APPLICATION OF THE NATIONAL MINIMUM WAGE ACT 9 OF 2018 TO COMMISSION BASED ESTATE AGENT

This summary must be read together with the attached legal opinion prepared for and on behalf of REBOSA

The National Minimum Wage Act 9 of 2018 ("**NMWA**") applies to employees, and not to independent contractors. The focus of this advisory relates to where there is either an established or presumed employment relationship.

Unfortunately, the question of "*Whether Estate Agents are employees or independent contractors*?" is not a simple one, and in many cases, the answer to this question can differ dramatically, depending on the circumstances surrounding the facts in question.

The first issue to be determined, is the type of relationship that exists. This is an important consideration for both Estate Agencies and Estate Agents alike, as certain legal consequences flow from the type of relationship which exists between the parties.

Section 200A of the Labour Relations Act ("**LRA**") further provides for the presumption that a person is an employee, regardless of the form of the contract. However, section 200A does not apply to a person who earns in excess of the statutory earnings threshold as determined by the Minister in terms of section 6(3) of the BCEA. This amount is currently R205 433. 30 per annum.

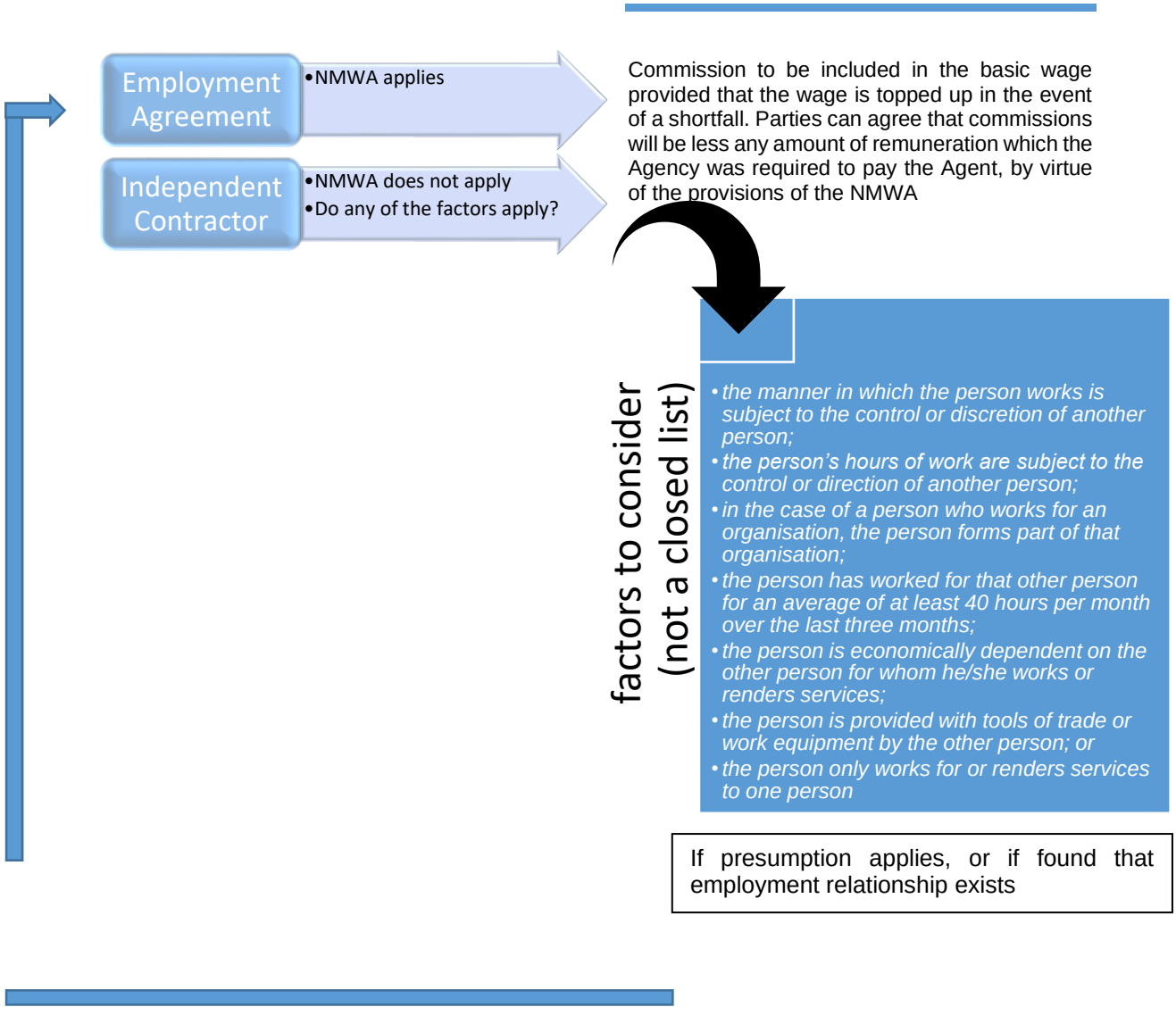
The provisions of Section 200A creates a presumption that a person who meets any the requirements stated in Section 200A of the LRA is an employee if that person earns less than or equal to the annual statutory threshold amount. In these circumstances, an Estate Agency would have to prove that despite this presumption, the independent contractor is not an employee, should it wish to escape the consequences of the LRA.

