ib 16039 Saccawu box

SACCAWU

Summer School '98

Introduction to the BCEA

Designed and Facilitated by Khanya College

Saccawu Summer School
BCEA Workshop
December 1998
Alpha Training Centre

Facilitated by Khanya College

Day Plans

Day 1	
8.30 - 8.45	Introductions
8.45 - 9.00	House Rules, Hand out of Course Material
9.00 - 9.15	Participants' Expectations
9.15 - 9.30	Aims of the Workshop A guide to the course material
9.30 - 10.15	What do you know about the old BCEA? Activity 1 - Individual Work
10.15 - 10.30	Tea break
10.45 - 11.15	A Brief History of the BCEA and who it covers Activity 2 - Presentation.
11.15 - 12.30	Aims of the new BCEA Activity 3 - Buzz Groups
12.30 - 12.45	How to read the BCEA Activity Sheet 4 - Plenary Work
12.45 - 1.45	Lunch Break
1.45 - 2.15	How the BCEA relates to agreements and contracts of employment Activity 5 - Plenary reading and discussion.
2.15 - 3.00	Who is covered by the BCEA Activity 6 - Buzz Groups

3.00 - 5.00	**Hours of Work** **Activity 7 - Group Work**
5.00 - 6.30	**Reportback from Groups**

Day 2

8.30 - 11.15	**Leave** **Activity 8 - Group Work**
11.15 - 11.30	**Tea**
11.30 - 12.30	**Reportback from Groups**
12.30 - 1.00	**Downward Variation** **Activity 9 - Presentation**
1.00 - 2.00	**Lunch**
2.00 - 3.15	**Notice** **Activity 10 - Group Work and Quiz**
3.15 - 3.30	**Tea Break**
3.30 - 4.30	**Notice Continued**
4.30 - 5.15	**The Employment Conditions Commission** **Activity 11 - Plenary Work**
5.15 - 6.00	**Enforcement** **Activity 12 - Plenary Work**
6.00 - 6.15	**Rights of Casuals** **Activity 13 - Summary Presentation**
6.15 - 6.30	**Evaluation and Closure**

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Worksheet 1 - What do you know about the old BCEA? [45 mins.]

Individual Work

- Each participant must write down on the cards provided 3 things they know about the old BCEA.
- Write only 1 item per card.
- Cards will be put up on a chart and a plenary discussion will follow.

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Worksheet 2 - Aims of the BCEA [1 hour 15 mins]

Buzz Groups

- Participants read the extract from the Green Paper on the BCEA issued by the Department of Labour in 1996.
- They then discuss the following questions with the comrade next to them.

Discusion Questions:

1. What do you think are the main aims behind the new BCEA?

2. How does the new Act want to achieve these aims?

3. What is your attitude to what the new Act wants to achieve?

Chapter A

INTRODUCTION

Contents

The publication of this Green Paper is the first step taken by the Department of Labour in developing new legislation to regulate minimum employment standards in South Africa. The Department believes that the Basic Conditions of Employment Act (BCEA) 3 of 1983 and the Wage Act 5 of 1957 should be revised and replaced by a single law regulating statutory employment standards. This is needed to meet the country's social, political and economic goals as reflected in the Reconstruction and Development Programme (RDP) and adopted by the Government of National Unity.

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

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

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

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

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

1 PRESENT LAW

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

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

TABLE 1

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

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

2 LABOUR MARKET POLICY AND EMPLOYMENT STANDARDS

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

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

- employment creation;
- improved living standards;
- reduced social inequality;
- competitive enterprises;
- enhanced investment in human resources development;
- improved levels of productivity;
- the deepening of democracy, including workplace democracy.

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

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

3 PROBLEMS WITH EXISTING LEGISLATION

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

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

Many workers are excluded from the scope of basic rights and work without legal protection. Others have very limited protection or have minimum standards that are harsh or excessive. Furthermore, the systems for enforcing rights and encouraging compliance with these Acts' standards have become ineffective. The law does not

protect the vulnerable and the unorganised. Many of the standards are also rigid and restrict the productive arrangement of work and working time which hampers productivity and efficiency.

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

- The daily and weekly limits on hours of work are rigid and restrict the arrangement of working hours for both part-time and full-time employees. These features are repeated in wage determinations.
- The BCEA was designed to protect full-time employees only: part-time workers are excluded from significant benefits.
- Permission from an inspector is required for Sunday work in a factory or a shop. The restriction on Sunday work is a central feature of the BCEA's regulation of working time.
- Some aspects of hours of work in the mining industry are regulated by the Minerals Act 50 of 1991. These are less favourable than those in the BCEA. The Mines and Works Act 27 of 1956 prohibits Sunday work in mines.
- There are arbitrary differences in conditions of employment for different groups of workers.
- Many of the conditions of employment in the BCEA and in wage determinations are inappropriate, unclear or require revision, such as:
  - limits on overtime and overtime pay;
  - annual leave;
  - sick pay;
  - notice of termination;
  - maternity leave;
  - child labour.
- Some provisions of the BCEA and wage determinations could be challenged under the new Constitution (Act 200 of the Republic of South Africa 1993), for example, child labour and maternity leave.
- The enforcement through criminal cases is adversarial, ineffectual and does not encourage compliance with employment standards. This severely disempowers the inspectorate.
- Both Acts are inconsistent with the Labour Relations Act (LRA) 66 of 1995 and other laws administered by the Department of Labour. This undermines the effectiveness of the Department.
- The protections in the BCEA and the Wage Act are not integrated with the unfair labour practice jurisdiction.
- The Wage Act does not apply to the agriculture and the domestic sectors.

4 THE BASIS FOR NEW LEGISLATION

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

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

"Regulated flexibility" has two main aspects:

- the protection and enforcement of revised basic employment standards;
- the establishment of rules and procedures for the variation of these standards.

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

5 PRINCIPAL ASPECTS OF NEW LEGISLATION

In the remainder of this introduction we look at some of the principal aspects of the proposed new legislation:

5.1 Set employment standards

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

- to modernise employment standards;
- to protect vulnerable employees and employees in non-standard employment;
- to bring employment standards in line with the 1993 Constitution and the reforms introduced by the LRA of 1995;
- to incorporate protection against unfair dismissal and unfair labour practices;
- to revitalise the Wage Board (to be reconstituted as the Employment Standards Commission);
- to develop appropriate employment standards for employees in unorganised sectors.

5.2 Allow greater labour market flexibility

The new legislation should:

- remove inappropriate restrictions on working time and other employment conditions;
- permit the introduction of arrangements for the more productive use of working time, skills and equipment;
- provide for wider variation of employment standards.

5.3 Promote collective bargaining

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

5.4 Support employment creation

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

5.5 Encourage compliance with employment standards

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

5.6 Promote a healthy work environment

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

5.7 Reduce administrative burdens

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

5.8 Establish a clear set of rights

The new employment standards legislation will be drafted in plain language and will aim to include a range of easily understood guides and schedules to

assist employees and employers to understand the law. Provision is made for the drafting of Codes of Good Practice.

5.9 Discrimination against women

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

5.10 International standards

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

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Worksheet 3 - The BCEA and Other Agreements [30 mins.]

Buzz Groups
Read **sections 4 and 5** of the BCEA then discuss the questions below with the comrade next to you.

Discussion Questions:

1. If a worker has an individual contract of employment, will this be higher than the BCEA?

2. When can a worker's individual contract of employment have worse conditions than what is in the BCEA?

3. If workers are covered by a Bargaining Council agreement, will such an agreement be higher or lower than the BCEA?

4. Can a Bargaining Council agreement have worse conditions than what is in the BCEA?

5. If workers are covered by a Wage Determination, will such a Determination be higher or lower than the BCEA?

6. Can a Wage Determination have worse conditions than what is in the BCEA?

7. If workers are covered by a union agreement at plant or company level, will such an agreement be higher or lower than the BCEA?

8. Can a plant or company agreement have worse conditions than what is in the BCEA?

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Worksheet 4 - Who is covered by the BCEA [45 mins.]

Buzz Groups
Read **sections 3 and 82** of the BCEA. Also read the definition of an 'employee' in **section 1.** Then decide which of the workers in the case study below are covered by the Act.

Case Study 1:
Thabo is an ex-MK soldier who now works as a gardener at the SANDF Walmaansthal military base. Is Thabo covered by the BCEA?

Case Study 2:
Shireen has finished high school and is looking for a clerical job in the bank. In the meanwhile she is helping out in her father's shop, without getting any pay. Is she covered by the BCEA?

Case Study 3:
Jabu worked for Coca Cola as a driver. The company has now bought him a delivery truck which is in his name and which he is paying off to the company. He delivers Coca Cola under contract to the company. Is he covered by the Act?

Case Study 4:
Bongi works at a big company where she does office cleaning. But she is employed by a labour broker, not the big company. Is she covered by the BCEA?

Case Study 5:
Alina is a paid worker at Khanya College, which does education work with trade unions and other mass organisations, for which it charges a fee. Is Alina covered by the BCEA?

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Worksheet 5(b) - Ordinary Hours of Work

- Read **Chapter 2, schedule 1 and section 5 of schedule 3.** Now look at the case studies below and answer the questions about them.

Case Studies

1. Elsie works a 5 day week for a company distributing hydraulic machinery. She starts at 7.30, gets a 10 minute tea break at 10.00 o'clock, takes 30 minutes lunch at 12.30, has another 10 minute tea break at 3.00 o'clock and finishes work at 5.00 in the afternoon. Are her ordinary working hours for the day in line with the new Act?

2. Thembe works a 6 day week for a specialist bookshop. Monday, Tuesday and Thursday she works an 8 hour day. On Wednesday and Friday she works a 9 hour day, and on Saturday she works for only the 3 hours the shop is open for. Will she be working proper ordinary weekly and daily hours according to the new Act?

3. Joshua is a security guard at a 7-Eleven store in town. He is not a member of Saccawu and the workers in the security company he works for have not yet organised themselves to join T&G. He works a 5 day week of 12 hour shifts per day. Will Joshua's weekly hours be in line with the new Act?

4. Thabiso works as a waiter in the restaurant at the Western Sands hotel. He starts work at 11.00 in the morning, in time for lunch preparations. Between 3 and 4.30 he sits outside with the other waiters, as part of the 'spreadover' time when the restaurant is closed. At 4.30 the waiters start to prepare the dining room again for supper. Thabiso and his comrades eventually finish work at 12.30, when they are taken home with hotel transport. Will his work hours be in line with the new BCEA?

