GENERAL NOTICE

PLEASE NOTE!
ALL FOOTNOTES ARE AT THE END OF THE DOCUMENT.

NOTICE 156 OF 1996

MINISTRY OF LABOUR

EMPLOYMENT STANDARDS STATUTE: POLICY PROPOSALS

1. The Minister of Labour requested the Department of Labour: Minimum Standards Directorate to draft a new Employment Standards Statute to replace the Basic Conditions of Employment Act, 1983, and the Wage Act, 1957.

2. After research and consultation with the International Labour Organisation and legal and labour specialists, a Green Paper identifying policy proposals for inclusion in a new Employment Standards Statute was prepared.

3. These proposals are hereby published by the Minister of Labour in the Schedule hereto for general information, public comment and negotiation at the National Economic, Development and Labour Council.

4. (a) All interested parties are invited to submit written comments on the draft policy proposals.

   (b) Such comments should be addressed to the Director-General: Labour, Private Bag X117, Pretoria, 0001, for the attention of Mrs M. Bergmann [Fax number (012) 320-2059].

   (c) Comments should reach the office of the Director-General by not later than 12 April 1996.

   (d) The name, telephone number or fax number and address of a person who may be contacted in regard to the comments should also be stated clearly.

5. The comments will be considered by the Department of Labour and will also be submitted to the National Economic, Development and Labour Council for consideration.

6. An Employment Standards Bill will then be drafted and placed before the aforementioned Council for deliberation.

SCHEDULE

GREEN PAPER: POLICY PROPOSALS FOR A NEW EMPLOYMENT STANDARDS STATUTE

Foreword

The Department of Labour is publishing a Green Paper entitled "Policy Proposals for a new Employment Standards Statute".

This is the start of the second phase of reviewing South Africa's labour laws. Last year the Labour Relations Act 66 of 1995 was negotiated by the social partners at the National Economic, Development and Labour Council (NEDLAC) and passed by Parliament. That law will come into effect on 1 May this year bringing a new era of labour relations.

This year we are turning our attention to the two most important laws setting minimum conditions in the workplace - the Basic Conditions of Employment Act 3 of 1983 and the Wage Act 5 of 1957.

The Green Paper describes these laws and lists many of the problems that these laws cause for employers and workers and why the Department believes a new law is required. The Green Paper contains proposals and options for developing a new law. These are not final proposals. They are made to initiate debate over these important issues.

These laws affect millions of South Africans. They set out many of the most basic work rights - for example, how many hours a worker can work in a week or how many weeks' leave a worker can spend with his or her family each year. They affect employers - large and small - as these rights apply in all workplaces. The new law should guarantee basic rights for all workers. It should contribute to fairness and equity in the workplace.

But it can only do so within the context of South Africa's social and economic development.

This year the government has stressed the critical importance of job creation. This raises important questions for the debate on the law proposed in the Green Paper. Can we use the proposed law to promote employment creation? Could some rights hinder employment creation? The Department has taken these issues into account in preparing its proposals. This is an important issue for debate. The first prize is a law that can set fair employment standards and promote the creation of new jobs. Striking the correct balance will be a difficult issue but it is one in which wide public participation is important.

The comments received from members of the public will be analysed and taken into account in the next stage of this process - preparing a draft Bill. The Green Paper will also be the subject of negotiations by the members of NEDLAC and will be scrutinised by other government agencies.

The proposals have been presented in a way which we hope is easy to read. The Green Paper offers an important opportunity for the public to express their views on this important issue.

T. T. Mboweni (MP)
Minister of Labour

COMMONLY USED ABBREVIATIONS

BCEA	Basic Conditions of Employment Act 3 of 1983
CCMA	Commission for Conciliation, Mediation and Arbitration
CLMC	Comprehensive Labour Market Commission
COIDA	Compensation for Occupational Injuries and Diseases Act 130 of 1993
ILO	International Labour Organisation
LRA	Labour Relations Act, 66 of 1995 (Note: the Labour Relations Act 28 of 1956 has not yet been repealed and is referred to as the 1956 LRA)
NEDLAC	National Economic, Development and Labour Council
RDP	Reconstruction and Development Programme
UIA	Unemployment Insurance Act 30 of 1966

UIF Unemployment Insurance Fund

DEPARTMENT OF LABOUR MINIMUM STANDARDS DIRECTORATE

POLICY PROPOSALS FOR A NEW EMPLOYMENT STANDARDS STATUTE

GREEN PAPER

23 FEBRUARY 1996

CONTENTS

SUMMARY

A INTRODUCTION

1 This Green Paper is the first step taken by the Department of Labour to develop new legislation to regulate employment standards in South Africa. The Green Paper is not an official government view. It contains a set of policy proposals and options for discussion and debate.

2 A draft Employment Standards Bill, to replace the Basic Conditions of Employment Act 3 of 1983 (BCEA) and the Wage Act 5 of 1957, will be placed before Parliament in the second half of 1996.

3 The BCEA and Wage Act do not meet current economic, social and political requirements. These laws are rigid, and outdated and complex. Vulnerable workers are inadequately protected. The enforcement of these Acts through the criminal courts is ineffective and does not encourage compliance with employment standards.

Regulated Flexibility

4 The Green Paper seeks to balance the protection of minimum standards with the requirements of labour market flexibility. A model of "regulated flexibility" is proposed. This has two main aspects:

* the protection and enforcement of a revised body of basic employment standards;

* rules and procedures to vary these standards through collective bargaining, sectoral determinations for unorganised sectors and administrative variations (exemptions).

Principal aspects of the new legislation

5 The principal considerations that have shaped the proposals in the Green Paper are:

* setting appropriate standards for current employment conditions. This includes modernising standards and improving the protection of vulnerable workers;

* allowing greater labour market flexibility through removing inappropriate restrictions, enabling arrangements to allow for the more productive use of working time and providing for variation through collective bargaining;

* promoting collective bargaining as a means of varying employment standards and introducing flexible working arrangements;

* supporting employment creation by ensuring that proposals are compatible with employment creation and avoiding consequences that may destroy jobs;

* encouraging compliance with employment standards through the introduction of more effective enforcement mechanisms;

* promoting a healthy work environment by minimising the potential negative effects of the arrangement of working time on the health and safety of workers and the public;

* reducing administrative burdens on employers;

* establishing a clear set of rights by developing a simpler statute drafted in plain language;

* addressing gender discrimination and giving effect to South Africa's obligations under the United Nations Convention on the Elimination of all Forms of Discrimination Against Women.

B SCOPE OF THE NEW LEGISLATION

6 New employment standards legislation should (like the Labour Relations Act of 1995) cover all employees except the security and intelligence forces. The Minister should have the power to vary the application of certain provisions of the Act to the public sector and to higher paid employees. There may be certain additional exclusions such as trainees whose employment conditions are set by other legislation and voluntary workers.

C NON-STANDARD EMPLOYMENT

7 There are increasing numbers of part-time workers, temporary workers, workers supplied by labour brokers, home workers and contract workers in the labour

market. To improve the protection of workers in non-standard employment, it is proposed that:

* part-time employees should be entitled to the same protections as full-time employees on a proportional basis;

* employers who engage labour contractors should be jointly and severally liable for violations of employment standards by the contractor;

* employment standards can be extended to "dependent contractors" - (ie workers who fall outside the formal definition of an employee).

D VARYING EMPLOYMENT STANDARDS

8 It is proposed that employment standards can be varied by:

* collective bargaining;

* wage determinations (sectoral employment standards);

* administrative variation (exemptions);

* individual contracts of employment.

Collective bargaining

9 For the purposes of collective bargaining, it is proposed that employment standards can be divided into:

* fundamental rights which cannot be varied by collective bargaining;

* standards which can be varied if the variation is not against the public interest (such a variation would require ratification by the Employment Standards Commission);

* standards which can be varied within statutory limits;

* standards which can be varied without any limitation, ??? agreements concluded at bargaining councils should have greater scope to vary employment standards than other collective agreements.

Administrative variation

10 If there is a representative trade union, no variation should be permitted unless there is a collective agreement or the trade union consents.

Individual contracts of employment

11 The legislation should state the matters that can be varied by individual contracts.

E EMPLOYMENT STANDARDS COMMISSION

12 The Wage Board should be revitalised and reconstituted as an Employment Standards Commission and its functions extended. Its principal function would be to develop employment standards for sectors of the economy not covered by collective bargaining. It should be able to advise the Minister of Labour on issues relating to employment standards and the impact of government policies and variations of employment standards on employment creation.

F WORKING TIME

13 The Green Paper explores achieving the goal of the 40-hour week and the introduction of a framework to enable more flexible arrangements of working time. This will require a comprehensive approach involving legislation and national agreements.

14 The following legislative changes are suggested:

* reducing ordinary weekly hours of work from 46 (day workers) and 48 (shift workers) to 45 and a reduction of the weekly limits from security workers from 60 to 48;

* permitting more flexible working arrangements such as compressed working weeks and the averaging of working hours (over a period of up to four weeks) by collective agreement;

* removing current restrictions on Sunday work (but retaining double pay as the basic approach to Sunday pay);

* adjusting the system for compensating overtime - overtime pay should be increased from time-and-a-third to time-and-a-half and employees should be able to exchange overtime for additional time off.

15 A national strategy should also include:

* a timetable for reducing working time;

* a framework agreement to reduce hours of work in the context of employment creation, productivity, human resource development and wage compensation;

* implementation of the agreement through sectoral and plant-level agreements;

* investigation by the Employment Standards Commission and the setting of sectoral employment standards in unorganised sectors;

* special provisions for small business;

* technical assistance to social partners in implementing reduced working hours;

* other aspects of working-time.

16 Rest periods should be regulated. This includes meal intervals, daily and weekly rest period. The weekly rest period should be 36 hours (including one full day) which could be averaged over two weeks.

17 The organisation of working time can impact significantly on the health and safety of workers and the public. There should be a general duty on employers to avoid these consequences. This would be supplemented by a Code of Good Practice to guide employers and employees.

18 Night work should be regulated. A 20% allowance for night work should be introduced and steps should be taken to protect the health of night workers.

19 The present annual leave entitlement of two weeks should be increased to three weeks.

20 The new legislation should be brought in line with the Public Holidays Act which allows for the exchange of a public holiday with another day.

21 The right to paid sick leave at current levels should be retained. Changes are introduced to allow for greater flexibility on the administration of sick leave and to promote the provision of comprehensive health benefits.

G MATERNITY RIGHTS AND FAMILY RESPONSIBILITY

22 The following proposals are made:

* an employee is entitled to four months' maternity leave during which her security of employment is protected;

* women may not work for six weeks after the birth of a child, unless agreed to by a doctor;

* a woman employed in night work or work which could be harmful to her or her child is entitled to suitable alternative work during pregnancy and a year after the birth of her child;

* employees with more than one year's service are entitled to three days' paid paternity or child-care leave during each year.

H CHILD LABOUR

23 There should be an integrated strategy linked to the provision of free basic education and addressing poverty to combat child labour. Children below 15 should be prohibited from working without Ministerial permission (variation). This should only be granted (for children over 12) if the work does not place the child's physical and mental well-being at risk. Children between 15 and 18 should not be permitted to perform work inappropriate for that child's age or harmful to their health.

I THE INDIVIDUAL EMPLOYMENT RELATIONSHIP

24 The provisions in the LRA of 1995 on unfair dismissal and individual unfair labour practices (excluding those relating to discrimination) should be transferred to the new legislation.

25 A four weeks notice period for an employer or employee to terminate a contract of employment is proposed.

26 Employees should have a right to receive written particulars of their employment.

27 Disputes concerning discrimination against employees for exercising rights in terms of the new legislation should be dealt with through mediation and arbitration.

J ENFORCEMENT

28 To encourage greater compliance with employment standards, enforcement through the criminal courts should be replaced by an integrated system of enforcement. This would include: inspectors being able to issue "compliance notices" to employers, and to issue penalties to employers who fail to keep prescribed records;

* employees being able to institute claims against employers in the Small Claims Court, Labour Court or the Commission for Conciliation, Mediation and Arbitration;

* retaining criminal sanctions for serious offences such as child labour and

repeated breaches of employment standards.

K ADMINISTRATIVE OBLIGATIONS

29 Labour statutes impose different administrative obligations upon employers. These obligations should be reduced and simplified. The introduction of a single prescribed reporting form is proposed. This would enhance the efficiency of the Department of Labour. The new legislation should also harmonise definitions commonly used in labour statutes to create greater certainty.

30 The Appendix contains information on the hours of work of South African employees.

Chapter A

INTRODUCTION

Contents

The publication of this Green Paper is the first step taken by the Department of Labour in developing new legislation to regulate minimum employment standards in South Africa.

The Department believes that the Basic Conditions of Employment Act (BCEA) 3 of 1983 and the Wage Act 5 of 1957 should be revised and replaced by a single law regulating statutory employment standards. This is needed to meet the country's social, political and economic goals as reflected in the Reconstruction and Development Programme (RDP) and adopted by the Government of National Unity.

The purpose of the Green Paper is to promote a debate on the development of the law. It contains proposals and options for discussion. It also briefly describes important aspects of these Acts for people who may not be familiar with their contents.

The Green Paper has been prepared by the Directorate: Minimum Standards of the Department of Labour which is responsible for enforcing the BCEA and the Wage Act. It does not represent an official government view. It has not been endorsed by the Cabinet. It awaits the outcome on certain issues of the Report of the Comprehensive Labour Market Commission. The Green Paper will be submitted to the social partners in the National Economic Development and Labour Advisory Council (NEDLAC) for consideration. It is published to obtain public comment and will be circulated to other government agencies to obtain their views.

The Green Paper concentrates on the principles that will form the basis for the development of the new legislation. It draws the attention of the public and the social partners to aspects of the existing laws that often do not receive adequate attention.

Once the initial negotiations at NEDLAC are concluded, and the public comment has been received and analysed, a draft Employment Standards Bill will be prepared and presented for consideration to the social partners at NEDLAC. It will then be tabled in Parliament.

This chapter looks at the laws that now regulate minimum standards and the problems with those laws. It then proposes themes for the development of new legislation.

1 PRESENT LAW

The BCEA and the Wage Act set minimum employment standards for the majority of employees in South Africa. They are therefore the formal basis of the employment conditions of millions of South Africans employed in the private sector. The BCEA sets a "floor" of minimum rights for employees in the private sector. As Table 1 illustrates these rights apply to more than four million employees. The BCEA covers matters such as working time, overtime and overtime pay, annual leave, sick pay and maternity leave. It does not set minimum wages. The Act does not apply to employers and employees in sectors of the economy with wage-regulating measures (industrial council (bargaining council) agreements, wage determinations and labour orders). It covers all other employees, although some employees, such as managers and senior personnel, are excluded from some of its provisions.

