Labour Law 1A (LLA 111 S)

Changes introduced by the Labour Amendment Act 2 of 2012

Supplementary information to be inserted in the study guide as follows:

Unit 5, section 2 (Identifying the employment contract), p. 54, insert the following at the end of the first paragraph:

In section 1 of the Labour Act 11 of 2007, an “employer” is defined as “any person, including the State and a user enterprise referred to in section 128(1) who –

(a) employs or provides work for an individual and who remunerates or expressly or tacitly undertakes to remunerate that individual; or
(b) permits an individual to assist that person in any manner in carrying on or conducting that person’s business;”  

In terms of the new section 128(1), a “user enterprise” means a legal or natural person with whom a private employment agency places individuals, while a “private employment agency” is defined as being any natural or juristic person, which provides one or more of the following labour market services:

- for matching offers of and applications for employment without the private employment agency becoming a party to the employment relationship which may arise therefrom; or
- engaging individuals with a view to placing them to work for an employer, which assigns their tasks and supervises the execution of those tasks; or
- other services relating to job-seeking that do not set out to match specific offers of and applications for employment, such as providing of information.

In order to protect persons who are placed by so-called labour hire companies, the new section 128 of the Labour Act provides, among others, that an individual (except an independent contractor) who is placed by a private employment agency at a user enterprise, shall be the employee of the user enterprise and the user enterprise shall be the employer of such person. Such person would therefore be entitled to all the rights afforded to employees in terms of the Labour Act; s/he must be employed on not less favourable conditions of employment as those who perform the same or similar work or work of equal value and the same employment policies and practices of incumbent employees must be applicable to them.

Unit 5, section 2 (Identifying the employment contract), p. 54, insert the following after the definition of an “employee” in the second paragraph:

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1 Published in Government Gazette No. 4925 of 12 April 2012 – GN 98, in operation since 1 August 2012 (with the exception of section 10).
2 S 1 of the Labour Amendment Act
3 S 6 of the Labour Amendment Act substitutes section 128 of the Labour Act 11 of 2007
4 S 1 of the Employment Services Act 8 of 2011, as amended
5 S 6 of the Labour Amendment Act. A user enterprise who contravenes this part of the Act commits an offence and is liable to a fine not exceeding N$ 80 000 or imprisonment of a period not exceeding two years or both. The Act provides for a possible exemption by the Minister, on application by the user enterprise, supported by both the private employment agency and the affected employee. If such exemption is granted, both the private employment agency and the user enterprise are deemed to be the employer of such individual and they are jointly and severally liable for contraventions of the Labour Act.
A definition of an “independent contractor” has now been added and means “a self-employed individual who works for or renders services to a user enterprise or customer as part of that individual’s business, undertaking or professional practice;”\(^6\)

Section 128A (Presumption as to who is employee)\(^7\) provides that an individual who works for or renders a service to any other person, is presumed, until the contrary is proved, to be the employee of that other person if any one or more of the following factors is present:

- The manner of work is subject to the control of that other person;
- The hours of work are subject to the control or direction of that other person;
- The individual’s work forms an integral part of the organisation;
- The individual has worked for that other person for an average of at least 20 hours per month over the past three years
- The individual is economically dependent on that person for whom s/he works or renders services to;
- The individual works or renders services to that other person;
- Any other prescribed factor.

Section 128B (Deeming individuals as employees)\(^8\) further allows the Minister, subject to certain conditions, to deem any individual to be an employee for the purposes of the Labour Act.

**Unit 5**, section 4 (Commencement and duration of a contract of employment), p. 64, insert the following after section 4.2 (Indefinite term or permanent contract):

Section 128C (Presumption of indefinite employment) provides that an employee is presumed to be employed indefinitely, unless the employer can establish a justification for employment on a fixed term, or the employee is appointed in a managerial position. The Act, however, does not clarify on what criteria the “justification” must be evaluated and it also does not specify the meaning of “managerial”.

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\(^6\) S 1 of the Labour Amendment Act  
\(^7\) S 7 of the Labour Amendment Act  
\(^8\) S 7 of the Labour Amendment Act