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Worksheet 5(d) - Overtime, Daily and Weekly Rest Periods

- Read **Chapter 2** of the Act. Then look at the case studies below dealing with the provisions from **sections 10 and 15.**

Case Studies

1. Thembe works at SureFit shoe repairs. The boss asks her to work overtime for the few days before the Christmas holidays so that all repair work can be completed. Thembe refuses. She says she does not like working overtime. Is she acting within her rights according to the new Act?

2. Six months later, Thembe decides she needs a bit of money and agrees to work overtime. When she works overtime on weekdays, the boss pays her time and one third. When she works overtime on a Saturday, the boss pays her time and a half. Is Thembe's overtime pay right according to the new Act?

3. On the second last day before a long weekend, the boss works out that there will still be 4 hours of work needed after knock-off time to finish all the repairs. He asks Thembe if she will stay and complete the work. She agrees. Is the boss acting within the new BCEA?

4. Another year passes. Thembe still works overtime sometimes but she and her boss have made an agreement that she will take paid time off instead of pay for overtime. If she works 5 hours overtime in the week, how much paid time off should she get according the new BCEA?

5. Surefit moves from the city to a big shopping mall in the suburbs. The shop now opens on a Sunday as well. But the boss is unwilling to hire another worker on a fulltime basis. He asks Thembe to take two and a half days rest only every second week. In this way he himself needs to work in the shop without her only every second Sunday. Thembe agrees. Is this a legal agreement according to the new Act?

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Worksheet 5(e) - Sunday Work

- Read **Chapter 2** of the Act. Then answer the questions in the case studies below dealing with **section 16.**

Case Studies

1. The boss of a butchery decides that he should open on Sundays as well. He asks the 3 workers who work for him who is prepared to work on a Sunday. One worker agrees. The boss now starts opening on Sundays, without asking the Department of Labour for an exemption for the worker to work. Is the boss acting according to the new BCEA? Does the worker have the right to refuse Sunday work?

2. Solly works at a restaurant as a waiter. He has to work every second Sunday. When he works on Sundays, the boss pays him time and a half. Is the boss paying Solly the correct rate for Sunday work according to the new Act?

3. Nthabiseng works a 5 day week of 9 hours per day at a small hardware. Her daily wage is R67, which is R7.44 per hour. Once every six months the boss asks her to come in for 4 hours on a Sunday to help with stocktaking. How much, according to the new Act, should she be paid for the hours she works on the Sunday?

4. Sophie works at a shoerepair shop. The company is putting in new machines. Sophie works from Monday to Thursday but is then asked to stay home on Friday and Saturday because that is when the new machines will be fitted. But she is asked to come to work on the Sunday to be trained on the new machines. When her boss pays her, he says that he will take the 6 hours she worked on Sunday as part of her weekly 45 hours since she did not work on the Friday and Saturday. Does the new BCEA allow Sophie's boss to do this?

5. Andile agrees to do some Sunday work for his boss on 29 November 1998. He also agrees with his boss that instead of taking pay for this work, he will take paid time off instead. The boss then asks Andile if he will agree to take this paid time off in November 1999 because he really needs Andile at work. Does the new BCEA allow such an agreement to be made?

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Worksheet 5(f) - Nightwork

Read **Chapter 2** of the Act. Then answer the questions in the case studies below dealing with **section 17.**

Case Studies

1. The Saccawu shop stewards at a big retail store table a proposal to management at the monthly meeting that workers should be paid a nightwork allowance for working till 9.00 p.m on Friday nights. Management rejects this proposal, saying it is not true that workers are doing night work. Management says these workers are simply working overtime. In terms of the new Act, who would you agree with?

2. Kgotla works in a takeaways opposite the soccer stadium in Welkom. The boss decides he wants to stay open late whenever there are big matches at the stadium. He asks Kgotla to work until 9.30 on those nights. Kgotla refuses, saying he does not want to do night work. Is Kgotla right to say the boss wants him to do night work and is he acting within his rights by refusing, according to the new Act?

3. Themba works at the reception desk at a big hotel near the airport. Most of the time he works day shift but he is expected to work from six in the evening to six in the morning at least 4 times per month. Would Themba be regarded as someone who regularly does night work according to the new Act?

4. In the example of Themba above, what are the different ways in which the boss can compensate him for doing night work? Does Who decides how he should be compensated?

5. Jonas works at a big hotel. He works between 11 at night and six the next morning on a regular basis, in other words, more than 5 times per month. What does the new Act say the boss's duties are towards Jonas regarding night work?

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Worksheet 5(a) - Who is Covered by this Chapter and Public Holidays

- Read **Chapter 2** of the Act. Then answer the questions in the case studies below dealing with **sections 6 and 18.**

Case Studies

1. Marlon works as a sales rep for a company that imports luxury foods. He travels to all the big supermarket chain head offices and other big regional stores, some of which are very far out of town, so he organises his own working hours. Is Marlon covered by the various provisions of this Chapter of the Act?

2. Albertina works as a casual worker. Two days in the week she works for Tick n Pay, and for another two days she works for Chequers. She has met someone from the Young Christian Workers, an organisation which is busy organising casual workers to be aware of their rights. The YCW person says that Albertina now has the same rights as all other workers. Albertina speaks to the Saccawu shop steward at Tick 'n Pay about this. The shop steward takes up the issue in the monthly meeting but management says the shop steward has the wrong information. Only workers who work 3 days a week for the same employer now have the rights given in this chapter. Has the Tick 'n Pay shop steward made a mistake?

3. Lovers works at Beggars clothing store in Eastgate. A public holiday is coming up and he is planning to go up north to visit his family. But the boss decides that she wants to keep the store open on that day, so she asks Lovers to work. Lovers refuses, saying he has already made other arrangements. Can the boss force him to work on the public holiday?

4. Lovers takes the public holiday off but promises to work the next time it is a public holiday. The next public holiday happens to be on a Sunday, a day he does not normally work on. But because he made a promise to the boss, Lovers agrees to work on that day, even though he wanted to watch Sundowns on TV. How should the boss pay Lovers for the work he does on the public holiday?

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Worksheet 5(c) - Compressed Working Week and Averaging

- Read **Chapter 2** of the Act. Then answer the questions to the case studies below dealing with **sections 11 and 12.**

Case Studies

1. Mathlodi works at a clothing factory, along with about 43 other workers. The workers are all union members and they all work a normal 45 hour week. One day, personnel calls the workers to the office one by one. They are asked to sign an agreement to work a compressed working week. Does management have the right to make such an agreement with the workers?

2. In the example above, the workers now work 12 ordinary hours per day from Monday to Wednesday, and 9 ordinary hours on a Thursday. Then they knock off for the week. But they do not get paid any overtime pay for the days they worked 12 ordinary hours per day, from Monday to Wednesday. Is there wages correct?

3. The following year, the union says it does not like the compressed working week and demands it should be scrapped. Management threatens retrenchment, and says the only way the company will survive is for the union to agree to averaging of the working week. The union finally agrees to this proposal. Now Mathlodi and her comrades find that they sometimes work up to 60 hours in a week, still without being paid overtime. Is the boss acting within the provisions of the new Act?

4. The union sees it has made a mistake. But an agreement has been signed, so the workers cannot even strike over the long hours they now work . How long will the agreement last for?

5. In which sectors organised by Saccawu do you think bosses would like to use the compressed working week or the averaging of weekly hours?

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Worksheet 6(a) - Annual Leave

Read **Chapter 3** of the Act.
Now design the details of a roleplay showing casual workers at Chequers negotiating annual leave with management.
Do not make the roleplay too long or too complicated. It should last no more than 10 minutes.
The group will be expected to perform the roleplay as part of its reportback.

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Worksheet 6(b) - Sick Leave

Read **Chapter 3** of the BCEA.
Now make a tape recording to highlight the most important sick leave provisions of the new Act. These are covered in sections 22 to 24.
The recording is designed for broadcast on community radio and must not be longer than 5 minutes.
The group will be expected to play this recording as part of its reportback.

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Worksheet 6(c) - Maternity Leave

Read **Chapter 3** of the BCEA.
The group must now design a poster showing the most important provisions of **section 25** and where possible, **section 26.**
Comrades can cut out pictures from the magazines provided or make drawings where necessary.
The poster will be used generally in public places and must be the size of a flipchart sheet at least.
The poster will be displayed as part of the group's reportback.

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Worksheet 6(d) - Who Gets Leave

Read **Chapter 3** of the BCEA.
Now make a table to show which workers get the different kinds of leave and those who do not.
The table will be shown to the house as part of the group's reportback.

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Worksheet 7 - Notice

Group Work - Quiz

Read **Chapter 5** in your group.

Now make up at least 1 question for each section from section 36 through to section 42. These are the questions you can choose from to ask in the quiz show that will take place after this exercise.

Your group will gets points every time one of the other groups cannot answer your question.

But remember, if your group has the wrong answer to the questions you ask, you will have a lot of points deducted.

So make sure you have the right answers to the questions you ask.

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Worksheet 8 - Employment Conditions Commission [45 minutes]

Read **Chapters 8 and 9** of the Act. Ask the comrade next to you to answer any questions you may have.

Disputed answers will be tabled in the plenary that follows.

Unaswered questions will also be taken in plenary.

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Worksheet 9 - Enforcement of the BCEA [45 mins]

Plenary Work

- Read **Part A of Chapter 10.**
- You can thereafter put questions to the house and the facilitator and answer questions put by other comrades.

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Evaluation [15 mins]

1. **Aims of the workshop**
   Do you think the workshop achieved its aim? .....

2. **Workshop content**
   Did the workshop cover the issues most important to workers? .....

   .....

   Were there any issues that you think could have been left out of the workshop? ...

   .....

   Were there any parts of the workshop you found particularly difficult? .....

   .....

3. **Workshop Format**
   Do you think the educational methods used in the workshop were successful? .....

   .....

   The workshop used a number of different methods. Circle the ones you enjoyed most.

Presentations	Quiz
Group work	Designing posters
Plenary discussion	Buzz groups
Radio recording	Designing a roleplay

Do you have any suggestions for other methods that can be used? .....

.....

Was the time allowed for the different activities enough, too short, too long? .....

.....

4. **Reading material**

Was using the actual BCEA in the workshop difficult or manageable? .....

