Cape Agri Employers' Organisation

Questions and Answers: Interpretation of certain statutory provisions regarding workplace issues

Introduction: *With this document an attempt is made to create an authoritative source of standard interpretations of certain provisions of Sectoral Determination 13 (farm workers) and accompanying labour laws/ regulations. It represents the broad consensus opinion of our experienced officials, which of necessity means that there could be slight differences of opinion here and there. Where there was uncertainty, we sought confirmation from the Inspectorate of the Department of Labour – which, in turn, is their opinion; only a court can make a ruling, which in turn can be appealed against or referred for review! You are welcome to contact us for further clarification. We present the opinions in a question-and-answer format, starting with Sectoral Determination (SD) 13 and using the SD's clause numbering:*

SECTORAL DETERMINATION 13 (SD13)

SECTION A: APPLICATION

1. **1(2): Scope of Sectoral Determination 13 (SV13)**:

   Does SV13 apply to employees working in packhouses and wine cellars on farms?
   Although employees working in packhouses and cellars on farms are regarded as "farm workers" for purposes of SD13, the interpretation only applies if the packhouse or cellar does not handle products of other producers. In such a case, unless a collective agreement as envisaged in the Labour Relations Act exists, the general provisions of the Basic Conditions of Employment Act shall apply, with no provision made for a minimum wage.

SECTION B: WAGES

2. **2(2): Minimum wage**:

   Must the minimum daily wage (currently R146.28) be paid irrespective of hours worked?
   The R146.28 per day minimum wage is only applicable if a normal working day is 9 hours ***and*** if such hours are indeed worked. Should a person be contracted to work for only 8 hours a day, and is contracted per hour at R16.25 (the minimum hourly rate), he/she shall only be paid R130.00 for that day.

   Must the workers be paid when working is not possible, for example due to unfavourable weather conditions? If so ***contracted*** both permanent and temporary employees can only be paid of work is available. This arrangement must however be applied fairly (for example, by giving timely notice and with due consideration of the financial implications for the family); however, it is therefore not compulsory to pay when no work is available (for example, rainy days, production factors, breakages and other factors beyond the employer's control). The hours lost can, however, be made up, but then all other provisions relating to working hours must be adhered to, for example overtime. Some producers pay a minimum of say 4 hours or provide training or alternative work during such periods.

3. **4: Calculation of remuneration:**

Must a worker be paid for the time it takes to be transported to and from work?
Workers are not remunerated for these hours, but should an accident occurs and someone is injured, such injury shall be deemed as having been sustained while on duty.
Employers must, however, also use their discretion, especially where workers are transported from one farm to a next.

4. **5: Payment of remuneration:**

When must wages be paid?
Wages, in the case of cash , must be paid within normal working hours and at the contracted time. Also note that the contracted wage, which shall not be less than the minimum wage, must be paid throughout the year, also when shorter and longer hours apply. **NB:** An important exception is seasonal workers who might only work during the periods of when longer hours apply and therefore will not enjoy the benefit of equal pay for shorter working hours. They must therefore receive overtime payas.

5. **7: Prohibited actions relating to payment**

What is meant by the words "work clothes" in Clause 7(1)(c) in respect of which no deduction may be made from a worker's wage if provided by the employer?

"Protective clothing" as envisaged in the Ooccupational Health and Safety Act, must be provided by the employer free of charge (for example, where employees work with poisonous substances). Work clothes, which are simply meant to protect the worker's own clothes and not his person, do not have to be provided. However, if such clothing is provided and made compulsory, it must be free of charge. It follows therefore that if the employer provides overalls featuring the employer's logo, this must also be provided free of charge.

A risk analyses will determine where and what are needed.

6. **8: Deductions**

May the cost of electricity consumption per household, as determined per separate meter per house, be deducted from wages together with the 10% for housing? Clause 8(1)(b)
The Department of Labour now agrees that if a proper electricity meter has been installed per house to determine monthly consumption per household, the cost of the actual consumption may be recovered from wages together with the 10% for housing.

