Daily spread-over and weekly rest period (sec.20) (M) – “Spread-over” is defined in section 8 as “… the period from the time an employee first starts work in any one 24 hour cycle to the time the employee finally stops work in that cycle”. According to this definition the meal interval and any other interlude of inactivity in between the time a person first reports for duty and finally goes home [such as in the case a restaurant worker who may work a morning and an afternoon shift], are part of the spread-over.

An employer, in terms of section 20, may not require or permit an employee to work a spread-over of more than 12 hours, except in the case of an employee performing > urgent work. In the latter instance an employee would be performing remunerated > overtime.

An employer may also not require or permit an employee to work without a weekly interval of at least 36 consecutive hours of rest.

Discussion: The prohibition of work on Sundays for the majority of employees has the effect of ensuring that they automatically enjoy a weekly rest period. However, in the many instances where an employee may be lawfully required to work on a Sunday, the consequence could be that such an employee may have to work seven days a week, and possibly do so for extended periods of time. Section 20 ensures that such unacceptable practices are legally prohibited. The 36 consecutive hours rest period would normally constitute two nights and a day (or for somebody working night shifts two days and a night).

Changes: No specific provision for a weekly rest period existed in the previous legislation other than a Sunday.

Declaration of continuous shifts (sec.15) (U) – The Minister of Labour and Social Welfare is authorised to declare any operation as a continuous operation (24 hours, 7 days per week) by notice in the Government Gazette, thus permitting the performance of continuous shifts of no longer than 8 hours each under prescribed conditions. The notice must be amplified by the Minister through any other available means to ensure that the parties whose interests are affected thereby duly receive the information.

Deductions and other acts concerning remuneration (sec.12) (M) – An employer shall not make any deduction from an employee’s
remuneration unless the employee agrees to it in writing and the subtraction is not in aggregate more than one third of the employee’s remuneration. Cumulative subtractions performed in terms of any law (such as tax and social security), or in terms of a court order (such as a fine or garnishee order for debts), are not subject to the one-third limitation and are calculated separately from other deductions.

Other prohibitions
An employer shall also not –
- levy a fine on an employee unless authorised by statute or collective agreement;
- accept repayment of any remuneration paid to an employee;
- allow an employee to acknowledge receipt for more pay than actually received;
- require an employee to buy goods from a shop owned or managed on behalf of the employer, or to utilize the employer’s services in lieu of remuneration; or
- require an employee to pay more for goods supplied by the employer than the price paid by the employer plus reasonable overheads (acquisition costs).

Permitted deductions
Permitted deductions, authorised by the employee, up to a total of one third of an employee’s remuneration are limited to –
- rent for accommodation provided by the employer;
- goods sold by the employer;
- money loaned by the employer;
- contributions to employee benefit funds; or
- trade union fees.

Deductions may also be made by the employer if required or permitted under any collective agreement or in terms of any arbitration award – these may, however, together with all the deductions authorised by the employee, not exceed one third of the employee’s remuneration.

All lawful subtractions made by the employer from an employee’s remuneration must be paid to the receiving person in time, and according to any other requirements pertaining to the deductions.

Reduced-hours or short-time
Unless there is a provision in a contract of employment or collective agreement to the contrary an employer may, for operational reasons or other reasons recognised by law, give written notice to an employee of the employer’s intention to require the employee to work fewer hours than
usual for a period not exceeding 3 months. The employer is entitled to correspondingly reduce the employee’s remuneration by up to one half of his/her basic wage during this period.

The reduction of ordinary hours of work may be extended for additional periods not exceeding three months by written agreement between the employer and employee or the employee’s registered trade union, in the case of an exclusive bargaining agent.

**Deduction of trade union dues** – >Recognition and Organisational Rights of Registered Trade Unions

**Discussion:** The so-called ‘reduced-hours’ or ‘short-time’ provision (section 12(6)) permits an employer to give written notice to an employee of the employer’s intention to require the employee to work fewer hours than usual as a temporary measure. It is implied that the notice should be given a reasonable period before the reduced hours are to commence and that there should be a good reason for wanting to do so (such as temporary lack of manufacturing raw materials or unforeseen mechanical breakdown). When an employer resorts to this short term adjustment measure, remuneration may be decreased by up to one-half of the normal basic wage. It follows that even if employees temporarily work no hours at all at the behest of the employer, they must still be paid at least one-half of their basic wage plus other benefits for the duration of the arrangement.

It should be noted that the provision does not require the employer to obtain any prior authorisation from the employees involved or from anybody else before such reduced remuneration is paid, neither does anybody except the employees themselves have to be notified about the introduction of short hours and the corresponding deductions from their normal pay. However, it is good practice and advisable to consult properly with the employees involved (and their union) beforehand. If the reduced-hours are to be extended beyond three months, consultation/negotiations on the issue becomes obligatory.

**Changes:** Generally, the provisions of section 12 do not differ much from previous stipulations. The main exception is that formerly an employer was permitted to levy a fine against an employee for any act or omission committed by the employee in the course of employment by way of lawful disciplinary action taken against the employee. Fines may no longer be levied unless authorised by statute or a collective agreement.

The section provides for an employer to make deductions from an employee’s remuneration if required or permitted to do so under a collective agreement, for example, deduction of trade union dues, or in
terms of an arbitration award, whether the employee has agreed thereto or not. This is a new provision.

The short-time provision introduces a number of changes from the previous situation under the Labour Act, 1992. These include the limitation that reduction of hours and corresponding pay is subject to any provision in a contract of employment or collective agreement to the contrary (i.e., may not be done if these prohibit such measures); no time limit for short-hours was previously mentioned; there was no reference to ‘operational reasons’ for instituting reduced-hours; and formerly deductions were limited to a third of remuneration instead of one-half of basic wage.

**Definitions and Interpretation (sec. 1) (M)** – Definitions applicable to the entire Labour Act, 2007 have, for the most part, been incorporated in the alphabetical discussion of the relevant provision to which they refer. However, for ease of reference, the definitions are repeated here verbatim as appearing in the first section of the Act. Insertions in square brackets are not part of the definitions but have been made to indicate the name of a specific section referred to by the section number appearing as part of the definition.