.....

5. **Facilitation**

Did the facilitators take comrades along and help them understand the issues? .....

.....

Did the facilitators encourage participation? .....

Were the presentations by the facilitators easy to follow or difficult? .....

.....

Any advice for the facilitators to make them more effective? .....

.....

6. **General**

Was there good participation in the workshop? .....

Did comrades show patience towards other comrades? .....

Did comrades keep to the house rules? .....

Any comments on travel arrangements, venue or food? .....

.....

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Supplementary Reading

From: "Nowetu Mpati" <nowetu@cosatu.org.za>
Date: 07/11/97 15:42
Subject: COSATU - Response on BCOE Act
Address: To: Multiple recipients of list <cospress@wn.APC.ORG>

07 November 1997

COSATU STATEMENT ON THE PASSING OF THE BASIC CONDITIONS OF EMPLOYMENT ACT BY THE NATIONAL ASSEMBLY

Today's passing of the Basic Conditions of Employment Act by the National Assembly is a milestone in the attempt to combat the conditions of abuse and insecurity which workers face as a result of decades of apartheid, colonialism and capitalism.

Today will go down in the history of the country, and the calendar of workers, as one of the days that represents a shift away from exploitative working conditions to fair labour standards, in line with our constitution and the RDP. This is a result primarily of the struggles of workers and the programme of the Alliance to transform the apartheid labour market.

The Basic Conditions of Employment Act is a step towards ensuring that workers are given relief from the relentless onslaught of unscrupulous employers on the working conditions of vulnerable workers like domestic and farm workers. Some of the important victories for workers include the following:

1. Extension of the provisions of the Act to vulnerable workers - domestic, farm and casual workers.

2. Regulation of working hours

3 Protection against dismissal of pregnant women workers and maternity leave provisions.

4. Overtime provisions

5. Written particulars of employment

6. Family responsibility leave,etc.

These and many other provisions of the Act will change the power relations between vulnerable workers and employers who think that we still live in a period of slavery. The challenge facing the government is how the provisions of the Act will be monitored and enforced. It is naive to think that many employers, such as farmers will comply without being forced to do so. The inspectorate should be resourced in a manner that will not allow farmers, small business bosses, unorganised establishments and employers of domestic workers to continue with their exploitative conduct as if nothing has happened.

While COSATU is happy at the passing of the Act, we want to record that there are other matters we are very unhappy about. Firstly, some matters resolved by the Alliance partners have not been properly captured to reflect the Alliance Agreement in the Act. These matters include the variation model.

Secondly, COSATU had made a list of proposed amendments to the Standing Committee. Few of those proposals have been taken on board. Other matters which remains outstanding include the eighteen months blanket exclusion of public workers from the act.

COSATU will ensure that amendments are introduced to correct these problems. We are currently in discussion with the ANC to ensure that this is achieved. On November 18th the Central Executive Committee of COSATU will make an overall assessment, and decide on a way forward.

We remain of the view that those outstanding issues can be resolved by

the Alliance in the same way that we resolve an earlier impasse.

Nowetu Mpati
COSATU Head of Communications

Tel: + 27 + 11 + 339-4911
Fax: + 27 + 11 + 339-2281
E-mail: nowetu@cosatu.org.za

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@ @
@ Visit the COSATU Web site at: @
@ @
@ http://www.cosatu.org.za @
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Workers' Charter?

The new Basic Conditions of Employment Act

The improved minimum rights of workers will make for a happier but more expensive labour force - and also some interesting new legal problems.

After almost two years of bitter wranglings in NEDLAC, on the shop floor, in Parliament and on the streets the new **Basic Conditions of Employment Act 75 of 1997 (BCEA)** will soon come into force with the bold objectives of advancing economic development and social justice, and giving effect to the constitutional right to fair labour practices and the country's international labour obligations (section 2). Apart from its name, the only similarity with its predecessor is its function: the new Act, like the old, is a classic piece of paternalistic legislation that sets minimum conditions of employment for all workers in the land. With a few exceptions that will be dealt with presently, no employer can compel or permit employees to work hours or submit to other conditions of service less favourable to them than those laid down in the Act, although nothing prevents them from agreeing to better. The Act provides expressly that a 'basic condition of employment' (ie a provision thereof or sectoral determination made pursuant to it - see below - that stipulates a minimum term or condition of employment) constitutes a term of any contract of employment, except to the extent that any other law or the contract itself is more favourable to the employee, or such basic condition has been varied in accordance with the Act (section 4). Furthermore, the provisions of the Act take precedence over any agreement (ie individual contract or collective agreement) entered into before or after its commencement (section 5).

Scope

The first and obvious difference between the new Act and the old is its reach. Like its counterpart, the Labour Relations Act, the new BCEA applies to all employees and employers with the exception only of members of the National Defence Force, the National Intelligence Agency, the Secret Service and sailors covered by the Merchant Shipping Act 57 of 1951 (section 3), although, as will be seen anon, certain employees are excluded from specific provisions. The term 'employee' has the same generous meaning as that given to it in the LRA - ie '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' (being any payment in money or kind paid for work), as well as 'any other person who in any manner assists in carrying on or conducting the business of an employer'.

Otherwise, the Act applies to casual and temporary workers, to those undergoing vocational training, to workers for charitable organisations, and to those employed by the long list of employers excluded from the old Act - the most significant of which, until recent amendments, were farmers, state institutions and educational institutions. Furthermore, any category of persons may be deemed by ministerial notice to be employees for purposes of the Act (section 83) - a power which may be used to extend protection to 'non-standard' employees mentioned in the preceding Green Paper on the Act - ie part-time, temporary and piecework employees, employees of sub-contractors and independent contractors who are in fact dependent on the person to whom they render service. Furthermore, for the purposes of protection against victimisation and discrimination, former employees and applicants for employment are brought under the Act (section 79). As far as employers are concerned, the common expedient of evading obligations under the Act by taking workers from labour brokers (now termed 'temporary employment services') is scotched by a provision that makes both the temporary employment service and its client jointly and severally liable for breaches of the Act or sectoral determinations (section 82).

Working time

The first substantive condition of work dealt with is working time, previously set at maxima of 60

The 45-hour working week is not the final goal

hours for security guards, 48 for farm and shift workers, and 46 for the rest (excepting higher-paid employees). The Act still provides for that exception, which will be set by ministerial determination on the advice of the new Employment Conditions Commission and after notice in the *Government Gazette*. Otherwise, 'senior managerial employees', those engaged as sales staff who travel to the premises of customers and who regulate their own hours of work, and those who work for less than 24 hours a month must arrange their hours of work with their employers. Senior managerial employees, apparently, are denied the right to limited hours because they, by definition, have 'the authority to hire, discipline and dismiss employees and to represent the employer internally and externally'. Work which is required to be done without delay 'owing to circumstances for which the employer could not reasonably have been expected to make provision and which cannot be performed by employees during their ordinary hours of work' is also excluded from calculation of ordinary time.

Apart from these exceptions and others mentioned below, maximum ordinary working hours are set at 45 hours a week, and nine hours a day for employees who work five days or fewer per week or eight hours a day for those who work more than five. Overtime can only be worked by mutual agreement, and is limited to three hours per day or ten hours per week, with the reward upped from the time-honoured 'time and a third' to one and one-half the employees' wage (not remuneration) for overtime worked. The only way an employer can escape paying this amount is to grant employees who have worked overtime 30 minutes' time off on full pay, provided they were paid their normal wages for the overtime worked, or 90 minutes off (presumably also on full pay, though the Act does not say so) for each hour of overtime worked, in which case the overtime is performed gratis. Time off in lieu of overtime worked must be granted within a month of the employee becoming entitled to it, unless that period has been extended by agreement in writing to anything up to 12 months. Such agreements must be re-negotiated every 12 months.

Health and safety

These detailed limitations notwithstanding, employers are enjoined to regulate the working time of each employee in accordance with any Act governing occupational health and safety and, more cryptically, with 'due regard' to a promised Code of Good Practice on the Regulation of Working Hours, as well as (most cryptically) to the health, safety and family responsibilities of employees (section 7). The legal effects of these latter obligations remain to be seen. Furthermore, the Minister is empowered to prescribe maximum working hours, including overtime, less than those prescribed by the Act for any category of employee.

The Act does, however, leave employers and workers with a measure of flexibility with regard to hours of work. The prescribed hours can be adjusted by 'compression' or 'averaging'. The former permits the employee by written agreement to work without overtime pay or time off in lieu for up to 12 hours a day, inclusive of meal intervals, for an agreed period, provided that in the period the 45-hour limit on weekly work is not exceeded, no more than 10 hours of overtime is worked per week, and the longer daily hours are limited to five days per week (section 11). Averaging allows for the employer to agree with its employees - this time only by *collective* agreement (ie with a registered trade union) - to increase daily working hours, including overtime, to the extent agreed upon over a four-month period, subject to a maximum of 45 ordinary working hours and five hours overtime per week. As in the case of overtime, such collective agreements have to be re-negotiated every 12 months, but only on the first two occasions (section 12).

Not final goal

However, the 45-hour working week is not, the final goal. As a sop to the unions' demand for a still shorter week, the Act includes a Schedule setting out steps to attain 40 hours. It does so, first, by making any demand for a reduction of working hours a mandatory subject of negotiation, and compels the Employment Standards Commission to investigate working hours at sectoral levels. Furthermore, the Department of Labour is required to complete an investigation of methods of achieving a 40-hour week within 18 months, and in the interim and thereafter to continually monitor progress towards the reduction of working hours.

Paid annual leave for all workers is up to 21 days

There is no change in regard to meal and rest periods. Employees remain entitled to an unpaid meal interval of one continuous hour after five hours' continuous work (including breaks of less than an hour), and must be allowed to cease work entirely except for functions that cannot be left unattended or which cannot be performed by another employee. An employee must be paid if he or she is required to work or be available for work during a meal interval and, unless he or she lives at the workplace, for any portion of a meal interval in excess of 75 minutes. Again, the parties may by agreement reduce the meal interval to not less than 30 minutes, or dispense with a meal interval entirely if the employee works fewer than six hours of the day.

Rest periods

As to longer rest periods, employees must be given at least 12 hours off (reducible by written agreement to ten if the employee lives in and his or her meal interval lasts longer than three hours) between ending and recommencing work on consecutive days, and at least 36 consecutive hours off per week which, unless otherwise agreed, must include a Sunday. The weekly rest period may by written agreement provide instead for a 60-hour period every fortnight, or be reduced to 24 hours in a particular week if the employee is given the balance the following week.

