

# Employment Laws in South Africa

## South African labour legislation:

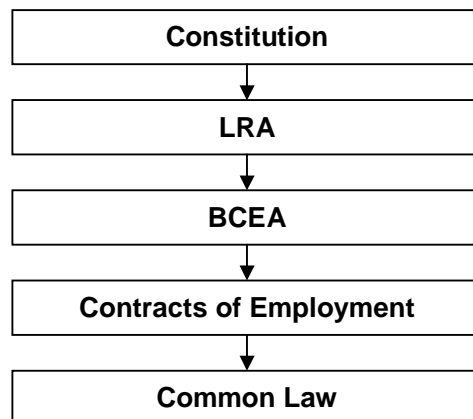
- Influenced internationally through the ILO (International Labour Organisation), division of United Nations. South Africa is a member state of this organisation and has to adhere to certain criteria and uphold its principles.
- Since 1994, the employment laws are underpinned by the principles of a non-sexist, non-racial and equality based democratic society.

## Employment laws impacting the Employer-Employee relationship in South Africa:

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- The Constitution (Bill of Rights)
- Labour Relations Act (LRA)
- Basic Conditions of Employment Act (BCEA)
- Employment Equity Act (EEA)
- Occupational Health and Safety Act (OHSA)
- Compensation for Occupational Injuries and Diseases Act (COIDA)
- Unemployment Insurance Fund (UIF)
- South African Qualifications Authority Act (SAQA Act)
- Skills Development Act (SDA)
- Skills Development Levies Act (SDLA)

Other sources of law also govern the employer-employee relationship, such as: contract of employment, collective agreements, etc.



### 1.1. THE CONSTITUTION (BILL OF RIGHTS)

- Also known as the Bill of Rights
- Supreme Act of the country, that supercedes all other acts of the country. The provisions of all South African statutes must conform to the basic principles contained in the Constitution.

- Essence of this act: human dignity, equality & freedom
- The Constitution provides clear guidelines with regards to employment relations. For example, Section 23 of the Constitution stipulates the following provisions:
  - ✓ Everyone has the right to fair labour practices
  - ✓ Everyone worker has the right to form and join a trade union, to participate in the activities and programmes of a trade union and to strike
  - ✓ Every employer has the right to form and join an employers' organisation and to participate in the activities of an employer's organisation
  - ✓ Every trade union and every employer's organisation have the right to determine its own activities, to organise, to bargain collectively and to form and join a federation.
  - ✓ Every trade union, employers' organisation and employer has the right to engage in collective bargaining. National legislation may recognise union security arrangements contained in collective agreements.
- Sets the scene for practice of employment relations in SA
- Labour legislation should therefore reflect fairness, both to management and labour

## 1.2. LABOUR RELATIONS ACT (LRA)

- Centerpiece of labour law
- All other labour laws are subordinate to the LRA
- Purpose of LRA: to advance economic development, social justice, labour peace and a democratisation of the workplace by fulfilling the primary objectives of the Act.
- Primary objectives: to realise and regulate the fundamental rights of workers and employers in the Constitution and to entrench the following rights:
  - Everyone has the right to fair labour practices
  - Everyone worker has the right to form and join a trade union, to participate in the activities and programmes of a trade union and to strike
  - Every employer has the right to form and join an employers' organisation and to participate in the activities and programmes of an employer's organisation
  - Every trade union and every employers' organisation has the right to determine its own administration, programmes and activities, to organise and to form and join a federation.
  - Every trade union, employers' organisation and employer has the right to engage in collective bargaining. National legislation may recognise union security arrangements contained in collective agreements.
- Scope: applies to employment relationships between employers and employees and it makes no distinction whether these are in private or public sector (except the South African National Defence Force, the National Intelligence Agency, and the South African Secret Services)
- Includes:
  - Schedule 1 – Establishment of bargaining council for the public service
  - Schedule 2 – Establishment and constitution of workplace forums
  - Schedule 3 – Aspects regarding CCMA
  - Schedule 4 – How different disputes should be dealt with
  - Schedule 5 – Technical amendments to BCEA and OHSA
  - Schedule 6 – Provisions of the Act which have been repealed
  - Schedule 7 – Transitional arrangements, e.g. residual unfair labour practices
  - Schedule 8 – Code of Good Practice: Dismissal

### Major issues addressed by the LRA:

### **a) Freedom of association and general protections**

Workers have the right to form and to join trade unions, and employers have the right to form employers' organisations. The LRA provides for the:

- Protection of employees and persons seeking employment
- Protection of employers' rights
- Rights of trade unions and employers' organisations

### **b) Collective bargaining**

The LRA promotes collective bargaining and in particular, sectoral level collective bargaining, as the desired method of setting wages and conditions of employment. This Act strongly promotes centralised bargaining at industrial or sectoral level. The Act does not contain a statutory right to bargain in the strict sense of the word, however, a duty to bargain is strongly promoted given the statutory organisational rights now afforded to trade unions. In terms of collective bargaining, the Act covers the following:

