Blok A, Inkwazi-Gebou
Embankmentstraat 1249
Centurion

Block A, Inkwazi Building
1249 Embankment Street
Centurion

Private Bag X180
Centurion, 0046
+27+12 643 3400
+27+12 663 6318
jana@agrisa.co.za

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To: Provincial Agricultural Unions
Commodity Organisations

Colleagues

SECTORAL DETERMINATION FOR FARM WORKERS APPLICABLE FROM 1 MARCH 2013

From 1 March 2013 new minimum wages apply to farm workers. The increase represents a 52% increase in the entry level wage of workers. The new minimum wages are:

Minimum rate for the period 1 March 2013 to 28 February 2014*			
Monthly	**Weekly**	**Daily**	**Hourly**
R2274.82	**R525.00**	**R105.00***	**R11.66**
**** For an employee who works 9 hours per day***			

The purpose of this communication is not to analyse or revisit all the provisions of the sectoral determination, but rather to highlight the legal position in respect of some decisions that farmers are likely to consider in the coming months.

The method of calculating wages has not been amended and there is no need to re-negotiate the wage levels of the workers. Wages above the minimum wage are therefore not affected and increases must be negotiated between the farmer and farm workers (or their representatives). The method of calculating wages is explained in **Annexure A.**

The economic impact of the increase may encourage farmers/employers (hereafter farmer/s) to consider one or more of the following options:

- Retrenching farm workers.
- Not paying the minimum wages (this is a contravention of the law).
- Applying for an exemption from the payment of minimum wages.
- Participating in the training lay-off scheme.
- Changing terms and conditions of employment of farm workers.
- Employing farm workers on a fixed term contract instead of indefinitely.
- Changing some farming practices (i.e. by outsourcing certain activities).

Should a farmer consider one or more of these options, the implication of labour legislation, as well as the Extension of Security of Tenure Act, must be kept in mind. Below some of the relevant laws and their implications are highlighted, but where appropriate, supplementary information is annexed.

Also, it should also be expected that trade unions will increase their efforts to recruit farm workers over the next few months. Farmers should refrain from dismissing workers for trade union involvement, or exercising their labour rights since this may constitute an automatically unfair dismissal.

The legal position in respect of these options is briefly as follows:

Retrenchments

Dismissals as a result of the employer's operational requirements are commonly referred to as retrenchments and are not due to the fault of the employee. Retrenchments are brought about by the economic, technological or similar needs of the employer. Typical reasons for a farmer to commence with retrenchment procedures would be the fact that a farmer can no longer afford his or her labour bill, or need fewer farm workers because of mechanising.

The Labour Relations Act (LRA) distinguishes between small and large retrenchments. A retrenchment is regarded as large if the employer employs more than 50 employees **and** contemplates retrenching a certain number of employees.

Retrenchments are initiated by a written notice and it must be issued once the farmer contemplates retrenching a farm worker or farm workers. The notice is followed by a consultation process. It is important that the farmer consults in good faith and with a mind open to alternatives. In other words, a farmer should not make up his or her mind to retrench and only then commence with the retrenchment procedure. This implies that the farmer must allow a consulting party to respond to the retrenchment notice, and if the farmer disagrees with the response, reasons must be provided by the farmer.

A farmer must pay a retrenched farm worker, severance pay equal to at least one week's remuneration (as applicable at the time of retrenchment) for each completed year of continuous service with that farmer.

More detail on the retrenchment procedure is provided in **Annexure C**

Not paying the minimum wages

Not paying the new minimum wages, is a contravention of the law and in terms of the Basic Conditions of Employment Act (BCEA) fines can be imposed. See **Annexure B** for the maximum fines in the case of underpayments.

Exemption from the payment of minimum wages

Article 50 of the BCEA provides that employers who cannot afford the new minimum wage can apply to the Department of Labour for exemption. This can be done by completing application form BCEA 6 (enclosed separately). These applications must

reach the Provincial Executive Manager or Executive Manager in Pretoria by no later than 28 February 2013.

An application does not automatically result in an exemption. Only after a positive reaction from the Department of Labour has been received, will an employer be exempted from paying the higher wage. In the meantime, employers must pay the higher wage as from 1 March 2013.

Farmers are encouraged to state the financial reasons for the application in very clear terms, to indicate whether any alternatives had been considered and also to what extent they can increase the wages.

If exemption is granted, it only provides for short term relief as it required from the applicant to implement certain recommendations by the Department of Labour in respect of the exemption. The exception will only apply to the specific year in which the current minimum wage is applicable.

The application form for exemptions is attached as **Annexure G.**

Training lay-off scheme

The training lay-off scheme is a temporary suspension of work of a worker or group of workers. During the suspension these worker(s) undergo training. The layoff depends on an agreement between the employer and the individual workers or and trade union, if the workers are represented. This scheme assists workers that could be affected by retrenchments to acquire new skills to be either being re-deployed or employed elsewhere.