Sundays and public holidays remain sacrosanct. Although special permission is no longer required for Sunday work, it comes at a premium - double the employee's wage if work on Sunday is not regular (in which case it is deemed to be overtime), time and a half if it is ordinarily worked, and if the amount computed is less than the employee's ordinary daily wage, at least that. The only way an employer can avoid paying these premiums is, within a month and with their consent, to give employees time off equivalent to the difference in value between what they were paid for working on the Sunday and what they would otherwise have been entitled to. If the greater part of an employee's shift falls on a Sunday, the whole must be treated as if it fell on that day.

Public holidays are just as expensive for employers. They, too, can only be worked by agreement. If they are not worked, workers are paid at normal rates. If they are, the employee gets double his her or her normal wage or, if it is, greater, double the normal wage *plus* the amount payed to the employee for work actually performed on that day, whether calculated by reference to time or otherwise. Like Sundays, a shift spanning an ordinary day and a public holiday is only deemed to fall into the latter if the lesser portion of it fell in the ordinary day. It is to be noted, however, that in terms of the Public Holidays Act 36 of 1994, public holidays can be exchanged by agreement for other days, in which case the other days are presumably treated on the same basis as public holidays.

Annual leave

Paid annual leave for all workers goes up from a minimum of 14 to 21 consecutive days per leave cycle of 12 months' employment with the same employer or, by agreement, one day for each 17 days worked, or one hour for each 17 hours worked. Although, absent an agreement to the contrary, the time at which leave is taken remains at the employer's discretion, it must be granted within six months of the end of the previous leave cycle, and cannot be granted during a period of sick leave or in a period of notice of termination. However, paid leave must be granted at the employee's request during a period of unpaid leave, and leave must be extended by a day for each public holiday falling within it. The employer may not require or permit employees to work for it (this does not, it seems, apply to another employer) during their annual leave, or pay them in lieu thereof except on termination of employment. Payment while on annual leave is determined according to the rate the employee earned at its commencement, and is payable either before the beginning of the leave period or, by agreement, on the employee's usual pay day.

Sick leave

Workers are entitled to one day's paid sick leave for every 26 days worked during the first six months, and thereafter to the number of days the employee would normally work in a period of six weeks (section 22). This must be on full normal pay, subject to the parties' right to reduce the pay by agreement to 75 per cent thereof if the number of days' sick leave is increased proportionately.

No hazardous work for pregnant women or children

But sick leave is reserved only for the sick or injured. Malingerers might be able to get away with occasional absences of up two days; for longer ones or after the third absence of any duration in an eight-week period they need not be paid unless they have produced a certificate issued by a medical practitioner or any person certified to diagnose and treat patients and who is registered with a statutory council (which currently excludes most 'traditional healers'). Live-in employees are exempted from this requirement if it is not 'reasonably practicable' for them to obtain a medical certificate, unless the employer provides them with 'reasonable assistance' to get one. With the exception of workers entitled to payments under the Compensation for Occupational Injuries and Diseases Act 130 of 1993 or the Occupational Diseases in Mines and Works Act 78 of 1973, statutory entitlement to leave pay is not affected by any amounts received by employee from other sources.

Maternity leave

Protection against dismissal afforded to labouring mothers or mothers-to-be by the LRA is extended by the BCEA, and the now redundant provision of the former Act that makes it automatically unfair to dismiss an employee for up to four weeks before the expected date and eight weeks after the actual date of birth has been repealed. Working mothers are now entitled to four months' unpaid maternity leave, commencing at any time from four weeks before the expected date of birth or from when a medical practitioner or midwife certifies that it is necessary for the health of mother or child, and extending for at least six weeks after the birth, unless it is certified that they are fit to start work before this period has elapsed (section 25). The dismissal of any employee during this entire period would be automatically unfair. The only obligation placed on the employee is that she must if reasonably practicable notify her employer at least four weeks before she intends to commence maternity leave. A footnote to the Act indicates that amendments to the Unemployment Insurance Act 30 of 1966 will improve maternity benefits and 'provide that the payment to an employee of maternity benefits does not adversely affect her right to employment benefits'. If expectant or nursing mothers do elect to work, employers are prohibited from requiring or permitting them to perform duties that are hazardous to their health or that of their new-born children. Employers will be offered guidance in this respect by yet another Code, which the Minister is obliged to issue. If during the period from the third month of pregnancy to the end of the sixth month after the birth of her child the mother performs night work or work that is dangerous to her health or that of her child, the employer must offer her 'suitable, alternative employment on terms and conditions no less favourable than her ordinary terms and conditions of employment', provided it is 'reasonably practicable' for the employer to do so.

Family responsibilities

Family responsibilities do not end at birth. Nor are they the monopoly of mothers. So some paid leave is given to workers of both sex for their discharge. Employers must grant to employees who have been in their employ for longer than four months and who work for them for at least four days a week, three days' paid leave per cycle of 12 months when an employee's child is born or falls ill, or in the event of the death of a spouse or life partner, parent, adoptive parent, grandparent child or adopted child, grandchild or sibling, subject to the employee tendering 'reasonable proof' of such occurrence(s) (section 27).

The children themselves may not be employed, on pain of a criminal sanction of up to three years' imprisonment, before their fifteenth year or the minimum school-leaving age, whichever the older (section 43). In addition, when a child is in employment, he or she may not be given work 'inappropriate for a person of that age' or which 'places at risk the child's well-being, education, physical or mental health, or spiritual, moral or social development' - another nice test for a court to decide. Guidance can, however, be expected from the Minister, who may make regulations prohibiting or placing conditions on the employment of children under 15 or school-leaving age, or regarding the conduct of medical examination of children in employment (sections 44 and 45).

Employment details

During the employment relationship, all

All employees are entitled to four weeks' notice of termination after a year's service

employers other than those of employees who work less than 24 hours a month, or of domestic workers, or those who have fewer than five employees, must at the commencement of the job supply the employee with a long list of details that comprise the normal elements of a standard service contract. These include the name and address of the employer, a brief description of the employee's work, the place or places of work, the date on which employment began, ordinary hours and days of work, wage, rate for overtime work, other payments in cash or kind, frequency of payment of remuneration and deduction therefrom, leave, period of notice required before termination, any period of employment with a previous employer that counts as employment with the present and a list of documents which are incorporated into the contract (section 29). Although the Act does not directly say so, the employer will be contractually bound by these details. The employer must ensure that the employee is placed in possession of and understands the document, and the written particulars must reflect any subsequent changes. Furthermore, the written particulars must be retained for three years after an employee leaves the job. In addition to these contractual particulars, each pay day the employee must be given a slip reflecting the period for which payment is made, the amount of remuneration in money, any deductions that have been made, the reason for such deductions and, if applicable, the overtime rate and hours of overtime worked and hours worked on Sundays or public holidays. All employers (including, presumably, those excepted from the previous requirement) must display a statement in the prescribed form (which will apparently be distributed in due course) of the employee's rights under the Act in the official languages spoken in the workplace.

Deductions

Deductions from an employee's remuneration is forbidden except when he or she has agreed in respect of a specified debt or where deduction is permitted by law, collective agreement or arbitration award, or to recover overpayments made in error, or to reimburse the employer for loss or damage caused by the employee. Recovery of the latter form is limited to cases in which the loss or damage occurred during the course of employment and was due to the fault of the employee and may not exceed one quarter of the employee's remuneration in money. Furthermore, before doing so, the employer must follow a fair procedure giving the employee a reasonable opportunity to show, if he can, why deductions should not be made.

As far as security of tenure is concerned, the Act does not meet the Green Paper's promise of incorporating the provisions of the LRA regarding individual employees' rights against unfair dismissals and labour practices, but like its predecessor restricts itself to governing requirements of notice terminating service contracts. This must be in writing, except in the case of an illiterate employee, and be of at least one week's duration during the first four weeks of the employee's service, two weeks for the remainder of the first year (except for farm and domestic workers, in which it then becomes four weeks), and four weeks thereafter, with both employer and employee bound by the same period (section 37). These periods may only be shortened by collective agreement, provided that the employee is not required to give longer notice than the employer.

Summary termination

Notice of termination may not be given during any period of annual, maternity or sick leave, but may run concurrently with sick leave. While an employer is exempted from giving statutory notice - and can, in other words, terminate the contract summarily - 'for any cause recognised by law' (ie gross misconduct), the fact that he or she has been given notice in accordance with the Act does not preclude a dismissed employee from raising a dispute concerning the fairness or lawfulness of the dismissal under the LRA. An employer who desperately wants to get rid of an employee can pay in lieu of notice, but the employee is no longer required to do so if the employer agrees to waive all or part of the notice period. On expiration of the contract, the employer must give the employee a certificate of service and must pay for swopped overtime or Sunday work and annual leave not taken by the employee and, if the dismissal arose from 'operational requirements', severance pay equal to one week's remuneration for each completed year of continuous service with the employer (it is to

Workers must now be allowed to discuss their conditions of service with anyone

be noted in this regard that service is deemed not to have been interrupted by a break or breaks of less than a year (section 84(1)).

Live-in employees receive special protection on termination. If the employer gives shorter notice than that required by the Act, or elects to pay in lieu thereof, the employee is entitled to stay on in the accommodation for a month or until the contract could lawfully have been terminated, whichever the later, subject only to the employer's right to recover the 'agreed' value of the accommodation by way or reduction of notice pay.

Discrimination

Like its predecessor, the new Act protects employees (but now including past employees and applicants for employment) against victimisation (now termed 'discrimination') by employers, although the list of such acts is now wider. Not only may employees not be victimised for refusing to comply with an instruction that is in contravention of the Act or a sectoral determination, or participating in proceedings in terms of the Act. They must also now be permitted freely to report to their trade union alleged breaches of the Act by their employer and to discuss their conditions of employment with their fellow employees, employer, or 'any other person' (section 78). While no person may favour, or promise to favour an employee in exchange for the employee not exercising one of the above rights, agreements to settle disputes arising from them are permissible. Disputes concerning the application or interpretation of the provisions concerning discrimination go to the Commission for Conciliation, Mediation and Arbitration (CCMA), which must attempt to settle them by conciliation, failing which they go to the Labour Court.

