The Independent Producers Organisation
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Registered Non-Profit Organisation
151-760 NPO

The IPO represents, protects and promotes the interests of independent South African film, television and video producers in South Africa.

7 February 2020

Chief Director: Labour Relations Directorate

Department of Employment and Labour

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PRETORIA

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Dear Sirs

Written Representations: Intention to Deem Persons in the Film and Television Industry as Employees for the purposes of the NMWA, the COIDA and some parts of the BCEA and LRA

1. We refer to the Government Notice 42900 of 11 December 2019 ("the Notice") calling for interested parties to make written representations in respect of the Department of Employment and Labour's draft notice of its intention "of deeming persons in the Film and Television Industry as employees" for the purposes of the National Minimum Wage Act 9 of 2018 ("NMWA"), the Compensation for Occupational Injuries and Diseases Act 130 of 1993 ("COIDA"), certain sections of the Basic Conditions of Employment Act 75 of 1997 ("BCEA") and the Labour Relations Act 66 of1995 ("LRA").

2. Interested parties have been invited to submit written representations within 60 days of the publication of the notice, accordingly 9 February 2020.

   As an organisation we believe strongly in fair working practices and we support, wholeheartedly, the efforts of the Department in seeking to uplift working conditions in the South African economy generally.

Interested party

3. Section 83(2)(b) of the BCEA requires that interested parties be invited to submit written representations on a proposed notice on the deeming of any category of person as an employee, within a reasonable period. The Independent Producers Organisation ("IPO") is an interested party.

   The IPO is a representative, national organisation of independent South African film, television and video producers constituted to represent, protect and promote the interests and needs of producers and develop the local film and television industry. The IPO currently represents the interests of eighty percent of working producers in South Africa, with a complement of 150 members.

   The key aims and objectives of the IPO are to:

- represent, promote and protect the specific needs and interests of producers;
- represent and promote the economic and cultural interests of the South African film, television and video production industry locally, continentally and abroad;
- develop, support and implement growth strategies for the industry to increase local, continental and international markets;
- promote the development and establishment of aspirant and emergent producers and production companies;
- overcome historical disparities within the industry, based on race, gender, disability and sexual orientation;
- promote the industry for the good of the broader South African economy;
- promote a stable and viable industrial environment within the industry;
- encourage professionalism and high technical and creative standards in the industry;
- keep producers at the forefront of technological, economic and cultural changes;
- interact with and create negotiating channels and standard agreements with industry-related organisations;
- regulate relations between members and employees or trade unions;
- promote health and safety standards for the industry;
- play a key role in education, training and enhancement of skills within the industry; and
- inform and enlighten non-industry organisations (e.g. educational institutions, government bodies, financial institutions) about the industry.

4. The Notice was published on 11 December 2019. This is shortly before the annual Christmas and New Year, end of year holidays when most industries take a long period of leave. It has been very difficult for the IPO to consult with its different constituencies and these representations have been drafted in some haste to the accommodate time constraints imposed on interested parties in terms of the Notice.

5. As the IPO, we would welcome the opportunity to engage directly with the Department regarding the working conditions in the Industry. We do believe that there should be on-going dialogue between the various groups in the Industry to better understand each other's concerns and to ensure that the Industry becomes more competitive, to the advantage of all who participate in it, and to the sectors that derive indirect economic benefit from it.

"**Persons**"

6. The Notice refers to the deeming of "persons" as employees in the Film and Television Industry ("the Industry"). The term "persons" is an extremely broad term. The Department has previously introduced deeming provisions into employment legislation[1]. Where it has done so in the past, the "persons" have been limited to "persons" earning less than the threshold prescribed by the Minister in terms of section 6(3) of the BCEA[2].

7. It is not clear from the Notice whether the Department intends limiting the ambit of the term "persons" to those earning under the earnings threshold, or whether it intends applying the term more broadly. A broad application of the term "persons" will not only be unprecedented but will have enormous and detrimental financial consequences for the industry. Clarity on this issue from the Department would be appreciated.

8. In terms of "persons" engaged in the Industry, production companies have a dual staffing model in which they (i) employ employees for the day to day running of the company and (ii) make use of independent contractors who render services on specific productions for a limited period of time. There are over twenty-thousand contractors active in the Industry. We address our concerns with the Notice with reference to these independent contractors engaged in the Industry.

9. These contractors are true independent contractors who provide the production companies with the "fruits of their labour". Contractors negotiate their rates with production companies and, as with other sectors that utilise contractors, such as the IT sector, will build into their rate the equivalent of the cost of typical employment benefits such as annual leave and maternity leave.

