

Employers guide to understanding basic conditions of employment



What is the pecking order of the basic conditions of employment, collective agreements and employment contracts?

Most employers struggle with answering this very important question. When entering into a contract of employment with an employee, it is important for an employer to know which terms of the contract are superior and which may be amended by collective agreements, mutual consensus or some form of legislation. So, what is the pecking order of collective agreements, the basic conditions of employment and employment contracts?

The answer to the above question would depend on the particular industry. The *employment contract* is regulated by one of the following:

- The Basic Conditions of Employment Act (BCEA)
- Collective agreement,
- Sectorial determination.

The Basic Conditions of Employment Act

The standard norm is that a contract of employment will be subject to the Basic Conditions of Employment Act (*BCEA*).

Section 4 of the BCEA states that the “basic conditions” as per the BCEA will always be included in the basic conditions of an employee’s contract unless:

- any other law makes provision for a term that is more favourable to the employee;
- the “basic condition” of employment has been replaced, varied or excluded in accordance with the provisions of the BCEA;
- a term in the contract of employment is more favourable to the employee than the “basic condition” of employment.

Collective agreements and other contractual terms

Sections 23(3) and 31(c) of the Labour Relations Act (LRA) determine that a collective agreement (agreement between the parties as such or, in the case of a specific industry, the bargaining council’s collective agreement) may cause the *conditions of employment* to be adjusted. If there is a conflict between any conditions stipulated by law, with the exclusion of the 1996 Constitution, the LRA will always receive preference.

Through negotiation, a bargaining council’s collective agreement may result in **less favourable** benefits than those originally stipulated in the contract of employment. It is also permissible to agree on more favourable benefits or terms in a contract, regardless of what any collective agreement or legislation stipulates. It is important to bear in mind that once a specific term has been made part of the contract of employment, the said term will be contractually enforceable. An employer may not stipulate that a specific term in the contract merely serves as a gesture of goodwill, as it has now been incorporated contractually.

Chapter 7 of the Basic Conditions of Employment Act (BCEA) determines that a bargaining council's collective agreement may amend any basic condition of the BCEA, provided that it will not result in less favourable terms in respect of the core conditions. The core conditions refer to working hours relating to health and safety, normal working hours (45 hours per week), annual leave, maternity leave, sick leave and child labour.

The BCEA allows for certain terms of the BCEA to be amended or varied per agreement. An example of this would be the adjustment of the 60-minute lunch break mentioned in the BCEA, which may be reduced to 30 minutes.

Sectorial Determination

When talking about Sectorial Determinations, no mention is made of any negotiations, nor that an attempt should be made to reach a consensus between parties. Only the Minister of Labour may make a determination in respect of the specific industry. The minister may determine conditions that are less favourable to the employee than those stated in the BCEA, although the employee may not be in a less favourable position overall.

Important to remember:

- A bargaining council collective agreement that contains terms that are less or more favourable than those in the BCEA will supersede the BCEA if it does not relate to the core conditions as mentioned above.
- Collective agreements and bargaining council collective agreements will override the conditions of the BCEA in the case of a condition that may be amended as per the BCEA.
- If parties contractually agree to more favourable terms in a contract of employment, those terms will always be ranked above the BCEA.
- Thanks to the LRA, a collective agreement and bargaining council collective agreement will carry more weight than the contract of employment.

SERR Synergy deals with all relevant labour legislation on behalf of businesses and the most common pitfalls that may be encountered.

About the author: Audrey Cloete obtained her LLB degree from the North-West University Potchefstroom in 2003. She completed her articles with the main focus on Criminal Law, however, broadened her horizons after being admitted as an attorney to take on other legal disciplines. She is also an admitted Conveyancer. Audrey joined SERR Synergy in 2015 where she currently works as a Legal Compliance Advisor.

