

NEWSLETTER

The Official Newsletter of SEENA Legal
Consult.



In this edition:

Page 1 – Voorwoord

Page 2 – FAQ's regarding
Contracts of Employment

Page 3 – Annual increase

Page 4 – Information regarding
the VET levy and the amended
definition of 'Remuneration'

Page 5 – Contact Us



Voorwoord

Somer is in die lug en die einde van die jaar is in sig. Soos sedert 2020, was dit weereens 'n uitdagende jaar vir die meeste besighede en moet ons nou skouer aan die wiel sit om die jaar op 'n hoë noot af te sluit.

We have mentioned in our previous newsletter (July 2021), that a decision regarding our annual increase had not been taken at that stage. We have now however decided to take the leap and increase our monthly premiums by a small margin. Read in this issue about the increase.

In the newsletters to follow, we will attend to Frequently Asked Questions (FAQ's) received by our Legal Advisors on a daily basis. In this issue, we tackle the issue of Employment Contracts.

SEENA Training is tans in die proses om opleiding ook aanlyn aan te bied. Daar sal eersdaags 'n groter verskeidenheid van kursusse wees. SEENA Training sal u op hoogte hou van nuwe verwickellings. Hou ook ons webtuiste (www.seenalegal.com) dop.

SEENA groete,

Koos Barkhuizen

FAQ'S REGARDING CONTRACTS OF EMPLOYMENT

On a daily basis, SEENA receives numerous questions relating to contracts of employment and it is clear that there is a general misconception regarding these agreements amongst business owners. In some cases, employers are of the opinion that their workforce is too small to justify lengthy and costly legal contracts and then opt to rather keep the relationship with their workers "informal". In other cases, employers spend a lot of money on contracts, but use the wrong contract for the type of relationship with their employee.

In an attempt to shed some light on employment contracts, we answer some of the most frequently asked questions here below.

1. What is the purpose of an employment contract?

An employment contract is a written agreement between an employer and employee which governs the employment relationship between the parties. The contract ensures that both parties are clear on the terms of the employment relationship from the start to ensure that there are no surprises going forward.

2. What clauses should a contract with an employee contain?

Our Labour Act, 11 of 2007 (the Act) does not stipulate which clauses must be contained in the contract of employment. However, in order to avoid future misunderstanding, it is our recommendation that the contract should set out the general terms to which the parties agree, for example the job title, job description, duration of the agreement, place of work and employment date. It should also contain the basic conditions of employment as provided for in the Act (as amended). This includes employment benefits, remuneration package, hours of work, provisions for the payment of overtime, night work, Sundays, Public Holidays and leave entitlements. Lastly, it is important for the contract to stipulate the contractual obligations and rights of both parties including the disciplinary code and policies, which will form part of the contract.

3. Do I really need a written employment contract?

A written contract is not a prerequisite for an employment relationship. The employment relationship commences once an offer of employment from an Employer is accepted by the Employee.

The mere fact that the parties have not concluded a written agreement, does not mean that the employment relationship does not exist. Where an offer is subject to terms and conditions contained in an employment contract it is important that it should be clearly stated.

4. What different forms of Employment Contracts are there?

The most common forms of employment contracts are:

- Permanent (indefinite) Contracts; and
- Fixed Term Contracts

In terms of section 128C of the Labour Amendment Act, 2 of 2012 (the Amendment Act) an employee is presumed to be employed indefinitely, unless the employer can establish a justification for employment on a fixed term. Therefore, unless the Employer can establish a lawful reason for appointing an employee on a fixed term contract, that employee shall be regarded as permanently employed.

There can be many justifications as to why an employee cannot be employed permanently. Here below are but a few everyday examples:

- a temporary relief worker assisting in the absence of another permanent employee who is absent on account of being on extended annual leave, sick leave or maternity leave; or
- A construction worker employed for a specific project, such as the building of a dam, road, etc.

Read more about the termination of Fixed Term Contracts in our Newsletter of August 2020, available on our website: www.seenalegal.com/download-newsletters

5. Can I just appoint an independent contractor and avoid appointing employees altogether?

Prior to 2012, some Employers sought to appoint persons on independent contracts. After the promulgation of the Amendment Act however, a clear distinction was drawn between independent contractors and employees.

