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GENERAL NOTICE

NOTICE 1774 OF 2006

CODE OF GOOD PRACTICE: WHO IS AN EMPLOYEE

CODE OF GOOD PRACTICE: WHO IS AN EMPLOYEE

PART 1

1. This Code of Good Practice is issued by NEDLAC in terms of section 200A (4), read with section 203, of the Labour Relations Act 66 of 1995 (LRA).

2. This Code sets out guidelines for determining whether persons are employees. Its purpose is –

   (a) to promote clarity and certainty as to who is an employee for the purposes of the Labour Relations Act and other labour legislation;

   (b) to set out the interpretive principles contained in the Constitution, labour legislation and binding international standards that apply to the interpretation of labour legislation, including the determination of who is an employee;

   (c) to ensure that a proper distinction is maintained between employment relationships which are regulated by labour legislation and independent contracting;

   (d) to ensure that employees - who are in an unequal bargaining position in relation to their employer - are protected through labour law and are not deprived of these protections by contracting arrangements;

   (e) to assist persons applying and interpreting labour law to understand and interpret the variety of employment relationships present in the labour market including disguised employment, ambiguous employment relationships, atypical (or non-standard) employment and triangular employment relationships.

Application

3. In terms of section 203(3) and (4) of the LRA, any person interpreting or applying one of the following Acts must take this Code into account for the purpose of determining whether a particular person is an employee in terms of –

   (a) Labour Relations Act 66 of 1995 (LRA);
   (b) Basic Conditions of Employment Act 75 of 1997 (BCEA);
   (c) Employment Equity Act 55 of 1998 (EEA); or
   (d) Skills Development Act 97 of 1998 (SDA).

4. The Code should also be taken into account in determining whether persons are employees in terms of the Occupational Health and Safety Act 85 of 1993, the Compensation for Occupational Injuries and Diseases Act 130 of 1993 and the Unemployment Insurance Act 63 of 2001. In applying these Acts, it must be borne in mind that the definitions of an employee in those statutes differ from that contained in the LRA. However, there are sufficient similarities for the Code to be of considerable assistance in determining who is covered by these statutes. These statutes are discussed further in Part 6 of the Code.

5. Part 1 of this Code deals with the application of the Code and issues of interpretation.

6. Part 2 of this Code deals with the rebuttable presumption as to who is an employee in terms of section 200A of the LRA and section 83A of the BCEA. Any person applying or interpreting those sections must take this Code into account.

7. Part 3 of this Code, deals with the interpretation of the definition of "employee" contained in the LRA, the BCEA, the EEA and the SDA.

8. Part 4 of the Code deals with determining the employment status of persons employed by temporary employment services.

9. Part 5 of the Code deals with the principles of interpretation that are applicable to interpreting the statutory presumptions of employment and the statutory definitions of an employee.

10. Part 6 deals with the extent to which the Code is of assistance in determining employment status for purposes of the Occupational Health and Safety Act 85 of 1993, the Compensation for Occupational Injuries and Diseases Act 130 of 1993 and the Unemployment Insurance Act 63 of 2001.

11. While every person applying or interpreting one of these statutes must take the Code into account, the Code is not a substitute for applying binding decisions of the courts. The Code therefore refers to many of the most important and helpful decisions of the courts on these issues. (A table of cases cited together with their references is attached to the Code).

PART 2
THE PRESUMPTION AS TO WHO IS AN EMPLOYEE

12. The 2002 amendments to the LRA and BCEA introduce a provision into each Act creating a rebuttable presumption as to whether a person is an employee and therefore covered by the Act. These provisions are found in section 200A of the LRA and section 83A of the BCEA. These sections only apply to employees who earn less than a threshold amount determined from time to time by the Minister of Labour in terms of section 6(3) of the BCEA.[1]

13. A person is presumed to be an employee if they are able to establish that one of seven listed factors is present in their relationship with a person for whom they work or to whom they render services. Before examining the seven factors, it is necessary to describe the general operation of the presumption.

14. Subject to the earnings threshold, the presumption applies in any proceedings in terms of either the BCEA or LRA in which a party ('the applicant') alleges that they are an employee and one or more of the other parties to the proceedings disputes this allegation.

15. In order to be presumed to be an employee, an applicant must demonstrate that –

    (a) they work for or render services to the person or entity cited in the proceedings as their employer; and
    (b) any one of the seven listed factors is present in their relationship with that person or entity. (These factors are discussed in paragraph 18 of the Code.)

[1]With effect from 14 March 2003, the threshold amount is R115 572 (GNR 356 *GG* 25012 of 14 March 2003). Previously, the amount was R89 455,00 per annum (GNR 1439 of 13 November 1998). For the purpose of determining whether an employee falls within this threshold, an employee's earnings are calculated as gross pay before deductions (i.e. income tax, pension, medical aid contributions and similar payments), but excluding contributions made by the employer in respect of the employee.

16. The presumption applies regardless of the form of the contract. Accordingly, a person applying the presumption must evaluate evidence concerning the actual nature of the employment relationship. The issue of the applicant's employment status cannot be determined merely by reference to either the applicant's obligations as stipulated in the contract or a "label" attached to the relationship in a contract. Therefore a statement in a contract that the applicant is not an employee or is an independent contractor must not be taken as conclusive proof of the status of the applicant.

17. The fact that an applicant satisfies the requirements of the presumption by establishing that one of the listed factors is present in the relationship does not establish that the applicant is an employee. However, the onus then falls on the "employer" to lead evidence to prove that the applicant is not an employee and that the relationship is in fact one of independent contracting. If the respondent fails to lead satisfactory evidence, the applicant must be held to be an employee.

18. The presumption comes into operation if the applicant establishes that one of the following seven factors is present –

(a) ***"the manner in which the person works is subject to the control or direction of another person"***

The factor of control or direction will generally be present if the applicant is required to obey the lawful and reasonable commands, orders or instructions of the employer or the employer's personnel (for example, managers or supervisors) as to the manner in which they are to work. It is present in a relationship in which a person supplies only labour and the other party directs the manner in which he or she works. In contrast, control and direction are not present if a person is hired to perform a particular task or produce a particular product and is entitled to determine the manner in which the task is to be performed or the product produced. It is an indication of an

employment relationship that the "employer" retains the right to choose which tools, staff, raw materials, routines, patents or technology are used. Likewise, the fact that an employer is entitled to take disciplinary action against the person as a result of the manner in which the person works is a strong indication of an employment relationship.

(b) ***"the person's hours of work are subject to the control or direction of another person"***

This factor will be present if the person's hours of work are a term of the contract and the contract permits the employer or person providing the work to determine at what times work is to be performed. However, the fact that the contract does not determine the exact times of commencing and ending work does not entail that it is not a contract of employment. Sufficient control or direction may be present if the contract between the parties determines the total number of hours that the person is required to work within a specified period. Flexible working time arrangements are not incompatible with an employment relationship.

(c) ***"in the case of a person who works for an organisation, the person forms part of that organisation"***

This factor may apply in respect of any employer that constitutes a corporate entity. It does not apply to individuals employing, for instance, domestic workers. The factor will be present if the applicant's services form an integrated part of the employer's organisation or operations.