Participation in the training layoff is voluntary. Whilst in training, the workers remains employed, but forego their normal wage for a training allowance. The employer pays full contribution to the social security (UIF, Compensation Commission and pension/provident fund).

After completion of training, the worker must either be re-deployed at the same workplace or retrenched, following the procedure as explained.

More details on the scheme could be obtained from the Commission for Conciliation, Mediation and Arbitration (CCMA).

Changes to conditions of employment

In an effort to reduce their labour bill, farmers may want to change conditions of employment such as hours of work or benefits. Farmers must guard against acting unilaterally in this regard since it may constitute an unfair labour practice. A farm worker may refer an unfair labour practice to the CCMA. If the conduct is indeed found to be an unfair labour practice as defined in the LRA, the arbitrator may decide the matter on terms that the arbitrator deems reasonable, which may include ordering reinstatement, re-employment or the payment of compensation up to the equivalent of 12 months' remuneration.

Please note that a unilateral change to conditions of employment may also prompt (further) strike action. Such a unilateral change may be referred to the CCMA by the farm worker or a trade union and in the referral, the referring party may require the farmer not to implement the unilateral changes, or if they had been implemented, to restore the terms and conditions that applied before the change. If the farmer fails to comply within 48 hours, strike action may commence.

Changes to conditions of employment cannot be made without prior consultation with the farm workers (or their representatives) and obtaining their agreement. If agreement cannot be reached, the only option for the farmer would be to proceed with a lock-out. If a lock-out is done in response to a strike, replacement labour may be utilized.

More detail on the lock-out procedure is provided in **Annexure D.**

Changes in conditions of employment may however be agreed upon as an alternative to retrenchment. (Section 189(3) of the LRA).

Fixed term contracts

A fixed-term contract is a contract of specific duration, determined with reference to specific dates and/or the occurrence of certain events like the completion of a project or task. Depending on needs, farmers may consider employing farm workers on a fixed term rather than indefinitely and then to renew the contracts only if there is still a need at the end of the contract. However, farmers should consider this option with caution since the non-renewal of a fixed term contract may constitute a dismissal. Farmers are advised to make use of knowledgable labour consultants to draft these fixed term agreements.

This type of dismissal has three elements:
1) A fixed-term contract.
2) A reasonable expectation that the contract would be renewed.
3) A failure to renew it on the same or similar terms.

The reasonableness of the expectation of renewal must be determined objectively and will usually include factors such as the number of times the contract had been renewed and promises made by the employer. A term in the contract that the employee has no expectation of renewal is simply one of the factors that must be considered when it is determined whether or not a reasonable expectation existed.

Currently it is uncertain whether the expectation of permanent employment is covered by this type of dismissal, but proposed amendments to labour legislation provides that it does.

Farmers will not escape the impact of this provision if the contract is renewed, but on less favourable conditions.

(Farmers are also alerted to proposed amendments to the LRA that will complicate the employment of farm workers on fixed terms contracts if its duration exceeds 6 months. Detail will be provided once it is clear that the amendments will indeed become law.)

If the dismissal is found to be unfair, **reinstatement** or **re-employment** or the payment of **compensation of up to** 12 months' remuneration may be ordered, depending on the duration of the agreement. (This may increase to 24 months' remuneration if the dismissal is found to be automatically unfair. See paragraph below on automatically unfair dismissal.)

Outsourcing

It is also likely that some farmers may consider outsourcing some of their activities. For instance, instead of engaging farm workers for a particular activity, the farmer may decide to contract directly with a provider of specific service (eg, harvesting, pruning, etc).

If a transfer of a part of the ownership of the business takes place, section 197 of the LRA may apply.. If the outsourcing amounts to a transfer of a business as defined in this section, the contracts of employment of the farm workers currently engaged in that activity will automatically transfer to the service provider. However, the farmer may retain some responsibilities in respect of the transferred farm workers. Section 197 of the LRA is reproduced in **Annexure E**, but farmers are strongly recommended to obtain legal advice when contemplating such a step.

Eviction

Employers who are contemplating the eviction of workers who have been retrenched as a result of the new minimum wage, need to ensure that they fully comply with the provisions of the Extension of Security of Tenure Act (ESTA). Termination of the right of residence may only follow on dismissal which complies fully with the requirements set down by the Labour Relations Act. Moreover the right of residence may only be terminated if the occupier's employment on the farm was the only reason for their residence there. A prescribed procedure of giving notice must then be followed, and a court order obtained. It is best to appoint an experienced attorney to deal with this. The availability of suitable alternative accommodation will have to be proven. Mediation may be an option which can be explored.

Automatically unfair dismissals

If a dismissal is due to any of the reasons listed in section 187 of the LRA, the dismissal is automatically unfair. This means that once the dismissal is established for one of these reasons, there is no opportunity for the farmer to show that the dismissal was nonetheless fair. Not all the reasons listed in the LRA are repeated here, but farmers are referred to some of the reasons which might be more relevant in the current climate.

