NEDLAC LABOUR LAW REFORM

WORKERS WHO ARE (NOT) EMPLOYEES: TOWARDS DECENT WORK, ACCESS TO LABOUR STANDARDS AND SOCIAL PROTECTION

Prepared by:
Debbie Collier, Darcy du Toit, Mario Jacobs, and Abigail Osiki
Centre for Transformative Regulation of Work
Contact: **dcollier-reed@uwc.ac.za**

CENTROW
Centre for Transformative Regulation of Work

UNIVERSITY of the WESTERN CAPE

FACULTY of LAW
UNIVERSITY of the WESTERN CAPE

NEDLAC LABOUR LAW REFORM

Workers who are (not) employees:
Towards decent work, access to labour standards and social protection

thinkpiece

Prepared by:

Debbie Collier, Darcy du Toit, Mario Jacobs, and Abigail Osiki
Centre for Transformative Regulation of Work
Contact: dcollier-reed@uwc.ac.za or 083 4436 852

June 2024

FACULTY of LAW
UNIVERSITY of the WESTERN CAPE

INTRODUCTION, OBJECTIVES AND CONTEXT

1. The changing world of work necessitates reflection on the nature of work relationships; and, specifically in the context of labour law (and labour law reform), on the status, and rights, of *workers in employment* and engaged by another. In this regard, the NEDLAC social partners have articulated the need for effective and appropriate protection of labour standards and labour law measures in terms of basic conditions of employment, labour relations, health and safety, and social protection.

2. More specifically, the key matters identified in the NEDLAC terms of reference / request for proposals include –

   '**Legislative and regulatory reforms** in respect of **workers who are not employees** (including basic conditions, labour relations, health and safety, social protection), [that] will entail a consideration of:

   (a) Identification of categories of workers who are not employees and **who should be covered by different statutes**:
   (b) Whether and if so, different categories of workers should be protected in respect of
   - **trade union** membership, [collective] **representation** and **collective bargaining**;
   - statutory **basic conditions of employment**; and
   - **unfair dismissal** and **unfair labour practices**.

   (c) Protection of **all categories of workers** under the following statutes: Occupational Health and Safety Act (OHSA), Mine Health and Safety Act (MHSA), Unemployment Insurance Act (UIA), Employment Equity Act (EEA) and Compensation for Occupational Injuries and Diseases Act (COIDA).'[1]

3. Parts A, B and C of the paper reflect the context and parameters of the law reform project, which is aimed at responding to the dynamics and emerging issues within the labour market. Part A of the paper unpacks the evolving concept of **employment** and provides a snapshot of the labour market and the reported forms of employment in South Africa; and Part B provides an **organising framework for categorising forms of employment and work based on the legislative framework in South Africa**, recognising an intermediate category between employees and self-employment. In Part C, a map of the labour and employment rights of the three categories is provided, highlighting potential **gaps in the legislative framework**. In the final part of the paper, **regulatory tools and strategies** are discussed, prioritising the exercise of **delegated regulatory powers** and administrative action to address the gaps identified in Part C, which are categorised as **implementation and enforcement gaps; protection/eligibility gaps;** and **organising/bargaining gaps**. The paper concludes with proposals on the way forward and a roadmap.

[1] NEDLAC Request for Proposals, para 3.3.

PART A. EMERGING FORMS OF EMPLOYMENT AND THE LABOUR MARKET IN SOUTH AFRICA

4. For the purposes of national statistics and reporting, the ILO's International Conference of Labour Statisticians (ICLS) recognises five forms of work,[2] of which *employment* is relevant for current purposes. Until recently, international standards for the classification of status in employment was binary; with a distinction between **paid employment jobs** undertaken by employees, and **self-employment jobs**, undertaken by, among others, own-account workers.[3] In the context of labour law, the binary reflects in the distinction between employees and independent contractors. In 2018, the International Conference of Labour Statisticians (ICLS) recognised 'the need to revise and broaden the existing standards for statistics on status in employment' taking account of changes in employment arrangements and forms of employment.[4] Consequently, the 2018 Resolution expands the previous (1993) classification of status in employment, and provides an overarching conceptual framework for status at work,[5] including a revised classification of status in employment,[6] which introduces the classification of **dependent contractors**, who are neither employees nor independent workers.

5. The 2018 Resolution on work relations describes **dependent contractors** as 'workers who have contractual arrangements of a commercial nature (but not a contract of employment) to provide goods and services for or through another economic unit. They are not employees of that economic unit, but are **dependent on that unit for organization and execution of the work, income, or for access to the market**. They are workers employed for profit, who are dependent on another entity that exercises control over their productive activities and directly benefits from the work performed by them.'[7] Although 'dependent contractors' are not a new phenomenon, the digitalisation of work and digital platform employment has expanded the grey area between employees and independent contractors; and while most platform workers are classified as self-employed (independent contractors), their work arrangements are likely to align with the concept of dependent contractor.[8]

[2] The five forms of work are: (1) own-use production work; (2) **employment**; (3) unpaid trainee work; (4) volunteer work; and (5) other work activities.
[3] Based on the International Classification of Status in Employment (ICSE-93) – which was revised in the 2018 Resolution on work relationships (ICLS/20/2018/Resolution 1).
[4] ICLS/20/2018/Resolution 1, *Preamble*.
[5] The International Classification of Status at Work (ICSaW-18), which categorises all forms of work, including employment, and comprises 20 work categories.
[6] The International Classification of Status in Employment (ICSE-18), that classifies (in 10 categories) employment based on the concepts of type of authority (from independent workers to dependent workers) and the type of economic risk (differentiating between employment for pay and employment for profit). See Annexure B.
[7] At paragraph 35. Because they are not employees, dependent contractors are 'usually responsible for arranging their own social insurance and other social contributions. … [and] the entity on which the worker is dependent does not withhold income tax for them.' (At paragraph 36.)
[8] See ILO, 21st ICLS Room Document 3 Integrating dependent contractors in the framework for statistics on the informal economy (2023) p. 6; and see Room Document 12 Digital platform work and employment (2023); and the conversation regarding the policy discussion: 'whether some workers in this grey area should be legally reclassified and recognised as employees'; and 'whether rights, protections, and obligations should be extended to them whatever their legal status.'

6. In South Africa,[9] for the purposes of the quarterly labour force survey (QLFS), '**employed'**[10] includes employers, employees, and self-employed workers (which will include most platform workers, and workers who are in disguised employment). The **labour force** – which combines the employed and unemployed working age population – increased from 21,5 in 2016 to 22,3 million in 2021,[11] and further increased to 24,1 million by Q1 2023.[12] In terms of **employment levels,** the Q2:2023 indicates an increase in employment since Q4:2021 (although still slightly below pre-Covid levels [16.4 million]); and between Q1 and Q2 in 2023, increased by 154 000 workers, to **16.3 million** (and 7.9 million unemployed workers).[13]

7. For the purposes of StatsSA QLSF reporting, **employment levels** are categorised across ten industries, and the table below[14] shows the distribution of employment by industry over the period 2016 to 2023.

Table 1. Industry Classifications and the distribution of employment by industry (2016 to 2023)

INDUSTRY	2016	2017	2018	2019	2020	2021	2022 (q4)	2023 (q2)
Thousand								
Agriculture	874	843	845	861	820	838	860	894
Mining	444	434	419	412	403	377	436	444
Manufacturing	1 692	1 782	1 769	1 762	1 582	1 408	1656	1558
Utilities	118	149	148	139	104	103	124	129
Construction	1 431	1 414	1 472	1 348	1 164	1 148	1 212	1 304
Trade	3 178	3 250	3 280	3 358	3 084	2 935	3 297	3 361
Transport	910	977	984	998	925	946	982	986
Finance	2 275	2 402	2 479	2 518	2 374	2 391	2 484	2 599
Services	3 571	3 609	3 694	3 667	3 484	3 356	3 727	3 965
Private households	1 283	1 303	1 292	1 281	1 160	1 177	1 142	1 093
TOTAL *	**15 780**	**16 169**	**16 394**	**16 350**	**15 061**	**14 691**	**15 934**	**16 346**

*Total includes 'Other forms of industry' (due to rounding numbers do not necessarily add up to total)

8. StatsSA differentiate between employment in the following sectors, with statistics (making up the workforce that is employed: i.e. 16.3 million) as at Q2: 2023,[15] as follows –
    - **Formal sector** (non-agri) employment: 11,3 million (69.3%)

[9] The section below draws primarily from the QLFS Q2 2023 and the *Labour Market* dynamics *in South Africa* published by StatsSA in 2021, which analyses the QLFS data over the period 2016 to 2021, and which is intended for planning purposes and policy formulation' and to monitor progress on achieving the NDP and SDG goals.' StatsSA *Labour Market dynamics in South Africa,* 2021 p. 3.

[10] For the purposes of the labour force surveys, the term 'employed' refers to 'market production employment' and consists of workers who (1) work for a wage, salary, commission, or payment in kind; (2) run a business (regardless of size) and either own-account or with partners; and (3) those who have helped without being paid in the business of a household member. StatsSA *Labour Market dynamics in South Africa*, 2021, p. 26.

[11] StatsSA *Labour Market dynamics in South Africa,* 2021 p. 4.

[12] https://www.statssa.gov.za/publications/P0211/Presentation%20QLFS%20Q1%202023.pdf. Consisting of 16.2 million employed and 7.9 million (32,9%) unemployed.

[13] https://www.statssa.gov.za/publications/P0211/Presentation%20QLFS%20Q2%202023.pdf.

[14] Data from StatsSA *Labour Market dynamics in South Africa,* 2021, p. 119; StatsSA *Quarterly Labour Force Survey: Quarter 2: 2023*, August 2023, p. 53.

[15] StatsSA *Quarterly Labour Force Survey: Quarter 2: 2023*, August 2023, p. 59.

- **Informal sector** (non-agri) employment: 3,0 million (18.5%)
- **Private households**: 1,1 million (6.7%)
- **Agriculture:** 894 000 (5.5%)

9. In terms of 'status in employment': 83.5% of the 16.3 million persons are recorded as 'employees' (who are in principle entitled to labour protection, but see paragraphs 12 and 13 below), which is one of four classifications, with reported statistics as at Q2: 2023[16] –
    - **Employee** – 13 656 000 (83.5%)
    - **Employer** – 926 000 (5.7%)
    - **Own-account worker** – 1 665 000 (10.2%) *includes disguised employment & dependent contractors / platform workers*
    - **Unpaid household member** – 99 000 (0.6%)

10. StatsSA describes **own-account work** as a vulnerable employment status 'associated with "low levels of development and high levels of poverty"', and as 'the type of employment that is typically characterised by decent work deficits – higher economic insecurity and informality, low productivity, with low or no pay and no social protection in developing countries.'[17] In the context of platform work, the Eastern Cape Social Economic Consultative Council (ECSECC) explain that platform work and digital labour platforms are highly concentrated in industries and occupations with 'a large share of own account workers',[18] and point out that growth in the gig economy is 'concentrated mostly in the service sector, particularly in transport and personal services industries', while 'there is no digital labour platform activity yet in manufacturing, natural resources or public services.'[19]

11. In the context of platform work in South Africa, Fairwork estimate that 'there are around 30, 000 workers in location-based platform work in South Africa, like taxi driving, delivery, and cleaning, and up to 100,000 actively undertaking online work, or "cloudwork"'; and that 'platform work touches at least 1% of the workforce; with this number growing by well over 10% annually .'[20] Fairwork reports that the digital platform for cleaning services, SweepSouth, has grown to over 7 000 cleaners since 2013,[21] and, according to Engineering News, 'the Uber platform has about 20 000 drivers and delivery people earning an income through the Uber and Uber Eats apps in South Africa'.[22] See also Part D below for specific details of the contractual and working arrangements of platform work in the services sector in South Africa.

