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This booklet is intended as a straightforward explanation of certain legal issues affecting the rights of employers of domestic workers. In the effort to be clear and direct, some detail has been omitted, and the booklet is not meant to substitute for a close reading of the relevant legislation. The authors, producers and publishers will not be held liable or responsible for any loss occasioned by any cause whatsoever, and in particular by any errors and/or omissions in the material, of whatever nature. All rights in and to this material, of whatsoever nature, are reserved to the producers and publishers. It is sold subject to the condition that it shall not by way of trade or otherwise be lent, re-sold, hired out, or otherwise circulated without the publisher's prior consent, in any form of binding or cover other than that in which it is published and without a similar condition including this condition being imposed on the subsequent purchaser.

Introduction

Question: Which laws regulate the relationship between my domestic worker and me?

The two most important are the Basic Conditions of Employment Act (No 75 of 1997, as amended), and the Labour Relations Act (No 66 of 1995, as amended).

Question: What is the effect of these laws?

The Basic Conditions of Employment Act sets out minimum employment standards for all employment contracts in relation to matters such as working hours, leave, remuneration etc. The most significant effect of the Labour Relations Act on you as the employer of a domestic worker is that it imposes a duty to carry out any possible dismissal of your domestic worker in a fair manner and to refrain from unfair labour practices like unilaterally changing your domestic's conditions of employment.

Question: Have there been any important recent changes in these laws?

Yes, the government has recently introduced a new set of basic employment standards specifically aimed at the domestic worker sector of the economy. The most well known of these is the new minimum wage requirement. The new set of employment standards was published in the Government Notice of 15 August 2002 under the title Sectoral Determination 7: Domestic Worker Sector. The notice was published in terms of the Basic Conditions of Employment Act, which entitles the Minister of Labour to set minimum standards for particular sectors of the economy.

Question: Do the new standards also apply to gardeners?

Yes, the term "domestic worker" refers to all employees performing domestic work in the home of their employer, including gardeners, persons employed by a household to drive a motor-vehicle, and persons who take care of children, the aged, sick, frail or disabled. (Domestic workers employed on farms on which employees performing agricultural work are employed are however not covered by the Determination}. It's important to note that the definition also includes all domestic workers employed or supplied by employment services and those employed as independent contractors.

Question: My domestic only works two days a week for me. Do the new standards apply to her as well?

The new employment standards and the laws on fair dismissal apply in full to all domestics working 24 hours a month or more for a particular employer. For those working fewer than 24 hours a month, only the minimum wage requirement applies. We discuss these minimum employment standards in Chapter One.

Question: How does the Labour Relations Act affect our relationship?

Readers of previous editions of our booklet will know that before the Act came into effect in November 1996, domestic workers were treated differently in many respects from employees in other areas of the economy. The Act put domestic workers on an equal footing with other employees. In so doing, it imposed many new duties on their employers. Amongst other things, the Act:

1. Makes it much more difficult than before for employers to end their domestic workers' employment, thereby giving domestic workers greater job security,
2. Requires employers to compensate domestics who have been unfairly dismissed,
3. Creates procedures for resolving disputes, as well as procedures allowing groups of employers and groups of employees to negotiate and enter into collective agreements on matters affecting the domestic worker industry,
4. Sets guidelines for disciplinary action by employers,
5. Requires employers to make severance payments to retrenched domestics, and
6. Gives important rights to domestics who are members of unions and gives rights to the unions themselves.

Question: How does the Labour Relations Act give domestic workers greater job security?

Before November 1996, it was easy to dismiss a domestic worker. Unless there was an agreement between the two of you, which said something different, you could basically fire her at will. The decision to dismiss her at any given time was entirely in your discretion. Your reasons for dismissing her and the procedure you followed in dismissing her had few legal consequences. As a result your domestic worker had very little job security. She relied on your kindness. Unfortunately some employers were less kind than others.

The Act cuts down on the freedom, which you previously had to end your employment relationship with your domestic worker. In so doing, it binds you and your domestic worker closely together.

Question: How does the Act bind my domestic worker and me together?

Basically, the Act says that you have to act "fairly" when dismissing your domestic worker. (The Act refers to any situation where you have unilaterally ended your worker's employment as a "dismissal" of the worker.) The Act goes on to state in detail what a "fair" dismissal is.

Question: When is a dismissal fair?

According to the Act, four conditions have to be met:

1. The dismissal must not be of the type which the Act says is "automatically unfair"; and
2. The worker must
 - a. have misbehaved, or
 - b. be incapable of performing her work; or
 - c. the dismissal must be necessary because of the employer's reasonable needs or requirements; and
3. The reason for the dismissal must be fair; and
4. The dismissal must be carried out according to a fair procedure. The dismissal is unfair unless all four conditions are met We will discuss all of the conditions in greater detail in Chapters Two to Five.

Question: What will happen if I dismiss my domestic worker unfairly?

Your domestic worker or her union can follow certain procedures laid out in the Act to obtain compensation. If she's successful, you will be ordered to take her back into your employment and/or to pay her the equivalent of up to twenty-four months' salary in compensation. We discuss this further in Chapter Six.

Question: What does the Labour Relations Act say about disciplining my domestic worker?

You can't dismiss your domestic worker fairly for misbehaviour unless you've followed the correct disciplinary steps first, so it's important to follow the Act's guidelines on discipline. We discuss discipline fully in Chapter Three.

Question: What is severance pay?

If you dismiss your domestic worker because of your own reasonable needs and requirements, even if it's a fair dismissal, you have to pay her one week's salary for each consecutive year she has been employed by you. It's possible to avoid this if you arrange appropriate alternative employment. **Severance pay** is discussed in Chapter Five.

Question: How will my domestic worker's membership of a union affect our employment relationship?

Some of the effects: she may request that you deduct her union dues from her salary and pay them over to her union; her union may declare a strike; she is entitled to be represented by a union official in certain situations.

Chapter One:

Minimum standards of employment

In this chapter we discuss mainly the minimum standards for domestic workers as contained in the Sectoral Determination: Domestic Worker Sector of 15 August 2002, referred to in our Introduction. These standards can be exceeded and improved by written or oral agreement between you and your worker, but any agreement involving lesser standards is invalid, and the minimum standards contained in the Determination will apply in such a case. The Determination also applies when there is no agreement between you and your worker about any of the matters regulated.

Question: When does the Determination come into effect?

The Determination came into effect on 1 September 2002 and is applicable to all domestic workers working 24 hours a month or more for a particular employer. Those employed for fewer than 24 hours a month are affected only by the minimum wage requirement, which comes into effect slightly later than the rest of the *Determination*, on 1 November 2002. In the following paragraphs we summarize the new employment conditions.

1. Remuneration

No. R.

Date:

BASIC CONDITIONS OF EMPLOYMENT ACT NO. 75 OF 1977

**AMENDMENT OF SECTORAL DETERMINATION 7: DOMESTIC WORKER
SECTOR, SOUTH AFRICA**

SCHEDULE:

DOMESTIC WORKER MINIMUM WAGE INCREASES FROM 1 JANUARY 2018

Wage Tables for the Domestic Worker Sector

Table 1 Minimum wages for domestic workers who work more than 27 ordinary hours per week

Area A

Bergrivier Local Municipality, Breederivier Local Municipality, Buffalo City Local Municipality, Cape Agulhas Local Municipality, Cederberg Local Municipality, City of Cape Town, City of Johannesburg Metropolitan Municipality, City of Tshwane Metropolitan Municipality, Drakenstein Local Municipality, Ekurhuleni Metropolitan Municipality, Emalahleni Local Municipality, Emfuleni Local Municipality, Ethekwini Metropolitan Municipality, Gamagara Local Municipality, George Local Municipality, Hibiscus Coast Local Municipality, Karoo Hoogland Local Municipality, Kgatelopele Local Municipality, Khara Hais Local Municipality, Knysna Local Municipality, Kungwini Local Municipality, Kouga Local Municipality, Langeberg Local Municipality, Lesedi Local Municipality, Makana Local Municipality, Mangaung Local Municipality, Matzikama Local Municipality, Metsimaholo Local Municipality, Middelburg Local Municipality, Midvaal Local Municipality, Mngeni Local Municipality, Mogale Local Municipality, Mosselbaai Local Municipality, Msunduzi Local Municipality, Mtubatu Local Municipality, Nama Khoi Local Municipality, Nelson Mandela, Nokeng tsa Taemane Local Municipality, Oudtshoorn Local Municipality, Overstrand Local Municipality, Plettenbergbaai Local Municipality, Potchefstroom Local Municipality, Randfontein Local Municipality, Richtersveld Local Municipality, Saldanha Bay Local Municipality, Sol Plaatjie Local Municipality, Stellenbosch Local Municipality, Swartland Local Municipality, Swellendam Local Municipality, Theewaterskloof Local Municipality, Umdoni Local Municipality, uMhlathuze Local Municipality and Witzenberg Local Municipality.

