

# Legislation

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**QCTO: Occupational Health,  
Safety Quality Practitioner  
Qualification – NQF Level 2**

**ISO NET (Pty) Ltd**

**Learner Guide**

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# Overview

## Purpose of this course

The purpose of this course is to provide you with an overview of the legal requirements regarding health, safety and the environment.

## OHS Act, 85 of 1993

### Purpose

To provide for the health and safety of persons at work and for the health and safety of persons in connection with the use of plant and machinery; the protection of persons other than persons at work against hazards to health and safety arising out of or in connection with the activities of persons at work; to establish an advisory council for occupational health and safety; and to provide for matters connected therewith.

### Key elements of the Act

#### Section 7

- The chief inspector may direct a company to formulate a Health and Safety Policy concerning the protection of the health and safety of his employees at work.
- The policy must include a description of the organisation and the arrangements for carrying out and reviewing that policy.
- The policy must include guidelines on its content, and must be signed by the chief executive officer.

It must be prominently displayed.

#### Section 8

- The employer must ensure a healthy and safe working environment.  
*NB: "employer" includes user of premises (as per Section 1)*  
(Sub-section 2) This general duty includes:
  - Systems of work, plant and machinery that are safe and without risk to health.
  - Eliminating hazards to the health and safety of employees before resorting to personal protective equipment.
  - Eliminating hazards in connection with articles and substances.
  - Identifying and evaluating hazards to health and safety in the work place, and the precautionary measures to be taken to minimize such hazards and providing the means to apply those measures.
  - Providing information, instruction, training and supervision to employees to ensure their health and safety work is not at risk.

Not permitting employees to perform work unless risk precautionary measures have been taken.

- Ensuring that the requirements of this act are complied with by all employees.
- Enforcing all requirements in the interests of health and safety.
- Ensuring that work is performed under supervision of a person who understands the types of hazards in the work place, and who has authority to take necessary precautions.

Individual scope of authority issued to all employees (job descriptions).

## **Section 9**

The Employer or self employed person shall conduct his undertaking in such a manner as to ensure, that persons other than those in his employment who may be directly affected by his activities are not exposed to hazards to their health or safety.

## **Section 10**

- Any person who supplies any article for use at work must ensure that it is safe and without risk when properly used.
- Any person who erects or installs any article for use at work, must ensure that it is safe and without risk when properly used.
- Any person who supplies any substance for use at work must ensure that it is without risk to health when properly used.
- He must supply both hazardous or safety data sheets and the necessary procedures (to follow) if an accident occurs.

## **Section 13**

The employer must:

- Make every employee conversant with the hazards to his health and safety with respect to any article or substance he may use in his work, and the precautions he must take.
- Inform the health and safety representatives concerned of impending visits from Inspectors or exemptions applied for.

Inform health and safety representatives concerned of incidents that have occurred in their work area.

## **Section 14**

- Every employee must:
  - Take reasonable care for own health and safety or others affected by his actions.
  - Co-operate with the employer to ensure that the Act is complied with.
  - Carry out any lawful, health or safety instructions given to him by his employer.
  - Report anything that is unsafe or unhealthy to his employer or health and safety representative.

If he is involved in an incident, he must report it as soon as possible, or at shift end.

## **Section 15**

No person shall interfere or misuse anything provided in the interests of health and safety

## **Section 16**

- The Chief Executive Officer shall ensure that duties of the employer as set out in the Act are complied with.
- Without detracting from his liability, the CEO may assign his duties to subordinates, who will act under his control and direction.

The assignment does not detract from his potential accountability for ensuring discharge of the duties.

## **Section 17**

- When a company has 20+ employees, a health and safety representative must be appointed in writing for a specific time and area.
- Health and safety representatives must be nominated and elected by the employees.
- The employees must consult with the employer regarding the procedures to be followed.
- Only full time employees must be considered for representatives, and they must be familiar with the work area for which they are designated.
- Health and safety representative are required as follows:
  - 1 per 100 employees in shops and offices.
  - 1 per 50 employees in industries.
- An Inspector may direct an employer to appoint more health and safety representatives if he deems it necessary.

All activities of representatives may be carried out in working hours.

## **Section 18**

- Representatives may perform the following functions:
  - Review effectiveness of health and safety measures.
  - Identify potential hazards and major incidents at the work place.
  - Assist his employer in establishing the cause of incidents at the work place.
  - Investigate employees' complaints regarding health and safety at the work place.
  - Make representation, on the above, to the employer, health and safety committee or an Inspector.
  - Make representation to the employer in general with regard to health and safety in the work place.
  - Inspect the work place at agreed intervals, (*NB: he must give reasonable notice of his intention to do so*).
  - Participate with, and accompany Inspectors during their inspections.
  - Receive information from Inspectors with respect to any requests they may have submitted to him.

- Representatives are members of a health and safety committee by virtue of election as representatives, and may attend the committee meetings.
- A health and safety representative is entitled to:
  - Visit the scene of an incident and attend meetings 'in loco' (at the scene).
  - Attend investigations or inquiries held by an Inspector.
  - Inspect any document, kept by the employer that he may require, to carry out his duties.
  - Accompany an inspector on inspection.
  - With employer approval, be accompanied by a technical advisor on any inspection.
  - Participate in health and safety audits.
- The employer must provide training, facilities and other assistance in order for representatives to carry out their functions effectively.

Representatives will not incur civil liability with regard to failure to discharge their duties.

## Section 19

- Where there are more than 2 health and safety representatives a health and safety committee must be formed.
- The employer may determine the number of members of the committee, subject to the following:
  - If there is only 1 committee, all the representatives will be members.
  - If there are 2 or more committees, representatives must be a member of at least one.
  - The employer members of the committee may not exceed the number of representatives.
- The nominated members of the committee must be designated in writing, for a specific period of time.
- Meetings must be held at least every 3 months, although an inspector may direct more frequent meetings.
- If 10% of the employees make a written request to an inspector, he may insist that meetings are held.
- The committee determines procedures at meetings.
- The committee may co-opt persons onto the committee, but the co-opted person has no vote.
- An inspector may direct a company to establish more committees if he feels that there are not enough.

## Section 20

- A Committee may:
  - May make recommendations to the employer, or an inspector, about anything effecting health and safety in the workplace.
  - Discuss incidents that have occurred in the work place and if necessary report them to an inspector, in writing.
  - Carry out any prescribed function.
- The employer must ensure that the committee holds its meetings.
- The committee must keep a record of recommendations and incidents. The employer must ensure the Committee keeps such records.

Neither the committee nor its members will incur civil liability, with regard to their duties.

## **Section 22**

No person may sell or market any article, substance, plant, machinery or health and safety equipment unless it complies fully with health and safety standards or other requirements.

## **Section 23**

An employer may not deduct money from an employee for any health and safety equipment provided.