In terms of section 128A of the Amendment Act, until the contrary is proved, an individual who works for or renders services to any other person, is presumed to be an employee of that other person, regardless of the form of the contract or the designation of the individual, if any one or more of the following factors are present:

- (a) the manner in which the individual works is subject to the control or direction of that other person;
- (b) the individual's hours of work are subject to the control or direction of that other person;
- (c) in the case of an individual who works for an organisation, the individual's work forms an integral part of the organisation;
- (d) the individual has worked for that other person for an average of at least 20 hours per month over the past three months;
- (e) the individual is economically dependent on that person for whom he or she works or renders services;
- (f) the individual is provided with tools of trade or work equipment by that other person;
- (g) the individual only works for or renders services to that other person; or
- (h) any other prescribed factor.

6. What if the employee refuses to sign the employment contract after his/her appointment?

It is preferable to conclude and sign an employment contract at the onset of the relationship, with an offer of employment tabled, subject to the Employee accepting the Employer's terms of contract. As stated above however, the mere fact that a contract was not concluded at the start of the employment relationship, does not mean that an employment

relationship does not exist. Although the parties are free to conclude an agreement at any stage after appointment, it can often be challenging to agree on wording that accurately captures the agreement between the parties up until that point. In the absence of consensus on the content of the contract an Employee cannot be forced to sign an employment contract.

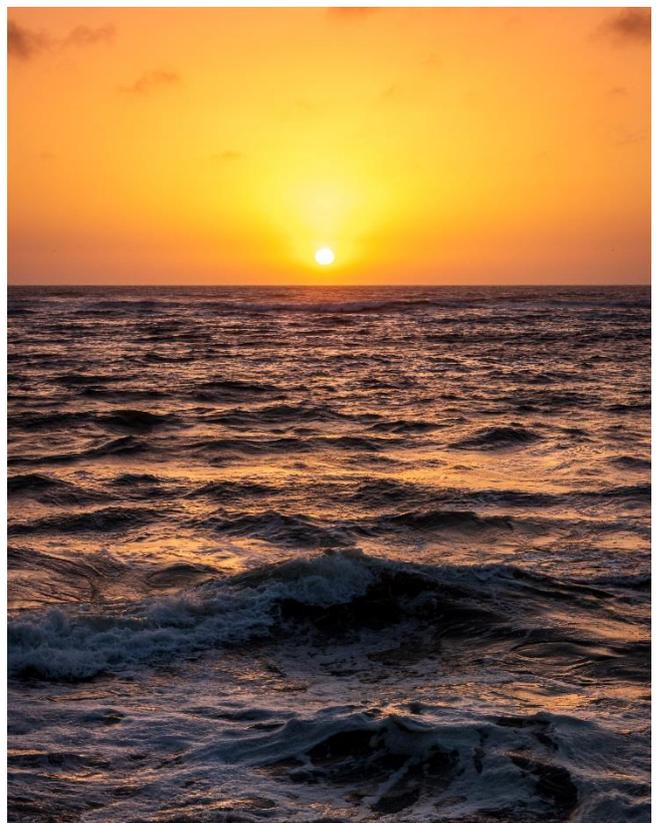
7. Where can I find a contract that suits my business' needs?

If you require employment contracts for your employees, you are welcome to contact your closest SEENA office and we will book a consultation with a legal advisor who will be happy to draft employment contracts that suit your business needs.

ANNUAL INCREASE

All members are advised that a premium increase of 5% (five percent) will take effect on the 1st of November 2021. Members who joined Seena during the last 6 months will not be affected by this increase.

This is the first increase in premiums since September of 2019.



INFORMATION REGARDING THE VET LEVY AND THE AMENDED DEFINITION OF REMUNERATION

What is the VET Levy and who is the NTA?

The Vocational Education and Training Act (2008) was promulgated to establish the Namibia Training Authority (NTA) and the National Training Fund (NTF) in order to:

- regulate the provision of vocational education and for the funding of vocational education and training;
- provide for the imposition of vocational education and training levy;
- provide for the appointment of inspectors and designation of quality system auditors;
- and to provide for incidental matters.

Who is required to register?

With the exception of exempted organisations, all employers operating within the borders of Namibia with estimated annual payroll of N\$1,000,000.00 or above for each Financial Year from 1st April 2014 – 31st March 2015 onwards are required to register with the Namibia Training Authority.