Minimum rates for the period 1 January 2018 to 30 November 2018

Hourly Rate (R) 13.05

Weekly Rate (R) 587.40

Monthly Rate (R) 2 545.22

Area B

Areas not mentioned in Area A

Minimum rates for the period 1 January 2018 to 30 November 2018

Hourly Rate (R) 11.89

Weekly Rate (R) 534.91

Monthly Rate (R) 2 317.75

Table 2 Minimum wages for domestic workers who work 27 ordinary hours per week or less

Area A

Bergrivier Local Municipality, Breederivier Local Municipality, Buffalo City Local Municipality, Cape Agulhas Local Municipality, Cederberg Local Municipality, City of Cape Town, City of Johannesburg Metropolitan Municipality, City of Tshwane Metropolitan Municipality, Drakenstein Local Municipality, Ekurhuleni Metropolitan Municipality, Emalahleni Local Municipality, Emfuleni Local Municipality, Ethekwini Metropolitan Municipality, Gamagara Local Municipality, George Local Municipality, Hibiscus Coast Local Municipality, Karoo Hoogland Local Municipality, Kgatelopele Local Municipality, Khara Hais Local Municipality, Knysna Local Municipality, Kungwini Local Municipality, Kouga Local Municipality, Langeberg Local Municipality, Lesedi Local Municipality, Makana Local Municipality, Mangaung Local Municipality, Matzikama Local Municipality, Metsimaholo Local Municipality, Middelburg Local Municipality, Midvaal Local Municipality, Mngeni Local Municipality, Mogale Local Municipality, Mosselbaai Local Municipality, Msunduzi Local Municipality, Mtubatu Local Municipality, Nama Khoi Local Municipality, Nelson Mandela, Nokeng tsa Taemane Local Municipality, Oudtshoorn Local Municipality, Overstrand Local Municipality, Plettenbergbaai Local Municipality, Potchefstroom Local Municipality, Randfontein Local Municipality, Richtersveld Local Municipality, Saldanha Bay Local Municipality, Sol Plaatjie Local Municipality, Stellenbosch Local Municipality, Swartland Local Municipality, Swellendam Local Municipality, Theewaterskloof Local Municipality, Umdoni Local Municipality, uMhlathuze Local Municipality and Witzenberg Local Municipality.

Minimum rates for the period 1 January 2018 to 30 November 2018

Hourly Rate (R) 15.28

Weekly Rate (R) 412.60

Monthly Rate (R) 1 787.80

Area B

Areas not mentioned in Area A

Minimum rates for the period 1 January 2018 to 30 November 2018

Hourly Rate (R) 14.03

Weekly Rate (R) 378.83

Monthly Rate (R) 1 641.48

2. Replace clause 14(2) which reads “An employer may only require or permit a domestic worker to be on standby if is agreed in writing and if the domestic worker is compensated by the payment of an allowance of at least R20, 00 per shift” with:

“An employer may only require or permit a domestic worker to be on standby if is agreed in writing and if the domestic worker is compensated by the payment of an allowance of at least R 30, 00 per shift”.

3. Delete the words “in excess of three hours” in clause 14(5) for the clause to read:

“an employer must pay a domestic worker for any time worked during any period of standby at-

- (a) the domestic worker’s overtime rate calculated in terms of 12(1);or**
- (b) grant the domestic worker paid time-off in terms of clauses 12(2) and (3)**

You should also note that:

- a. Employers are obliged to pay the prescribed monthly or weekly wage unless they **have** agreed with the employee that they will be paid at the hourly rate.
- b. A domestic worker who works for less than four hours on any day must be paid for no less than four hour's work that day.
- c. If the annual increase in the Consumer Price Index six weeks before either of the stipulated wage increases is 10 % or higher, then all domestic workers will be entitled to receive an increase equivalent to the rise in the Consumer Price Index and a notice will be published in the Government Gazette to this effect.

Question: I'm already paying my domestic worker more than the minimum wage. Am I entitled to reduce her salary to the prescribed minimum?

No. Your domestic's current rate of pay forms part of your employment agreement with her, and such agreements can only be altered by the consent of both parties to the agreement.

Question: How is remuneration calculated?

- a. A domestic's wage is calculated with reference to their ordinary hours of work. There should be agreement on whether you are going to pay at an hourly, weekly or monthly rate.
- b. For the purposes of calculation, a monthly wage is said to be equivalent to four and a third times the weekly wage.

Question: What amounts am I permitted to deduct from my domestic's wage?

Employers are only allowed to make deductions under the following conditions:

- a. If the worker has been absent from work, other than an absence on paid leave or at the initiative of the employer, the employer may deduct an amount from the domestic's wage proportionate to the length of period of absence.
- b. If the employer supplies a room or other accommodation to the worker, the employer may deduct an amount not more than 10% of the wage, as long as the accommodation:
 - i. is weatherproof and generally kept in good condition, and
 - ii has at least one window and door, which can be locked, and
 - iii. has a toilet and bath or shower, if the domestic worker does not have access to any other bathroom.
- c. With the written consent of the domestic worker, the employer may deduct any amount, which the employer has paid or has undertaken to pay:

- i. to any holiday, sick, medical, insurance, savings, provident or pension fund of which the domestic worker is a member,
 - ii. to any registered trade union in respect of subscriptions,
 - iii. to any banking institution, building society, insurance business, registered financing institution or local authority in respect of a payment on a loan granted to the domestic worker to acquire a dwelling,
 - iv. To any person or organisation in respect of the rent of a dwelling or accommodation occupied by the domestic worker.
- d. The employer is allowed to deduct an amount not exceeding one-tenth of the due wage on the payday concerned towards the repayment of any amount loaned or advanced to the domestic by the employer.
 - e. If an employer, at the request of the domestic worker, pays fees for a domestic worker's hospital or medical treatment, the fees paid may be set off against the worker's pay.
 - f. Deduction of any amount which the employer is required to make by law or in terms of a court order or arbitration award is also permissible.

Question: What about food supplied to my domestic at meal intervals, and work clothing supplied to her. Am I allowed to set those off against her wage?

No, an employer may not receive payment either directly or indirectly, or withhold any payment from a domestic in respect of:

- a. The supply of any work clothing,
- b. Any food supplied to the domestic while they are working or simply present at the workplace,
- c. The supply of any work equipment or tools,
- d. The employment or training of that domestic worker.

An employer may furthermore not require a domestic worker **to** purchase any goods from the employer or from any person, shop or other business nominated by the employer.

An employer may also not levy a fine against a domestic worker, or require or permit them to repay any wage amount except for overpayments previously made by the employer resulting from an error in calculating the domestic worker's pay. An employer may also not require a domestic worker to acknowledge receipt of an amount greater than the pay actually received.

Question: How should a domestic's wage be paid?

- a. Remuneration must be paid daily, weekly, fortnightly or monthly, and in South African currency. It must be paid in cash, by cheque or by direct deposit into an account designated by the domestic.

- b. If payment is by cash or cheque then it must be made:
 - i. At the workplace; and
 - ii.** During the domestic's working hours; and
 - iii. In a sealed envelope, which becomes the domestic's property.
- c. Remuneration must be paid on the normal payday agreed to by the domestic worker.

Question: Do I need to give my domestic any information with her pay?

Yes, on every payday you must give her a statement or payslip (see Appendix A) showing:

- a. Your name and address
- b. Domestic's name and occupation
- c. The period for which payment is being made
- d. The domestic's wage rate and overtime rate
- e. The number of ordinary hours worked by the domestic in that period
- f. The number of overtime hours worked by the domestic in that period
- g. The number of hours worked by the domestic on any public holidays or Sundays within that period
- h. The wage for the period
- i. Details of any other pay arising out of the domestic's employment
- j. Details of any deductions made, and
- k. The actual amount paid to the worker.

The law obliges you to keep a copy of each such statement for three years.

2. Working time

Question: How is working time regulated?

Ordinary working hours:

- a. Maximum weekly working hours: 45.
- b. Maximum daily working hours:
 - i. For a domestic working 5 days in a week or fewer: 9 hours a day
 - ii. For a domestic who works on more than five days in a week: eight hours a

day.

Overtime:

- a. May only be worked by agreement between employer and domestic
- b. Maximum working hours in any day, including overtime: 12 hours
- c. Maximum weekly overtime: 15 hours
- d. Overtime rate: at least one and half times the usual wage
- e. Instead of paying this rate, an employer may by agreement:
 - i. pay the normal hourly wage for the overtime worked and give the domestic thirty minutes off on full pay for every hour of overtime worked, or
 - ii. pay nothing for the overtime worked and give the domestic ninety minutes off on full pay for each hour of overtime.

Any leave granted according to this arrangement must be given within one month of the worker becoming entitled to it, though this period may be extended to 12 months by written agreement. If such a written agreement is concluded with the domestic worker when they first enter employment or during the first three months of employment, then it is only valid **for** one year.
- f. Time worked On a Sunday or public holiday must be paid in accordance with the laws for Sunday and public holiday pay set out below.

Night work:

"Night work" means work performed after 18h00 and before 06h00 the next day.