May the 10% for housing be deducted if a prepaid meter has been installed in the house? Clause 8(1)(b)
Yes, this is permissible. The employer bears the cost of the installation and the employee the usage.

How are deductions for communal housing calculated, for example hostels? Clause (8)(6)(a) and (b)
According to this clause, the deduction equals 25% of the minimum wage applicable to a worker (currently R3169.19 per month, i.e. X 25% = R792.30 per month) divided by the number of workers who share the housing. Therefore, the more workers living together, the lower the

deduction per individual will be, for example if 100 workers share the accommodation, the monthly deduction for each worker is R76.92.

How lawful is saving schemes? Clause 8(7)(a)

Saving schemes are inly lawful if they are operated by a registered third person, and if the worker is a member of such scheme and has requested the deduction in writing.

SECTION C: CONDITIONS OF EMPLOYMENT

7. ***Must each worker receive an own copy of the conditions of employment (employment contract)? Clause 9***

The answer is 'yes'. Note that SD13 does not require that 'employment contracts' be signed, but recommends that this be done. This can be done in the form of a 'receipt' where the worker (or various workers collectively – for practical reasons) acknowledge that the conditions of employment had been explained to them, that they understand and accept them, and that they had received a copy thereof.

Debt on termination of employment: Clause 9

If agreed in writing in advance, debt may be recovered from the last payment, including outstanding leave.

Changes to conditions of employment: Clause 9(3) & Labour Relations Act

Conditions of employment may not be changed unilaterally, but must be consulted with the relevant workers and, where applicable, with their union. If workers do not agree with the changes and there is no alternative, a last resort would be a formal retrenchment process.

SECTION D: WORKING HOURS

8. **<u>Overtime work: Clause 13</u>**

Which threshold applies for "overtime" – the agreed-upon hours per day, or the hours per week?

Overtime is calculated based on hours worked that exceed the agreed-upon number of working hours ***per day*** or ***per week***. This means that even if a worker works fewer than the agreed-upon 9 hours, overtime must be paid for the period of time he worked more than 9 hours on one day, for example a worker who is contracted to work for 9 hours a day, 5 days per week (45 hours per week), who on a Monday works 10 hours, must be paid overtime for that extra hour, i.e. X 1½ even if, for any reason whatsoever, he does not work for the rest of the week. This means he does not have to "fill up" his 45 hours for the week to earn overtime. An employment contract may, however, stipulate shorter hours, for example 8 hours per day (a total of 40 hours per week). In this case the worker must be paid overtime for any time exceeding 8 hours worked on any day, irrespective of whether the 40 hours per work had been "filled up". For any hours that he had not worked on any day in that week he would simply not be paid.

Also, in the case of a compressed working week (Clause 15), overtime must be paid if a worker had worked more than 12 hours on a given day during that week, even if the total hours per week is 45 hours or fewer.

May an employment contract that prescribes a 5-day working week further stipulate that should a worker, for any reason whatsoever, be unable to work the 45 hours "in full" within a week, such worker may be expected to make up the rest of the hours on a Saturday without overtime pay?

The answer is a simple ***'no'***. A worker cannot work a 5-day ***or*** a 6-day week – it is ***either*** one ***or*** the other, each with its own conditions for maximum hours and overtime. If a 5-day worker therefore has not worked his "full hours" during the week, and he works on Saturday, the Saturday hours will be considered overtime.

Must overtime be paid when longer hours (Clause 12) are worked per agreement, and such longer hours are exceeded?
This clause allows farm workers to work up to 5 hours per week longer (maximum 50 hours) than ordinary hours in summer (maximum of four months), provided that they are allowed to work up to 5 hours per week less (maximum 40 hours) in winter (an average therefore of 45 hours per week over the year), on condition that they consistently receive the same basic wage per day/week throughout the year irrespective of whether they worked longer or shorter hours. [This arrangement must be agreed upon annually in writing.]