10. As a consequence, these contractors work at a higher rate than an employee with equivalent skills and experience would receive. Payment for services in the Industry is also relatively high compared to other industries in South Africa. As an example, the lowest paid contractor position in the film and television industry is the equivalent of R2,500 to R4,500 per week depending on the size of the budget for the project.

[1] S83 of the BCEA, S198A(3)(b), S198B(5), S200A of the LRA,
[2] Currently R205 433.33 per annum.

11. Contractors are engaged on fixed terms linked to a particular production and may in a year provide services to a number of different production companies. They may accordingly receive income from various different sources in a single year.

12. Performing artists in the Industry are often represented by Agents, who will look after their interests and represent them in contract negotiations. Performing artists have a collective voice through representation with the South African Guild of Actors (SAGA) and other representative bodies. We understand that almost 80% of crew in the Industry are organised through crew agencies who will represent the interests of their clients in contracting with production houses.

"Film and Television Industry"

13. The Notice applies to the Film and Television Industry. It appears that the Department views this as a homogenous industry. The Industry is in fact a very wide and diverse industry.

14. Although there are parallels in process, equipment and skills, there are fundamental differences in the scope, scale, and time frames for productions in the film and television. Although there are long series production that may extend to over a 12-month period, the bulk of film and television productions are relatively short and intense, and may span weeks or months as opposed to years. With commercials, the turnaround time is even more intense.

15. The emphasis on the time period for the completion of, especially a film production is intentional as a number of the employment "benefits" that the Notice seeks to extend are related to a specific period of time which is longer than a contractor's appointment on a production.

16. The point we make is that a one-size fits all piece of legislation would be inappropriate for the Industry. We believe that a proper feasibility study should be conducted of the Industry and the consequences of any deeming provision carefully considered. Applying standards that may be appropriate in one segment of the industry, may have severely detrimental consequences to another segment. We extend our invitation to engage with the Department in this regard.

Current legislative protections

17. It is not clear what the purpose of the deeming provision is from the Notice but we respectfully submit that there are no good legal reasons for the introduction of the deeming provision in the Industry.

18. If the purpose of the Notice is the protection of vulnerable workers, then this is not a concern in the Industry. There are already sufficient protections in place for vulnerable workers.

19. Not only are workers in the Industry well remunerated, but both the LRA[3] and the BCEA[4] already have protections for vulnerable persons[5] as they create a rebuttable presumption as to who is an employee. The

[3] S200A
[4] S83A
[5] Threshold

Code of "Good Practice: Who is an Employee", further sets out comprehensive guidelines whether persons are employees.

20. Whether someone is an employee and entitled to the protections under the BCEA and the LRA is a question of law that is easily determined. A basic tenant of the BCEA and the LRA is that both apply to employees only. The definition of "employee" in both the BCEA and the LRA specifically excludes independent contractors. There is no need for a deeming provision to artificially extend employment rights to workers, who are independent of the persons from whom they receive work and are specifically excluded from the provisions of both the BCEA and the LRA.

21. To do so would be contrary to the legislative scheme that is currently in place.

NMWA

22. We have absolutely no difficulty with the application of minimum wages. Wages in the industry (in the case of employees) and hourly rates (in the case of contractors) exceed the national minimum wage of R20 an hour.

23. We understand that legally it is unnecessary to deem certain persons "employees' for the purposes of the NMWA. The NMWA does not use or define the term "employee". Its scope is much wider as it applies to a "worker" who is defined in the NMWA as "any person who works for another and who receives, or is entitled to receive, any payment for that work whether in money or in kind".

24. There is accordingly no need to deeming persons employees in respect of the NMWA. The NMWA already applies to workers in general.

BCEA

25. Notwithstanding our contention that there is no legal basis for the deeming provision, we deal with the sections of the BCEA referred to in the notice and point out our difficulties with the intended "deeming" provision.

Annual leave & pay for annual leave (sections 20 and 21)

26. In terms of section 20(1) of the BCEA an "annual leave cycle" means a period of 12 months' employment with the same employer immediately following an employee's commencement of employment or the completion of that employee's prior leave cycle.

27. Section 20(2) requires that an employer must grant an employee at least 21 consecutive days' annual leave on full remuneration in respect of each annual leave cycle.