The Wage Act established the Wage Board. The Board has the power to investigate standards of employment in sectors of the economy without industrial councils and make recommendations to the Mr-Lister to make wage determinations. These may contain minimum wages and other conditions of employment. The Wage Act still does not apply to farmworkers and domestic workers.

TABLE 1

Approximate figures showing number of employees covered

TOTAL WORKFORCE (PRIVATE SECTOR)	6 300 000
Employees covered by the BCEA	4 600 000
Employees covered by wage determinations	730 000
Employees covered by labour orders	120 000
Employees covered by industrial council agreements	850 000

Significantly, some 850 000 domestic workers and 950 000 farmworkers are not covered by the Wage Act.

2 LABOUR MARKET POLICY AND EMPLOYMENT STANDARDS

The RDP White Paper states that "an active labour market policy must be geared towards maximising quality employment and minimising unemployment and underemployment, and while doing so improve efficiency, equity, growth and social justice" (paragraph 3.11.1). Employment standards legislation is thus an integral part of such a labour market policy.

Current employment standards and the development of new standards must be within the context of the economic, social and political goals of the Government of National Unity. These include:

* employment creation;

* improved living standards;

* reduced social inequality;

* competitive enterprises;

* enhanced investment in human resources development;

* improved levels of productivity;

* the deepening of democracy, including workplace democracy

The revision of employment standards is part of a broad developmental strategy in line with these goals. The Comprehensive Labour Market Commission (CLMC), appointed by the President, has been investigating the employment-related aspects of the RDP and will be reporting in June this year. In addition, the proposals in this Green Paper need to be seen in the context of other reforms proposed by the Ministry of Labour's 1994 Five-Year Plan. Employment Equity legislation is also planned for this year, while 1997 should see the revision of the Department's legislation in the area of human resources. Amendments have been proposed to the Insolvency Act 24 of 1936 to strengthen the claims of workers in the event of their employer's insolvency.

The success of aspects of the proposed legislation depends on other areas of social reform. For example, the provisions concerning sick pay will depend on reforms to the health system. The strategies to regulate child labour depend on the reconstruction of our education system. The proposals for improving the enforcement of employment standards are paralleled in the draft Mine Health and Safety Bill prepared by the Department of Mineral and Energy Affairs and mining unions and employers. The observance by small employers of employment standards is linked with the development of an enabling environment for emerging and expanding SMMEs as proposed in the National Small Business Enabling Act.

3 PROBLEMS WITH EXISTING LEGISLATION

The BCEA and the Wage Act do not meet the requirements of the country's new economic, social and political goals.

The BCEA was enacted in 1983. It merged the minimum conditions of employment in the Shops and Offices Act and the Factories Act. Many of the provisions in the BCEA have their origins in legislation introduced in the 1920s to 1940s. These reflect a rigid and outdated approach to the regulation of working hours and other conditions of employment.

Many workers are excluded from the scope of basic rights and work without legal protection. Others have very limited protection or have minimum standards that are harsh or excessive. Furthermore, the systems for enforcing rights and encouraging compliance with these Acts' standards have become ineffective. The law does not protect the vulnerable and the unorganised. Many of the standards are also rigid and restrict the productive arrangement of work and working time which hampers productivity and efficiency.

The more detailed reasons why a new law is required to give effect to comprehensive labour market policies are described below.

* The daily and weekly limits on hours of work are rigid and restrict the arrangement of working hours for both part-time and full-time employees. These features are repeated in wage determinations.

* The BCEA was designed to protect full-time employees only: part-time workers are excluded from significant benefits.

* Permission from an inspector is required for Sunday work in a factory or a shop. The restriction on Sunday work is a central feature of the BCEA's regulation of working time.

* Some aspects of hours of work in the mining industry are regulated by the

Minerals Act 50 of 1991. These are less favourable than those in the BCEA. The Mines and Works Act 27 of 1956 prohibits Sunday work in mines.

* There are arbitrary differences in conditions of employment for different groups of workers.

* Many of the conditions of employment in the BCEA and in wage determinations are inappropriate, unclear or require revision, such as:

* limits on overtime and overtime pay;

* annual leave;

* sick pay;

* notice of termination;

* maternity leave;

* child labour.

* Some provisions of the BCEA and wage determinations could be challenged under the new Constitution (Act 200 of the Republic of South Africa 1993), for example, child labour and maternity leave.

* The enforcement through criminal cases is adversarial, ineffectual and does not encourage compliance with employment standards. This severely disempowers the inspectorate.

* Both Acts are inconsistent with the Labour Relations Act (LRA) 66 of 1995 and other laws administered by the Department of Labour. This undermines the effectiveness of the Department.

* The protections in the BCEA and the Wage Act are not integrated with the unfair labour practice jurisdiction.

* The Wage Act does not apply to the agriculture and the domestic sectors.

4 THE BASIS FOR NEW LEGISLATION

The new legislation must address both the new standards and the procedures and institutions to make the standards effective.

This Green Paper proposes a legislative model of "regulated flexibility". This is a policy approach that aims to balance the protection of minimum standards and the requirements of labour market flexibility.

"Regulated flexibility" has two main aspects:

* the protection and enforcement of revised basic employment standards;

* the establishment of rules and procedures for the variation of these standards.

The new legislation must provide for the variation of employment standards through collective bargaining, sectoral determination for unorganised sectors, administrative variation and individual contracts of employment.

5 PRINCIPAL ASPECTS OF NEW LEGISLATION

In the remainder of this introduction we look at some of the principal aspects

of the proposed new legislation:

5.1 Set employment standards

The Green Paper makes proposals to develop. a set of employment standards appropriate for current employment conditions. These are:

* to modernise employment standards;

* to protect vulnerable employees and employees in non-standard employment;

* to bring employment standards in line with the 1993 Constitution and the reforms introduced by the LRA of 1995;

* to incorporate protection against unfair dismissal and unfair labour practices;

* to revitalise the Wage Board (to be reconstituted as the Employment Standards Commission);

* to develop appropriate employment standards for employees in unorganised sectors.

5.2 Allow greater labour market flexibility

The new legislation should:

* remove inappropriate restrictions on working time and other employment conditions;

* permit the introduction of arrangements for the more productive use of working time, skills and equipment;

* provide for wider variation of employment standards.

5.3 Promote collective bargaining

The new legislation will promote the role of collective bargaining as a means of varying employment standards. In particular, the proposals stress the role of collective bargaining in introducing flexible working arrangements.

5.4 Support employment creation

"Employment creation is at the heart of efforts aimed at creating a democratic and prosperous society" (Ministry of Labour's programme of action 1994 to 1998 at page 3). The proposals in the Green Paper are compatible with employment creation and seek to avoid any consequence that may destroy jobs.

5.5 Encourage compliance with employment standards

Effective measures for encouraging compliance with employment standards need to be developed. It is proposed that the current use of criminal sanctions as the major means of enforcement be replaced by a range of mechanisms and incentives for compliance with employment standards.

5.6 Promote a healthy work environment

A central purpose of labour law is to promote a healthy work environment

and the arrangement of working time is a crucial aspect of this. The new legislation should promote an approach which minimises the potential negative impact of the arrangement of working time on employees' health and safety and on the public. Important examples are the regulation of night work and work in sectors which affect the safety of the public.

5.7 Reduce administrative burdens

It is important to reduce the administrative burdens placed by current labour laws upon employers. Proposals are made to rationalise and simplify administrative obligations upon employers.

5.8 Establish a clear set of rights

The new employment standards legislation will be drafted in plain language and will aim to include a range of easily understood guides and schedules to assist employees and employers to understand the law. Provision is made for the drafting of Codes of Good Practice.

5.9 Discrimination against women

South Africa has recently ratified the "Convention on the Elimination of all Forms of Discrimination Against Women" of 1979. The new legislation gives effect to obligations that affect employment standards.

5.10 International standards

The BCEA and the Wage Act do not comply with many international standards reflected in International Labour Organisation (ILO) Conventions. These Conventions are indications of what government, employers and trade unions consider appropriate minimum international norms and standards. The proposals for new legislation are guided by these standards where they are appropriate for South Africa.

Chapter B

SCOPE OF THE NEW LEGISLATION

This chapter lists the categories of employees who are not covered by the BCEA and Wage Act and examines whether they should be covered by the new legislation.

1. Problem statement

The RDP calls for "equal rights for all workers, embodied in a single set of labour statutes (paragraph 4.8.2).

Significant groups of employees (eg state employees) are excluded from the BCEA. The Constitution states all workers are entitled to fair labour practices. Farmworkers and domestic workers are not covered by the Wage Act.

2. Discussion

The LRA of 1995 will be the first labour relations law to apply to both the public and private sector. It covers all employees except members of the security forces and intelligence services. The harmonisation of aspects of the law of collective bargaining, dispute resolution and unfair dismissal is one of the most significant reforms introduced by the LRA of 1995. The provisions concerning unfair dismissal and the residual unfair labour practice are to be moved to the proposed employment standards legislation.

2.1 State employees. The most significant exclusion from both the BCEA and the Wage Act is that of employees of the state (both national and provincial) and employees of state-funded educational institutions. The law of unfair dismissal and the residual unfair labour practice which will apply to these employees is to be transferred from the new LRA to the new employment standards legislation. The extent to which the remainder of the proposed new legislation should similarly include the public and private sectors requires careful consideration.

The arguments in favour of this approach include the benefits of standardisation and consistency. Increasingly, the distinction between the private sector and public service is becoming blurred. Internationally, many public administrations have used private sector approaches to improve efficiency. This has led to corresponding changes in employment standards.

The employment standards legislation prescribes substantive minimum conditions of employment. The sources of substantive conditions of employment in the public service are found in the Public Service Act (Proc. 103 of 1994) and the legislation regulating the police and the educational sector, the various staff codes and bargaining council agreements (under the new LRA). In sectors in which bargaining councils are established these agreements will take precedence over the proposed legislation. The direct effect of inclusion of the public service under the new law will be that many of its provisions will not apply to the public service.

2.2 Farmworkers and domestic workers. Farmworkers and domestic workers remain excluded from the Wage Act. These employees require the protection of all aspects of new employment standards legislation.

2.3 Parastatal and statutory bodies. The continued total exclusion of a variety of parastatal organisations, marketing control boards and state-aided welfare organisations, children's welfare institutions and cultural institutions established under particular enabling legislation is no longer appropriate.

2.4 Temporary employees employed for agricultural and industrial shows. Temporary employees employed for agricultural, industrial or similar shows are excluded. Exclusion is not appropriate. Any need to vary employment standards for the duration of a show should be regulated by variation.

2.5 Employees on vessels at sea covered by the Merchant Shipping Act 57 of 1951. It may be appropriate for the full extent of this exclusion to be reviewed and appropriate conditions for this sector (or parts of this sector) to be regulated by a proposed Sectoral Employment Standard (wage determination).

2.6 Trainees and university students. Employees in training whose conditions of employment are regulated by conditions of apprenticeship under the Manpower Training Act, 56 of 1981 are excluded from the operation of the BCEA to the extent that their conditions of employment are regulated by that Act. This approach should continue. If specific employment standards are developed for trainees under legislation regulating human resources development and training, those standards should take precedence on the matters that they regulate.

University students performing work required for their degrees should continue to be exempt from the BCEA.

2.7 Voluntary charity workers. The exclusion of voluntary workers should

continue as these employees do not require the protection of employment standards.

2.8 Partial exclusions. The BCEA applies in a limited fashion to several significant categories of employees:

* sales personnel and travellers;

* shop and office employees earning a prescribed amount;

* managers and other senior personnel earning above a prescribed amount.

(1)

The partial exclusion of sales personnel and travellers requires consideration. The continued exclusion of high-paid employees should continue. The Minister should exercise these powers on the advice of the Employment Standards Commission.

3. PROPOSALS

a) The legislation should cover all employees except:

* members of the security forces and intelligence services;

* unpaid employees of charitable organisations;

* trainees, to the extent that their conditions of employment are regulated under other legislation.

b) The Minister of Labour should have the power, in consultation with the relevant Minister, to exclude the application of any provision of the Act to employees of the state, the South African Police Services and employees of educational institutions.

c) The Minister should have the power to exclude the application of any provision of the Act to employees earning above a defined level of earnings.

Chapter C

NON-STANDARD EMPLOYMENT

Contents

This chapter looks at the need for the new legislation to protect vulnerable employees in non-standard employment.

The current labour market has many forms of employment relationships that differ from full-time employment. These include part-time employees, temporary employees, employees supplied by employment agencies, casual employees, home workers and workers engaged under a range of contracting relationships. They are usually described as nonstandard or atypical.

Most of these employees are particularly vulnerable to exploitation because they are unskilled or work in sectors with little or no trade union

organisation or little or no coverage by collective bargaining. A high proportion are women. Frequently, they have less favourable terms of employment than other employees performing the same work and have less security of employment. Often they do not receive "social wage" benefits such as medical aid or pension or provident funds.

These employees therefore depend upon statutory employment standards for basic working conditions. Most have, in theory, the protection of current legislation, but in practice the circumstances of their employment make the enforcement of rights extremely difficult. Others are excluded and consideration must be given to their inclusion. This section identifies the main categories of non-standard employment and makes proposals for greater protection.

The proposals must be viewed in the context of the changes introduced by the LRA of 1995 which will significantly improve the employment security of these employees. This must also be seen in the context of the proposals to achieve greater compliance with employment standards set out in Chapter I. PART-TIME EMPLOYEES

1.1 Problem statement

Part-time employees are inadequately protected by the BCEA and the Wage Act.

1.2 Discussion

Part-time employees are employees who regularly work less than the ordinary hours of work in the sector in which they are employed. While there appears to be relatively low levels of part-time employment (approximately 2% of the workforce work less than 20 hours per week) in South Africa, most part-time employees are women (October Household Survey, 1994).

The BCEA incorrectly uses the term "casual employees" to describe part-time employees. It classifies employees who work for an employer on three or less days a week as "casual employees". The BCEA denies them the right to paid leave, paid sick pay and notice of termination. A 1996 ILO study reveals that approximately 50% of employers in manufacturing do not grant paid leave or paid sick leave to part-time workers (ILO Country Review).

The BCEA defines domestic workers who work for an employer for three days or less in a week as "regular day workers". They receive all the protections in the BCEA on a proportional basis, except the right to notice of termination. This new approach was necessary because many domestic workers work part-time for several employers. This more inclusive approach suggests the direction for future reforms.

The basic norm should be that all employees, including part-time employees, should be protected by employment standards. Where appropriate, these employees should receive benefits on a proportional basis.