The Green Paper indicated that in the interest of flexibility in the labour market employers and unions should be permitted to vary all but fundamental statutory employment conditions by collective agreement. The approach adopted in the Act is different. It specifies quite clearly that the Act takes ultimate precedence, followed by ministerial determinations, and then, to the extent that they effect changes to the Act that are permitted, by collective agreements concluded by bargaining councils, those between registered unions and employers or employers' organisations, and, finally, by private agreements between employers and individual employees to the extent permissable.

Agreed changes

As seen above, certain specified rights can be altered or excluded by collective or private agreement. These include compensation for overtime, the compression of a working week or the averaging of working hours, the shortening of meal times, the alteration of daily and weekly rest periods, the swopping of public holidays, and the reduction of pay for sick leave and time off for maternity leave. But for the rest, there are only three ways in which the provisions of the Act can be lawfully altered to the detriment of employees: first, by collective agreement concluded in a bargaining council; second, by general ministerial determination; third, by sectoral ministerial determination.

A bargaining council may alter, replace or exclude any basic condition save those governing ordinary working time, night work, maternity leave and sick leave and child labour. Moreover, any changes must be 'consistent with the purposes of the Act'. Variations by the Minister must also be consistent with those purposes and his power to effect them, though far-reaching, is hedged about with limitations. First, he may not tamper with ordinary working time and hours of work or with the provisions governing child labour except to the extent that he may permit employment of children in advertising, sports or cultural activities. Determinations in respect of categories of employers and employees may be made only on the advice of the Employment Conditions Commission, while those in respect of particular employers and employees only on application by the employer or its employers' organisation, and only with the consent of every registered trade union that represents employees that will be covered by the determination, unless unions who don't agree are given the opportunity to make representations to the Minister.

Sectoral determinations

Sectoral determinations applicable to sectors or areas must follow an investigation by the

All disputes concerning the provisions of the Act go to the Labour Court

Director-General of Labour, during which all interested parties may make representations, and a recommendation by the Commission (sections 51-54). They may set minimum terms and conditions of employment for the sector, including minimum rates of remuneration or their periodical adjustment, prohibit or regulate task-based or piecework, home work and contract work, set minimum standards for accommodation, and regulate training and education schemes, pensions and other employee benefit schemes. Indeed, the only statutory provisions that may not be altered by a sectoral determination are those relating to ordinary working time and unsuitable child work. If, however, employers and employees enter into a collective agreement in respect of matters covered in a sectoral agreement, the former prevails.

The teeth of the Act are located in Chapter 10. Enforcement of basic employment laws has up to now been done by armies of inspectors functioning under various Acts. They are replaced by labour inspectors with wide-ranging duties and powers, including advising employers and employees, investigating complaints, and 'endeavouring to secure compliance with an employment law by securing undertakings or issuing compliance orders'. They have wide powers of entry (not, however, to private homes) and any person questioned by them is enjoined to be truthful and to assist them in performing their functions effectively.

Compulsion

But labour inspectors are not just policemen. Before using compulsion, they are required (section 68 uses the word 'must') to endeavour to secure a written undertaking by the employer to comply with a provision which there are reasonable grounds to suspect has been breached, and further to seek to obtain agreement between the employer and the employee over any amounts allegedly owing to the latter in terms of the Act. Failing agreement, a 'compliance order' may follow, unless the employee concerned is covered by a collective agreement that provides for arbitration in respect of disputes concerning amounts owing under the Act, or the employee concerned is a senior manager or has been excluded by virtue of his or her salary, or the amount has been due for longer than 12 months or proceedings have been instituted for recovery.

An employer is given two chances to resist such an order. First, it can lodge an objection with the Director-General, who may confirm, vary or cancel it after considering the employer's 'compliance record' and the steps taken by the employer to comply with the provision at issue. If still not satisfied, the employer may appeal to the Labour Court (and then, in terms of the LRA, to the Labour Appeal Court). Failing compliance with the Act by a recalcitrant employer, the Director-General may likewise apply to have the compliance order made an order of the Labour Court, in which case the compliance order will be deemed to be an arbitration award and the normal rules relating to execution and contempt will apply. Although the Act makes no specific reference to criminal sanctions for non-compliance with the provisions of the Act, Schedule 2 sets a sliding scale of fines between R100 for the first offence not involving an underpayment to R500 for the fourth, and for those involving underpayment, from 25 per cent of the amount due for the first offence, to 200 per cent in respect of the fourth.

Dispute settlement

The cumbersome jurisdictional division between the Magistrates' and Industrial Courts that existed under the old Act is brought to an end by a provision that empowers the Labour Court or an arbitrator to determine amounts owing under the BCEA when hearing claims regarding unfair dismissals under the LRA (section 74). In addition, the already heavily-burdened Labour Court is given exclusive jurisdiction in respect of all matters falling under the Act, with the exception of offences relating to the employment of children and forced labour, disclosure of information, and obstruction of persons performing statutory functions, which are the only criminal provisions to be found in the Act. It is also given the duty of reviewing acts performed by labour inspectors and, presumably, the Director-General and Minister.

Employers bracing themselves for the effects of the Act have been granted some breathing space by its transitional provisions which, in the first place, give the public service (defined in terms of the meaning given to that term in the Public Service Act and so excluding semi-autonomous

Disputes over the Act are sure to add to the Labour Court's lengthening roll

institutions such as universities) 18 months' grace, unless bargaining councils decide on earlier dates. Farm workers continue to labour under the old BCEA until their working conditions are set by a sectoral determination, and they, together with mine workers and security guards, may be compelled to work in excess of the hours prescribed by the Act for 12 months after its commencement. The new annual and sick leave entitlements generally commence when employees complete their current leave cycles under the BCEA.

Such then, are the provisions of the long-awaited new BCEA, which clearly fall short of some of the promises of the Green Paper and the expectations of workers and unions, but exceed what many employers still regard as their right to manage their own businesses as they see fit. The Act will clearly fall more heavily on some employment sectors than on others - employers of night workers and mostly female staff spring to mind - and only time will tell how the Minister uses his far-reaching powers to make sectoral determinations. The Act may not be quite the Workers' Charter that organised business appeared at one stage to fear, and for which the unions hoped. But one thing can be predicted with reasonable certainty. Until the meanings of some of the new provisions are settled, disputes over them will add to the already lengthening roll of the Labour Court. ❐

Sources
Basic Conditions of Employment Act 75 of 1997
Employment Standard Statute: Policy Proposals Government Notice 156 of 1996 *Government Gazette* No 17002 of 23 February 1996
'Bye Bye BCEA' (12) 5 1996 *Employment Law* 90

WHAT'S ON

COMMERCIAL MEDIATION IN MODERN LEGAL PRACTICE

CAPE TOWN (Sports Science Institute)	31 MARCH 1998
DURBAN (Edward Hotel)	1 APRIL 1998
JOHANNESBURG (Venue to be announced)	2 APRIL 1998

EFFECTIVE CONCILIATION AND ARBITRATION WORKSHOP

DURBAN (Royal Hotel)	23 - 26 FEBRUARY 1998 24 - 27 MARCH 1998 20 - 23 APRIL 1998 19-20 & 26 - 27 MAY 1998
JOHANNESBURG (Eskom Conference Centre)	16 - 19 FEBRUARY 1998
(Karos Indaba Hotel)	23 - 26 MARCH 1998
(Eskom Conference Centre)	20 -23 APRIL 1998
(Eskom Conference Centre)	19 - 20 & 26 - 27 MAY 1998

SENIOR MANAGEMENT DEVELOPMENT PROGRAMME

DURBAN (University of Natal)	4 - 14 MARCH 1998

TRUSTS AND ESTATE PLANNING SEMINAR

CAPE TOWN (Sports Science Institute)	24 MARCH 1998
DURBAN (Royal Hotel)	26 MARCH 1998
JOHANNESBURG (Rosebank Hotel)	27 MARCH 1998

Undermining Standards

The ANC's New Employment Strategy

BY IGHSAAN SCHROEDER AND MARLEA CLARKE

Ighsaan Schroeder is a labour educator working at Khanya College, Community Division, Johannesburg. Marlea Clarke is a member of the SAR editorial collective who is currently based in Cape Town. She is researching globalisation and the related challenges facing the labour movement.

"... we should not have called it an Employment Standards Act. We should have called it Employment Law" (Labour Minister Tito Mboweni, commenting on the proposed new Employment Standards Act)

At first glance, Mboweni's comment appears to be a mere toss of words. In reality, it goes to the very heart of the new legislation. Far from setting labour standards as its name implies, the Employment Standards Act (ESA) is essentially about breaking them. Rather than defending and advancing worker rights as COSATU hoped the new law would do, the ESA is designed specifically to ensure "flexibility" in the South African labour market and thereby to undermine labour standards.

The ideologues of the Labour Ministry regard the labour market in South Africa as being too "rigid", i.e., it forces too many employers to abide by labour standards negotiated by unions or set by wage determinations and the Basic Conditions of Employment Act. They argue that the resultant higher labour cost makes local capitalists internationally uncompetitive. Since international competitiveness is regarded as the necessity – indeed the only

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possible – growth path for the economy, it follows that labour markets should be made more flexible, allowing for greater "free market" operations, and hence, increased competitiveness.

Not surprisingly, but still disappointingly for workers and what's left of the left in South Africa, the neo-liberal philosophy of labour market flexibility and competitiveness that informed the drafters of both the new Labour Relations Act and the state's recent macroeconomic strategy document, "Growth, Employment and Redistribution," has also shaped this new legislation. To meet the presumed imperatives of globalization, legislation will be passed to assist in enticing multinationals to locate here ... while also convincing national companies that labour costs are as cheap in South Africa as they are elsewhere in the region. This *race to the bottom* may in fact create more jobs, as the government argues, but the question is: what kind of jobs? Less full-time, protected, unionized jobs, and more vulnerable, unprotected *bad* jobs? Chances are, workers will be forced to work longer and harder so business can make higher profits more easily.

Challenging this proposed legislation does not appear to be an easy task for labour. But if workers are to find ways of resisting this accelerated accommodation to neoliberalism, key questions must be addressed and debated. Most important, perhaps, is the need to understand the contents and potential impact of the proposed legislation. Why the imperative of greater flexibility? How will the ESA achieve and ensure flexibility? And what are the likely consequences for the working class?

