

'YES' EMPLOYMENT

THE RULES OF ENGAGEMENT



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Melanie Ferreira is the Managing Director at Labour Solve, established in 2007. Their service offerings range from Industrial Relations, Human Resources, Employment Equity and Skills Development to B-BBEE Consulting. In 2000, she completed her LLB from the University of Johannesburg. She is passionate about labour law and leads a team that supports organisations in creating a healthy, inclusive and legally compliant environment for their workforce. Her strength lies in developing and applying tailor-made strategies in line with legislative requirements to meet the unique needs of her clients. However, this is taking into account that everyone has the right to fair labour practices; every worker has the right to form and join a trade union, as well as participate in the union's activities.

The YES 4 Youth initiative presents opportunities to both the YES Employee and host or sponsoring organisation alike. Apart from the requirements of B-BBEE Scorecard criteria, there are two obligations an organisation has to a YES Employee. Firstly, the YES Employee must be exposed to meaningful work experience. Secondly, they must receive treatment in line with the Basic Conditions of Employment Act or applicable Sector Conditions of Employment. Our Constitution contains a Bill of Rights, Chapter Two, which enshrines the rights of all South Africans in what is the foundation of South African labour law.

One of the misconceptions in respect to a YES Employee is that it is a 'free and easy' labour resource, whereby they may be commanded at the whim of their employer. The truth is in vast contrast, as a YES Employee has the same rights and protection as anyone forming part of an organisation's workforce.

It is, therefore, imperative that organisations take into account the rights which a YES Employee has in respect to their employment under this initiative. Furthermore, what obligations does a host or sponsoring organisation have to the YES Employee? South Africa has a plethora of employment legislation, all with its qualifying criteria in terms of its applicability. Each piece of legislation applies to a YES Employee, which include, but are not limited to:

- Labour Relations Act No. 66 of 1995;
- Basic Conditions of Employment Act, No. 75 of 1997;
- Employment Equity Act, No. 55 of 1998;
- Skills Development Act, No. 97 of 1998;
- Occupational Health and Safety Act, No. 85 of 1993;
- Compensation for Occupational Injuries and Diseases Act, No. 130 of 1993;
- Unemployment Insurance Contributions Act, No. 4 of 2002; and
- National Minimum Wage Bill, 2017.

First and foremost, a YES Employee is a fully fledged employee as per the definition contained in section S213 of the Labour Relations Act, No. 66 of 1995, as amended: "Any person, excluding independent contractors, who work for another person, including the State, and who receives or is entitled to receive any remuneration." Therefore, in line with the definition of an employee, a YES Employee will render services to an organisation and will receive a remuneration in exchange for said services. Based on this, in terms of the Labour Relations Act, a YES Employee is a fully fledged employee and as such is entitled to the protection this legislation offers. Included are the referral of disputes, collective bargaining and organisational rights.

One of the inherent benefits of the YES Initiative is that a YES Employee can be sponsored into another organisation for the duration of the contract. However, this poses the question: Who is the direct employer of a sponsored YES Employee? Is it the organisation who remunerates the YES Employee or the organisation that sponsors the YES Employee and receives the services? The Practice Note 1 of 2018 gazetted on 12th October 2018, presented no clarity on this burning issue. Therefore, the identity of the employer must be guided by legislation. Section 200A of the Labour Relations Act contains a presumption as to who is considered an Employee until the contrary is proven. In terms of section 200A, a person who works for another or renders a service is presumed to be that party's employee, regardless of the form of the contract, if any one or more of the following factors are present:

- The manner of work subject to the control and direction of another person;
- The hours of work subject to the control and direction of another;
- A person forms part of an organisation;
- Works an average of 40 hours per month;
- Economically dependent on another;
- A person is provided with tools of the trade; and
- A person that only works for or renders services to one person.

Based on the job requirements of a YES Employee, the presumption, based on the Labour Relations Act, is that a YES Employee is the employee of the organisation that receives the rendered services, regardless of which organisation pays them.

Another contentious issue is whether a YES Employee is entitled to the same conditions of employment as all other employees. Organisations need to be mindful of the fact that the Constitution, as well as the Employment Equity Act, protect employees and prospective employees from discrimination or discriminatory practices. Furthermore, entrenched in the rights of employees are freedom of association, fair labour practices, as well as the right to strike. In the event of a YES Employee being treated differently in respect to working conditions, policies and practices that guide a workforce, without reasonable justification, such conduct by an employer would be viewed as discrimination. Ascertaining whether such would be deemed as discrimination would be taken up with either the CCMA or Labour Court, bearing in mind that the organisation hosting the YES Employee would bear the burden of proof.

The YES requirements dictate that a YES Employee will have a 12-month fixed contract, in line with the minimum wage requirements. It is, therefore, necessary that there is a signed employment contract which limits the duration of employment to the said 12-months. The following should further be included in a YES Employee employment contract:

- Working hours;
- Annual leave;
- Sick leave;
- Family responsibility leave; and
- Maternity leave.

It is important to know that the Basic Conditions of Employment Act do not govern some sectors, like the Motor Industry, Metal Industries and Mining, to name but a few. These sectors are governed by specific Sectoral Main Agreements, which regulate and govern employees in these particular industries. Such sector-specific conditions of employment must be contained in a fixed-term YES Employee employment contract to ensure compliance with legislation.

Vital to the success of the YES initiative and the favourable scorecard result, is both parties having reasonable expectations up-front. Organisations must expose YES Employees to an induction programme, make them aware of the policies and procedures in place, as well as any other employment practices particular to the organisation. In doing this, any dispute or challenge which may arise due to misconduct, ill health or non-performance, will be treated in the same fair and consistent manner as all other employees.

The YES initiative is in no way the 'silver bullet' that will instantaneously address the Youth unemployment crisis. However, it is a positive collaboration between Government and business that is a step in the right direction. But, in implementing the YES initiative, it is imperative that YES Employees are not exploited or in any way treated outside our legal employment framework.