**Arbitration** – means arbitration proceedings conducted before an arbitration tribunal established in terms of section 85 [Arbitration];

**Arbitrator** – means an individual appointed as such in terms of section 85 [Arbitration];

**Collective agreement** – means a written agreement concerning the terms and conditions of employment or any other matter of mutual interest, concluded by –

(a) one or more registered trade unions, on the one hand, and
(b) on the other hand –
   (i) one or more employers;
   (ii) one or more registered employers’ organisations; or
   (iii) one or more employers and one or more registered employers’ organisations;

**Conciliation** – includes -

(a) mediating a dispute;
(b) conducting a fact finding exercise; and
(c) making an advisory award if-
(i) it will enhance the prospect of settlement; or  
(ii) the parties to the dispute agree.

**Conciliator** – means an individual appointed as such in terms of section 82 [Resolution of disputes through conciliation];

**Committee for Dispute Prevention and Resolution** – means the Committee established in terms of section 97(1)(a) [Committees] [of the Labour Advisory Council];

**Dispute** – means any disagreement between an employer or an employers’ organisation on the one hand, and an employee or a trade union on the other hand, which disagreement relates to a labour matter;

**Dispute of interest** – means any dispute concerning a proposal for new or changed conditions of employment employment, but does not include a dispute that this Act or any other Act requires to be resolves by –  
(a) adjudication in the Labour Court or other court of law; or  
(b) arbitration;

**Employee** – means an individual, other than an independent contractor, who -  
(a) works for another person and who receives, or is entitled to receive, remuneration for that work; or  
(b) in any manner assists in carrying on or conducting the business of an employer;

**Employer** – means any person, including the State who –  
(a) employs or provides work for, an individual and who remunerates or expressly or tacitly undertakes to remunerate that individual; or  
(c) permits an individual to assist that person in any manner in the carrying on, or conducting that person’s business;

**Employers’ organisation** – means any number of employers associated together for the principal purpose of regulating relations between those employers and their employees or the employees’ trade unions;

**Essential Services Committee** – means the committee established in terms of section 97(1)(b) [Committees] [of the Labour Advisory Council];
Exclusive bargaining agent – means a trade union that has been recognised as such in terms of section 64 [Recognition as exclusive bargaining agent of employees];

Individual – means a natural person;

Labour Commissioner – means the individual appointed as Labour Commissioner in terms of section 120 [Appointment of Labour Commissioner and Deputy Labour Commissioner”];

Labour Court – means the court referred to in section 115 [Continuation and powers of Labour Court];

Labour inspector – means an individual appointed as a labour inspector in terms of section 124 [Appointment of inspectors];

Legal practitioner – means an individual admitted to practice as a legal practitioner in terms of the Legal Practitioners Act, 1995 (Act No. 15 of 1995);

Lockout – means a total or partial refusal by one or more employers to allow their employees to work, if the refusal is to compel those employees or employees of any other employer to accept, modify or abandon any demand that may form the subject matter of a dispute of interest;

Medical practitioner – means an individual who is registered as such in terms of the Medical and Dental Professions Act, 20044 (Act No. 10 of 2004) and includes an individual who is registered as a nurse or midwife in terms of the Nursing Professions Act, 2004 (Act No. 8 of 2004);

Minister – means the Minister responsible for Labour;

Ministry – means the Ministry responsible for Labour;

Office-bearer – in relation to a trade union or employers’ organisation, means an individual, other than an official, who holds any office in that trade union or employers’ organisation and includes a member of a committee of that trade union or employers’ organisation;

Official – in relation to trade union or employers’ organisation means a person employed as a secretary, assistant secretary or any similar capacity, whether or not in a full-time capacity;
Permanent Secretary – means the Permanent Secretary of the Ministry responsible for Labour;

Premises – includes any building or structure, or part of it, whether above or below the surface of the land or water, or any vehicle, truck, vessel or aircraft;

Prescribed – means prescribed by regulation in terms of this Act;

Public holiday – means any public holiday referred to in or declared under the Public Holidays Act, 1990 (Act No. 26 of 1990);

Registered – in relation to a trade union or employers’ organisation, means a trade union or employers’ organisation registered in terms of Chapter 6;

Remuneration – means the total value of all payments in money or in kind made or owing to an employee arising from the employment of that employee;

Spouse – means a partner in a civil marriage or a customary law union or other union recognised as a marriage in terms of any religion or custom;

State – includes a regional council, local authority or any body created by law over which the State or Government of Namibia has some control over because of shares held in or funds made available to that body by the State or Government of Namibia;

Strike – means a total or partial stoppage, disruption or retardation of work by employees if the stoppage, disruption or retardation is to compel their employer, any other employer or an employers’ organisation to which the employer belongs, to accept, modify or abandon any demand that may form the subject matter of a dispute of interest;

This Act – includes any regulation made under it;

Trade union – means an association of employees whose principal purpose is to regulate relations between employees and their employers;

Wages Commission – means the Commission referred to in section 105 [Continuation of Wages Commission];

Wage order – means a wage order made in terms of section 13 [Wage order].

Definitions Relating to Basic Conditions of Employment (sec.8) (M) – Definitions applicable specifically to Chapter 3 of the Labour Act, 2007 have for the most part been incorporated in the alphabetical
discussion of the relevant provision to which they refer. However, for ease of reference, they are repeated verbatim below as appearing in section 8 (1)7. Insertions in square brackets are not part of the definitions but have been made to indicate the name of a specific section referred to by the section number appearing as part of the definition.

**Annual leave cycle** – means the period of 12 consecutive months’ employment with the same employer immediately following –

(i) an employee’s commencement of employment; or
(ii) the completion of the last annual leave cycle;

**Basic wage** – means, for the purpose of calculating any basic condition of employment, that part of an employee’s remuneration in money including the cash equivalent of payment in kind, if any, as calculated in terms of section 10 [Calculation of remuneration and wages], paid in respect of work done during the hours ordinarily worked but does not include –

(i) allowances, including travel and subsistence, housing, motor vehicle, transport and professional allowances, whether or not based on the employee’s basic wage;
(ii) pay for overtime as defined in section 8(f) [Definitions relating to basic conditions of employment];
(iii) additional pay for work on a Sunday or a public holiday;
(iv) additional pay for night work, as required in terms of section 19 (1) [Night work];
(v) payment in respect of pension, annuity or medical benefits or insurance;

**Continuous shift** – means a shift in a continuous operation, as permitted by the Minister in terms of section 15(1) [Declaration of continuous shifts];