- a. An employer may only permit or require night work by a domestic:
 - i. In accordance with a written agreement, and
 - ii. If the domestic is compensated by an allowance, which must be agreed between the employer and worker, and
 - iii. If the domestic resides at the workplace or if transport is available between their place of residence and the workplace at the beginning and end of the worker's shift.
- b. An employer who requires a domestic worker to perform work for a period of longer than one hour after 22h00 and before 06h00 the next day at least five times per month or 50 times per year must:
 - i. Inform the domestic of the any health and safety hazards associated with the **work** and enable her to undergo a medical examination concerning those hazards
 - ii. Transfer the domestic to suitable day work within a reasonable time if the domestic suffers from a health condition associated with the performance of night work and if it is practicable for the employer to do so.

Standby:

"Standby" means any period between 20h00 and 06h00 the next day when a domestic is required to be at the workplace and is permitted to rest or sleep but must be available to work if necessary.

- a. An employer may only require or permit a domestic worker to be on standby if it is agreed in writing and if the domestic worker is compensated by the payment of an allowance of at least R30.00 per shift.
- b. An employer may not require or permit a worker to be on standby for more than five times per month or 50 times per year.
- c. An employer may only require or permit a worker to perform work, which is required to be done without delay.
- d. An employer must pay a domestic worker for any time worked in excess of three hours during any period of standby at the domestic's standard overtime rate, or give paid leave as explained in the paragraphs dealing with overtime.

Meal intervals:

- a. At least one continuous hour for a domestic who works continuously for more than five hours.
- b. During the meal interval the domestic can only be permitted or required to work at duties that cannot be left unattended and cannot be performed by another domestic
- c. A domestic must be paid for a meal interval where they are required to be available for work, and or for any portion of a meal interval longer than 75 minutes (unless they live at the workplace).
- d. The employer and domestic may agree in writing:
 - i. That the meal interval be reduced to 30 minutes, and
 - ii. That a domestic who works less than six hours a day does not have a meal interval.
- e. Whenever an employer is required to give a domestic worker a second meal interval because of overtime worked i.e. if she works more than ten hours, that interval may be reduced to no less than 15 minutes.

Daily and weekly rest period:

- a. Daily: a rest period of at least 12 consecutive hours between ending and starting work again. This daily rest period may be reduced by written agreement to ten hours for a domestic who lives at the place where the workplace is situated and whose meal interval is at least 3 hours long.
- b. Weekly: a rest period of at least 36 consecutive hours, which, unless otherwise agreed, must include a Sunday; or, by written agreement, a rest period of 60 consecutive hours every two weeks.

Payment for work on Sundays:

- a. Domestic ordinarily works on a Sunday: one-and-a-half times the normal hourly rate. Domestic doesn't ordinarily work on a Sunday: twice the normal hourly rate.
BUT: If the amount thus calculated is less than the normal daily wage, then an amount equivalent to the normal daily wage must be paid.
- b. By agreement, however, the employer may pay the domestic at her normal hourly rate and give her paid time off equivalent to the extra owed to her in terms of (a) above. This paid time off must be granted within one month of the domestic worker becoming entitled to it, though an agreement in writing can extend this period to one year.
- c. Time worked on a Sunday by a domestic who doesn't normally work then, counts as overtime and not as ordinary working hours.
- d. If a shift worked by a domestic worker falls on a Sunday and another day, the whole shift is deemed to have been worked on the Sunday, unless the greater portion of the shift was worked on the other day, in which case the whole shift is deemed to have been worked on that day.

Public holidays:

- a. An employer may only require or permit a domestic to work on a public holiday in accordance with an agreement.
- b. If the domestic would otherwise have worked on the day on which the public holiday falls, the domestic is entitled to a paid holiday. The employer must pay what the domestic would normally receive for working on that day.
- c. If the domestic works on the public holiday and it is a day on which she would normally work, then the employer must pay the domestic at least double the daily wage.
- d. If the domestic works on the public holiday and it is a day on which he/she would not ordinarily work, the employer must pay her the daily wage plus the hourly wage for each hour actually worked.
- e. An employer must pay a domestic for a public holiday on the domestic's usual payday.
- f. If a shift worked by a domestic worker falls on a public holiday and another day, the whole shift is deemed to have been worked on the public holiday, unless the greater portion of the shift was worked on the other day, in which case the whole shift is deemed to have been worked on that day.

3. Leave, sick leave, maternity leave, family responsibility Leave

Question: How much leave and sick leave is due to her?

Annual leave:

- a. An employer must grant a domestic at least:
 - i. Three weeks annual leave on full pay in respect of each 12 months of employment (the annual "leave cycle"), or

- ii. by agreement, one day of annual leave or full pay for every 17 days on which the domestic worked or was entitled to work, or
 - iii. by agreement, one hour of annual leave on full pay for every 17 hours worked.
- b. If a public holiday occurs during the leave period, on a day on which the domestic would otherwise have worked, the employer must grant an additional day of paid leave.
- c. An employer is entitled to reduce leave due by the number of days of occasional leave on full pay granted to the domestic at her request during that leave cycle.
- d. The minimum of three weeks annual leave must be granted not later than six months after the end of the annual leave cycle, or the year in which the leave was earned.
- e. The leave earned in one year must be granted over a continuous period i.e. on consecutive days, if requested by the worker.
- f. The annual leave must be taken in accordance with any agreement, or, if there is no agreement, at a time determined by the employer in accordance with these rules.
- g. An employer may not require or permit a domestic to take annual leave during any other period of leave to which the employee is entitled in terms of these rules, or during any period of notice of termination of employment.
- h. An employer may not require or permit a worker to work for the employer during any period of annual leave.
- i. Except on termination of employment, an employer may not pay a domestic instead of granting paid leave.
- j. The domestic must be paid at least the amount she would have received for a period equal to the leave period, at the rate at which she was paid immediately preceding the leave.
- k. The employer must pay the leave pay before the beginning of the leave.

Sick leave:

- a. During every sick-leave cycle of 36 months, a domestic is entitled to paid sick leave equal to the number of days she would normally work during a period of six weeks. (For new domestics, "sick-leave cycle" means the first 36 months of continuous employment. For other domestics, "leave cycle" means the period of 36 months' continuous employment immediately following the completion of the prior sick-leave cycle.)
- b. During the first six months of continuous employment, however, the domestic is only entitled to sick leave at the rate of one day's paid sick leave for every 26 days worked. Sick leave due in the first leave cycle may be reduced by the

number of days of paid sick leave thus taken.

- c. The amount due for a day's sick leave is the same as the amount payable to the domestic for the ordinary hours the domestic would have worked on that day.
- d. If an employer, at the request of the domestic worker, pays fees for a domestic worker's hospital or medical treatment, the fees paid may be set off against the worker's pay.
- e. An employer does not have to pay sick-leave if the domestic does not, at the employer's request, produce a medical certificate after she has been absent from work for more than two consecutive days or on more than two occasions during an eight week period.
- f. The medical certificate must state that the domestic was unable to work for the duration of the domestic's incapacity. It must be signed by a medical practitioner, a traditional healer, a professional nurse who is authorized to issue certificates, or by any other person who is certified to diagnose and treat patients and is registered with a professional council established by Act of Parliament
- g. If an employer requests the production of a medical certificate, they must provide reasonable assistance to the domestic to obtain one if the domestic lives on the employer's premises and it is not reasonably practicable for the domestic to obtain one.

Question: What are the rules concerning maternity leave?

Maternity leave:

- a. A domestic is entitled to at least four consecutive months (unpaid) maternity leave.
- b. A domestic may begin maternity leave at any time from four weeks before the expected date of birth, unless otherwise agreed, or on a date from which a medical practitioner or midwife certifies that it is necessary for her health or that of the unborn child.
- c. A domestic may not work for six weeks after birth of her child unless a medical practitioner or midwife certifies that she is fit to do so.
- d. A domestic who bears a still-born child or suffers a miscarriage during the third trimester of pregnancy is entitled to maternity leave for six weeks after the miscarriage or stillbirth, whether or not she had commenced maternity leave at the time of the miscarriage or stillbirth.
- e. A domestic must notify an employer in writing, unless she is unable to, of the date when she intends to commence maternity leave and return to work from maternity leave. This notification must be given at least four weeks before she intends to commence maternity leave, or, if it is not reasonably practicable to do so, as soon as reasonably practicable thereafter.
- f. No employer may require or permit a pregnant domestic or a domestic who is nursing her child to perform work that is hazardous to her health or to that of her child.

Family responsibility leave:

- a. This type of leave is only applicable to a domestic who works at least four days a week for an employer and who has been in employment for longer than four months.
- b. During each 12 months of employment, and at the request of the domestic, the employer must grant her five days of paid leave, which the domestic is entitled to take:
 - i. When the domestic's child is born; or
 - ii. When the domestic's child is sick; or
 - iii. In the event of the death of the domestic's spouse or life partner, parent, adoptive parent, grandparent, child, adopted child, grandchild or sibling.
- c. The worker may take family responsibility leave for the whole or part of the day.
- d. The employer must pay the worker the wage she would normally have received for working on that day. This amount must be paid on her normal payday.
- e. Before paying a domestic for leave taken, an employer may require reasonable proof of the reason set out in (b) above for which the leave was taken.
- f. Unused family responsibility leave lapses at the end of the annual leave-cycle.

Question: At what age may a domestic worker legitimately enter employment?