28. The reality of the Industry is that a contractor is rarely engaged for 12 months by the same production company. A production, by its very nature, is costly. In an Industry where the clock ticks more aggressively than most the control of costs is paramount. As a result, scheduling is done very carefully and as efficiently as possible. The result is an intense, production period and over a relatively short period of time. It would be impossible for a contractor to be allowed 21 consecutive annual leave days (or any days) during a production.

29. As we have pointed out the hour rates for contractors already contemplate a factor which includes employment type benefits such as leave. The costs of introducing an additional payment for annual leave, on top of this, would have severe financial implications for the Industry.

30. The purpose of statutory annual leave is to allow employees time off annually to rest. Contractors, unlike employees, are in full control of their time. They are free to decide when, and if, they need time off for rest and recuperation between productions and do not require statutory assistance in this regard.

31. If the deeming provision were to be applied the only feasible option in the Industry would be accrual of leave at the rate of 1 day in every 17 worked (as recorded in section 20(2)(b)) and then leave would have to be paid out on termination of contract rather than taken.

Sick leave and proof of incapacity (Sections 22 and 23)

32. The sick leave provisions as prescribed in the BCEA are not appropriate for the Industry.

33. The scheme of sick leave in the BCEA is based on indefinite continuous employment. A sick leave cycle, in terms of section 22(1), is a 36-month cycle. In terms of section 22(2) during that cycle an employee is entitled to an amount of paid sick leave equal to the number of days the employee would normally work during a period of six weeks.

34. In terms of the BCEA an employee may take his or her full sick leave entitlement (36 days for a 6 day a week worker) after 6 months of employment. As we have pointed out contractors are appointed on short fixed term contracts which rarely exceed a year. A contractor who is appointed on a 7-month contract and falls ill would then technically be entitled to 36 days paid sick leave even though they will not work a full sick leave cycle. This is neither fair nor appropriate. This would place contractors (who are not entitled to statutory employment benefits) in a better position than employees who are entitled to this benefit.

35. We repeat the concerns that we have raised in respect of the duplication of costs where the rates for contractors already contemplate a factor which includes employment type benefits such as leave. The costs of introducing an additional payment for sick leave, on top of this, would have severe financial implications for the Industry.

36. The only way that this section could practically apply to contractors is if the provision in section 22(3), that provides that during the first six months of employment, an employee is entitled to one day's paid sick leave for every 26 days worked, was applied to contractors for the duration of the production, if the period exceeded 6 months.

Application to occupational accidents or diseases (Section 24) and COIDA

37. Section 24 of the BCEA provides that the sick leave provisions and proof of incapacity provisions of the BCEA do not apply to an inability to work caused by an accident or occupational disease as defined in the Compensation for Occupational Injuries and Diseases Act 130 of 1993 (COIDA), except in respect of any period during which no compensation is payable in terms of COIDA.

38. This provision is simply not workable. Inter alia, Chapter 9 of COIDA requires the registration of an "employer" with the Compensation Commissioner, the keeping of records for 4 years, the furnishing of

returns of earnings. If the deeming provision were to be introduced production companies would have to comply with serious statutory administrative requirements in respect of contractors who render services for a very short period of time. It would introduce an unnecessary level of complexity into the production environment.

39. Furthermore, production companies already take personal accident cover insurance for their independent contractors in the event of injury on a production. Personal accident cover is more than adequate for this purpose and it provides a better option than payment by the Compensation Fund. The Fund is known to operate inefficiently and is notorious for delays in payment.

40. Including contractors as part of COIDA would serve only to place more complexity and strain on an already under resourced and over-burdened department.

41. The application of COIDA to independent contractors will also have a huge financial impact on especially the already struggling long term productions that work on low margins by increasing production cost.

Maternity leave (section 25)

42. In terms of section 25(1) of the BCEA an employee is entitled to at least four consecutive months' maternity leave. Maternity leave is unpaid and, in terms of section 25(7), the payment of maternity benefits will be determined by the Minister subject to the provisions of the Unemployment Insurance Act 63 of 2001.

43. There is no benefit to this provision being extended as, in its current form, it provides only for unpaid time off for pregnant employees from 4 weeks before the expected birth of the child. This deeming provision is currently unworkable as contractors are not entitled to claim any Unemployment Insurance benefits.

44. If the Notice was amended to extend the deeming provision to UIF we rise the same concerns that we have regarding the introduction of unnecessary complexity that we did with COIDA above.

45. This section is also unnecessary as production companies, for health and safety reasons, would not require a pregnant contractor to render services. We also reiterate that maternity leave in some instances would be longer that the period of appointment of the contactor.