12. Turning now to the context of **employees** (who, as a category of employed workers should largely covered by labour and social security law). The QLF surveys measure the extent to which **employees** (recorded as 13 656 000 out of a total of 16.3 mill persons in employment in the 2023 Q2 QLFS) in fact benefit from **conditions in employment and social protection**. The surveys assess among others, the employment

[16] StatsSA *Quarterly Labour Force Survey: Quarter 2: 2023*, August 2023, p. 65.
[17] StatsSA *Labour Market dynamics in South Africa,* 2021 p. 83.
[18] ECSECC *The Gig Economy, Digital Labour Platforms, and Independent Employment in the Eastern Cape* (March, 2022) p. 21.
[19] Ibid.
[20] Fairwork, *South Africa Ratings 2022: Platform work amidst the cost of living crisis* (2023) p. 15.
[21] Fairwork, *South Africa Ratings 2022* p. 25.
[22] At https://www.engineeringnews.co.za/article/uber-expands-african-offering-uber-eats-sees-healthy-growth-in-sa-2022-10-24#:~:text=Mobility%20platform%20Uber%20has%20about,Saharan%20Africa%20GM%20Kagiso%20Khaole.

rights listed below, and the results reflect (out of the 13 656 000 of employees) [23] the number and percentage of workers who indicated that they were –

- entitled to any paid leave (9 007 000) (66%)
- entitled to paid sick leave (9 838 000) (72%)
- entitled to maternity/paternity leave (7 441 000) (54%)
- a UIF contribution (8 534 000) (62%)

13. The statistics suggest a high level of non-compliance (noting however that employees who work for less than 24 hours per month are excluded from the BCEA leave provisions and from the scope of the UIA), which resonates with studies on non-compliance with Sectoral Determinations (SDs).[24] SDs are issued by the Minister of Labour to establish basic conditions of employment in a sector and area; and, according to the DPRU study, SDs 'covered around one-third of employees in South Africa in both 2001 and 2007. The largest covered sector in 2007 was the Domestic worker sector with 1.2 million employed individuals, followed by the Retail sector with 802,242 individuals. The smallest sectors with the Civil Engineering and the Forestry sectors with approximately 59.926 and 17,373 employed workers respectively.'[25] The study indicates that the Retail, Domestic worker, Taxi, Security and Hospitality sectors had experienced significant growth during the period under review. The study uses an *index of violation* and indicates that non-compliance is high, and that 'a significant number of employers [45% in 2007] in South Africa … are violating minimum wage laws across all sectoral determinations.'[26]

14. Although the LRA, BCEA and EEA are explicit in terms of their limited scope of application to 'employees', to the exclusion of independent contractors; it is less so in the case of the SDs, with the Domestic Worker SD expressly including independent contractors, and with a range of application across the SDs to workers in the respective sectors. Moreover, the NMWA applies to 'workers' and does not explicitly exclude independent contractors. These classifications inform the proposed organising framework for workers in employment.

PART B. WHO IS (NOT) AN EMPLOYEE: AN ORGANISING FRAMEWORK

15. The proposed organising framework draws on the existing statutory categorisations – specifically the definitions of an **employee** and a **worker.** The LRA, BCEA, EEA and SDA define an **employee** as -
    (a) any person, excluding an **independent contractor**, who works for another person or for the State and who receives, or is entitled to receive, any remuneration; and
    (b) any other person who in any manner assists in carrying on or conducting the business of an employer.

16. While paragraph (b) is articulated broadly, its scope remains narrow in terms of who is an employee and retains the binary between employees and independent contractors. For workers who fall between the

[23] See StatsSA *Quarterly Labour Force Survey: Quarter 2:* 2023, August 2023, p. 67 to p. 73.
[24] See Development Policy Research Unit (DPRU) *Addressing the Plight of Vulnerable Workers: The Role of Sectoral Determinations* (2010), Prepared for the Department of Labour. In addition to Children in the Performance of Advertising, Artistic or Cultural Activities, and Learnerships, SDs have been implemented in respect of workers in the following sectors: Farmworkers; Wholesale and Retail; Domestic Workers; Forestry; Taxi (the SD specifically does not apply to owner-drivers); Private Security; Civil Engineering; Contract Cleaning; and Hospitality.
[25] Ibid, p. 5.
[26] Ibid, p. 9.

binary, various legal tools, and mechanisms, including the **dominant impression test /and reality test**[27] and the **presumption** (**LRA s. 200A)** as to who is an employee, are used to determine whether a worker is an employee or a self-employed independent contractor.[28]

17. Whereas **employees** and **independent contractors** are specified in the LRA, BCEA and EEA; the NMWA refers to a **worker**,[29] who is a person who works for another and is entitled to receive payment, in money or kind. Moreover, s23.(2) of the Bill of Rights recognises that 'every **worker** has the right to … form and join a trade union' and to participate in trade union activities.

18. The terms **employee**, **worker**, and **independent contractor** in statutory law provide a framework congruent with the ICLS classification of status in employment, which, as discussed above, introduced the category of **dependent contractor** in 2018. As mentioned, although 'dependent contractors' are not a new phenomenon, the digitalisation of work and digital platform employment has expanded the grey area between employees and independent contractors, giving rise to the following policy discussion: 'whether some workers in this grey area should be legally reclassified and recognised as employees'; and 'whether rights, protections, and obligations should be extended to them whatever their legal status.'[30] Resonating with this, the Constitutional Court has referred to the grey area created by new business models and the evolving world of work as the 'twilight zone'.[31] The organising framework below maps out the existing statutory classifications, and reflects the application of labour standards in the various statutes to the different categories.

[27] The 'reality test' is concerned with determining the existence of an employment relationship and considers 'three primary criteria: (1) the employer's right of supervision and control; (2) whether the employee forms an integral part of the employer's organisation; and (3) the extent to which employee is economically dependent upon the employer.' *State Information Technology Agency (Pty) Ltd v Commission for Conciliation, Mediation and Arbitration & Others* (2008) 29 ILJ 2234 (LAC) para [12].

[28] See Annexure A.

[29] Similarly, in terms of the draft ESA Amendment Bill (published for comment in February 2022) a '**worker**' means any person who works for another and who receives, or is entitled to receive, any payment for that work whether in money or in kind.' Note that a '**worker**' in the context of the SDA is more broadly stated to include 'an employee, an unemployed person and a workseeker'.

[30] ILO, 21st ICLS Room Document 3 Integrating dependent contractors in the framework for statistics on the informal economy (2023) p. 6; and see Room Document 12 Digital platform work and employment (2023).

[31] For Froneman J in *Pretorius and Another v Transport Pension Fund and Another* (2018) 39 ILJ 1937 (CC), para [48]: 'Contemporary labour trends highlight the need to take a broad view of fair labour practice rights in section 23(1). Fewer and fewer people are in formal employment; fewer of those in formal employment have union backing and protection. More and more people find themselves in the **"twilight zone"** of employment as supposed "independent contractors" in time-based employment subject to faceless multinational companies who may operate from a web presence. In short, the LRA tabulated the fair labour practice rights of only those enjoying the benefit of formal employment – but not otherwise. Though the facts of this case do not involve these considerations, they provide a compelling basis not to restrict the protection of section 23 to only those who have contracts of employment.' He identifies gig workers such as Uber drivers as an example.

Table 2. Statutory classifications and status of workers in employment

** ***Category 1 is outside the scope of enquiry***	Workers (individual persons) engaged by one or more 'employing' entity (see para 0 below)		
1.** **(SE)** **Own-account worker** providing goods or services directly to the market (working alone or with one or more partner) & **Employers** (own-account worker engaging one or more employees)	2. **(SE/IC)** **Independent contractor** (genuinely operating a business) Engaged through a commercial contract (might employ others: as **Employer**)	3. **(W)** **Worker** (engaged by another* to work for payment) *See footnote 33.	4. **(E)** **Employee** Includes: Part-time Temporary TES Employee (includes disguised employees / workers deemed to be employees in terms of the presumptions / common law tests)
	Broad overview of the application of labour and social protection statutes		
LRA, BCEA and EEA are not applicable (but will apply to any employees of the SE worker)	LRA, BCEA and EEA are not applicable; but will apply to employees (if any) of the IC	LRA, BCEA and EEA may apply if the worker is in disguised employment and deemed to be an employee	LRA, BCEA, EEA applies (BCEA standards have limited application to employees working < 24 hours / month)
NMWA should apply to SEs who provide services	NMWA applies	NMWA applies	NMWA applies
	Sectoral determination may apply	Sectoral determination may apply	Sectoral determination may apply
SE with separate legal personality *may* (optional) contribute to UIF (as employer and contributor/ employee)	The employing entity is excluded from liability for UIF[32] contributions (but IC may register as employer for purposes of UI and COIDA)	Depending on work arrangements: -the employing entity may be liable for UIF contributions	Employer obliged to pay UIF contributions for employees, excluding employees who work < 24 hours a month
SE workers generally not covered by COIDA (unless registered as an employer)		-COIDA requires a contract of service	Employees are covered by COIDA

19. 'Employing entities' that engage workers include **employers**, **temporary employment services**, and **digital platforms**. Definitions of an employer vary in the legislation (Part III considers possibilities for clarification) – for example, see COIDA and the NMWA;[33] and s 198 of the LRA for the definition of a **TES**. The ESA Amendment Bill defines a '**digital labour platform**' as 'an electronic entity that enables the provision of work or services by a person to any other person in the Republic'.

[32] The UIA applies to 'all employers and employees [excluding independent contractors], other than employees employed for less than 24 hours a month with a particular employer, and their employers.'

[33] The NMWA defines an employer as 'any person who is obliged to pay a worker for the work that that worker performs for that person.' Also note the ESA Amendment Bill, which defines an 'employer' as 'any person who remunerates, or is liable to remunerate, an employee or a worker'.

20. Table 2. (above) identifies four worker classifications: (1). Self-employed workers providing goods or services directly to the market (SE) - this category of SE worker falls outside of the scope of enquiry;[34] (2). Self-employed workers engaged as independent contractors (SE/IC); (3). (Dependent) workers engaged by an employing entity but are not employees (W); and (4). Employees. In the next section, the rights of workers in categories (2.), (3.) and (4) are set out and compared in **an index of labour and employment rights** (Table 3.) based on the scope of application of existing statutory rights. Thereafter, potential gaps in the protection of core labour standards are identified, differentiating between **implementation and enforcement gaps; protection/eligibility gaps**; and **organising/bargaining gaps**.

PART C. AN INDEX OF STATUTORY RIGHTS AND GAPS IN THE PROTECTION OF LABOUR STANDARDS

21. The table below provides a comparison of employment rights for the following categories of workers: self-employed independent contractors (SE/IC); workers engaged by another to work for payment (W); and employees (E).

Table 3: Index of labour and employment (statutory) rights

Index of Fundamental Labour and Employment Rights and Obligations			Eligibility (SE/IC) (W) (E)		
			SE/IC	**W**	**E**
1	**LRA**	**Freedom of Association and Collective Bargaining**			√
	s. 4	Employees' right to freedom of association			√
	Ch. III	Collective bargaining / organisational rights, representation			√
	Ch. VIII	Unfair dismissal and unfair labour practice			√
2	**BCEA**	**Basic Conditions of Employment**	+/-(SD)	+/-(SD)	√
	Ch. Two	Regulation of Working Time			√
	Ch. Three	Leave (annual, sick leave, maternity/parental, family responsibility)			√
	Ch. Four	Particulars of employment and remuneration			√
	Ch. Five	Termination of employment			√
3	**NMWA**	**NMWA National minimum wage** [includes learnership allowances]			
	s. 4.	National minimum wage	√	√	√
4	**EEA**	**Employment Equity Act**			
	Ch. II	Prohibition of Unfair Discrimination			√

[34] In this regard, various processes are currently under way that consider the extension of social protection to workers who are self-employed; see the SA Law Reform Commission, Discussion Paper 153 on Project 143: *Investigation into Maternity and Parental Benefits for Self-Employed Workers in the Informal Economy* (2021) and Project 143: Report on Investigation into maternity and parental benefits for self-employed workers, 09 Dec 2022 [Released 13 Sep 2023]. Note also the 2012 Comprehensive Social Security in South Africa report (tabled in December 2016 by an Inter-Ministerial Task Team (National Treasury and Department of Social Development) that envisages a national social security fund (NSSF) for all workers. See also the NEDLAC UIF Sub-Committee report *The extension of UIF benefits to atypical workers* (2022).

