

## Sources of law that govern the employment relationship

There are a variety of sources of law in South Africa that impact on the world of work.

The legal principles applicable to the employment relationship in this country come from a variety of sources. These include, the common law, international, law labour legislation, workplace level collective agreements, bargaining council collective agreements and the contract of employment. All of these are subject to the principles contained in the Constitution.

If one has to create a hierarchy of the sources (an order of the most important) referred to above, it would be as follows:

1. The Constitution;
2. Labour legislation, including determinations made by the Minister of Labour;
3. Collective agreements concluded in bargaining councils;
4. Collective agreements concluded outside of bargaining councils;
5. Contract of employment; and
6. The Common Law.

## The Constitution

- The Constitution of the Republic of South Africa, 1996, is the supreme law in this country.
- It provides the framework against which all other law (legislation and the common law) must be measured.
- All laws must be in line with the requirements of the Constitution or run the risk of being cancelled for being seen to be unconstitutional.
- All laws must also be interpreted and applied in a way that is in the line with the Constitution. For example, if there are two possible interpretations of the law, one giving effect to constitutional rights and one not, the interpretation giving effect to the Constitution must be adopted.

## Conventions of the International Labour Organisation (ILO)

- South Africa is a member of the ILO.
- The main instruments of the ILO are Conventions, which reflect the agreements reached by consensus among the member states of the ILO.
- The Conventions of the ILO have a role to play in determining the content of the labour rights in the Bill of Rights and the proper interpretation of our labour legislation.
- South Africa has ratified several ILO conventions and by doing so, it undertakes binding legal obligations relating to a wide variety of matters.
- Labour legislation enacted since 1995 for example, the Labour Relations Act 66 of 1995 (LRA), the Basic Conditions of Employment Act 75 of 1997 (BCEA) and the Employment Equity Act 55 of 1995 (EEA) reflect ratification or adoption of core ILO Conventions.



## Labour legislation

- The main source of labour law is legislation or statutes.
- These are Acts of Parliament which regulate specific matters of labour law.
- Laws generally contain broad provisions setting out rights and duties, establishing processes and procedures and imposing obligations on parties.
- Obvious examples would be the LRA or BCEA.

See information sheet: Labour legislation that regulates the employment relationship

## Regulations

- Broader provisions contained in legislation are often regulated in more detail by means of regulations. The regulations focus how to practically implement aspects of legislation. For example, in 2006 the Minister of Labour issued General Administrative Regulations in terms of the EEA, which set out in detail how employment equity plans must be drawn up. Regulations are a form of subordinate legislation, but are binding in the same way as statutes.

## Codes of Good Practice

- Certain pieces of legislation (LRA, BCEA and EEA) make provision for the issuing of Codes of Good Practice.
- Codes of Good Practice are guidelines and any person interpreting or applying legislation must take the relevant code into account.
- Codes of Good Practice provide employers with information that may assist them with implementing various pieces of legislation.
- Codes of Good Practice are prepared and issued by NEDLAC in terms of the law.
- Employers should be guided by a particular Code of Good Practice unless they have a good reason to depart from it.

Some of the more well-known Codes of Good Practice are:

- Code of Good Practice: Dismissal;
- Code of Good Practice on the Handling of Sexual Harassment Cases in the Workplace;
- Code of Good Practice on the Employment of People with Disabilities.

## Sectoral determinations

- Chapter 8 of the BCEA allows the Minister of Labour to issue sectoral and ministerial determinations which set basic conditions of employment for employees working in a particular sector.
- For example, determinations have been issued for domestic workers and the cleaning services sector. Where the issues dealt with in a sectoral determination are also dealt with by the BCEA, the determination shall be accepted.

The Minister has made sectoral determinations for the following sectors:

- The contract cleaning sector (Sectoral Determination 1)
- The clothing and knitting sector (Sectoral Determination 4)
- The civil engineering sector (Sectoral Determination 2)
- Learnerships (Sectoral Determination 5)
- The private security sector (Sectoral Determination 6)
- The domestic workers sector (Sectoral Determination 7)
- The wholesale and retail sector (Sectoral Determination 9)
- Children in the performance of advertising  
artistic and cultural activities (Sectoral Determination 10)
- The taxi sector (Sectoral Determination 11)
- The farm workers sector (Sectoral Determination 13)
- The forestry sector (Sectoral Determination 12)
- The hospitality sector (Sectoral Determination 14)

It is important that all employers familiarise themselves with the contents of sectoral and ministerial determinations and keep abreast with the changes to the minimum rates of pay.

### **Collective agreements**

- Collective agreements are written agreements between trade unions and employers or employers' organisations, concerning terms and conditions of employment or any other matter of mutual interest.
- Collective agreements are a form of 'collective contract'.
- A collective agreement can amend, replace or change some basic conditions of employment to the extent it is allowed by the BCEA.
- That agreement is then the instrument that regulates the minimum conditions of employment for the employees covered by it.

### **Collective agreements concluded in bargaining councils**

- A bargaining council is a voluntary institution made up of one or more registered employers' organisations and one or more registered trade unions, which is set up for particular sectors and which regulates terms and conditions of employment or any other matter of mutual interest in that sector.
- Bargaining council collective agreements are also important because they regulate dispute resolution processes (conciliation and arbitration) applicable in the sector and area for which the council has been established.
- With some exceptions, bargaining council agreements can set aside or change even the minimum standards set out in the BCEA.
- If certain requirements are met, an agreement concluded in a bargaining council by employers and trade unions that represent the majority of employees in a sector may be extended to cover employers and employees who are not a party to the council at, provided that they fall within the area of jurisdiction of the council.



## Collective agreements concluded outside of bargaining councils

- Collective agreements concluded between employers and trade unions outside of bargaining councils are also an important source of rules governing the employment relationship between an employer and its employees.
- Such agreements might regulate any matter of mutual interest, terms and conditions of employment and contain disciplinary codes and procedures.

## Contract of employment

- A contract of employment still has an important role to play in our labour law. It creates and regulates the employment relationship.
- A contract comes into existence when an employer and employee intend to create binding obligations and agree on the content of the agreement.
- A contract of employment may be indefinite or for a fixed term.
- An indefinite contract of employment may be oral or in writing, but a fixed-term contract must be in writing and must state the reason for entering into a fixed-term contract.
- An employer and employee are free to agree to the terms of the employment relationship in the contract of employment, but they may not contract out of the minimum conditions of employment set out in the BCEA.

See template: Permanent contract

See template: Fixed-term contract

## The Common Law

- The Common Law is a body of law, a set of principles, that has been developed by South African Courts over decades, initially drawing on Roman-Dutch and English law.
- It is unwritten, but its contents became clear as the courts consistently applied the same legal principles to the cases that came before them. For example, most of the South African law of contract is to be found in the common law.
- Even though the common law is unwritten, it remains an important and a binding source of law.
- The common law can be relied on unless it has been overridden or excluded by legislation.