**Incapacity** – means an inability to work owing to any sickness or injury;

**Monetary remuneration** – refers to that part of the remuneration that is paid in money;

**Overtime** – means time worked in excess of the hours an employee ordinarily works in any ordinary working day but does not include any work done on –

(i) a Sunday, if it is not an ordinary working day for that employee; or
(ii) a public holiday;
Security Officer – means an employee who -
  (i) controls, checks and reports on the movements of individuals, vehicles and goods through a checkpoint or at any other place; or
  (ii) protects persons or property;

Sick leave – means any period during which the employee is unable to work due to incapacity;

Sick leave cycle – means -
  (i) the period of 36 consecutive months’ employment with the same employer immediately following –
     (aa) an employee’s commencement of employment; or
     (bb) the completion of the last sick leave cycle; and
  (ii) includes any period, or combination of periods, not exceeding a total of 36 weeks, during which an employee is on annual leave, sick leave or any other absence from work on the instructions, or with the permission, of the employer;

Spread-over – means the period from the time an employee first starts work in any one 24 hour-cycle to the time the employee finally stops work in that cycle;

Urgent work – means -
  (i) emergency work, which if not attended to immediately, could cause harm to or endanger the life, personal safety or health of any person or could cause serious damage or destruction to property
  (ii) work connected with the arrival, departure, loading, unloading, provisioning, fuelling or maintenance of –
     (aa) a ship;
     (bb) an aircraft; or
     (cc) a truck or other heavy vehicle used to transport passengers, livestock or perishable goods;

Week – in relation to an employee, means a period of 7 days within which the working week of that employee falls;

Weekly interval – means the interval between the end of one ordinary working week and the start of the next.

For the purpose of paying basic wages, an employer may not pay to an employee in-kind payment except by agreement between the employer and the employee or in terms of a collective agreement. (sec. 8 (2))
The Minister must prescribe the portion of basic wage that may be paid in-kind pursuant to any agreement and the manner of calculation of the cash equivalent value of an in-kind payment. (sec. 8 (3))

[See Regulation 2: Portion of basic wage that may be paid in-kind and value of in-kind payments]

**Delegation of powers (sec. 141) (U)** – In terms of this section the key functionaries identified in the Act, namely, the Minister of Labour and Social Welfare, the Permanent Secretary and the Labour Commissioner, may assign any power conferred upon them by the Act to any official of the Ministry, with the exception of –

- the power to delegate authority;
- the power to make regulation; and
- the power to issue codes of good practice, guidelines for the proper administration of the Act, or any amendment of these.

**Disability** – >Fundamental Rights and Protections >Prohibition of discrimination in employment

**Disclosure** – >Employer and employers’ organisation unfair labour practices

**Discrimination in employment, prohibition of** – >Fundamental Rights and Protections

**Dismissal arising from collective termination or redundancy** – >Termination of employment

**Dispute** – >Definitions and Interpretations

**Disputes affecting the national interest (sec. 80) (N)** – According to section 80 the Minister may, if he/she considers it in the national interest, decide on one of two main courses of action:

- The Minister may request the Labour Commissioner to appoint a conciliator to conciliate the dispute or potential dispute; or
- The Minister may, in consultation with the Labour Advisory Council, appoint a panel of persons representing the interests of employers, employees and the State to investigate any industrial conflict, or potential conflict, for the purpose of reporting and making recommendations to the Minister.
A panel appointed by the Minister to investigate an industrial conflict or latent conflict situation is vested with similar powers to those of a conciliator, including the right to subpoena, to administer oaths and to question any individual about matters relevant to the dispute or potential dispute.

**Discussion:** Major labour disputes have the potential to cause substantial damage to the future viability of an enterprise, a group of enterprises, or even an entire industry. They can simultaneously seriously curtail workers’ security of income and may eventually threaten the very means of their livelihood on a massive scale.

In addition, intermittent industrial strife casts a dark shadow on a country’s image as an attractive investor destination, and can be a contributing catalyst for economic decline and insidious poverty. It is for these reasons that the legislature has deemed it fit to empower the Minister responsible for Labour to become pro-actively involved in resolving industrial conflict when it threatens to get out of hand, or to take early preventative measures when signs of such a possibility become discernible.

A conciliator or panel of persons appointed for this purpose would be selected from persons with proven capability and credibility in the sphere of industrial relations, and preferably also with intimate knowledge of the industry concerned. Furthermore, it could be expected that such a panel, in addition to its investigating and reporting task, would also perform a conciliatory role in the course of its enquiry.

Different forms of industrial actions generally form part of the social dynamics of a democratic society. They need only to be managed properly in order to mitigate the negative affects thereof.

**Dispute of interest** – >Definitions and Interpretations

**Dispute of right** – >Definitions and Interpretations >Dispute
**Employee** – >Definitions and Interpretation

**Employer** – >Definitions and Interpretation

**Employers’ organisation** – >Definitions and Interpretation

**Employment decision** – >Fundamental Rights and Protections >Prohibition of discrimination and sexual harassment in employment

**Essential service** – >Essential services, designation of

**Essential Services Committee** (sec.104) (N) – The Essential Services Committee is established as one of two standing committees of the >Labour Advisory Council under the provisions of section 97(1). [Employees involved in essential services are prohibited from striking whilst employers of such employees are prohibited from resorting to lockouts. Disputes in essential services must be resolved by conciliation and/or arbitration.]

**Functions**
The Committee’s functions are to:
- Recommend the designation of essential services to the Labour Advisory Council (LAC) in terms of section 77.
- Determine disputes in this regard and make recommendations thereon to the LAC.

**Composition and term of membership**
The Committee consists of chairperson who is a member of, and is designated by, the Labour Advisory Council and four other individuals with expertise in labour law and labour relations designated or appointed by the Labour Advisory Council. An appointed member holds office for 3 years and may be re-appointed. A designated member holds office for as long as he/she remains a member of the LAC.

**Conditions of appointment and procedures**
A member who is not in the employment of the State qualifies for the payment of allowance for attending meetings as well as travel and subsistence reimbursement. The Committee may make its own rules for the conduct of its work.