	PEPUDA	Equality Act	√	√	
5	**OHSA**	**Occupational health and safety**			√
	s. 8 -12	General duties of employers & manufacturers	√	√	√
	s. 17	Health and safety representatives			√
6	**MHSA**	**Mine Health & Safety Act**			√
	Ch. 2/3	H&S and H & S Representatives			√
7	**COIDA**	**Compensation for Occupational Injuries & Diseases**	#	#	√
	s. 22	Right of Employee to compensation – *includes a 'casual' employee*			√
	Ch. VIIA	Rehabilitation and reintegration			√
	Ch. VIII	Medical aid (conveyance, medical expenses)			√
8	**UIF**	**Unemployment Insurance Act**	#	#	√
	Ch. 3	Claiming benefits			√
9	**UICA**	**UI Contributions**	#	#	√
	Ch. 2	Duty to contribute			√

Possibly, if the IC has separate legal personality and is registered; and in the case of workers, it will depend on the nature of the working arrangements

22. As is to be expected, **employees** are the primary beneficiaries of labour and employment law protections; however, the limited protection of workers who are in work relationships of **subordination** and **dependence** (**dependent contractors**) raises concerns regarding equitable treatment and decent work, and in some cases the exclusion of categories of workers may be unconstitutional.[35]

23. The index of labour and employment rights (Table 3.) reflects potential gaps in protection, including protection in relation to –
    1. Workers who are not employees, but who have the right to freedom of association and the right to organize (subject to the provisions in competition law),[36] however their organisations are not permitted to register as trade unions in terms of the LRA and therefore are excluded from statutory rights and protection;
    2. Workers' access to statutory minimum conditions (sick leave, maternity leave), and protection from unfair labour practices and unfair termination; and
    3. Access to social protection contributory schemes (unemployment (UIF), workers compensation (COIDA)) for workers who are not classified as employees.

[35] For example, in the *SANDF* decisions, the Constitutional Court affirms the rights of a category of workers (soldiers) to organise, and to trade union representatives and collective bargaining. *SANDF* (1) (1999) 20 ILJ 2265 (CC) and *SANDF* (2) (2007) 28 ILJ 1909 (CC).

[36] s. 3 (**Application of Act**) of the Competition Act 1998 provides that the Act 'applies to all economic activity within, or having an effect within, the Republic, except – (a) collective bargaining within the meaning of section 23 of the Constitution, and the Labour Relations Act, 1995; (b) a collective agreement, as defined in section 213 of the Labour Relations Act, 1995', which refers to collective agreements concluded by a *registered* trade union(s) and employer(s).

Part D below considers ways to close the gaps, keeping in mind various processes and developments underway.

24. Gaps in protection may arise from a lack of effective implementation or a lack of enforcement and high levels of non-compliance (**implementation and enforcement gaps**); or from gaps in the scope and application of statutory rights, where a worker is ineligible for protection (**protection/eligibility gaps**). Inadequate support for the collective rights of workers and their organisations (**organising/bargaining gaps**) may be the result of a protection/eligibility gap but could also arise from practical barriers to organising workers and a lack of institutional structures and support for organising.

25. High levels of non-compliance (as reflected in the QLFS surveys discussed above) and conditions of informality contribute to **implementation and enforcement gaps** in cases where employees and workers are, by law, covered by the relevant statutory provisions, but in practice do not benefit from protection (for example: employers who do not comply with the BCEA in respect of their obligations towards employees).[37] Barriers to enforcement include a lack of awareness of rights, fear of victimisation by an employer, conditions of informality and the limited capacity of the inspectorate.[38] However, in some cases it may be difficult, particularly involving new forms of work, such as platform work, to categorise a worker as an employee, in which case, the lack of protection may be the result of a **protection/eligibility gap**.

26. In the context of **freedom of association and the right to organise**, the current definitions in the LRA of an employee and a trade union give rise to a **protection/eligibility gap** that limits the collective rights of workers who are not employees contrary to the provisions of core ILO labour standards.[39] Similarly, a **protection/eligibility gap** arises from the legislative framework for contributory schemes, in which access to **unemployment, illness and maternity/parental/adoption benefits** is linked to employment of an 'employee'.[40] Self-employed workers are 'owners' and 'entrepreneurs' for the purposes of labour and employment law, and fall outside the scope of its protection. However, their exclusion raises questions regarding the protection of core labour standards, constitutional rights and the normative function of collective bargaining and labour law, particularly where a self-employed worker is in a precarious position of economic dependency and a bargaining imbalance with a dominant contracting party who has the power to determine the cost of labour and the terms and conditions of work.

[37] Part of the problem might also be confusion/ uncertainty as to whether a worker is covered by a relevant labour standard, and it may also be difficult for inspectors to determine whether certain workers are covered by the BCEA.
[38] These, among others, are considered in Koukiadaki A, & Katsaroumpas, I (2017) *Temporary contracts, precarious employment, employees' fundamental rights and EU employment law*.
[39] Conventions 87, 98. Article 2 of the Convention concerning Freedom of Association and Protection of the Right to Organise 87 of 1948 guarantees the right of all 'workers and employers without distinction whatsoever … the right to establish, and subject only to the rules of the organisation concerned, to join organisations of their choosing without previous authorisation.' Moreover, the Committee on Freedom of Association has affirmed the criteria for the application of C 87 is not based on the existence of an employment relationship, and that self-employed workers should enjoy the right to organise. (Freedom of Association: Digest of Decisions and Principles of the Freedom of Association Committee of the Governing Body of the ILO (ILO, Geneva, 1996. Cited in the Code of GP para 66).
[40] See note 34 on related developments.

PART D. REGULATORY TOOLS AND STRATEGIES FOR CLOSING THE GAPS IN PROTECTION

27. Various approaches to closing the gaps in protection are considered in Part D, including options for **law reform** and the use of existing regulatory mechanisms / **delegated regulatory powers** in the law, including **regulations**, **determinations**, and **codes of good practice**. Before doing so, an overview of practical work arrangements and the contract terms for categories of workers in the e-hailing, delivery and domestic cleaning sector in South Africa are considered as a representation of employment practices which result in gaps in protection. An overview of the relevant statutory powers of the Minister, the D-G, NEDLAC, and, at sectoral level – Bargaining Councils and Statutory Councils – is also provided before a consideration of strategies for closing the gaps.

(1.) Typical work arrangements for contracted workers who are not employees

28. A study of OECD countries concludes that '**solo self-employment**' [self-employed persons without employees] accounts for between 4 and 22 percent in the countries of the OECD area', and, in South Africa, according to StatsSA data (see in Part A) in terms of status in employment, own-account workers make up just over 10% of workers in employment, although not all will necessarily be engaged in contractual arrangements for work. The statistics on platform work in South Africa suggest a growing sector 'concentrated mainly in the services sector' – e-hailing, delivery, and cleaning services. The services sector is however not the only sector where non-standard employment relations are increasingly the norm.[41]

29. In some cases, self-employed workers are in **disguised employment** - an obvious case would be full-time workers for an extended period who perform the same work alongside employees of the employing entity; and these workers can seek recourse and classification as employees in terms of available mechanisms (see 3.4 below); however, for others the arrangements might be more complex. The context of **gig work facilitated by digital platforms** and technology that connects the worker with work opportunities is one of the grey areas (the 'twilight zone') which gives rise to the ILO's policy question; *'whether rights, protections, and obligations should be extended to them whatever their legal status'?*

30. Typical work arrangements and contract terms for workers who are not employees in the platform economy in South Africa are reflected in the following arrangements for delivery, e-hailing, and cleaning services -

    [1] Supermarket **grocery delivery drivers**, such as the ubiquitous Checkers Sixty60 'heroes'. Sixty60 drivers deliver groceries ordered via the Sixty60 app within 60 minutes and are regarded as independent contractors engaged by an intermediary – Pingo. Sixty60 orders are delivered by Pingo, a 'last-mile delivery company', and delivery drivers are engaged as Pingo driver partners.[42] Consequently, 'as independent contractors they get no benefits whatsoever and they have no protection of our labour law',[43] and, in the context of collective employment rights, because they are

[41] The Constitutional Court noted that much in *Pretorius v Transport Pension Fund* (see note 31) above.
[42] According to the Pingo website, Pingo (Pty) Ltd was formed in May 2022 through a joint venture (Shoprite Group and RTT Group) following the growth of Checkers Sixty60, and 'works with a variety of businesses who require on-demand delivery services.'
[43] Tariro Washinyira, 'Precarious lives of delivery guys' (August-September 2023) The Big Issue, citing MP and labour law attorney Micheal Bagraim.

not recognised as employees[44] (they are 'offering a service as entrepreneurs'), and, from a trade union perspective, 'legally, we can't organise them into SACCAWU'.[45]

A closer look at the form of relationship between Pingo and their drivers suggests a (complex) arrangement akin to an employment relationship (yet in *Athur / RTT Group* (footnote 44) an RTT delivery driver was held to be an independent contractor in *in limine* proceedings at the CCMA after the driver referred an unfair dismissal dispute).[46] Relevant factors in this regard include –

- Pingo is a joint venture between the Shoprite Group and RTT Group, a transport logistics company,[47] whose subsidiary companies include Courier IT and Orion Logistics.
- The Sixty60 drivers are contracted to deliver Checkers goods only.
- The drivers are allocated to a specific Checkers store and available during the operating hours of that store. Their hours of work are thus set by the commercial contract between Checkers and Pingo, noting that Checkers is a 50% shareholder in Pingo.
- Their rate of pay is set by Pingo.
- Drivers acquire the tools (motorbike) on a rent-to-own basis and the purchase of a mobile device; and operate a Checkers branded motorbike and uniform.

---

[44] In the CCMA matter between *Athur / RTT Group (Pty) Ltd* [2021] 6 BALR 610 (CCMA) the Commissioner ruled that the CCMA lacked jurisdiction as the applicant was not an employee but an independent contractor on the grounds that –

> 'firstly, he accepts work from the App as they become available and if not, he is unable to render such services. Secondly, he received remittance slips of the earnings in line with the delivery made. Thirdly, in terms of the remittance slip, the applicant paid VAT and not PAYE. Lastly, the only deduction made was for the repayment of the motorbike, insurance and VAT." The Commissioner than concludes that, "It appears to me that the applicant controlled his own hours of work since he could only make delivery once the delivery becomes available on the App. Unlike a comparable employee, the employee would have fixed hours, pay UIF, pay PAYE tax and not VAT, receives payslips and not remittance slips. An employee would not be expected to repay for the tools or equipment used to conduct the services including the equipment's insurance.'

Without any further interrogation of the circumstances or application of the dominant impression test, **because work was received from an App**, and the applicant 'controlled his own hours of work', he was found to work 'outside of the protection of the LRA.' The case clearly illustrates the hurdles when claiming to be in **disguised employment**, and the difficulty in establishing the jurisdiction of the CCMA / bargaining council in the context of platform work.

[45] SACCAWU spokesperson, cited in 'Precarious lives of delivery guys' *Ibid.* While we suggest that Pingo drivers operate within the transport sector, it's noteworthy that SACCAWU, known for its organisation within the retail sector, is contemplating the organisation of Pingo drivers, which may be because of the connection between Pingo drivers and the Shoprite Group.

[46] Also note the imbalance of bargaining power: RTT was represented in the CCMA by the Guardian Employers' Organisation, whereas the delivery driver represented himself.

[47] A consideration in this regard that was not interrogated is the question of jurisdiction of the National Bargaining Council for the Road Freight and Logistics Industry (NBCRFLI), and the possible application of NBCRFLI employment conditions, as the drivers are engaged in the delivery of goods, falling within the scope of bargaining council. Although, note the SACCAWU statement (footnote 45) and the retail sector 'competitor' (ASAP drivers employed by Pick'nPay). While, in the context of the retail sector, an additional consideration is the scope of Sectoral Determination 9: Wholesale and retail sector. In terms of SD 9, ' … the "wholesale and retail sector" *means the sector in which employers and employees are mainly or wholly associated for the purpose of procuring products from any supplier or manufacturer for the purpose of sale to any person, whether on a wholesale or retail basis; and, in addition, includes—*
(a) any other activities engaged in by an employer in the wholesale and retail sector including, but not limited to, merchandising, warehousing or distribution operations that are incidental to, or supportive of, the employer's enterprise.'

[2] **E-hailing drivers**, such as Uber drivers. Although the Labour Court has ruled that Uber drivers are not the employees of Uber South Africa, [48] the courts have yet to decide whether Uber drivers would be considered to be in an employment relationship with the Uber Netherlands company.[49]

[3] **Domestic services sector workers**, such as the SweepSouth 'SweepStars'. 'SweepStars' are service providers engaged by the service 'User' as an **independent contractor**, with SweepSouth as an **intermediary 'communications platform'**, providing a connection between the service provider and the service user, which allows workers to 'dictate where and when they would like to work'. [50]

SweepSouth defines itself as a 'communication platform',[51] linking workers with clients, which is a type of arrangement contemplated by **Sectoral Determination 7: Domestic Worker Sector** (**SD7**), which governs the employment of domestic workers, including domestic workers employed by employment services and domestic workers engaged as independent contractors. According to SD 7, an 'employment service' *'means any person who recruits, procures or provides domestic workers for clients in return for payment, regardless of which party pays the domestic worker.'*[52] SweepSouth recruits domestic workers via their

---

[48] *Uber South Africa Technology Services (Pty) Ltd v National Union of Public Service and Allied Workers (NUPSAW) & Ors* [2018] 4 BLLR 399 (LC).