## **Section 24**

- The following incidents must be reported:
  - Each incident occurring at work, or in connection with the activities thereof, or as a consequence of which any person:
    - dies;
    - becomes unconscious ;suffers the loss of a limb or part thereof;
    - is injured/ill such that he is likely to die/ suffer permanent physical defect; or
    - is likely to be unable to resume work for 14 days or longer.
  - A major incident has occurred.
  - the health or safety of any person was endangered and:
    - a dangerous substance was spilled;
    - the uncontrolled release of a substance under pressure;
    - failure or fracture of machinery;
    - machinery running out of control.
- The incidents shall be reported within the prescribed time periods, and on the prescribed forms to the local Inspector.
- This Section does not apply to the following:
  - a traffic accident on a public road,
  - an accident in a household,
  - (*the above incidents are to be reported to the SAPS*),
  - an accident investigated in terms of the Aviation Act, 74 of 1962.

A member of the SAPS shall report any household incident to the Department of Labour Inspectorate.

## **Section 25**

Any medical practitioner who treats a person for a disease which he believes the person sustained at work must report the disease to the Department of Labour in the prescribed manner and on the prescribed form.

## **Section 26**

- An employer may not dismiss an employee, or alter conditions of employment, where an employee has:
  - Given information to an inspector about working conditions.
  - Complied with a directive given by an inspector.
  - Given evidence in court.
  - Refused to do something unlawful in terms of this Act.

An employer may not dismiss or disadvantage an employee:

- Due to occupational disease he may have contracted at work.
- Who has been placed onto biological monitoring.
- Who has been placed under medical surveillance.

## **Section 29**

A Labour Inspector may:

- Enter any premises, at any reasonable time.
- Question any person on the premises alone or in company.
- Ask any person to produce documents to him at his request.
- Examine or make copies of documents.
- Ask any person to explain these documents.
- Inspect anything, remove for examination, or take samples of anything on the premises.
- Use any documents, samples of, or anything that was removed from such premises as evidence in a prosecution, an employer may make copies of any documents seized.
- He may direct any person to appear before him at his request, either alone or in company in order to question him.
- Perform any other function.

An employer must provide facilities (such as a table, chair and office) as the inspector may request, so that he can carry out his duties.

If an inspector removes anything from premises he must issue a receipt for it.

## **Section 30**

- If an employer does anything that an inspector considers to be a threat to the health or safety of any person, he may write out a prohibition notice.
- If an employer uses plant or machinery in such a way that an inspector considers it to be a threat to the health or safety to persons he may write out a prohibition notice.
- An inspector may write out a prohibition notice stopping an employer using certain categories of employees in work areas where they are exposed to articles, substances or other organisms that may pose a threat to their health or safety.

- A prohibition notice will be revoked after an inspector is satisfied that the threat has been removed.
- In order to enforce a prohibition where necessary, an Inspector can lock off machinery, bar entry to, or barricade off areas to which a prohibition notice applies
- When an inspector is of the opinion that the health or safety of persons at a work place is threatened because an employer refuses or fails to take necessary steps, he may direct him or take such steps, usually by issuing a contravention or improvement notice.
- If an inspector finds that an employer has contravened a section of the act or regulations he may issue a contravention notice telling him to take corrective action.
- If an extension period beyond the normal 60 days stipulated on the notice is required, an inspector may extend the period, in writing.
- Any notices issued by an inspector must be brought to the attention of employees and health and safety representatives as soon as possible.

An Inspector may investigate the following:

- Incident at the workplace causing death, injury or illness.
- Incident in connection with the use of machinery causing death, injury or illness.
- Incident at the workplace which could have caused death, injury or illness.
- Incident in connection with the use of machinery which could have caused death, injury or illness. When a formal inquiry is not necessary, an investigation is held, and when this is completed, the inspector must submit a report to the attorney-general and to the chief inspector.
- In the case of a death, after the report has been received by the Attorney-General he will decide whether to proceed with, or decline prosecution or refer the matter for inquest.
- An inspector may not incur civil liability as a result of any report that has been submitted to the attorney-general.

The purpose of an investigation is finding the cause or causes of the accident and to make recommendations to prevent a re-occurrence of an event or to minimise the risk thereof.

## Section 32

- The chief inspector may instruct inspectors to hold inquiries, into incidents which have, or in the opinion of the chief inspector, could have resulted in death or injury.
- If requested by a person with *prima facie* evidence of an offence having been committed, he shall instruct inspectors to hold inquiries.
- The inspector holding the inquiry may subpoena any person to appear before him to give evidence or produce documents he may require for the inquiry.
- The rules of normal criminal proceedings will apply at these inquiries, with regard to taking oaths, answering questions or producing documentary evidence.
- All inquiries are to be held in public but undesirable persons may be excluded by the Inspector.
- The inspector may designate the person to lead evidence and question witnesses.
- Any person with an interest in the case or his representative, may question any witness, as the inspector may allow.

The following shall be deemed interested persons:

- any person who was injured or suffered damage,
- the employer or user of the premises where the incident occurred,
- any person, who in the opinion of the inspector was responsible for the incident,
- any trade union representing the injured person, or the “accused”,
- the owner or occupier of the premises where the incident took place,
- any other person, at the discretion of the inspector.
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Affidavits (statements) made by witnesses may be submitted as evidence. The inspector may then subpoena the witness to appear, to give evidence, or to reply to submissions (questions) from the inspector on his evidence.

- If a person cannot attend an inquiry and his evidence is vital, the inspector may appoint a person as a commissioner charged with collecting that evidence, whether that person is in or outside of South Africa.

### **Section 33**

- Where the Inquiry concerns a fatality, it may be conducted jointly with an Inquest, in terms of the Inquests Act.

When the Inquiry is completed, the inspector submits a report to the Attorney-General, for consideration of prosecution, and Chief Inspector.

### **Section 34**

- At an inquiry or investigation no person may
  - Fail to comply with any instruction that an inspector may give him.
  - Refuse to answer any question put to him by an inspector or other person unless he will incriminate himself.
  - Influence any person in such a way that they refuse to do something that they have been instructed to do by an inspector or other persons.
  - Refuse to offer assistance to an inspector or other person in order to carry out investigations or inquiries.
  - Refuse to attend an inquiry or investigation.

Insult the inspector, or disrupt proceedings.

### **Section 35**

- A person aggrieved by an Inspector’s instruction may lodge a written appeal within 60 days, with the Chief Inspector.
- If the person is dissatisfied with the Chief Inspector’s ruling, the person may lodge appeal with the Labour Court.

While the appeal is pending, the instruction stands, although a person may make urgent application to the Labour Court to disregard the instruction, until the outcome of the appeal.

### **Section 40**

- This Section empowers the Minister to grant exemptions.

- An exemption granted to a particular employer will be in the form of a certificate issued to the employer.

Where the exemption is granted to a category of employers, the exemption will be published in the Government Gazette as a Notice.

#### **Section 41**

This Act is not affected by any condition or any agreement, which sets out to undermine its provisions.

#### **Section 44**

This Section empowers the Minister to incorporate a specific standard or Code into the Act. He merely has to quote the reference number and title of the Standard to be incorporated.

#### **Section 47**

A Magistrates Court has jurisdiction to impose any penalty in terms of this Act.