These reasons include if the farm worker is dismissed because:

- Of his or her participation in the formation of a trade union, membership of a trade union or participating in the activities of a trade union.
- He or she intends to or actually participates in a lawful strike.
- Of a refusal by the worker to do the work normally done by farm workers who are participating in a lawful strike.

- The farm worker does something that he or she is entitled to do in terms of the LRA, for instance, referring an alleged unfair labour practice dispute to the CCMA or assisting another employee at a disciplinary inquiry.

In the case of an automatically unfair dismissal, the **reinstatement** or **re-employment** or payment of **compensation** of up to 24 months' remuneration may be ordered.

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In conclusion, it is once again stressed that farmers should not take any rash decisions regarding existing farm worker contracts. The above is an attempt to alert farmers of potential legal complications and it is not intended to be a detailed analysis of the applicable law. Farmers are therefore encouraged to obtain advice from a reliable labour consultant or lawyer. We also encourage farmers to once again study all the provisions of the sectoral determination, in particular those provisions regulating the termination of employment. (Annexure F.)

ANNEXURE A

CALCULATION OF WAGE / SALARY

In the case where the farm worker earns more than the minimum wage, the following formula is used to calculate his/her wage:

Calculation of employee's hourly wage:

- Divide the employee's weekly wage by the number of normal working hours worked during the week.

Calculation of the employee's daily wage

Multiply the hourly wage with the normal hours worked by the employee on the relevant day.
Divide the employee's weekly wage by the number of days worked during a week.

Calculation of the employee's weekly wage

Multiply the hourly wage by the number of hours worked during the day by the employee and multiply it by the number of days worked during a week, or multiply the daily wage by the number of days worked by the employee during a week, or divide the employee's monthly salary by 4.33.

Calculation of the employee's monthly salary

Multiply the weekly wage by 4.33.

If the employee is paid an hourly tariff but receives payment monthly, multiply the hourly wage by the number of normal days worked by the employee during the relevant month.

Maximum deductions allowed in terms of the Sectoral Determination for farm workers

The sectoral determination states that the following deductions may be made:

A) Food (rations)

If the farm workers receives free food from the employer on a regular basis (meat, vegetables, flour, milk, etc.) the employer may only deduct 10% of the employee's wage;
the food must be provided on a regular basis; and
the value of the food may not be less than the amount deducted.

(Such food excludes goods or food purchased from the farm store.)

PLUS

B) Housing

If the employee lives on the farm a further 10% may be deducted (in addition to the 10% for free food).

Such deduction shall not be considered as rental, but serves as payment (rebate) to the employer/ farm owner for the fact that housing is provided to the employee.

The deduction may only be made if:
no deductions are made for water and/or electricity (the employee may, however, purchase power via the prepaid system).
And
The house must have the following:

- A strong and stable roof that does not leak.
- Glass windows that can open.
- Electricity (if the farm infrastructure allows for it).
- Drinking water available inside the house or outside within 100m from the house.
- A flush- or pit toilet inside or near the house.
- The house must be at least 30 m^2 in size.

Note that these deductions may be made from the salary of only one person living in the house, except in the case where more than two employees lives in a communal complex. In such a case an amount may be deducted from each employee: Provided that:

- The deduction per employee shall be less than 10% of the employee's wage; and
- the total deduction per commune shall not exceed 25% of the relevant minimum wage.

(No deduction may be made in respect of housing if the employee is younger than 18 years.)

PLUS

C) Payments to a third party

Any amount payable to a third party according to an instruction from the employee or a court order. There is no limit on the percentage of the employee's wage that may be deducted.

PLUS

D) Personal loan

Where the employee has incurred a personal loan with the employer, ONLY 10% of the employee's gross wage may be deducted as repayment instalment. This does NOT mean that the employer/farmer may only deduct

10% for food purchased at the farm store. This clause is applicable to money advanced to the employee for personal use (e.g. to buy furniture or to pay funeral costs, etc.).

PLUS

E) Compensation for damages

If the employee is guilty of malicious damage to the employer's property and/or through his/her negligence has caused the employer to suffer losses, the employer may recover such replacement or repair costs from the employee's wage. Such recovery may be made in installments where the total deduction per installment shall not exceed 25% of the employee's wage.

ANNEXURE B

Maximum permissible fine involving an underpayment:

No previous failure to comply	25% of the amount due, including any interest owing on the amount at the date of the order
A previous failure to comply in respect of the same provision within three years	50% of the amount due, including any interest owing on the amount at the date of the order
A previous failure to comply in respect of the same provision within a year, or two provisions to comply in respect of the same provision within three years	75% of the amount due, including any interest owing on the amount at the date of the order
Three previous failures to comply in respect of the same provision within three years	100% of the amount due, including any interest owing on the amount at the date of the order
Four or more previous failures to comply in respect of the same provision within three years	200% of the amount due, including any interest owing on the amount at the date of the order

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ANNEXURE C[1]

Operational requirements/retrenchments: (Unless indicated otherwise, all section references are to the LRA)

Meaning of operational requirement dismissals/retrenchments

These dismissals, often referred to as retrenchments, are not due to the fault of the employee and are brought about by the economic, technological or similar needs of the employer.