[49] Note that in the UK, where the law recognises a category of **worker** between an employee and independent contractors (a so-called 'limb 'b' worker) who is protected by certain statutory rights, albeit not all), the Supreme Court maintained, in the landmark decision in *Uber BV and others v Aslam and others* [2021] 4 All ER 209 that Uber drivers are workers.

[50] See https://sweepsouth.com/our-mission/. [50] In the terms and Conditions on the Sweepsouth website that are otherwise in lower case, the website states the following in CAPITAL LETTERS:

'Nature of the Service

THE COMPANY … IS NOT A CLEANING, GARDENING AND GENERAL LABOUR SERVICE PROVIDER…. THE COMPANY OFFERS INFORMATION AND A METHOD TO OBTAIN SERVICES (SUCH AS CLEANING AND GARDENING), BUT DOES NOT AND DOES NOT INTEND TO PROVIDE SUCH SERVICES OR ACT IN ANY WAY AS THE SERVICE PROVIDER, AND INDIVIDUAL SERVICE PROVIDER. BY USING A SERVICE PROVIDER WHO IS OFFERING THEIR SERVICES THROUGH THE WEBSITE OR SOFTWARE, YOU AGREE AND UNDERSTAND THAT SUCH SERVICE PROVIDER IS AN INDEPENDENT CONTRACTOR. … SweepSouth is not an employment service and does not serve as an employer of any User or Service Provider. As such, SweepSouth will not be liable for any tax or withholding, including but not limited to unemployment insurance, employer's liability, social security or payroll withholding tax in connection with the use of these Services. You understand and agree that if SweepSouth is found to be liable for any tax or withholding tax in connection with these Services, then the Service Provider will immediately reimburse and pay to SweepSouth an equivalent amount, including any interest or penalties thereon.'

[51] The Terms and Conditions on the website indicate that '**SweepSouth is a Platform.** The Website and Software are a communications platform ("Platform") for enabling the connection between individuals seeking to obtain services (such as home cleaning, outdoor cleaning, childcare, caregiving, heavy lifting, office cleaning, live-in domestic, but not limited to) and/or individuals seeking to provide services (such as home cleaning, outdoor cleaning, childcare, caregiving, heavy lifting, office cleaning, live-in domestic, but not limited to). The Company checks the backgrounds of service providers via third party background check services; however, the Company does not guarantee or warrant, and makes no representations regarding, the reliability, quality or suitability of such service providers. … Neither the company nor its affiliates or licensors is responsible for the conduct, whether online or offline, of any user of the Services. The Company and its affiliates and licensors will not be liable for any claim, injury or damage arising in connection with your use of the Services.'

[52] Paragraph 29 of the SD regulates **employment services** and provides that: (1) A domestic worker whose services have been provided by an employment service is employed by that employment service for the purposes of this determination if the employment service pays the domestic worker. (2) An employment service contemplated in subclause (1) and the client are jointly and severally liable if the employment service, in respect of a domestic worker who provides services to that client, does not comply with the determination or any provision of the Basic Conditions of Employment Act.

platform for clients, and receives payment from the client and, thereafter, pays the domestic worker. As a platform, SweepSouth is involved in setting rates of pay and regulating working hours per day, and the vetting of domestic workers' service history, criminal record, and work permits of workers who are non-South African.

31. The working arrangements for workers who are not employees can be complex and 'workers are often confused about the nature of their employment relationship'.[53] Moreover, the status of workers who are engaged by the same entity may differ significantly: for example, some may be engaged in gig work on an irregular and ad hoc basis in addition to, and separately from indefinite work in an employment relationship (for example an employee who chooses to engage in gig work after their ordinary working hours as a means to 'top-up' their income).[54] While some gig-workers might choose to work '7am to 7pm' (a Sixty60 driver) for the same entity, or 'five days a week from 7am to 6pm [and then] after 6pm moonlights as an Uber driver,'[55] while still others may drive 'for a couple of the companies at different times'. Workers in such arrangements are largely excluded from employment rights and access to social protection.

(2.) Overview of regulatory powers: the Minister, D-G, NEDLAC, Bargaining & Statutory Councils

32. Existing labour and employment law provisions establish a comprehensive framework for the exercise of delegated regulatory powers in response to changes in the work of world. In this regard the functions and powers of the **Minister** and the **Director-General (DG)** are extensive and, among others, include –

LRA:	→ **s.203(2A) Code of Good Practice** issued by the Minister; ss(4) may provide that the Code *must* be taken into account in applying or interpreting *any employment law.* → **s.208 Regulations** including any matter that the Minister, after consulting NEDLAC, considers necessary to achieve the objects of the LRA → **s.95(8) Guidelines to be applied by the Registrar** (for trade unions/ employer organisations) to be published by the Minister after consultation with NEDLAC → (Also **s.44 Ministerial determinations** based on a collective agreement submitted by a statutory council)
BCEA:	→ **s.50 Variation by Minister** provides for a **Ministerial determination** (advice of the NMW Commission) in respect of any category or employees / employers[56] → Chapter 8. **Sectoral determinations,[57] s.55 (4)** terms and conditions *including for persons other than employees*

[53] Boeri, T., Giupponi, G., Krueger, A.B. and Machin, S., 2020. Solo self-employment and alternative work arrangements: A cross-country perspective on the changing composition of jobs. *Journal of Economic Perspectives*, *34*(1), p. 181. (hereafter Giupponi et al 'Solo-self employment')

[54] Giupponi et al 'Solo-self employment' *Ibid* p 181.

[55] 'Precarious lives of delivery guys'.

[56] Ministerial determinations include the small business sector; the welfare sector; and the Ministerial Determination and Code of Good Practice for Expanded Public Workers Programmes

[57] Sectoral determinations include Contract Cleaning Sector; Civil Engineering Sector; Private Security Sector; Clothing and Knitting Sector; Learnership; Private security sector; Domestic Workers; Farm Workers; Wholesale and retail sector; Children; Taxi Sector; Forestry Sector; Hospitality Sector.

	→ **s.83 Deeming of persons as employees** applicable to the whole or part of the BCEA or any other employment law (excluding the UIA) or sectoral determination; or in the context of the UIA, deeming persons as contributors for the purposes of the whole or part of the UIA → **s.86 Regulations** → **s.87 Codes of Good Practice** after consulting NEDLAC
EEA:	→ **s. 54 Codes of good practice** on the advice of the Commission for Employment Equity → **s.55 Regulations** on the advice of the CEE
OHSA:[58]	→ **s.43 Regulations** by the Minister after consultation with OHS Advisory Council, on an extensive list of matters related to the activities of persons at work *including activities of self-employed persons* (ss(1)(j))
COIDA:	→ **s. 4 Functions of D-G** include *deciding whether a person is an employee*, *employer*, mandator or contractor for purposes of the Act; and decide upon tariffs of assessment, amounts of assessments and manner of payment of assessments and related matters. → **s.83 Assessment of employer** – the DG may assess an employer/category of employers on such basis as he may deem equitable & levy a minimum assessment iro a particular category of employers (s.83 (2)) → **s.97 Regulations by the Minister** including different regulations for different classes of employers and employees
UIA:	→ **s.54 Regulations** by the Minister after consultation with UIB (procedure in s 56) → **s. 69 Persons regarded as contributors for purpose of UIA** – by Minister, after *receipt of an application in a prescribed form* = declaration of persons as contributors
UICA:	→ **s.6 Determination of contribution** by Minister of Finance in the natural annual budget (s.6(1)(b)) → **s.18 Regulations by Minister of Finance**

33. In addition to its **advisory** function, **NEDLAC** has important **regulatory powers** in terms of the LRA, including –

[58] In the context of the MHSA, [Regulations issued under s.98] & ODIMWA [Regulations issued under s. 121].

LRA:

→ **s.203 Codes of Good Practice** prepared and issued or changed or replaced by NEDLAC;[59] and in terms of ss(4), the provisions of the Code may provide that the Code *must* be taken into account in applying or interpreting *any employment law.*

→ **s.200A Presumption as to who is an employee, ss. (4)** requires NEDLAC to prepare and issue a Gode of Good Practice setting out Guidelines for determining whether persons are employees.

34. At the sectoral level, Bargaining Councils, within the context of their registered scope, have the power (**s.28 LRA Powers and functions of bargaining councils**) to extend their services and functions – which includes collective bargaining, dispute resolution, and establishing and administering schemes and funds for pension, provident, medical aid, sick pay, holiday, and unemployment, to **workers in the informal sector and home workers**.[60]

35. Similarly, a statutory council (**s.40 LRA Establishment and registration of statutory council / s.41 Establishment … in absence of agreement**) that is established for a sector and an area has powers and functions akin to those of a bargaining council, with provision for a collective agreement concluded in a statutory council to be made a **ministerial determination** (**s.44 LRA**).

(3.) Closing the gaps: strategies and pathways to labour rights and social protection

36. The gaps in protection (**implementation and enforcement gaps**; **protection/eligibility gaps**; and **organising/bargaining gaps**) reflect the concerns of self-employed workers[61] regarding –

    [1] equitable access to social protection;[62]
    [2] the prevention of bogus self-employment / disguised employment; and
    [3] access to collective bargaining rights for the purpose of collective bargaining to determine terms and conditions of employment.

37. To address these concerns, various regulatory **tools and pathways** (and combinations of these) could be pursued: the appropriate / most effective route will depend on a number on factors, feasibility, and capacity, and ultimately will be shaped by the feedback and input from government and the social partners in the law reform process.

---

[59] In accordance with this legislative mandate, NEDLAC has issued numerous codes of good practice including: who is an employee; dismissal for operational reasons; protest action to promote or defend socio-economic interests of workers; and collective bargaining, industrial action and picketing.

[60] There is, however, a lack of reliable data of bargaining council agreements establishing these kinds of schemes for workers in the informal sector and home workers.

[61] Fulton, Lionel, 'Trade unions protecting self-employed workers' ETUC (2018) also identify, as a fourth priority (in addition to the three mentioned above) for governments, is to change competition law the identifies in addition point out the need to change competition law if necessary in order to establish a framework for collective bargaining for self-employed workers.

[62] Including UIF and COIDA, and access to pension / provident fund schemes should also be considered.

38. In the sections that follow, **four pathways** (which could overlap or could be sequenced) are considered – the first is **legislative reform**, primarily focussed aligning the LRA with core ILO standards by addressing the exclusionary impact of the current definitions of an employee and a trade union. The second pathway is **revision of the NEDLAC Code of Good Practice: Who is an employee**,[63] (the '**Employee Code**') with a view to modernising the code and take account of new forms of work. Revision of the Employee Code could be implemented independently of, or could run parallel with, amendments to the LRA or other regulatory interventions (see 3.3 below). The third pathway involves the strategic use of **regulatory powers of the delegated authorities** (such as the deeming provisions), and the fourth pathway involves **direct action (referral of a dispute / strategic litigation)** by workers who are not employees, or their representatives.

3.1 Law reform to align with ILO labour standards and related constitutional rights

39. Revisions to the statutory framework in accordance with core ILO standards,[64] which seek to close the **organising/bargaining gaps** in the law, should be prioritised.[65]

40. Constraints on collective labour rights originate in the LRA s. 213 definitions.[66] Section 213 defines an '**employee**' to exclude an independent contractor, and a '**trade union**' as 'an association of employees whose principal purpose is to regulate relations between *employees* and *employers* …'. The **Genuine Trade Union Guidelines** reiterates that a trade union is an association of employees and that 'an organisation cannot be registered as a trade union unless … it is *in fact* an association of employees' (para. 6). Moreover, the Guidelines provide that 'a trade union must recruit as members employees who are in employment' (para. 12).[67] The definition of an employee is narrowly interpreted, and the Guidelines are restrictive, contrary to the provisions of Convention 87 and s. 23 of the Constitution. [68]

---

[63] At the same time reflecting on the Genuine Trade Union Guidelines issued by the Minister in terms of **LRA s.95(8)**, which may require revision, depending on any amendments of the LRA definitions.

[64] Convention 87 (**Freedom of Association and Protection of the Right to Organise Convention**) applies to 'workers and employers, without distinction whatsoever' (Article 2), and as the Employee Code (para 66.) points out, 'the Freedom of Association Committee has held that the criteria for determining whether persons are covered by Convention 87 is not based on the existence of an employment relationship and self-employed workers in general should enjoy the right to organize.'