- Organisational rights
- Trade union access to workplace
- Leave for trade union activities
- Disclosure of information
- The exercise of organisational rights
- Collective agreements
- Agency shop agreements
- Closed shop agreements
- Bargaining councils

### **c) Strikes and lockouts**

Every employee has the fundamental right to strike. The right is subjected to certain limitations. The following is included in the LRA, in terms of strikes and lockouts:

- Defining strikes and lockouts
- Forbidden strikes and lockouts
- Procedures to be followed to engage in protected strike action
- Legitimate and compliant strikes and lockouts
- Secondary strikes (sympathy strikes)
- Picketing
- Essential and maintenance services
- Protest action

### **d) Workplace forums**

The role of a workplace forum is to promote the interests of all employees in the workplace, irrespective of whether they are trade union members – but excludes senior management employees.

Functions of a workplace forum are to:

- Promote the interest of all employees in the workplace, whether or not they are trade union members
- Enhance efficiency in the workplace
- Be consulted by the employer, with a view to reaching consensus, about specific matters referred to in Section 84.

- Participate in joint decision-making about specific matters referred to in Section 86.

#### **e) Trade unions and employers' organisations**

This section contains the registration and regulation of trade unions and employers' organisations.

#### **f) Dispute resolution**

Various forums can be used to resolve disputes in an efficient and cost saving manner at the lowest possible level. The way in which disputes should be resolved depends on the reason for the dispute. Resolutions can be done through:

- Internal – within the company
- The Commission for Conciliation, Mediation and Arbitration (CCMA)
- The Labour Court
- The Labour Appeal Court

#### **g) Unfair dismissals and unfair labour practice**

Every employee has the right not to be unfairly dismissed, or be subjected to unfair labour practices. This Act covers the following in terms of unfair dismissals and unfair labour practice:

- Unfair dismissal applications
- Dismissal based on operational requirements
- Limits on compensation for dismissal
- Transfer of a business
- Amendments to the Insolvency Act
- Employment contracts
- Severance pay

A dismissal, according to the LRA, means:

- An employer has terminated a contract of employment with or without notice
- An employee reasonably expected the employer to renew a fixed term contract of employment on the same or similar term but the employer offered to renew it on less favourable terms, or did not renew it.
- An employer refused to allow an employee to resume work after she:
  - Took maternity leave in terms of any law, collective agreement or her contract of employment
  - Was absent from work for up to four weeks before the expected date, and up to eight weeks after the actual date, of the birth of her child
- An employer who dismissed a number of employees for the same or similar reasons has offered to re-employ one or more of them, but has refused to re-employ another.
- An employee terminated a contract of employment with or without notice because the employer made continued employment intolerable for the employee.
- An employee's contract of employment is terminated with or without notice, because a new employer, after the transfer of business, provided the employee with conditions or circumstances at work that are substantially less favourable than those which were provided by the old employer.

An unfair labour practice, in terms of the LRA, means:

- Unfair conduct relating to the promotion, demotion, probation or training of an employee, or relating to the provision of benefits to an employee (this excludes disputes about dismissals or a reason pertaining the probation of an employee)
- Unfair suspension or other unfair disciplinary action short of a dismissal of an employee
- A failure or refusal by an employer to reinstate or re-employ a former employee in terms of any agreement
- An occupational detriment, other than a dismissal in contravention of the Protected Disclosures Act on account of the employee having made a protected disclosure in that Act

### **1.3. BASIC CONDITIONS OF EMPLOYMENT ACT (BCEA)**

- Purpose: to advance economic development and social justice by establishing and enforcing basic conditions of employment
- Primary Objectives:
  - Give effect to and regulate the right to fair labour practices as contained in Section 23(1) of the Constitution by establishing and enforcing basic conditions of employment.
  - Give effect to obligations incurred by the Republic as member state of the International Labour Organisation

#### **Major issues addressed by the BCEA:**

##### **a) Work time and rules**

- Ordinary hours of work
- Overtime
- Extended ordinary daily hours of work
- Meal intervals
- Daily and weekly rest period
- Night work
- Sunday work and public holidays
- Emergency work
- Annual leave
- Sick leave
- Maternity leave
- Family responsibility leave

##### **b) Remuneration and deductions**

- An employer must pay an employee according to arrangements made between them. Payment may take place daily, weekly, fortnightly or monthly.
- An employer may only deduct money from an employee's pay if permitted or required to do so by law, collective agreement, a court order or arbitration award. A deduction for loss or damage caused by the employee in the course of employment may only be made by agreement and after the employer has established, by a fair procedure, that the employee was at fault. An employee may agree in writing to an employer deducting a debt specified in the agreement.