Small and large retrenchments

It is useful to distinguish between small and large retrenchments. The former are regulated by s 189. Large retrenchments are regulated by s 189A. A retrenchment is regarded as large if the employer employs more than 50 employees and contemplates retrenching:

- 10 employees and employs up to 200 employees;
- 20 employees and employs between 200 and 300 employees;
- 30 employees and employs between 300 and 400 employees;
- 40 employees and employs between 400 and 500 employees; or
- 50 employees and employs more than 500 employees.

Note that for purpose of the above calculation, the number of employees dismissed by the employer during the previous 12 months must also be included.

Procedure for small retrenchments

Once the employer contemplates retrenchment, the employer must consult and engage with the aim to reach consensus on a number of things. This process includes the disclosure of certain information and the making of representations by the other consulting party (s 189). While the employer may take a provisional position on retrenchment and explore its potential, consultation must take place before a final decision is taken and during the consultation process the employer must remain open to alternatives.

Consulting parties

The employer must consult with any person with whom the employer is required to consult in terms of a collective agreement. If there is no such agreement, the employer must consult with both the workplace forum and any registered trade union whose members are likely to be affected by the retrenchment, or the latter only if there is no workplace forum. If there is no trade union, the employer must consult with those employees who are likely to be affected by the retrenchment (s 189(1)(a)–(d)).

[1] This is an abbreviated version of author's contribution in Jordaan, Kalula and Strydon (eds) *Understanding the Labour Relations Act* (2009).

Purpose of consultation

The aim of consultation is to reach consensus on:

- ways of avoiding the dismissal;
- ways of minimising the retrenchment;
- ways of changing the timing of the dismissals;
- ways of mitigating the adverse effects of the dismissals;
- the method of selecting the employees to be dismissed; and
- severance pay (s 189(2)).

Invitation to consult

The employer, when contemplating retrenchment, must invite the consulting parties in writing to consult with him or her, and the employer must disclose in writing all relevant information (see s 189(3)).

Disclosure of information

Section 189(3) provides that the information disclosed must relate to, but is not limited to:

- The reasons for the proposed retrenchment.
- the alternatives considered by the employer before proposing the retrenchment, and the reasons for rejecting each of those alternatives.
- The number of employees likely to be affected and the job categories in which they are employed.
- The proposed method for selecting which employees to retrench.
- The time when, or the period during which, the retrenchments are likely to take effect.
- The severance pay proposed.
- The assistance that the employer proposes to offer to the employees likely to be retrenched.
- The possibility of the future re-employment of the employees who are retrenched.
- The number of employees employed by the employer.
- The number of employees that the employer has retrenched in the preceding 12 months.

Representations by other consulting party

The other consulting parties must be given an opportunity to make representations about the consensus-seeking process and the information disclosed. The employer must respond to these representations and must give reasons if he or she does not agree with certain aspects of the representations. (See s 189(3) and (4))

Employees selected for retrenchment

The employer must ultimately select the employees to be retrenched by using criteria that the consulting parties have agreed to, or, if no criteria were agreed to, the employer must use criteria that are fair and objective (s 189(7)).

Large retrenchments

In the case of a large retrenchment additional obligations are placed on the employer. The most important difference is that in the case of a large scale retrenchment, either party has the option of asking for a facilitator to be appointed to manage the consultation process between the consulting parties (s 189A(2)).

If no facilitator is appointed, a dispute that arises during consultation may only be referred to the CCMA 30 days after the expiry of the notice given in terms of s 189(3). Thereafter the parties must wait for the certificate to be issued to the effect that the dispute remains unresolved or 30 days must have expired from the date of the referral to the CCMA. Only once these time periods have elapsed may the employer proceed with a notice of termination of employment and the registered trade union or employees may either give a strike notice or refer a dispute concerning whether there is a fair reason for dismissal to the Labour Court. These last two options are mutually exclusive. (See s 189A(8) read with s 64(1)(a).)

If a facilitator is appointed and 60 days have expired since the notice in terms of s 189(3) was given, the employer may proceed with a notice of termination of employment and the registered trade union or employees may either give a strike notice or refer a dispute concerning whether there is a fair reason for dismissal to the Labour Court. These last two options are once again mutually exclusive. (See s 189A(7) read with s 64(1)(a).)

Severance pay

An employee is entitled to severance pay equal to at least one week's remuneration for each completed year of continuous service with the employer who is retrenching him or her. (See s 41(2) of the BCEA) However, an employee who unreasonably refuses to accept the employer’s offer of alternative employment with that employer or any other employer is not entitled to severance pay.