What is considered Payroll for the purpose of VET levy?

Payroll means the total remuneration paid or payable by an employer to its employees during any financial year.

What is the definition of remuneration according to the NTA?

According to Notice 97, published in the Government Gazette by the minister of Higher Education, Technology and Innovation, the definition of remuneration is as follows: *Remuneration means remuneration as defined*

in Part 1 of Schedule 2 of the Income Tax Act, 1981 (Act No.24 of 1981). Previously, remuneration was aligned to the definition of remuneration in the Labour Act, 2007.

The new definition of remuneration has seemingly brought about different interpretations, specifically with regards to what employers are to include in the computation of remuneration for purposes of the levy. This communique serves to clarify this particular amendment. The term “remuneration” as defined in the Income Tax Act, is for purposes of arriving at taxable income, which tax payers and employers use to determine tax payable by, or due to a tax payer. However, for purposes of the VET levy, the focus is strictly on the definition of remuneration. There is no need to apply other sections of the Income Tax Act, which are aimed at giving meaning to “remuneration” for purposes of tax.

The NTA’s intention with the adopted definition of remuneration, is that remuneration includes any amount of income which is paid or is payable to any person by way of any salary, leave pay, allowance, wage, overtime pay, bonus, gratuity, commission, fee, emolument, pension, superannuation allowance, retiring allowance or stipend, whether in cash or otherwise, and whether or not in respect of services rendered (as listed under definition of remuneration).

Based on this interpretation and the NTA’s intention in adopting the Income Tax Act definition of remuneration, all payments listed under the remuneration definition should form part of the amount to be declared for purposes of the VET levy, without applying other parts of the Income Tax Act dealing with deductions and exclusion for purposes of tax.

Financial Year/ Levy Payment

- The Financial year applicable for the VET Levy, runs from 1 April – 31 March, which commenced on 1 April 2014.
- Employers should determine if the payroll/remuneration for their business is expected, for the incoming Financial Year, to be equal to or above the threshold of N\$ 1 000 000.00. If it is, that employer is legally required to pay the levy into the National Training Fund Bank Account.
- The levy is payable each month by the 20th of the following month.

What happens if an employer's payroll for an incoming financial year is estimated to be below N\$1 000 000.00?

Employers with a projected annual payroll of less than N\$1 000 000.00 are not required to register as a levy paying company.

What will the NTA do if employers do not register or have unpaid levies?

The NTA will estimate an employer's payroll/levy in cases where the employer failed to register. Penalties and interest will be applied. The same will be applied in the case of unpaid or underpaid levies. The NTA will pursue all outstanding debts.

Training Grants

The main aim of these funding allocations, is to incentivise employers and other stakeholders to engage in vocational related training.

Employers who meet the criteria for training grants may claim back up to a maximum of 50% of the levies paid to the NTA in the financial year, provided that the employer is up to date with payments and does not have interest and submitted evidence of training provided/received in the required form.

Who can we contact to register or obtain more information:

SEENA can assist our clients with the initial registration with the NTA at a fee of N\$1380.00 (Incl VAT). Contact Nicholine Smit at md@seenalegal.com

The employers can also contact the NTA directly regarding registration and any information in respect of the NTA, VET levy payments Training Grants and Key Priority Funding.

The contact persons at the NTA (National Training Authority) who can assist you are as follows:

FENNY TJIRIANGE
Company Training Advisor
+264 61 207 8168
+264 21 381 9859
FTjiriange@nta.com.na

GENETTE SHITALANGAHO
Manager: Levy Collection
+264 61 207 8507
+264 81 146 7230
gshitalangaho@nta.com.na

CONTACT US

Windhoek Office

Tel: (061) 309 260
Fax: (061) 309 266
Email: windhoek@seenalegal.com

Swakopmund Office

Tel: (064) 416 100
Fax: (064) 461 000
Email: swakop@seenalegal.com

Otjiwarongo Office

Tel: (067) 304 915
Fax: (067) 304 809
Email: otjiwarongo@seenalegal.com

Keetmanshoop Office

Tel: (063) 225 931
Fax: (063) 225 932
Email: keetmans@seenalegal.com

Tsumeb Office

Tel: (067) 222 900
Fax: (067) 222 500
Email: tsumeb@seenalegal.com