A person who works for or supplies services to an employer as part of conducting their own business does not form part of the employer's organisation. Factors indicating that a person operates their own business are that they bear risks such as bad workmanship, poor performance, price hikes and time over-runs. In

the case of employment, an employer will typically bear these types of risks.

(d) ***"the person has worked for that other person for an average of at least 40 hours per month over the last three months"***

If the applicant is still in the employment of the employer, this should be measured over the three months prior to the case commencing. If the relationship has terminated, it should be measured with reference to the three-month period preceding its termination.

(e) ***"the person is economically dependent on the other person for whom he or she works or renders services"***

Economic dependence will generally be present if the applicant depends upon the person for whom they work for the supply of work. An employee's remuneration will generally be his or her sole or principal source of income. On the other hand, economic dependence will not be present if the applicant is genuinely self-employed or is running their own business. A self-employed person generally assumes the financial risk attached to performing work. An important indicator that a person is genuinely self-employed is that he or she retains the capacity to contract with others to work or provide services. In other words, an independent contractor is generally free to build a multiple concurrent client base while an employee is bound to a more exclusive relationship with the employer.

An exception to this is the position of part-time employees. The fact that a part-time employee is able to work for another employer in the periods in which he or she is not working does not affect his or her status as an employee. Likewise, the fact that a full-time employee may be able to take on other employment that does not conflict with

the interests of their employer in their spare time is not an indication of self-employment.

(f) ***"the person is provided with the tools of trade or work equipment by the other person"***

This provision applies regardless of whether the tools or equipment are supplied free of cost or their cost is deducted from the applicant's earnings or the applicant is required to re-pay the cost. The term "tools of trade" is not limited to tools in the narrow sense and includes items required for work such as books or computer equipment.

(g) ***"the person only works for or renders services to one person"***

This factor will not be present if the person works for or supplies services to any other person. It is not relevant whether that work is permitted in terms of the relationship or whether it involves "moonlighting" contrary to the terms of the relationship.

19. If any one of the factors listed in the preceding paragraph is established, the applicant is presumed to be an employee. An "employer" that disputes that an applicant is an employee must be given the opportunity to rebut the presumption by leading evidence concerning the nature of the working relationship. After hearing this evidence, and any additional evidence provided by the applicant or any other party, the presiding officer must rule on whether the applicant is an employee or not.

20. In cases in which the presumption is not applicable, because the person earns above the threshold amount, the factors listed in the presumption (and discussed above) may be used as a guide for the purpose of determining whether a person is in reality in an employment relationship or is self-employed.[2]

[2] *Denel (Pty) Ltd v Gerber* at para 201.

PART 3
INTERPRETING THE DEFINITION OF AN EMPLOYEE

21. The LRA defines an employee as –

> *"(a) any person, excluding an independent contractor, 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,*
>
> *and 'employed' and 'employment' have meanings corresponding to that of 'employee'".*[3]

22. The interpretation given to the term "employee" by the courts prior to the insertion into the LRA of the presumption as to who is an employee, remains relevant. This is so because –

(a) the presumption only applies to employees who earn less than the earnings threshold determined by the Minister;

(b) in the case of employees who earn less than the threshold amount, the employer may lead evidence to rebut the presumption, and establish that they are not an "employee". For example, if the person who claims to be an employee establishes that he or she has worked for the other person for an average of at least 40 hours over the last three months, he or she must be presumed to be an employee. The 'employer' may, however, lead evidence that that person is an independent contractor engaged to perform a particular task. The

[3]This definition is also found in the BCEA, the EEA and the SDA.

court or tribunal will then have to determine whether that person is an employee.

23. Sub-paragraph (a) of the definition of an "employee" in the LRA includes any person who works for another person and who receives, or is entitled to receive, remuneration, unless that person is an independent contractor. In general terms, this reflects the common law distinction between employees and independent contractors.

24. Sub-paragraph (b) contemplates that other categories of persons who assist in carrying on or conducting businesses also fall within the statutory definition of an 'employee'. Sub-paragraph (b) has the consequence that persons who are not engaged in terms of a contract of employment may nevertheless be statutory employees. The courts have not yet delineated the precise ambit of persons who should be classified as employees because they fall within the terms of sub-paragraph (b).

25. In 1970 the then Appellate Division[4] interpreted wording similar to that contained in sub-paragraph (b) and concluded that it did not include persons who work for another as an independent contractor.[5] While the courts have not delineated the precise categories of employees who will be covered, it has been held that this part of the definition contemplates the assistance that a person may render to a person other than their employer.[6] A category of persons who clearly fall within the terms of sub-paragraph (b) are unpaid workers who work for an employer.

When does a person become an employee?

26. The definition of an "employee" includes a person who has concluded a contract of employment to commence work at a future date. Accordingly, it

[4] Now known as the Supreme Court of Appeal.
[5] *Dental Technicians Association of SA Ltd v Dental Association of SA Ltd & others* at 741 A; *Borcherds v CW Steward t/a Lubrite Distributors at 1269-1277.*
[6] *Liberty Life Association of Africa Ltd v Niselow* at 683 A-D (ILJ); 833 C-G (BLLR).

is not a requirement that the person has commenced work in order to be classified as an employee in terms of labour legislation.[7]

Distinguishing between an employee and an independent contractor

27. When deciding whether a person is an employee rather than an independent contractor, the courts follow an approach usually referred to as the "dominant impression" test.[8] In terms of this approach, it is necessary to evaluate all aspects of the contract and the relationship and then make a classification based on the "dominant impression" formed in that evaluation. Accordingly, there is no single factor that decisively indicates the presence or absence of an employment relationship. In this regard, the approach differs from that used when applying the presumption as the presumption comes into play if one of the listed criteria is present. That there is no single decisive criterion that determines the presence or absence of an employment relationship does not mean that all factors should be given the same weighting.

28. To determine whether a person is an employee, our courts seek to discover the true relationship between the parties. In certain cases, the legal relationship between the parties may be gathered from a construction of the contract that the parties have concluded. However, in practice, an interpretation of the wording of the contract will only determine the matter definitively if the parties expressly admit that the contract is consistent with the realities of the relationship or elect not to lead evidence concerning the nature of the relationship. The parol evidence rule that prevents oral evidence being lead to interpret a contract, has no application in determining whether or not a person is an employee for the purposes of labour legislation.[9]

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[7] *Wyeth SA (Pty) Ltd & others v Manqele* at paras 50-52.

[8] This was first adopted in *Smit v Workmen's Compensation Commissioner* and has been applied by the Labour Appeal Court in cases such as *SA Broadcasting Corporation v McKenzie.*

[9] *Denel (Pty) Ltd v Gerber* at paras 20 -21.