Generally, there are six factors the Labour Court will take into consideration when determining the true nature of the relationship (reality or dominant impression test). The difference between an employee and an independent contractor can be summarized as follows:

Employee	**Independent Contractor**
The object of the contract is to render personal services.	Object of contract is to perform a specified work or produce a specified result.
Employee must perform services personally.	Independent contractor may usually perform work through others.

Employer may choose when to make use of services of employee.	Independent contractor is subservient to the contract, not under supervision or control of employer.
Employee obliged to perform lawful commands and instructions of employer.	Independent contractor is subservient to contract, not under supervision or control of employer.
Contract terminates on death of employee.	Contract does not necessarily terminate on death of employee.
Contract also terminates on expiry of period of service in contract.	Contract terminates on completion of work or production of specified result.

The legal provisions as explained above are best applied in the following diagram:



Only where it is determined that an employment relationship exists between an Estate Agency and an Estate Agent, the provisions of the NMWA applies, although the Estate Agent earns exclusively on a commission-based structure.

Commission is not excluded in terms of the NMWA and there are no prescribed categories of payment which have been prescribed yet. Commission therefore forms part of the wage/ remuneration calculation, excluding certain exceptions, provided that the wage/ remuneration is topped up in the event of a shortfall.

<u>If an Estate Agent (who is an employee) does not make any sales in a month or does not earn commission to the value of R 3 500. 00, must the Estate Agency pay the Agent a minimum wage?</u>

This is complex question, but on our reading of the NMWA, the answer is yes.

If an Estate Agent (who is an employee) has not made any sales within the relevant period of assessment (within 12 months from the anniversary date of employment), it is likely that the provisions of the NMWA will compel the employer (Estate Agency) to pay, or at least 'top up', the Estate Agent's wage/ remuneration to R 3 500. 00 for the month, and any subsequent months in which the Estate Agent does not affect any commission earning sales.

The Estate Agency (employer) will be entitled to embark on a poor performance management process in respect of poorly performing Estate Agents (who are employees), who consistently fail to achieve their sales targets, and ultimately terminate the relationship based on incapacity – poor performance.

Estate Agencies (employers) are however cautioned that all the substantive and procedural aspects prescribed in the LRA must be followed in order to lawfully terminate the relationship.

<u>What happens if an Estate Agent (who is an employee), earns a good commission in one month, but in subsequent months fails to make any sales and earn commission in excess of R 3 500. 00?</u>

The provisions of the NMWA are untested by our Courts in this respect.

We are of the opinion that, given the purpose of the NMWA[1], there is scope for legal argument that commissions earned in excess of the national minimum wage in a month, may be averaged over a 12-month period.

In other words, if Estate Agent A, does not earn any sales commissions in excess of R 3 500. 00 for example 3 months in the relevant period of assessment, the Estate Agency will be required to pay, alternatively top up Estate Agent A's remuneration up to R 3 500. 00 per month. However, if Estate

[1] 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.

