

EXCLUSIVE PROTECTION FOR EMPLOYEES I.T.O LEGISLATION

1) Who is an Employee?

To understand what is meant by the protective nature of labour laws, one may picture the labour law division as an umbrella. People not covered by labour laws will not be protected and will have to find other laws to protect themselves.

The aim of the LRA (Labour Relations Act) is to promote sound relations between employers and employees in the workplace. Workers who aren't employees fall outside the scope of the LRA and are not entitled to protection against unfair dismissal.

It's sometimes hard to differentiate between an employee and an independent contractor, because they closely resemble each other. An independent contractor is contracted to perform a specific task or to produce a specific result, while an employee is appointed to render personal services in terms of a job description.

The definition of an *employee* states an employee is :

- (a) any person , excluding independent contractors, who works for another person or for the State and who receives, or is entitled to receive, any remuneration; and
- (b) any other person who in any manner assists in carrying on or conducting the business of an employer.

The difficulty in determining who qualifies as an employee and who doesn't has prompted the courts to formulate various tests to distinguish between employees and independent contractors.

2) Guidelines to distinguish between Employees and Independent Contractors

The courts have given guidelines to distinguish between employees and independent contractors, and three tests were developed:

- the control test : Looks at the control over the work the person does, the manner in which the work must be done and by when the work must be done.
- the organisation test : Looks at whether the person is part and parcel of the business.
- the dominant impression test : This test is favoured by the courts and considers the employment relationship as a whole, rather than just one factor of it.

Section 200A of the LRA reads – Until the contrary is proven, a person who works for, or renders services to any other person, is presumed to be an employee, if any one or more of the following are present:

- * manner in which person works is subject to the control or direction from another person
- * person's hours of work are subject to the control or direction of another person
- * in the case of a person working for an organisation, they form part of that organisation
- * person has worked for the other person for an average of at least 40 hours per month over the last 3 months
- * person is economically dependent on the other person for whom they work or render services
- * person is provided tools of the trade or work equipment by the other person
- * person only works for or renders services to one person.

Sections 200A and 83A should be read in conjunction with the Code : Who is an Employee? As far as control is concerned the Code determines:

- control includes the right to determine what work the employee will do, in what manner and what their working hours will be
- control might be a term of the contract, but even where it is not specified in writing, it doesn't mean there's no contract of employment.

As far as the organisation test is concerned the Code states *inter alia* that:

- the traditional workplace no longer exists and the employee doesn't need to work from the employer's premises to indicate a valid employment relationship
- the tools of the trade provided by the employer may range from a modem to a cell phone package to a set of screw drivers.

It can be said that the courts are generally more in favour of an extended interpretation than a restrictive approach to the definition of an 'employee' in recent years. When an interpretation has to be done, the definition of 'employee', the employment contract, the Code, and the presumptions must *all* be considered together.

3) Categories of Employees

To complicate matters further when distinguishing between an employee and an independent contractor, there are different categories of employees. The most common categories are:

- Permanent Employee: employed for an indefinite period of time.
- Temp/Contract/Fixed-term Employee: employed for a specific period or for a specific project.
- Casual Employee: works for the same employer for maximum 3 days a week and employment can be temporary or permanent.
- Part-Time Employee: works for the employer only at certain times of the day and only a few days a week and employment is also temporary or permanent.

The terms 'temporary employees', 'casual workers', 'part-time employees' and 'contract workers' are often used interchangeably as all these workers are known as "temporary employees". They generally work fewer hours and are also excluded from employment benefits such as medical aid and pension funds. The definition of 'employee' doesn't differentiate between the categories.

4) Unprotected Workers

*** Illegal Workers**

In terms of the common law an unlawful contract is void or voidable. Under criminal law any unlawful conduct is punishable by a court of law. However, an important distinction has been made between protection in terms of the Constitution or the LRA for illegal workers.

For example a prostitute will have a right to fair labour practices as a result of the employment relationship, which exists despite the illegality of the type of work. Due to the fact that there cannot be a valid contract of employment, she *won't* be protected against unfair dismissal. Her claims will therefore be in terms of section 23 of the Constitution via the civil courts.

Any employer who knowingly employs an illegal foreigner or a foreigner in contravention of the Act commits an offence. What the Immigration Act is trying to achieve, is to deter employers from *intentionally* hiring workers who are unauthorised to work in terms of the Act. It can be accepted that legislature wouldn't have intended to allow an employer, through criminal conduct in employing unauthorised workers to escape its obligations in terms of the employment contract. However, an illegal foreigner may still be able to enforce his/her contractual rights against the employer. The Labour Appeal Court accepted that if the relationship is akin to one of employment – the same protection is applicable.

*** Statutory Exclusions of Workers**

Though the LRA applies to many employees, the following categories are excluded from the definition:

- members of the National Defence Force
- members of the National Intelligence Agency
- members of the South African Secret Service
- members of the South African National Academy of Intelligence
- members of Comsec

The same exclusions apply to the BCEA. In addition to the above people, the BCEA also excludes the following people from its protection:

- unpaid volunteers working for charitable organisations or organisations with a public purpose
- people employed on vessels at sea

It should be noted that the BCEA does apply to persons undergoing vocational training, except to the extent that any term or condition of their employment is regulated by the provisions of any other law.

Who is An Employer?

Even though no SA labour legislation presently defines an *employer*, it can be accepted that 'employer' is defined as :

- any person or body which employs any person in exchange for remuneration
- any person who permits any person to assist them in conducting his/her business

The above definition includes TES (temporary employment services). For purposes of the LRA and BCEA a labour broker is deemed to be the 'employer' of a person whose services have been obtained for a client for reward. Here there's a triangular relationship between an employer, an employee and the client. By using a TES, an employer can avoid responsibilities such as providing employees with benefits and avoiding admin tasks like deducting UIF contributions. The TES is responsible for the liabilities and duties that go with the employer-employee relationship.

Trade Unions are against the use of labour brokers as it creates difficulties in identifying who the *real* employer is. In this whole process workers might be exploited. Some of the other concerns are:

- that the worker goes home with a reduced salary because the TES deducts its fess from there
- that protection against unfair dismissal and unfair labour practices isn't shared between the TES and the client