29. However, the contractual relationship may not always reflect the true relationship between the parties. In these cases, the court must have regard to the realities of that relationship, irrespective of how the parties have chosen to describe their relationship in the contract.[10] Adjudicators should look beyond the form of the contract to ascertain whether there is an attempt to disguise the true nature of the employment relationship or whether there is an attempt by the parties to avoid regulatory obligations, such as those under labour law or the payment of tax. Our courts have frequently noted that the inequality of bargaining power within an employment relationship may lead employees to agree to contractual provisions that do not accord with the realities of the employment relationship. This is particularly important in the case of low paid workers who may have agreed to be classified as independent contractors because of a lack of bargaining power.

30. Disguised employment is a significant reality in the South African labour market and has been dealt with in a number of reported decisions. The Employment Relationship Recommendation, 2006 of the International Labour Organisation states that a "disguised employment" relationship occurs when the employer treats an individual as other than an employee in a manner that hides his or true legal status as an employee".[11] It is an established principle of our law that the label attached to a contract is of no assistance where it is chosen to disguise the relationship.[12] A contract that designates an employee as an independent contractor, but in terms of which the employee is in a subordinate or dependent position, remains a contract

[10] *SA Broadcasting Corporation v McKenzie* at para 10; *Denel (Pty) Ltd v Gerber* at para 22. The International Labour Organisation's Employment Relationship Recommendation 197 of 2006 states (in Article 9) that "the determination of the existence of such a (employment) relationship should be guided primarily by the facts relating to the performance of work and the remuneration of the worker, notwithstanding how the relationship is characterized in any contrary arrangement, contractual or otherwise, that may have been agreed between the parties."

[11] Article 4(b) of Recommendation 197 of 2006.

[12] *SA Broadcasting Corporation v McKenzie* at 591 at para 10.

of service.[13] In other cases, employers have claimed that a person who was formerly an employee has been 'converted' into an independent contractor. If the person has previously performed the same or similar work as an employee, this is a very strong indication that he or she remains an employee.[14] Likewise, the fact that other employees employed by the same employer, or by other employers in the same sector, to perform the same or similar work under similar conditions are classified as employees may be a factor indicating that the person is an employee.

31. It is consistent with the purposes of the LRA and other labour legislation to classify as employees, workers who have agreed to contracts purporting to classify them as independent contractors. The fact that a person provides services through the vehicle of a legal entity such as a company or a closed corporation does not prevent the relationship being an employment relationship covered by labour legislation. It is necessary to look beyond the legal structuring to ascertain the reality of the employment relationship and determine whether the purpose of the arrangement was to avoid labour legislation or other regulatory obligations.[15] However, where a person has made representations to an agency such as the SA Revenue Services that they are not an employee in order to gain tax benefits, it may be appropriate for a court or arbitrator to refuse to grant them relief on the basis that they have not instituted the proceedings with "clean hands".[16]

[13] See, for instance, *Motor Industry Bargaining Council v Mac-Rites Panel Beaters and Spray Painters (Pty) Ltd* at 1163 C – 1165 D (sale); 1079 G – 1081 H (ILJ).
[14] See, for instance, *Building Bargaining Council v Melmon's Cabinets CC & another* at para 21.
[15] *Denel (Pty) Ltd v Gerber* at paras 20 -21. This represents a change of approach from that previously adopted by the LAC in *CMS Support Services v Briggs*.
[16] *Denel (Pty) Ltd v Gerber* at paras 204 and 205.

Factors

32. In the initial decision adopting the "dominant impression" test, the then Appellate Division listed six factors[17] to distinguish a contract of employment from a contract for services concluded by an independent contractor. These factors, which are frequently cited in judgments, are tabulated below and discussed in turn. These six factors are not a definitive listing of the differences between the two types of contract.

	Employee	**Independent Contractor**
1.	Object of the contract is to render personal services.	Object of contract is to perform a specified work or produce a specified result.
2.	Employee must perform services personally.	Independent contractor may usually perform through others.
3.	Employer may choose when to make use of services of employee.	Independent contractor must perform work (or produce result) within period fixed by contract.
4.	Employee obliged to perform lawful commands and instructions of employer.	Independent contractor is subservient to the contract, not under supervision or control of employer.
5.	Contract terminates on death of employee.	Contract does not necessarily terminate on death of employee.
6.	Contract also terminates on expiry of period of service in contract.	Contract terminates on completion of work or production of specified result.

[17] The Appellate Division uses the Latin term *indicia* to refer to these factors – in this Code, they are referred to as "characteristics" or "factors".

Rendering of personal services

33. In terms of the common law, an employee renders personal services, while an independent contractor is contracted to produce a specified result. An employee is contracted to work and the labour itself is the object of a contract of employment. An independent contractor is contracted to deliver a completed product and the result of the labour is the object of the contract.

34. The Supreme Court of Appeal (SCA) has cited with approval an alternative formulation of this core distinction proposed by the author Brassey who describes the difference in the following terms – 'an employee is a person who makes over his or her capacity to produce to another; an independent contractor is a person whose commitment is the production of a given result by his or her labour'.[18]

35. The acceptance of this formulation of the object of the contract does not alter the SCA's continued application of a multi-factoral approach in the form of the "dominant impression" test. The object of the contract therefore remains one of the factors that must be taken into account in determining the nature of the contract. An individual engaged to perform specified work may nevertheless be an employee if other aspects of the relationship sufficiently resemble an employment relationship. This may be the case, for example, if the employee is required to perform the specified work personally and under close supervision by the employer.

Employee must perform personally

36. A key defining feature of an employment relationship is that the employee is required to perform services personally when required to do so by the employer. This has been described by the courts as the employee being "at

[18] Quoted with approval in *Niselow v Liberty Life Association of Africa Ltd* at 165 F – J (SALR); 753 J – 754 A (ILJ).

the beck and call" of the employer. An independent contractor need not perform the service personally and may use the services of other people, unless the contract expressly provides otherwise. Accordingly, a contractual provision requiring a contractor to perform personally does not always mean that the relationship is one of employment. Similarly, the fact that an employee may be permitted or required to arrange a substitute during absences does not in itself imply he or she is an independent contractor.

37. The fact that a person employs, or is entitled to employ, other people to assist in performing the allocated tasks will not always be inconsistent with an employment relationship, although it is an indication that the relationship is one of independent contracting. In some sectors of the economy, it is a practice for sub-contractors to be engaged to work and required to recruit other workers to assist them. This requirement does not in itself exclude the sub-contractors from the possibility of being classified as employees. It will still be necessary to examine the relationship between the principal and sub-contractor, as well as the relationship between the principal and the persons engaged by the sub-contractor, to ascertain if the relationship is one of employment. Depending upon an examination of all the factors, including, for instance, the extent of control exercised by the principal sub-contractor, it is feasible that both the sub-contractor and the workers that he or she has engaged may be employees of the principal contractor. A relevant factor would be the extent to which the employer exercises control over a decision to terminate the services of persons engaged by the sub-contractor.

Employer may choose when to make use of services of employee

38. The courts conventionally state that an employer has the right to determine whether to require an employee to work, while an independent contractor is bound to perform or produce as specified by the contract. An employer will however, in most circumstances, be liable to pay an employee who tenders his or her services, even where the employer does not require the employee to work.