- a. No person may employ as a domestic worker a child who is under 15 years of age, or who is under the minimum school leaving age in terms of any law, whether this is 15 or older. (According to the South African Schools Act, every parent must cause every learner for whom she is responsible to attend a school until the last school day of the year in which the learner reaches the age of 15 or the ninth grade, whichever occurs first.)
- b. No person may employ a child (i.e. those under 18 years of age) in an employment that is inappropriate for a person of that age or that places at risk the child's well-being, education, physical or mental health, or spiritual, moral **or** social development
- c. An employer must maintain for three years a record of the name, date of birth and address of every domestic worker under the age of 18 years employed by them.

4. Notice periods and payments on termination

Please note that if the reason for termination of the employment is dismissal of the worker, then your compliance with the rules set out beneath is not sufficient cause for the dismissal to be legally valid. You must also comply with the rules for fair dismissal set out in Chapters Two, Three, Four and Five.

Question: If I terminate my domestic worker's employment, what period of notice must I give her?

If there's a written or oral agreement between you and your worker which says that she is entitled to a longer period of notice than what is set out below, then you must give her notice according to the agreement.

If there's no such agreement, or if the agreed notice period is less than what is set out below, then you must give her notice as follows:

- a. If she works for fewer than 24 hours a month for you, then the notice period is the same as the period for which she is usually paid e.g. one day or one week.
- b. If she works 24 hours a month or more, then the notice period is 1 week if she has been employed for six months or less, and four weeks if she has been continuously employed for more than six months.

Take note of the following as well:

- a. Notice of termination must be given in writing except when given by an illiterate employee.
- b. If an employee who receives written notice does not understand it, it must be explained orally by or on behalf of the employer in an official language the employee reasonably understands.
- c. Notice of termination given by the employer must:
 - i. Not be given during any period of leave to which the employee is entitled in terms of the rules set out in chapter seven under "LEAVE";
 - ii. Not run concurrently with any period of leave to which the employee is entitled, except sick leave.

Question: What are the consequences if she's living in accommodation provided by me at the time that I give her notice, or pay her out in lieu of notice?

- a. The law says that a domestic who works or has been working 24 hours a month or **more** for a particular employer and who stays in accommodation at the workplace or other accommodation supplied by the employer, is entitled to remain in the accommodation for one- month or until the contract could lawfully have been terminated (if this period is longer), if the employer:
 - i. Terminates the contract of employment before the date on which he was entitled to; or
 - ii. Terminates the contract by paying out notice.
- b. If the worker chooses to remain in the accommodation after the employer has terminated the contract prematurely as set out above, the employer may deduct 10 percent of the amount the employer is obliged to pay as the value of the accommodation.

Question: What amounts of money must I pay to my worker on termination of the employment agreement?

You must comply with any agreement you have with her, bearing in mind that she is

entitled to the following as a minimum.

1. Salary for time worked

If you have terminated the agreement for a valid legal reason then you must pay her at her usual rate for all the time worked by her up to the time of her dismissal. This would include overtime- If she's been dismissed with notice then you obviously also have to pay her while she works out the notice period, unless you take the option to immediately pay her what she would have earned had she worked out the period of notice.

2. Accumulated leave pay

You must pay her out for all leave accrued to her but not yet taken, including any leave which may have accrued to her as a result of working overtime and on Sundays and public holidays. If she has been in service longer than four months, you must also pay pro rata for annual leave entitlement during the current incomplete 12-month leave cycle at the rate of one week's wages for every four months worked or one day's wages for each 17 days worked or for which she was entitled to be

3. Severance pay.

Over and above these payments, a retrenched employee (see Chapter Four) must be paid severance pay at the rate of at least one week's salary for each year of continuous service with that particular employer. (Remember that the retrenchment must be fair in terms of the Labour Relations Act)

BUT: an employee who unreasonably refuses to accept the employer's offer of alternative employment with that same employer or with another employer is not entitled to severance pay.

5. Employer's administrative obligations

Question: Do I need to have a written agreement with my worker?

- a. You don't need a written agreement to establish a binding contract of employment. An oral/spoken agreement of employment is just as binding as a written one. The only advantage of a written agreement is that the employer and domestic have clarity about each other's rights and duties. But while some employers and domestics feel insecure without a written agreement, others would rather not have one. It's a matter of choice. Appendix F is a specimen written agreement, which you are welcome to use if you wish.

- b. BUT: The law does require that "written particulars of employment" (see Appendix **B**) must be handed to new employees on commencement of employment.

The following particulars must be supplied:

1. Full name and address of employer
2. Name of domestic and occupation, or a brief description of the work for which the domestic is employed
3. Place of work and, if the domestic is required or permitted to work at different places, an indication of this
4. The date on which the employment began
5. Ordinary hours and days of work
6. Wage, or rate and method of payment
7. Rate of pay for overtime
8. Any other cash payments the domestic is entitled **to**
9. Any payment in kind that the domestic is entitled to and the value of the payment in kind
10. How frequently wages will be paid
10. Any deductions to be made from the **wage**
11. Leave to which the domestic is entitled
12. Notice periods for termination or, if the employment is for a specified period, the date when the employment will end.

If the domestic worker is not able to understand the written particulars then the employer **must** ensure that they are explained in a language and manner that the domestic understands.

The employer must revise the written particulars if the employer and domestic worker agree to any change in the domestic's terms of employment.

The employer must sign the written particulars and any change in the terms of employment as mentioned above.

The employer is entitled to require the worker to acknowledge receipt of the written particulars in writing on a copy of the particulars. If the worker is unable or refuses to acknowledge receipt, the employer must record that the worker has received a copy.

An employer must keep a copy of the written particulars while the domestic is employed **and** for three years thereafter.'

Failure to hand over the written particulars does not mean that no agreement of employment has come into being. Such a failure does, however, constitute an offence for which the employer may be fined.

Question: What points should be covered in an agreement of employment, whether spoken or written?

- a. identities of the employer and worker, and the place of work

- b. is the agreement for an indefinite or fixed period?
- c. starting date (and a finishing date, in respect of fixed period contracts)
- d. the nature of the job and duties
- e. salary, including the value of any payments in kind
- f. whether the domestic will be required to perform a probationary period
- g. is she prepared to work overtime, and if so, how much?
- h. other possible benefits such as a pension
- i. days and hours to be worked
- j. meal and tea intervals
- k. starting and finishing times
- l. pay for overtime, Sundays and public holidays
- m. leave pay
- n. sick leave, sick-leave **pay**
- o. notice periods for employer and worker to terminate the agreement

Question: Am I obliged to provide a reference for my domestic on termination of her employment?

On termination of employment a domestic worker is entitled to a Certificate of Service stating:

- a. The worker's full name
- b.** **The** name and address of the employer
- c. The date of commencement and date of termination of employment
- d. The title of the job or brief description of the work for which the domestic worker **was** employed as at the date of termination
- e. Any relevant training received by the worker
- f. The pay at date of termination
- g. If the worker requests it, the reason for termination of employment.

Question: Am I obliged to keep any further records at the workplace?

The rules oblige you to keep a copy of the sectoral determination or an official summary of it available in the workplace in a place to which the domestic worker has access.

Question: I've lost track of the documents I'm supposed to keep.

Here's a summary of the compulsory ones:

- a. Particulars of Employment - to be kept while the worker is employed and for three years after termination.
- b. Payslips - to be handed to worker with wage in a sealed envelope, copies to be

kept for three years.

- c. Certificate of Service - to be handed to domestic worker at termination of employment.
- d. Copy of the sectoral determination, or an official summary - to be kept at the workplace in a place where the worker has access to it

It's advisable but not compulsory to keep copies of all other relevant documentation such as written warnings etc.

7. Employment Services

Question: What are my rights and responsibilities if a worker employed by a domestic worker agency performs my domestic work?

Anyone who recruits, procures or provides domestic workers for clients, regardless of who actually pays the worker, is defined as an employment service.

If the worker is paid by the employment service itself, then the **worker** is regarded as being employed by the employment service for purposes of these rules.

BUT: If the employment service does not comply with any of these rules, then you, as a client of the employment service, are jointly and severally liable with the employment service. In other words, legal action may be taken against either or both of you.

9. You and your domestic worker's union

Question: Am I obliged to deduct union dues from my domestic's salary?

If your worker authorizes you in writing to deduct subscriptions or levies payable to her trade union from her wages, then you are obliged to do so. You must send the amount deducted to the trade union by not later than the 15th day of the month following the date each deduction is made.

Question: Are trade union officials and office-bearers entitled to enter my household?

Only if you agree to let them enter.

Question: If I'm interviewing someone for possible appointment as my domestic worker, can I tell her she can get the job as long as she doesn't join a trade union?

Definitely not. In fact, the Act says not only must you not discriminate against your domestic worker, you're also not allowed to discriminate against someone seeking employment from you. **You may not, for example, favour a non-trade union member above a member.**

8. General

Question: Am I entitled to place a new domestic worker on probation?

Yes, provided that you do it for the appropriate reason, namely to assess the domestic worker's capacity to perform the work for which you are employing her. For a full discussion of probation, please see the beginning of Chapter Four.

Question: Am I obliged to make provision for a pension/or her?

Not unless you have agreed to do so.