**Essential services, designation of** (sec.77) (N) – The Essential Services Committee, established under section 97(1) of the Act, must
recommend to the Labour Advisory Council (LAC) the designation of all or part of a service to be essential if, in the opinion of the Committee, the interruption of that service would endanger the life, personal safety or health of the whole or any part of the population of Namibia. [Employees involved in essential services are prohibited from striking whilst employers of such employees are prohibited from resorting to lockouts. Disputes in essential services must be resolved by conciliation and/or arbitration.]

Procedure
The procedure by the Committee to recommend designating a service or part thereof as an essential service entails the following steps:

1. Notice in the Government Gazette of the investigation it intends conducting with a view to possible declaration of a service or part thereof as an essential service. The notice must –
   - indicate the service in question;
   - invite interested parties to submit written submissions; and
   - state the date, time and venue of a possible public hearing of the matter.

2. Enabling any interested party to inspect any written representations made pursuant to the notice.

3. Holding of a public hearing, if the Committee so desires, at which persons who made written submissions may elaborate on these through oral representations.

4. Decision, after due consideration of all the facts, whether or not to recommend designation of the whole or part of the service that was the subject of the investigation as an essential service.

5. Forwarding a report and recommendation to the LAC.

6. Publishing a notice in the Gazette if it does designate the service or part thereof as an essential service.

The LAC must, after considering the report of the Essential Services Committee, forward its recommendations to the Minister.

The Minister can decide whether or not to accept the recommendations. If the Minister does, the Minister must publish a notice of designation of that essential service in the Gazette. The section emphasises that in making such a decision the Minister is not “bound by or obliged” to follow the recommendation of the Labour Advisory Council.

The notices in the Gazette referred to above must be amplified by the Essential Services Committee or the Minister, as the case may be, through any other available means to ensure that the parties whose interests are affected by the notices duly receive the information.
The Essential Services Committee may recommend to the LAC to vary or cancel the designation of any essential service by following similar steps of consultation and deliberation as indicated above.

**Disputes about designation as essential service**
Disputes regarding whether or not employees or an employer are engaged in an essential service may be referred in writing to the Committee, with confirmation that a copy of the referral has been served on all parties involved. The Committee is then obliged to follow a similar procedure as above in making a recommendation on the matter to the LAC with the final decision to be taken by the Minister.

**Urgent Application**
In a situation where a party to a dispute of interest asserts that the dispute pertains to a service that should be designated as an essential service, that party must refer the matter to the Essential Services Committee for urgent consideration no later than the date on which the dispute is referred to the Labour Commissioner for conciliation. The Committee must deal with the matter and forward its recommendation to the LAC within 14 days, which must likewise forward its recommendation to the Minister within 14 days.

The Minister must decide whether or not to designate the whole or part of the service as an essential service and must communicate the decision to the parties within 14 days from the date of receipt of the recommendation from the LAC. No strike may be conducted by a trade union, and no lock-out may be engaged in by an employer, pending the Minister’s decision.

**Essential services, disputes in (sec.78) (N)** – In a situation of an industrial dispute of interest where the parties are prohibited to strike or lockout due to the fact that they are engaged in essential services as recommended by the Essential Services Committee and approved by the Minister, any such party is entitled to refer the dispute to the Labour Commissioner. It should be noted that the dispute referred to here is not about a question of whether or not the service should be classified an essential service, but rather about the substantive dispute, such as a wage dispute, itself.

Having been satisfied that a copy of the notice of a dispute has been served on all parties, the Labour Commissioner, may refer the dispute to an arbitrator to arbitrate the dispute in terms of Part C of Chapter 8 (compulsory arbitration), or the Labour Commissioner may refer the matter for arbitration in accordance with Part D of Chapter 8 (private arbitration, if the parties have agreed to this).
Evidence (sec. 133) (U) – In any legal proceedings in terms of the Labour Act, 2007 the following principles shall apply:

- In a case where there is a dispute about the age of an individual with no satisfactory proof at hand, a labour inspector’s opinion of the probable age of that individual will be presumed to be his/her age.
- An interested party who does not accept this estimation may, at own expense, require the individual to appear before and be examined by a medical practitioner whose certification on the matter will constitute conclusive proof of the age of that person for the purpose of the proceedings.
- A statement or entry in a book or document kept by an employer or found on the employer’s premises, as well as any copy thereof, is admissible in evidence against the employer as admission of the facts stated in the document, unless it is proved that entry was not made by the employer or somebody on the employer’s behalf.
- If it is alleged that an employer failed to pay an employee at a rate of pay prescribed in terms of the Act – with proof that the employee was in the employ of the employer and that the provision prescribing the rate of pay binds the employer – it will be presumed, unless the contrary is proved, that the employer did fail to pay the employee as required.

Exclusive bargaining agent – >Definitions and Interpretation

Exemption from a wage order – >Wage order, exemption from

Exemptions and variations (sec. 139) (M) – Exemptions from and variations of provisions of Chapter 3 of the Act (basic conditions of employment) may be granted to an employer or a class of employers by the Minister as set out here below. Sections 35 (severance pay) and 38 (the manner in which disputes regarding basic conditions of employment are to be dealt with) are excluded from such flexibility.

Exemption
Before the Minister of Labour and Social Welfare considers an application for exemption the Minister must be satisfied that employees affected by the proposed exemptions or their trade unions have been duly consulted. An exemption must be in the prescribed form –
- indicating the employees or category of employees affected;
- including any conditions under which the exemption is granted;
- stating the period of the exemption, which may be made retrospective but not earlier than the date of application; and
The exemption may be amended or be withdrawn by the Minister, and if published in the Government Gazette, the amendment or withdrawal may also only be done by notice in the Gazette. All notices relating to exemptions must be amplified by the Minister through any other available means to ensure that the parties whose interests are affected by the notices duly receive the information. Any person who is dissatisfied by the granting, amendment or withdrawal of an exemption, or with its period of applicability, may appeal against the decision to the Labour Court.

**Variation**

Variations of basic conditions of employment provisions by the Minister are dealt with in similar manner as indicated above for exemptions, except that the Minister is also called upon to consult the Labour Advisory Council as part of the process.

[See Regulation 26: Application for exemption or variation]

**Discussion:** The term *exemption* in the above context basically means that an employer is excused or set free from the obligation to comply with a certain statutory condition of employment. The term *variation* signifies a change or departure – to a lesser or greater extent – from a statutory condition of employment as pertaining to a specific employer or class of employers as determined by the Minister.