Employer's right of control

39. An employee is subject to the employer's right of control and supervision while an independent contractor is notionally on a footing of equality with the employer and is bound to produce in terms of the contract. The right of control by an employer includes the right to determine what work the employee will do and how the employee will perform that work. It can be seen in an employer's right to instruct or direct an employee to do certain things and then to supervise how those things are done.

40. The employer's right of control is likely to remain, in most cases, a very significant indicator of an employment relationship. The greater the degree of supervision and control to be exercised, the greater the probability that the relationship is one of employment.[19] The right of control may be present even where it is not exercised. The fact that an employer does not exercise the right to control and allows an employee to work largely or entirely unsupervised, does not alter the nature of the relationship.

41. A court may conclude that a contract of employment exists even if the employer exercises a relatively low degree of control because of the presence of other factors in the relationship that are indicative of employment. In some cases, particularly in the case of workers with high levels of skills or occupying senior positions within a company, the normal indications of control may not be present but nevertheless the relationship may be one of employment because, for instance, of their degree of integration into the employer's organisation.

Termination of contract on death of employee

[19] In *Smit v Workmen's Compensation Commissioner* it was said that a 'right of supervision and control is one of the most important *indicia* that a particular contract is in all probability a contract of service'.

42. The fifth of the original characteristics suggested that a contract of employment terminates on the death of an employee, while the death of an independent contractor does not necessarily terminate the relationship. It has been observed that this distinction may be of limited value as the death of an individual who is an independent contractor may terminate the relationship.[20]

Termination of contract on expiration of period of service

43. The sixth characteristic is that a contract of service terminates on the expiration of the period of service while a contract of work terminates on completion of the relevant work or task. Again, this distinction is of very little practical value in dealing with difficult cases. It is not uncommon for the life of a contract of employment to be defined by reference to a project on which an employee is engaged.[21]

Other characteristics of a contract of employment

44. The six factors listed are not an exclusive list of the factors that should be considered when assessing whether an employment relationship exists. The factors in section 200A of the LRA and section 83A of the BCEA that form part of the presumption of employment also serve as a useful guide to be used in this process. The comments on each of these factors in Part 2 of the Code are therefore relevant in considering whether a person is an employee. The remainder of this Part of the Code deals with a number of other considerations that may be relevant to determining whether an employment relationship exists in particular cases.

[20] See *Medical Association of SA v Minister of Health & Another* at 540F (ILJ); 573 H (BLLR).
[21] *Medical Association of SA v Minister of Health & another* at 540 H – I (ILJ); I – J (BLLR).

Remuneration and benefits

45. A worker's remuneration and benefits may assist in determining their employment status. The fact that an employee receives fixed payment at regular intervals which is made regardless of output or result tends to be a strong indication of an employment relationship. This type of payment regime would generally be inappropriate for persons who are genuinely self-employed.

46. Likewise, the fact that a person is a member of the same medical aid or pension scheme as other employees of the employer is an indication that they are an employee. Other factors which may be indicative of an employment relationship are –

(a) the inclusion in a contract of payments in kind for items such as food, lodging or transport;
(b) the inclusion in a contract of provision for weekly rest periods and annual leave will usually be consistent with an employment relationship;
(c) the provision of benefits that are designed to reward years of service with their employer.

47. Many employees receive variable payments that depend on their performance, such as commissions or bonuses based on productivity, attendance or other factors. The receipt of variable payments in this form is not inconsistent with an employment relationship. The fact that an employee does not receive a conventional salary or wage package, or does not have the same medical aid or pension as other employees, should not be relied upon as the only basis for deciding that he or she is or is not an employee.

48. It is not inconceivable that a remuneration package can be structured to create an appearance of an independent contracting relationship which is at

variance with the underlying nature of the employment relationship. However, the manner and method of payment may be one factor along with others that lead to a conclusion that a person is not an employee.

Provision of training

49. The provision by an employer of training in the employer's methods or other aspects of its business is generally an indication of an employment relationship. Usually, a genuinely self-employed person would be responsible for ensuring their own training. However, provision of training as part of a contractual arrangement is not necessarily inconsistent with a relationship of independent contracting.

Place of work

50. The place at which work takes place may sometimes be taken into account as a factor determining the nature of an employment relationship. However, great caution needs to be taken in using this factor. The fact that a person works regularly at the employer's premises and has no other place of work can be an indication of an employment relationship. However, this might not be the case where the work is of such a nature (for instance, repairs to machinery or equipment) that it has to be performed at the employer's premises or if the contractor leases premises from the employer independently of its contract for work or services. The fact that a person does not work at the employer's premises is not necessarily inconsistent with an employment relationship. It is conceivable that homeworkers, working from their own premises or those of fellow employees, are employees because of factors such as the extent of control that the employer exercises over the manner in which they work.

Conclusion

51. The determination by a court or tribunal as to whether a person is an employee or an independent contractor has important consequences. In particular, independent contractors are not afforded the protection of labour legislation.

52. Courts, tribunals and officials must determine whether a person is an employee or independent contractor based on the dominant impression gained from considering all relevant factors that emerge from an examination of the realities of the parties' relationship.

PART 4
EMPLOYEES OF TEMPORARY EMPLOYMENT SERVICES

53. The LRA and the BCEA specifically regulate the employment of persons who are procured for, or provided to, a client by temporary employment services. Temporary employment services are one type of the wider category of triangular employment relationships. A temporary employment service is a person or business who –

(a) procures or provides employees to perform work or render services for a client; and
(b) remunerates those employees.

54. Both of these elements must be present for the person providing or procuring the employees to fall within the definition of a temporary employment service.

55. An arbitrator or court which is required to determine whether section 198 of the LRA or section 83 of the BCEA is applicable must be satisfied that the relationship between the client and the temporary employment service is a genuine arrangement and not a subterfuge entered into for the purpose of avoiding any aspect of labour legislation.

56. Whether or not an individual supplied to a client by a temporary employment service is an employee of the client or an independent contractor must be determined by reference to the actual working relationship between the worker and the "client" for whom the worker provides services or works.[22] The relationship between the worker and the temporary employment service is relevant to the extent that it may give some indication of the relationship

between the worker and the client. The relationship between the worker and the client must be assessed in the light of the normal criteria used to determine the existence of an employment relationship. Therefore, for example, it would be appropriate to examine factors such as the extent to which the client issues instructions to the worker or any other relevant factor. The presumption of employment is applicable to cases involving persons engaged by temporary employment services, if the employees earn less than the prescribed earnings threshold.

57. If it is found that the individual has an employment relationship with the client, then for the purposes of the LRA and the BCEA –

(a) the individual is an employee of the temporary employment service;[23]

(b) the temporary employment service is the individual's employer.[24]

58. However, the client is jointly and severally liable for any contravention by a temporary employment service of any terms and conditions of employment in a bargaining council collective agreement, an arbitration award, or any sectoral determination or provision of the BCEA. In addition, in terms of section 57(2) of the Employment Equity Act, the client and the temporary employment service are jointly and severally liable for any act of discrimination committed by the temporary employment service on the express or implied instructions of the client.