Question: Am I obliged to make contributions to the Unemployment Insurance Fund on her behalf?

Changes are currently being made to the UIF to enable benefits to be extended to domestic workers. **You** will probably hear of these through the media in the near future.

9. Further advice and assistance

Question: Where can I get further assistance and advice?

- a. Phone your local office of the Department of Labour (ask to speak to one of the inspectors).
- b. Contact your local branch of the Commission for Conciliation, Mediation and Arbitration ("CCMA": reach them through the Department of Labour if necessary).
- c. Speak to a private expert such as a labour law consultant or attorney.

Chapter Two:

Dismissing your domestic worker fairly

An employment contract can be terminated in a number of different ways, for example by the resignation or death of the employee, by agreement between employer and employee, and so on. But whenever the employer unilaterally terminates an employee's employment, our law regards the termination as a dismissal, and sets legal requirements for the dismissal to be valid. In the following chapters we discuss the legal requirements for dismissal as set out in the Labour Relations Act.

Question: So whenever an employer ends their domestic worker's employment, it's a "dismissal"?

Yes. "Dismissal" covers all situations where an employer ends a domestic worker's employment, including the following:

1. Whenever you terminate the agreement of employment. Whether you give her notice or not, it's still dismissal. But if the agreement between the two of you was that she would only work for a fixed period, for example for a three-month period ending on a specified date, then it's not dismissal if you tell her to leave at the end of that period.
2. However, if your worker reasonably expects you to renew the fixed-period agreement of employment on the same or similar terms and conditions at the end of the fixed period, and you don't renew it, or you offer her less favourable terms and conditions, that's also dismissal. Your worker could form a reasonable expectation for a variety of reasons. Common reasons would be that you had renewed her employment at the end of fixed periods in the past, or that you told her at some point that you intended to renew the agreement.
3. If you don't allow her to take up her work again when she returns from maternity leave that she was entitled to take by law or by agreement, it's also regarded as dismissal.
4. If you had more than one domestic worker and you dismissed two or more of them for the same or similar reasons, and you've offered to re-employ one or more of them but you've refused to re-employ another, the new Act says your refusal constitutes dismissal.
5. If your domestic worker leaves your employ because you've made her job impossibly unpleasant **or** difficult, then the Act says that you've effectively dismissed her.

Note that a dismissal is not in itself unfair. Most of the above dismissals could be fair in the right circumstances,

Question: If I've agreed with my domestic worker that either of us can terminate the agreement of employment on, let us say, one month's notice, then is it still dismissal if I terminate her employment in accordance with that agreement?

Yes, as was stated in paragraph 1 above. The dismissal would have to satisfy all the necessary conditions for a fair dismissal.

Question: But what about my agreement with her?

The Act overrides the agreement. You can only agree with your worker to give her more protection and benefits than are in the Act. Any part of an agreement that says she gets less protection and rights than the Act gives, is invalid.

Question: When is a dismissal fair?

As we said earlier, there are four conditions:

1. The dismissal must not be of the type which the Act says is "automatically unfair"; and
2. The worker must:
 - a. have misbehaved, or
 - b. be incapable of performing her work; or
 - c. the dismissal must be necessary because of the employer's reasonable needs or requirements; and
3. The reason for dismissal must be fair in the circumstances; and
4. The dismissal must be carried out according to a fair procedure.

Question: What dismissals are "automatically unfair"?

1. If the employer in dismissing the domestic worker:
 - a. prejudices her because she has refused to do something which the employer may not lawfully require her to do, such as a crime or other illegal action; or
 - b. prejudices her because she has disclosed information to someone about the employer which she is entitled to disclose; or
 - c. interferes with her exercising any right given to her by the Act, such as the right to be a member of a trade union, or prejudices her for exercising such a right.
2. If the reason for the dismissal is:
 - a. that the domestic worker supports a lawful strike or protest action; or
 - b. that the domestic worker refused to do any work normally done by another employee who at the time was taking part in a lawful strike, unless that work is necessary to prevent an actual danger to life, personal safety or health; or if the domestic worker has indicated an intention to refuse to do such work.

- c. to force the domestic worker against her will to obey any demand the employer is making on her; or
 - d. that the domestic worker is taking action against the employer by exercising her rights as set out in the Act;
 - e. the employee's pregnancy or intended pregnancy or any reason related to her pregnancy.
3. If the employer in dismissing the domestic worker unfairly discriminates against her on any ground, the dismissal is automatically unfair. The dismissal may be fair, however, if the discriminatory reason for the dismissal is based on a specific requirement for the job. Furthermore, a dismissal based on age is fair if the domestic worker has reached the normal or agreed retirement age for domestic workers.

Question: What are the consequences for an employer of an automatically unfair dismissal?

We will see in Chapter Six that the domestic worker is entitled to greater compensation than **one** whose dismissal is unfair in the normal course

Question: If the dismissal is not automatically unfair, then in what circumstances is it fair?

As was stated earlier, only three categories of reasons for dismissal can possibly be fair. The reason must be:

- a. that the domestic worker has misbehaved (the technical term is "dismissal for misconduct"); or
- b. that she is incapable of performing the job ("dismissal due to incapacity"); or
- c. the employer's own reasonable needs or requirements ("retrenchment"),

The above reasons must in addition be fair in the particular circumstances of the case, and the procedure followed in carrying out the dismissal must also be fair.

Chapter Four:

Dismissal due to incapacity

Your domestic worker may be incapable of performing her duties, in whole or in part, for any number of reasons including the following: unsatisfactory work performance, ill-health or injury, desertion other employment. As for misbehaviour, your reason for dismissal must be fair in the circumstances and the procedure you follow must also be fair.

Dismissal for poor work performance

It's important to distinguish between a dismissal for poor work performance carried out while the domestic worker is on probation, and a dismissal for poor work performance in the normal course of affairs. In relation to dismissal during probation, the law will accept less compelling reasons for dismissal related to poor work performance than in the normal course of affairs. It's only in relation to the standards of work performance that less compelling reasons for dismissal will be accepted, however. If the dismissal is due to misconduct or to the employer's operational requirements, then the normal standards for those types of dismissals will apply.

Dismissal during probation

You are entitled to require a newly hired worker to serve a period of probation before confirming her appointment. The purpose of probation is to give you an opportunity to evaluate the employee's performance before confirming the appointment. Probation should not be used to deprive employees of the status of permanent employment. For example, a practice of dismissing employees as they complete their probation periods and replacing them with newly hired employees is not consistent with the purpose of probation and constitutes an unfair labour practice.

The period of probation should be determined in advance and be of reasonable length. The length of the probationary period should be fixed according to the nature of the job and the time it takes to determine the worker's suitability for continued employment.

During the probationary period, you should assess the domestic's performance and give her reasonable evaluation, instruction, training, guidance or counselling in order to allow her to render a satisfactory service.

If you determine that her performance is below standard, then you should advise her of the aspects in which you consider that she is performing below standard. If you believe she is incompetent, you should advise her of the respects in which she is not competent.

The period of probation may only be extended for a reason that relates to the actual purpose of probation, and not for ulterior motives. The period of extension should be in line with the purpose, which you want to achieve.

You may only decide to dismiss a worker or extend the probationary period after inviting the worker to make representations and considering the representations made. A trade union representative or fellow worker can make the representations on behalf of the domestic.

If you decide to dismiss the employee or to extend the probationary period, you should advise the domestic other right to take the matter to the CCMA (see Chapter Six).

Dismissal for poor work performance in the normal course of affairs

Fair reasons for dismissal

You have fair reasons for dismissing your worker for poor work performance if:

1. She failed to perform some or all of her work to the standard set by you; and
2. She was aware or could reasonably have been expected to be aware of the required standard set by you; and
3. You gave her a fair opportunity to improve her work to your required standard. In other words you ought to have pointed out her failure to comply with the standard and given her a chance to improve; and
4. Dismissal must have been an appropriate response to your worker's not meeting the required performance standard. In practice this would mean you must have exhausted all other avenues **of** improving her poor work performance, by training and advice and so on.

Fair procedure

1. You should not dismiss her unless you have given her the appropriate evaluation, instruction, training, guidance or counselling she needs to perform the work properly.
2. If she then continues to perform unsatisfactorily after a reasonable time for improvement, you should investigate the reasons for the unsatisfactory performance and consider whether there are any ways of correcting the situation other than dismissal.
3. You must inform her that you're considering dismissing her, and of your reasons for doing so, and give her a reasonable opportunity to state her case in response. She is entitled to be represented by a fellow-employee or a trade union representative. For these purposes it would be best to hold a semi-formal enquiry along the lines set out in the previous chapter on dismissal for misconduct.
4. Make your decision after careful consideration of the circumstances and of your worker's submissions. If necessary, obtain informed advice.
5. As was stated in connection with dismissal for misconduct, you must then make a decision about whether or not you are going to give her notice. If she's totally incapable of performing the work properly then she's probably not entitled to notice. On notice, see Chapter One. Remember that you have the option to not give her notice as long as you pay her the amount she would have received had you given the necessary notice. Bear in mind her right to continue staying in accommodation you have provided for another month.
6. Inform her of your decision. If you're giving her notice, this must be done in writing.
7. Calculate the moneys due to her and pay them to her on or before her last day, and hand her a Certificate of Service. Remember to obtain a receipt.