#### **Offences and penalties**

#### **Section 37**

- If an employee contravenes the Act, the employer will be presumed to have contravened the Act, and will be held liable for prosecution, unless he can show:
  - the employee did not have permission to do, nor was his employer aware of what he was doing.
  - the employee was acting outside of his job description or scope of authority.
  - the employer took reasonable steps to prevent the contravention from taking place.
- The above employer's liability extends to contractors, subject to the parties having entered written arrangements and procedures for the contractor to comply with the Act.

Instructions issued by an employer are not sufficient as "reasonable steps" to prevent the contravention.

#### **Section 38.1**

- Failing to comply with requirements imposed by the Act.
- Failing to comply with notices issued in terms of this Act.
- Failing to comply with an exemption.
- Falsifying any document or information required in terms of the act.
- Hindering an Inspector in the conduct of his investigations
- Failing to appear at an inquiry, or leaves before being excused.
- Hindering the course of an inquiry
- Tampering with anything provided in the interests of health and safety at the work place.

- Failing to use safety equipment that has been provided.

Wilfully doing anything that may threaten the health or safety or any other person at the work place.

**FINE:**

- R 50 000 fine, or
- 1 year imprisonment, or

Both.

**Section 38.2**

- Negligently causing injury to a person, such that the person *could have* died.

Where a person dies at the workplace, this is dealt with as culpable homicide

**FINE:**

- R 100 000 fine, or
- 2 yrs imprisonment, or

Both.

**Section 39**

- This Section sets out presumptions in favour of the State, including:
  - Statements or documents that an employer must keep, can be used as evidence against him, unless it can be proved that he didn't make the entries.
  - Statements or documents found in the premises, can be used as evidence against him, unless it can be proved that he didn't make the entries.

If it is proved a document is falsified, it will be assumed that this was wilful, unless the accused can prove otherwise.

**Regulations to the Act**

The Act consists of various sets of regulations of which the following are the more important:

- **General Administrative Regulations:** Addressing administrative health and safety issues e.g. the reporting of incidents and collective agreements.
- **General Safety Regulations:** Govern safety in general with reference to objects in daily use, personal protective equipment and first aid requirements.
- **Environmental Regulations:** Include aspects such as fire, housekeeping, noise, ventilation, lighting and thermal requirements.
- **Facilities Regulations:** Relate to toilets, canteens, change-rooms, seating, lockers and seats.
- **General Machinery Regulations:** Deal with the appointment of engineers, safeguarding of machinery and supervision.

- **Driven Machinery Regulations:** Address the safeguarding of specific types of machinery.
- **Electrical Machinery Regulations:** Deal with very specific requirements of major electrical installations e.g. overhead lines, as well as electrical requirements for portable equipment such as drills.
- **Electrical Installation Regulations:** Prescribe how any work on electrical installations such as distribution boards should be performed (i.e. by an approved electrician).
- **Vessels Under Pressure Regulations:** Relate to boilers, compressors, portable gas containers, etc.
- **Major Hazardous Installations Regulations:** Prescribe how risk assessments shall be conducted in order to determine an operation's potential impact upon its surroundings.
- **Hazardous Chemical Substances Regulations:** Deal with the demarcation of workplaces, the training of employees to work with the substances, and the requirement of a medical surveillance programme to be implemented for these employees.
- **Hazardous Biological Agents Regulations:** Deal with the classification of Agents, the training of employees to work with the Agents, and the requirement of a medical surveillance programme to be implemented for these employees.
- **Noise Induced Hearing Loss Regulations:** Deal with hearing exposure assessments and audiograms of employees, as well as noise reduction measures to be implemented.
- **Construction Regulations:** Deal with construction safety management plans, project risk assessment, and criteria for certain types of machinery and equipment.

### **COIDAct, 130 of 1993**

#### **Purpose**

To provide for compensation for disablement caused by occupational injuries or diseases sustained or contracted by employees in the course of their employment, or for death resulting from such injuries or diseases; and to provide for matters connected therewith

#### **Key elements of the Act**

#### **Section 22**

- In case of disablement or death, employee or dependants are entitled to benefits.
- No periodical payments for temporary total or partial disablement lasting 3 days or less.
- No compensation for *serious and wilful misconduct*, unless -
  - Serious disablement.
  - Death (dependant wholly financially dependent).
- Commissioner/employer may pay medical aid, notwithstanding the above.

Accident deemed *in the course of employment*, if person was acting in his capacity as employee.

#### **Section 23**

- An employee temporarily employed outside the Republic shall be compensated as if the accident happened in the Republic if:
  - The chief place of business is in the Republic.
  - The person is ordinarily employed in the Republic.
- The compensation amount is based on the earnings the employee would have received in the Republic.
- This does not apply to employment outside the Republic for 12 months, save by agreement.

If entitled to compensation in terms of this Act as well as the law of another state, the employee shall by written notice to the Compensation Commissioner elect one or the other.

### **Section 26 – 34**

- If an accident results in death or disablement, compensation or medical aid may be refused:
  - if the accident or death resulted from previous injury or occupational disease, which the employer falsely denied.
  - if death or disablement resulted from the employee's unreasonable refusal or wilful neglect to submit to medical aid.
- If the contract of service is invalid, it is deemed that the contract was valid at the time of the accident.

If the employee is unable to perform the essential actions of life without constant help, an additional allowance may be granted.

- Compensation may not be:
  - Ceded or pledged.
  - Attached under a judgment or court order.
  - Subject to income tax.
  - Set off against debt.
- The employer may be compensated for payments to the employee in respect of occupational disablement.
- Any agreement, which cedes or relinquishes any compensation benefits shall be void.

Compensation for the death of an employee shall not form part of his estate.

### **Section 35**

An employee or dependant has no action for damages and the employer has no liability, save under the provisions of this Act

### **Section 36**

If a third party is liable for damages:

- The employee may claim compensation in terms of this Act, and institute civil action for damages.
- The Commissioner/employer may institute civil action against the third party for compensation.
- In awarding civil action damages against the third party the Court will note the amount the employee is entitled to in terms of this Act.

In an action against the third party, the civil action amount shall not exceed the damages that would be awarded, in the absence of that awarded in terms of the Act.

### **Section 38**

- The employee must give written or verbal notice as soon as possible to the Employer and to the Compensation Commissioner.
- Failure to give notice shall not bar compensation if the employer had knowledge of the accident, and:
  - The Compensation Fund would not be seriously prejudiced by such failure or error in not giving notice.

The failure or error was caused by oversight, absence from the Republic or other reasonable cause.

### **Section 39**

- The Employer shall within 7 days after receiving notice of an accident, report it to the Compensation Commissioner.
- An accident includes any injury reported by an employee to his employer, if it allegedly arose out of the scope of his employment.

If the Employer fails to report an accident within 7 days, the Compensation Commissioner may impose a fine.

### **Section 40**

- The Compensation Commissioner shall conduct an inquiry after learning of an accident.
- The Employee and Employer shall, at request of the Compensation Commissioner, furnish particulars of the accident.
- The Employer who fails to comply with any request from the Compensation Commissioner, shall be guilty of an offence.

The Compensation Commissioner may refuse to adjudicate the claim of an employee, who fails to comply with any request from the Compensation Commissioner.