The payment of severance pay in compliance with this clause does not affect an employee’s right to any other amount payable according to law.

If there is a dispute only about the entitlement to severance pay in terms of this clause, the employee may refer the dispute in writing to the CCMA.

ANNEXURE D

Lock-outs

A lock-out is defined in s 213 of the LRA as the exclusion by an employer of employees from the employer's workplace, for the purpose of compelling the employees to accept a demand in respect of any matter of mutual interest between employer and employee, whether or not the employer breaches those employees' contracts of employment in the course of or for the purpose of that exclusion.

In order for a lock-out to be protected, it must be for a valid reason and the correct procedures must be followed. A valid reason will be any matter of mutual interest between the employer and the employees such as a salary increase (above the minimum wage), hours of work or the changing of a shift system. In order to meet the procedural requirements, the dispute must be referred to the CCMA; a certificate must be issued that conciliation has failed or that a period of 30 days have elapsed since the referral; and at least 48 hours' notice of the lock-out must be given to the employees.

Lock-outs are not permitted in the circumstances listed in section 65(1) of the LRA.

Although it is not the only consequence, one of the consequences of a lock –out is that the employer need not pay remuneration for the duration of the lock-out (but must continue to pay remuneration in kind if so requested by the employees).

The most important sections in the LRA regulating lock-outs are sections 64, 65, 67 and 68.

ANNEXURE E

Section of the Labour Relations Act, 1995

197 Transfer of contract of employment

(1) In this section and in section 197A-
  (a) 'business' includes the whole or a part of any business, trade, undertaking or service; and
  (b) 'transfer' means the transfer of a business by one employer ('the old employer') to another employer ('the new employer') as a going concern.

(2) If a transfer of a business takes place, unless otherwise agreed in terms of subsection (6)-
  (a) the new employer is automatically substituted in the place of the old employer in respect of all contracts of employment in existence immediately before the date of transfer;
  (b) all the rights and obligations between the old employer and an employee at the time of the transfer continue in force as if they had been rights and obligations between the new employer and the employee;
  (c) anything done before the transfer by or in relation to the old employer, including the dismissal of an employee or the commission of an unfair labour practice or act of unfair discrimination, is considered to have been done by or in relation to the new employer; and
  (d) the transfer does not interrupt an employee's continuity of employment, and an employee's contract of employment continues with the new employer as if with the old employer.

(3) (a) The new employer complies with subsection (2) if that employer employs transferred employees on terms and conditions that are on the whole not less favourable to the employees than those on which they were employed by the old employer.
  (b) Paragraph (a) does not apply to employees if any of their conditions of employment are determined by a collective agreement.

(4) Subsection (2) does not prevent an employee from being transferred to a pension, provident, retirement or similar fund other than the fund to which the employee belonged prior to the transfer, if the criteria in section 14 (1) (c) of the Pension Funds Act, 1956 (Act 24 of 1956), are satisfied.55

(5) (a) For the purposes of this subsection, the collective agreements and arbitration awards referred to in paragraph (b) are agreements and awards that bound the old employer in respect of the employees to be transferred, immediately before the date of transfer.
  (b) Unless otherwise agreed in terms of subsection (6), the new employer is bound by-
    (i) any arbitration award made in terms of this Act, the common law or any other law;
    (ii) any collective agreement binding in terms of section 23; and

(iii) any collective agreement binding in terms of section 32 unless a commissioner acting in terms of section 62 decides otherwise.

(6) (a) An agreement contemplated in subsection (2) must be in writing and concluded between-

(i) either the old employer, the new employer, or the old and new employers acting jointly, on the one hand; and

(ii) the appropriate person or body referred to in section 189 (1), on the other.

(b) In any negotiations to conclude an agreement contemplated by paragraph (a), the employer or employers contemplated in subparagraph (i), must disclose to the person or body contemplated in subparagraph (ii), all relevant information that will allow it to engage effectively in the negotiations.

(c) Section 16 (4) to (14) applies, read with the changes required by the context, to the disclosure of information in terms of paragraph (b).

(7) The old employer must-

(a) agree with the new employer to a valuation as at the date of transfer of-

(i) the leave pay accrued to the transferred employees of the old employer;

(ii) the severance pay that would have been payable to the transferred employees of the old employer in the event of a dismissal by reason of the employer's operational requirements; and

(iii) any other payments that have accrued to the transferred employees but have not been paid to employees of the old employer;

(b) conclude a written agreement that specifies-

(i) which employer is liable for paying any amount referred to in paragraph (a), and in the case of the apportionment of liability between them, the terms of that apportionment; and

(ii) what provision has been made for any payment contemplated in paragraph (a) if any employee becomes entitled to receive a payment;

(c) disclose the terms of the agreement contemplated in paragraph (b) to each employee who after the transfer becomes employed by the new employer; and

(d) take any other measure that may be reasonable in the circumstances to ensure that adequate provision is made for any obligation on the new employer that may arise in terms of paragraph (a).