Dismissing your worker if she's incapable due to poor health or injury.

Fair reasons for dismissal

1. Your worker must be incapable of performing some or all of the work; and
2. The nature and extent of the incapacity are important.

a. Nature of the incapacity:

The Act says that in relation to certain types of incapacity, other steps than dismissal might be appropriate. For example, in cases of drug abuse or alcoholism, counselling and rehabilitation may be more appropriate steps for an employer to take.

Where the worker's incapacity has been caused by an injury at work or by work-related illness, there is a heavier duty on the employer to keep the worker in their employment and accommodate the disability in some way.

b. Extent of the incapacity

- i. You must establish to what extent the worker is unable to perform her tasks.
 - ii. Is it possible to alter her work circumstances to accommodate her disability?
 - iii. Is it possible to alter her work duties to accommodate the disability?
 - iv. It must be remembered that where the worker's incapacity has been caused by an injury at work or by work-related illness, there is a heavier duty on the employer to keep the worker in his employment and accommodate the disability in some way.
3. You should consider whether it's possible to offer the worker any suitable alternative employment with you.

Fair procedure

The Act distinguishes between temporary and permanent incapacity.

Temporary incapacity

1. If your worker is temporarily incapable of performing the work, then you should investigate the extent of the incapacity or injury.
2. If you find that your worker is likely to be incapable for an unreasonably long time, then you must first consider all the possibilities open to you other than dismissal. You should take into account the nature of the job, the period of absence, the seriousness of the illness or injury and the possibility of hiring a temporary replacement for the ill or injured employee.

3. While you are carrying out your investigations, your worker must be given the opportunity to state her case in response. She is entitled to be assisted by a fellow-employee or trade union representative.
4. After carrying out your investigations, hearing your worker's case and careful consideration, you must make your decision. Remember to obtain advice if necessary.
5. If she's incapable of working then there's probably no need to give her notice.
6. Inform her of your decision. Any notice given must be in writing. See Chapter One for more information on notice. Remember that you have the option to not give her notice as long as you pay her the amount she would have received had you given the necessary notice.
7. Calculate the moneys due to her. Pay them to her **on or** before her last day, and hand her a Certificate of Service at the same time.

Permanent incapacity:

1. You must investigate the possibility of employing your worker in an alternative job, if any alternative jobs with you are available, or of adapting the duties or work circumstances of your worker to accommodate her disability.
2. While you are carrying out your investigations, your worker must be given the opportunity to state her case in response. She is entitled to be assisted by a fellow-employee or trade union representative.
3. After carrying out your investigations and hearing your worker's case, you must make your decision.
4. If she's incapable of working then there's probably no need to give her notice.
5. Inform her of your decision. Any notice given must be in writing. Remember that you have the option to not give her notice as long as you pay her the amount she would have received had you given the necessary notice.
6. Calculate the moneys due to her. Pay them to her on or before her last day, and hand her a Certificate of Service at the same time.

Chapter Five:

Dismissal due to employer's needs and requirements

This type of dismissal is more commonly known as retrenchment. Employers' circumstances, needs and requirements change from time to time, and along with these changes, their need or ability to retain the services of an employee may fall away. An employer of a domestic worker, for example, might no longer be able to afford to pay his worker her salary, or he might emigrate. The technical term for these needs and requirements is operational requirements. Only sound and objective needs and requirements will be sufficient to justify dismissal, and it would be wise to check that your reason for retrenchment is appropriate before proceeding.

Severance pay

If you have dismissed your worker because of your own needs and requirements, the Act requires you to pay to her as a lump sum an amount equal to one week's salary for each year of continuous service that the worker has been in your employ. This amount is called "severance pay" and is payable over and above any other amount which is due to the worker.

If, however, the worker unreasonably refuses to accept an alternative offer of employment on the same or similar terms and conditions, with you or with any other employer, then you are not obliged to pay severance pay. If an employer wishes to avoid paying severance pay, he should therefore find someone else to employ his domestic from the time of her dismissal, on similar terms and conditions.

The Minister of Labour may vary the rate of severance pay from time to time, and employers may apply to the Minister to be exempted from the obligation to make a severance payment. This would only be granted in special circumstances. Before agreeing to pay out an amount it would be wise to check precisely what is due.

If there is a dispute about severance pay the domestic worker can follow the dispute procedure set out in Chapter Six of this booklet.

Fair reasons and procedure for dismissal

If you are contemplating dismissing your domestic worker, you should:

1. Consult with your worker or her representative, in a meaningful, joint, consensus-seeking process (the wording of the Act), and attempt to reach consensus on:
 - a. Appropriate measures to avoid the dismissal, to minimize the number of dismissals (if more than one is contemplated), to change the timing of the dismissal, and to minimize the adverse effects of the dismissal,
 - b. The method for selecting the employees to be dismissed (if more than one is employed).
 - c. The amount of severance pay.

2. As part of this process, you should make known to your worker or her representative all relevant information in a written notice, including:
 - a. The reasons for the proposed dismissal/s; and
 - b. The alternatives which you considered before deciding on the dismissal/s, and the reasons why you rejected each of those alternatives; and
 - c. If you have more than one worker, the number of workers likely to be affected, and their job categories; and
 - d. If you employ a number of workers, the proposed method for selecting the worker/s to be dismissed; and
 - e. The time of the proposed dismissal; and
 - f. The proposed severance pay; and
 - g. Any assistance you will offer the worker likely to be dismissed;
 - h. The possibility of your re-employing the worker in the future again;
 - i. The number of employees employed by you; and
 - j. The number of employees you have retrenched in the preceding 12 months.
3. During the discussions, you must give your worker or her representative a chance to make proposals and suggestions about any of the matters being discussed. As proof that the discussion was held, it's a good idea to keep some sort of record and in particular to have a neutral third party present
4. You must consider and respond to the proposals and suggestions made on behalf of your worker. If you disagree with them you must state your reasons for disagreeing. If representations are made to you in writing, you should respond in writing.
5. If you employ more than one worker, you must select the worker to be dismissed according to a method that has been agreed in the course of your discussions. If no method has been agreed to, then you must select the worker to be dismissed according to a fair and objective method.

6. Make your decision after careful consideration. Obtain advice if necessary. Remember that the aim of the procedure is to cause as little harm to the employee as reasonably possible, either by avoiding dismissal or by minimizing its harsh effects.
7. You are obliged to give your worker notice if you have chosen to dismiss her. Such notice must be given in writing. Remember that you have the option to not give her notice as long as you pay her the amount she would have received had you given the necessary notice.
9. Inform her of your decision.
10. Calculate the moneys due to her, including the severance pay due. Pay her money to her on or before her last day, and hand her a Certificate of Service at the same time. Be sure to obtain a receipt for the money.

Chapter Six:

Disputes and remedies

Question: If my domestic worker were to report me for allegedly breaching one of the basic employment conditions, what would the consequences be?

An Industrial Inspector from the Department of Labour would investigate the matter. Initially the Inspector would try to resolve the matter informally, for example by telephone. If you continue breaching the condition, then he would issue an order forcing you to comply with the condition in question. Should you fail to comply with that order, then the matter would be referred to an appropriate court of law. It should be remembered that breaching certain fundamental employment laws and conditions such as the minimum wage and the ban on child labour amounts to a criminal offence for which employers may be fined and in extreme cases even jailed.

Question: What will happen if my worker disputes her dismissal?

The Act sets out a specific procedure for sorting out such disputes. Before dealing with the procedure, we briefly discuss the organizations created by the Act to deal with such disputes:

The Commission for Conciliation, Mediation and Arbitration (CCMA) is a non-government body whose task is to perform some of the functions set out in the Act, notably the settling of disputes, and giving impartial advice in response to questions. Commissioners and Senior Commissioners staff the Commission.

Statutory councils are established on application of trade unions or employers' organizations within a particular sector of the economy and for a specific geographical area. Their function is to settle disputes arising between employers, trade unions and employees within that particular area. At the time of writing this booklet no council for the domestic worker sector had been established. Where the existence of a council is relevant to any decision to be made, the reader should establish whether such councils have been established.

The **Labour Court** is a court of law functioning on similar lines to the ordinary Magistrate's and High Courts, but in which only labour law matters are heard.

Question: How are disputes about dismissals settled?

In the first place, the CCMA or statutory council will try to get the employer and worker to agree on a suitable solution to the dispute, through a process of mediation and conciliation.

If the employer and worker can reach no agreement, then a solution will be imposed. This process of imposing a solution is called arbitration. The decision reached through **arbitration** is binding on the employer and worker whether or not they agree with it.

Procedure for resolving disputes

If your dismissed worker wants to dispute the fairness of dismissal, she must refer the dispute, in writing, and within thirty days of the date of dismissal, to any statutory council which has been established to deal with such disputes, or, if no such council has been established, to the Commission for Conciliation, Mediation and Arbitration. She must also deliver a copy of the written referral to you.

If the dispute is not referred within the thirty-day period, then the worker no longer has the right to dispute the dismissal and the dismissal becomes final in effect. However, if she can show the council/ CCMA a good reason why she did not refer the dispute within the thirty-day period, she may be permitted to refer the dispute after the thirty-day period has expired.