### **Section 41**

- The employee reporting an accident shall furnish such information as prescribed or requested by the Compensation Commissioner.

The Employer shall send claims and information to the Compensation Commissioner within 14 days.

### **Section 42**

- The employee shall submit to a medical examination by a designated medical practitioner.
- The employee is entitled to have a medical practitioner or chiropractor of his choice present at the examination.

The costs of having the chosen medical practitioner or chiropractor, present shall be for the employee's own expense.

### **Section 43**

A claim for compensation must be lodged within 12 months of the accident or death. Failing this, the claim shall not be considered, except where reported in terms of **Section 39**.

### **Section 44**

The right to compensation benefits shall lapse if the accident is not reported within 12 months

### **Section 65**

- An employee shall be entitled to compensation in terms of this Act if he has contracted an occupational disease, or other disease, which arose out of his employment.
- Benefits in terms of this action shall lapse if the disease is not brought to the attention of the Compensation Commissioner within 12 months.

The commencement of a disease shall be deemed to be the date when a medical practitioner diagnosed it for the first time, or such earlier date as is favourable to the employee

### **Section 66**

If an employee contracts an occupational disease in any work mentioned in **Schedule 3**, it shall be presumed that the disease arose out of his employment.

### **Section 67**

Compensation for a disease shall be calculated on the basis of the earnings of the employee, as per **Section 63**.

### **Section 68**

- An employee shall as soon as possible after the start of the disease give written notice to his employer, and he may also give written notice to the Compensation Commissioner.

The employer shall within 14 days after having received such notice or having learned in some other way of the disease, report it to the Compensation Commissioner.

### **Section 71 – 78**

- The Employer shall furnish and maintain the prescribed equipment and services for first aid.
- This section does not apply to first aid requirements in terms of the ***Occupational Health and Safety Act, 85 of 1993***, or ***Minerals Act, 50 of 1991***.
- The Employer shall make the necessary conveyance available.
- An employer, who demands or receives a contribution towards the cost of medical aid from an employee, is guilty of an offence.

The Compensation Commissioner may approve medical aid provided by an employer, if it is not less favourable than that provided for in this chapter.

## Section 80

- An Employer shall register his business with the Compensation Commissioner, and furnish him with such particulars as he may require.

An Employer shall notify the commissioner of any change in particulars within 7 days.

## Section 81

- The Employer shall keep a record of wages, time worked, piece work and overtime and shall at all reasonable times on demand of an authorized person produce it for inspection.

The Employer shall retain these records for at least 4 years after the date of the last entry

## Section 82

The Employer shall furnish the Compensation Commissioner with a Return showing:

- amount paid to employers from 1st of March of the previous year to the last day of February of the current year, and
- further information the Compensation Commissioner requires.

If the Employer has more than one place or class of business, the Compensation Commissioner may require a separate Return for each

## Section 83

- The Employer shall be assessed according to a Tariff of Assessment. If an employer fails to furnish the Compensation Commissioner with a return, the Compensation Commissioner may:
  - Assess the Employer on the basis of earnings estimated.

Impose a fine of 10 % of amount assessed.

## Section 85

- If the business of an Employer is designed to prevent accidents and the number of accidents is less than usual, commissioner may assess employer at a lower tariff of assessment.
- If the accident record of an employer during a particular period is less favourable than like businesses, and this situation is likely to continue, the Compensation Commissioner may assess the Employer at a higher Tariff.

If the accident record during a period is more favourable than like businesses, the Compensation Commissioner may give the Employer a Rebate on any assessment.

## **Section 86**

The Tariff of Assessment shall be paid within 30 days after the date appearing on the Notice of Assessment, or in instalments as the Compensation Commissioner may determine.

## **Section 89**

If a contractor fails so to register or pay any assessment, the employees of the contractor shall be deemed to be the employees of the mandatory (client company), and the mandator shall pay the assessments in respect of the contractor employees.

## **Offences and penalties**

### **Section 37**

Threatening or compelling an employee in order to discourage them from using a right or benefit provided for.

#### **FINE:**

*(Section 99 – all offences)*

- fine (unspecified), or
- 1 year imprisonment.

### **Section 39**

Failure to give notice of an accident to the Director General.

### **Section 40**

Failure to provide Director General with particulars of accident

### **Section 47**

Failing to pay employees compensation for first three months.

**Section 64**

Making deductions from compensation payable to employees.

**Section 68**

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**Section 72**

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**Section 77**

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**Section 80**

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**Section 82**

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**Section 87**

Failing to pay tariff of assessment.

**Section 96**

Unauthorised disclosure of information.

**Section 98**

Making false statements.

**Section 97**

Failing to comply with Regulations.

**FINE:**

unspecified, or 6 month's imprisonment.

## **Labour Relations Act, 66 of 1994**

### **Purpose and preamble**

To change the law governing labour relations and, for that purpose:

- to give effect to section 27 of the Constitution;
- to regulate the organisational rights of trade unions;
- to promote and facilitate collective bargaining at the workplace and at sectoral level;
- to regulate the right to strike and the recourse to lock-out in conformity with the Constitution;
- to promote employee participation in decision-making through the establishment of workplace forums;
- to provide simple procedures for the resolution of labour disputes through statutory conciliation, mediation and arbitration (for which purpose the Commission for Conciliation, Mediation and Arbitration is established), and through independent alternative dispute resolution services accredited for that purpose;
- to establish the Labour Court and Labour Appeal Court as superior courts, with exclusive jurisdiction to decide matters arising from the Act;
- to provide for a simplified procedure for the registration of trade unions and employers' organisations, and to provide for their regulation to ensure democratic practices and proper financial control;
- to give effect to the public international law obligations of the Republic relating to labour relations;
- to amend and repeal certain laws relating to labour relations; and
- to provide for incidental matters.

### **Section 1 – Purpose**

The purpose of this Act is to advance economic development, social justice, labour peace and the democratisation of the workplace by fulfilling the primary objects of this Act, which are -

- to give effect to and regulate the fundamental rights conferred by section 27 of the Constitution;
- to give effect to obligations incurred by the Republic as a member state of the International Labour Organisation;
- to provide a framework within which employees and their trade unions, employers and employers' organisations can:
  - collectively bargain to determine wages, terms and conditions of employment and other matters of mutual interest; and
  - formulate industrial policy; and
- to promote:

- orderly collective bargaining;
- collective bargaining at sectoral level;
- employee participation in decision-making in the workplace; and
- the elective resolution of labour disputes

## **Key elements of the Act**

### **Section 4**

- This Section provides for the right of every employee to form, or join a trade union, and to participate in their lawful activities.
- The employee has the right to be elected as a representative official of the union.

### **Section 5**

- An employee may not be discriminated against, by virtue of involvement with a union.
- Similarly, an employer may not force an employee to abandon union involvement, or prevent them from the same.
- A person seeking employment may not be discriminated against, by virtue of involvement in union activities.

### **Section 6**

- Every employer has the right to participate in, or form associations, and undertake their lawful functions.

### **Section 7**

- An employer may not be discriminated against, by virtue of involvement with an association.
- Similarly, no person may force an employer to abandon association involvement, or prevent them from the same.