The question is whether overtime must be paid when the 50 hours per week in summer and/or 40 hours per week (8 hours per day) in winter are exceeded. The answer is that overtime is paid as from the first hour that the worker works longer than the agreed-upon daily maximum, whether 10, 9 or 8 hours. For example, if a worker works 8 hours a day in winter and 10 in summer, the overtime is calculated based on the hours that exceed 8 or 10.

How is the question of overtime dealt with when seasonal workers perform 'piece work' and are not on the farm in winter to enjoy the benefit of shorter hours at the normal basic wage?
The above concession relating to longer hours is further subject to the condition that if the worker cannot enjoy the shorter hours in winter at the basic wage, he must receive overtime pay for the extra hours worked in summer. Most seasonal workers are not on the farm in winter and therefore do NOT enjoy the shorter hours at full pay. Therefore, they must be paid overtime for working longer than 45 hours per week in summer. Should they be remunerated on a piece-work basis, gross pay for such piece work is hopefully considerably more than the overtime pay would have been. If NOT, the piece work must be subject to the minimum wage PLUS overtime.
EXAMPLE: Summer time is 50 hours per week, or 10 hours per day, therefore R16.25 hours X 9 hours = R146.25; PLUS 1 hour @ 1½ = R24.38, i.e. a total of R170.63 per day. If the piece work result therefore amounts to less than R170.63, payment should be at least R170.63!

May time off be granted instead of overtime pay? Clause 14(2) and (3)
Time off instead of overtime pay may be applied in two ways per agreement with the worker. Firstly, he may be paid at the normal hourly rate for the time worked, plus half an hour off for each hour overtime worked. Alternatively, he may be granted 90 minutes off for every hour overtime worked. Any such time off must be granted within one month from the time that the worker becomes entitled to it. The worker may agree in writing that the time off should be granted within 12 months.

9. Compressed working week

What does a compressed working week entail? Clause 15

This Clause states that an employer may agree in writing with his workers (who fall under the remuneration threshold) that they will work up to 12 hours on any day (meal times included) and that overtime pay shall not apply, provided that they adhere to the maximum of 45 hour per week.

10. Work on a Sunday

How is payment for work performed on a Sunday calculated? Clause 16(1)

The formula is essentially the same as the one in the corresponding section of the Basic Conditions of Employment Act, but unnecessarily more complicated. While the Basic Conditions of Employment Act states that a worker who normally does not work on a Sunday must be paid for any work performed on a Sunday at double the normal rate for each hour worked, Clause 16(1) of SD13 makes provision for four levels of time worked (1 hour or less + 2 X 1 hour; more than 1 hour but not more than 2 hours = double the time worked; more than 2 hours but not more than 5 hours = normal daily wage; and more than 5 hours = the greater of double pay for time worked , or double the daily wage).

11. Night work

What does night work entail? Clause 17

Workers who must work at night between 20:00 pm and 04:00 am must receive 10% of their daily basic wage as a night allowance. Also note that special arrangements apply for people who regularly perform night work (more than 5 times per month or 50 times a year).

12. Meal breaks

Must the employer pay the worker during breakfast and tea breaks? Clause 18

Workers may not be allowed to work continuously for longer than 5 hours without a meal break of at least one hour (unpaid). This meal break may be reduced per written agreement to a minimum of 30 minutes. The parties may also decide per written agreement on a break within the 5-hour shift (typically for breakfast – minimum 30 minutes) which will be **unpaid.** Tea breaks of 15 minutes fall outside this arrangement and are therefore **paid**, morning and afternoon, but not compulsory. Breaks for breakfast are less common. Clause 15(6) states that when an employer must grant a worker a second meal break due to overtime being worked (think sprayers), the break may be reduced to at least 15 minutes and will be **unpaid**.