It goes without saying that any application for an exemption or a variation must be justifiable and well motivated. The exact exemption or variation requested should be precisely indicated with reference to the relevant section(s) and subsection(s). It is general practice in labour administration that exemptions and variations must usually be reciprocated by a *quid pro quo* ‘something for something’ arrangement, in the sense that an employee giving up an existing employment benefit, such as a meal break, would be compensated for it by, for example, being paid overtime in lieu of the break and/or being permitted to have a meal whilst on duty.

The consultation aspect is a vital prerequisite and should be done as completely and thoroughly as circumstances permit. Written proof thereof – and ideally formal agreement by the union or those affected, or at least by the majority of such persons – should accompany the application.
Extended maternity leave – >Maternity leave, extended

F

Family responsibility – >Fundamental rights and protections >Prohibition of discrimination and sexual harassment in employment

Food – >Accommodation

Forced labour, prohibition of – >Fundamental Rights and Protections >Prohibition of Forced labour

Freedom of association – >Fundamental Rights and Protections >Freedom of Association

Fundamental Rights and Protections (Chapter 2) – Sections 3 to 7, appearing as entries A. to E. below, deal with Fundamental Rights and Protections.

Discussion: The chapter on fundamental rights and protections addresses some very basic human rights (NLL 1 p.141) issues which find resonance in certain of the Core Conventions (NLL 1 p.133) of the International Labour Organisation (NLL 1 p.92), most of which have been ratified by Namibia. The Core Conventions are the following:

• Forced Labour Convention, 1930 (C. 29 of 1930);
• Freedom of Association and Protection of the Right to Organise Convention, 1948 (C. 87 of 1948);
• Equal Remuneration Convention, 1951 (C.100 of 1951);
• Right to Organise and Collective Bargaining Convention, 1949 (C. 98 of 1949)
• Abolition of Forced labour Convention, 1957 (C. 105 of 1957);
• Discrimination (Employment and Occupation) Convention, 1958 (C.111 of 1958);
• Minimum Age Convention, 1973 (C.138 0f 1973); and
• Worst Forms of Child Labour Convention (C. 182 of 1999).
A. Prohibition and restriction of child labour (sec.3) (U) – The Act forbids any person from employing a child and from requiring or permitting it to work in any circumstances prohibited in terms of section 3. The essential particulars of this provision are as follows.

1. Children under the age of 14 years
A child under the age of 14 years must not be employed under any circumstances at all. In other words, this is an explicit all-encompassing blanket prohibition with not even the Minister having the authority or right to permit any exceptions at all.

2. Children aged at least 14 but under 16 years
Children in this age category may not be employed in respect of any work done between the hours of 20h00 and 07h00 or on any premises where:
- Work is done underground or in a mine;
- construction or demolition takes place;
- goods are manufactured;
- electricity is generated, transformed or distributed;
- machinery is installed or dismantled; or any work-related activities take place that may place the child’s health, safety, or physical, mental, spiritual, moral or social development at risk.

A child under 16 may also not be employed in any circumstances contemplated in Article 15(2) of the Namibian Constitution. This article determines that:
Children are entitled to be protected from economic exploitation and shall not be employed in or required to perform work that is likely to be hazardous or to interfere with their education, or to be harmful to their health or physical, mental, spiritual, moral or social development. For the purpose of this Sub-Article children shall be persons under the age of sixteen (16) years.”

Furthermore, such children may not be employed in any circumstances specifically prohibited by the Minister of Labour and Social Welfare by regulation.

3. Children aged at least 16 but under 18 years
Children in this age category may also not be employed in respect of any work done between the hours of 20h00 and 07h00 nor for work specified next to the five bullets above, except insofar as the Minister by regulation in accordance with sec.3(5) may permit.
4. **Persons aged at least 18 and above**

Individuals in this category are not regarded as children for the purpose of the Labour Act, 2007 and may be employed to perform any lawful type of work within the regulatory parameters of the Act.

**Penalty**

A person who contravenes or fails to comply with this section is liable on conviction to a maximum fine of N$20 000.00 and/or up to 4 years imprisonment.

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**Discussion:** The topic of child labour is a very sensitive global concern, with countless blatantly exploitative abuses being the order of the day in many developing countries, particularly in parts of Asia, Latin America and Africa. Exploitation also occurs in other parts of the world but usually not so manifestly and mostly at lower levels of frequency.

It has been recognized by the ILO that there is a difference between the worst forms of child labour (as dealt with in Convention No.182 of 1999 concerning the Prohibition and Immediate Action for the Elimination of the worst Forms of Child Labour) and the traditional forms of child labour. Due recognition has also been given as to what amounts to child labour and child work. The latter being accepted as being necessary for, and to be applied only to, the upbringing of a child.

**Impacting variables**

Cultural, pedagogic and other considerations play a significant role when it comes to keeping children occupied, particularly in rural communities. But often there is a blurred line between what would represent acceptable forms of teaching a child to be a useful member of the family or community in which he/she lives, on the one hand, and what would actually represent reprehensible forms of child labour, on the other.

Parents or guardians are obviously entitled to tutor their children in routine household and related family chores. However, they have to be careful not to overstep the limits of what can reasonably be considered light educative menial work as opposed to arduous labour.

An additional, more recently emerging, problem is that of AIDS orphans trying to provide for themselves and siblings. Should they be equally disallowed from doing so?

These are all sensitive, intricate issues placing a big responsibility on parents, teachers and community leaders and, indeed, on the Nation as a whole. But as far as employers are concerned, the provisions of section 3, properly read within the broader context of the Act, serves as a clear
guideline as to what is, and what is not, permissible when it comes to youth employment.

It should be borne in mind in this respect, that where a child from 14 to 17 years of age is legally employed, even in a casual or temporary capacity, that individual is an employee within the full meaning of the Act and enjoys all the rights, benefits and protections stipulated in it. In addition, the normal common law principles pertaining to employment contracts (NLL 1 p.137), would also apply (in as far as they have not been amended by statutory law), with all the relevant rights and obligations which they entail for the relationship between an employer and an employee.

