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EMPLOYMENT ALERT

IN THIS ISSUE

Separating the employees from the “wannabe’s” - Employees versus Independent Contractors

Determining whether a person is an employee or an independent contractor has material financial implications for a company, particularly in the context of retrenchments, equal pay as well as the rights of a company to terminate the relationship. The CDH Employment practice has developed the following determination tree to assist you in making this assessment.

EMPLOYEE V INDEPENDENT CONTRACTOR

The test for determining who is an employee and who is an independent contractor differs with reference to persons who earn above or below the threshold in terms of section 6(3) of the Basic Conditions of Employment Act 75 of 1997.

ABOVE THRESHOLD

(Nedlac Code of Good Practice)

Factors contained in section 200A (1) of the LRA are merely a guideline to determine whether a person is an employee.

The determination for persons who earn above the threshold is subject to the following tests:

CONTROL TEST

1. Person formed integral part of organization.
2. Extent to which the person was economically dependent on the Company.

(State Information Technology Agency (Pty) Ltd v CCMA & Others (2008) 29 ILJ)

REALITY TEST

The courts will have regard to all relevant factors which indicate the factual relationship between the parties.

(Denel (Pty) Ltd v Gerber (2005) 26 ILJ 1256 (LAC))

DOMINANT IMPRESSION TEST

The courts will consider the dominant impression created having regard to all relevant factors upon examining the reality of the relationship between the parties.

(Uber South Africa Technology Services (Pty) Ltd v National Union of Public Service and Allied Workers (NUPSAW) and Others (2018) 39 ILJ 903 (LC))

BELOW THRESHOLD

(Presumptions in terms of section 200A(1) of the Labour Relations Act 66 of 1995 (LRA))

In terms of section 200A(1) of the LRA, persons who earn below the threshold are rebuttably presumed to be employees where one or more of the following factors are present:

SINGLE EMPLOYER

The person in question only renders services to one person.

TOOLS OF TRADE

The person in question is provided with tools/equipment by other party.

ECONOMIC DEPENDENCE

The person in question is economically dependent on the other party.

TIME WORKED

The person in question has worked for at least 40 hours per month, over the preceding 3 months.

INTEGRAL TO COMPANY

In the case of a person who works for a Company, the person forms part of the Company.

CONTROL

The person's hours of work are subject to the control or direction of the other party.

The manner in which the person works is subject to the control or direction of the other party.

NB: The abovementioned factors will ordinarily not apply to independent contractors. However, the courts have adopted the "reality approach", in terms of which they consider the holistic relationship between the parties. The facts of the case rather than the nature of the agreement is the determining factor.
An independent contractor, unlike an employee, is obliged to perform a specific task or produce a specified result as opposed to doing work personally.



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EMPLOYMENT

CASE LAW UPDATE 2019



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to access CDH's Employment Law booklet to assist you in navigating the employment relationship during the current economic uncertainty.

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Aadil Patel ranked by CHAMBERS GLOBAL 2015 - 2020 in Band 2: Employment.

Fiona Leppan ranked by CHAMBERS GLOBAL 2018 - 2020 in Band 2: Employment.

Gillian Lumb ranked by CHAMBERS GLOBAL 2020 in Band 3: Employment.

Hugo Pienaar ranked by CHAMBERS GLOBAL 2014 - 2020 in Band 2: Employment.

Michael Yeates ranked by CHAMBERS GLOBAL 2020 as an up and coming employment lawyer.



Our Employment practice is ranked as a Top-Tier firm in THE LEGAL 500 EMEA 2020.

Fiona Leppan is ranked as a Leading Individual in Employment in THE LEGAL 500 EMEA 2020.

Aadil Patel is recommended in Employment in THE LEGAL 500 EMEA 2020.

Gillian Lumb is recommended in Employment in THE LEGAL 500 EMEA 2020.

Hugo Pienaar is recommended in Employment in THE LEGAL 500 EMEA 2020.

Michael Yeates is recommended in Employment in THE LEGAL 500 EMEA 2020.

Jose Jorge is recommended in Employment in THE LEGAL 500 EMEA 2020.



CLIFFE DEKKER HOFMEYR

OUR TEAM

For more information about our Employment practice and services, please contact:



Aadil Patel
National Practice Head
Director
T +27 (0)11 562 1107
E aadil.patel@cdhlegal.com



Michael Yeates
Director
T +27 (0)11 562 1184
E michael.yeates@cdhlegal.com



Anli Bezuidenhout
Senior Associate
T +27 (0)21 481 6351
E anli.bezuidenhout@cdhlegal.com



Jose Jorge
Director
T +27 (0)21 481 6319
E jose.jorge@cdhlegal.com



Mohsina Chenia
Executive Consultant
T +27 (0)11 562 1299
E mohsina.chenia@cdhlegal.com



Sean Jamieson
Senior Associate
T +27 (0)11 562 1296
E sean.jamieson@cdhlegal.com



Fiona Leppan
Director
T +27 (0)11 562 1152
E fiona.leppan@cdhlegal.com



Faan Coetzee
Executive Consultant
T +27 (0)11 562 1600
E faan.coetzee@cdhlegal.com



Bheki Nhlapho
Senior Associate
T +27 (0)11 562 1568
E bheki.nhlapho@cdhlegal.com



Gillian Lumb
Director
T +27 (0)21 481 6315
E gillian.lumb@cdhlegal.com



Avinash Govindjee
Consultant
M +27 (0)83 326 5007
E avinash.govindjee@cdhlegal.com



Asma Cachalia
Associate
T +27 (0)11 562 1333
E asma.cachalia@cdhlegal.com



Hugo Pienaar
Director
T +27 (0)11 562 1350
E hugo.pienaar@cdhlegal.com



Riola Kok
Consultant
T +27 (0)11 562 1748
E riola.kok@cdhlegal.com



Jaden Cramer
Associate
T +27 (0)11 562 1260
E jaden.cramer@cdhlegal.com



Thabang Rapuleng
Director
T +27 (0)11 562 1759
E thabang.rapuleng@cdhlegal.com



Tamsanqa Mila
Associate
T +27 (0)11 562 1108
E tamsanqa.mila@cdhlegal.com

BBBEE STATUS: LEVEL TWO CONTRIBUTOR

Our BBBEE verification is one of several components of our transformation strategy and we continue to seek ways of improving it in a meaningful manner.

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JOHANNESBURG

1 Protea Place, Sandton, Johannesburg, 2196. Private Bag X40, Benmore, 2010, South Africa. Dx 154 Randburg and Dx 42 Johannesburg.
T +27 (0)11 562 1000 F +27 (0)11 562 1111 E jhb@cdhlegal.com

CAPE TOWN

11 Buitengracht Street, Cape Town, 8001. PO Box 695, Cape Town, 8000, South Africa. Dx 5 Cape Town.
T +27 (0)21 481 6300 F +27 (0)21 481 6388 E ctn@cdhlegal.com

STELLENBOSCH

14 Louw Street, Stellenbosch Central, Stellenbosch, 7600.
T +27 (0)21 481 6400 E cdh Stellenbosch@cdhlegal.com

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