Employees who enter employment on a part-time basis and who remain in regular employment should acquire the right to fill appropriate vacancies that arise in the full-time workforce. Provisions of this type encourage part-time employment as a "bridge" into permanent full-time employment.

1.3 PROPOSALS

a) Part-time employees should be entitled to all protections in the Act, where appropriate on a proportional basis.

b) A part-time employee who has been employed for two years or longer is entitled to be considered in preference to any person not in employment for a vacancy for which the employee is adequately qualified and has sufficient experience.

2 TEMPORARY EMPLOYEES

2.1 Problem statement

Many employees in regular employment are classified by their employers as temporary employees although they are in ongoing employment.

2.2 Discussion

The practice of incorrectly classifying employees as "temporary" is used by some employers to pay them lower benefits than other employees performing similar tasks. The unfair dismissal provisions and the residual unfair labour practice will offer protection against this type of abuse.

3 EMPLOYEES OF CONTRACTORS

3.1 Problem Statement

Employers who engage contractors have no liability for violation of employment standards by the contractors. Certain contractors are able to evade their obligations in terms of labour legislation.

3.2 Discussion

Employers are increasingly using contractors and sub-contractors to supply goods or services. There is significant use of contractors in many sectors of the economy, especially the mining industry Considerable use is made of contractors to perform tasks formerly performed by employees.

Three parties are involved in a contracting relationship: the contractor, its employees and the user (the business that engages the contractor). The terms "contractor" and "sub-contractor" are sometimes used interchangeably and usage varies from sector to sector. (In this discussion the term "contractor" is used to cover both categories.)

The LRA of 1995 protects employees engaged by temporary employment services by imposing joint and several liability for violation of employment standards on both the employment service and the client to whom the employees are supplied. (This means that both parties are liable in the event of a violation of labour legislation.) This approach should be adopted in the proposed legislation to protect employees of certain types of contractors.

Labour legislation commonly distinguishes contractors who supply goods or services from contractors who supply labour. The potential for abuse in labour contracting is recognised internationally; several countries prohibit labour contracting or require authorisation. To the extent that labour contractors fall outside the definition of a temporary employment service, the new legislation should impose joint and several liability.

Many contracts for services are in effect contracts for labour. This is particularly true when employees are engaged through a cascading series of

contracting relationships, for example, in the construction industry or where the contractor has minimal infrastructure as in the security industry. These contractors sometimes avoid their obligations by simply changing their identity or location.

It is therefore proposed that the term labour contractors should include contractors who, while supplying a service:

* do not supervise their employees while working;

* supply little or none of the infrastructure or equipment used by employees.

Much contracting work is performed in respect of work formerly performed by the user's employees. This is very controversial because these arrangements are often preceded by retrenchments. It also leads to situations in which employees performing similar or the same work may receive different benefits.

For this reason, many countries have sought to regulate this type of contracting by placing joint and several liability on users where the contractor's employees are performing work that forms a part of the employer's principal or core business or by requiring equality of treatment. The regulation of this form of contracting requires careful consideration.

3.3 PROPOSAL

An employer who engages a labour-only contractor is jointly and severally liable if the contractor violates any employment standard.

4 DEPENDENT CONTRACTORS

4.1 Problem statement

Some workers are excluded from employment standards because they are not classified as "employees".

4.2 Discussion

Labour law traditionally distinguishes employees (who enter into a contract of service with their employer) from independent contractors. The South African courts look at the contract as a whole to determine whether a person is an "employee" or an "independent contractor". This distinction excludes "classic" independent contractors (such as a plumber hired to perform a particular task) from the ambit of labour legislation.

The development of new working arrangements has led to an increasing number of workers being excluded from the protection of labour legislation because of the terms of their contract which do not meet the traditional employment test.

Sectors where this is present include home working, transport and agriculture.

These workers are potentially subject to extremely exploitative working conditions and are often referred to as "dependent contractors".

Certain countries extend labour protection to "dependent contractors". It is proposed that this should be done in South Africa by empowering the Employment Standards Commission to recommend to the Minister to extend

particular sectoral employment standards to "dependent contractors".

4.3 PROPOSAL

The Employment Standards Commission should have the power to recommend the extension of employment standards to workers who fall outside the formal definition of an "employee" but who are engaged in a dependent contracting relationship.

5 EMPLOYMENT AT PIECE RATES

5.1 Problem statement

Many vulnerable workers are paid on a piece-rate basis. There is no general protection against the abuses associated with piece-rate work.

5.2 Discussion

There is no general protection of employees engaged on a piece-rate basis. The BCEA provides some protection for piece workers in agriculture (s. 19(3)); a number of wage determinations and industrial council agreements either prohibit payment other than for time worked, or prescribe specific minimum payments for time worked by employees doing piece work, with the piece-work payments being treated as productivity bonuses. Task-based work has been used on labour-intensive job creation schemes in the civil engineering industry.

Payment of blanket piece-work rates often undermines the provisions on working hours effectively compelling employees to work excessive hours. It is suggested that the provisions applicable in certain wage determinations and the BCEA approach regarding farmworkers be made generally applicable. Consideration must be given to the inclusion of appropriate general protections for piece-rate workers.

Chapter D

VARIATION OF EMPLOYMENT STANDARDS

Contents

Employment standards legislation must provide for variation from the statutory standards in certain circumstances. Under the existing law variation from employment standards is permitted by an administrative procedure for exemption or by the replacement of the standards by those contained in wage regulating measures. Wage regulating measures include wage determinations, industrial council agreements, labour orders and conditions of apprenticeship. These methods of, variation have been criticised for their rigidity and lack of responsiveness to the needs of the modern enterprise in an increasingly global economy.

Any new legislation must seek to balance the demands of international competitiveness and the protection of basic rights of workers in order to give effect to the goals and principles of the RDP. These include high productivity, improved efficiency, equity and social justice (paragraph 3.1.1 of the RDP White Paper) and the promotion of collective bargaining at industrial and workplace levels (paragraphs 3.11.1 and 3.11.13 of the RDP

White Paper).

New legislation must recognise that South Africa's return to the international economy demands that enterprises compete with countries whose employment standards and social costs of production vary considerably. It must therefore avoid the imposition of legal rigidities in the labour market, provide greater flexibility and introduce more responsive mechanisms for variation from statutory standards. The new law envisages four methods to give effect to this idea of "regulated flexibility":

* collective bargaining;

* wage determinations (sectoral employment standards);

* expeditious administrative procedures for exemption;

* individual contracts of employment.

1 VARIATION BY COLLECTIVE BARGAINING

1.1 Problem statement

Under the LRA of 1956, collective agreements could not vary the provisions of the BCEA without an exemption from the Minister. Under the LRA of 1995, collective agreements acquire legal force in terms of section 23 of that Act. The proposed employment standards legislation must promote collective bargaining but place appropriate limits on the outcomes of collective bargaining.

1.2 Discussion

Collective bargaining is the preferred method of regulating the labour market.

One of the purposes of any employment standards legislation must be to encourage collective bargaining. It can do this by permitting collective bargaining to vary basic employment standards by collective agreement. it can promote collective bargaining in workplaces where there are representative trade unions by requiring agreement as a necessary condition for administrative exemption or ratification.

However there are limitations that should be placed on the outcomes of collective bargaining to ensure that the broad policy goals of the statute are not undermined.

1.2.1 Fundamental rights

Collective agreements should not be able to vary - to the detriment of employees - fundamental rights and protections. The precise ambit of the fundamental rights that merit this form of protection requires debate. The question for debate is which rights are so fundamental that the state must guarantee them to all employees. The Constitution and the state's public law obligations may provide the starting point for this enquiry. The following rights and standards may constitute the core of this category:

* the prohibition on child labour;

* the prohibition on discrimination;

* protection against employer abuse (for example the imposition of

fines);

* automatically unfair dismissals.

1.2.2 Variations not against the public interest

The second reason for limiting collective bargaining is the effect that a variation may have on third parties. For instance, the right to sick pay illustrates an area of potential controversy. Should a bargaining council be able to strike an agreement in terms of which employees do not have the right to paid sick leave? This may represent a trade-off for another benefit such as a higher wage increase. But it will have adverse social costs. Employees working while they are sick results in a transfer of costs from the enterprise to the health system. The Australian Industrial Relations Commission ruled that an agreement of this kind was not in the public interest.

The approach to this category of rights and standards should be to permit variation by collective bargaining subject to exemption or ratification. The new legislation ought to provide a fast-track procedure for exemptions based on collective agreements or provide for the ratification of collective agreements that vary rights and standards in this category by the Employment Standards Commission.

Consideration must be given in the debate to what the test for ratification or exemption should be. The tests that are generally employed are whether or not the variations from the standards are: (a) in the "public interest"; or (b) "on the whole not less favourable". The rights and protections that may fall into this class are:

* sick pay rights;

* maternity rights.

1.2.3 Variation within statutory limits

The new legislation should also specify the instances in which collective agreements are able to vary employment standards within defined limits but without exemption or ratification. This would include the capacity to make arrangements to promote flexible working patterns. Proposals in this regard are included in this Green Paper. This approach has been adopted in respect of the following:

* ordinary working time including the length of the working day and the length of the working week;

* weekly rest periods;

* meal intervals.

It is necessary to distinguish between agreements concluded by the parties to bargaining councils and other collective agreements. The LRA of 1995 significantly alters the interplay between the bargaining council agreements and minimum standards. Under the LRA of 1956 an agreement concluded by the parties to an industrial council acquired the force of subordinate legislation once promulgated by the Minister of Labour. The promulgated agreement, like any other wage-regulating measure, took precedence over the provisions of the BCEA by virtue of section 1(3) of the BCEA. The Minister's right to exercise a discretion as to whether or not to promulgate an individual agreement allowed the Minister to examine the agreement concluded by the parties to a council

in the light of the BCEA and to determine whether or not the conditions of employment were acceptable.

In terms of the LRA of 1995, all collective agreements, including those concluded at bargaining councils, acquire legal force in terms of section 23 of the Act. Agreements are no longer transformed into subordinate legislation. The role of the Minister is confined to the extension of an agreement to non-parties within the registered scope of the council (s. 32). The Minister does not consider the substantive conditions of employment in deciding on an extension other than whether or not they discriminate against non-parties.

The LRA of 1956 accords no special status to collective agreements that are not promulgated in the Government Gazette. Their provisions cannot deviate from the BCEA unless an administrative exemption is obtained.

The new legislation should maintain the distinction that has been traditionally drawn between bargaining council agreements and other collective agreements.

There are issues on which it is appropriate to permit bargaining councils to vary employment standards but on which it may not be appropriate to permit individual employers and trade unions to do so. For instance, it is not consistent with the purpose of the legislation for individual employers to seek to compete with each other through extending the ordinary working day or reducing the overtime rate. Bargaining council agreements, however, should be entitled to do just this, not only because it sets a floor for competition, but also because it is in keeping with the goal of the LRA which has as one of its primary objects the promotion of collective bargaining at sectoral level. Accordingly, in the debate on what the statutory limits ought to be in respect of this category of standards, consideration ought to be given to the expanded horizons that ought to be accorded to bargaining councils.

1.2.4 Variation without limits

The new legislation should permit collective bargaining agreements to vary employment standards without a requirement for administrative exemption or ratification. Further deliberation is needed on the kind of matters that ought to be included under this head. In respect of working time, the issues will need to be the subject of the consultations on a national strategy referred to in the following Chapter.

1.3 PROPOSALS

a) A collective agreement may automatically vary any employment standard except:

   * a fundamental right;

   * a right that requires ratification for variation.

b) A collective agreement may vary any employment standard to the extent permitted by legislation.

2 VARIATION BY WAGE DETERMINATION (SECTORAL STANDARDS)

2.1 Problem statement

The Wage Board has tended to reproduce the standards in the BCEA and has not made full use of its power to set sector specific standards.

2.2 Discussion

Under existing law, the Wage Board is entitled to make recommendations on minimum wages and employment standards in a sector. In practice the Wage Board reproduced the provisions of the BCEA and very seldom made recommendations to vary employment standards to fit the particular requirements of the sector. The Department envisages that a restructured Wage Board (Employment Standards Commission) will provide a mechanism to vary employment standards to suit the needs of particular sectors.

In 1993 and 1994 the BCEA was extended to cover farmworkers and domestic workers. A large number of provisions that apply specifically to these sectors were included in the Act. The provisions applicable to agriculture were agreed to between agricultural employers organisations and trade unions representing farmworkers as part of the process of extending labour legislation to the agricultural sector. The provisions applicable to domestic workers were the result of recommendations by the National Manpower Commission.

These sectoral provisions have increased the complexity of the legislation. The basic conditions applicable to agriculture are found in both the BCEA and the Agricultural Labour Act 147 of 1993. The incorporation of sector-specific provisions in the body of the Act was required because these sectors are not covered by the Wage Act. The jurisdiction of the Wage Board should be extended to these two sectors. Existing provisions in the BCEA applicable to farmworkers and domestic workers should remain in force until superseded by a bargaining council agreement or wage determination binding on employers and employees in that sector. These provisions would be listed in a transitional schedule.

2.3 PROPOSAL

The existing provisions applicable to farmworkers and domestic workers in the BCEA should be included in transitional provisions pending an investigation by the Employment Standards Commission on the promulgation of a Sectoral Employment Standard for each of the sectors.

3 VARIATION BY ADMINISTRATIVE PROCEDURE

3.1 Problem statement

The exemption procedure is bureaucratic and time consuming.

3.2 Discussion

The Minister can grant an exemption in respect of any aspect of the BCEA.

Exemptions may be of general application or in respect of an individual employer or employee. Authorisation from an inspector is required to work

New legislation should use the term "variation" instead of "exemption". This emphasises that employers are not being relieved of the obligation to comply with a labour standard but being required to meet a different standard. This will bring the statutory formulation in line with practice because most exemptions are granted on specified conditions.

The Act does not lay down any procedure for the making and consideration of applications for an exemption although the general rules of

administrative law apply. This requires allowing interested parties the opportunity to make representations before any decision is made. The power to permit variations should be conferred upon the Minister. The Minister would then be able to delegate the power to the appropriate level within the Department.

The Minister should be able to seek the advice of the Wage Board on any application for a variation. The Minister should be required to consult with relevant health and safety authorities on any application for a variation that may have an impact upon occupational health and safety.

The practice has developed that employee or trade union consent is an important consideration in applications for variations. The variation process should respect the integrity of the collective bargaining process. If an employment standard is the subject of negotiation between an employer and trade union, no variation should be granted unless the trade union consents. If there is a representative trade union in the workplace, variation should be granted only if there is a collective agreement or the trade union consents to the variation.