13. Public holidays

i) ***How is remuneration determined for a worker who works on a public holiday which normally would have been a working day? Clause 20(2)(b)***

He must receive a day's wage PLUS at least another day's wage (thus double pay) even if he only worked, say, 2 hours on the public holiday. Therefore, if he normally works 9 hours per day, he will be paid for 9 + 9 hours = 18 hours.

ii) ***How is remuneration determined for an employee who works overtime on a public holiday that would normally have been a working day? Clause 14.4***

As in the case described above, he must receive a day's wage PLUS at least another day's wage (thus double pay), or if it is more, payment for the time actually worked on a public holiday. Therefore, if he normally works 9 hours per day, and he had worked 10 hours on the public holiday, he must be paid for 9 + 9 + 1 hour = 19 hours.

iii) ***How is remuneration determined for an employee who works on a public holiday, which normally would <u>not</u> have been a working day – typically a Saturday? Clause 20(3)***

He must receive a day's wage PLUS his hourly rate for actual hours worked. Therefore, if he works on a Saturday which falls on a public holiday, he must be paid for 9 + 1 hour = 10 hours [a very expensive hour's work!].

SECTION E: LEAVE

14. <u>Leave: Clause 21</u>

Does normal leave accumulate when a worker is on leave as a result of an injury sustained on duty?

Even die Department of Labour is uncertain whether normal leave (and sick leave) accumulates while a worker is absent as a result of an injury sustained on duty. Until such time that we have greater clarity on this matter, we recommend that leave should **not** accumulate.

Does leave accumulate during maternity leave*? Clause 21*

Normal leave, and therefore also sick leave, accumulates during maternity leave (however, sick leave is not granted for absence in the event of illness during normal leave, even if the worker submits a medical certificate).

Must workers who go on leave be paid in advance or on normal pay days? Clause (10)

SV13 states that wages must be paid before commencement of leave.

How does paid leave accrue to seasonal workers?

A distinction must be made between *annual leave* and *occasional leave.* SV13 mentions various options to determine *annual leave* per annual leave cycle. Such leave must be taken within 6 months **after** the end of the leave cycle. This leave may be reduced by the number of days *paid occasional leave* granted to the worker.

It is recommended that the following conditions be included in employment contracts for seasonal workers:

a) The leave accrual rate per SV13 is 1 day for every 17 days for which a worker is entitled to payment. Since the worker is appointed for a limited fixed period (as mentioned in x above) during a season of high work pressure, no annual leave shall be granted during this period.

b) In exceptional cases, depending the merits, occasional leave may be granted on condition that the employer's explicit consent is obtained in advance. Any absence without such explicit consent shall be deemed unpaid.

c) If the worker has completed more than four months' consecutive service on expiry of the employment contract, any leave to which he is entitled in terms of this clause and which he had not used shall be paid out to the worker.

15. <u>Sick leave:</u>

Must sick leave be granted where the worker sustained an injury as a result of his own behaviour? Clause 22(6)

Paid sick leave must be granted when the worker cannot work "due to illness or injury", even if his condition is the result of, for instance, fighting or participation in sport. Disciplinary action would therefore be the preferred route should abuse of sick leave be suspected.

Who may issue medical certificates? Clause 22(7)

Although this clause is essentially the same as the corresponding section in the Basic Conditions of Employment Act, there is one big difference: Unlike the Basic Conditions of Employment Act, the SD does not require that the practitioner who issues the certificate must be registered with a professional council established in terms of legislation. The implication is that a traditional healer and clinic sister who is not registered with a professional body will also be able to issue medical certificates.

May a worker be expected to submit a medical certificate as from day one of absence? Clause 22(6)

The employer may only after two days' absence insist on a medical certificate or if such absence occurs on more than two occasions during an eight-week period. In our opinion it would be fair to include a clause in the employment contract stipulating that a worker must as soon as reasonably possible inform the employer that he is sick or injured. If it is suspected that this benefit is being abused, an inquiry may be conducted into the alleged illness/injury and disciplinary action may be taken depending on the circumstances. An employer who does not enforce strict discipline can expect abuse to take place.

May a worker be expected to submit a medical certificate if he is off sick on the day before or the day after a public holiday or weekend?