B. Prohibition of forced labour (sec.4) (U) – Any person, whether an employer or not, is prohibited from directly or indirectly causing, required or permitting any individual to perform forced labour. Forced labour includes –

(a) any work or services performed or rendered involuntarily by an individual under threat of any penalty, punishment or other harm to be imposed or inflicted on or caused to that individual by any other individual, if the first-mentioned individual does not perform the work or render the service;

(b) any work, performed by an employee’s child who is under the age of 18 years, if the work is performed in terms of an arrangement or scheme in any undertaking between the employer and the employee;

(c) any work performed by any individual because that individual is for any reason subject to the control, supervision or jurisdiction of a traditional chief or headman in that chief’s or headman’s capacity as chief or headman.” (own emphases)

Discussion: Section 4. is closely founded in the provisions of the ILO’s Forced Labour Convention, 1930 and the Abolition of Forced Labour Convention, 1957 both of which have been ratified by Namibia. Forced labour has elements of slavery where people are considered or treated as human property; to do the bidding of others against their will and mostly without compensation. Whilst outlawed in most countries the practice continues in various forms around the world.

Again, social and cultural consideration can play a role, as would be the case where an individual performs work by virtue of subservience to a traditional leader, or where a child is obliged to carry out chores at home or
at school (such as weeding a flower bed or picking up debris in the yard). In the first instance, the Act outlaws such conduct outright, irrespective of socio/cultural considerations. In the second instance (tasks assigned to a child by family, friends or a teacher), reasonableness and common sense should prevail. In other words, justifiable and reasonable social, cultural and pedagogic considerations would obviously continue to have their rightful place, unless explicitly prohibited by law.

Penalty
A person who contravenes or fails to comply with this section is liable on conviction to a maximum fine of N$20 000.00 and/or up to 4 years imprisonment.

C. Prohibition of discrimination and sexual harassment in employment (sec.5) (M) – The Act forbids a person to discriminate in any employment practice against any individual on the basis of:
- Race, colour, or ethnic origin.
- Sex, marital status or family responsibilities.
- Religion, creed or political opinion.
- Social or economic status.
- Degree of physical or mental disability.
- AIDS or HIV status.
- Previous, current or future pregnancy.

In this regard, it is discrimination to differentiate between two or more employees who do work of equal value, or between two or more applicants for employment who seek work of equal value. It is not discrimination to –
- select any person for purposes of employment or occupation according to reasonable criteria, including but not limited to, the ability, capacity, productivity and conduct of that person or in respect of the operational requirements and needs of the particular work or occupation in the industry concerned.
- distinguish, exclude or prefer any individual on the basis of an inherent job requirement;
- take affirmative action measures;
- take any measures approved by the Employment Equity Commission in terms of the Affirmative Action (Employment) Act, 1998;
- temporarily reassign a pregnant employee to other duties which are suitable to her pregnant condition, provided there is no reduction in remuneration or any other benefits; or
employ a person who as a consequence of a disability is incapable of performing certain duties or functions connected to the position or which is so prohibited by law.

Definitions

‘AIDS’ is defined as the Acquired Immune Deficiency Syndrome, a human disease which is caused by the Human Immunodeficiency Virus (HIV) and which is characterised by the progressive destruction of the body’s immune system.

‘Employment decision’ can take on a wide range of activities and encompasses both pre-employment and in-the-job employment situations. In this respect it includes access to vocational guidance, training, placement services, advertising, recruitment, selection, appointment, promotion, demotion and transfer. An employment practice also refers to remuneration, conditions of employment, benefits, security of tenure, discipline, suspension and termination of employment and dismissal arising from retrenchment.

‘Family responsibility’ means the responsibility which an employee has towards a family member who may be a parent, spouse (husband or wife), son or daughter who, regardless of age, needs the care and support of the employee.

‘HIV’ is defined as the Human Immunodeficiency Virus, a virus that weakens the body’s immune system, ultimately causing AIDS.

‘Person with disability’ is defined as an individual who suffers from any persistent physical or mental limitation that restricts that individual’s preparation for, entry into or participation or advancement in employment or in an occupation.

‘Racially disadvantaged persons’ means persons who belong to a racial or ethnic group which formerly had been or still are, directly or indirectly disadvantaged in the sphere of employment as a consequence of social, economic or educational imbalances arising out of racially discriminating laws or practices before the independence of Namibia.

‘Work of equal value’ refers to work that is broadly the same and requires comparable skills, abilities and responsibilities from employees working within a similar environment.

Sexual harassment

Section 5, in addition, expressly forbids sexual harassment of an employee or prospective employee by any person. Where sexual harassment does occur and an employee resigns as a result thereof, the resignation constitutes constructive dismissal and entitles the employee to remedies available to an employee who has been unfairly dismissed.

For the purpose of the section, ‘sexual harassment’ is defined as any unjustifiable behaviour of a sexual nature which infringes on the dignity of
an employee, and undermines equality in employment, in a situation where either the victim has made it known to the offender that his/her behaviour is offensive, or where the offender should have been aware that the conduct is unacceptable under the circumstances.

Disputes
Disputes alleging discrimination which arise from an employer's lawful implementation of affirmative action must be decided in favour of the employer.

Discussion: The elimination of unfair discrimination at the workplace has been a fundamental social justice objective of human rights activists for many years, both prior and subsequent to Namibia’s independence. Most informed observers would agree that, overall, the situation improved dramatically after the country’s decolonisation and methodical implementation of employment equity programmes in the public and private sectors. Nevertheless, discrimination in various guises has not been totally eradicated, hence the continued need for legislative intervention.

The stipulation that it is not discrimination to distinguish, exclude, or prefer any individual on the basis of an inherent job requirement, carries an important principle, which is indispensable for productive efficiency. Maintaining proper work performance standards and selecting those who are objectively best suited for a job, have nothing to do with unfair discriminatory conduct characterised by favouritism, bigotry and prejudice. However, when there is a lack of due process, or performance criteria seem unreasonably high, suspicions of veiled unfair discrimination will soon be aroused.

Disability in the sense used in this provision is usually understood as a serious physical or mental limitation which puts the individual at a distinct disadvantage at the workplace in comparison to non-disabled colleagues or candidates for employment. Such an individual would, however, be able to perform the required functions of a post satisfactorily, with some special training and/or form of adaptation of the workplace, or some other reasonable form of assistance or aid.

Changes: The previous Act did not carry a definition of ‘racially disadvantaged person’. The definition in the present Act is based largely on the formulation contained in the Affirmative Action (Employment) Act, 1998.