##### **c) Termination of employment**

- Notice period:
  - During first 6 months of employment – 1 week's notice
  - 6 months to 1 year – 2 week's notice
  - More than 1 year's service – 4 week's notice
- Notice must be in writing.
- Termination of employment by an employer on notice in terms of the Act does not prevent the employee challenging the fairness or lawfulness of the dismissal in terms of the LRA.
- An employee must receive fair remuneration on termination.

#### **d) Administrative obligations**

- An employer must:
  - Give the employee written particulars of employment when the employee starts employment. The Minister of Labour must prescribe the required particulars.
  - Keep these particulars of employment for four years after the end of the contract of employment.
  - Must give employee information concerning remuneration, deduction and time worked with their pay.
  - Keep a record of the time worked by each employee and their remuneration.
  - Display at the workplace a statement of employees' rights under the Act.
- On termination of employment, an employee is entitled to a certificate of service.

#### **e) Children and forced labour**

- Children under 18 may not be employed to do work inappropriate for their age or that places them at risk.
- No person may employ a child under 15 years of age.

#### **f) Variations**

- A collective agreement concluded by a bargaining council or between an employers' organisation and a trade union might replace or exclude any basic condition of employment.
- Bargaining council agreements take preference over other collective agreements, and the latter in turn take preference over individual agreements.
- A bargaining council agreement may vary any provision of the Act, accept the core rights of an employee.
- Other collective agreements include:
  - Averaging of hours of work
  - Family responsibility leave
  - Deduction from an employee's wages
  - Shorter notice period for the termination of employment
  - Removal of labour inspector's ability to issue a compliance order if the collective agreement provides for arbitration
  - Certain conditions of employment within the limits set by the act, e.g. overtime, weekly rest periods, Sunday work and sick pay.

#### **g) Monitoring, enforcement, legal proceedings**

- The Minister of Labour may appoint labour inspectors who should perform their functions subject to the direction and control of the Minister.

- The function of labour inspectors is to promote, monitor or enforce compliance with employment laws. They must advise employees and employers on their rights and obligations in terms of employment laws. They may also conduct inspections, investigate complaints and secure compliance with employment law.
- A dispute concerning the exercise of these rights may be referred to a bargaining council or to the CCMA. If this does not resolve the dispute, it may be referred to the Labour Court.

#### 1.4. EMPLOYMENT EQUITY ACT (EEA)

- Purpose:
  - Promote equal opportunity and fair treatment
  - Affirmative action to redress advantages
- Designated groups:
  - Black people (Africans, Coloureds, Indians)
  - Women
  - People with disabilities
- Designated employers:
  - Employers who employ 50 or more employees
  - Employers who employ less than 50 employees but whose total annual turnover equals or exceeds a certain applicable turnover (as gazetted)
  - An employer appointed by a collective agreement
  - Municipalities
  - Organs of state
- Duties of designated employers:
  - Assign a manager
  - Disclosure of information
  - Consultation
  - Analysis
  - Preparation & implementation of an EE plan
  - Report to the Department of Labour
  - Display a summary of the provisions of the Act
- Discrimination: Usually refers to unfair treatment of an individual or group on grounds of their gender, race or disability. When defining inherent requirements of a job, we must consider and avoid using criteria that might be discriminatory. The inherent requirements of a job are essential requirements a person must have in order to be effective in a position – without these, the person would not be able to perform in the job.
  - Unfair discrimination: Discrimination which goes beyond the inherent requirements of a position, e.g. discrimination based on the race, gender, religion, age, culture, sexual orientation, marital status, belief, political opinion, pregnancy, social origin, disability, status, language or birth of individuals.
  - Fair discrimination: Entails ruling out candidates that are unsuited for a position, based purely not those specific inherent requirements needed in order to perform a particular task or functional role effectively.
- Definitions of affirmative action:
  - Affirmative action is a business strategy and process aimed at transforming socio-economic environments which have excluded individuals from disadvantaged groups in order for such disadvantaged individuals to gain access to opportunities based on their potential (*IPM, 1995*)
  - 'the purposeful and planned placement or development of competent or potentially competent persons in or to positions from which they were debarred in the past, in an attempt to redress past disadvantages and to

render the workforce as more representative of the population, on either local or national level'.