[65] It should be noted that proposed amendments are under consideration in Phase 1 of the law reform processes and developments in this regard may lead to revision of the definition of an employee, which will inform the shape and direction of further revision to the regulatory framework for organising and collective bargaining and individual labour protections more broadly. Importantly, revisions to the LRA framework must align labour law and practice with the Bill of Rights (s.23 (2)) provision that 'Every worker' has the right – (a) to form and join a trade union; (b) to participate in the activities of a trade union; and (c) to strike.

[66] The current regulatory framework is grounded in the provisions of the LRA, which is interpreted taking into account relevant Codes of Good Practice, including the Collective Bargaining, Industrial Action, and Picketing (the '**Collective Bargaining Code'**) issued by NEDLAC in terms of s.203(1) of the LRA; as well as the Guidelines to determine whether a trade union or employers' organisation is genuine for the purposes of registration (the '**Genuine Trade Union Guidelines'**) issued, at the same time, by the Minister of Labour, in consultation with NEDLAC, in terms of s.95(8) of the LRA.

[67] As the regulatory framework evolves, care should be taken to ensure a shared understanding of 'employee', 'employer', and 'employment'.

[68] The Constitutional Court in *National Union of Metalworkers of SA v Bader Bop (Pty) Ltd & Another* (2003) 24 ILJ 305 (CC) has pointed out that section 3 of the LRA requires the Act to be interpreted to give effect to its object and to

41. On the requirements of international law, the ILOs Freedom of Association Committee (CAS) has affirmed that: 'The criterion for determining the persons covered by the right to organize is not based on the existence of an employment relationship. Workers who do not have employment contracts should have the right to form the organizations of their choosing if they so wish.'[69] Likewise, the CAS has maintained that 'it is contrary to Convention No. 87 to prevent trade unions of self-employed workers who are not subordinate to, or dependent on, a person.'[70]

42. The ILO treats the principle of freedom of association in a purposive manner as 'a means of improving conditions of labour and of establishing peace'.[71] To this end Convention 98 goes on to provide that: 'Measures appropriate to national conditions shall be taken, where necessary, to encourage and promote the full development and utilisation of machinery for voluntary negotiation between employers or employers' organisations and workers' organisations, with a view to the regulation of terms and conditions of employment by means of collective agreements' (emphasis added).[72] However, the 'machinery' for collective bargaining in South Africa, which is premised on the institutions developed by employers and workers in large-scale industry and mining from the late 19th century onwards, limits participation to trade unions whose membership is strictly confined to employees. At workplace level, too, organisational rights are recognised on this basis.[73] Equally problematic in an increasingly **digitalised working environment** (characterised by platform work and remote work), is the LRA's notion of the '**workplace**' as being the employer's place of operations.[74] For workers contracted to a platform with no physical existence other than a registered office or head office that may be located in a different city or country these rights are largely meaningless. [75]

43. Considerations for broadening access to trade union membership, and the shape of instruments for the exercise of related collective labour rights,[76] include the varying conditions of different sectors, but an

---

comply with the Constitution and South Africa's public international law obligations as stipulated in section 39 of the Constitution. This was recently reiterated in the Labour Court in *Simunye Workers Forum v Registrar of Labour Relations* [2023] JOL 59729 (LC) para [27] – [28] to the effect that the relevant provisions must be interpreted and applied to give effect to ILO standards, and in a manner that 'promotes the spirit, purport and objects of the Bill of rights', and in which freedom of association is 'interpreted generously'. However, the content and 'letter of the law' can prevent a more purposive interpretation in compliance with international law obligations.

[69] Freedom of Association. Compilation of decisions of the Committee on Freedom of Association / International Labour Office – Geneva: ILO, 6th edition, 2018 at paragraph 330.

[70] *Ibid* at paragraph 389.

[71] Preamble, Convention 87.

[72] Art 4, **Convention on the Right to Organise and Collective Bargaining Convention**, 1949 (Convention 98).

[73] In this regard, the right to elect trade union representatives (shop stewards) or to access information is limited to trade unions that have majority membership in the workplace; and the right of access by union officials, and to deduction of union dues by stop order or leave for union officials or representatives for union activities, are available only to trade unions that are 'sufficiently representative' in the workplace.

[74] The notion of a **workplace**, and the presence of a **sufficiently representative trade union(s)** in the workplace are central to the current regulatory framework to enable workplace and central collective bargaining.

[75] Collective rights, too, are tied to workplaces to a significant extent. For example, the right to make collective agreements at workplace level binding on non-union members (LRA s. 23) or the right to picket (LRA, s. 69).

[76] Which could be achieved through different routes: by way of example, the Minister, on the advice of the National Minimum Wage Commission (NMWC) may deem persons as employees in line with s. 83 of the BCEA. The provision permits the Minister (after consulting the NMWC) to **deem persons specified in the notice to be employees for the purposes of the whole or any part** of the BCEA or any other employment law (e.g. LRA) other than the UIA or any sectoral determination. Hence, trade union organising and bargaining rights could be extended to particular persons

obvious starting point would be to revisit the statutory definitions of an **employee** and (or) **trade union**.[77] In this regard, there are a number of regulatory options. For example, amendments to the definitions could be at a generalised level and apply to the LRA as a whole;[78] or an amendment could be more specific and targeted at broadening access to collective rights (freedom of association, collective bargaining and industrial action); or a combination of both.

44. Key considerations with regard to the LRA definition of an employee are –

    [1] the concept of '**worker**' as conceptualised in ILO standards, in the Constitution and the NMWA; and
    [2] the meaning of '**independent contractor**',[79] and the methodology[80] to determine whether a person is an independent contractor, particularly in the context of an increasingly digitalised world of work. Simultaneously, the meaning of '**employer**'[81] (including LRA 200B) and '**employment**' should also be considered.
    [Additional regulatory options include revisions to the Employee Code, and the use of deeming provisions or determinations (see 3.2. and 3.3 below), which could complement amendments to employment law, and may be useful for responding to the varying conditions of different sectors.]

45. In the context of platform work, [82] consideration should be given to the introduction of definitions (which could either be in primary legislation or in instruments issued by the delegated authority) that clarify the

---

under this provision without necessarily extending all other rights accorded to employees under the LRA. A further option is for the Minister, in consultation with NEDLAC, to revise the **Genuine Trade Union Guidelines** (which could be reinforced by an updated **Code of Good Practice: Who is an Employee**), which could for example clarify that for the purposes of the guidelines an 'association of *employees*' includes an individual who works, or who normally works or who seek to work, for another, and who perform the work or services personally**,** and could indicate the threshold for exclusion (for example a person who genuinely operates an independent business and is not in a position of subordination or economic dependence in relation to the contracting party). Litigation provides an alternative avenue, but is perhaps the least satisfactory, as the courts are constrained by the facts of a particular case, and, even if 'purposive' in their approach, the 'letter' of the law can be an obstacle.

[77] Which should take into account related LRA provisions (eg s. (4), and the scope of related constitutional rights (s. (23)(2); and s. 18 (freedom of association); as well as Article 2 of Convention 87, which as mentioned, provides that 'workers and employers, without distinction whatsoever, shall have the right to establish and, subject only to the rules of the organisation concerned, to join organisations of their own choosing without previous authorisation.'

[78] Similar considerations will apply across the suite of statutes considered to be 'employment law'.

[79] At the same time, consideration should be given to the meaning of, and rights of, a **dependent contractor**.

[80] A recent development to consider which clarifies whether a worker is an independent contractor is the 'ABC' Test elaborated in the State of California, Assembly Bill No. 5. Chapter 296. The ABC Test creates a presumption that 'a worker who performs services for a hirer is an employee' (for defined purposes, including unemployment benefits) rather than an independent contractor unless 'the hiring entity demonstrates that the person is free from the control and direction of the hiring entity in connection with the performance of the work, the person performs work that is outside the usual course of the hiring entity's business, and the person is customarily engaged in an independently established trade, occupation, or business.' Moreover, consideration should be given (either to the definition of an employee or in the presumptions) to contractual arrangements where the person provides services to customers of the hiring entity, and the hiring entity sets the applicable rates for the services. The ABC test shifts the emphasis away from control and has been described as a 'game changer'.

[81] Including clarifying employment via a digital platform, and the context for more than one employer.

[82] The Portfolio Committee on Employment and Labour Budgetary Review and Recommendation Report (BRRR) of the Portfolio Committee on Employment and Labour, 25 October 2022 reports on the DoEL's plans to review existing legislation, in relation to new platform workers.

use of **digital labour platforms** and the status of platform workers. [83] The would provide certainty and avoid outcomes such as that in *Athur / RTT Group (Pty) Ltd* (note 44).

46. Law reform should prioritise amendments to the legal framework that protects the collective labour rights of self-employed workers. The framework for collective bargaining should be enabling and inclusive in its scope, and in this regard, collective bargaining rights should not be limited to workers in an employment relationship, and the rights of platform workers and independent contractors should be clarified.[84]

47. In the context of the definition of an employee, the related instruments and mechanisms for determining who is an employee – which includes the presumption (LRA s.200A) and the Code of Good Practice who is an employee (**Employee Code**) issued by NEDLAC in 2006 – should also be revisited.[85]

3.2 Revisiting the NEDLAC Code of Good Practice who is an employee

48. Modernising and updating the Employee Code (regardless of whether or not the definition of an employee is amended) is desirable in response to changes in working practices and new forms of work that have emerged in the 18 years since it was published, particularly forms of work mediated via **digital apps**, such as platform or online work (referred to below as '**digitalised work'**).

49. A central feature of digitalised work is that workers are almost always classified as independent contractors and thus excluded from the reach of the LRA, the BCEA and most other employment laws. Yet, despite the forms of their contracts, these workers often perform the same work that employees would have done in their place. It thus represents a further stage in the **externalisation of employment**, and the proliferation of 'disguised employment' and non-standard work which the Code set out to address.

50. While disguised employment is not new, digitalisation has introduced further complexities which the Code could not have anticipated; for example, algorithmic controls determining and monitoring the work done by workers and the networking of management functions over different corporate entities, often in

---

[83] For example, the Employment Services Amendment Bill (Government Gazette No. 45962, 28 February 2022), in clause 1, has the following definitions: '**digital labour platform**' means an electronic entity that enables the provision of work or services by a person to any other person in the Republic'; an '**employer**' means any person who remunerates, or is liable to remunerate, an employee or a worker'; '**employment**' means employment as an employee or as a worker;' and '**worker**' means any person who works for another and who receives, or is entitled to receive, any payment for that work, whether in money or in kind'. Clause 3 of the Amendment Bill provides that: '… a digital labour platform is an employer and any person who provides work or services in the Republic to another person by means of a digital labour platform is a worker if – (a) the payment for, or terms and conditions of, such work or services are determined by (sic) digital labour platform; and (b) the digital labour platform remunerates the worker.'

[84] Due consideration should be given to developments regarding platform work at the ILO (and the EU). As mentioned in the Scoping Paper, standard-setting for decent work in the platform economy is on the agenda of the International Labour Conference in June 2025, and issues being considered include management by algorithm and preventing discriminatory bias in the use of algorithms in the context of platform work; practical difficulties with inspection in the context of platform work; whether / in which circumstances should platforms be regarded as private employment agencies; termination and discipline of self-employed workers; minimum wages; hours of work; health and safety and social security in the context of self-employed persons.

[85] Issues of non-compliance, implementation and enforcement gaps are exacerbated, not because of gaps in the legislation, but because of the complexities in determining an employment relationship, and in this regard, care should be taken to ensure that the applicable principles – and how to apply the principles and the factors to consider - are explained, with flow diagrams adapted for the appropriate context, in relevant codes, guidelines, information sheets and other materials that are widely distributed and accessible.

different jurisdictions. The disadvantages experienced by workers under these conditions, combined with the continuing prevalence of disguised employment in more traditional forms, are inconsistent with the right to fair labour practices which the Constitution promises to 'everyone'. As Froneman J points out in *Pretorius and Another v Transport Pension Fund and Another* (see footnote 31 above), 'fewer and fewer people are in formal employment; fewer of those in formal employment have union backing and protection. More and more people find themselves in the "twilight zone" of employment as supposed "independent contractors" in time-based employment subject to faceless multinational companies who may operate from a web presence.' These developments make it essential to revisit **the criteria in the dominant impression test**[86] for identifying employment relationships, and to align the test with current working practices with a view to **curtailing the scope for disguised employment**. Updating the guidelines in the Code (see the marked-up proposals in Annexure A) is an appropriate means of doing so for two reasons.

