

RESPONSES TO QUESTIONS RECEIVED REGARDING THE LEGAL OPINION CDH DRAFTED FOR REBOSA

- 1 Questions asked and answered based on the assumption that the estate agent has been found to be an employee
- 2 If an agency paid the minimum wage to an agent who hadn't earned anything for 3 months, that amount could be offset against earnings in month 4 and if that amount was sufficient, this could result in no further minimum wages being paid that year. When does the 12-month period start? Is it a rolling 12 months, calendar year, company financial year or the SARS tax year?
 - 2.1 It is within 12 months from the anniversary date of employment. This seems most practicable given the fluctuating nature of the industry. However, amendments could be made to the legislation in order to regulate this aspect.
 - 2.2 Please note that the national minimum wage is to be adjusted annually and this adjustment once in effect ought to be considered.
- 3 When calculating the Skills Development Levy, what amount is used for commission earners? Is it their total commission for the year?
 - 3.1 Irrespective of whether an employee is a commission earner or not, 1% of the total amount paid in salaries to employees (including overtime payments, leave pay, bonuses, commissions and lump sum payments) is payable as the skills development levy. As the amounts deducted or withheld by the employer must be paid to the South African Revenue Services ("**SARS**") on a monthly basis, the amount of commission the skills development levy is based on ought to be the amount of commission earned within that month.
- 4 When calculating UIF, what amount is used for commission earners as the amount earned differs radically from month to month?
 - 4.1 The employer must pay a total contribution of 2% (1% contributed by the employee, that is 1% of the employee's remuneration, and 1% contributed by the employer) within the prescribed period. As the amounts deducted or withheld must be paid by the employer to SARS on a monthly basis, commission ought to be calculated on a monthly basis as well or as per the arrangement between the parties.
- 5 Does one have to pay an agent if they take leave?
 - 5.1 If the estate agent works less than 24 hours a month for the estate agency, the answer is no.

However, generally the answer will be yes. In terms of section 21 of the Basic Conditions of Employment Act 75 of 1997 ("**BCEA**"), an employer must pay an employee leave pay at least equivalent to the remuneration that the employee would have received for working for a period equal to the period of annual leave, calculated at the employee's rate of remuneration immediately before the beginning of the period of annual leave and in accordance with section 35.

6 How does one calculate leave pay due to an agent –

6.1 If they take a 2-week holiday?

6.2 Section 35(4) of the BCEA states that, "*If an employee's remuneration or wage is calculated, either wholly or in part, on a basis other than time or if an employee's remuneration or wage fluctuates significantly from period to period, any payment to that employee in terms of this Act must be calculated by reference to the employee's remuneration or wage during the preceding 13 weeks or if the employee has been in employment for a shorter period, that period.*"

6.3 Section 35(4) must be read with section 20 of the BCEA in order to determine the exact number of leave days an estate agent has remaining and whether the leave days are on full remuneration.

6.4 Should the estate agent's leave pay exceed the value of R42 000.00 (R3 500.00 per month/ R20 per hour being the current national minimum wage) within the 12 month period discussed in paragraph 2, the estate agency may contractually agree to deduct leave pay from subsequent commission that is paid to the estate agent during annual leave [in excess of minimum pay]. This is in accordance with the NMWA and the unreasonableness of paying leave pay where the amounts earned vary to a large extent. This seems to be an anomaly when reading the provisions of the NMWA and the BCEA together. A risk identified is that an agent may leave the estate agency after being paid for leave - This would leave the estate agency in a shortfall with limited possibility of recovery. Provision should be made for a deduction consent or some other document of a similar nature to be in place in order to ensure that the estate agency can recover any amounts they were due to deduct.

6.5 Please note that any deduction an employer makes from an employee's remuneration must be agreed upon by the employee in writing and in accordance with section 34 of the BCEA. The total deductions from the employee's remuneration in terms of this section must not exceed one-quarter of the employee's remuneration in money¹. An anomaly is created in the situation where the estate agent takes 2-weeks leave and the estate agency, for example, has had to pay R26 000 as a result of paid leave (assuming the estate agent is earning above the minimum wage) to the estate agent. It appears that in order to deal with this anomaly, you can deduct from their next monthly commission up to a maximum of 25% with their consent. Should the deduction not cover the R26 000 paid, you would then have to deduct up to a maximum of 25% of their next monthly commission earned. This will continue until the deduction is recovered in full.

6.6 They leave your employ with an annual leave balance?

6.7 This will also be calculated in accordance with section 35(4).

6.8 Should the employee's employment be terminated, an employer must pay an employee-

6.8.1 For any paid time off that the employee is entitled to with regards to overtime or for work on Sunday that the employee has not taken;

6.8.2 Remuneration for any period of annual leave due that the employee has not taken; and

¹ Section 34(2)(d) of the BCEA.