Provision should be made for an expeditious procedure in the application and the grant of variations. This will require decentralised decision making and a set of guidelines to ensure consistency.

3.3 PROPOSALS

a) If there is a representative trade union in the workplace, variation by administrative procedure should not be permitted unless there is a collective agreement or the trade union consents.

b) The administrative procedures must be expeditious.

4 VARIATION BY INDIVIDUAL CONTRACT OF EMPLOYMENT

4.1 Problem statement

No provision was made for variation by individual contract of employment without an exemption.

4.2 Discussion

The proposed legislation should also define the matters that can be regulated by individual agreement. These agreements would be more limited than collective agreements. The provisions would not permit employers to deal with individual employees on these matters in contravention of the terms of a collective agreement. Issues that could be varied by individual agreement include:

* the introduction of compressed work weeks;

* work on Sundays;

* arrangement of meal intervals;

* scheduling of annual leave.

4.3 PROPOSAL

The legislation should define the matters that can be varied by individual contracts of employment.

Chapter E

THE WAGE BOARD AND SECTORAL EMPLOYMENT STANDARDS

1. Problem statement

The Wage Board has not played an effective role in the development and enforcement of employment standards in unorganised sectors.

2. Discussion

In recent years there has been a considerable decline in the significance of the Wage Board. This trend is evident in the number of wage determinations, which have declined from 75 (1973) to 19 (1995). The current 19 wage determinations cover some 90000 employers and 730000 employees. This figure is misleading as the bulk of employees falling under the Wage Act are covered by a single determination. Wage Determination 455 for the Commercial Distributive Trade covers 80000 employers and almost 500000 employees.

The decline in the number of wage determinations is the result of a deliberate policy of the previous administration to run down the Wage Board. Wage determinations currently cover only a small proportion of unorganised employers. A further factor that has contributed to the decline in significance of the Wage Board has been the failure in recent years to revise minimum wages regularly. In contrast to industrial council agreements, minimum wages have often remained static for a two-year period without any provision for escalation being made in the determination.

An effective Wage Board remains an essential part of government policy to develop and enforce effective employment standards. Its capacity to make a significant contribution to the development of equitable employment standards is revealed by our recent history - the emerging trade union movement of the 1970s made effective use of the Wage Board to press its claims for improved working conditions for black workers. Wage Board hearings became focal points for the growth of trade unions.

The proposals in this section are aimed at revitalising the institution to play an active role in the development of a coherent policy on employment standards and to provide a mechanism for sectoral variation where the standards are inappropriate. The basis for this is laid by the inclusion of a reconstituted Wage Board in a single statute regulating employment standards. The extension of the Wage Board's role to the full range of decisions that involve the potential variation of employment standards will promote the development of an integrated policy. The Board should be able to advise the Minister on any matter impacting upon employment standards as well as the impact of standards upon employment creation.

Wage determinations may include minimum wages as well as conditions of employment. Current wage determinations set minimum wages and repeat with little variation the provisions of the BCEA. The most significant areas of variation have been spread-over, annual leave, and, in recent wage determinations, a short period of compassionate leave. The effectiveness of the Board would be increased if determinations were limited to minimum wages and sector-specific provisions. Where a sector-specific standard is not considered appropriate the statutory employment standards should continue to apply to the sector.

The rules regulating the Wage Board's conduct of investigations and hearings should be sufficiently flexible to permit it to perform its functions in a manner appropriate to the sector concerned. In sectors where there are employer and employee organisations, the Wage Board should be able to

encourage and assist the parties to develop sectoral employment standards through conciliation and negotiation. The determination may then amount to a ratification of a set of standards that have the support of the parties in the sector - a procedure that is now adopted in respect of labour orders made in terms of the LRA of 1956. This will contribute to higher levels of compliance with determinations.

The Wage Board should remain an advisory body. However, the provisions regulating its relationship with the Minister should be reviewed to ensure that this process permits a public debate over the determination of employment standards. At the conclusion of an investigation, the Wage Board makes a recommendation to the Minister of Labour on the proposed contents of a determination. Currently, the Minister may either make a determination in terms of this recommendation or reject it. Proposals are made to permit an exchange of views between the Minister and the Wage Board over differences regarding the levels of standards and their economic impact.

Additional changes are required as a result of the LRA of 1995. Institutional changes are required to conform with the introduction of statutory councils and the removal of the labour order.

The Wage Board can now make recommendations on an extensive list of conditions of employment. The list will have to be revised in line with the approach of the new legislation as well as the issues relevant to the protection of vulnerable employees.

The powers of the Wage Board should be extended to include powers that have been expressly granted to statutory councils in terms of the LRA of 1995, such as the establishment of training and education schemes and of social insurance schemes or funds such as provident and medical aid funds.

These proposals concern the revitalisation of the enabling structure in terms of which the Wage Board is established and operates. The Green Paper contains no recommendations in terms of the policies that should guide the Wage Board in the determination of minimum wage levels. These matters are currently being investigated by the CLMC which is investigating the relationship between national income determination and existing wage determination mechanisms.

Finally, it must be pointed out that the Wage Board is inappropriately named - its functions are not confined to the setting of wages. It is proposed that it be renamed the Employment Standards Commission.

3. PROPOSALS

a) The Employment Standards Commission (Wage Board) should consist of:

* a chairperson and additional members with experience in the setting of employment standards;

* sectoral members with experience of particular sectors and who are appointed to investigate employment standards in a particular sector;

* members appointed by the Minister after consultation with NEDLAC.

b) The primary functions of the Employment Standards Commission are to:

* investigate employment standards in any sector in which no bargaining council is established with a view to making recommendations to the Minister;

* ratify provisions in collective agreements that vary employment

standards that affect third parties or the public interest

* advise the Minister on any matter involving the application of employment standards, including any variation or exemption from employment standards.

c) A Sectoral Employment Standard (wage determination):

* may contain minimum levels of remuneration for the sector;

* may vary any employment standard contained in the statute in order to address the specific needs of the sector;

* may not deal with any matter regulated by a bargaining council agreement or a ministerial determination made on the recommendation of a statutory council;

* should be reviewed at least every three years.

d) The Employment Standards Commission must investigate conditions of employment in any sector if:

* directed to do so by the Minister;

* requested to do so by an organisation representing a significant number of employers or employees in the sector;

* it is satisfied that it is necessary for the proper regulation of conditions of employment in the sector.

e) The Employment Standards Commission must:

* publicise its investigation;

* invite and consider written and oral representations;

* be able to call meetings of affected parties and encourage them to reach consensus;

* be able to subpoena the information that it requires to conduct an investigation and make a recommendation;

* publish a report of its investigations, including recommendations for a wage determination.

The Minister may publish a wage determination in line with the recommendations of the Employment Standards Commission.

g) If the Minister does not concur with the recommendations, the Minister must give reasons.

h) The Minister may publish a wage determination after the Employment Standards Commission has considered and commented on the Minister's reasons.

Chapter F

WORKING TIME

Contents

1 Debate on the reduction of working hours
2 Working hours
3 Flexibility arrangements
4 Sunday work
5 Rest periods
6 Working time and health and safety
7 Night work
8 Shift work
9 Paid leave
10 Public holidays
11 Paid sick leave

Many South Africans work very long hours. Information on working time is included in the Appendix. The limits on working time are rigid and require change. The goal of South Africa should be to achieve a 40-hour week for its employees. This will involve complex and difficult issues. To achieve this goal will require fundamental agreements between employers, trade unions and the government.

The length and arrangement of working time involves balancing a number of considerations:

* the economic and technological constraints and requirements of the economy and the enterprise;

* the biological and physical needs of employees;

* familial, parental and social needs and aspirations of employees;

* the possible impact upon the health, safety and well-being of the community.

The legal regulation of working hours requires a thorough overhaul. The weekly limits on working time are set out in Table 2. Internationally the trend has been, when reviewing the regulation of working time, to couple the reduction in working hours with greater flexibility in working time arrangements.

TABLE 2

Ordinary weekly hours of work under the BCEA

Day workers	46
Shift workers	48
Farmworkers	48
Security guards	60
Outside sales personnel	no limit
Shop & office employees (earning above a certain specified wage)	no limit
Managers and senior personnel (earning above a specified wage)	no limit

The impetus for this has arisen on the one hand from the need of workers for better working conditions and for greater choice about their working lives, and on the other from the need of employers to adjust operating periods in line with demand in order to meet global competitive pressures. The trade off has included the introduction of more flexible arrangements such as averaging schemes, flexitime, compressed work weeks, changes in shift work systems and various patterns of part-time work.

The introduction of flexible working time in conjunction with reduced working hours can have a positive outcome for workers' health and safety. Fatigue and

stress associated with long working hours has been shown to contribute to high levels of ill health. Reduced hours allow increased time for training and education, family and social responsibilities and leisure time. In some sectors, such as transport, long hours of work of workers can endanger the safety of the community. The negative effects of long working hours are exacerbated in a society such as South Africa in which many workers have to travel long distances to work. Advantages for employers are the ability to adjust operating capacity to fluctuating demands, the better utilisation of available resources and improved productivity.

It is proposed that, in line with international trends, rigidities that have restricted the arrangement of working hours should be removed from our law. However, equally importantly, employment standards legislation must ensure that working time is arranged responsibly.

1 DEBATE ON THE REDUCTION OF WORKING HOURS

The demand for shorter working time for individual employees has been described as Via constant and universal demand". This is reflected in South Africa's political history - the Freedom Charter records the right of all South Africans to a 40-hour week. The international significance of the 40-hour week and the eight-hour day are also reflected in ILO Conventions and Recommendations.

The implications of legislated reduced working time on employment depend on a number of factors. These relate to the structure, level of development and performance of the economy as a whole and on the particular performance of individual firms affected by such a measure. The relationship between legislated reduced working hours and employment is complex and should not be approached simplistically. There would appear to be general consensus on the social welfare merits of reduced working hours, even if there is no consensus on the employment effects.

It is necessary to emphasise that this measure is not being proposed as an isolated policy, but in the context of other strategies aimed at employment creation, such as the Growth and Development Strategy currently being formulated by government and the anticipated recommendations of the CLMC. The manner in which any change to working hours is made must be compatible with employment creation and avoid consequences that may lead to job losses.

A reduction of working hours does not necessarily increase unit labour costs. The effect on costs will depend on whether or not the reduction of working time is accompanied by a compensatory wage increase. A compensatory wage increase may be traded off or accommodated by the phasing in of the reduction over a number of years.

A legislative reduction in working time has often acted as a trigger to management to reconsider work organisation or to introduce new and more efficient patterns of working time. Proponents of a reduction in working hours claim that the potential gains to enterprises of shorter hours is an increase in productivity. The linkage between the reduction and productivity has often provided the basis for the conclusion of agreements between business and labour.

The impact of a reduction of working hours varies between sectors and between businesses. Factors that account for this variation include:

* skills levels - it may not be possible to increase levels of productivity in sectors reliant upon high levels of unskilled labour. A shortage of skilled labour may hinder the capacity to benefit from flexible working arrangements (until more employees acquire these skills);

* size of the business and methods of organisation of production;

* the structure of markets and demands for products;

* employee attitudes - low paid workers, particularly those who depend on overtime earnings, may be more reluctant to agree to a reduction of working time than better paid workers;

* the extent of trade union participation - schemes for the re-organisation of working time accompanying a reduction in working time have generally been implemented more successfully if there has been trade union participation in the process.

It is evident from the above discussion that the relationship between a policy to reduce working hours over time and its effect on the economy is complex and the goal of reducing ordinary working hours to 40 hours per week is not realisable by legislation alone. What is needed is a comprehensive and integrated approach to the reduction of working hours and the introduction of more flexible working time arrangements. Any proposal to reduce working hours must:

* be compatible with employment creation and avoid consequences that may lead to job losses;

* be directed at reducing the actual working time of employees;

* enhance the potential for increased productivity (of labour and capital);

* take account of the potential and limitations of specific sectors and businesses to reduce working hours;

* take account of the possibility of increased costs;

* address the need for employees to be compensated for the reduction in working hours.

With this in mind, the following package is proposed. As a first phase and part of the package, there should be a rationalisation of maximum working hours from 46 (or 48 for shift workers) to 45. Employees who work excessive hours should have their maximum ordinary hours reduced from 60 to 48. The rigidities imposed on daily or weekly time should be made more flexible and the restrictions on Sunday work removed. The detailed proposals concerning this first phase are dealt with in the next section.

The second and further phases cannot be achieved by legislation alone. The complex relationship between a reduction in working hours and its impact upon the economy requires thorough consultation with stakeholders and, if possible, an agreed national strategy. The elements of such a strategy should include:

* a phased time-table for the reduction of working time;

* a framework agreement on the reduction of working time in the context of employment creation, productivity, human resources development and wage compensation;

* implementation of the framework agreement through sectoral and plant-level collective agreements;

* investigation by the Employment Standards Commission of working hours in unorganised sectors;

* special provisions for application to small business;

* technical assistance to social partners in implementing reduced working hours.

2 WORKING HOURS

2.1 Ordinary working time

2.1.1 Problem statement

The BCEA sets different maximum hours of work for different categories of employees. The limits on ordinary working time require reconsideration (See Table 2).

2.1.2 Discussion

With certain limited exceptions, the new legislation should set a single set of maximum daily and weekly hours applicable to all employees. Work performed in excess of these limits would be overtime. This limit should apply to both "day" workers and shift workers. It is suggested that there is no justification for a different limit on ordinary hours for shift workers. While the working hours of shift workers reflect a traditional six-day week of eight-hour shifts, the practice in many agreements is to set lower ordinary working hours. This is reflected in the legislation of many countries. Many shift workers perform night work or other work involving high levels of fatigue or stress.

Special consideration needs to be given to the position of security guards. The 60- hour week is not only found in the BCEA but in wage determinations and many industrial council agreements. This is unacceptable and requires revision.

The Department proposes that the initial phase of reforming limits on working hours should be to replace the limit of 46 with 45 as the maximum permitted ordinary working hours. This is motivated by the Department's desire to reduce working hours over a period of time and to provide a simpler basis for calculating hours in the context of proposals to achieve greater flexibility. These changes are implemented as part of the objective of achieving a 40-hour week.

Two other limits should be set on daily working time. These are total working time (which includes both ordinary and overtime) and spread-over (which is the measure of time from the start to the finish of work on a day, including intervals). Maximum spread-over is currently 12 hours (except for farmworkers and domestic workers).

The limit on total working time and on spread-over should be 12 hours. A lower limitation on total working time should apply to any sectors or occupations in which there is a high level of risk of accident or disease. The limit on total working hours in any such sector or occupation should be nine hours unless, otherwise provided.