[22] *LAD Brokers v Mandla* at paras 26-32.

[23] In terms of section 57(1) of the Employment Equity Act, an employee provided by a temporary employment service who is engaged to work for a client on an indefinite basis or works for a period of longer than three months is deemed to be an employee of the client for the purposes of the Affirmative Action provisions of the Employment Equity Act.

[24] For the position under the Occupational Health and Safety Act, see paragraph 72 of the Code.

PART 5
INTERPRETATION OF LABOUR LEGISLATION

59. Any person who is considering the application of either the presumption of employment or the definition of an employee in a particular statute is engaged in the interpretation of that statute. Accordingly, they must be mindful of the approach that must be adopted to the interpretation of labour legislation.

60. Section 3 of the LRA provides that any person applying the Act must interpret its provisions –

(a) to give effect to its primary objects;
(b) in compliance with the Constitution; and
(c) in compliance with the public international law obligations of the Republic.

61. The Constitutional Court has stated that section 3 of the LRA is an express injunction to interpret the provisions of the LRA purposively.[25] A 'purposive' approach to interpretation considers a statutory provision broadly so as to give effect to the Constitution and to the underlying purpose of the statute. This may result in a generous interpretation of the relevant provision.[26]

62. In order to interpret labour legislation in compliance with the Constitution, a commissioner, arbitrator or judge must interpret its provisions in a way that ensures the protection, promotion and fulfilment of constitutional rights, in particular the labour rights contained in section 23 of the Constitution.[27] If more than one interpretation can be given to a provision, the decision-maker

[25] *National Education Health and Allied Workers Union(NEHAWU) v UCT and others* at para 41.
[26] *S v Zuma* at paras 15 - 16; *S v Makwanyane and Another* at paras 9 – 10.
[27] See *National Education Health and Allied Workers Union v University of Cape Town and others* at para 14. In *South African National Defence Union v Minister of Defence and Another* at paras 20 – 29.

must choose the interpretation that best gives effect to the Constitution, provided this does not unduly strain the language of the statute[28] or infringe any protected right. The Labour Appeal Court extended the literal construction of the definition of an employee to include persons who have concluded contracts of employment to commence at a future date because a literal translation resulted in gross hardship, ambiguity and absurdity.[29] The Constitutional Court has noted that security of employment is a core value of the LRA and this should be taken into account in determining whether a person is an employee and therefore entitled to protection against unfair dismissal.[30]

63. Section 39(2) of the Constitution requires that "when interpreting any legislation, and when developing the common law or customary law, every court, tribunal or forum must promote the spirit, purport and objects of the Bill of Rights". The Constitutional Court has confirmed that the common law must be interpreted in a way that develops the common law and ensures that it is consistent with constitutional principles.[31]

64. Section 23 of the Constitution establishes the fundamental rights in respect of labour relations. In particular, section 23(1) and (2) provide that –

> *"(1) Everyone has the right to fair labour practices.*
>
> *(2) Every worker[32] has the right-*
>
> *(a) to form and join a trade union;*
>
> *(b) to participate in the activities and programmes of a trade union; and*
>
> *(c) to strike."*

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[28] *De Beer NO v North-Central Local Council and South-Central Local Council and Others* at para 24; and *NUMSA and Others v Bader Bop (Pty) Ltd and Another* at para 37.
[29] *Wyeth SA (Pty) Ltd & others v Manqele* at paras 50-52.
[30] *NEHAWU v UCT* at para 47.
[31] *Pharmaceutical Manufacturers Association of SA and Others; In re: Ex Parte Application of President of the RSA and Others* at para 49; *Carmichele v Minister of Safety and Security and Another* at paras 39 – 40.
[32] The Constitutional Court has held that the term 'worker' in section 23(2) includes, military personnel who are expressly excluded from the ambit of the LRA and other labour legislation (*South African Defence Union v Minister of Defence and* Another at para 25).

65. The Constitutional Court has confirmed that the major source of South Africa's public international law obligations in respect of labour law, is the Conventions and Recommendations of the International Labour Organisation (ILO).[33] Two supervisory bodies ensure the application and observation of these Conventions: the Committee of Experts on the Application of Conventions and Recommendations, and the Freedom of Association Committee of the Governing Body of the ILO.[34]

66. In certain instances, these bodies have expressed views on the categories of workers covered by particular Conventions. Article 2 of the Convention concerning Freedom of Association and Protection of the Right to Organise 87 of 1948 guarantees the right of "workers and employers without distinction whatsoever, to establish and join organisations of their own choosing, without prior state authorisation." The Freedom of Association Committee has held that the criteria for determining whether persons are covered by Convention 87 is not based on the existence of an employment relationship and self-employed workers in general should enjoy the right to organise.[35] South Africa has ratified Convention 87 and compliance with its provisions therefore constitutes a public international law obligation.

67. The ILO has adopted an Employment Relationship Recommendation that addresses issues of criteria that define an employment relationship, as well as indicators that are associated with an employment relationship. A copy of the Recommendation is attached to this Code.

68. Section 3(d) of the Employment Equity Act specifically provides that the Act should be interpreted in compliance with the ILO's Discrimination (Employment and Occupation) Convention 111 of 1958.

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[33] *NUMSA and Others v Bader Bop (Pty) Ltd and Another* at para 28.
[34] *NUMSA and Others v Bader Bop (Pty) Ltd and Another* at paras 29-30.
[35] *Freedom of Association: Digest of Decisions and Principles of the Freedom of Association Committee of the Governing Body of the ILO* (4ed) (ILO, Geneva 1996).

PART 6

INTERPRETATION OF THE DEFINITION OF AN EMPLOYEE IN OTHER LEGISLATION ADMINISTERED BY THE MINISTER OF LABOUR

Unemployment Insurance Act 63 of 2001

68. For the purposes of the Unemployment Insurance Act 63 of 2001, (UIA) an employee is –

> *"any natural person who receives remuneration or to whom remuneration accrues in respect of services rendered or to be rendered by that person, but excludes any independent contractor";*

Persons applying or interpreting the UIA should take Parts 2 and 3 of this Code into account when deciding whether a person is an independent contractor and therefore excluded from the ambit of the Act.