Key components of the new Employment Standards Act

First released in February last year as a "Green Paper" (a draft bill for comment and debate), the draft bill under discussion (the Employment Standards Act) is part of the ministry's five year plan to reform the South African labour market and revamp labour legislation. This legislation will replace the existing Basic Conditions of Employment Act and the Wage Act. Emphasizing that the old acts "are too rigid and restrict the productive arrangement of work and working time which hampers productivity and efficiency," the Labour Minister states:

"New legislation must recognize that South Africa's return to the international economy demands that enterprises compete with countries whose employment standards and social costs of production vary considerably. It must therefore avoid the imposition of legal rigidities in the labour market, provide greater flexibility and introduce more responsive mechanisms for variation from statutory standards."

In consequence, as the Green Paper states, new legislation must "seek to balance the demands of international competitiveness and the protection of basic rights of workers through a mechanism of 'regulated flexibility'."

Legislating 'regulated flexibility'

Labour market flexibility in the proposed legislation includes flexibility in both the organization and the use of labour. Overall, the push is for greater flexibility in working time arrangements, wage and employment flexibility, and job flexibility (often referred to as "functional flexibility"). In theory, these forms of flexibility, combined with the lowering of labour standards set out in the law as a kind of permissible "variation downward," are intended to ensure the rapid and effective response by business to market changes.

While the government and unions have agreed on the importance of training for workers, "functional flexibility" will likely have the effect of de-skilling many workers. For example, legislation will allow for labour power to be used in a way not restricted by job descriptions by having workers perform jobs previously performed by a number of different workers. Although this can take a range of different forms, most often this means that workers are expected to carry tasks previously performed by numerous workers, or to operate more than one machine at a time.

Workers rightly regard this so-called "multi-skilling" as being merely multi-tasking. Business or other proponents of multi-skilling argue that this leads to a real acquisition of skills and higher wages for workers. But this has not been the experience of workers elsewhere, and it is unlikely to be the case here. Why? First, workers are rarely formally trained to take on the extra work they are expected to perform. Second, it is not automatic that multi-tasked workers are compensated with wage increases. Moreover, even if workers are properly trained and do get wage increases, it is only a small number of workers who benefit – a development which is outweighed by the large numbers of workers who lose their jobs.

The proposed system of "regulated flexibility" – to balance, as stated, "the protection of minimum standards and the requirements of labour market flexibility" – means that the ESA will set standards and then allow for their variation downward. Variation is allowed for ordinary hours of work, overtime, meal intervals, rest periods, night work, public holidays, sick leave, parental leave and notice or termination. So, while the bill stipulates workers should work a normal working day of no more than 9 hours, it also adds that collective and individual agreements can be made whereby workers can work as long as 12 hours *normal time*. Thus, workers will not be paid overtime for the extra hours worked. In this way, the ESA introduces a form of wage flexibility.

This push for "flexible hours" to benefit the employer rather than the workers by facilitating a practice

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of longer hours for lower pay is boldly stated in the Green Paper: "This [flexible working time] allows the distribution of working time in a manner that may coincide better with the employer's demand for production . . ." and "generally results in a saving on overtime pay."

One step forward, two steps back . . . again

The move towards more "flexible" forms of production is, of course, not new. The introduction of flexibility was a key component of restructuring in industrialized economies from the 1970s onward, and a central feature of structural adjustment programs implemented in other parts of the world. Now, despite the international experience of labour flexibility (massive loss of jobs, rapid decline in working conditions and a range of other economic and social problems for workers), South Africa is moving quickly to duplicate this experience by lowering its labour standards and undermining the bargaining position of trade unions.

What is the likely impact of this legislation on South African workers? After decades of struggles, South African workers have won substantial rights for themselves. From higher rates for overtime work and shift allowances to limits on the length of the work day and improved working conditions and job descriptions, rights have been fought for, codified and in some cases generalized in minimum standards legislation. It is precisely these victories that are now being rolled back through the emphasis on greater flexibility and the introduction of "more responsive mechanisms for variation from statutory standards."

If passed, as it seems likely to be during this session of parliament, the Unemployment Standards Act will likely result in lower wages, increased unemployment, the intensification of work, longer working hours, and a wide range of health and safety problems. For example, the incidence of repetitive stress injuries is sure to increase, forcing many workers off the production lines long before retirement age. At Mazda in Japan, the majority of workers interviewed said they will be worn out or injured before they retire. At the Nissan plant in Britain, a researcher openly speculated as to how long the young workers on the production line would last considering the line speed. Further, flexible working time also brings with it a whole range of social and political problems for workers: less time with family and friends, less time for sport and recreation and less time for involvement in politics. It threatens, in short, to "dislodge the working class from its class groove."

Already vulnerable in the present economic climate, women and black workers stand to be most adversely affected by this legislation as the "core" workforce shrinks while the "flexible, non-core" workforce continues to increase. A smaller proportion of workers will remain as "fixed overhead" (managerial and technical staff, for example), while other workers — considered "unskilled" — will be hired on short term, casual or temporary contracts. Already we can see the effects of increased flexibility in the retail sector where women are the majority of the growing part-time, casual workforce: "a female ghetto within an already female ghetto" (as Pete Lewis of UCT's Industrial Health Research Group puts it).

Perhaps the most disturbing aspect is how the legislation will undermine the very policies and practices that have provided the basis for collective working class defense against exploitation. Organized and unorganized workers alike will be adversely affected by the decentralizing tendency of the Act. Already centralized bargaining itself has not been sufficient safeguarded against capitalists in whole regions wanting exemption from industrial council agreements. The metal industry is a case in point where, although there is formalized centralized bargaining, this in itself has not been sufficient to stop employers in whole regions from attempting exemption from the agreement.

Moreover, where collective agreements exist at centralized level, the Act gives employers every incentive to move away from these and instead bargain at levels where they are strongest in relation to the unions. Where no centralized bargaining occurs, unions have entered into company and plant level agreements. These too will now come under pressure. Insofar as the new Act allows variation of standards through individual contract, wage determination and administrative procedure (and taking into account that the LRA itself deliberately omitted any mention of a legal duty to bargain) the present bill poses a direct threat to the future of trade unions themselves. It is hard to avoid the conclusion that the longer term effect will be one of severely weakening, or even breaking, trade unions.

The politics of the ESA: neo-liberalism, the ANC and 'flexible' intellectuals

Since coming to office, the ANC has introduced an explicitly neo-liberal macroeconomics strategy, reflected in its various education, land, housing, and agriculture policies. This has now found codified expression in the Growth, Employment and Redistribution (GEAR) strategy document. Such an embracing of neo-liberalism has become generally acknowledged fact, admitted to even by the Communist Party.

However, the one ministry that has heretofore been able to present its policies as being "pro-worker" has been the Labour Ministry under Tito Mboweni. Now (despite some improvements to past employment legislation that are apparent in this new labour law) the ESA's primary focus on "regulated flexibility" must surely shake the ministry's and Mr. Mboweni's reputa-

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tions, since it clearly renders the Act incompatible with the entrenchment of worker rights and standards. At a moment when South African workers are perhaps most in need of strong legislation to protect themselves against the problems associated with rapid economic and trade liberalization, this legislation creates a legal framework for further exploitation of workers for the benefit of national and international capital.

Indeed, reforms to the labour market introduced by the Minister are entirely consistent with, and in furtherance of, neo-liberal policies. Indeed the progression towards neo-liberalism is even apparent in the last rounds of evolution of the current legislation: the Green Paper (the initial draft of the legislation) contained a chapter on extending rights to temporary and casual workers while the current Employment Standards Bill severely diluted this. And yet, as should be obvious, encouragement of temporary labour is entirely inconsistent with extending greater rights to such workers.

The reason the ministry cloaks its reforms in such progressive terms is two-fold. Firstly, it confronts an organized union movement that has many problems but remains militant. The anti-LRA campaign of 1995 proved this decisively. A frontal assault on worker rights in such a context is out of the question. Second, but related to this, the ministry is staffed and advised by a range of intellectuals who were previously tied, directly or indirectly, to the union movement, and who remain influential within it. It is these intellectuals, many of them erstwhile ideologues for socialism, who now espouse the neo-liberal dogma contained in the various policy documents released by the ministry.

Together with the union bosses, whom they have convinced of the inevitability of the neo-liberal path, and with other intellectuals also tied to the labour movement, these "flexible intellectuals" have managed to "sell" a brand of legislative reform to the labour market that is antithetical to everything that the union movement has struggled for over time. Much of this neo-liberalism is perforce dressed up as a muddle of "co-determination," and sweet reason. But in practice it is a combination of political dissembling, organizational manoeuvre, good old-fashioned lying and secret negotiation that is guaranteeing that these "reforms" find their way onto the statute books.

Whether the South Africa working class itself will be fooled into believing that the reforms are indeed a step forward is an altogether different story.

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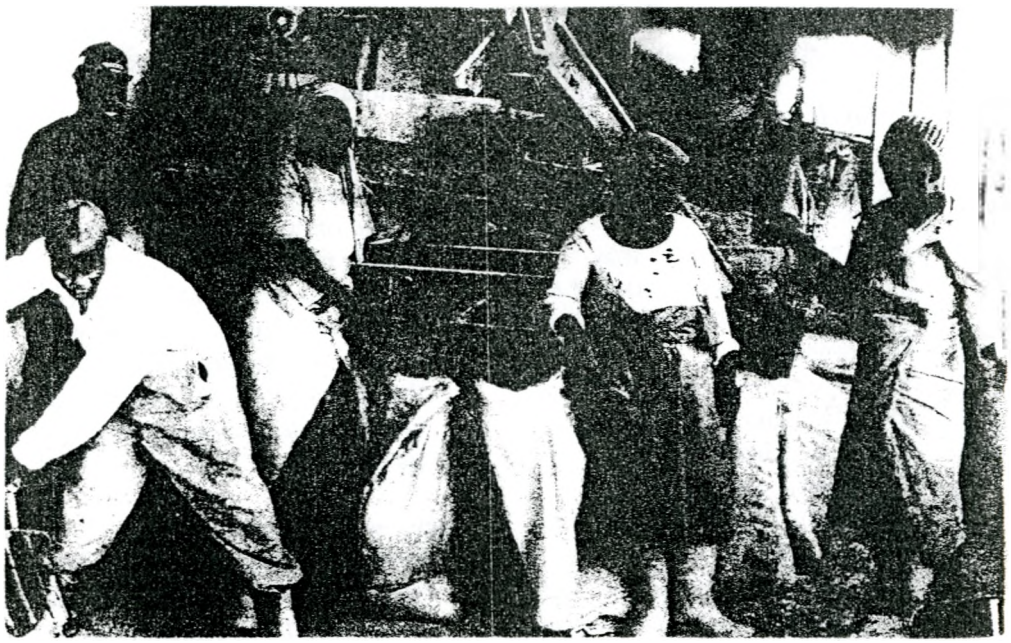
BASIC CONDITIONS OF

The Basic Conditions of Employment Act was passed earlier this year. However, promulgation was delayed because small business complained that it would be seriously affected by the new law.