(8) For a period of 12 months after the date of the transfer, the old employer is jointly and severally liable with the new employer to any employee who becomes entitled to receive a payment contemplated in subsection (7) (a) as a result of the employee's dismissal for a reason relating to the employer's operational requirements or the employer's liquidation or sequestration, unless the old employer is able to show that it has complied with the provisions of this section.

(9) The old and new employer are jointly and severally liable in respect of any claim concerning any term or condition of employment that arose prior to the transfer.

(10) This section does not affect the liability of any person to be prosecuted for, convicted of, and sentenced for, any offence.

ANNEXURE F

TERMINATION OF EMPLOYMENT AS PRESCRIBED BY THE SECTORAL DETERMINATION 13 FOR FARM WORKERS

TERMINATION OF EMPLOYMENT

(1) A contract of employment terminable at the instance of a party to the contract may be terminated only on notice of not less than-

(a) one week if the farm worker has been employed for six months or less;

(b) four weeks, if the farm worker has been employed for more than six months.

(2) The employer and farm worker may agree to a longer notice period, but the agreement may not require or permit a farm worker to give a period of notice longer than that required of the employer.

(3) (a) Notice of termination of contract of employment must be given in writing except when it is given by an illiterate farm worker.

(b) If a farm worker who receives notice of termination is not able to understand it, the notice must be explained orally by, or on behalf of, the employer to the farm worker in an official language the farm worker reasonably understands.

(4) Notice of termination of a contract of employment given by an employer must–

(a) not be given during any period of leave to which the farm worker is entitled in terms of clause 21.

(b) not run concurrently with any period of leave to which the farm worker is entitled in terms of this determination, except sick leave.

(5) Nothing in this clause affects the right -

(a) of a dismissed farm worker to dispute the lawfulness or fairness of the dismissal in terms of Chapter VIII of the Labour Relations Act, 1995, or any other law; and

(b) of an employer or a farm worker to terminate a contract of employment without notice for any cause recognized by law.

(6) Nothing in clauses 26, 27, 28 and clause 29 of this determination affects the rights of farm workers accrued in terms of any land reform processes.[2]

[2] The Land Reform (Labour Tenancy) Act No 3 of 1996, Extension of Security of Tenure Act No 62 of 1997

PAYMENT INSTEAD OF NOTICE

(1) Instead of giving a farm worker notice in terms of this clause, an employer may pay the farm worker the remuneration the farm worker would have received, if the farm worker had worked during the notice period.

(2) If a farm worker gives notice of termination of employment, and the employer waives any part of the notice, the employer must pay the remuneration referred to in sub-clause (1), unless the employer and the farm worker agree otherwise.

ACCOMMODATION, LIVESTOCK AND CROPS ON TERMINATION

(1) This clause applies if the employer of a farm worker terminates the contract of employment of that farm worker –

(a) before the date on which the employer was entitled to do so in terms of clause 26; or

(b) in terms of clause 27.

(2) If the farm worker resides in accommodation on the premises of the employer or that is supplied by the employer, the employer is required to provide the farm worker with accommodation for a period of one month, or if it is a longer period, until the contract of employment could lawfully have been terminated.

(3) A farm worker who keeps livestock on the land of the employer is entitled to keep that livestock for the period stipulated in the contract of employment or for one month from the date on which the contract of employment was terminated in terms of sub-clause (1).

(4) (a) A farm worker who has standing crops on the land of the employer is entitled to tend to those crops and harvest and remove them within a reasonable time after they become ready for harvesting, unless the employer pays the farm worker an agreed amount for the crops.

(b) Paragraph (a) applies in addition to a farm worker who terminates the contract of employment in accordance with clause 26.

(5) If a farm worker elects to remain in accommodation in terms of sub-clause (2) after the employer has terminated the farm worker's contract of employment in terms of sub-clause (1), the employer may deduct an amount calculated in accordance with clause 8 from the amount that the employer is required to pay the farm worker in terms of clause 29.

PAYMENTS ON TERMINATION

(1) On termination of employment, an employer must pay a farm worker all monies due to the farm worker including –

(a) any remuneration that has not been paid;

(b) any payment owing in respect of extended ordinary hours of work in terms of clause 11;

(c) any paid time off that the farm worker is entitled to in terms of clause 14 or 16 that the farm worker has not taken;

(d) remuneration calculated in accordance with clause 21(9) for any period of annual leave due in terms of clause 21(1) that the farm worker has not taken; and

(e) if the farm worker has been in employment longer than four months, in respect of the farm worker's annual leave entitlement during an incomplete annual leave cycle as defined in clause 21(1) –

(i) one day's remuneration in respect of every 17 days on which the farm worker worked or was entitled to be paid; or

(ii) remuneration calculated on any basis that is at least as favourable to the farm worker as that calculated in terms of subparagraph (i).