### **Section 8**

- Employee unions and employer associations have the right to:
- Form federations.
- Affiliate themselves with international organisations (e.g. International Labour Organisation).
- Organise own administration and lawful activities.

### **Section 12**

- A trade union representative is entitled access to a workplace, in order to recruit members, or serve members' interests.

### **Section 13**

- An employee may authorise an employer to deduct subscription from the employee's wages, in favour of the union.
- Similarly, the employee may authorise the employer to revoke the deduction.

### **Section 14**

- Employees are entitled to trade union representatives, according to various ratio's, e.g.:
- 10 members – 1 representative.
- 10+ members – 2 representatives.
- 50+ members – 2 representatives for the first 50, and 1 representative per 50 thereafter.

#### **The representative is entitled to:**

- Monitor employer's compliance with the Act.
- Report contraventions of the Act.
- Perform functions agreed to between the representative union and employer.

### **Section 15**

- An employee who is a union representative, is entitled to reasonable leave, during office hours, in order to fulfil functions for the union.

### **Section 16**

- An employer is duty bound to provide a union with information necessary for the representative to perform the functions set out in Section 14.
- This does not apply to legally privileged information, or information, which, may not be disclosed by law.
- Disputes regarding provision of information may be referred to the Commission for Conciliation, Mediation and Arbitration (CCMA).

### **Section 18**

- An employer and representative trade union, i.e. whose members are the workforce majority, may conclude a collective agreement, setting a threshold of representatives required.
- This threshold must be equally applicable to all unions with members at the workplace.

### **Section 21**

- A union exercising rights in terms of this chapter must give the employer written notice thereof.
- Where the notice concerns negotiation of a collective agreement, the employer must enter negotiations within 30 days of the notice.
- Any failure to conclude such an agreement may be referred to the CCMA.

## **Section 23**

- A collective agreement is legally binding upon the parties thereto.
- The agreement may also bind the ordinary contract of employment, of the employees.

## **Section 24**

- A collective agreement must have a dispute resolution procedure. This does not apply to Agency or Closed Shop agreements.

## **Section 25**

- The employer and representative trade union may conclude an agreement whereby the employer may deduct agency fees from non-member employees, who are eligible for membership.

## **Section 26**

- The employer and representative trade union may conclude an agreement whereby all employees covered by the agreement, are required to be members of the union.

## **Section 64**

- This Section provides for an employee's right to strike, and an employer's right to utilise lockout.
- These rights are subject to declaration of failure of dispute resolution.
- 48 hours notice must be given of a proposed strike, or lockout.

## **Section 65**

Strikes or lockouts are not permitted:

- Where a collective agreement prohibits this (unless the dispute concerns the agreement itself).
- The dispute may be referred to the CCMA or Labour Court for resolution.
- The person performs an essential service.
- The person is bound by an arbitration award.

## **Section 66**

This Section provides for the right to participate in secondary strikes in support of other employees.

- The main strike must be lawful, in terms of this Act, and 7 days notice of the secondary strike must be given.

## Section 67

- A strike or lockout which complies with this Act, is deemed protected. In turn, participating in these is not a delict, or breach of contract.
- The employer is not obliged to pay wages for the period of the protected strike/lockout, but if the remuneration includes amenities e.g. food/accommodation, these may not be withheld.
- An employee participating in a protected strike may not be dismissed; however, the employee could be dismissed for undertaking unlawful conduct during the protected strike.
- In addition, any such unlawful conduct may give rise to civil actions.

## Section 68

- The labour Court has jurisdiction to grant an interdict against non compliant strikes/lockouts.
- The party seeking the interdict must give 48 hours notice to the other party.

## Section 69

- A union may authorise its members to engage in peaceful protests. An employer may not unreasonably withhold permission for picketing on the premises.
- Any dispute concerning a picket may be referred to the CCMA, and if this fails, to the Labour Court.
- Pickets may be held in public places, off the premises of an employer, or (with employer permission) on the employer's premises.

## Section 76

- An employer may not engage a maintenance employee (i.e. one not involved in production) to perform production work during a protected strike.
- An employer may only recruit replacement labour, if the lockout is in response to a strike.

## Section 79

This Section deals with the general functions of a workplace forum.

These include:

- Promoting the employees' interests (whether or not union members).
- Consulting with the employer on various matters, e.g. restructuring of business,

- dismissals or retrenchments (Section 84).
- Joint decision making on various matters, e.g. disciplinary codes, workplace rules (Section 85).

## **Section 80**

- Any workplace with 100+ employees may have a Forum established.
- The representative union may apply to the CCMA for the establishment, subject to giving notice thereof to the employer.
- Where the establishment is concluded by a collective agreement, the provisions of this Chapter no longer apply.

## **Section 81**

- If a collective agreement empowers a union to negotiate on behalf of all employees, the union may apply in the prescribed manner, for the establishment.
- The union may select the Forum members.

## **Section 82**

- The Forum must have a constitution. The constitution must set out a formula for determining number of members, as well as procedure for election thereof.
- It must further establish terms of office for the members and grounds for vacation of office.
- It must establish procedure for conducting meetings.
- An employer must allow a Forum member reasonable time off, during office hours, to perform functions of the Forum.
- Union representatives and the employer may participate in Forum meetings.

## **Section 89**

- An employer is duty bound to provide a Forum with information necessary for it to perform the functions set out in Sections 85 and 86.
- This does not apply to legally privileged information, or information, which, may not be disclosed by law.
- Disputes regarding provision of information may be referred to the Commission for Conciliation, Mediation and Arbitration (CCMA).

## **Section 185**

- Every employee has a right against unfair dismissal.

## **Section 186**

- “Dismissal” includes:

- Termination of employment contract without reason.
- Failure to renew a reasonably expected contract of employment, or renewing it on less favourable terms.
- Refusal to reinstate a woman taking lawful maternity leave.
- An employee's forced resignation due to intolerable workplace circumstances.
- Reinstating some of a group of employees dismissed for a particular reason.

## Section 187

- "automatically unfair dismissal" includes:
- Dismissing an employee for participating in a protected strike.
- Dismissing an employee for refusing to work during a protected strike.
- Dismissing an employee for taking lawful action against an employer in terms of this Act.
- Dismissing an employee due to pregnancy.
- dismissing an employee due to unfair discrimination based on race, gender, religious belief, thought etc.

## Section 188

- A dismissal not automatically unfair, is nevertheless unfair if the employer fails to show that it was fair.

## Section 189

Where an employer contemplates dismissal on operational requirement grounds (retrenchment), he must consult with:

- the parties set out in a collective agreement;
- or the Forum;
- or a registered union with members in the workforce;
- or the employees.
- The consulting parties must endeavour to avoid dismissals.

## Section 192

- The employee must prove there was dismissal.
- The employer must prove the dismissal was fair.

## Section 193

- The labour Court, or CCMA may order the employer found guilty of unfair dismissal to reinstate or compensate the employee.
- Compensation would be awarded where the employee does not wish reinstatement, or the circumstances are such, that continued employment at the workplace is not reasonably practicable or intolerable.