Compensation for Occupational Injuries and Diseases Act 130 of 1993

69. For the purposes of the Compensation for Occupational Injuries and Diseases Act an employee is -

> *"a person who has entered into or works under a contract of service or of apprenticeship or learnership, with an employer, whether the contract is express or implied, oral or in writing, and whether the remuneration is calculated by time or by work done, or is in cash or in kind, and includes –*
>
> *(a) a casual employee employed for the purpose of the employer's business;*

(b) a director or member of a body corporate who has entered into a contract of service or of apprenticeship or learnership with the body corporate, in so far as he acts within the scope of his employment in terms of such contract;

(c) a person provided by a labour broker against payment to a client for the rendering of a service or the performance of work, and for which service or work such person is paid by the labour broker;

(d) in the case of a deceased employee, his dependants, and in the case of an employee who is a person under disability, a curator acting on behalf of that employee;

but does not include-

(i) a person, including a person in the employ of the State, performing military service or undergoing training referred to in the Defence Act, 1957 (Act 44 of 1957), and who is not a member of the Permanent Force of the South African Defence Force;

(ii) a member of the Permanent Force of the South African Defence Force while on 'service in defence of the Republic' as defined in section 1 of the Defence Act, 1957;

(iii) a member of the South African Police Force while employed in terms of section 7 of the Police Act, 1958 (Act 7 of 1958), on 'service in defence of the Republic' as defined in section 1 of the Defence Act, 1957;

(iv) a person who contracts for the carrying out of work and himself engages other persons to perform such work;

(v) a domestic employee employed as such in a private household;"

70. The central issue that will be raised when interpreting this definition is whether a person is employed in terms of a contract of service and has not been specifically excluded in terms of the definition. Again, persons

interpreting and applying this definition should take Parts 2 and 3 of this Code into account.

Occupational Health and Safety Act, 85 of 1993

71. For the purposes of the Occupational Health and Safety Act 85 of 1993 (OHSA), an employee is –

> *"any person who is employed by or works for an employer and who receives or is entitled to receive any remuneration or who works under the direction or supervision of an employer or any other person";*

The definition differs substantially from that in other labour legislation. A person is an employee and therefore covered by OHSA, if they –

(a) are employed by, or work for, an employer and are entitled to receive remuneration; or

(b) work under the direction or supervision of an employer or any other person.

Nevertheless, a person applying or interpreting the definition should take Parts 2 and 3 of this Code into account when determining whether a person is "employed by or works for an employer" or whether they "work under the direction or supervision of an employer".

72. Unlike the position under the LRA and BCEA, a temporary employment service is not the employer for the purposes of compliance with OHSA. The definition of an employer in OHSA provides that a labour broker as defined in the LRA is not the employer of employees that it provides to a client. This provision must now be read as excluding temporary employment service (as contemplated under the LRA and BCEA) from being the employer for the

purposes of OHSA.[36] Accordingly, the client to whom a worker is supplied by a temporary employment services must meet the obligation of an employer under OHSA.

[36] Section 12(1) of the Interpretation Act 33 of 1957.

Table of cases

1. Borcherds v CW Steward t/a Lubrite Distributors (1993) 14 ILJ 1262 (LAC).
2. Building Bargaining Council v Melmon's Cabinets CC & another (2001) 22 ILJ 120 (LC); [2001] 3 BLLR 329 (LC).
3. Carmichele v Minister of Safety and Security and Another 2001 (4) SA 938 (CC); 2001 (10) BCLR 995 (CC).
4. CMS Support Services v Briggs (1998) 19 ILJ 271 (LAC); [1997] 5 BLLR 533 (LAC).
5. De Beer NO v North-Central Local Council and South-Central Local Council and Others 2002 (1) SA 429 (CC); 2001(11) BCLR 1109 (CC).
6. Denel (Pty) Ltd v Gerber (2005) 26 ILJ 1256 (LAC); [2005] 9 BLLR 849 (LAC).
7. Dental Technicians Association of SA Ltd v Dental Association of SA Ltd & others 1970 (3) SA 733 (AD).
8. LAD Brokers v Mandla (2001) 22 ILJ 1813 (LAC); [2001] 9 BLLR 993 LAC.
9. Liberty Life Association of Africa Ltd v Niselow (1996) 17 ILJ 673 (LAC); [1996] 7 BLLR 825 (LAC).
10. Medical Association of SA v Minister of Health & Another (1997) 18 ILJ 528 (LC); [1997] 5 BLLR 562 (LC).
11. Motor Industry Bargaining Council v Mac-Rites Panel Beaters and Spray Painters (Pty) Ltd 2001 (2) SA 1161 (N); (2001) 22 ILJ 1077 (N).
12. National Education Health and Allied Workers Union v University of Cape Town and others 2003 (3) SA 1 (CC); (2003) 24 ILJ 95 (CC); 2003 (2) BCLR 154 (CC).
13. Niselow v Liberty Life Association of Africa Ltd. 1998 (4) SA 163 (SCA); (1998) 19 ILJ 752 (SCA).
14. NUMSA and others v Bader Bop (Pty) Ltd and another 2003 (3) SA 513 (CC); (2003) 24 ILJ 305; [2003] 2 BLLR 103 (CC); 2003 (2) BCLR 182 (CC).
15. Pharmaceutical Manufacturers Association of SA and Others: In re: Ex Parte Application of President of the RSA and Others 2000 (2) SA 674 (CC); 2000 (3) BCLR 241 (CC).
16. S v Makwanyane 1995 (3) SA 391 (CC); 1995 (6) BCLR 665 (CC).
17. S v Zuma 1995 (2) SA 642 (CC); 1995 (4) BCLR 401 (CC).

18. SA Broadcasting Corporation v McKenzie (1999) 20 ILJ 585 (LAC); [1999] 1 BLLR 1.

19. South African Defence Union v Minister of Defence and another 1999 (4) SA 469 (CC); 1999 (6) BCLR 615 (CC).

20. Smit v Workmen's Compensation Commissioner 1979(1) SA 51 (AD).

21. Wyeth SA (Pty) v Manqele and Others (2005) 26 ILJ 749 (LAC); [2005] (6) BLLR 523 (LAC).

Annexure

ILO RECOMMENDATION CONCERNING THE EMPLOYMENT RELATIONSHIP

The General Conference of the International Labour Organization,

Having been convened at Geneva by the Governing Body of the International Labour Office, and having met in its Ninety-fifth Session on 31 May 2006, and

Considering that there is protection offered by national laws and regulations and collective agreements which are linked to the existence of an employment relationship between an employer and an employee, and

Considering that laws and regulations, and their interpretation, should be compatible with the objectives of decent work, and

Considering that employment or labour law seeks, among other things, to address what can be an unequal bargaining position between parties to an employment relationship, and

Considering that the protection of workers is at the heart of the mandate of the International Labour Organization, and in accordance with principles set out in the ILO Declaration on Fundamental Principles and Rights at Work, 1998, and the Decent Work Agenda, and

Considering the difficulties of establishing whether or not an employment relationship exists in situations where the respective rights and obligations of the parties concerned are not clear, where there has been an attempt to disguise the employment relationship, or where inadequacies or limitations exist in the legal framework, or in its interpretation or application, and

Noting that situations exist where contractual arrangements can have the effect of depriving workers of the protection they are due, and

Recognizing that there is a role for international guidance to Members in achieving this protection through national law and practice, and that such guidance should remain relevant over time, and

Further recognizing that such protection should be accessible to all, particularly vulnerable workers, and should be based on law that is efficient, effective and comprehensive, with expeditious outcomes, and that encourages voluntary compliance, and

Recognizing that national policy should be the result of consultation with the social partners and should provide guidance to the parties concerned in the workplace, and

Recognizing that national policy should promote economic growth, job creation and decent work, and

Considering that the globalized economy has increased the mobility of workers who are in need of protection, at least against circumvention of national protection by choice of law, and

Noting that, in the framework of transnational provision of services, it is important to establish who is considered a worker in an employment relationship, what rights the worker has, and who the employer is, and

Considering that the difficulties in establishing the existence of an employment relationship may create serious problems for those workers concerned, their communities, and society at large, and

Considering that the uncertainty as to the existence of an employment relationship needs to be addressed to guarantee fair competition and effective protection of

workers in an employment relationship in a manner appropriate to national law or practice, and

Noting all relevant international labour standards, especially those addressing the particular situation of women, as well as those addressing the scope of the employment relationship, and

Having decided upon the adoption of certain proposals with regard to the employment relationship, which is the fifth item on the agenda of the session, and

Having determined that these proposals shall take the form of a Recommendation; adopts this 15th day of June of the year two thousand and six the following Recommendation, which may be cited as the Employment Relationship Recommendation, 2006.