[1] In the first place the Code, in common with other Codes of Good Practice, has considerable authority among judges and arbitrators and its guidelines are generally applied. Updating the guidelines could help to ensure outcomes more consistently in line with section 23(1) of the Constitution in disputes where a worker's employment status or the jurisdiction of the tribunal is at issue. The result may be to extend protection to disguised employees whose conditions of employment could not have been anticipated by the existing criteria. But, in the longer term, it may also reduce litigation concerning employment status by establishing criteria for identifying disguised employment that would be applied from the outset, also by the CCMA and bargaining councils. This would, in turn, provide clearer parameters for the scope for independent contracting relationships which employers would be encouraged to take account of, and which will also provide clarity for workers and their representatives, and for the labour inspectorate, etc.

[2] Secondly, updating the Code is a relatively simple procedure which does not require any statutory amendments. As mentioned (in Annexure A) in the proposed revisions to the Code in paragraphs 18(c), 25 and 47, the suggested updates of the criteria fall within the parameters of paragraph (b) of the definition of 'employee' in the LRA, BCEA and EEA and serve to clarify the meaning of the phrase 'assists in carrying on or conducting the business of an employer'. However, amendments to the definition of an employee, may, depending on the direction of the developments, impact on the proposed amendments to the Employee Code, and to this extent, Annexure A is intended as a 'starting point' and to provide guidance on the direction of developments.

51. A further point to note is the issue of **dependent contractors**, which has received much attention internationally alongside **disguised employment**. **Dependent contractors** (see Part A above for the ILO 2018 Resolution) are categorised as independent contractors but who are, in reality, largely (economically) dependent on a single work-provider or a small number of work-providers. Although

[86] The dominant impression test is the accepted basis for distinguishing an employee from an independent contractor (see paragraphs 28 and 29 of the Code). The distinction between an employee and an independent contractor may not be absolute in every respect and, as noted in the Code, various aspects of a relationship may be consistent with either employment or independent service provision. No single factor is decisive and it is necessary to weigh up the factors in order to arrive at a conclusion. This involves distinguishing factors that are neutral (i.e., equally consistent with employment or independent contracting) from those pointing predominantly towards one or the other. Since these are findings of fact, they should be based on an objective assessment of all the relevant evidence, including scrutiny of the content and terms of the contract to identify whether they are genuine or if they serve to disguise the nature of the relationship; for example, a clause that states that the worker has the right to work for others when in practice the nature of the work makes it impossible to do so.

dependent contractors and workers in disguised employment share similarities, dependent contractors have a degree of control and autonomy in respect of their working arrangements which workers in disguised employment do not. Extending protection to dependent contractors is an important consideration is an important consideration in terms of law reform, but is not are not fully canvassed in the Employee Code, which is bound to the definition of an employee and concerned with **disguised employment** (ie. the test for distinguishing between workers who are, in reality, **employees** in an employment relationship regardless of their contractual description and those who carry on operations that are genuinely independent of the alleged employer). As the law reform process unfolds, care should be taken not to conflate the concepts of disguised employment and dependent contracting.

52. The Employee Code consists of 6 Parts,[87] and (see Annexure A), we suggest revisions to the Code that update the context and content of the Code, specifically in relation to the **factors in the presumption**[88] (Part 2 of the Code), and the **dominant impression test** and **criteria** for differentiating between an employee and an independent contractor (Part 3 of the Code). The proposed changes clarify the **control**[89] element of the dominant impression test, while emphasizing the additional characteristics of whether or not the workers forms an **integral part**[90] of the employer's organization, and the question of **economic dependence** on the employer, (the three criteria in *State Information Technology Agency (SITA) (Pty) Ltd v CCMA & others*),[91] and add the latter two to the table of factors to be considered in the application of the dominant impression test.

53. The marked-up changes take account of emerging forms of work, but are not confined to digitalised work and could be applied equally in identifying disguised employment in more traditional forms of enterprise.

---

[87] Part 1 – Application; Part 2 – The presumption as to who is an employee; Part 3 – Interpreting the definition of an employee; Part 4 – Employees of temporary employment services; Part 5 – Interpretation of Labour Legislation; Part 6 – Interpretation of the definition of an employee in other legislation administered by the Minister of Labour.

[88] In particular, the elements of **control** and **integration**, and whether the employer provides the **tools of the trade**. Regarding the latter, the proposed revisions take account of developments in the platform economy, where there is often no physical workplace and workers provide their own tools or resources, while performing services offered by the platform under its own brand and on its own terms and conditions. For example, drivers offering passenger transport services under the brand of platforms such as Uber provide their own vehicles (which may be leased from a fleet owner). Similarly, food and other delivery drivers operate under the umbrella of a platform as well as workers doing online work from their homes using their own computers and internet connectivity. While this may seem to suggest that such workers are independent contractors, it does not necessarily follow. No single factor is decisive in terms of the dominant impression test. Where the other factors referred to in the Code are predominantly indicative of an employment relationship, the mere fact that workers are required to provide their own tools or equipment cannot in itself prove the opposite. It may mean however that workers are obliged to bear part of the capital investment and running costs of the business, which the employer would traditionally have borne, and other factors – for example, control by the platform over the price and nature of the service – may well outweigh it.

[89] **Control** by the employer, in the form of the right to direct or instruct the employee *how* to perform work, has often been treated as the most decisive criterion of employment, which is consistent with the distinction between the **subordination** of the employee in the performance of services and the **independence** of the independent contractor. However, the degree of control that is exercised in practice may vary substantially. Moreover, control is not limited to the physical performance of work (how it is done) but may include the nature and organisation of the work (what precisely it consists of and the terms on which it is done). In the provision of transport services, for example, control may include deciding how to advertise the service, which vehicles must be used, which routes they may follow, terms of engagement with customers and what rates customers are charged. An independent contractor would have greater scope decide these issues independently and to accept or reject any suggestions by the 'employer'.

[90] The '**organisation**' or '**integration**' test is particularly effective for identifying a disguised employment relationship in the context of digitalised and non-standard work. This approach is summarised in paragraphs 18(c) and 25 of the updated Code.

[91] [2008] 7 BLLR 611 (LAC) at para 13.

3.3 Strategic use of regulatory powers by the delegated authorities

54. The delegated authorities in employment law have broad powers to intervene in the labour market to achieved the objects of labour law. Overarching powers in s. 83 BCEA give the Minister (after consulting the NMWC) powers to **deem persons specified in the notice to be employees for the purposes of the whole or any part** of the BCEA or any other employment law,[92] other than the UIA (here, the Minister has power to deem any category of persons as contributors for the purpose of the UIA),[93] or for the purposes of any sectoral determination. For example, trade union organising and bargaining rights (and other employment law rights) could be extended to categories of self-employed workers under this provision without necessarily extending all other rights accorded to employees under the LRA. Sectoral determinations could also be amended to include independent contractors / self-employed workers engaged by employers (as is the case in the in the SD for Domestic Workers). The provisions – in any applicable employment law - could differentiate between the different rights which apply to different categories of workers. Moreover, albeit limited to basic conditions provided for in the BCEA, and limited by the provisions in s. 50 BCEA, the Minister may 'make a determination to replace or exclude any basic condition of employment' provided it is consistent with the purpose of the BCEA, in respect of any category of employees or category of employers.'

55. In the context of workers compensation, COIDA imposes obligations on an employer to register with the commissioner and to pay any assessments due in accordance with the provisions of the Act in respect of employees who work 'under a contract of service or of apprenticeship or learnership'. An independent contractor / self-employed person[94] who is also an employer would be obliged to register and comply with the COIDA regulatory framework for workers compensation,[95] however, **the same obligation does not apply to a self-employed worker / independent contractor** who is 'solo' self-employed.[96] While required to register for tax purposes,[97] there is currently no provision for an unincorporated business operated by a 'solo' self-employed person (or in a partnership without employees) to register under COIDA; although arguably it could be possible as a sole trader. Mechanisms to extend cover could be considered in terms of s. 83 of the BCEA (for example to extend cover to categories of self-employed

[92] For the purposes of the BCEA, **'employment law' '**includes this Act, any other Act the administration of which has been assigned to the Minister, and any of the following Acts: (a) Unemployment Insurance Act, 2001; (b) the Skills Development Act, 1998; (c) the Employment Equity Act, 1998; (d) the Occupational Health and Safety Act, 1993; (e) the Compensation for Occupational Injuries and Diseases Act, 1993

[93] UIA **s. 69 Persons regarded as contributors for purpose of UIA**: the Minister, after receipt of an application in a prescribed form may declare any person as a contributor for the purposes of the Unemployment Insurance Act.

[94] Self-employment refers to 'individuals who are sole owners [sole proprietors / sole traders], or joint owners [partners], of the unincorporated enterprises in which they work'. Boeri, T., Giupponi, G., Krueger, A.B. and Machin, S., 2020. Solo self-employment and alternative work arrangements: A cross-country perspective on the changing composition of jobs. *Journal of Economic Perspectives*, *34*(1), pp.170-195.

[95] For example, a self-employed medical practitioner who operates as a sole proprietor or in a partnership and who employ a receptionist and a bookkeeper.

[96] For example, an 'Uber' driver (and gig workers more generally who tend to be 'solo' self-employed), or a self-employed auto-mechanic or plumber without employees.

[97] Registration for tax purposes could be explored as to route to accessing social insurance schemes. The tax liability threshold for persons younger than 65 years for 2023 is R91 250, which equates to a monthly income of approximately R7,600. Registration for tax requires a trading name, which could be used to provide a mechanism for UIF / COIDA registration if an SE worker is registered for tax (ie. voluntary registration could be facilitated via regulations / directions that clarify the rights of self-employed workers).

workers, particularly where a hiring entity (eg. Uber, Pingo, SweepSouth) can be identified). In terms of modalities, the mechanisms put in place for domestic workers could be considered.

56. Self-employment is recognized as an object of the Skills Development Act;[98] and considerations to broaden access to social protection is underway,[99] with a view to including self-employed workers in social insurance schemes.[100] The BCEA s. 83 mechanisms could also be explored as a route to protection of labour rights. Notably, in the EU, space is being carved out (in competition law) for the protection of the collective labour rights of self-employed workers, which may be a relevant consideration in parallel with a broadening of access to collective labour rights.

3.4 Direct action by self-employed workers (and/or their organisations)

57. A 'direct action' pathway envisages enforcement of rights by workers who are **misclassified as independent contractors** (ie. in **disguised employment**),[101] who take **direct action** using existing legislation to secure access to employment and social protection through the labour inspectorate or by obtaining a ruling on their status as an employee. Depending on the earnings received by the worker(s): workers who earn below the BCEA earnings threshold could directly approach the **CCMA** for an **advisory award** 'on whether the persons involved in the [work] arrangements are *employees'* (**LRA s200A(3)**);[102] alternatively, workers who earn above the threshold, could bring a dispute - depending on the circumstances – that would require a ruling on their status as employees: for example as an unfair labour practice dispute (or, as the Uber drivers did, an unfair dismissal dispute) or a dispute related to unfair discrimination in an employment policy or practice based on their contractual status. Workers seeking to register a trade union could also do so under s.96 of the LRA and, if their application is refused, appeal the registrar's decision in the Labour Court.

58. Moreover, in terms of **s.157 Jurisdiction of the Labour Court**, the Labour Court has jurisdiction 'in respect of any alleged or threatened violation of any fundamental right entrenched in Chapter 2 of the Constitution … and arising from – (*c*) the application of any law for the administration of which the Minister is responsible'. For example, organisations that organise self-employed workers, such as platform workers or freelancers or musicians and other music industry workers,[103] could challenge the constitutionality (based on provisions/impact of current regulatory framework in terms of which they are precluded from exercising the right to organise as workers in terms of the LRA).

---

[98] Ie. **to promote self-employment** (**SDA, s.2(*a*)(iii)**).
[99] See footnote 34.
[100] In this regard Article 9 of the ICESCR has been interpreted to imply that 'part-time workers, casual workers, seasonal workers, and the self-employed, and those working in atypical forms of work in the informal economy' should be covered. See General Comment No 19 para 16, read with paras 33 and 34. Olivier, Marius P., and Avinash Govindjee. 'A critique of the Unemployment Insurance amendment Bill, 2015.' *Potchefstroom Electronic Law Journal* 18.7 (2015): 2739-2776.
[101] Disguised employment is used to reduce taxes, social security contributions and to exclude workers' rights for the parties contractual relationship.
[102] For example, workers who are 'SweepStars' could seek an advisory award regarding their employment status in relation to SweepSouth.
[103] See for example https://tumsa.org/.