2.1.3 PROPOSAL

a) The maximum weekly hours of work should be reduced to 45 ordinary hours with effect from 1 January 1997.

b) The maximum working day should be nine ordinary hours (eight hours for employees who work six days per week).

c) The hours of work of security guards should be reduced to 48 over a period of two years.

d) Any adjustment in pay occasioned by the reduction in working hours must be implemented in terms of the proposed national agreement.

e) No employee may work for more than 12 hours in a day.

f) No employee may work for more than nine hours in any work with a particular exposure to health and safety risks or high levels of physical or mental stress. The Minister may set a different limit after consulting with the relevant occupational health and safety authority.

g) The maximum spread-over period on any day is 12 hours.

2.2 Overtime

2.2.1 Problem statement

Many South Africans work high levels of overtime. Overtime rates are relatively low in comparison to other countries. They require consideration in the light of levels of overtime worked.

2.2.2 Discussion

Levels of overtime worked in certain sectors in South Africa tend to be high. (See Appendix, Tables A, B and C)

The BCEA sets maximum overtime of three hours per day and ten hours per week; inspectors may authorise the working of extended overtime. This is one of the most common reasons for applications for exemption. Payment for overtime (including additional overtime) is at a time-and-a-third. While the statute provides that overtime work is voluntary, many contracts of employment require employees to agree to work overtime when requested.

The limit of ten hours overtime per week should be retained. However, there should be no daily limit. The amount of overtime that can be worked on any day will be regulated by the daily total limit on working time. Extended overtime should be permitted only by exemption. many countries set an annual limit for overtime in addition to the daily and weekly limits. Limits of 150 and 200 hours of overtime annually are common.

This approach seeks to balance the short-term need for overtime with stricter limits on the regular use of lengthy periods of overtime.

Is the overtime pay regime still appropriate? The first area for examination is that of overtime payment or compensation. An examination of overtime systems elsewhere in the world indicates that an overtime rate of time-and-a-third for all overtime worked is lower than in most other countries. Two options for reform should be considered:

* an increase of the rate of pay for all overtime worked;

* the introduction of a staggered system of overtime pay in which a higher rate of pay must be paid beyond certain number of hours of overtime worked. (For example: a premium of one-third for the first five hours of overtime in a week and a premium of one-half for the next five hours in the week).

There could be more flexible approaches to the compensation of overtime. Overtime could be exchanged for additional leave or time off. This approach again balances the short-term demands with limiting overtime over a longer period. Employees- could work overtime during busy periods and in return gain longer holidays.

2.2.3 PROPOSALS

a) An employee may agree to work ten hours at overtime rates in any week.

b) An individual agreement to work overtime may not be valid for more than one year.

c) All overtime worked must be remunerated at a rate of time-and-a-half.

d) A collective or individual agreement may provide that employees may receive paid time off in exchange for working overtime.

3 FLEXIBILITY ARRANGEMENTS

3.1 Problem statement

The hours of work prescribed by the BCEA restrict the ability of employers and employees to make certain types of flexible working arrangements.

3.2 Discussion

One facet of the re-organisation of work has been the move towards the flexible arrangement of working time. Some flexible arrangements can operate within the limits of the current statutory framework, while the BCEA inhibits others.

Two of these are discussed.

3.2.1 The compressed working week

The compressed working week permits employees to work extended hours in order to work the same or a similar number of hours in a shorter number of days. An employee may, for instance, work a 40-hour week consisting of four ten-hour working days.

The advantages of this system include a larger number of days off during the week, reduced transport costs, and in some cases better utilisation of equipment.

The compressed working week is not applicable to all sectors. The extended daily hours involved would be subject to any limit placed on total daily hours for any reason involving the health and safety of employees or the public.

3.2.2 PROPOSALS

a) A collective or individual agreement may permit employees to work up to 12 hours of normal work on any day

b) An employee whose hours of work are regulated by such an agreement may not work on more than four days per week.

3.2.3 Averaging of working time

Under the BCEA working hours are calculated in one-week cycles. No transfer of hours is permitted from week to week other than in continuous shift operations, which can utilise three-week cycles. "Averaging" permits employers and employees to calculate average working hours over a cycle of longer than one week. This allows the distribution of working time in a manner that may coincide better with the employer's demand for production than an equal spread of hours, between weeks.

Hours of work can be unequally distributed between weeks provided that the average number of hours worked within the cycle is not greater than a specified figure. If this figure is lower than the usual limits on weekly hours, this would offer employees the benefit of reduced working hours. For employers, the more efficient arrangement of working time generally results in a saving on overtime pay. This may enable employers to compensate employees for any reduction in working hours.

The new legislation should permit the introduction of averaging through collective bargaining. It should also place a limit on the weekly average hours and also limit the period over which averaging can be calculated. It is suggested that a period of four weeks as a basic rule would permit the operation of most commonly utilised shift systems and allow sufficient short-term flexibility. A longer period would require an exemption.

3.2.4 PROPOSALS

a) A collective agreement may permit normal working hours to be calculated over a cycle of longer than one week.

b) An agreement may not:

* permit an averaging period of longer than four weeks;

* permit employees to work an average of more than 40 hours per week over that period.

4 SUNDAY WORK

4.1 Problem statement

Sunday work is restricted by both the BCEA and the Mines and Works Act.

4.2 Discussion

In terms of the BCEA:

* permission from an inspector is required for Sunday work in factories or shops;

* there are two basic pay regimes: double pay or time-and-a-third coupled with a day off in the following week. Employees (other than farmworkers) working on Sunday must receive at least a full day's wages;

* Sunday work is excluded from the calculation of the weekly maximum;

* special rules apply to Sunday work in plants that have a continuous operation exemption.

In terms of the Mines and Works Act essential maintenance work is allowed on Sundays. Additional work may be permitted by the Minister of Mineral

and Energy Affairs "in the national interest".

The purpose of this legislation should be the protection of employees, not the restriction of operating time. While the restriction of Sunday work is not uncommon in the rest of the world, the continuation of these restrictions in

South Africa is not justified. Extended operating times, not only in mines but in other sectors of the economy, has important employment creation potential. The requirement of permission to work on a Sunday in factories and shops in the BCEA should be repealed as should the prohibition on work in mines on a Sunday.

The removal of this prohibition from the mining industry is being negotiated by employers and trade unions in the industry. The conclusion of an agreement to give effect to this will boost employment creation and improve wages and is of great importance.

Sunday work, like night work, can have disruptive social and family consequences. It therefore remains appropriate to continue to require payment of premium rates on Sunday. To the greatest extent possible, work on Sundays should accommodate individual preferences.

The exclusion of Sunday work from the calculation of total hours (ordinary time plus overtime) that can be worked in a week should, however, be removed.

4.3 PROPOSALS

a) Unless agreed to in a collective or individual agreement, an employee may not work on three successive Sundays.

b) An employee who works on a Sunday is entitled to the greater of:

* payment at double the ordinary rate for time worked; or

* one ordinary day's wage.

c) If part of a working period falls on a Sunday, all work during that period must be remunerated at Sunday rates.

d) Sunday work is included in the calculation of total permissible working hours.

5 REST PERIODS

5.1 Problem statement

Adequate rest periods are an essential aspect of the scheduling of working time. The new legislation should regulate meal intervals and daily and weekly rest periods.

5.2 Meal intervals

5.2.1 Discussion

Under the BCEA, employees are entitled to a one-hour break after five hours' continuous work; this may be reduced to 30 minutes by written agreement. A minimum meal interval of 30 minutes is in line with international practice and should be retained. Meal intervals of between 30 minutes and 75 minutes are unpaid. This limit prevents

longer meal intervals being used to create split shift working arrangements. Certain flexibility should be introduced to accommodate employees who do not work full days. For instance, the entitlement to a meal break should not apply to employees who work six hours or less per day.

The requirement that certain employees who work a 12-hour shift are paid for meal intervals (currently applicable to security guards) should be extended to all employees who work extended shifts.

5.2.2 PROPOSALS

a) Employees must have adequate meal intervals.

b) Collective and individual agreements may regulate the taking of meal intervals.

c) In the absence of an agreement, no employee may work for longer than five hours without a meal interval of at least 30 minutes. This does not apply to employees who do not work more than six hours.

d) An employee is entitled to payment for meal intervals if the employee:

* is required to remain in control of any machinery, equipment or vehicle or at the disposal of the employer during the meal interval;

* works for a daily period of longer than ten hours;

* is required by the employer to take a meal interval of longer than one and one-quarter hours.

5.3 Daily rest period

The BCEA requires a daily rest period of 12 hours. This is because the maximum spread-over permitted is 12 hours. Placing a limit on the spread-over of working time achieves the same purpose as setting a minimum daily rest period. No proposal is made to depart from this approach.

Employees are entitled to a daily rest period of 12 hours.

5.4 Weekly rest period

5.4.1 Discussion

The introduction of a 36-hour minimum weekly rest period is proposed. Th rest period must include one complete day. The logic for a 36-hour period is that it consists of 24 hours plus the daily rest period of 12 hours. The weekly rest period is an important safeguard in an approach that permits the flexible arrangement of working time.

The requirement for a rest period is not a substantive change. The reason for th absence of a stipulated rest period was because of the restrictions on work o Sundays.

The principles of averaging may apply, on a limited basis, to the weekly rest period. It could be permissible to consolidate rest periods over a 14-day cycle

5.4.2 PROPOSALS

a) Every employee is entitled to a rest period of 36 continuous hours,

including one complete day, in every week.

b) A collective agreement may provide that the rest period may be averaged over a cycle of up to 14 days.

6 WORKING TIME AND HEALTH AND SAFETY

6.1 Problem statement

The manner in which working time is organised impacts significantly on the health and safety of employees and the public. No legislation regulates or promotes the organisation of work for this purpose.

6.2 Discussion

The proper scheduling of working time, together with factors such as engineering controls, the ergonomic design of workplaces and improved health and safety training, can make a major contribution to improving the country's unacceptably high level of occupational accidents and disease.

The following two examples serve to highlight this point. Adequate rest-breaks are one of the prime methods of reducing the risk of musculo-skeletal injuries among employees whose work involves rapid and repetitive movements. These employees include video display unit operators, assembly line workers and many types of machinists. The full extent of these injuries in South Africa is not known as adequate statistics are not collected. In industrialised countries this is the most common work-related disease. Long hours of work and payment on commission are associated with the high level of accidents in the taxi industry.

There should be a general duty on employers to take account of the potential health and safety consequences of the arrangement of working time. This is already a part of the employer's common law and statutory duties. However, its express inclusion in employment standards legislation will highlight this important but neglected aspect of employer obligations.

The general duty should be supplemented by a Code of Good Practice to guide employers, employees and trade unions. This would set out guidelines for the considerations that should be taken account of in particular forms of work. The Code of Good Practice should be published as a schedule to the legislation.

Since the regulation of work at night is perhaps the most significant health issue raised by the arrangement of working time, additional proposals are made.

6.3 PROPOSALS

a) Working time must be arranged so as not to endanger the health, safety or welfare of the employee, other employees or the community.

b) This applies to the duration and scheduling of working time, the rotation of shifts, rest periods, and hours during which an employee works.

c) A Code of Good Practice on working time should be drafted.

7 NIGHT WORK

7.1 Problem statement

Before 1983 night work by women was prohibited. There is currently no regulation of night work. Night work has been shown to have significant health consequences.

7.2 Discussion

The reason for the prohibition of night work by women was the impact of night work on family life. In addition, there is extensive evidence to demonstrate that night work has adverse health consequences for all employees. The proposals made here seek to promote a responsible and informed approach to the regulation of night work to avoid or minimise health risks. International awareness of the problems associated with night work led to the adoption of the Night Work Convention 171 of 1990.

The most common health risks associated with regular night work are:

* the disruptive effect of night work on the human circadian (day/night) variation;

* sleep deprivation and disorders;

* chronic fatigue;

* increased risk of digestive disorders and ulcers;

* increased risk of cardiovascular disease;

* increased use of stimulants and sedatives, drugs, cigarettes and alcohol;

* disruption and strain in social and family life.

Certain of these health problems have a direct effect on safety at work. Increased levels of fatigue among night workers lead to low levels of alertness and vigilance and a reduced ability to respond to information or signals. This has been shown to lead to a higher rate of accidents during night shifts. The effect is greater if the length of night shifts is extended beyond eight hours or if employees perform work likely to accentuate fatigue. This has led many countries to place lower limits on the number of hours that night workers can perform. Rest periods and meal intervals are of particular importance for night workers. Additional problems faced by employees performing night work include security and the absence of adequate public transportation.

The arrangement of night work directly affects the public. Major hazard installations, such as refineries, operate 24-hour shifts and public and goods transportation services operate at night.

Night work should be defined as work performed between 23h00 and 6h00.

The effective regulation of night work requires a comprehensive package of proposals. The initial proposal is the introduction of a night shift allowance. These allowances are commonly required in the legislation of other countries. Available information indicates that most employers in South Africa making use of regular night shifts pay a night-shift allowance of between 10% and 33% of basic wages. It is proposed that the allowance should be equivalent to 20% of an employee's normal pay.

Other proposals are that employees who regularly perform more night work should be informed of the possible health hazards and should be entitled

to receive a free health assessment after commencing night work and at subsequent intervals. An employee who suffers from a health condition associated with the performance of night work should be entitled to be transferred to suitable day work. Special protection should be given to pregnant employees engaged in night work.

7.3 PROPOSALS

a) All employees performing work at night are entitled to receive a premium of 20% for work performed.

b) An employer who regularly engages employees in night work must take adequate steps to ensure the health of employees.

c) Any employee who suffers from a health condition associated with the performance of night work is entitled to be transferred without loss of benefit, if reasonably practicable, to suitable day work.

8 SHIFT WORK

8.1 Problem statement

Under the BCEA, special conditions apply to continuous shift work.

8.2 Discussion

As mentioned earlier it is proposed that there should not be separate limits for shift work. Consideration needs to be given to whether any special provisions have to be included in the legislation for plants that operate on a continuous shift basis. These plants operate in terms of rules issued by the Minister of Labour which vary the application of a number of provisions. These include the calculation of weekly hours, Sunday pay and meal breaks. The proposed systems of averaging would permit these plants to agree on appropriate working arrangements.

9 PAID LEAVE

9.1 Problem statement

The general leave entitlement of two weeks is below the practice of most employers and out of line with international standards.

9.2 Discussion

Although most South African employees receive three weeks' annual leave or longer, surveys show that approximately 5% of weekly paid workers receive less than three weeks' leave (PE Corporate Services). For higher paid categories the leave entitlements are more generous. For example, more than 75% of managers receive more than four weeks' annual leave.