No, a worker may not be expected to submit a medical certificate in such a case. If abuse of the benefit is suspected, an inquiry may be conducted into the alleged illness/injury and disciplinary action can be taken against the worker depending on the outcome. NB: According to the wording in Clause 22(6), a medical certificate may be demanded only after absence on two "consecutive days". The definition in SV13 of "day" refers to working days. In the case where the public holiday falls on a week day and the farm is operational on that day, we believe a case can be made out for the worker who had been absent on the day before and the day after such public holiday to be deemed having been absent for three days, in which case the employer can insist on a medical certificate before paid sick leave is granted.

How must the first three days of absence be dealt with when the worker is absent due to an injury sustained on duty?

The first 3 days are not covered by the Workmen's Compensation fund, but paid leave can be granted.

Does a seasonal worker qualify for sick leave after completing 6 months in service (during which he was entitled to 1 day's sick leave for every 26 days worked) at the same rate (6 weeks per 3-year cycle) as permanent workers?

The answer is 'yes'.

Must the worker be paid for the time he spends visiting clinics?

Employers are not always sure what to do when workers are absent because they have to

collect medication at clinics or similar institutions where they spend long hours in queues and often are not really sick. We discussed the problem with Prof. Barney Jordaan, who suggested that the matter be cleared with the Department of Labour in Cape Town.

Answer: The situation can be summed up as follows:
If it is about contraceptives or non-essential medication, paid sick leave will **not** apply.

When it is about medication that the worker must take on the recommendation of a registered medical practitioner, the matter is less clear and the employer will have to act in a circumspect manner. Similarly, the visit to the clinic may form part of the worker's recovery or prevention of a recurrence or deterioration of the condition. On the other hand, the Act implies that workers may only take sick leave if they are too sick or injured to work. It is recommended that the safe route would be to regard such cases as part of the recovery or prevention process and therefore broadly as part of paid sick leave. However, this does not prevent the employer from introducing practical rules, such as the following:

- Require the medical practitioner to confirm in writing that the medication is essential (without such confirmation, the worker will have to take normal leave);
- Consider granting a half-day paid sick leave;
- Look at the availability of alternatives (e.g. mobile clinics);
- Consider collecting the medication ion behalf of the worker – in consultation with the clinic;
- Locally there may also be other options.

Who must pay a seasonal worker if he sustains a work injury and his contract comes to an end while he is still booked off by a medical practioner?

The employer pays the prescribed 75 % until the end of 3 months', even if the contract expires in, say, 2 months'. After that the employee must claim it directly from the Compensation Commissioner.

16. Maternity leave: Clause 24

Does an adoptive mother qualify for maternity leave?
Although legislation does not make provision for maternity leave in the case of adoptions (except the 3 days compassionate leave), we recommend that employers should grant unpaid leave for this purpose and that a clear policy be formulated in this regard. (Women who adopt children under the age of 2 do in fact qualify for unemployment insurance benefits.)

SECTION G: TERMINATION OF EMPLOYMENT

17. Payment on termination of employment: Clause 29

How is a temporary worker's leave entitlement and any severance package calculated on termination of employment?

Temporary workers, like other farm workers, qualify for accumulated leave to be paid out to them on termination of employment only after they had been in service for four months – of

course, less any leave already taken. NB: In the case of seasonal workers who are reemployed by the same employer with the interval between the two employment periods being less than one year, the interval is ignored and the periods of employment are added together for purposes of calculating the four months. When temporary workers have been in employment for longer than 24 months and their employment is terminated, they qualify for severance packages, but the 24 months shall be calculated based on time actually worked.

GENERAL

18. ***Must workers be paid for the time spent on training outside working hours?***

Training must be provided during working hours and paid for by the employer unless agreed otherwise beforehand. The employee then has the right to refuse training. The idea is that all work-related training should be provided during working hours free of charge but if, for instance, the employee applies for a bursary or decides to study further and receives financial assistance, agreement can be reached on repayment, provided that such agreement is reached before training or studies commence.