The council/ CCMA, having received the written referral, must then attempt to assist you and your worker to come to an agreement about ending the dispute. It's important to understand that at this point the council/ CCMA is unable to impose a solution to the dispute on you and your worker. For any resolution of the dispute to be legally binding at this stage, it must be agreed to by both of you. It's more likely that good relations will be preserved if there is mutual agreement than if a solution is imposed from above.

The council/ CCMA will arrange a meeting and will act *as* neutral umpire and go-between, trying to reconcile the parties. The council/ CCMA has thirty days within which to negotiate a solution, which period the employer and employee can extend by agreement.

If that further period of thirty days, or the further agreed period, expires without an agreement to end the dispute having been reached, then the dispute must be resolved by the unilateral decision of the council/ CCMA, or of the Labour Court. As we said above, this process of arbitration is different from conciliation in that the decision of the CCMA, Labour court or council is legally binding even if the employer or worker does not agree with it.

It's very important to understand that the responsibility to prove that a dismissal is fair rests on the employer. This is a good reason to understand the law and to follow the correct procedures. If the fairness of a dismissal is unclear, the law will favour the worker's case.

According to the act, certain types of unfair dismissal are to be arbitrated by the council/ CCMA, and certain by the Labour Court.

The following types would usually be arbitrated by a council/ CCMA:

- a. If the reason for dismissal is misconduct or incapacity, unless the employer has alleged that the reason for dismissal is the worker's participation in an unlawful strike;
- b. If the worker has alleged that the employer made her continued employment intolerable;
- c. If the worker does not know the reason for dismissal.

The worker may refer the matter to the Labour Court, if she alleges that the reason for dismissal is:

- a. Automatically unfair; or
- b. Based on the employer's operational requirements; or
- c. The worker's participation in an unlawful strike;
- d. Because the worker refused to join, was refused membership of or was expelled from a trade union party to a closed shop agreement.

Question: What about disputes about matters other than the fairness/unfairness of dismissals?

According to the Act, certain actions or omissions on the part of the employer are "unfair labour practices", and the worker may follow a procedure similar to that for allegedly unfair dismissals. Unfair labour practices include:

- a. Unfairly discriminating against a worker or an applicant seeking employment, on any arbitrary ground, if the discrimination is not based on a requirement of the job.
- b. Unfair conduct by the employer in respect of the training of a worker, or in respect of benefits due to the worker.
- c. The unfair suspension of a worker, or any other disciplinary action short of dismissal.
- d. An employer's refusal to reinstate or re-employ a worker in respect of any agreement.

Remedies for unfair dismissals

If a council, Commission or the Labour Court finds that you have unfairly dismissed your worker, it can make any of the following orders:

1. Reinstatement

An order that you must take your worker back into your employment, as if the dismissal has never taken place. This is termed *reinstatement*. The reinstatement may be backdated to any date between the date when the dispute is resolved and the date of the dismissal. The effect of backdating the reinstatement is that you will have to pay to your worker all outstanding salary and benefits with effect from the backdated date, even if she has not been performing her tasks since that time.

2. Re-employment

An order that you must re-employ your worker. This is slightly different from reinstatement because a new agreement of employment is entered into. You would have to re-employ the worker either in the same work in which she was previously employed, or in any other reasonably suitable position. The court can order that the re-employment must take effect from any date, which the court finds appropriate, as long as it's after the date of dismissal.

3. Compensation

Compensation is intended to compensate your former worker for having lost her job and to penalize you for having acted unfairly. The compensation is in addition to any other moneys due by the employer to the worker and is not meant to replace them. If for example, there are wages or leave pay due, this would have to be paid in addition to the amount set as compensator!.

Question: When -will I be ordered to pay compensation, and -when will I be ordered to re-employ or reinstate my worker?

The Act says that you must reinstate or re-employ your worker in the event of an unfair dismissal unless the following circumstances apply:

- a. She does not want to be reinstated or re-employed; or
- b. A continued employment relationship would be intolerable because of the circumstances surrounding the dismissal. This would normally apply where the relationship between employer and worker has broken down to such an extent that it cannot be resumed; or
- c. If it's not reasonably practical for you to reinstate or re-employ the worker; or
- d. If the reason for the dismissal was fair but the procedure you followed was unfair in these cases you would be ordered to pay compensation.

If the dismissal is automatically unfair, then the Labour Court may make any order that **it** considers appropriate, in addition to any of the orders set out above.

Question: How much compensation would I be ordered to pay?

The Act distinguishes between different compensation awards on the basis of the type of unfair dismissal.

1. If the reason for the dismissal was fair, but the procedure was unfair, then the compensation must be equal to the salary the worker would have received for the period between the date of the unfair dismissal and the last date of the arbitration. The salary must be calculated in accordance with the worker's salary as at the date of dismissal.

If the worker has delayed unreasonably in making her claim, however, then compensation cannot be ordered in respect of the period of unreasonable delay.
2. If the dismissal is automatically unfair then the compensation must be fair in all the circumstances, but equal to not more than twenty-four months' salary.
3. If the reason for dismissal was not a fair reason based on the worker's conduct or capacity, **or** the employer's operational requirements, then the compensation awarded must be fair, but not equal to more than twelve months of the worker's salary.

Chapter Seven:

Completing the written agreement of employment

If you already employ a domestic worker, then there is some sort of agreement between you and her about the terms of her employment. The agreement might be spoken rather than written. It might be of the most basic nature, covering only matters such as rate of pay and hours to be worked. Nevertheless, as long as it's lawful, it's a valid legal agreement, and the law obliges both of you to respect and uphold it.

As we saw in Chapter One, no matter whether the agreement is spoken or written, the law will automatically set certain minimum standards and conditions for the employment relationship if you haven't reached agreement about these or if you've agreed on standards and conditions less than the minimum.

Our specimen written agreement (Appendix "D") has two different uses: firstly for the situation where you **are** already employing a domestic worker and simply wish to record your spoken agreement with her in writing; secondly where you wish to enter into a new agreement of employment and want the agreement to be in writing from the outset. In both cases it's very important that you and your worker are in agreement about the contents. You should discuss each separate point with **her**.

Writing down an existing spoken agreement

If you simply wish to record all the terms of the spoken agreement in writing, then the written agreement is not a new agreement, but the same old agreement in a different form. However, if in writing down the agreement you wish to add or change something, then you are altering the agreement and you can only do so if your domestic worker consents to the alteration. An agreement or an alteration to an agreement is only legally binding if both parties consent to be legally bound by the agreement or alteration. For this reason it's important to discuss each part of the written agreement with your worker and to obtain her consent to any change or addition.

If you attempt to force a new or changed agreement on her and refuse to honour your existing agreement either in whole or in part, then you are breaking your agreement with her. The new Labour Relations Act would interpret your action either as an unfair dismissal or as an unfair labour practice and your worker would be able to enforce her rights to have the existing agreement upheld.

Entering into a new written agreement

You will have to reach consensus with your worker on all parts of the agreement. Certain parts of our written agreement apply only to a situation where a new agreement is being entered into. These are marked with an asterisk (*).

Guide to the written agreement

You are at liberty to use the written agreement provided to record an agreement with your domestic worker. Where the written agreement does not reflect what you and your employee have agreed between yourselves, it will have to be amended. You may scratch out existing clauses and add clauses of your own, provided that you and your worker are in agreement and that the alterations are within the legal limits. Alterations and additions should be initialled by both of you. Both parties should initial each page.

1. Insert employer and employee's details.
2. The list of duties should be as complete and accurate as possible. Examples of duties for a domestic worker are cooking, preparing food, washing dishes and clothes, ironing, answering the phone, minding the children, cleaning and maintaining the household, and shopping for the household. The duties of a gardener might include mowing the lawn, weeding, planting, trimming the lawn edges, and general maintenance and repair **work**.
3. A common probation period is three months. See generally Chapter Four on probation.
4. See generally Chapter One.
6. The notice periods for termination of the agreement are as set out in Chapter One.
7. See the information on leave in Chapter One.
8. We have allowed for the minimum sick leave permissible under the Act You may increase the leave if you wish.
- 10 This clause basically incorporates the Labour Relations Act disciplinary guidelines referred to in Chapter Three of the booklet. Add any rules and standards you wish to have specifically spelt **out**.

Appendix A

Specimen form - Pay slip

1. Name of employer.....
2. Address of employer.....
.....
3. Domestic worker's name and occupation:.....
4. Wage rate and overtime rate:.....
5. Period for which wage is being paid:.....
6. Number of ordinary hours worked:.....
7. Number of overtime hours worked.....
8. Number of hours worked on Sundays/ public holidays:.....
9. Total wage:.....
10. Any other pay arising out of employment:.....
11. Deductions made:.....
12. Actual amount paid:.....