In terms of the BCEA, employees are entitled to two weeks' paid leave per year. Employees like security guards who work a 60-hour week and those whose hours of work are not restricted have the right to three weeks' leave. Wage determinations allow for three or four weeks' leave. Most industrial councils set the annual leave entitlement at between three and four weeks.

ILO Convention 132 of 1970 sets an international standard of three weeks (21 days of leave). Most countries guarantee between two and six weeks' annual leave to employees, with the majority being at three weeks or higher.

The increase of the minimum entitlement to three weeks will bring South African legislation in line with international standards and local practice. As this is a widespread practice, it is not likely to have major cost implications for employers.

The legislation of many other countries gives additional leave to employees with longer service. This can be achieved through collective and individual agreements.

A number of changes should be introduced to simplify the calculation of leave and remove certain discriminatory provisions from the right to accrued leave.

9.3 PROPOSAL

a) Every employee is entitled to three weeks' paid annual leave.

b) An employee's right to take paid leave accrues at the rate of one week's leave for every four months' employment.

c) On termination of employment, an employee is entitled to be paid for leave that has accrued but not been taken.

d) An employee is entitled to:

* accumulate leave up to a maximum of six weeks;

* take a reasonable amount of leave as occasional leave.

e) An employee may not receive payment as an alternative to taking the prescribed amount of leave.

10 PUBLIC HOLIDAYS

10.1 Problem statement

The Public Holidays Act (1994) extends the rules for remuneration for public holidays in the BCEA to all employees. No provision exists in the Public Holidays Act for exemptions or for variation by agreement (although public holidays can be exchanged for other days).

10.2 Discussion

The Public Holidays Act 36 of 1994 introduced a system for the payment of public holidays that applies equally to all employees. The employment standards legislation should regulate payment for public holidays for all employees. The Public Holidays Act should be confined to the proclamation of holidays.

In terms of the BCEA, employees are entitled to normal pay for public holidays or, if they work, double pay (subject to a minimum payment of one day's wages) or time-and-a-third plus a day off in the following week. This approach should be retained except the alternative of time-and-a-third plus a day off on pay should be omitted because the Public Holidays Act permits the exchange of a public holiday for another day.

10.3 PROPOSALS

a) An employee is entitled to be paid for every public holiday.

b) An employee who works on a public holiday is entitled to the greater of:

* double pay for time worked; or

* one ordinary day's wage.

11 PAID SICK LEAVE

11.1 Problem statement

The right to paid sick leave should be retained at current levels.

11.2 Discussion

* The BCEA allows for six weeks' sick leave to accrue over a three-year period. In the first year of service, sick leave accrues each month.

* The BCEA permits employers and industrial councils to operate sick pay schemes that are inferior to the provisions of the BCEA.

* Proof of illness is required for absences of longer than two days and for repeated absences.

The new legislation should set the floor for sick leave provisions while allowing for greater flexibility to bargain collectively on the administration of sick leave.

No proposal is made to alter the levels of sick pay However, the acquisition of sick pay in the first year of employment should be less restrictive. It is proposed that the full rights to accrue sick leave should occur after six months' employment.

The issue of proof of sickness is a controversial issue. These provisions should, on the one hand, prevent the abuse of sick leave provisions by healthy people.

On the other hand, they should not result in employees having to incur disproportionate expenses or have the effect of denying employees the benefit of sick pay. Consideration should be given to whether the current approach strikes this balance.

Certain sick pay schemes have been permitted to offer benefits that are inferior to those provided by the BCEA. This is in particular true of certain industrial council schemes whose levels of sick pay are below 20% of the employee's wages.

This exclusion should not be allowed to continue and these funds should be required to comply with the Act within a certain period. However, consideration should be given to proposals that may permit flexibility in sick pay where employees receive comprehensive medical benefits.

11.3 PROPOSALS

a) Every employee is entitled to six weeks' paid sick leave over any three-year cycle. This is calculated by multiplying the number of days that the employee works in a week by six.

b) During the first six months of employment, an employee is entitled to one day's sick leave for 23 days worked.

Chapter G

MATERNITY RIGHTS AND FAMILY RESPONSIBILITY

Contents

1 MATERNITY RIGHTS

1.1 Problem statement

The BCEA prohibits pregnant employees from working for 12 weeks. The only statutory support for women is the Unemployment Insurance Fund (UIF). Only contributors may receive these benefits.

1.2 Discussion

The BCEA prohibits work for four weeks before and eight weeks after the birth of a child. The mother may not work during this period without an exemption.

This is one of the most common sources of applications for exemptions. The LRA of 1995 has for the first time provided job security for pregnant women. A dismissal in relation to pregnancy is automatically unfair.

Legislation should provide two things:

* a period during which work is prohibited;

* a longer period of maternity leave during which an employee's security of employment is guaranteed.

A total prohibition on work for 12 weeks can be criticised as many employees may be able to work during this period. It is suggested that the prohibition on work be shortened to six weeks after the birth of the child. At the same time, a woman may be able to return to work earlier, depending on the kind of work she does and her health. However, a relaxation of the prohibition may expose employees to pressure to return to work prematurely. Therefore, the mother should be required to get a medical certificate indicating good health to return within the six-week period. The other approach would be to require an exemption which is the current position.

The proposed legislation should guarantee the employee's job during maternity leave. A number of factors determine the appropriate length of maternity. These include the employee's health and the nature of the work performed. It is suggested that the maximum period for which maternity benefits are available should be four months. There should be no qualification period to receive protection against dismissal.

1.2.1 Maternity pay

There is no general right to maternity pay, although the Unemployment Insurance Act 30 of 1966 (UIA) makes limited provision for maternity benefits. Employees who are contributors to the Fund may receive 45% of their wages for up to six months. More than 60000 women claim maternity benefits from the Fund annually. There are a number of restrictions on this benefit:

* domestic workers and employees earning above a certain amount are excluded;

* an employee receiving the maternity benefit may not be paid more than one-third of her salary by her employer during this time;

* the Act does not permit the total benefit to be paid over a shorter period.

These problems restrict the capacity of employers and employees to make suitable arrangements during maternity leave. Greater flexibility would help create a more equitable system of maternity pay. The introduction of these reforms would have financial consequences for the Fund. A stakeholders' committee is currently considering the future direction of the Fund, including issues relating to maternity benefits. The level of maternity benefits has been the subject of criticism for a considerable period of time - the Wiehahn Commission on Labour Legislation in 1981 recommended an increase (The Complete Wiehahn Report, Part 3, paragraph 3.4.7,1982).

International employment standards suggest that the responsibility for maternity pay should rest upon the state and not employers. The most common solution internationally is for maternity benefits to be paid from social security funds. However, approximately a third of countries (including a significant number in Africa) do impose a statutory obligation upon employers in respect of maternity pay. Maternity pay is a widely granted benefit in South Africa - up to 60% of manufacturing enterprises provide maternity entitlement for women (ILO Country Review, 1996). Consideration needs to be given to the regulation of maternity pay.

1.2.2 Right to suitable work

Pregnancy restricts the type of work that a woman may perform. This also applies to nursing mothers. Undesirable work includes the lifting of heavy objects or standing for long periods of time and night work. A pregnant employee who performs work that may place her health at risk should be offered suitable alternative work on terms of employment that are no less favourable. This should apply during the period of pregnancy and for a period of three months after the birth of a child.

1.2.3 Adoption benefits

The UIA allows women who adopt children of under two years of age to take leave equivalent to maternity leave. Consideration should be given to the period during which the employment security of an adoptive parent should be guaranteed.

1.3 PROPOSALS

a) An employee may not work for six weeks after the birth of a child (unless her doctor certifies that she is fit to return to work).

b) An employee is entitled to four months' maternity leave during which her security of employment is protected.

c) Maternity leave may be taken at any time in the period starting four weeks before the expected date of birth, or at an earlier date if required for the employee's health and safety.

d) A woman employed in night work or in work which may be harmful to her or

her child is entitled to suitable alternative work without loss of benefit during pregnancy and a year after the birth of her child.

2 PATERNITY AND CHILD-CARE LEAVE

2.1 Problem statement

The BCEA does not grant employees paid paternity leave or child-care leave. Employees are required to take occasional leave (from their annual quota) or unpaid leave.

2.2 Discussion

Paternity and child-care leave are common demands in collective bargaining, but have been unsuccessfully regulated through collective bargaining.

It is proposed that the legislation should provide for a short period of paid paternity or child-care leave during the year of the birth of a child and that additional benefits should remain a matter of collective bargaining.

2.3 PROPOSALS

a) Every employee with more than one year's service is entitled to three days' paid paternity or child-care leave during the year of the birth of the child.

b) This leave does not accrue if it is not used in any year.

c) An employer may require reasonable proof of paternity.

3 FAMILY RESPONSIBILITY

One of the challenges of removing discrimination against women is to introduce provisions that permit women to continue working careers with the greater burden of family responsibility that they assume. Two options are:

* permitting women to interrupt their employment to care for children - "the career break"; and

* permitting women to reduce their working hours in order to combine parental responsibility with continued work.

The second option should be considered.

Chapter H

CHILD LABOUR

Contents

Section 30(1)(e) of the Constitution gives children under 18 years the right "not to be subject to exploitative labour practices nor to be required or permitted to perform work which is hazardous or harmful to his or her education, health or well-being". (3)

Child labour in South Africa is widespread, although the precise extent is not known. An analysis of the 1994 October Household Survey indicates that over 200 000 children between ten and 14 years are engaged in child labour. This figure is significantly higher than most previous estimates and represents 4% of all children between those ages. Preliminary research indicates that the four sectors employing most of the child workers are agriculture (21%), retail and catering (17%), manufacturing (12%) and social and personal services (7%). Fifty-eight percent of child workers in commercial farming areas work 40 to 49 hours a week and 20% more than 50 hours.

It is internationally recognised that child labour should be combated for reasons such as the following:

* children are easily exploited;

* the education of children who work is limited and their physical and social development is harmed;

* child labour contributes to a higher level of adult unemployment;

* child labour contributes to a cycle of poverty affecting future generations.

Eliminating child labour is a complex matter. Thousands of fan-Lilies currently facing poverty and unemployment depend on the income of their children. A comprehensive strategy is required to address the problem of child labour. This strategy should include compulsory and free basic education (including the necessary infrastructure such as adequate school facilities within reasonable distance), appropriate social security and welfare provisions, economic development which would increase earnings of adults to reduce the need for children to work and programmes to raise public consciousness about child labour.

The ILO's Minimum Age Convention No. 138 of 1973 requires that countries which ratify the convention undertake to "pursue a national policy designed to ensure the effective abolition of child labour and to progressively raise the minimum age for admission to employment or work to a level consistent with the fullest physical and mental development of young persons" (Article 1).

The Convention also provides that no employer should be allowed to employ children under the age of 15 years. This age level is increased if the child has not completed compulsory schooling. The minimum age for someone "carrying out work that is likely to jeopardise the health, safety or morals of a young person shall not be less than 18 years" (Article 3).

This Convention states that the minimum age for light work (work which is not likely to be harmful to children's health or education) is 13 years. This could be reduced to 12 years:

* in countries with a low level of economic development and educational facilities;

* after due consultation with employer and worker organisations; and

* for a limited period (Article 7 read with Article 2(4)).

1 PROHIBITION ON CHILD LABOUR

1.1 Problem statement

Existing legislation does not give effect to the Constitution or to relevant provisions of the ILO's Minimum Age Convention.

1.2 Discussion

The prohibition on child labour by children under 15 years, subject to exemptions, should continue. Legislation should also regulate the employment of children between 15 and 18 years. This minimum age should be increased, if necessary, to coincide with provisions on compulsory education.

The wage rate paid to children plays a significant role in determining the extent of child labour. It is generally accepted that a requirement to pay children the same wage as adults who do the same work discourages child labour. Consideration should be given to whether legislation should regulate this topic or whether it should be left for regulation in Sectoral Employment Standards.

1.3 PROPOSALS

a) Children below 15 years may not work.

b) Children below 18 years may not perform work which is inappropriate for that child's age, or which is hazardous or harmful to their health.

2 RESPONSIBLE DEPARTMENT

2.1 Problem statement

The BCEA prohibits employment of children under 15 years, but contains no provision for enforcement.

The enforcement clause was removed from the BCEA when a similar prohibition was included in the Child Care Act in 1991. However, the Department of Welfare, which is responsible for this Act, does not have the resources to enforce the prohibition.

2.2 Discussion

The Department of Welfare does not have the necessary infrastructure or staff to deal effectively with this problem. The administration and enforcement of child labour prohibitions fits more appropriately with the Department of Labour.

2.3 PROPOSALS

a) Child labour should be regulated in the proposed legislation and the Department of Labour should be primarily responsible for its enforcement.

b) The Minister of Labour should be empowered to delegate inspection and other enforcement responsibilities to officials from other government departments.

3 EXEMPTIONS

3.1 Problem statement

The existing provisions empower the Minister of Welfare to grant exemptions to individual employers or exemptions that are of general application. General exemptions make monitoring difficult.

3.2 Discussion

South African legislation has traditionally contained a total prohibition on child labour. However, the widespread occurrence of child labour in South Africa indicates that these policies have not succeeded. The reason lies both in the economic dependence of many families on income earned by child workers, and in the weak enforcement by authorities of the relevant provisions.

Although exemptions can be granted in terms of existing legislation, very few applications for exemptions have been received. In practice, the exemption process is ignored and merely serves to conceal the extent of the problem.

The exemption process should offer an opportunity for government agents to identify, regulate and control users of child labour. Employers of child workers should be encouraged to identify themselves through the exemption process.

This would facilitate focused inspections. General exemptions are inappropriate since this makes it difficult for inspectors to monitor whether the conditions for exemptions are complied with.

The grant of exemptions would have to comply with relevant Constitutional provisions.

3.3 PROPOSAL

An exemption may only be granted to an individual employer to employ children above the age of 12 years to perform work which is not likely to be harmful to the child's health or education.

4 ENFORCEMENT

4.1 Problem statement

The enforcement of child labour provisions presents particular difficulties not encountered with other breaches of employment standards. In most cases, child workers and their parents are unwilling to prosecute or to testify-

4.2 Discussion

The violation of the child labour provisions should remain a criminal offence. To enable children and their families to prosecute and to testify in child labour cases, the law should include appropriate procedures, presumptions, protections and sanctions. The precise nature of these requires consideration.

4.3 PROPOSALS

a) Contravention should remain a criminal offence, although these provisions should also be capable of civil enforcement.

b) The victimisation of parents who refuse to grant permission for their minor children to work should be prohibited.