19. ***May a seasonal worker's disciplinary record be "carried over" to a new contract? Labour Relations Act***

A seasonal worker's disciplinary record may not be carried over from one contract to another. Rather consider not be reemploying him or her, but start each contract with a clean slate. In cases where a permanent worker's warning period had lapsed (for example, after 6 months), the employer can keep it on record and use it if it can in the long term serve as aggravating factor or as proof of some or other problem re the worker.

20. ***How do I know whether the person or organisation I use for recruitment is registered with the Department of Labour?***

Any person or organisation that recruits people for a client must be registered in terms of Section 24 of the Skills Development Act; therefore, ask for a registration certificate as proof. (Form – 08)

21. ***Are citizens of other countries covered by the Unemployment Insurance Act?***

Every worker in South Africa is obliged to contribute to and receive benefit from the Unemployment Insurance Fund, irrespective of nationality or citizenship. There are no exceptions.

22. ***Stand-by***

Stand-by hours are not addressed in legislation and would therefore be something that must be agreed between the employer and the employee. Such a worker is therefore only paid for actual hours worked. However, take note that the night shift allowance, rest periods and other provisions will still apply.

23. ***May a person who receives an old age pension from the State work for reward?***

Yes, but a means test will be done before it grants anybody a pension. This test first assesses a person's income and assets to determine whether he or she qualifies for a state pension.

24. ***May I compel a worker's spouse or children to work on the farm? Sections 43 and 48 of the Basic Conditions of Employment Act***

No, definitely not. Every employee must have his own employment contract and it must be a

voluntary one. Therefore, it may not be a requirement that family members should also be available for work. It would be illegal but also unfair, for instance, to compel a farm manager's wife to work in the packhouse or office during the season.

25. ***What is the difference between 'absence without leave' and 'desertion': Labour Relations Act***

There is often confusion in this regard, which could cost employers who do not clearly understand the distinction dearly. Therefore, effectively forget the statement that 'the deserter dismisses himself'! The same applies to any policy that stipulates that the services of a worker who is absent without leave for a specified number of days will 'automatically' be terminated.

What is the difference? Desertion means the worker does not intend to return to work – which begs the question: how must the employer determine what the employee's intention is? The employer must make proper enquiries as to where the worker is – telephonically, per sms, a letter to his last known address, or per messenger. The message must inform the worker that he is absent without leave, and that he must contact the employer to explain why in order to avoid disciplinary action. It is important that the employer keep record of attempts to find the worker before further action is taken. And then?

It is recommended that several days (not fewer than 5 working days) be allowed before action is taken. Keep the worker's file open but place all unpaid monies such as leave pay, etc. in a suspension file. Remember that the worker may still return to work, with or without a proper excuse. If he does return, a disciplinary process can commence to determine whether he was guilty of an offence, and a suitable sanction can be instituted. If, after say a month, he has still not returned to work and every effort had been made to find him, it can be assumed that his intention was not to return, after which his file can be closed – the UIF must also be informed accordingly.

26. ***Some years ago we bought a farm. We took over all the farm workers and employed them as from the date of purchase. One of them complained that the previous owner had not paid him a 'severance wage'. What should we do?***

Before a purchase agreement is signed, the buyer and seller must consult with the workers on how the transaction will affect them in terms of continued employment and fringe benefits. Arising from such consultation, the consensus reached between the buyer and the seller about the position of the workers must form the basis of the purchase agreement. This will determine whether or not the farm is sold as a going concern. If it is sold as a going concern, the buyer takes over all the staff, who will then retain their years of service, accumulated leave benefits, etc. The agreement between the buyer and seller will determine what each one's financial responsibilities will be in terms of this cost.

Based on the question, it seems that the farm was taken over as a going concern, workers and all. Since the worker had not lost his job, he will not receive a severance package. His years of service, however, will accumulate from the time he was first appointed by the previous owner. Members are advised to consider this carefully when they buy (or sell) a farm. However, it would be wise to seek expert advice.