The Basic Conditions of Employment Act is now expected to come into effect from December 1 this year. The following is a summary of the most important sections of the Basic Conditions of Employment Act, 1997. If you want to find out more detail about any section, get a copy of the Act and go to the section that you are interested in.

As Shopsteward went to print, small business was arguing that this new law should not apply to employers who employ less than a certain number of workers. Watch the press for details.

Take special note of the "Variations" sections – sections 49 – 50. This is likely to cause workers most headaches. It is the clause that allows certain conditions to be varied downwards by agreement.

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Who does it cover?

All employees and employers except members of the National Defence Force, National Intelligence Agency, South African Secret Service and unpaid volunteers working for charities.

This Act sets down the minimum conditions that apply. In other words if your agreement (a company agreement or a Bargaining Council agreement) with your employer sets down conditions that are worse than this Act, then this Act must apply and not your Agreement.

But if your agreement has better conditions than this Act, then your agreement will apply.

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Working time : Chapter 2

This chapter does not apply to senior managerial employees, travelling salespersons and those who work less than 24 hours a month.

Ordinary hours of work: Section 9

(a) 45 hours in any week;
(b) nine hours a day for a 5 day week (or less days)
(c) eight hours a day for a more than 5 day week

Small employers are pushing government to exclude small workplaces from the provisions of this Act.

Overtime: Section 10

An employer may not require or permit an employee
(a) to work overtime except by agreement;
(b) to work more than
(i) three hours' overtime a day; or
(ii) ten hours' overtime a week.

Overtime must be paid at 1.5 times the employee's normal wage or an employee may agree to receive paid time off – 90 minutes paid time off for every hour of overtime; or a worker's ordinary hourly rate for each hour of overtime plus 30 minutes paid time off for each hour worked.

Compressed working week : Section 11

You can agree in writing to work up to 12 hours in a day without re

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EMPLOYMENT ACT, 1997

ceiving overtime pay.
- but if you do, you cannot work
  (a) more than 45 ordinary hours in any week;
  (b) more than ten hours' overtime in any week; or
  (c) more than five days in any week.

Averaging of hours of work: Section 12
- A collective agreement may permit the hours of work to be averaged over a period of up to four months.
- An employee who is bound by a collective agreement may not work more than
  (a) an average of 45 ordinary hours in a week over the agreed period;
  (b) an average of five hours' overtime in a week over the agreed period.

Meal intervals: Section 14
- An employee must have a meal interval of 60 minutes after five hours work.
- A written agreement may
  (a) reduce the meal interval to 30 minutes;
  (b) scrap the meal interval if less than six hours a day of work.

Daily and weekly rest period: Section 15

An employee must have a daily rest period of 12 consecutive hours. BUT a written agreement can reduce the daily rest period to 10 hours:
- if the worker lives on the premises and
- if his meal break lasts for 3 hours.

An employee must have a weekly rest period of 36 consecutive hours, which, unless otherwise agreed, must include Sunday. BUT, a written agreement can:
- reduce this to 60 consecutive hours every 2 weeks OR
- reduce this by up to 8 hours in any week as long as the rest period the next week is extended by 8 hours.

Pay for Sunday work: Section 16
- An employee who occasionally works on a Sunday must receive double pay.
- An employee who ordinarily works on a Sunday must be paid at 1.5 times the normal wage.
- Paid time off in return for working on a Sunday may be agreed upon.

Night work: Section 17
- Employees who work at night between 18h00 and 06h00 must be compensated by payment of an allowance or by a reduction of working hours and transport must be available.
- Employees who work regularly after 23:00 and before 06:00 the next day must be informed
  (a) of any health and safety hazards; and
  (b) the right to undergo a medical examination.

Prohibition of Employment of Children and Forced Labour: Sections 43 – 48
- It is a criminal offence to employ a child under 15 years of age.
- Children under 18 may not be employed to do work inappropriate for their age or that places them at risk.
- Forced labour is a criminal offence.

Public holidays: Section 18
- Employees must be paid for any public holiday that falls on a working day
- Work on a public holiday is by agreement and paid at double the rate.
- A public holiday is exchangeable by agreement.

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Leave: Chapter three

Does not apply to an employee who works less than 24 hours a month and if the agreement gives you more than the Act.

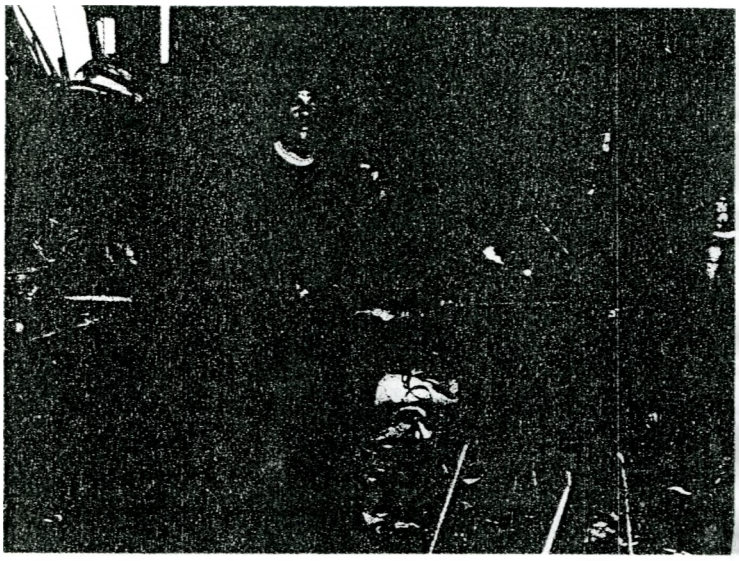
Annual leave: Sections 20 & 21
- 21 consecutive days' annual leave or by agreement, one day for every 17 days worked or one hour for every 17 hours worked.
- Leave must be granted not later than six months after the end of the leave cycle (i.e. 12 months).
- An employer must not pay an employee instead of granting leave except on termination of employment.
- public holidays do not count as leave.

Sick leave: Sections 22 – 24
- six weeks' paid sick leave in a period of 36 months.
- During the first six months an employee is entitled to one day's paid sick leave for every 26 days worked.
- An employer may require a medical certificate before paying an employee who is absent for more than two consecutive days or who is frequently absent.

Maternity leave : Sections 25 & 26
- four consecutive months' mater-

nity leave.
- A pregnant employee or employee nursing her child is not allowed to perform work that is hazardous to her or her child.

Family responsibility leave : Section 27
- Full time employees - three days paid family responsibility leave per year
- An employer may require reasonable proof.



Many provisions do not apply to workers working less than 24 hours in a month

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Employment and remuneration: Chapter four

This chapter does not apply to an employee who works less than 24 hours a month for an employer.

Sections 29 - 35

These sections spell out what the employer must do for the worker:
* give a worker the details of the contract when s/he starts a new job
* the employer cannot make unlawful deductions from a worker's pay unless s/he agrees
* display workers' rights in the workplace
* keep records of each worker
* give workers pay slips with full details showing normal rate of pay, overtime, deductions etc.

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Termination of employment: Chapter five

This chapter does not apply to an employee who works less than 24 hours in a month for an employer.

Notice of termination of employment: Section 37
- A contract of employment may be terminated only on notice of not less than
  (a) one week, if employed for four weeks or less;
  (b) two weeks, if employed for more than four weeks but not more than one year;
  (c) four weeks, if employed for one year or more, or is a farm worker or a domestic worker who has been employed for more than four weeks.

Notice must be given in writing except when it is given by an illiterate employee.
- The notice on termination of employment by an employer in terms of the Act does not prevent the employee challenging the fairness or lawfulness of the dismissal in terms of the Labour Relations Act, 1995 or any other law.

Severance pay: Section 41

An employee, dismissed for operational requirements is entitled to one week's severance pay for every year of service.

Variations: Sections 49 – 50

A collective agreement concluded by a bargaining council may replace or exclude any basic condition of employment "if the collective agreement is consistent with the purpose of this Act". But it cannot,
(a) reduce the protection given in (S.7, 9 and 13);
(b) reduce the health and safety checks on employees who perform night work (S. 17(3) and (4);
(c) reduce annual leave to less than two weeks (S. 20);
(d) reduce entitlement to maternity leave (S 25);
(e) reduce entitlement to sick leave to the extent permitted (S. 22-24); and
(f) conflict with provisions on child labour.

Collective agreements and individual agreements may only replace or exclude basic conditions of employment "to the extent permitted by the Act or a sectoral determination (S.49)."

The Minister of Labour may make a determination to replace or exclude a basic condition of employment.

This can also be done on application by an employer or employer organisation (S. 50).

A determination may not be granted unless a trade union representing the employees has consented to the variation or has had the opportunity to make representations to the Minister.

A copy of any determination must be displayed by the employer at the work place and must be made available to employees (S.50).

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feature

The Employment Standards Bill

undermining gender rights?

The Employment Standards Bill seeks to establish basic workplace rights. ***Melanie Samson*** *points to the danger of women's rights being undermined in the current negotiation process.*

In the year since the Employment Standards Green Paper was released, there has been almost no public debate about its proposals. If an Employment Standards Act (ESA) is successfully negotiated it will have a huge effect on the lives of all South African workers. It will establish basic rights (things like working hours, sick leave, and annual leave) of different categories of workers (full-time, part-time etc). It will also probably set out how these basic rights can be changed and, most importantly, whether these rights can actually be *reduced*.

One of the objectives of the Green Paper is to address gender discrimination. However, interviews with negotiators reveal that discussions about gender have not extended beyond debates around maternity and paternity leave.

Progressive maternity and paternity standards will help to reduce the reproduction tax which women pay on entering the labour market (see 'Globalisation' p 8) They will also help to distribute the burden of child care more fairly between men and women.