Chapter I

THE INDIVIDUAL EMPLOYMENT RELATIONSHIP

Contents

1 DISMISSAL

1.1 Problem statement

Protections for individual employees are found both in the BCEA and the LRA. Chapter VIII of the LRA of 1995 regulates unfair dismissal. The residual unfair labour practice protects employees against other forms of unfair labour practice.

1.2 Discussion

The explanatory memorandum to the Labour Relations Bill, 1995, stated:

> "Those sections of the Bill regulating individual employment relations, in particular unfair dismissal and other individual unfair labour practices, are contained in excisable parts. This will allow for their repeal, without alteration to the main body of the new Act, and their inclusion into the proposed new laws regulating basic conditions of employment and employment equity.

The law of unfair dismissal is contained in Chapter VIII of the LRA of 1995, and in Schedule VIII to that Act which contains the Code of Good Practice. In the past, there has been a lack of clarity about the relationship between the requirements of the BCEA, such as the protections against victimisation, which carry a criminal sanction, and the equity-based considerations of the unfair labour practice. There is a considerable overlap - many actions may violate the BCEA and be an unfair labour practice. The concern of unfair dismissal is the individual employment relationship and it is therefore appropriate that a "codified" body of unfair dismissal law should be situated in a statute regulating individual employment relations rather than one dealing with collective bargaining. Rationalising the protections applicable to individual employees into a single statute will create greater clarity.

Similar considerations apply to certain portions of the residual unfair labour practice in Part B of the Transitional Arrangements (Schedule 7 of the LRA of 1995). Paragraph (a) concerns discrimination against employees and prospective employees. Issues of discrimination are to be dealt with in the proposed Employment Equity legislation and these provisions should at an appropriate time be re-enacted in that law.

The remaining paragraphs of the residual unfair labour practice concern unfair acts or omissions that arise between an employer and employee (including an applicant for employment) concerning:

* promotion, demotion or training relating to the provision of benefits;

* suspension or other disciplinary action short of dismissal;

* failure or refusal to reinstate a former employee in terms of an agreement.

It is important that employers and employees can obtain guidance as to the effect of the unfair labour practice definition. For this reason a Code of Good Practice should be developed. The LRA of 1995 provides for

disputes concerning the residual unfair labour practice to be referred to the Labour Court. On the other hand individual disputes that cannot be resolved through mediation will be determined by arbitration. This approach should be adopted in respect of individual unfair labour practice disputes.

1.3 PROPOSALS

a) Chapter VIII of the LRA of 1995 on unfair dismissal should be included in the proposed new Employment Standards statute.

b) The relevant parts of paragraphs (b) - (d) of the definition of residual unfair labour practice should be incorporated into employment standards legislation as an individual unfair labour practice.

c) The legislation should provide for the development of codes of practice to guide all persons applying the individual unfair labour practice.

d) Disputes concerning individual unfair labour practices should be dealt with in the same manner as individual unfair dismissals.

2 NOTICE OF TERMINATION

2.1 Problem statement

The notice period for a weekly paid employee is one week, while for a monthly paid employee it is two weeks. During the first four weeks of employment, the notice period is 24 hours.

Farmworkers and domestic workers (other than those who are weekly paid) are entitled to one month's notice.

2.2 Discussion

The distinction between weekly paid and monthly paid employees is archaic and no longer appropriate in contemporary labour law.

The same minimum notice period should apply to all employees regardless of the frequency of their payment. The only exception should be made in respect of an initial period of employment. The issue is to determine what an appropriate notice period is. Factors to consider are:

* statutory notice periods does not apply to dismissals for misconduct;

* the notice period must be adequate to give employees dismissed for incapacity or operational reasons a reasonable opportunity to seek alternative employment;

* the requirement to give notice applies equally to employers and employees;

* the two-week provision represents a decrease of the common law rights of monthly paid employees.

It is proposed that a reasonable period of notice would be four weeks.

2.3 PROPOSALS

a) An employer who terminates employment must give an employee four weeks' notice of the termination or pay the employee for the period of notice. This does not apply to:

* a dismissal on account of the employee's conduct;

* a dismissal during the first four weeks of employment during which one week's notice may be given.

b) An employee who resigns from employment must give the employer four weeks' notice of the termination of employment.

3 PROTECTIONS

3.1 Discrimination

3.1.1 Problem statement

The BCEA and the Wage Act contain criminal victimisation provisions to protect employees against dismissal or discrimination for insisting on their rights in terms of the Acts or for co-operating with an inspector or other official.

The LRA of l995 has remodeled the victimisation provisions as a discrimination provision enforceable through mediation and arbitration proceedings under the CCMA.

3.1.2 Discussion

The proposed employment standards legislation should adopt an approach that is consistent with the LRA of 1995 and should include a discrimination provision. Those portions of the present victimisation section that overlap with the LRA of 1995 should be removed.

3.1.3 PROPOSALS

a) No employer may discriminate against employees for:

* doing anything permitted, or exercising any right conferred, by this legislation;

* failing or refusing to do anything prohibited by this Act;

* reporting any matter to an official of the Department of Labour, or to any other person responsible for the enforcement of any employment standard, or to a trade union representative.

b) These protections apply to applicants for employment.

3.2 Protection of wages

3.2.1 Problem statement

Employment standards law regulates the payment of wages to prevent abuse.

3.2.2 Discussion

The BCEA (and Wage Act) regulates the method of payment of remuneration and prohibits practices which may deprive employees of the benefit of their wages. These include:

* requiring an employee to repay remuneration;

* imposing a fine upon an employee;

* making a deduction from an employee's pay without the written consent of the employee or court authorisation.

3.2.3 PROPOSAL

Protections of this type must be retained and there is no basis to depart from the approach of the BCEA.

4 WRITTEN PARTICULARS OF EMPLOYMENT

4.1 Problem statement

There is no requirement in labour legislation that employers supply employees with written particulars of employment.

4.2 Discussion

A written record of the details and particulars of an employment relationship is an important aspect of monitoring compliance with labour legislation and enforcing employment standards. Many cases fail because the employee is unable to prove even the most basic terms. It is therefore proposed that every employee should be entitled to receive from the employer written particulars of employment. These particulars should be designed to permit the employee, or a person assisting the employee, to assess whether the employee's statutory rights have been observed. The employer should be required to update the particulars regularly. If there are no particulars, the onus should be on the employer to prove the terms of any contract. The particulars could include:

* the full names and addresses of the parties to the contract;

* the date upon which employment began;

* a description of the employee's job;

* the employee's wages (or the method of calculating the employee's wages) and the period of payment;

* overtime pay rates;

* the employee's normal working hours, shifts and days;

* the employee's entitlement to sick leave and annual leave;

* the period of notice required to terminate the contract of employment.

4.3 PROPOSALS

a) An employer must supply an employee with prescribed written particulars of employment within a prescribed period.

b) The legislation should include a model form.

5 CERTIFICATE OF SERVICE

5.1 Problem statement

Currently, employees are entitled to a certificate of service on termination of employment. This does not apply to casual employees or

employees who "desert" employment.

5.2 PROPOSALS

a) On termination of employment, all employees should be entitled to a certificate of service regardless of the reason for the termination of their employment.

b) An employee should be entitled to request that the reason for the termination of his or her employment does not appear on the certificate.

c) The legislation should include a model certificate of service.

Chapter J

ENFORCEMENT

Contents

1 CONDUCTING OF INSPECTIONS

1.1 Problem statement

The powers of industrial inspectors are dealt with separately in labour legislation. The inspectors' powers are confined to the conducting of inspections.

1.2 Discussion

Inspectors' powers under all legislation should be rationalised in the new statute. It would enhance the efficiency and effectiveness of the Department, since in a single visit an inspector would be able to check compliance with all labour laws. The new legislation should therefore contain a chapter on labour inspection. This should set out the powers required to conduct inspections relevant to all legislation administered by the Department of Labour. These powers should include the right to enter premises without notice, conduct inspections and examinations, question employers, employees and witnesses, require the production of records and, if necessary, remove the records.

Inspectors should be granted additional powers to empower them to encourage compliance with minimum standards and to enhance their effectiveness. These are discussed in the following section.

1.3 PROPOSAL

The new legislation should contain a chapter consolidating the powers of labour inspection contained in the different Acts administered by the Department of Labour.

2 COMPLIANCE AND ENFORCEMENT

2.1 Problem statement

The BCEA and Wage Act are enforced through the criminal courts. This does not encourage compliance with employment standards.

2.2 Discussion

Criminal proceedings are not an effective method of enforcing cases involving employment standards. The criminal courts are overloaded with other cases and are in general inadequately resourced to deal with labour cases. Labour cases do not have a high priority within the criminal justice system. This contributes to long delays, parties not turning up at court and prosecutors dealing inadequately with cases. It also makes a major impact on the time of inspectors.

Even in those cases that reach a conclusion, the most common outcomes are a warning, a suspended fine or a low fine. The reliance on criminal proceedings undermines the capacity of the Department of Labour to encourage compliance with employment standards.

Certificates are required from the Attorney-General or Director-General to proceed in the civil courts to enforce statutory conditions of employment. This is cumbersome and time consuming and causes an unnecessary duplication of legal proceedings. Many cases involve both a failure to comply with statutory contractual provisions, requiring the institution of separate legal proceedings.

The changes made by the LRA of 1995 need to be considered. Breaches of conditions of employment contained in bargaining council agreements are enforced through mediation and arbitration rather than the criminal courts.

Total decriminalisation is not appropriate in the proposed law. Criminal sanctions must be retained for offences such as the illegal employment of child labour. However, criminal sanctions cannot remain the primary mechanism for breaches of employment standards.

There must be a range of remedies available to encourage and enforce compliance with employment standards. The system of enforcement must contribute to the effective operation of the inspectorate. It is therefore proposed that the enforcing agency should have a direct role in the imposition of warnings and penalties.

The CCMA should become the primary forum for the adjudication of disputes concerning employment standards. The requirement for conciliation, the informality of arbitration proceedings and the labour expertise of commissioners make it a more appropriate mechanism for the enforcement of claims than the civil or criminal courts.

The current system of enforcement through the criminal courts has one very significant benefit for employees: the state enforces claims on behalf of employees. This is of particular importance to employees who are not members of trade unions. However, the ineffectiveness of criminal prosecutions means that this benefit is often theoretical. Any revised system of enforcement must allow for state enforcement on behalf of employees. It is suggested that this should be retained by permitting the inspectors of the Department of Labour to bring cases on behalf of employees to the CCMA.

A successful enforcement system must ensure employers meet their administrative obligations - supplying employees with wage slips and maintaining records. An employee who does not have a wage slip is often not able to prove that he or she has been underpaid.

In the past many employers who have received state assistance to establish businesses in decentralised areas have been known to operate their business in violation of the BCEA and wage determinations. There are

still low levels of compliance with the BCEA in agriculture, a sector in which a high proportion of employers receive state assistance.

In the long term, the proposals in this chapter should be supplemented by incentives for employers to adopt appropriate employment standards. Compliance with employment standards legislation should be a requirement for employers to obtain state contracts or benefits from state schemes such as financial and technical assistance to small and medium enterprises, Land Bank loans and export or industrial incentive schemes.

2.3 PROPOSALS

An integrated enforcement system should contain the following elements:

a) An inspector may impose administrative penalties on employers who fail to keep the prescribed records.

b) In other offences, an inspector may issue a "compliance notice" to employers who are in violation of any provision of the law. The notice would state:

* the steps that an employer must take to comply with the law; and

* the penalty the employer would be required to pay if the employer does not comply with the notice.

c) The penalties imposed would be:

* subject to appeal to the CCMA and, in serious cases, the Labour Court;

* increased in the case of repeated offences.

d) Employees should be entitled to institute claims arising out of a failure to comply with employment standards in the appropriate court. (Proceedings could be instituted in the Small Claims Court, the CCMA or in the Labour Court.)

e) An inspectorate could institute arbitration proceedings before the CCMA on behalf of the employee.

f) Criminal sanction should be retained for:

* serious offenses, including the employment of child labour;

* repeated breaches of employment standards.

Chapter K

ADMINISTRATIVE OBLIGATIONS

1. Problem statement

Different labour statutes impose different administrative obligations upon employers. This burdens employers and the Department of Labour.

2. Discussion

Labour legislation imposes three different types of obligations:

* registration;

* record-keeping;

* submission of returns.

Employers' administrative obligations

All employers must

* register with the:

  - Director-General in terms of the UIA (section 28);

  - Compensation Commissioner in terms of section 80 of the Compensation for Occupational Injuries and Diseases Act (COIDA);

* keep records of hours of work, remuneration and deductions under the BCEA (Regulation 3), the Wage Act (Regulation 5), the Manpower Training Act (section 44) and the UIA (section 32);

* submit to the:

  - Compensation Commissioner, an annual return of earnings each March;

  - Unemployment Insurance Commissioner, monthly statements of employees' earnings, together with contributions (section 30(1)).

Employers who operate factories must obtain a factory registration certificate from the Regional Director in terms of General Administrative Regulation under the Occupational Health and Safety Act 85 of 1993.

The record-keeping requirements are inconsistent. For instance, some records must be kept for three years and others for four years.

Different Acts have different definitions of key terms. For instance, the UIA employment (section 3) and COIDA (section 63) have different definitions of earnings.

The duplication of administrative requirements:

* is burdensome for employers and the Department;

* creates uncertainty as to the legal requirements they must meet;

* is extremely difficult for the inspectorate to monitor and enforce.

The absence of a single, clear definition of earnings and the keeping of separate records contribute to serious under-reporting of earnings of employees. It is estimated that underpayment by employers to the Compensation Fund is in excess of R200 million. Contributions to the UIF are also not always made (although it is not possible to estimate the full extent of this).

This under-reporting means that:

* employers who report their earnings fully and accurately subsidise employers who do not;

* there is less money in the funds;

* the capacity to pay employees improved benefits is reduced;

* the compensation and unemployment insurance benefits received by employees

are reduced.

The new legislation should introduce a single set of definitions to rationalise reporting requirements. A single prescribed reporting form should be introduced and employers should be able to meet all their obligations under labour legislation by maintaining a single set of records. This will significantly reduce an employer's obligation to maintain records and submit returns. Within this framework, additional rationalisation to assist small employers could be developed.

In the longer term, the Department should investigate a coordinated approach with the Receiver of Revenue since it is less likely that employers will understate their wage bill for tax purposes. This will also achieve greater administrative efficiency in collecting a contribution to these funds.

