



PARLIAMENT
OF THE REPUBLIC OF SOUTH AFRICA

PORTFOLIO COMMITTEE ON LABOUR
BASIC CONDITIONS OF EMPLOYMENT AMENDMENT BILL [15-2012]
WORKING DRAFT 1
DATE: 07 NOVEMBER 2012

KEY: **Yellow – is currently in the Bill and is proposed to be changed/removed**
Grey is the new proposed changes for committee consideration

Clause 1: Definitions

- No legal issue identified.
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Clause 2: Prohibited Conduct

- This clause deals with the prohibited conduct by an employer to not force an employee or a potential employee to buy certain products from the employer or from a business or person nominated by the employer.
- During the preliminary committee process on the Bill, it was explained that the words: "Require", "or accept" must be interpreted according to its ordinary dictionary meaning. The Collins English Dictionary defines the words as follows:

"require" means "lay down as an imperative; command; instruct; order"

"accept" means "consent to receive; .."

- These words were contrasted against section 34A in the Principal Act, which uses the word "*deduction*". An employer effects a deduction in the case of pension, provident, retirement, medical aid or similar funds which are referred to as a benefit fund.
- Thus the wording of section 33A(1)(a) and (b) does not seem to be problematic.
- In section 33A(2)(a) it was pointed out during the committee meeting that an employee must receive a *financial* benefit and not merely a benefit. It was further discussed that a financial benefit is subjective and does not necessarily mean that money left the hands of the employee.

- No further matters of emphasis were identified in this clause.

Clause 3: Prohibition against work by children

Explanatory Note:

- It was clarified during the committee meeting that section 43(1) was being amended to prohibit “*work*” by children, instead of “*employment*”. This conforms to the word “*work*” that is used in section 28(f) of the Constitution and the ILO Convention.
- That the new section may be problematic as it is more onerous than the previous section 43, as it now states that-

“A person must not require or permit”.

- Section 43(1) therefore creates a blanket prohibition against the work of a child under the age of 15 years or the minimum school leaving age.
- It should be noted that section 50(2)(b) allows the Minister to make a determination in respect of section 43(1) to allow for the *employment* of children in the performance of advertising, sports, artistic or cultural activities.
- Currently, section 50(2)(b) is not linked to section 43(1) in the Bill and this could thus create an anomaly whereby the Minister in making a determination, could be seen to, “*permit*” a child to work and be guilty of an offence in terms of section 43(3).
- It is therefore recommended that section 43(1) be amended (see the grey below) in order to allow for the determination as exclusion to the total prohibition. Section 50 was not presented as an amendment in the Bill, but the words in section 50(2)(b) should be “*work*” and not “*employment*”.
- It was also pointed out that section 43(2) in the Principal Act mirrors section 28(f) of the Constitution and this is therefore the “safety parameter” to ensure that the section is constitutional.

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) ~~Subject to section 50(2)(b),~~ [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.”.

Clause 4: Regulation of work by children

Explanatory Note:

- Section 44 seeks to allow for the regulation of work by children who are 15 to 17 years of age. Previously the section referred to employment.
- The definition of child in the BCEA and the Constitution refer to child as:
“a person under the age of 18.”.
- Section 44(1A) allows the Minister to issue regulations in respect of work by children aged 15 to 17.
- It was also stated that no definition of “work” currently exists, and this may be why the concept of “work” will be regulated by the Minister in terms of section 44(1A).

Clause 5: Medical examinations

- Consequential amendment by changing “*employment*” to “*work*”
- No issues identified

Clause 6: Prohibitions (offence to assist a person to let a child work)

- Consequential amendment to align the section to section 43(1), i.e. a person may not require or permit...

- And the word “employed” to “work”
 - No issues identified.
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Clause 7: Evidence of Age

- Consequential amendment
 - No issues identified
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Clause 8: Making a sectoral determination

- Issue identified relates to section 55(4)(b) that introduces the adjustment of remuneration by way of
 - (i) minimum rates; or
 - (ii) minimum increases.
 - Owing to the fact that the adjustments are effected in a sectoral determination environment, the Minister cannot unilaterally impose a determination. Also, it is either a minimum rate or increase that can be applied and not both.
 - Issue identified relates to the matter of sub-contracting in section 55(4)(g).
 - As indicated during the committee meeting, the making of a sectoral determination is not effected unilaterally by the Minister. In section 55(1) of the Principal Act it is indicated that the Minister acts after considering the report and recommendations by the Commission.
 - This then ensures that the sub-contracting will not be prohibited in sectors which rely on this form of business service.
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Clause 9: Securing undertakings

- During the committee meeting concern was expressed at the fact that the Labour Inspector may endeavour to secure an undertaking and that only after the employer's failure to comply with an undertaking can the Director-General apply to the Labour Court to enforce the undertaking.
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Clause 10

No legal issue identified

Clause 11: Objections to compliance order

- Technical amendments.
 - No issue identified
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Clause 12: Repeal of sections

- No issue identified
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Clause 13: Order may be made order of Labour Court.

- This amendment is effected in order to provide a date in the compliance order in order to ensure that the employer is aware of the proceedings.
 - No issues identified.
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Clause 14: Consolidation of proceedings.

- No issue identified
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Clause 15: Jurisdiction of the Labour Court

- No issue identified
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Clause 16: Schedule of term of imprisonment

- No issue identified.
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Clause 17: Schedule of Fines

- No issue identified
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Clause 18: Short Title

- Recommended to be drafted to indicated how it will come into operation.

Short title

18. This Act is called the Basic Conditions of Employment Amendment Act, 2012, and comes into operation on a date fixed by the President by proclamation in the Gazette.