**Preparing an employment equity plan:**

- Phase 1: Preparation:
  - Step 1: Assign responsibility
  - Step 2: Communication, awareness & training
  - Step 3: Consultation
  - Step 4: Analysis
- Phase 2: Implementation
  - Step 5: Corrective measures & objectives
  - Step 6: Time frames established
  - Step 7: Allocation of resources
  - Step 8: Plan communication
- Phase 3: Monitor
  - Step 9: Monitor, evaluate and review
  - Step 10: Report

**Occupational levels and categories:**

<b>Occupational levels</b>	<b>Occupational categories</b>
Top management	Legislators, senior officials and managers
Senior management	Professionals
Professionally qualified and experienced specialists and mid-management	Technicians and associated professionals
Skilled technical and academically qualified workers, junior management, supervisors, foremen, and superintends	Clerks
Semi-skilled and discretionary decision making	Service and sales workers
Unskilled and defined decision making	Skilled agricultural and fishery workers
	Craft and related trades workers
	Plant and machine operators and assemblers
	Elementary occupations

**1.5. OCCUPATIONAL HEALTH AND SAFETY ACT (OHSA)**

- Promulgated in 1993 to make provision for:
  - The health and safety of people at work and in relation to their use of operating equipment and machinery
  - The protection of other people against threats to their health and safety arising from the activities of people at work
  - The establishment of an advisory council for occupational health and safety and related matters.
- Each employee must:
  - Take reasonable precautions at work for his/her own safety and health and that of other people who may be affected by his/her actions or failures.
- Each employer must:
  - Establish and maintain a work environment that is safe and without risk to the health of its employees



- Operate its organisation in such a way that people who are not employees and who are directly affected by the activities of the organisation are not exposed to threats to their health and safety as a result.
- There are separate acts for mining and shipping merchants

## **1.6. COMPENSATION FOR OCCUPATIONAL INJURIES AND DISEASES ACT (COIDA)**

This allows for compensation to be aid to an employee who, as a result of his/her activities at work is partially or totally disabled or contracts an occupational disease.

## **1.7. UNEMPLOYMENT INSURANCE FUND (UIF)**

- Compulsory insurance scheme
- Can't claim in the following instances:
  - Contributors who receive a monthly pension/disability grant from the state or in terms of the COIDA
  - Contributor who refused to accept appropriate work
  - Contributor who resigned voluntary, except constructive dismissal
- Benefits:
  - Illness
  - Maternity
  - Adoption
  - Dependents
  - Unemployment
- UIF Contributor's Act: 1% of Employee and 1% of Employer

## **1.8. SOUTH AFRICAN QUALIFICATIONS AUTHORITY ACT (SAQA ACT)**

- Purpose: The plethora of training qualifications and pathways that are available on the training market make it increasingly difficult for learners to judge the credibility and market value of a course and for employers to determine the value of the qualifications achieved by trainees. The South African Qualifications Authority Act successfully addresses this problem by providing a regulatory framework for a comprehensive national recognition framework consisting of national standards to improve the quality and relevance of training.
- The objective of the Act establishes the South African Qualifications Authority (SAQA), whose function it is to oversee the development and implementation of the National Qualifications Framework (NQF).
- The NQF serves as a vehicle to create an integrated national framework for learning achievements and to enhance access to and mobility and quality within the components of the education and training delivery system.
- The vision of the SAQA is to develop an education and training system that reflects the objectives of the NQF.
- This mission of SAQA is to ensure the development and implementation of a National Qualifications Framework which contributes to the full development of each learner and to the social and economic development of the nation at large

## **1.9. SKILLS DEVELOPMENT ACT (SDA)**

- Purpose: The Skills Development Act seeks to develop the skills of the South African workforce and thereby:
  - Increase the quality of working life for workers
  - Improve the productivity of the workplace
  - Promote self-employment and the delivery of social services.
- The Act also seeks to encourage employers to use the workplace as an active learning environment and to provide opportunities for new entrants to the labour market to gain work experience.
- Special focus is given to improve the employment prospects of previously disadvantaged persons through education and training.
- The objectives of the Skills Development Act are to be achieved by establishing a stronger institutional and financial framework than previously existed under the Manpower Training Act.
- The National Training Board is replaced by a National Skills Authority (NSA). The NSA is an advisory body to the Minister of Labour with responsibility for ensuring that national skills development strategies, plans, priorities and targets are set and adhered to.
- Industry training boards are replaced by Sector Education and Training Authorities (SETAs) responsible for developing sector skills plans that correspond to the national skills strategies and targets.

#### **1.10. SKILLS DEVELOPMENT LEVIES ACT (SDLA)**

- Purpose: The rationale for a national levy scheme for skills development is premised on the assumption that effective skills formation requires a strong link between occupationally based education and training and the workplace.
- The Skills Development Levies Act provides a regulatory framework to address the current low level of investment by companies in training. The Act establishes a compulsory levy scheme for the purpose of funding education and training as envisaged in the Skills Development Act.
- The Act introduces a levy equivalent to 1% (one percent) of employers' payroll per month. Employers must pay this levy to the Commissioner for the South African Revenue Service. In some cases, monies may be paid directly to the particular SETA.
  - 20% of the funds collected + money received from fiscus is allocated to the National Skills Fund. This is used to fund national skill priorities.
  - 80% of the funds collected is paid to the SETA to fund the performance of their functions and pay for their administration.