

## Chapter 1

# Who is covered by the Act?

Almost all employers and employees are covered.  
So too are jobseekers and former employees.



## Who does the Act cover?

### Employees and employers

Almost every employee and employer is covered by the Act.

People who are considered to be genuine “independent contractors”<sup>1</sup> are not employees and they are thus not protected by this Act (or by other labour legislation).

Some unscrupulous employers have, in the past, simply informed their employees that they have become “independent contractors” even if the employment relationship has not changed or have persuaded their employees to sign contracts which state that they are no longer “employees” but “independent contractors”. Those same employers often do not contribute to the unemployment insurance fund (UIF) or are covered by the compensation fund or meet basic obligations in terms of occupational health and safety legislation.

In a number of judgements the Labour Court has shown that it will not accept an independent contractor contract at face value but will consider a range of factors to determine whether the person is in fact an independent contractor or an employee.<sup>2</sup>

The 2002 amendments to the LRA have clarified the issue further by providing that where a particular factor is present in the relationship between a worker and the person for whom he or she works, the worker is presumed to be an employee, unless the employer proves the opposite.

These factors are whether or not a person:

- falls under the control or direction of the employer;
- works hours which are subject to the control of another person;
- forms part of an organisation;

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<sup>1</sup> An independent contractor is a person who sells his or her services to the public and who does not fall under the control of an employer. For example a plumber or electrician.

<sup>2</sup> See for example, *Building Bargaining Council (Southern and Eastern Cape) v Melmons Cabinets CC and Another* (2001) 22 ILJ 20 (LC) and *Motor Industry Bargaining Council v Mac-Rites Panel Beaters and Spray Painters (Pty) Ltd* (2001) 22 ILJ 1077(N)

- has worked for another person for an average of at least 40 hours per month over the last 3 months;
- is economically dependant on the employer;
- is provided with tools of trade or equipment; or
- only works for one employer.

The presumption (as to who is an employee) does not apply to a person who earns in excess of an amount stipulated by the Minister in terms of the Basic Conditions of Employment Act, 1997.<sup>3</sup>

If an employer is of the view that despite the presence of one of these factors there is no employment relationship, the employer must prove this.

## Applicants for jobs

The Act protects people who are applying for a job from being discriminated against. The Act also provides that no person may require a person seeking employment not to be a member of a trade union or workplace forum or to give up membership of the trade union or workplace forum.

## Former employees

The Act covers former employees who are disputing an employer's failure to re-employ them when the employer has re-employed other former employees dismissed for a similar reason. Likewise, if an employer fails to re-employ former employees in terms of an agreement to do so, this may be challenged.

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<sup>3</sup> Presently that amount is R89 455.

## Who does the Act not cover?

The Act does not apply to members of the National Defence Force, the National Intelligence Agency and the South African Secret Service. This is in line with international standards. Military and secret service personnel are supposed to have a special duty towards the state and, therefore, do not have the same employment rights as other public servants. However, these personnel have the right to protection against unfair labour practices in terms of the Constitution. The Constitutional Court has held that this includes the right of Defence Force members to join trade unions.<sup>4</sup>

## Do all employees covered by the Act enjoy identical rights?

Domestic workers, members of the police, and essential service and maintenance service workers are restricted in certain respects. These restrictions relate mainly to organisational rights (the rights of trade unions) and the right to strike and will be dealt with in chapters 3 and 7.

### Further information

Relevant sections of the Act are:

- Section 2: Exclusion from application of this Act
- Section 5: Protection for employees and persons seeking employment
- Section 186: Meaning of dismissal
- Section 200A: Presumption as to who is an employee

Forms to fill in

No forms.

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<sup>4</sup> *South African National Defence Union v Minister of Defence and others* 1999 (6) BCLR 615 (CC)