Agent A earns R 60 000. 00 (sixty thousand rand) commission on a sale in month 4, then the R 60 000. 00 is averaged out over 12 months being R 5 000. 00 per month, and no further payments or top ups will be required from the Estate Agency (employer) for the remainder of the relevant assessment period.

May an Estate Agency (employer), who has paid, or who has topped up an Estate Agent in the absence of any commissions earned in a period of assessment, claim back any remuneration paid to the Estate Agent (who is an employee), once commission in excess of the national minimum wage is earned within the period of assessment?

Once again, the provisions of the NMWA are untested by our Courts in this respect.

However, in short, we are of the opinion that the Agency (employer) will not be able to claim back any remuneration already paid but will be able to contractually agree that any commissions payable, will be less any amount of remuneration which the Agency was required to pay the Estate Agent, by virtue of the provisions of the NMWA, as long such deductions do not result in the Estate Agent earning under the national minimum wage over the relevant assessment period.

By using the same example referred to above, if Estate Agent A does not earn any sales commissions in excess of R 3 500. 00 for example 3 months in the relevant period of assessment, the Estate Agency will be required to pay, alternatively top up Estate Agent A's remuneration up to R 3 500. 00 per month, amounting to R 10 500. 00. However, if Estate Agent A earns R 60 000. 00 (sixty thousand rand) commission on a sale in month 4, then the R 10 500. 00 becomes deductible from the R 60 000. 00 commission. This calculation still leaves the Estate Agent (who is considered an employee) with a balance of R 49 500. 00, which equates to R 4 125.00 averaged over 12 months. No further payments or top ups will be required in respect of the respective Estate Agent for the remainder of the relevant assessment period.

Do Estate Agencies as "employers" now have to deduct and pay over UIF for our agents?

As mentioned above, the first issue to be determined, is the type of relationship that exists.

If the parties have arranged their relationship according to the principles of an independent contractor arrangement, then the provisions of the applicable labour legislation, including the UIF Act, do not apply.

However, all employees, as well as their employers, are responsible for contributions to the UIF. However, there are some exclusions. Employees are excluded from contributing to the UIF if the employee –

- Is employed by the employer for less than 24 hours a month;
- Receives remuneration under a contract of employment as contemplated in section 18(2) of

the SDL Act[2];

For the purposes of this answer, we have not included employees in the government sector.

Do Estate Agencies as "employers" now have to pay SDL on the earnings of agents?

As mentioned above, the first issue to be determined, is the type of relationship that exists.

If the parties have arranged their relationship according to the principles of an independent contractor arrangement, then the provisions of the applicable labour legislation, including the SDL Act, do not apply

SDL is due by registered employers and is a levy imposed to encourage learning and development in South Africa and is determined by an employer's salary bill.

Where an employer expects that the total salaries will be more than R500 000 over the next 12 months, that employer becomes liable to pay SDL. Any employer whose total remuneration subject to SDL (leviable amount) paid/due to all its employees over the next 12-month period won't exceed R500 000 is exempted from paying SDL. If this is the reason for exemption, these types of employers are not required to register to pay SDL.

For the purposes of this answer, we have not included employees in the government sector.

Will the requirement for supervision and control of intern agents automatically make them employees?

For the purposes of this answer, we shall assume that intern agents constitute "learners" and fall under the ambit of the SDL Act.

Per section 18(1) of the SDL Act, where the intern agent [or learner] already has an employment contract with the Estate Agency, then the intern agent is an employee and all the natural consequences of an employment relationship flows therefrom.

However, section 18(2)[3] of the SDL Act requires that all learners, who are party to a learnership

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[2] Contract of employment with learner for a learnership [see chapter 4 of the SDL]. "learner" includes an apprentice.

[3] 18 (2) If the learner was not in the employment of the employer party to the learnership agreement concerned when the agreement was concluded, the employer and learner must enter into a contract of employment.

(3) The contract of employment with a learner contemplated in subsection (2) is subject to any terms and conditions that may be determined by the Minister on the recommendation of the Employment Conditions Commission established by section 59(1) of the Basic Conditions of Employment Act.

agreement, must conclude an employment agreement.