A TENTATIVE SCHEDULE AND WAY FORWARD

59. The way forward and a more concrete roadmap and timelines for interventions will depend on several relevant factors including –

- progress on law reform (phase 1) initiatives being considered by the Labour Reform Task Team;
- the feasibility of interventions and whether or not there is consensus on the way forward;
- priorities and 'appetite'; and
- the practical logistics, cost and ease of implementation.

60. The most urgent intervention that we propose is concerned with the need to align the LRA framework and current practices with ILO core conventions in relation to organising and collective bargaining. This would address deficits in the legal framework related to the **protection/eligibility** and **organising/bargaining gaps**. It is possible that the problem could be resolved (or partially resolved) in the phase 1 law reform processes. However, in addition to law reform (or, perhaps in the absence of law reform or as an alternative that partially addresses the problem) revision of the **Genuine Trade Union Guidelines** issued by the Minister (in consultation with NEDLAC) in terms of s.95(8) should be an urgent consideration.

61. A '**quick win**' (in our view) relates to revision / updating / modernising the Code of Good Practice: Who is an Employee? to take account of developments in the world of work since the issuing of the Code in 2006. Some of the 'heavy lifting' in terms of addressing the problem of **disguised employment**, and aspects of **dependent contracting**, and specifically in the context of new forms of work (**platform work**) could be achieved by clarifying and elaborating the elements of the criteria[104] to be considered when determining the status of a worker. (See Annexure A in this regard).

62. The strategic use of statutory delegated authority (such as s. 83 of the BCEA) to achieve the objects of labour law should also be considered. Interventions in this regard could be particularly effective in specific contexts where there are categories of workers that can be identified and narrowed to known sector/industry practices where there are gaps in protection and which can be (practically) addressed by designing a regulatory instrument with features that target specific gaps (**protection/eligibility gaps**), which should prioritise equitable access to social protection, and in relation to organising and collective bargaining.

63. Sequencing and a roadmap – an action plan – for the way forward should be developed in discussion with the social partners, taking into account the factors that have been indicated, and with due regard to the interests of all stakeholders.

[104] The three criteria in *State Information Technology Agency (SITA) (Pty) Ltd v CCMA & others* [2008] 7 BLLR 611 (LAC) at para 13, within the context of the dominant impression test.

ANNEXURE A: PROPOSED REVISIONS TO THE CODE OF GOOD PRACTICE: WHO IS AN EMPLOYEE?

CODE OF GOOD PRACTICE: WHO IS AN EMPLOYEE?

PART 1

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

2. This Code sets out guidelines for determining whether persons are employees. Its purpose is – [indicate the rationale to modernise and take account of new forms of work]

   (a) to promote clarity and certainty as to who is an employee for the purposes of the Labour Relations Act and other labour legislation;
   (b) to set out the interpretive principles contained in the Constitution, labour legislation and binding international standards that apply to the interpretation of labour legislation, including the determination of who is an employee;
   (c) to ensure that a proper distinction is maintained between employment relationships which are regulated by labour legislation and independent contracting;
   (d) to ensure that employees - who are in an unequal bargaining position in relation to their employer - are protected through labour law and are not deprived of these protections by contracting arrangements;
   (e) to assist persons applying and interpreting labour law to understand and interpret the variety of employment relationships present in the labour market including disguised employment, ambiguous employment relationships, atypical (or non-standard) employment and triangular employment relationships .

Application

3. In terms of section 203{3) and (4) of the LRA, any person interpreting or applying one of the following Acts must take this Code into account for the purpose of determining whether a particular person is an employee in terms of-
   (a) Labour Relations Act 66 of 1995 (LRA);
   (b) Basic Conditions of Employment Act 75 of 1997 (BCEA);
   (c) Employment Equity Act 55 of 1998 (EEA); or
   (d) Skills Development Act 97 of 1998 (SDA).

4. The Code should also be taken into account in determining whether persons are employees in terms of the Occupational Health and Safety Act 85 of 1993, the Compensation for Occupational

Injuries and Diseases Act 130 of 1993 and the Unemployment Insurance Act 63 of 2001. In applying these Acts, it must be borne in mind that the definitions of an employee in those statutes differ from that contained in the LRA. However, there are sufficient similarities for the Code to be of considerable assistance in determining who is covered by these statutes. These statutes are discussed further in Part 6 of the Code.

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

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

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

8. Part 4 of the Code deals with determining the employment status of persons employed by temporary employment services. [consider clarifying the status of digital labour platforms]

9. Part 5 of the Code deals with the principles of interpretation that are applicable to interpreting the statutory presumptions of employment and the statutory definitions of an employee. [clarify the principles of interpretation; and applying specific provisions 'in circumstances that were not present to the minds of those involved in their preparation' and to inform departure from plain meaning of language]

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

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

cases cited together with their references is attached to the Code).

PART2
THE PRESUMPTION AS TO WHO IS AN EMPLOYEE

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

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

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

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

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

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

[1] With effect from 20 February 2023, the threshold amount is R241,110.59 (GNR 3067 GG 48092 of 20 February 2023). For the purpose of determining whether an employee falls within threshold, an employee's earnings are calculated as gross pay before deductions (i.e. income tax, pension, medical aid contributions and similar payments), but excluding contributions made by the employer in respect of the employee.

the applicant.

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

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

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

The factor of control or direction will generally be present if the applicant is required to obey the lawful and reasonable commands, orders or instructions of the employer or the employer's personnel (for example, managers or supervisors) as to the manner in which they are to work. It is present in a relationship in which a person supplies only labour and the other party directs the manner in which he or she works. In contrast, control and direction are not present if a person is hired to perform a particular task or produce a particular product and is entitled to determine the manner in which the task is to be performed or the product produced. As discussed in paragraphs 41-43 below, the dividing line is not absolute: employees may work independently to a greater or lesser degree, and independent contractors may be subject to a degree of control as to the performance of their contracts. However, the extent of the employer's control is significant. It is also ~~an~~ indicative ~~on~~ of an employment relationship ~~that~~ if the "employer" retains control over the organisation of the work; for example, the right to choose which tools, staff, raw materials, routines, branding, patents or technology are used as well as the price that customers must pay for products or services delivered by the persons in question. Likewise, the fact that an employer is entitled to take disciplinary action against the person as a result of the manner in which the person works is a strong indication of an employment relationship.

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

This factor will be present if the person's hours of work are a term of the contract and the contract permits the employer or person providing the work to determine at what times work is to be performed. However, the fact that the contract does not determine the exact times of commencing and ending work does not entail that it is not a contract of employment. Sufficient

control or direction may be present if the contract between the parties determines the total number of hours that the person is required to work within a specified period. Flexible working time arrangements are not incompatible with an employment relationship.

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

This factor may apply in respect *of* any employer that constitutes a corporate entity. It does not apply to individuals employing, for instance, domestic workers. The factor will be present if the applicant's services form an integrated part of the employer's organisation or operations. Indicators of such integration are that the services performed by the applicant form part of the core business of the organisation, that the organisation derives revenue from the services performed by the applicant or that the applicant is delivering a brand marketed by the organisation. Such an approach is consistent with paragraph (b) of the definition of "employee", as discussed in paragraphs 21 and 25 below.

A person who works for or supplies services to an employer as part of conducting their own business does not form part of the employer's organisation. Factors indicating that a person operates their own business are that they bear risks such as bad workmanship, poor performance, price hikes and time over-runs. Similarly, a person offering a service on behalf of an own business will determine its nature and price. In the case of employment, an employer will typically bear these types of risks and take such decisions.

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

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

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

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

generally free to build a multiple concurrent client base while an employee is bound to a more exclusive relationship with the employer.

An exception to this is the position of part-time employees. The fact that a part-time employee is able to work for another employer in the periods in which he or she is not working does not affect his or her status as an employee. Likewise, the fact that a full-time employee may be able to take on other employment that does not conflict with the interests of their employer in their spare time is not an indication of self-employment.[2]

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

This provision applies regardless of whether the tools or equipment are supplied free of cost or their cost is deducted from the applicant's earnings or the applicant is required to re-pay the cost. The term "tools of trade" is not limited to tools in the narrow sense and includes items required for work such as books or computer equipment. However, it does not exclude persons who are required to provide their own tools or means to perform the work (for example, delivery drivers or riders) from being employees if other factors indicate that this is their true status.

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

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

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

20. In cases in which the presumption is not applicable, because the person earns above the threshold amount, 1he factors listed in the presumption (and discussed above) may be used as a guide for the purpose of determining whether a person is in reality in an employment relationship

[2] See, e.g., *Peter v Commission for Conciliation Mediation and Arbitration and Others* (JR 798/12) [2013] ZALCJHB 265 (10 July 2013).

or is self-employed.[3]

PART 3
INTERPRETING THE DEFINITION OF AN EMPLOYEE

21. The LRA defines an employee as -

"(a) any person, excluding an independent contractor, who works for another person or for the State and who receives, or is entitled to receive, any remuneration; and

(b) any other person who in any manner assists in carrying on or conducting the business of an employer,

and 'employed' and 'employment' have meanings corresponding to that of 'employee'".[4]

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

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

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

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

24. Sub-paragraph (b) contemplates that other categories of persons who **assist** in carrying on or conducting businesses also fall within the statutory definition of an 'employee'. Sub-paragraph (b)

---

[3] *Denel (Pty) Ltd v Gerber* at para 201.
[4] This definition is also found in the BCEA, the EEA and the SDA.

has the consequence that persons who are not engaged in terms of a contract of employment may nevertheless be statutory employees. The courts have not yet delineated the precise ambit of persons who should be classified as employees because they fall within the terms of sub-paragraph (b).

25. The courts have made it clear in a number of decisions that sub-paragraph (b) does not include persons who work for another as an independent contractor. In 1970 the then Appellate Division,[5] interpreted~~ed~~ing wording similar to that contained in sub-paragraph (b), ~~and concluded that it did not include persons who work for another as an independent contractor~~ concluded that it did not include persons who work for another as an independent contractor.[6] In the same way, the Labour Appeal Court stated in 1993, the distinction can be drawn between 'working for' a person and 'doing work for' a person.[7] On this basis the "true test" of whether a person (B) is an employee or not is "whether B is about A's business or about his own".[8] Independent contractors thus do not assist in carrying on or conducting the business of an employer by rendering their services on an ongoing basis.

26. While the courts have not delineated the precise categories of employees who will be covered, it has been held that this part of the definition contemplates the assistance that a person may render to a person other than their employer.[9] A category of persons who clearly fall within the terms of sub-paragraph (b) are unpaid workers who work for an employer.

When does a person become an employee?

27. The definition of an "employee" includes a person who has concluded a contract of employment to commence work at a future date. Accordingly, it is not a requirement that the person has commenced work in order to be classified as an employee in terms of labour legislation.[10]

Distinguishing between an employee and an independent contractor

28. When deciding whether a person is an employee rather than an independent contractor, the courts follow an approach usually referred to as the "dominant impression" test.[11] In terms of this

---

[5] Now the Supreme Court of Appeal.
[6] *Dental Technicians Association of SA Ltd v Dental Association of SA Ltd & others* at 741 A.
[7] *Borcherds v C W Pearce & J Sheward t/a Lubrite Distributors* (1993) 14 *ILJ* 1262 (LAC) at 1276.
[8] *R v AMCA Services Ltd and another* 1959 (4) SA 207 (A) at 213H.
[9] *Liberty Life Association of Africa Ltd v Niselow* at 683 A-D (ILJ); 833 C-G (BLLR).
[10] *Wyeth SA (Pty) Ltd & others v Mangele* at paras 50-52.
[11] This test was first adopted by the Appellate Division in *Ongevallekommissaris v Onderlinge Versekerings Genootskap (AVBOB)* 1976 (4) SA 446 (A).and has been applied by the Labour Appeal Court in cases such as *SA Broadcasting Corporation v McKenzie, State Information Technology Agency (SITA) (Pty) Ltd v CCMA* and

approach, it is necessary to evaluate all aspects of the contract and the relationship and then make a classification based on the "dominant impression" formed in that evaluation. Accordingly, there is no single factor that decisively indicates the presence or absence of an employment relationship. In this regard, the approach differs from that used when applying the presumption as the presumption comes into play if one of the listed criteria is present. That there is no single decisive criterion that determines the presence or absence of an employment relationship does not mean that all factors should be given the same weighting.