SEVERANCE PAY

(1) For the purpose of this clause, "operational requirements" means requirements based on the economic, technological, structural or similar needs of an employer.

(2) An employer must pay a farm worker who is dismissed for reasons based on the employer's operational requirements, severance pay equal to at least one week's remuneration for each completed year of continuous service with that employer.

(3) A farm worker who unreasonably refuses to accept the employer's offer of alternative employment with that employer or any other employer is not entitled to severance pay in terms of sub-clause (2).

(4) The payment of severance pay in compliance with this clause does not affect a farm worker's right to any other amount payable according to law.

(5) If there is a dispute only about the entitlement to severance pay in terms of this clause, the farm worker may refer the dispute in writing to the CCMA.

CERTIFICATE OF SERVICE

(1) On termination of employment, a farm worker is entitled to a certificate of service stating –

(a) the farm worker's full name;

(b) the name and address of the employer;

(c) a description of any council or sectoral employment standards by which the employers business is covered;

(d) the date of commencement and date of termination of employment;

(e) the title of the job or brief description of the work for which the farm worker was employed at the date of termination;

(f) the remuneration at the date of termination;

(g) any relevant training received by the farm worker;

(h) the pay at date of termination; and

(i) if the farm worker requests, the reason for termination of employment.

ANNEXURE G

BCEA 6

BASIC CONDITIONS OF EMPLOYMENT ACT, 1997
Section 50(1)(b)

READ THIS FIRST

⇓

WHAT IS THE PURPOSE OF THIS FORM?

This form is an application for a Ministerial determination to replace or exclude certain provisions of the Act or a Sectoral Determination.

WHO FILLS IN THIS FORM?

The employer.

WHERE DOES THIS FORM GO?

The Provincial Executive Manager

INSTRUCTIONS

- The sections of the Act or Sectoral Determination for which variation is sought must be mentioned.
- Proof of any consent to the application by the registered trade union(s) in terms of section 50(7)(a) must be attached to this form.
- If no consent is obtained, proof of service on registered trade union(s) and proof of reasonable steps to bring the application to the notice of employees must be attached.
- Shift roster must be included if applicable.

NOTE

A Department of Labour official may conduct an inspection to verify the information or seek more information in relation to your application.

If there is insufficient space on the form use separate piece of paper.

National applications and applications to vary prescribed minimum wages must be forwarded to the Executive Manager, Employment Standards, P/Bag X117, Pretoria. 0001

DEPARTMENT OF LABOUR

APPLICATION FOR MINISTERIAL DETERMINATION

N.B. ALL APPLICABLE FIELDS MUST BE COMPLETED

A. EMPLOYER PARTICULARS

1. FULL NAME OF EMPLOYER OR COMPANY TRADING NAME

……

UIF REFERENCE NUMBER :……...

SARS NUMBER :……..……

COMPANY REGISTRATION NUMBER :……

COMPENSATION FUND REGISTRATION

NUMBER :……

2. NATURE OF BUSINESS CONDUCTED

……

3. CONTACT PERSON(S)

…….

4. POSTAL ADDRESS

…..……

……..……

……..……

POSTAL CODE ……..

TEL. NO. (……) ……. FAX. NO. (…..) …….

E-MAIL: ...…..……

PROVINCE: ☐ **Eastern Cape** ☐ **Free State** ☐ **Gauteng**

☐ **KwaZulu-Natal** ☐ **Limpopo** ☐ **Mpumalanga**

☐ **Northern Cape** ☐ **North-West** ☐ **Western Cape**

5. STREET ADDRESS

…….

…….

TOWN/ SUBURB:……..…POSTAL CODE :……

PROVINCE: ☐ **Eastern Cape** ☐ **Free State** ☐ **Gauteng**

☐ **KwaZulu-Natal** ☐ **Limpopo** ☐ **Mpumalanga**

☐ **Northern Cape** ☐ **North-West** ☐ **Western Cape**

B. DETAILS OF APPLICATION

1. VARIATION IS APPLIED FOR IN RESPECT OF THE FOLLOWING SECTION(S) OF THE ACT OR CLAUSE(S) OF THE FOLLOWING SECTORAL DETERMINATION(S):

……

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2. AREA AND PROJECT FOR WHICH VARIATION IS SOUGHT: ……..

…….

3. PERIOD FOR WHICH VARIATION IS SOUGHT: ……

……..

……..