AIDS or HIV status and pregnancy are new additions to the list of grounds
which may not be used as a reason for discrimination in employment. The inclusion of HIV/AIDS is indicative of concern about the stigmatisation of affected persons which impacts negatively on their chances to find and retain regular employment. Compliance with the provision should not be problematical to employers, although some guidance may be needed regarding employees who have become physically incapable of performing the duties and functions for which they were employed.

The addition of ‘previous, current or future pregnancy’ to the list of prohibited discrimination, seeks, inter alia, to counteract the potential negative impact on the employment of younger women due to the added cost factor of expanded maternity benefits.

The previous prohibition of discrimination on grounds of sexual orientation is absent in the present text. The former reference to the banning of harassment in employment or occupation per se, has also been omitted. Instead, sexual harassment has been explicitly prohibited reflecting concern about suspected widespread abuse of this nature at the workplace. Apart from the statutory prohibition it is expected that sexual harassment will also be dealt with in the >guidelines and codes of good practice to be published in terms of section 137.

D. Freedom of association (sec.6) (U) – In terms of section 6 of the Act, an employer may not discriminate against an employee or somebody seeking employment because of that person’s –

- membership of a trade union or participation in the lawful activities of a trade union;
- exercising of any right conferred by the Act;
- disclosure of information he/she is entitled to, or legally required, to give; or
- refusal to do something unlawful.

Conversely, a trade union (or an employers’ organisation) may not discriminate against an individual on grounds of race, sex, religion, social status, etc, with regard to admission, suspension or termination of membership; election or removal from office; and organisational activities.

Discussion: Freedom of association (>NLL 1 p.84) is a fundamental human right allowing a country’s inhabitants, including employees and employers, to associate with each other and to establish or join organisations such as political parties, religious denominations, trade unions, em-
E. Disputes concerning fundamental rights and protections (sec.7) (N) – Disputes relating to alleged discrimination in employment, freedom of association or any matter dealt with in the Act and Chapter 3 of the Namibian Constitution (Fundamental Human Rights and Freedoms) may be referred to the labour Commissioner.

Having been satisfied that a copy of the dispute has been served on all parties, the Labour Commissioner, may refer the dispute to an arbitrator to resolve the dispute through arbitration. In the case of a dispute involving alleged discrimination, the Labour Commissioner has the option of first referring the matter to conciliation and only refer the matter to arbitration if conciliation should fail.

The foregoing notwithstanding, an aggrieved party has the right to take legal action on any alleged fundamental right infringement through the Labour Court instead of following the arbitration or conciliation/arbitration route.

G

General Provisions (Chapter 10) (M) – Miscellaneous matters not dealt with in any other part of the Act. Each is discussed separately in the Lexicon under the appropriate alphabetic heading. The headings are as follows:
- Contracts entered into by the State for provision of goods and services (sec.138);
- Delegation of powers (sec.141);
- Evidence (sec.131);
- Exemptions and variations (sec.139);
- Guidelines and codes of good practice (sec.137);
- Labour hire, prohibition of (sec. 128);
- Legal Assistance (sec.140);
- Liability for contravention of this Act by manager, agent or employee (sec.132);
- Limitation of liability (sec.134);
- Preservation of secrecy (sec.131);
- Records and Returns (sec.130);
- Regulations (sec.135);
- Regulations, administration of (sec.136);
- Repeal of laws, transition and consequential amendments (sec.142);
- Service of documents (sec.129); and
- Short title and commencement (sec.143).

**Guidelines and codes of good practice (sec.137)** 

This section authorises the Minister of Labour and Social Welfare, after consulting the Labour Advisory Council, to issue codes of good practice and guidelines for the proper administration of the Act as well as a code of ethics for conciliators and arbitrators. Such guidelines include guidelines on dispute prevention and resolution for application by the Labour Commissioner and the users of his/her services. The Minister is likewise empowered to change or replace any such codes or guidelines. Both actions are taken by publication in the Government Gazette.

**Discussion:** Codes and guidelines of this nature constitute what is known as soft law (>NLL 1 p.162) and must be taken into account by any person interpreting the Act (such as a court or an arbitrator) or applying it (such as an employer or labour inspector). While following such soft law is not obligatory, any deviation there from must be convincingly explained and motivated if an employer were to be challenged on its departure from the declared norm.

The existence of codes and guidelines place a high responsibility on employers to comply with fair labour practices and procedures, since a defence of ignorance or lack of technical expertise in human resources related matters is largely obviated. For this reason enforcing agents, such as the Ministry of Labour and Social Welfare and its labour inspectors, arbitrators and the Labour Court will justifiably expect employers to be much more conversant with proper and fair labour practices than has been the case heretofore.
To date, two such codes of good practice have been issued by the Minister. A Code of Good Practice on Industrial Actions (Strikes and Lockouts) and a Code of Good Practice on Picketing. Both appeared in Government Gazette No. 4361 of 19 October 2009, Government Notice No.208 of 2009.

**H**

*Health, Safety and Welfare of Employees (Chapter 4)*

– Sections 39 to 47, appearing as entries A. to I. below, deal with the health, safety and welfare of employees.

**Discussion:** Health, safety and welfare of employees constitute integral elements of conditions of employment, work environment and work related conduct. Both the employer and the employee have a duty to maintain standards suitably conducive to human wellbeing. During the past two and a half centuries Industrial history has gone through various stages of almost total disregard for the vital role of a healthy and safe work environment to the detriment of countless suffering workers and their dependants.

Even today, health and safety at the workplace is still often not accorded the priority it deserves both from a humanitarian and a good business practice perspective. It is, therefore, hardly surprising that the Labour Act places such a high premium on this aspect of the employment relationship. The Act itself, as well as the *Regulations* framed there under, go into extensive detail on significant matters relating to occupational health, safety and welfare.

**A. Employer duties to employees (sec.39) (U)** – The Act enumerates 9 primary responsibilities which an employer has towards his/her employees in terms of occupational health and safety and which form the basis of a multitude of ‘secondary’ rules which derive there from. The basic employer duties are to:

- Provide a safe working environment that is *without risk to health* and that has *adequate facilities* for the welfare of employees.
- Provide and maintain *industrial premises, machinery, tools, systems* and *work processes* that are safe and without risk.
• Provide and maintain safe entry and exit places from work.
• Provide employees with adequate personal protective clothing and equipment.
• Provide employees with information and training to work safely and without risk to health.
• Ensure that the transport, use, handling and storage of hazardous substances (>NLL 1 p.89) is safe and without risk to health.
• Ensure that employees are given instructions and supervision to work safely and without risk to health.
• Ensure that the organisation of work, including hours of work and meal breaks are such that they do not adversely affect employees’ health.
• Take any other prescribed steps [as well as reasonable steps even if not prescribed] to ensure the safety, health and welfare of employees at work.