46. Contractors, unlike employees, are in full control of their time. They are free to decide when, and if, they need time off for rest and recuperation and do not require statutory assistance in this regard.

Severance pay (section 41 of the BCEA) and severance for a fixed term contract exceeding 24 months (section 198B(10)(a) of the LRA)

47. The extension of the severance-pay provisions to contractors engaged on a fixed term contract that is linked to the term of a production is at odds with our law.

48. Section 41 of the BCEA, consistent with the scheme of the act, applies to employees that are indefinitely employed. The severance provision of one week's payment is based on each completed year of service where the employee's services are terminated for operational requirements.

49. Our law is clear that fixed term contracts of employment terminate automatically by effluxion of time. The termination of a fixed term contract is not regarded as an operational requirements dismissal and accordingly no severance is payable.

50. This provision undermines our employment laws related to fixed term contracts and would provide contractors with more generous terms than those currently enjoyed by employees, to whom the BCEA applies.

51. Section 198B(10)(a) of the LRA requires that an employer who employs an employee in terms of a fixed term contract to work exclusively on a specific project for a period exceeding 24 months must pay the employee, on expiry of the contract, one week's remuneration for each completed year of the contract.

52. Section 198B applies only to employees earning under the earnings threshold. As we have recorded, it is not clear from the Notice whether ambit of the deeming provision will extend to all persons or only those receiving income that falls below the earnings threshold. If it is intended that the Notice apply to all persons in the Industry then this would, again, provide independent contractors, regardless of their income, with more favourable statutory rights than employees earning over the earnings threshold.

53. The implementation of these provisions would place further financial constraints on a production company in circumstances that inconsistent with our law. This would be an untenable and unfair consequence.

Conclusion

54. The ambit of the "persons" that the deeming provision applies to is unclear.

55. The effect of the deeming provision, if implemented, would undermine much of current law relating to, especially, fixed term contracts.

56. We contend that the deeming provision for the Film and Television Industry is unnecessary as the current protections for vulnerable workers, in terms of the law, are more than adequate to address the issue.

57. The Department of Trade and Industry ("the DTI") has identified the film and television industry as having excellent potential for growth and as a catalyst for direct and indirect job creation. The South African film industry is attractive internationally for a number of reasons like its locations and skills, but primarily because it has lower production costs than the USA and UK in particular.

58. The Industry is experiencing increasing competition internationally from countries in Eastern Europe, while countries like Australia are extremely attractive because of the large rebates their Government provides for foreign studios and production companies. The film and television industry must guard against relinquishing any advantage it may have.

59. In so far as we have been able to engage more broadly, following the publication of the Notice, we have been advised by ACASA (Association of Crew Agents of South Africa) which represents film crew, that almost all of their members are opposed to legislation that introduces employee deeming provisions as they fear that this will ultimately lead to them having their status changed from independent contractors to employees and that they will lose the financial benefits of being independent contractors .

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The IPO represents, protects and promotes the interests of independent South African film, television and video producers in South Africa.

60. We fully support a fair income model and we believe that the Industry does pay far in excess of the national minimum wage.

61. The deeming of independent contractors as employees, as envisaged in the Notice, will have severe financial implications for the Industry and introduce unnecessary complexity in doing business. Production companies will be forced to either pass the increased costs on to their clients thereby disincentivising foreign investment in the local industry, or it will have to manage its costs internally by reducing its head count on productions. This will mean fewer economically active persons in the industry. Either outcome is not in the interests of the broader South African economy or, indeed, those persons that the Department wishes to protect.

62. The deeming provision, if implemented, would have the opposite effect of that intended. Rather than protect workers it will impede the creation of jobs and be destructive to the economy. Given our current unprecedented unemployment rates this would be disastrous.

63. As one of the largest representative bodies in the Industry we would welcome the opportunity to engage directly with the Department of Employment and Labour in respect of proposed changes. The implementation of a one size fits all deeming provision is inappropriate.

64. We believe that we can offer valuable insight into the Industry and that through proper consultation we can address the Department's concerns.

65. The Industry is unique in respect of its working conditions. As we have pointed out, workers in the Industry are largely represented, through organisations such as SAGA and ACASA. We believe that through constructive engagement between organisations such as the IPO and contractor representative bodies that we should be able to agree a set of guidelines that will clarify and standardise working conditions in the Industry.

Yours faithfully,

Nimrod Geva and Sisanda Henna

Co-Chairs

Independent Producers Organisation