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

30. However, the contractual relationship may not always reflect the true relationship between the parties. In these cases, the court must have regard to the realities of that relationship, irrespective of how the parties have chosen to describe their relationship in the contract.[12] Adjudicators should look beyond the form of the contract to ascertain whether there is an attempt to disguise the true nature of the employment relationship or whether there is an attempt by the parties to avoid regulatory obligations, such as those under labour law or the payment of tax. Our courts have frequently noted that the inequality of bargaining power within an employment relationship may lead employees to agree to contractual provisions that do not accord with the realities of the employment relationship. This is particularly important in the case of low paid workers who may have agreed to be classified as independent contractors because of a lack of bargaining power.

31. Disguised employment is a significant reality in the South African labour market and has been dealt with in a number of reported decisions. The Employment Relationship Recommendation,

---

Phaka and Others v Bracks and Others [2015] 5 BLLR 514 (LAC); (2015) 36 ILJ 1541 (LAC).

[12] *SA Broadcasting Co1poration v McKenzie* at para 10; *Dene! (Pty) Ltd v Gerber* at para 22. The International Labour Organisation's Employment Relationship Recommendation 197 of2006 states (in Article 9) that "the detemination of the existence of such a (employment) relationship should be guided primarily by the facts relating to the performance of work and the remuneration of the worker, notwithstanding how the relationship is characterized in any contrary arrangement, contractual or otherwise. that may have been agreed between the parties."

2006 of the International Labour Organisation states that a "disguised employment" relationship occurs when the employer treats an individual as other than an employee in a manner that hides his or true legal status as an employee".[13] It is an established principle of our law that the label attached to a contract is of no assistance where it is chosen to disguise the relationship.[14] A contract that designates an employee as an independent contractor, but in terms of which the employee is in a subordinate or dependent position, remains a contract of service.[15] In other cases, employers have claimed that a person who was formerly an employee has been 'converted' into an independent contractor. If the person has previously performed the same or similar work as an employee, this is a very strong indication that he or she remains an employee.[16] Likewise, the fact that other employees employed by the same employer, or by other employers in the same sector, to perform the same or similar work under similar conditions are classified as employees may be a factor indicating that the person is an employee.

32. It is consistent with the purposes of the LRA and other labour legislation ~~to classify~~that workers may claim to be ~~as~~ employees~~, workers who~~ even if they have agreed to contracts purporting to classify them as independent contractors. ~~The fact that a person provides services through the vehicle of a legal entity such as a company or a closed corporation does not prevent the relationship being an employment relationship covered by labour legislation.~~ In such cases it is necessary to look beyond the legal structuring of the relationship to ascertain ~~the reality~~its real nature ~~of the employment relationship~~ and determine whether the purpose of the arrangement was to avoid labour legislation or other regulatory obligations.[17] The fact that a person provides services through the vehicle of a legal entity such as a company or a closed corporation does not prevent the relationship being an employment relationship covered by labour legislation. However, where a person has made representations to an agency such as the SA Revenue Services that they are not an employee in order to gain tax benefits, it may be appropriate for a court or arbitrator to refuse to grant them relief on the basis that they have not instituted the proceedings with "clean hands".[18]

Factors

33. In the initial decision adopting the "dominant impression" test, the then Appellate Division listed

---

[13] Article 4(b) of Recommendation 197 of 2006.
[14] *SA Broadcasting Corporation v McKenzie* at 591 at para 10.
[15] See, for instance, *Motor Industry Bargaining Council v Mac-Rites Panel Beaters and Spray Painters (Pty) Ltd* at 1163 C-1165 D (sale); 1079 G-1081 H (ILJ)
[16] See, for instance, *Building Bargaining Council v Melmon* 's *Cabinets CC & another* at para 21.
[17] *Denel (Pty) Ltd v Gerber* at paras 20-21.
[18] *Denel (Pty) Ltd v Gerber* at paras 204 and 205.

six factors[19] to distinguish a contract of employment from a contract for services concluded by an independent contractor. These factors are not a definitive listing of the differences between the two types of contract and further criteria have been added in response to changing conditions of work. In 2008 the Labour Appeal Court identified the "primary criteria" for distinguishing an employee from an independent contractor as including:

"1. An employer's right to supervision and control.

2. Whether the employee forms an integral part of the organisation with the employer. And,

3. The extent to which the employee was economically dependent upon the employer."[20] ~~These factors, which are frequently cited in judgments, are tabulated below and discussed in turn. These six factors are not a definitive listing of the differences between the two~~

[19] The Appellate Division uses the Latin term *indicia* to refer to these factors. In the Code they are referred to as "characteristics" or "factors".

[20] *State Information Technology Agency (SITA) (Pty) Ltd v CCMA & others* [2008] 7 BLLR 611 (LAC) at para 13.

~~types of contract.~~

Employee	Independent Contractor
1. Object of the contract is to render personal services	Object of contract is to perform a specified work or produce a specified result
2. Employee must ~~usually~~ perform services personally when required	Independent contractor may perform through others
3. Employer may choose when to make use of services of employee	Independent contractor must perform. work (or produce result) within period fixed by contract
4. Employee obliged to perform lawful commands and instructions of employer	Independent contractor is subservient to the contract, not under supervision or control of employer.
5. Contract terminates on death of employee.	Contract does not necessarily terminate on death of employee.
6. Contract also terminates on expiry of period of service in specified contract.	Contract terminates on completion of work or production of result.
7. Employee forms an integral part of organisation of employer	Independent contractor has own business
8. Employee is economically dependent on employer	Independent contractor has client base in addition to employer

34. These factors also provide a basis for determining what an employer (A) must prove to establish that a worker (B) is an independent contractor. Taken together, they imply that A must establish the following key elements:

(a) B is contracted to perform a specific service or deliver a specific result that does not form part of A's business;

(b) The service or product delivered by B forms part of an independent business conducted by B; and

(c) B is independently delivering the service or product in terms of a contract with A and is not under A's supervision or control.

35. The eight factors pointing at the existence of an employment relationship are tabulated below and

discussed in turn.

Rendering of personal services

~~34.~~36. In terms of the common law, an employee renders personal services, while an independent contractor is contracted to produce a specified result. An employee is contracted to work and the labour itself is the object of a contract of employment. An independent contractor is contracted to deliver a completed product and the result of the labour is the object of the contract.

~~35.~~37. The Supreme Court of Appeal (SCA) has cited with approval an alternative formulation of this core distinction proposed by the author Brassey who describes the difference in the following terms - 'an employee is a person who makes over his or her capacity to produce to another; an independent contractor is a person whose commitment is the production of a given result by his or her labour'.[21]

~~36.~~38. The acceptance of this formulation of the object of the contract does not alter the SCA's continued application of a multifactoral approach in the form of the "dominant impression" test. The object of the contract therefore remains one of the factors that must be taken into account in determining the nature of the contract. An individual engaged to perform specified work may nevertheless be an employee if other aspects of the relationship sufficiently resemble an employment relationship. This may be the case, for example, if the employee is required to perform the specified work personally and under close supervision by the employer.

Employee must perform personally when required

~~37.~~39. A key defining feature of an employment relationship is that the employee is required to perform services personally when required to do so by the employer. This has been described by the courts as the employee being "at the beck and call" of the employer and will include time when the employee is “on call” or otherwise available for work. An independent contractor can determine when to do work within the period stipulated in the contract and need not ~~perform the service~~do so personally ~~and~~ but may use the services of other people, unless the contract expressly provides otherwise. Accordingly, a contractual provision requiring a contractor to perform personally does not always mean that the relationship is one of employment. Similarly, the fact that an employee may be permitted or required to arrange a substitute during absences, or is allowed to work flexible hours, does not in itself imply he or she is an independent contractor. However, such deviations from the norm should be stated in the contract unless it is clear from

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

the parties' conduct that this is the manner in which they both intend the services to be performed.

~~38.~~40. The fact that a person employs, or is entitled to employ, other people to assist in performing the allocated tasks will not always be inconsistent with an employment relationship, although it is an indication that the relationship is one of independent contracting. In some sectors of the economy, it is a practice for sub-contractors to be engaged to work and required to recruit other workers to assist them. This requirement does not in itself exclude the sub-contractors from the possibility of being classified as employees. It will still be necessary to examine the relationship between the principal and sub- contractor, as well as the relationship between the principal and the persons engaged by the sub-contractor, to ascertain if the relationship is one of employment. Depending upon an examination of all the factors, including, for instance, the extent of control exercised by the principal sub-contractor, it is feasible that both the sub-contractor and the workers that he or she has engaged may be employees of the principal contractor. A relevant factor would be the extent to which the employer exercises control over a decision to terminate the services of persons engaged by the sub-contractor.

Employer may choose when to make use of services of employee

~~39.~~41. The courts conventionally state that an employer has the right to determine whether to require an employee to work, while an independent contractor is bound to perform or produce as specified by the contract. An employer will however, in most circumstances, be liable to pay an employee who tenders his or her services, even where the employer does not require the employee to work. This may include time when employees are on call or otherwise placing their services at the employer's disposal, and are therefore unable to undertake any other work.

.

Employer's right of control

42. An employee is subject to the employer's right of control and supervision while an independent contractor is notionally on a footing of equality with the employer and is bound to produce in terms of the contract. The right of control by an employer includes the right to determine what work the employee will do and how the employee will perform that work, as well as quality control and the terms and conditions on which work is performed for customers. It can be seen in an employer's right to instruct or direct an employee to do certain things, ~~and then~~ to supervise how those things are done and to market the product of the work.

~~40.~~43. Digital technology has made it possible for an employer to indirectly control and monitor many aspects of the work performed by the employee, including the determination and allocation of tasks, terms and conditions such as remuneration, time of commencement and completion and

quality control in the form of feedback by customers. Platform operators have argued that such mechanisms are operated by algorithms rather than by them. However, algorithms do not operate by themselves. To the extent that digital applications are owned by platforms and the rules determining the operation of the algorithms are determined by the owners, the controls exercised by means of those rules must be considered as being exercised by or on behalf of the owners.

44. The employer's right of control is likely to remain, in most cases, a very significant indicator of an employment relationship. The greater the degree of supervision and control to be exercised, the greater the probability that the relationship is one of employment.[22] The right of control may be present even where it is not exercised. The fact that an employer does not exercise the right to control and allows an employee to work largely or entirely unsupervised, does not alter the nature of the relationship.

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

Termination of contract on death of employee

41.46. The fifth of the original characteristics suggested that a contract of employment terminates on the death of an employee, while the death of an independent contractor does not necessarily terminate the relationship. It has been observed that this distinction may be of limited value as the death of an individual who is an independent contractor may terminate the relationship.[23]

Termination of contract on expiration of period of service

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

[22] In *Smit v Workmen's Compensation Commissioner* it was said that a 'right of supervision and control is one of the most important *indicia* that a particular contract is in all probability a contract of service [employment]'.
[23] See *Medical Association of SA v Minister of Health & Another* at 540F (ILJ); 573 H (BLLR).

is engaged.[24]

Forms an integral part of the employer's organisation

48. As discussed in paragraphs 18(c) and 25 above, this test flows from paragraph (b) of the definition of employee which includes any person who "assists in carrying on or conducting the business of an employer". By implication, this excludes persons who perform incidental or occasional services for the employer's business and do not form part of its organisational structure. Employees are therefore limited to persons involved in performing the ongoing activities or core business of the employer's organisation, whereas independent contractors may "assist" only to the extent of providing specific services as and when needed. The Appellate Division has noted that, while most of the other factors may not be decisive, the question "whether B is about A's business or about his own" can be seen as "the root of the matter".[25] This test has been upheld in the judgments referred to above.

Economic dependence on the employer

~~42.~~49. This characteristic is discussed in paragraph 18(e) above. The courts have interpreted the test for economic dependence as depending on whether an employee has the *right* to work for others, not whether he or she is actually earning income from working for others. However, it remains necessary to also have regard to the reality of the relationship. Even though a contract may state that a person has the right to work for others, the fact that it is not reasonably possible to do so should be taken into account in order to assess whether economic independence truly exists exists.

Other characteristics of a contract of employment

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

[24] *Medical Association of SA v Minister of Health & another* at 540 H - I (ILJ); I - J (BLLR).
[25] *R v AMCA Services Ltd and another* 1959 (4) SA 207 (A) at 213H-214B.

determining whether an employment relationship exists in particular cases.