speedily resolved. The Labour Relations Act and the Act assign certain labour and employment matters to the Labour Court. Section 77(1) provides that, subject to the Constitution and the jurisdiction of the Labour Appeal Court, and except where the Act provides otherwise, the Labour Court has exclusive jurisdiction in respect of all matters in terms of the Act, except in respect of an offence specified in sections 33A, 43, 44, 46, 48, 90 and 92.

3.8 Penalties

Clauses 16 and 17 of the Bill seek to impose heavier penalties for offences provided for in the Act by increasing the maximum term of imprisonment for specified offences and the maximum permissible fine not involving an underpayment. The maximum term of imprisonment for an offence involving child labour or forced labour is increased from three years to six years, and the maximum term of imprisonment in respect of an offence under section 33A is set at three years. The maximum permissible fine not involving an underpayment maximum penalty that may be imposed, is increased by 200%. These penalties have not been amended since the Act came into operation.

4. CONSULTATION

NEDLAC: The National Economic, Development and Labour Council Act, 1994 (Act No. 35 of 1994), provides for the objects, powers and functions of the National Economic, Development and Labour Council (NEDLAC). NEDLAC must consider all proposed labour legislation before it is introduced in Parliament and must also consider significant changes to the social and economic policy before it is implemented and introduced in Parliament.

5. FINANCIAL IMPLICATIONS

None.

6. PARLIAMENTARY PROCEDURE

- 6.1 The Department 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.
- 6.2 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.

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