## Section 194

- An employee who was unfairly dismissed may be awarded up to 12 months salary in compensation.
- An employee who was automatically unfairly dismissed may be awarded up to 24 months salary in compensation.
- Compensation would not be awarded for the period where the delay in hearing was due to the employee.

### **Unfair Labour Practices – Schedule 7**

This Part sets out to clarify the meaning of an unfair labour practice, and provides that this includes:

- Unfair discrimination e.g. towards gender, race, religion, creed etc.
- Unfair employer conduct, regarding promotion, demotion or training of an employee.
- Unfair suspension or disciplinary action short of outright dismissal.
- Failure to reinstate a former employee in terms of an agreement.
- This Part, however, allows positive discrimination, where this is an inherent part of a job (e.g. man job specifications).
- Disputes regarding unfair labour practices may be referred to the Commission for Conciliation, Mediation and Arbitration (CCMA).

Where this fails, the dispute may be referred to the Labour Court.

### **Code of Good Practice – Dismissal – Schedule 8**

This Schedule sets out to guide employers and employees on the key aspects of dismissal, and the reasons that may be acceptable.

- It includes discussion of:
- Fair dismissal.
- Fair disciplinary measures.
- Fair procedure.
- Maintenance of records.
- Dismissal for misconduct.
- Dismissal for poor conduct.
- Dismissal for incapacity.

### **National Environmental Management Act, 19 of 1998**

#### **Purpose**

To provide for co-operative environmental governance by establishing principles for decision-making on matters affecting the environment, institutions that will promote co-operative governance and procedures for co-ordinating environmental functions exercised by organs of state; to provide for the prohibition, restriction or control of activities which are likely to have a detrimental effect on the environment; and to provide for matters connected therewith.

#### **Preamble**

WHEREAS many inhabitants of South Africa live in an environment that is harmful to their

health and well-being;

- everyone has the right to an environment that is not harmful to his or her health or well-being;
- the State must respect, protect, promote and fulfil the social, economic and environmental rights of everyone and strive to meet the basic needs of previously disadvantaged communities;
- inequality in the distribution of wealth and resources, and the resultant poverty, are among the important causes as well as the results of environmentally harmful practices;
- sustainable development requires the integration of social, economic and environmental factors in the planning, implementation and evaluation of decisions to ensure that development serves present and future generations;
- everyone has the right to have the environment protected, for the benefit of present and future generations, through reasonable legislative and other measures that -
  - prevent pollution and ecological degradation;
  - promote conservation; and
  - secure ecologically sustainable development and use of natural resources while promoting justifiable economic and social development;
- the environment is a functional area of concurrent national and provincial legislative competence, and all spheres of government and all organs of state must co-operate with, consult and support one another;

Some important further provisions of the preamble are the following:

- National environmental law is brought in line with the Constitutional human rights provisions.
- The responsibility of the State and everyone else to respect, protect, promote and fulfil the social, economic and environmental rights of us all.
- The Act provides the framework for integrating good environmental management into all development activities.
- The Act is intended to facilitate the enforcement of environmental laws by civil society.

## **Key elements of the Act**

### **Section 2**

This section sets out the principles, which will apply throughout South Africa to the actions of all organs of state that may significantly affect the environment.

These include:

- priority for human concerns.
- social, environmental and economical sustainability of development.
- minimization of disturbances, pollution and wastage.
- anticipation of negative impacts by risk adverse approach.
- wide participation in environmental governance and enforcement.
- respect for international obligations.

## **Section 28**

If a company causes, significant pollution or degradation of the environment it must take reasonable measures to prevent the pollution or degradation continuing or re-occurring.

Such measures are listed in the Act, and include:

- investigation of impacts.
- information to employees regarding impact posed by their work.
- modification of polluting/degrading activities.
- elimination of sources of pollution / degradation.
- remedying of effects of pollution / degradation.
- Should a person fail to comply, or inadequately comply with a directive, above, the Director-General or the Province may take reasonable measures to remedy the situation and recover the cost

## **Section 29**

- Persons refusing to do environmentally hazardous work: may not be dismissed, disciplined, prejudiced or harassed because of their refusal, nor may action be taken against them for such refusal.

## **Section 30**

The person responsible for an incident must immediately:

- take all reasonable measures to contain and minimise the environmental, health and safety effects of the incident;
- undertake clean-up procedures;
- remedy the effects of the incident and
- assess the immediate and long-term environmental and health effects of the incident.

The incident must be reported immediately to the relevant municipal or provincial authority, and:

- the local SAPS.
- the local fire prevention services, and
- all persons whose health may be affected by the incident.

The report should include:

- The nature of the incident.
- Any public health, safety and property risks posed by the incident.
- The toxicity of substances or by-products released by the incident.
- Any steps that should be taken to minimise or avoid the environmental effects of the incident.

### **Section 31**

Every person is entitled to have access to information held by organs of state regarding:

- the state of the environment,
- actual and future threats to the environment,
- emissions to air, water or soil, and
- the production, handling, transportation, treatment, storage and disposal of hazardous wastes and substances.

Organs of state are entitled to have access to such information to carry out their responsibilities in terms of this Act or any other law concerned with the protection of the environment or the use of natural resources.

- A request for information may be refused if:
- it is manifestly unreasonable or formulated in too general a manner.
- the information may negatively impact on national security or public order.
- the information will compromise the protection of commercially confidential matters or personal privacy.
- the granting of information endangers or further endangers the environment .
- Whistle-blowers are not criminally or civilly liable and may not be dismissed, disciplined, prejudiced, threatened or harassed.

### **Section 32**

- Any person may seek relief in a court of law against any breach or threatened breach of any provision governing environmental protection.
- If the person is successful, the court award may include costs of suit, they have incurred, against the defending party.
- Courts can award both criminal and civil relief.

### **Section 33**

- Any person may, on the grounds of public interest, or environmental protection, institute prosecution against a breach, or threatened breach of any provision governing environmental protection.

### **Section 34**

- A person convicted of an offence under any provision listed in Schedule 3 may be liable for damages suffered by an organ of state, including likely costs of rehabilitation.
- The court may assess the monetary value to be gained by the offence, and, in addition to any other punishment imposed in respect of that offence, order compensation or fine equal to the amount assessed.
- The court may, upon application by the public prosecutor or organ of state, order the person to pay the reasonable costs of the investigation and prosecution of the offence.
- A director of a firm shall himself or herself be guilty of the offence and liable on conviction to the penalty specified in the relevant law (Schedule 3).
- Proof of the offence by the firm is *prima facie* evidence that the director is guilty.
- Any manager, agent, employee or director may be convicted and sentenced in addition to the employer or firm.

## Section 35

- The Minister of Environmental Affairs and Tourism, designated MEC's and local authorities may enter into co-operation agreements with a company for the purposes of promoting compliance with the principles laid down in the Act.
- The aim of the agreement will be for a company to improve the standards laid down by the law for the protection of the environment and to set measurable targets for fulfilling these undertakings.

## Section 36

- The Minister of Environmental Affairs and Tourism may purchase or expropriate, subject to compensation, any property for environmental or other purpose under this Act. The purpose must be in the public interest.