By virtue of section 18(2) of the SDL, it appears as if intern agents on a learnership must have employment contracts, and thereby the relationship will constitute an employment relationship.

We are however aware of certain Estate Agencies who have referred disputes to the Tax Ombudsman in this respect. Regrettably, SARS have withdrawn their claim that estate agents constitute employees and therefore SDL levies must be paid and there is no finality to this question yet. We are however of the opinion that this question is not simply a "yes" or "No" question, as the circumstances in each case may differ, yielding a different result.

Employees are not only entitled to a minimum hourly wage under the Basic Conditions of Employment Act, but they are also entitled to other conditions of employment prescribed in terms of the BCEA, such as leave entitlement, overtime and mandatory rest periods etc.

In the absence of a sectoral determination or an exemption under the BCEA, it is correct to say that employers are bound by the provisions of the BCEA.

This means that its employees, are entitled to the minimum prescribed conditions of employment as prescribed in the BCEA, which includes the right to leave entitlement, as well as prescribed rest periods etc.

Generally, if the estate agent earns in excess of R 205 433.30 per annum, or is a senior managerial employee or the estate agent is an employee engaged as sales staff who travel to the premises of customers (we are, however, of the opinion that an estate agent cannot be considered sales staff) and who regulate their own hours of work or the estate agent is an employee who works less than 24 hours a month for an employer, Chapter 2, save for section 7 dealing with the regulation of working time of the BCEA, does not apply. In other words, the following provisions of the BCEA generally will not apply - Section 9 (Ordinary hours of work), Section 9A (Daily wage payment), Section 10 (Overtime), Section 11 (Compressed working week), Section 12 (Averaging of hours of work), Section 13 (Determination of hours of work by Minister), Section 14 (Meal intervals), Section 15 (Daily and weekly rest period), Section 16 (Pay for work on Sundays), Section 17 (Night work) and Section 18 (Public holidays).[4]

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(5) The contract of employment of a learner may not be terminated before the expiry of the period of duration specified in the learnership agreement unless the learnership agreement is terminated in terms of section 17(4).

(6) The contract of employment of a learner terminates at the expiry of the period of duration specified in the learnership agreement unless the agreement was concluded with a person who was already in the employment of the employer party to the agreement when the agreement was concluded.

[4] In terms of section 2(2) of the Public Holidays Act, 1994 (Act No. 36 of 1994), a public holiday is exchangeable for any other day which is fixed by agreement or agreed to between the employer and the employee.

Sectorial Determination (SD) for Estate Agents.

It is possible for industries to request the Minister of Labour to investigate a sector or industry and to decide of the conditions of employment in that sector or industry.

The purpose of the BCEA is to "*To give effect to the right to fair labour practices referred to in section 23(1) of the Constitution by establishing and making provision for the regulation of basic conditions of employment; and thereby to comply with the obligations of the Republic as a member state of the International Labour Organisation; and to provide for matters connected therewith*."

Section 4(6) of the National Minimum Wage Act (NMWA), provides that the payment of a national minimum wage cannot be waived, and the national minimum wage takes precedence over a sectoral determination. This means that if a sectoral determination does not prescribe a wage or prescribes a lower wage than the National Minimum Wage, the National Minimum Wage must be paid.

In terms of Section 51(1) of the BCEA the Minister of Labour may make a SD establishing basic conditions of employment for employees in a sector and area.

CONCLUSION

The provisions of the NMWA allows scope for commission to be included in the basic wage provided that the wage is topped up in the event of a shortfall.

Once an Estate Agent (who is an employee) earns enough commission which would satisfy the national minimum wage requirement over the relevant assessment period, the Estate Agency is neither required to pay, nor top up the Estate Agent's remuneration.

Payments made to an Estate Agent (who is an employee) during the relevant assessment period may be deducted from subsequent commission earned as long such deductions do not result in the Estate Agent earning under the national minimum wage over the relevant assessment period. This arrangement may however require certain changes or amendments to existing contracts in order to avoid unlawful deduction disputes.