4. TOTAL NUMBER OF EMPLOYEES: ……..

5. NUMBER OF EMPLOYEES AFFECTED BY APPLICATION: ……..…...

6. MOTIVATION AND REASONS WHY THE APPLICATION FOR VARIATION SHOULD BE GRANTED:

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C. PREREQUISITES

1. **IF THIS APPLICATION HAS THE CONSENT OF ALL THE REGISTERED TRADE UNION(S) THAT REPRESENT THE EMPLOYEES IN RESPECT OF WHOM THE DETERMINATION IS TO APPLY, PROOF OF THAT CONSENT SHOULD BE ATTACHED TO THIS FORM.**

2. **IN THE ABSENCE OF THE CONSENT REFERRED TO IN 1. PROOF OF SERVICE OF A COPY OF THIS APPLICATION ON ALL REGISTERED TRADE UNIONS THAT REPRESENTED EMPLOYEES AFFECTED BY THIS APPLICATION MUST BE ATTACHED.**

3. **IN ADDITION, IF THE MAJORITY OF EMPLOYEES ARE NOT REPRESENTED BY A REGISTERED TRADE UNION, PROOF OF REASONABLE STEPS TAKEN TO BRING THIS APPLICATION TO THE NOTICE OF EMPLOYEES MUST BE ATTACHED.**

4. **IF NO AGREEMENT COULD BE REACHED WITH THE PARTIES REFERRED TO IN 1, 2 OR 3 – POINTS OF DISSENSION**

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NAME: ……

SIGNATURE: ……

POSITION: ……

DATE: ……

ADDRESSES OF PROVINCIAL EXECUTIVE MANAGERS

In the province of KwaZulu/Natal: The Provincial Executive Manager Department of Labour P O Box 940 **DURBAN** 4000 TEL: (031) 336 2022 FAX: (031) 305 9540	In the province of Northern Cape: The Provincial Executive Manager Department of Labour Private Bag X5012 **KIMBERLEY** 8300 TEL: (053) 838 1502 FAX: (053) 832 9386
In the Limpopo Province: The Provincial Executive Manager Department of Labour Private Bag X9368 **POLOKWANE** 0700 TEL: (015) 290 1607 FAX: (015) 290 1608	In the province of North-West: The Provincial Executive Manager Department of Labour Private Bag X2040 **MMABATHO** 2735 TEL: (018) 387 8101 FAX: (018) 384 2597
In the province of Eastern Cape: The Provincial Executive Manager Department of Labour Private Bag X9005 **EAST LONDON** 5200 TEL: (043) 701 3128 FAX: (043) 722 1012	In the Province of the Western Cape: The Provincial Executive Manager Department of Labour P O Box 872 **CAPE TOWN** 8000. TEL: (021) 441 8110/8112 FAX: (021) 441 8111
In the province of Gauteng: **Gauteng-North**: In the Magisterial Districts of: Bronkhorstspruit, Cullinan, Krugersdorp, Pretoria, Randfontein, Soshanguve I, Soshanguve 2, and Wonderboom. The Provincial Executive Manager Department of Labour P O Box 393 **PRETORIA** 0001 TEL: (012) 309 5253 FAX: (012) 320 2367	In the province of Gauteng: **Gauteng-South**: In the Magisterial Districts of: Alberton, Boksburg, Brakpan, Germiston. Heidelberg, Johannesburg, Kempton Park, Oberholza, Randburg, Roodepoort, Nigel, Benoni, Springs, Vanderbijlpark, Vereeniging and Westonaria. The Provincial Executive Manager Department of Labour P O Box 4560 **JOHANNESBURG** 2000 TEL: (011) 853 0302 FAX: (011) 853 0470
In the Province of Mpumalanga: The Provincial Executive Manager Department of Labour Private Bag X7263 **WITBANK** 1035 TEL: (013) 655 8700/8701 FAX: (013) 655 8838	In the Province of the Free State: The Provincial Executive Manager Department of Labour PO Box 522 **BLOEMFONTEIN** 9300 TEL: (051) 505 6200/6203 FAX: (051) 447 5329

ABRIDGED FINANCIAL INFORMATION REQUIRED FOR CONSIDERATION IN TERMS OF SECTION 50 OF BASIC CONDITIONS OF EMPLOYMENT ACT (BCEA)

1. Financial Information

	End of previous tax year e.g. 2012/2/29	Estimate: Current tax year e.g. 2013/2/28
GROSS FARMING INCOME (sales of farm products)		
LESS: Farming Expenditure[1)] – Rent		
– Interest payments		
– Levies (e.g. RSC , SETA)		
– Seed + Fertilizer		
– Fodder		
– Irrigation – H_2O		
– Cash Remuneration (Farmworkers) – provide detail of each worker separately		
– Value of payment in kind (Farmworkers)		
– Maintenance		
– Fuel		
– Chemicals (e.g. Dips & Sprays)		
– Other current expenses – provide detail		
INDICATE SURPLUS / LOSS		

Note: Excluding purchases and tax deductions in respect of equipment, machinery, livestock, etc. in other words only current expenses must be declared.

2. What farming events in the current year are envisaged that will lead to you being unable to afford the adjusted (prescribed) minimum wages?

3. Please indicate:

	Number
Permanent workers employed by you	
Temporary workers employed on an annual basis	