### The evolution of risk management activism factors

#### Labour Unions

Union influence has been exerted not only in direct negotiations, but also through financing or supporting of safety and health research, lobbying for safety and health legislation, and backing of liability suits filed by union members. Today's union activity in safety and health is greater than ever before and most companies have health and safety agreements with the unions representing the workforce.

#### Societal demands (consumerism)

Demands from the broader society are having a significant influence on safety and health management. The goals may be clustered around a concern for the “quality of life” of everyone concerned.

As Alvin Toffler observed in *The Adaptive Corporation*, “Corporate retorts to the New Consumerism based on traditional economic arguments cut no ice - for the very good reason that the movement’s goals are a saner, more civilised society, not necessarily a richer one.”

Consumers have emphasised growing concern over dangers associated with manufactured products. Many products with formerly widespread common uses have been banned or severely restricted. Food additives, appliances, sleepwear, furniture and even soft drink containers have all been the targets of restrictions or bans.

In the case of the containers, for instance, the suspicion of birth defects arising from use of acrylonitrile in a plastic bottle resulted in the Monsanto Company’s closure of four plants, the layoff of 1 000 workers, a profit reduction of fifteen million dollars, and a projected one-year sales loss of one hundred million dollars.

Environmental protection groups have also become more active over recent years and the effects of business operations on the environment is being closely monitored by such groups.

### **Legal requirements and liabilities**

Every business is exposed to legal liability on a daily basis through the acts or omissions of its executives. The exposure could either be to civil or to criminal liability. This does not mean that executives are safeguarded against personal liability. Many statutes specifically provide for individual executive responsibility. It is therefore imperative that the risk is identified and managed.

Typical laws that have an influence on the management of risks in businesses are :

- Occupational Health and Safety Acts.
- Environmental Conservation Acts.
- Water Acts.
- Hazardous Substances Acts.
- Compensation for Occupational Injuries and Diseases Acts.
- Soil Conservation Acts.
- Physical Planning Acts.

In addition to the above, legislative bodies have responded to the actions of individuals, courts and influence groups. They have started inquiries and hearings, or made new laws and standards where they perceived a need or desire.

### **Technology**

Technology has created a need for extensive, dynamic risk control systems. In the past 50 years, scientists and engineers have developed more new equipment and processes that were developed in the preceding thousands of years. Many tasks are becoming increasingly complex and demanding and the potential consequences of errors more costly. Also, it has been shown that virtually total safety is possible ... if one is able and willing to pay the price in resources.

The psychological effect of these advances has seen greater insistence on safety where risks had previously been assumed. People now feel that things can and should be safe. As a result, management decision-making has been broadened to encompass the potential applications of sophisticated techniques, such as a system safety analysis and a concern for the entire useful life of a product.

In brief, technological progress suggests these two vital considerations for management leaders: first, potential safety and health problems are being generated faster than ever before; second, no problem in the workplace is too big or complex to master through professional management.

### **Workforce changes**

The character of the workplace has undergone great changes in the last decade. Regulations exist requiring employment opportunity without bias to race, religion, sex, etc. The economic need to have an added earner in the family, has also brought more women into work environments which were once exclusively male precincts.

Other regulations require the employment of the handicapped within their limitations. In addition, today's workers tend to be better educated and informed, and they expect more of their work than just a livelihood. Each of these factors introduces new demands and new challenges for risk management.

### **Medical research**

A relatively recent and widespread cause of concern has been the toxic substances that create health hazards in the workplace. For many years, industry has conducted research on the effects of these toxic substances, and industrial standards organisations have recommended controls and exposure limits.

But general lack of management response has led governmental groups to take over standards-settings as a logical addition to their own research and enforcement. Also, medical researchers, both those in governmental agencies and those working on governmental grants, are focusing their attention more and more on physical and health hazards in the workplace.

Research is helping to define limits on exposures in those cases where problems can be avoided by limiting the amount or duration of exposure. More importantly, research is identifying substances and by-products which have irreversible effects and, in some cases, are carcinogenic.

The enlarged list of diseases which may be work-related presents an enlarged list of liabilities possibly causing harm to workers' physical and/or mental health. The consequences of new facts through medical research have sometimes been swift and drastic. Governmental control has abruptly closed down many primary product lines, dictating a total change in the objectives of the affected businesses.

In many cases research findings have also dictated expensive recalls of products when user experience has revealed hazards not acceptable to the people, or the legislators who represent them.

### **International codes and standards**

Many organisations are being pressurised by clients, employees, the community and government to comply to international codes and standards such as:

- ISO 9000 (quality).
- ISO 14000 (environment), and
- OHSAS 18000 (health and safety).

This brings with it additional cost and effort from management and employees.

### **Activity**

#### **Safety activism factor exercise.**

**Complete the table below by rating the most important factors facing your organisation in the next 10 years.**

**1 – most critical**

**7 – least critical**

<b>Safety Activism Factors</b>				
<b>What would you rate as the most important factors facing your organisation in the next 10 years?</b>			<b>Priority</b>	
	<b>Factors</b>	<b>Comment</b>	<b>Priority</b>	
			<b>Individual</b>	<b>Group</b>
1	<b>Labour unions</b>			
2	<b>Societal demands</b>			
3	<b>Legal requirements and liabilities</b>			
4	<b>Technology</b>			

5	<b>Workforce changes</b>			
6	<b>Medical research</b>			
7	<b>International codes and standards</b>			

## Corporate governance

### Introduction

Corporate governance was formalised in South Africa in 1994 by the publication of the King Report.

The Code of Corporate Governance, established by the King Report III, went beyond the financial and regulatory aspects of corporate governance in advocating an integrated approach to managing a company, based on principles of good financial, social, ethical and environmental practice.

### Summary of the King III Report

### Application of the Code

The Code applies to the following enterprises referred to as affected companies.

- All companies with securities listed on the JSE Securities Exchange S.A.
- Banks, financial and insurance entities as defined in various legislation regulating the S.A financial services sector.
- Public sector enterprises and agencies that fall under the Public Finance Management Act including any State or administration in national, provincial or local government.

### 7 characteristics of good corporate governance

The Code outlined 7 characteristics of good corporate governance, as follows:

- Discipline – commitment by a company's senior management to adhere to behaviour that is universally recognised and accepted to be correct and proper.
- Transparency – a measure of how good management is at making necessary information available in a candid, accurate and timely manner.
- Independence – the extent to which mechanisms have been put in place to minimise or avoid potential conflicts of interests.

- Accountability – mechanisms developed to ensure individuals or groups in a company who make decisions are held accountable.
- Responsibility – pertains to behaviour that allows for corrective action and for penalising mismanagement.
- Fairness – taking into account all those that have an interest in the company and its future. The rights of various groups have to be acknowledged and respected.
- Social responsibility – awareness of and response to social issues, placing a high priority on ethical standards. A good corporate citizen is non-discriminatory, non-exploitative, and responsible with regard to environmental and human rights issues.