I. NATIONAL POLICY OF PROTECTION FOR WORKERS IN AN EMPLOYMENT RELATIONSHIP

1. Members should formulate and apply a national policy for reviewing at appropriate intervals and, if necessary, clarifying and adapting the scope of relevant laws and regulations, in order to guarantee effective protection for workers who perform work in the context of an employment relationship.

2. The nature and extent of protection given to workers in an employment relationship should be defined by national law or practice, or both, taking into account relevant international labour standards. Such law or practice, including those elements pertaining to scope, coverage and responsibility for implementation, should be clear and adequate to ensure effective protection for workers in an employment relationship.

3. National policy should be formulated and implemented in accordance with national law and practice in consultation with the most representative organizations of employers and workers.

4. National policy should at least include measures to:

(a) provide guidance for the parties concerned, in particular employers and workers, on effectively establishing the existence of an employment relationship and on the distinction between employed and self-employed workers;

(b) combat disguised employment relationships in the context of, for example, other relationships that may include the use of other forms of contractual arrangements that hide the true legal status, noting that a disguised employment relationship occurs when the employer treats an individual as other than an employee in a manner that hides his or her true legal status as an employee, and that situations can arise where contractual arrangements have the effect of depriving workers of the protection they are due;

(c) ensure standards applicable to all forms of contractual arrangements, including those involving multiple parties so that employed workers have the protection they are due;

(d) ensure that standards applicable to all forms of contractual arrangements establish who is responsible for the protection contained therein;

(e) provide effective access of those concerned, in particular employers and workers, to appropriate, speedy, inexpensive, fair and efficient procedures and mechanisms for settling disputes regarding the existence and terms of an employment relationship;

(f) ensure compliance with, and effective application of, laws and regulations concerning the employment relationship; and

(g) provide for appropriate and adequate training in relevant international labour standards, comparative and case law for the judiciary, arbitrators, mediators, labour inspectors, and other persons

responsible for dealing with the resolution of disputes and enforcement of national employment laws and standards.

5. Members should take particular account in national policy to ensure effective protection to workers especially affected by the uncertainty as to the existence of an employment relationship, including women workers, as well as the most vulnerable workers, young workers, older workers, workers in the informal economy, migrant workers and workers with disabilities.

6. Members should:

(a) take special account in national policy to address the gender dimension in that women workers predominate in certain occupations and sectors where there is a high proportion of disguised employment relationships, or where there is a lack of clarity of an employment relationship; and

(b) have clear policies on gender equality and better enforcement of the relevant laws and agreements at national level so that the gender dimension can be effectively addressed.

7. In the context of the transnational movement of workers:

(a) in framing national policy, a Member should, after consulting the most representative organizations of employers and workers, consider adopting appropriate measures within its jurisdiction, and where appropriate in collaboration with other Members, so as to provide effective protection to and prevent abuses of migrant workers in its territory who may be affected by uncertainty as to the existence of an employment relationship;

(b) where workers are recruited in one country for work in another, the Members concerned may consider concluding bilateral agreements to prevent abuses and fraudulent practices which have as their

purpose the evasion of the existing arrangements for the protection of workers in the context of an employment relationship.

8. National policy for protection of workers in an employment relationship should not interfere with true civil and commercial relationships, while at the same time ensuring that individuals in an employment relationship have the protection they are due.

II. DETERMINATION OF THE EXISTENCE OF AN EMPLOYMENT RELATIONSHIP

9. For the purposes of the national policy of protection for workers in an employment relationship, the determination of the existence of such a relationship should be guided primarily by the facts relating to the performance of work and the remuneration of the worker, notwithstanding how the relationship is characterized in any contrary arrangement, contractual or otherwise, that may have been agreed between the parties.

10. Members should promote clear methods for guiding workers and employers as to the determination of the existence of an employment relationship.

11. For the purpose of facilitating the determination of the existence of an employment relationship, Members should, within the framework of the national policy referred to in this Recommendation, consider the possibility of the following:

(a) allowing a broad range of means for determining the existence of an employment relationship;

(b) providing for a legal presumption that an employment relationship exists where one or more relevant indicators is present; and

(c) determining, following prior consultations with the most representative organizations of employers and workers, that workers

with certain characteristics, in general or in a particular sector, must be deemed to be either employed or self-employed.

12. For the purposes of the national policy referred to in this Recommendation, Members may consider clearly defining the conditions applied for determining the existence of an employment relationship, for example, subordination or dependence.

13. Members should consider the possibility of defining in their laws and regulations, or by other means, specific indicators of the existence of an employment relationship. Those indicators might include:

(a) the fact that the work: is carried out according to the instructions and under the control of another party; involves the integration of the worker in the organization of the enterprise; is performed solely or mainly for the benefit of another person; must be carried out personally by the worker; is carried out within specific working hours or at a workplace specified or agreed by the party requesting the work; is of a particular duration and has a certain continuity; requires the worker's availability; or involves the provision of tools, materials and machinery by the party requesting the work;

(b) periodic payment of remuneration to the worker; the fact that such remuneration constitutes the worker's sole or principal source of income; provision of payment in kind, such as food, lodging or transport; recognition of entitlements such as weekly rest and annual holidays; payment by the party requesting the work for travel undertaken by the worker in order to carry out the work; or absence of financial risk for the worker.

14. The settlement of disputes concerning the existence and terms of an employment relationship should be a matter for industrial or other tribunals or arbitration authorities to which workers and employers have effective access in accordance with national law and practice.

15. The competent authority should adopt measures with a view to ensuring respect for and implementation of laws and regulations concerning the employment relationship with regard to the various aspects considered in this Recommendation, for example, through labour inspection services and their collaboration with the social security administration and the tax authorities.

16. In regard to the employment relationship, national labour administrations and their associated services should regularly monitor their enforcement programmes and processes. Special attention should be paid to occupations and sectors with a high proportion of women workers.

17. Members should develop, as part of the national policy referred to in this Recommendation, effective measures aimed at removing incentives to disguise an employment relationship.

18. As part of the national policy, Members should promote the role of collective bargaining and social dialogue as a means, among others, of finding solutions to questions related to the scope of the employment relationship at the national level.