Should something nonetheless go wrong, the employer has the duty to immediately report any accident, or occurrence of any occupational disease, to a labour inspector in the prescribed manner.

**B. Employer duties to persons other than employees (sec.40) (U)** – An employer’s responsibility for health and safety goes further than only towards employees. He/she has a statutory duty to conduct the business operation in a manner that as far as is reasonably practicable also does not place any customers, visitors or any other non-employees on the premises at any risk to their health and safety. Towards this end the Minister of Labour and Social Welfare is authorised to require, by regulation published in the Government Gazette, an employer to inform such persons of any potential risk to their health or safety that might exist on the premises.

**C. Employee duties (sec.41) (U)** – Employees, too, have certain fundamental responsibilities regarding health and safety which they are required by law to perform. These take on three main forms:

- Every employee has a duty to take reasonable (>NLL 1 p.157) care to ensure the employee’s own safety and health in the workplace.
- Every employee has a duty to take reasonable care to ensure the safety and health of any other person who may be affected by the employee’s activities at work.
- Every employee has a duty to cooperate with the employer to perform any obligation imposed under Chapter 4 of the Labour act, 2007 (Health, Safety and Welfare of Employees), as well as in terms of the Regulations Relating to the Health and Safety of Employees at Work, 1997.
D. Dangerous place of work, employee’s right to leave (sec.42) (U) – An employee has the right to leave a duty station or even a work area which the employee has reasonable cause to believe is hazardous and contains a threat to his/her health or safety until the situation has been remedied. If such conditions prevail, the employee must immediately inform the employer thereof. The employee who has removed him/herself from a dangerous place of work is entitled to normal pay and other conditions of employment during the period of absence.

**Discussion:** Infringement of these provisions by employees are usually seen in a very serious light by employers, since the employer carries the ultimate responsibility for health and safety at the workplace. Any untoward incident caused by an employee’s negligence can have numerous adverse consequences for the enterprise and those employed by it. It is therefore not uncommon to have an appropriate health and safety clause in an employer's *disciplinary code (>NLL 1 p.75)* and procedure as well as in employment contracts.

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E. Health and safety representatives, election of (sec.43) – (U) Employees at a workplace are entitled to elect health and safety representatives to tend to their interests in this sensitive sphere. Where there are more than 10 employees but less than 101, and regardless whether they are trade union members or not, they may elect one representative from amongst themselves. They may elect one additional representative for each additional 100 employees or part thereof. An employer and employees or trade union may agree to a greater number of health and safety representatives if they so desire.

A health and safety representative is elected in the prescribed manner (with the employer providing reasonable facilities for this purpose), holds office for two years and is re-electable thereafter.

**Discussion:** It is important to note that the provision requires an employee to have *reasonable* cause to believe that dangerous conditions prevail before being entitled to remove him/herself from the place of work. Insufficient reason for the employee to have left the workplace could lead to the absence not being remunerated, and may, depending on circumstances, also lead to disciplinary action being instituted against such a person.
The employer is required to grant a health and safety representatives reasonable paid time off during working hours in order to perform their functions, as well as reasonable leave of absence to attend off-premise health and safety meetings and training courses provided that payment for such leave of absence lies in the employer’s discretion. These rights of a health and safety representative are subject to the provisions of a possible collective agreement, and any reasonable conditions by the employer that are necessary to ensure the effective operation of the enterprise.

[See Regulation 6: Election of health and safety representatives]

**F. Health and safety representative, rights and powers of (sec.44) (U)** – Health and safety representatives are entitled to perform the following functions:

- Collect information.
- Inspect workplaces at reasonable times.
- Investigate potential hazards, complaints about safety, health or welfare and causes of accidents and diseases at work.
- Make representations to the employer, and a labour inspector.
- Perform any other functions agreed to by the health and safety committee or provided for in a collective agreement.

**G. Information, duty to provide (sec.45) (M)** – An employer is obliged to provide a health and safety representative with sufficient relevant information so as to enable him/her to perform the required functions and maintain or improve conditions of safety, health and welfare at the workplace. The employer must consult with the representative on applicable policy and in respect of any changes to the content, process or organisation of work that may affect the health, safety or welfare of employees. The representative should at any reasonable time be allowed to carry out relevant inspections as well as to have access to a labour inspector if necessary.

The above notwithstanding, an employer is not obliged to supply information that:

- Is not related to the represented employees;
- is prohibited by law from being disclosed (such as certain health information);
- is private and personal;
- may be detrimental to the business for reasons not related to health and safety;
- or
- is legally privileged (disclosure protected by law, such as confidential information shared with a physician or lawyer).
**Changes:** Whereas an employer was previously also duty bound to provide a health and safety representative with the necessary information to be able to perform his/her task, this duty has now been amplified although simultaneously qualified as indicated.

**H. Health and safety committees (sec. 46) (U)** – At a workplace with more than 100 employees a health and safety representative may request the employer to establish a health and safety committee consisting of the elected health and safety representative/s, an equal number of persons appointed by the employer and any additional individuals agreed to by the committee.

The committee – which may make its own rules for meetings – is entrusted with the *monitoring* of the application of health and safety rules and regulations, *advising* the employer on any health and safety matter and the performance of any *other function agreed to* it by the committee and the employer.

**I. Health and safety provisions: resolution of disputes (sec. 47) (N)** – A party to a dispute concerning a health, safety or welfare matter is entitled to refer it to the Labour Commissioner. Having been satisfied that a copy of the dispute has been served on all parties, the Labour Commissioner must refer the dispute to an arbitrator to resolve the matter through arbitration.

**Hours of Work** – >Continuous shift (sec 8); >Declaration of continuous shifts (sec.15); >Ordinary hours of work (sec.16); >Overtime (sec.17); >Meal intervals (sec.18); >Night work (sec.19); >Daily spread-over and weekly rest period (sec. 20); >Work on Sundays (sec.21); >Public holidays (sec.22)

**Housing** – >Accommodation