27. **"*A worker dies while still being owed accumulated wages and outstanding leave. He does not have many assets and left a wife and children behind who are in need. May these monies be paid out to the widow". If not, how must such monies be dealt with?"***

The short answer is that such monies may not be paid out to the widow. All monies owed to the worker at the time of his death form part of his deceased estate and will be decided on by the Master of the High Court. Depending on the extent of the assets in the deceased estate, the process could be either simpler or more cumbersome.

- If the cash and other assets in the estate amount to less than R50 000, the widow may approach the local magistrate's office and ask that a letter of authority be issued by the Master. Only a certificate is needed and no fees are payable. The letter will authorise the employer to pay out the accumulated wages and leave monies. This could take a month or two to finalise.

- If the cash and other assets in the estate amount to more than R50 000 but less than R125 000, the process is somewhat more complicated and an attorney may be appointed at a small fee to refer the estate to the Master on behalf of the family, in which case it will take longer to finalise.

- Deceased estates valued at more than R125 000 are subject to the full formal procedure. Benefits due to the worker from the retirement fund will be dealt with in terms of the provisions of the relevant fund. Employers should encourage members of provident funds to nominate the person or persons who must receive these funds on a "beneficiary form" in good time. If the widow is indicated as the beneficiary on this form, the accumulated benefit will be paid out to her. Funds in ordinary informal saving schemes shall form part of the deceased estate.

28."If a manager has the authority to appoint or dismiss workers but earns less than the R205 433.30 threshold, must he be paid for overtime worked? (After all, he would then be a 'senior management employee".) On several farms managers earn less than this and do not receive overtime pay."

This question emanated from the recent increase in the remuneration 'threshold' in terms of the Basic Conditions of Employment Act. This legislation contains various exclusions from certain provisions in respect of matters such as working hours, overtime pay, rest periods, Sunday work, etc.

One of these exclusions is in respect of a 'senior management employee', who is defined as 'someone who has authority to appoint, discipline and dismiss people and to represent the employer internally and externally'. This means it is not simply about the title 'manager'. One must understand that NOT all managers earning below the treshold have such authority and are therefore excluded from overtime payment.

The other exclusion referred to here is the remuneration threshold, currently R205 433-33 per year. This exclusion is independent of the first one dealing with 'senior management staff', which means such a manager's remuneration level does not determine whether or not he is paid for overtime worked.

The following should be noted:

- The test to determine whether a manager meets the definition is a stringent one. If disputed, the Department of Labour/ CCMA requires examples of appointment, disciplining and dismissal of workers and representation.

- The "senior" posts referred to probably earn two or three times the threshold amount or more!

- If a manager's employment contract stipulates that he will receive payment for overtime worked, the threshold will have no effect on his right to receive overtime pay.

29. ***Extra leave due to excessive overtime worked***

Plant workers regularly work excessive overtime during the season, usually from January to mid-June each year. During such a period a shift system is in place according to which employees work on a rotation basis 24 hours, 7 days per week. All employees receive a shift allowance, plus the relevant overtime pay negotiated with a union, which currently amounts to 1.5 x the normal wage for the first 10 hours; thereafter 1.85 x the normal wage and for Sundays and public holidays 2.5 x the normal wage.

The union now insists that these workers are entitled to a further 2 – 3 days' leave a year since they work excessive overtime during the season, although they are remunerated for such overtime worked. Workers are currently entitled to 15 working days' leave a year. Such a worker will typically work up to 25% more hours for 5 out of 12 months a year and, according to the union's calculation, such a worker should receive 10 – 15% more leave days than a normal worker, which will then amount to 2 – 3 days extra per year.

Does legislation stipulate that an employer must grant more leave days in such a case despite remuneration already being paid in this regard?

Answer:

According to the Department of Labour, an employer is not legally obliged to grant more leave when excessive overtime had been worked. The union must negotiate with the company.

30. How far back can an Inspector, by means of a compliance order, force an employer to rectify failure to comply, for example, to pay the minimum wage?

Answer:

Section 70 of the Basic Conditions of Employment Act stipulates that it could be up to 12 months.