6.8.3 If the employee has been in employment longer than four months, in respect of the employee's annual leave entitlement during an incomplete annual leave cycle, one day's remuneration in respect of every 17 days on which the employee worked or was entitled to be paid or remuneration calculated on any basis that is at least as favourable to the employee than the one day remuneration as stated above.

7 Can an agent lose leave if they don't take it in a particular year? So if their leave balance is 12 days at the end of year, do they have to forfeit this?

7.1 It depends on the type of leave. For example, in terms of annual leave - the annual leave cycle means a 12-month period of employment with the same employer immediately following an employee's commencement of employment or the completion of that employee's prior leave cycle. An employer must grant annual leave not later than six months after the end of the annual leave cycle. After the six months lapse, the agent can lose his/her annual leave. It is however recommended that estate agencies cater for such forfeiture in a workplace leave policy.

7.2 Sick leave entitlement does not accumulate, and an employee only become eligible for sick leave, if indeed sick.

7.3 Family responsibility leave also does not accumulate and an employee only becomes entitled to family responsibility leave in the event of qualifying reasons.

8 Can an agency charge a desk fee and deduct this from the monthly minimum wage? For example, an agency may say that the employee is charged R2000 a month to cover marketing, internet, office supplies, websites, etc. Would the agency be able to subtract this from the R3500 and only pay the employee R1500 net?

8.1 Section 5(4) of the NMWA states that any deduction made from the remuneration of a worker must be in accordance with section 34 of the BCEA provided that a deduction made in terms of section 34(1)(a) of the BCEA does not exceed one quarter of a worker's remuneration.

8.2 However you cannot deduct a desk fee from the estate agent's salary as a condition of employment. It may be perceived that the estate agency is trying to avoid liability and negate the purpose of the NMWA should the estate agency charge a desk fee and deduct this from the national minimum wage owed to an estate agent.

8.3 **We must emphasise that a more appropriate approach would be to treat the desk fee as a separate commercial transaction from the remuneration that is earned by an estate agent.**

9 Is the NMWA enforceable already?

9.1 Yes, the commencement date of the NMWA was that of 1 January 2019. This means that as of 1 January 2019 it has been enforceable.

10 Must we implement the minimum wage already?

10.1 If your estate agents and other staff members working under you fall in the category of an employee as opposed to an independent contractor, implementation of the minimum wage would be in compliance with your legal obligations as an employer. In this event, we recommend you implement the NMWA unless you intend on applying for an exemption in terms of the NMWA Regulations or restructure the organisation to align its structure with an independent contractor model.

11 One agent spends a minimum of 4 hours per month in the office. He has not earned any commission. He has another job where he earns far more than R205 433.30 per annum. Is he an independent contractor or employee? Or must I pay him R20 per hour?

11.1 This question is unanswered in our Labour Courts. However, set out below is a summary of the relevant legal provisions in order to provide an informed opinion.

11.2 Section 5(2) of the NMWA states that, "*Subject to section 9A of the Basic Conditions of Employment Act, a worker is entitled to receive the national minimum wage for the number of hours that the worker works on any day.*"

11.3 Section 9A of the BCEA reads as follows-

"Daily wage payment

(1) An employee or a worker as defined in section 1 of the National Minimum Wage Act, 2018, who works for less than four hours on any day must be paid for four hours work on that day.

(2) This section applies to employees or workers who earn less than the earnings threshold set by the Minister in terms of section 6(3)."

11.4 To explain further, an employee must be paid, at minimum, the NMWA equivalent to 4 hours of work per day even if the employee worked for less than 4 hours (for 2019, an amount of R20 per hour). However, this is only applicable for employees who earn less than the statutory threshold which is currently set at R205 433.30 per annum.

11.5 As he earns more than the statutory threshold, it is our opinion that he is not entitled to a minimum wage, even if the statutory threshold is met through another job. The purpose of the minimum wage is set out in section 2 of the NMWA, in that the purpose of the NMWA is to advance economic development and social justice by-

- a) improving the wages of lowest paid workers;
- b) protecting workers from unreasonably low wages;
- c) preserving the value of the national minimum wage;
- d) promoting collective bargaining; and
- e) supporting economic policy.

- 11.6 Payment of the minimum wage in this context does not advance any of the purposes of the NMWA and could not have been what the legislature intended in these circumstances. It would be advisable to get written confirmation by the estate agent of his alternate employment.
- 12 An gent spends a maximum of 25 hours per week in the office according to the office hours set out in his contract. Can I then pay him R20 per hour? (He will earn more in commission that the minimum wage in the current financial year)
- 12.1 Payment of R20 per hour will be in order. Until the total commission he has earned passes the statutory threshold, he will remain eligible for the minimum wage.