However, the most important gender issues relate not to isolated 'women's' standards but to the way in which the ESA will be designed to promote the 'international competitiveness' of the economy.

Male and female workers occupy different positions in our economy. As a result they will be affected differently by any provisions which allow standards to be changed, and which are geared at making the labour market even more flexible than it already is. These are the hard gender issues which will determine whether an ESA overcomes or further entrenches gender discrimination.

Regulated flexibility

The Green Paper is based on an *active acceptance* of globalisation. Like the Growth, Employment and Redistribution Strategy (GEAR), it supports the adoption of economic policies directed 'towards greater openness and competitiveness'.

The ideology of international competitiveness requires that capitalists in South Africa equal, or exceed, the profits they could make in other countries. Employment standards are central to international competitiveness, as workers' benefits eat into profits. Guarantees of job security and fair working hours also reduce

capital's ability to exploit workers.

The Green Paper says that the ESA "must seek to balance the demands of international competitiveness and the protection of basic rights of workers." In order to strike this balance the government supports an approach called 'regulated flexibility' to the setting of standards.

Variation

According to this approach, while an ESA would set basic standards, it would also outline how these standards could be changed, and set limits for their variation. A few core standards, such as maternity leave and prohibitions against child and enforced labour, would not be variable. However, most standards could be varied either through collective bargaining, individual contract, or by the Minister of Labour.

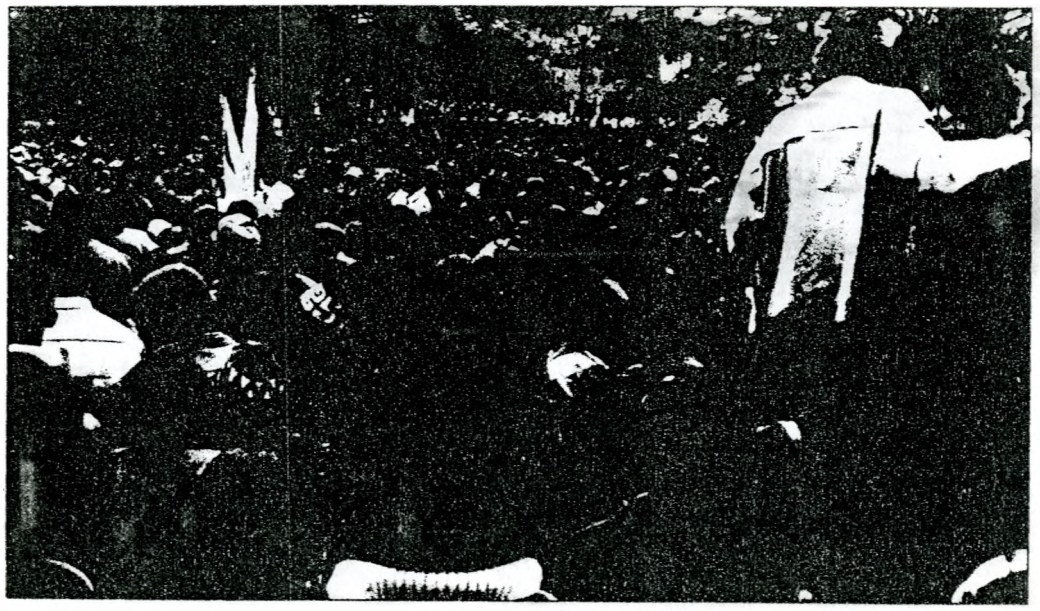
The Government has proposed that longer ordinary hours of work, overtime, meal intervals, the weekly rest period, compensation for night work, work on public holidays, the amount of paid sick leave, parental leave and notice on termination of service could all be varied by collective agreement. Ordinary hours of work, overtime, meal intervals, weekly rest period, compensation for night work and work on public holidays could all be varied by individual contract.

This means that most of the minimum standards could either be changed or completely abandoned if workers, either individually or as represented by unions, 'agree' to this.

Such an approach assumes that if the variation of standards is regulated in law, the flexibility which results is fair. It ignores the power dynamics between capitalists and unions/workers which would lead to certain unions/workers being forced to accept standards which are lower than the minimums.

Gender issues

Internationally capitalists have exploited the weaker position of women in the labour market in order to boost their profits. In South Africa women workers are concentrated in sectors which either are not



Male workers would also be entitled to parental leave.

Parental leave

The Green Paper proposes that maternity leave be increased from three months (as provided for in the Basic Conditions of Employment Act (BCEA)) to four months. It also provides for job security while a woman is on leave. No probation period is laid down – this means that even if a woman has been with a company for a short period of time she cannot be dismissed from her job while on maternity leave.

The negotiators have not been able to agree on maternity leave. Business would like to stick to the current situation, in terms of which most women are not paid while on maternity leave. Labour originally demanded six months paid maternity leave. Without pay, most women will not be able to take advantage of extended leave.

The Green Paper also proposes that every male employee with more than one year's service be entitled to three days paid paternity or child-care leave during the year of the birth of a child. The Bill changes this to a more general parental leave to which any employee who works more than four hours a week is entitled. Business opposes this proposal as it regards this as the imposition of additional leave on top of the one week increase in annual leave. There is a danger that a provision which could encourage fathers to share some of the responsibility for their children will be cut from the final Act.

this could be changed to 12 hours a day (with no overtime pay) as long as the 45 hour weekly limit is not exceeded. Even this requirement is flexible, as working hours could also be averaged over a period of four months. Workers could therefore work 12 hours per day, five days a week for two months without receiving overtime pay, as long they worked only 30 hours per week for the following two months.

Such intensive working hours would cause health problems and the disruption of social life for *all* workers. They would pose particular problems for women workers. Women would be exposed to greater risks of violence and rape as they would be staying at the work place and travelling home from work late in the evening. They would be forced to make alternative child care arrangements and would have less time to fulfil their household duties. Women who have struggled to find time to participate in union meetings and activities, and training and education programmes would face great pressure to forego these important activities.

Women who have struggled to find time to participate in union activities would have to forego these.

Negotiations continue

The ESA is still under negotiation. Business is arguing that the higher the floor of the standards which is proposed, the greater the need will be for variation from the law through collective agreement. It has also raised concerns about the extent of the proposed regulation. Business favours universal coverage of basic conditions of employment for all employees, but argues for greater flexibility with respect to part-time and irregular categories of employees.

Labour and government are both still pushing for an ESA to cover all workers, including part-time, casual and seasonal workers. Labour has tabled an alternative approach to regulated flexibility which would allow some form of flexibility of standards, but would not allow standards to be bargained downwards. Business is believed to be opposed to this proposal. The details of the proposals are not yet public, and key negotiators on both sides could not be reached for further comment.

At the time of writing, COSATU was considering calling for mass action in support of labour's demands. Hopefully the final product will secure basic rights for all workers - men and women - and ensure that no worker or union will be pressurised to bargain their rights away. ★

(29 January 1997)

Reference

Church and Work Office, South African Catholic Bishops' Conference (1996), New Employment Standards Discussion Paper.

History of the BCEA

1. First passed in 1983

2. First Act to set comprehensive minimum conditions

3. Shops and Offices Act
   Factories, Machinery and Building Work Act before that

4. Covered workers in private sector only

5. **Excluded workers like farmworkers and domestics until 1993/94**

6. **Set the <u>minimum</u> conditions of employment**

7. **Bosses could not give less than this > <u>No Downward Variation allowed</u>**

8. **Agreements could only give better conditions**

9. **Did not set minimum wages**
   [Done by the Wage Act instead]

10. **Came to be depended upon mainly by unorganised workers [nearly 5 million]**

11. **Passing of the new BCEA:**
    Mix of old BCEA and Wage Act > wages and conditions of employment
    Which parts promulgated so far > Child labour, the ECC
    Remainder > August to December '98

Rights of Casuals

1. **The old BCEA > definition of casuals:**
   Working for same employer not more than 3 days per week

2. **Old BCEA > some protections:**
   Hours of work e.g.

3. **New BCEA > no definition of casuals**

4. **But almost all rights given to all workers who work 24 hours or more per month for employer**

5. **Position of Contract Workers**

6. **Table of comparative rights**

Table of Worker Rights as per the BCEA 1997

Right	Kind of Worker Permanent	Kind of Worker All other workers who are not permanent but who work 24 hours or more per month for an employer (including contract workers)
Hours of work		
Weekly	45 hours	Same
Daily	9	Same
Compressed working week	Individual workers can agree to extend the normal working day to 12 hours without being paid overtime	Same
Averaging of the working week	Collective agreements can be made whereby workers work an average of 45 hours over 4 months	It will depend on whether a trade union has made such an agreement at the workplace.
Overtime Weekly	10 hours	Same
Overtime daily	3	Same
Overtime pay	Time and a half	Same
Meal intervals	60 minutes after 5 hours but can be reduced to 30 minutes by agreement	Same
Rest period weekly	36 consecutive hours including Sunday if there is no agreement to work on a Sunday	Same
Variation of the weekly rest period	Individual workers can agree to take only 60 hours rest over a 2 week period	Same
Rest period daily	12 hours	Same
Sunday work	By agreement	Same
Sunday work pay	Double pay for those who do not normally work on a Sunday and time and a half for those who do normally work	Same
Night work (work after 18.00 and before 06.00	By agreement	Same

next day)		
Night work allowance	Can pay shift allowance (no set figure) or reduce working time	Same
Public holidays	As per the Public Holidays Act, but workers can agree to work	Same
Pay for public holiday work	Normal pay plus pay for the work done, which can be calculated in various ways including hours worked	Same
Leave		
Annual leave	21 consecutive days	Same or 1 day's paid leave for every 17 days worked, or 1 hour's paid leave for every 17 hours worked.
Sick leave	6 weeks over 36 months (actual number determined by whether a 5 day week or 6 day week)	The Act does not exclude these workers from sick leave but it only allows for 6 weeks over 36 months, unlike the annual leave arrangement, which is more flexible.
Family responsibility leave	3 days paid for the birth of a child or when a child is sick or death of a family member	**Only applies to workers who have worked for longer than 4 months and who work at least 4 days a week for the boss**
Maternity	4 months (payment issue unresolved)	Same
Notice		
4 weeks service or less	1 week	Same
More than 4 weeks service but not more than 1 year	2 weeks	Same
More than 1 year service or is a domestic worker or farm worker with more than 4 weeks service	4 weeks	Same