III. MONITORING AND IMPLEMENTATION

19. Members should establish an appropriate mechanism, or make use of an existing one, for monitoring developments in the labour market and in the organization of work, and for formulating advice on the adoption and implementation of measures concerning the employment relationship within the framework of the national policy.

20. The most representative organizations of employers and workers should be represented, on an equal footing, in the mechanism for monitoring developments in the labour market and the organization of work. In addition, these organizations should be consulted under the mechanism as often as

necessary and, wherever possible and useful, on the basis of expert reports or technical studies.

21. Members should, to the extent possible, collect information and statistical data and undertake research on changes in the patterns and structure of work at the national and sectoral levels, taking into account the distribution of men and women and other relevant factors.

22. Members should establish specific national mechanisms in order to ensure that employment relationships can be effectively identified within the framework of the transnational provision of services. Consideration should be given to developing systematic contact and exchange of information on the subject with other States.

IV. FINAL PARAGRAPH

23. This Recommendation does not revise the Private Employment Agencies Recommendation, 1997 (No. 188), nor can it revise the Private Employment Agencies Convention, 1997 (No. 181).

ILO RECOMMENDATION CONCERNING THE EMPLOYMENT RELATIONSHIP

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Considering that laws and regulations, and their interpretation, should be compatible with the objectives of decent work, and

Considering that employment or labour law seeks, among other things, to address what can be an unequal bargaining position between parties to an employment relationship, and

Considering that the protection of workers is at the heart of the mandate of the International Labour Organization, and in accordance with principles set out in the ILO Declaration on Fundamental Principles and Rights at Work, 1998, and the Decent Work Agenda, and

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or where inadequacies or limitations exist in the legal framework, or in its interpretation or application, and

Noting that situations exist where contractual arrangements can have the effect of depriving workers of the protection they are due, and

Recognizing that there is a role for international guidance to Members in achieving this protection through national law and practice, and that such guidance should remain relevant over time, and

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Considering that the uncertainty as to the existence of an employment relationship needs to be addressed to guarantee fair competition and effective protection of workers in an employment relationship in a manner appropriate to national law or practice, and

Noting all relevant international labour standards, especially those addressing the particular situation of women, as well as those addressing the scope of the employment relationship, and

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(c) ensure standards applicable to all forms of contractual arrangements, including those involving multiple parties so that employed workers have the protection they are due;

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procedures and mechanisms for settling disputes regarding the existence and terms of an employment relationship;

(f) ensure compliance with, and effective application of, laws and regulations concerning the employment relationship; and

(g) provide for appropriate and adequate training in relevant international labour standards, comparative and case law for the judiciary, arbitrators, mediators, labour inspectors, and other persons responsible for dealing with the resolution of disputes and enforcement of national employment laws and standards.

5. Members should take particular account in national policy to ensure effective protection to workers especially affected by the uncertainty as to the existence of an employment relationship, including women workers, as well as the most vulnerable workers, young workers, older workers, workers in the informal economy, migrant workers and workers with disabilities.

6. Members should:

(a) take special account in national policy to address the gender dimension in that women workers predominate in certain occupations and sectors where there is a high proportion of disguised employment relationships, or where there is a lack of clarity of an employment relationship; and

(b) have clear policies on gender equality and better enforcement of the relevant laws and agreements at national level so that the gender dimension can be effectively addressed.

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(a) in framing national policy, a Member should, after consulting the most representative organizations of employers and workers, consider adopting appropriate measures within its jurisdiction, and where

appropriate in collaboration with other Members, so as to provide effective protection to and prevent abuses of migrant workers in its territory who may be affected by uncertainty as to the existence of an employment relationship;

(b) where workers are recruited in one country for work in another, the Members concerned may consider concluding bilateral agreements to prevent abuses and fraudulent practices which have as their purpose the evasion of the existing arrangements for the protection of workers in the context of an employment relationship.

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10. Members should promote clear methods for guiding workers and employers as to the determination of the existence of an employment relationship.

11. For the purpose of facilitating the determination of the existence of an employment relationship, Members should, within the framework of the national

policy referred to in this Recommendation, consider the possibility of the following:

(a) allowing a broad range of means for determining the existence of an employment relationship;

(b) providing for a legal presumption that an employment relationship exists where one or more relevant indicators is present; and

(c) determining, following prior consultations with the most representative organizations of employers and workers, that workers with certain characteristics, in general or in a particular sector, must be deemed to be either employed or self-employed.

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13. Members should consider the possibility of defining in their laws and regulations, or by other means, specific indicators of the existence of an employment relationship. Those indicators might include:

(a) the fact that the work: is carried out according to the instructions and under the control of another party; involves the integration of the worker in the organization of the enterprise; is performed solely or mainly for the benefit of another person; must be carried out personally by the worker; is carried out within specific working hours or at a workplace specified or agreed by the party requesting the work; is of a particular duration and has a certain continuity; requires the worker's availability; or involves the provision of tools, materials and machinery by the party requesting the work;

(b) periodic payment of remuneration to the worker; the fact that such remuneration constitutes the worker's sole or principal source of income; provision of payment in kind, such as food, lodging or transport; recognition of entitlements such as weekly rest and annual holidays; payment by the party requesting the work for travel undertaken by the worker in order to carry out the work; or absence of financial risk for the worker.

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15. The competent authority should adopt measures with a view to ensuring respect for and implementation of laws and regulations concerning the employment relationship with regard to the various aspects considered in this Recommendation, for example, through labour inspection services and their collaboration with the social security administration and the tax authorities.

16. In regard to the employment relationship, national labour administrations and their associated services should regularly monitor their enforcement programmes and processes. Special attention should be paid to occupations and sectors with a high proportion of women workers.

17. Members should develop, as part of the national policy referred to in this Recommendation, effective measures aimed at removing incentives to disguise an employment relationship.

18. As part of the national policy, Members should promote the role of collective bargaining and social dialogue as a means, among others, of finding solutions to

questions related to the scope of the employment relationship at the national level.

III. MONITORING AND IMPLEMENTATION

19. Members should establish an appropriate mechanism, or make use of an existing one, for monitoring developments in the labour market and in the organization of work, and for formulating advice on the adoption and implementation of measures concerning the employment relationship within the framework of the national policy.

20. The most representative organizations of employers and workers should be represented, on an equal footing, in the mechanism for monitoring developments in the labour market and the organization of work. In addition, these organizations should be consulted under the mechanism as often as necessary and, wherever possible and useful, on the basis of expert reports or technical studies.

21. Members should, to the extent possible, collect information and statistical data and undertake research on changes in the patterns and structure of work at the national and sectoral levels, taking into account the distribution of men and women and other relevant factors.

22. Members should establish specific national mechanisms in order to ensure that employment relationships can be effectively identified within the framework of the transnational provision of services. Consideration should be given to developing systematic contact and exchange of information on the subject with other States.

IV. FINAL PARAGRAPH

This Recommendation does not revise the Private Employment Agencies Recommendation, 1997 (No. 188), nor can it revise the Private Employment Agencies Convention, 1997 (No. 181).