Appendix B

Specimen form - Particulars of Employment

1. Employer's full name.....
Employer's full address:.....
2. Employee's name:.....
Employee's occupation/description of employee's work:.....
3. Place of work:.....
Is the employee required to work anywhere else?.....If so, where?.....
4. Date on which employment began:.....
Is the employment for a fixed period?.....
If "yes", when will it end?.....
If "no", what is the period of notice required to terminate the employment?.....
5. Employee's ordinary hours and days of work:.....
6. Employee's wage, or rate and method of calculating wage:.....
How frequently will wage be paid: (i.e. daily, weekly, fortnightly, monthly?).....
7. Rate of pay for overtime work:.....
8. Any other cash payment the employee is entitled to:.....
9. Payment in kind that the employee is entitled to: (egg food, transport, accommodation):
.....

Value of the payment in kind:.....
10. Deductions to be made from wage:.....
11. Leave to which the employee is entitled:.....

.....
Employee's signature indicating receipt

.....
Date

Appendix C

Specimen Form: Certificate of Service

1. Name of employer:.....
2. Address of employer:.....
.....
3. Full names of employee:.....
.....
4. Employee's occupation/brief description of duties:.....
5. Date of engagement:.....
6. Date of termination of employment:.....
7. Relevant training received:.....
8. Wage at date of termination:.....
9. Reason for termination of employment (only if requested by domestic worker):
.....

I declare that the above is true and correct.

.....
Employer's signature

.....
Date

Appendix D

Specimen Form: Agreement of Employment

1. Employer's full name:.....Domestic worker:.....

ID no:.....ID no:.....,

Home address:..... Home address:.....

Tel no:(h).....(w)..... Tel no: (h).....

2. Occupation/description of work:.....

Domestic worker's general duties:.....

In addition to her general duties, the domestic worker shall also carry out all other reasonable tasks and duties directed by the employer or on the employer's behalf.

3. Details of employment

a. The employment shall commence on * / began on.....

Select (b) or (c)

b. The employment is for a fixed period ending on.....

c. The employment is for an indefinite period.

d. * The domestic worker will be on probation formonths.

e. The domestic worker will live in/not live in. (delete)

f. Place of employment:.....

g. Also required to work at:.....

4. Working hours

a. Normal working hours

Days to be worked:-.....

* Applies only to a new domestic worker

Duty times, meals and other breaks

Mondays:.....,

Tuesdays.....

Wednesdays:.....

Thursdays.....

Fridays.....

Saturdays.....

Total of normal weekly working hours Monday to Saturday:.....

The domestic worker acknowledges that the employer may need to change normal working hours from time to time, and undertakes not to unreasonably withhold her consent to such changes.

b. Sunday hours

Which Sundays to be worked?:.....

Duty times and breaks:.....

c. Public holidays to be worked:.....

The domestic worker shall be entitled to a paid holiday in respect of every other public holiday, which falls on a day, which would otherwise be a working day for the domestic worker, unless she agrees to work on that day.

d. Overtime

The domestic worker agrees to work overtime as requested by the employer on 24 hours notice to the domestic worker.

e. The domestic worker agrees to be on standby as requested. An allowance of R20.00 will be paid per shift.

f. The domestic worker agrees to perform night work as requested by the employer. An allowance of R20.00 per shift will be paid over and above the usual wage.

5. Wage

a. Wage to be paid per day/week/fortnight/month (delete as appropriate)

b. Time and method of payment:.....

c. Wage for normal working hours:

Basic wage per day/week/fortnight/month (delete)
excluding payment in kind:

The domestic worker agrees to the following deductions:

Nett wage per day/week/fortnight/month (delete):

d. Payment in kind to which the worker is entitled (egg food, clothing, accommodation etc)

Value of payment in kind per wage period:.....

e. Any other cash payment the worker is entitled to:.....

f. Overtime wage:

The domestic worker shall be paid for overtime at one and a half times her normal hourly wage. Alternatively, the employer may in his discretion pay the normal wage and give the domestic thirty minutes off on full pay for every hour of overtime worked, or give ninety minutes off on full pay for every hour of overtime worked.

g. Public holiday wage:

i. The domestic is entitled to a paid holiday in respect of each public holiday falling on a day when she would otherwise work, unless the employer requires her to work on that day.

- ii. If the domestic works on the public holiday and it is a day on which she would normally work, then the employer shall pay the domestic double the daily wage.
 - iii. If the domestic works on the public holiday and it is a day on which he/she would not ordinarily work, the employer shall pay her the daily wage plus the hourly wage for each hour actually worked.
- h. Sunday wage
- i. If the domestic ordinarily works on a Sunday, she shall be paid at one and half times the normal hourly rate. If she does not, she shall be paid at twice the normal hourly rate.
 - ii. No matter how short the time worked, the employer shall pay her an amount at least equivalent to the normal daily wage, if this is more than (i) above.
 - iii. Alternatively to (i) and (ii) above, and in the employer's sole discretion, the employer may pay the domestic at her normal hourly rate and give her paid time off equivalent to the extra owed to her in terms of (i) and (ii) above. This paid time off must be granted within one year of the worker becoming entitled to it.

6. Notice periods for termination of employment agreement

In the first six months of employment the domestic worker and employer shall give the other one week's notice of termination of this agreement of employment. After the first six months of employment, each shall give the other no less than four weeks' notice of termination. The employer and domestic worker may terminate the agreement without notice for any reason valid in law.

7. Leave

Select one of the following three options:

The domestic worker will be entitled to three weeks of paid leave after each year of continued employment. The dates for leave are subject to the approval of the employer.

The employer will grant paid leave at the rate of one day's leave for every 17 days worked.

The employer will grant paid leave at the rate of one hour's leave for every 17 hours worked.

8. Sick leave

- a. During every sick-leave cycle of 36 months, the domestic is entitled to paid sick leave equal to the number of days she would normally work during a period of six weeks.
- b. During the first six months of continuous employment, however, the domestic is only entitled to sick leave at the rate of one day's paid sick leave for every 26 days worked. Sick leave due in the first leave cycle may be reduced by the number of days of paid sick leave thus taken.
- c. The amount due for a day's sick leave is the same as the amount payable to the domestic worker for the ordinary hours the domestic worker would have worked on that day.

9. Other forms of leave

The domestic worker is entitled to five days of paid family responsibility leave during each 12 months of employment. The domestic is entitled to four consecutive months of unpaid maternity leave.

10. Discipline

- a. The domestic worker agrees to carry out the employer's instructions diligently and conscientiously.
- b. The domestic worker agrees to observe a high standard of honesty and integrity in relation to the employer's household and the performance other duties.
- c. Without limiting the types of misconduct which may result in disciplinary action being taken against an domestic worker, the following are likely to result in such action being taken: late coming/unpunctuality, absence without leave, fraud, minor and gross negligence, disobedience, intoxication during working hours, theft, violence against persons and property, verbal abuse or intimidation,

The employer may take any of the following steps against a worker guilty of misconduct, with the proviso that he shall be guided by the guidelines set out in the Labour Relations Act No 66/1995 in respect of discipline and dismissal for misconduct:

- i. Informal advice and correction;
- ii. A written or spoken first formal warning, valid for three months;
- iii. A written or spoken second formal warning, valid for three months;
- iv. A written or spoken final formal warning, valid for six months;
- iv. Dismissal.

11. Termination of agreement

This agreement may be terminated on any of the following grounds:

- a. Retrenchment of the domestic worker
- b. Dismissal of the domestic worker for misconduct, poor work performance or incapacity
- c. Any other reason sufficient in law.

If the possibility of retrenchment or dismissal for misconduct, incapacity or poor work performance is foreseen, the provisions of the Labour Relations Act 66/1995 will guide the employer

12. The employer and domestic intend the Basic Conditions of Employment Act (No 75 of 1997, as amended) to apply to any matter not fully covered by this agreement.

.....

Employer

Domestic worker

Date:...../...../..... Date:..... J.....J..

Appendix E

Specimen form: First/second written warning

(valid for three months)

To:..... (name of domestic worker)

From:..... (name of employer)

Date handed to worker.....

Reason(s) for warning:.....

.....

Employer's signature:

.....

Date of signature by employer:

.....

Worker's signature indicating receipt:

.....

Date received by worker:

Appendix F

Specimen form: Final written warning

(valid for six months)

To:..... (name of domestic worker)

From:..... (name of employer)

Date handed to worker.....

Reason(s) for warning:.....

Further misbehaviour may result in your dismissal.

.....

Employer's signature:

.....

Date of signature by employer:

.....

Worker's signature indicating receipt:

.....

Date received by worker:

Appendix G

Specimen form: Notice of Enquiry (discipline or incapacity)

1. To:.....;.....
From:.....
Date and time handed to worker:.....—.....
2. You are required to attend an enquiry on (date)..... at (venue)
..... at (time).....
3. The enquiry is being held because it is alleged that our employment relationship has broken **down** completely because of the following (specify each alleged act in sufficient detail that the worker **can** respond meaningfully):

(Egg: Breach of trust; unauthorized use of my telephone during the period.....
unauthorized possession and removal of..... from my premises on.....)
4. Evidence of these allegations will be led at the enquiry. You will have a full opportunity to defend yourself against them and to produce your own evidence.
5. You are entitled to be represented by a fellow-worker or an official of any union you belong to.
6. The enquiry may result in your dismissal.
7. You will /will not (delete) be suspended from work until the enquiry is over.
8. You can speak to me before the hearing if necessary.