3. PROPOSALS

a) The new legislation should include definitions of terms commonly used in all labour legislation.

b) There should be a single prescribed form to allow employers to comply with most of the key obligations under legislation administered by the Department of Labour.

c) The legislation should prescribe:

* the records that employers must keep on hours of work, remuneration and other conditions;

* information that must be contained in wage slips.

d) A simple computer software programme could be developed to enable employers to record information and calculate payments in the manner set out in the prescribed forms.

APPENDIX

HOW LONG DO SOUTH AFRICANS WORK?

Contents

This Appendix gives information on hours of work in South Africa. It looks at standard hours, overtime and actual hours worked by full-time employees.

1 Standard hours

The BCEA sets a maximum of 46 ordinary hours (with exception) in a week. In comparison, the ILO recommends a maximum of 40 hours (ILO Convention No. 47 and Recommendation No. 116). However, a comparison of South Africa's legislated maximum with that of 103 countries worldwide, both developed and developing, shows that 47 countries have standard hours of less than 46 a week. In other words, a little under half of the countries for which information was available have shorter legislated working hours than South Africa and just over half have longer hours. This survey also reveals that the eight-hour day is the most common and that a longer ordinary working day is permitted in few countries. (4)

An examination of industrial council agreements reveals, however, that standard hours of work agreed to are often less than BCEA levels. A survey of 79 industrial council agreements shows that out of 83 working time arrangements (excluding watchmen), 64 provided for working hours below the specified legislative maximum of 46 hours. In 13 instances hours were set at 40 a week. The industrial council agreement for the iron and steel industry stipulates a 44-hour week.

In contrast, however, the weekly hours for watchmen and security guards were mostly 60 hours a week.

The majority of wage determinations tend to follow the provisions in the BCEA.

2 Actual normal hours worked

Figures on hours of work are not available for all sectors. Table A at the end of this Appendix gives the average actual ordinary hours worked, as well as overtime, in the manufacturing and building and construction industries in 1992 (Central Statistical Service, Bulletin of Statistics, Vol 29(3), 1992, page 2.55). It shows that the average ordinary hours per worker per week in 1992 were just above 40 hours in both manufacturing (41.3) and building (41.4). In certain industries, average weekly hours were below 40 hours a week: rubber products (38.7), paper and paper products (38.8), printing (38.9), footwear (39), motor vehicles, parts and accessories (39.1), glass and glass products (39.2) and wearing apparel (39.6). The iron and steel industry recorded an average working week of 41 hours for metal products, 43.8 for non-ferrous metal basic industries and 45.2 for basic iron and steel industries.

A more recent source of information on hours of work is The South African Challenge: Restructuring the Labour Market, an ILO Country Review, Geneva, ILO 1996. Tables B and C are drawn from this survey. The figures for five sectors in 1995 (Table B) show a range in ordinary hours for production workers between 41 in paper and printing and 44.4 in food processing. Table C analyses these figures by size of business, indicating that the lowest ordinary hours are found in businesses with workforces of less than 50.

At present, agreed working hours in the mining industry are 96 hours in an 11-shift fortnight. In other words, the daily limit is eight hours forty-four minutes, giving a 48-hour week. An international comparison of limits on ordinary working hours underground in 1990 showed that of 27 countries with metal mining operations, 17 (63%) worked fewer than 48 hours.

There is evidence to show that significant differences exist between workers according to the kind of occupation they perform. Watchmen and security guards tend to work longer hours than other workers. This is also true for factory workers compared with office workers. A survey of 720 South African companies which together employ in excess of one million people shows that office staff have a shorter working week than factory workers. According to the survey, while 28% of factory staff employed by the respondent companies worked more than 46 hours, only 4% of office staff did. The highest proportion of office staff worked 38 to 40 hours (47%), while the highest proportion of factory staff, 43 to 45 hours (39%). Only 34% of office staff worked longer than 40 hours, while the percentage for factory workers was 78%. (PE Corporate Services, The South African Salary Survey, September 1995, page 13). This feature is confirmed in Tables B and C, from the ILO Country Review, which distinguishes between production workers and other employees and reveals that in most sectors production workers work roughly two hours more than other employees.

3 Overtime

The BCEA sets overtime maxima of three hours a day and ten hours a week. This amounts to 520 hours in a year. A recent (but incomplete) ILO survey of 73 countries shows that 29% set annual limits, these ranging from 120 to 200 hours (ILO survey, January 1996). just over half of the countries for which overtime limits could be distinguished set stricter limits than South Africa. The survey shows that South Africa's overtime limits are more in line with those in the developing world (Information supplied by the ILO, January 1996).

Central Statistical Service (CSS) figures for 1992 show that average overtime hours per worker in the manufacturing industry were 3.4 hours per week. Taken as a percentage of ordinary hours worked, this amounted to 8.2% (Central Statistical Service, Bulletin of Statistics, 1992). Overtime levels in the construction industry were slightly lower: average overtime hours per worker being 2.9 hours per week or 7% of ordinary hours worked. This ratio places South Africa among the countries that have the highest rates of overtime as a proportion of normal hours worked. High overtime levels in certain industries were also recorded by the ILO Country Review.

It shows that the highest weekly overtime hours are among production workers in paper and printing (7.5 hours) and in metal and engineering (5.6 hours). Table C reveals that the lowest levels of overtime are in businesses with fewer than 50 employees.

High levels of overtime are also confirmed by a survey undertaken in July 1995 of 626 employers across a wide range of industries (manufacturing, however, representing more than half the sample). The survey found that 56% of respondents had employees who regularly worked paid overtime. An average 30% of the workforce worked regular Paid overtime of an average of 7.7 hours a week. The manufacturing sector was slightly above the average with 36% of the workforce working regular paid overtime of 8.16 hours a week. However, when an average was taken across all manufacturing industries (including those in which regular paid overtime was not worked), the average overtime per worker per week amounted to 4.84 hours, bringing the figure closer to the 3.4 hours found in the CSS survey. What the statistics show is that the actual average overtime worked in the manufacturing industry (taking into account only those who work overtime) is high (F Horwitz and E Franklin, An Investigation into Flexible Work Practices in South African Organisations, Draft Report, 1995 at page 55).

Research shows that South African companies make extensive use of overtime both on a regular basis and as a means to meet short-term upsurges in demand. The Horwitz survey above reveals that overtime was the most popular method used by South African employers (86% of respondents) when faced with additional short-term demands as compared with 21% who used temporary agencies,
53% who hired workers on a short-term basis and 1.8% who used some other means (Horwitz, page 22).

The popularity of overtime among South African employers is borne out by a survey undertaken by the Steel and Engineering Industries Federation of South Africa (SEIFSA) in 1989 of 766 metal companies. It reveals that when companies wished to expand their use of capacity, they chose to do so via increased overtime rather than through increasing shifts (SEIFSA Survey on Production Capacity, 1989, unpublished).

A comparison of levels of premia in South Africa and other countries shows that 54 of the 81 countries for which information was available set premia higher than the one third provided for by the BCEA. Certain countries chose to stagger overtime premium, the level rising according to the number of hours

of overtime worked (Information supplied by the ILO, January 1996).

4 Actual total hours (ordinary hours plus overtime)

The CSS figures show that average actual hours worked in 1992 were 44.7 a week in manufacturing and 44.3 in construction. According to the CSS, the industry with some of the highest average normal hours per week - the iron and steel industry - also had some of the highest average overtime levels, giving it on average the highest total hours worked per worker per week. In non-ferrous metal basic industries, average overtime hours per worker per week were 6.1 in 1992 and overtime as a proportion of ordinary hours worked, 13.9%. In basic iron and steel industries, average hours overtime per worker were 5.9 and overtime hours as a proportion of ordinary hours, 13%. The average actual week was 49.9 hours in non-ferrous metal and 51.1 in basic iron and steel. Other industries above the manufacturing average weekly actual hours were plastic products, industrial chemicals and other chemicals, textiles, food, other non-metallic mineral products, wood and cork, beverages and electrical machinery.

The ILO figures in Table B reveal a range of total hours between 46.2 in textiles and garments and 49 in metals and engineering for production workers. If salaried white collar workers are included, the total actual hours worked ranges from 46.2 in metals and engineering to 44.8 in textiles and garments.

An analysis of the 1994 October Household Survey covering 30000 households and 103722 individuals shows that the overall average working week was 45.1 hours for men compared with 41.9 for women. (No distinction was made between ordinary and overtime hours in the survey.) Rural workers worked an average of 2.4 hours longer than urban workers. The survey's sectoral analysis shows that the longest mean weekly hours of workers were in coal mining (50.7 hours), followed by land transport (48.3 hours), agriculture (46.9 hours), gold/uranium mining (46.4), other mining (46.1) and forestry and other metal mining (both 45.9). This is demonstrated in Table E at the end of the Appendix.

A gender breakdown shows that the longest mean weekly hours for male workers was in the agricultural sector (47.9), followed by transport (47.5) and then mining (47). A similar pattern was observed for women for the first two sectors (43.5) and (42.7), with the retail trade replacing mining as the third highest category (42.6).

Of those working longer than 46 hours, the highest proportion (43%) was in the agricultural industry, followed by mining (37%), transport (34%), and then construction (28%). The survey also shows that the longest weekly hours were worked by persons in the lowest income group and those with less education. There was a difference of over four hours between the illiterate (those with standard 2 or less) and those with tertiary education (Budlender D, Exploring Hours of Work in the OHS 1994, unpublished paper, January 1996, pages 3-6).

A comparative survey of actual weekly hours in 43 countries in the manufacturing industry for 1992 reveals that just under 75% of countries had shorter hours than South Africa's average of 44.7. In the construction sector 61% of the 36 countries surveyed had shorter actual hours of work than South Africa's 44.3 hours. These figures demonstrate that South Africa's manufacturing and construction workers work comparatively long hours (Yearbook of Labour Statistics 1995 ILO, 1995).

Table A

Actual ordinary and overtime hours worked in the manufacturing, building and construction industries (1992)

SECTOR	ORDINARY HOURS	OVERTIME HOURS	TOTAL HOURS
MANUFACTURING	41.3	3.4	44.7
Basic iron & steel	45.2	5.9	51.1
Non-ferrous metal	43.8	6.1	49.9
Plastic products	41.9	5.0	46.9
Other chemicals	41.8	4.7	46.5
Industrial chemicals	42.3	3.8	46.1
Textiles	41.0	5.0	46.0
Food	42.0	5.0	46.0
Other non-metallic mineral products	42.1	3.3	45.4
Wood and cork	43.7	1.5	45.2
Beverages	41.8	3.2	45.0
Electrical machinery	41.3	3.7	45.0
Machinery	41.3	3.4	44.7
Other transport	40.8	3.9	44.7
Pottery	41.6	2.8	44.4
Paper and paper products	38.8	5.3	44.1
Furniture	42.1	1.8	43.9
Tobacco	42.1	1.8	43.9
Metal products	41.0	2.8	43.8
Rubber products	38.7	5.0	43.7
Professional equipment	41.3	1.9	43.2
Glass and glass products	39.2	3.5	42.7
Leather and leather products	40.0	2.6	42.6
Footwear	39.0	1.6	40.6
Printing	38.9	3.6	42.5
Other manufacturing	40.8	1.6	42.4
Motor vehicles/parts accessories	39.1	3.1	42.2
Wearing apparel	39.6	1.4	41.0
CONSTRUCTION	41.4	2.9	44.3
Civil engineering	43.0	3.9	46.9
Other construction	40.4	3.2	43.6
Building construction	40.5	2.1	42.6

Table B

Working hours by industry, employees and production workers (1995)

INDUSTRY	PRODUCTION WORKERS			EMPLOYEES		
	Standard	Overtime	Total	Standard	Overtime	Total
Metals, engineering	43.5	5.6	49.0	41.7	1.8	43.5
Textiles, garments	42.2	4.0	46.2	42.0	1.4	43.4
Chemicals	42.8	5.2	48.0	41.0	1.2	42.2
Food processing	44.4	4.0	48.4	42.0	1.4	43.4
Paper & Printing	41.0	7.5	48.5	39.9	1.9	41.7
Other	43.7	4.1	47.8	41.9	0.8	42.7

Table C

Working hours by employment size, employees and production workers (1995)

INDUSTRY	PRODUCTION WORKERS			EMPLOYEES		
	Standard	Overtime	Total	Standard	Overtime	Total
SIZE						
1 - 50	42.5	3.2	45.7	42.7	1.3	43.9
51 - 150	42.6	6.0	48.7	41.4	1.8	43.2
151 - 400	43.4	5.9	49.3	41.3	1.6	42.9
401 +	44.3	5.3	48.6	40.4	1.3	41.6

Table D

October Household Survey: weekly hours - all employees (1994)

HOURS	TOTAL	WOMEN	MEN	TOTAL	WOMEN	MEN
1-20	138 540	72 724	65 816	2%	3%	1%
21-35	746 356	360 275	386 081	9%	13%	7%
36-40	3 047 640	1 194 090	1 853 550	38%	43%	35%
41-46	1 972 890	642 920	1 329 970	25%	23%	25%
47-50	1 093 904	276 264	817 640	14%	10%	16%
50+	1 021 304	241 714	779 590	13%	9%	15%
TOTAL	8 020 634	2 787 987	5 232 647	100%	100%	100%

Table E

Mean weekly hours of wage and salaried workers

Agriculture	46.9
Forestry	45.9
Coal mining	50.7
Gold/uranium mining	46.4
Other metal mining	45.9
Other mining	46.1
Food manufacturing	44.4
Textile/cloth	43.1
Wood manufacturing	43.2
Petrol manufacturing	43.7
Non-metal mining	43.4
Basic metal	45
Electrical machinery	44.2
Transport equipment	44
Furniture	43.2
Electricity, gas supply	43.9
Construction	43.9
Wholesale trade	43.3
Retail trade	42.7
Motor sale/repair	44
Hotel / restaurant	43.9
Land transport	48.3
Post and telecommunication	44.3
Financial	42.8
Insurance / pension	41.7
Other business	43.7
Public administration defence	43.7
Education	40.1
Health / social work	43
Other community	42.9
Membership orgs	42
Recreation	4.7
Other service	41.1

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PLEASE NOTE!
THE AFRIKAANS VERSION WILL BE AVAILABLE AT A LATER STAGE.

Footnotes:

(1) The prescribed amount varies regionally and is currently from R34 500.00

(2) Between R34 500 and R40 500 per year.)

(3) The Working Draft of the Final Constitution states: "A child should not be required or permitted to perform work or provide services that are inappropriate for that child's age, or that place at risk the child's well-being, education, physical or mental, or spiritual, moral or social development" (s. 27(1)(e)).

(4) The information on legal standards in other countries was supplied by the International Labour Office in January 1996. The information has been collected for a Digest on Conditions of Work which is expected to be published in March 1996.