## **Chapters of the Code**

### **Chapter 1 - Boards and Directors.**

This section covers the duties and responsibilities of the board of directors and is the focal point of the corporate governance system. Some pertinent points are :

- The board *must identify key risk areas* and key performance indicators.
- The board *must give strategic direction* to the company.
- The board should have access to all company information.

The board should consider developing a corporate code of conduct.

### **Chapter 2 – Corporate citizenship: Leadership, Integrity and Responsibility**

Every company should report at least annually on the nature and extent of its social, transformation, ethical, safety, health, and environmental management policies and practices.

### **Chapter 3 – Audit Committees**

As per this Section, an effective internal audit function should provide:

- Assurance that the management processes are adequate to identify and monitor significant risks.
- Confirmation of the effective operation of the established internal control systems.
- Credible processes for feedback on risk management and assurance.

## **Chapter 4 – Risk Management**

Companies should develop a system of risk management and internal controls to demonstrate that the company's key risks are being managed.

- The board is responsible for the total process of risk management.
- Management is accountable to the board for designing, implementing and monitoring the process of risk management.
- The board should set the risk strategy policies in place.
- The board must decide the company's tolerance for risk. The board must ensure that the company has implemented an effective *ongoing process to identify risk, to measure risk and to manage risk*.
- The board must at least annually ensure that a systematic, documented assessment of the process and outcomes surrounding key risks is taken.

Companies should develop a system of risk management and internal controls with a view to enhancing shareowners' interests.

Reports from management to the board should provide a balanced assessment of significant risks and the effectiveness of the system of internal control in managing those risks.

Any significant control failings or weaknesses should be covered in these reports, including the impact they had on the company and the actions taken to rectify them.

## **Chapter 5 – Internal Audit**

This section details the distinction between Auditing and Non-audit Services. Reporting on Financial and Non-financial Information is also addressed in this section.

## **Chapter 6 – Integrated sustainability reporting and disclosure**

Companies should be ready where practicable, to enter into dialogue with investors based on constructive engagement and the mutual understanding of objectives.

## **Chapter 7 – Compliance with laws, regulations, rules and standards**

It is the board's duty to present a balanced and understandable assessment of the company's position in reporting to stakeholders.

Reports and communications must be made in the context of growing society demand for greater transparency and accountability from companies regarding their non-financial matters.

## **Chapter 8 – Managing stakeholder relationships**

This section simply states that all boards and individual directors have a duty and responsibility to ensure that the principles set out in this Code are observed.

## **Chapter 9 – Fundamental and affected transactions**

This section simply states that all boards and individual directors have a duty and responsibility to ensure that the principles set out in this Code are observed.

### **Summary of the Turnbull Report**

In 1999 the Institute of Chartered Accountants of England and Wales published a Combined Code, commonly known as the Turnbull Report. The Code is intended to assist companies listed on the London Stock Exchange, particularly with regard to maintenance of internal control.

#### **Objectives of the Code**

Objectives of the Code are as follows:

- Reflect sound business practice, whereby internal control is integrated into the business processes.
- Remain relevant over a period of time, by evolving, in line with changing business trends.
- Be capable of implementation in any company, having regard to its circumstances.

#### **Emphasis on internal control**

The Code places emphasis on the maintenance of internal control, for various reasons:

- Internal control is essential for the management of significant risks against fulfillment of company objectives.
- Internal control is essential for safeguarding shareholders'; investments in the company, as well as its assets.
- Internal control facilitates the effectiveness and efficiency of company operations, while maintaining compliance with laws and prescribed standards.
- Internal financial controls are essential for minimising a company's exposure to unnecessary financial risks, as well as loss of assets or fraud
- Internal control requires regular review of the risks facing a company, insofar as these may change along with the continual evolution of a company.

## **Internal control requirements**

### **Responsibilities**

The Code requires a company's board of directors to establish policies reflecting the internal controls. The policies and systems of controls should be based on detailed and systematic consideration of the risks facing the company.

Management is responsible for identifying the risks to be considered by the board and for developing a system for implementing the internal controls.

Employees are responsible for implementing the internal controls, and must have the necessary knowledge, skills etc.

### **System elements**

An internal control system embodies all the policies, processes, and tasks etc., which:

- Enable efficient response to the significant risks faced by the company.
- Ensure quality of internal and external reporting.
- Ensure compliance with laws and prescribed standards.

The internal controls can reduce, but not necessarily eliminate risks faced by a company, in particular risks posed by human beings, e.g. poor judgment. As such, the internal control system is deemed to provide reasonable, but not absolute assurance that a company will not be hindered by risks to its business.

## **Reviewing internal control systems**

### **Responsibilities**

The board is ultimately responsible for review of the internal control system. It must report on such reviews in the company's annual report.

Management is accountable for monitoring the internal control system, and reporting to the board that it has done so. The reports must include a balanced evaluation of the risks facing the company and the internal controls which address these.

The board is responsible for setting the scope and nature of the regular reviews and annual assessments.

### **Review process**

The board should regularly review reports received on the internal control system.

The board should furthermore undertake an annual assessment of the internal control system (for inclusion in the annual report).

The reviews and assessment must encompass all types of significant risks.

If a failure of internal control is detected, the system should be reviewed to determine the cause of the failure, and how the system can deal with the failure.

## **Summary of the Sarbanes Oxley Act**

### **Introduction**

The Sarbanes-Oxley Act of 2002 was promulgated in the USA with the intent of addressing some of the issues brought to light during corporate governance incidents involving *Enron* and *Arthur Andersen*.

The law has far reaching effects into the financial reporting systems of American companies subject to Security Exchange Commission (SEC) reporting requirements.

### **Main features of the Act**

In addition to establishing records retention requirements for audit papers, the Act creates a new Board (Public Company Accounting Oversight Board) for accounting firms auditing publicly traded companies.

The Act also addresses the following:

- Auditor independence.
- Corporate responsibility at publicly traded companies.
- Financial disclosures of publicly traded companies, and
- Conflicts of interests of financial analysts.

The Act also creates protections for "whistleblowers" applicable to private and public companies and imposes new criminal penalties relating to fraud, conspiracy, and interfering with investigations.

The Act addresses compliance management from a high perspective but does not indicate whether SHE performance is excluded. US Scholars, however, believe the Act will require disclosure of a series of company operations, including safety, health, and the environment, in addition to pure financial reporting.

### **Extracts from the Act**

#### **Title I - Public Company Accounting Oversight Board**

This Title (Section) deals with the formation of, and powers of the Board. The functions include:

- Register public accounting firms.

- Establish, or adopt quality control and other standards relating to the preparation of audit reports.
- Conduct inspections of accounting firms.
- Conduct investigations and disciplinary proceedings, and impose appropriate sanctions.
- Perform such other duties or functions as necessary or appropriate.
- Enforce compliance with the Act, the rules of the Board, professional standards, and the securities laws relating to audit reports and the obligations and liabilities of accountants.

In order to audit a public company, a public accounting firm must register with the Board.

## **Title II – Auditor independence**

It is unlawful for a registered public accounting firm to provide any non-audit service to an issuer at the same time that an audit is being conducted.

## **Title III –Corporate Responsibility**

Various obligations and burdens are placed on the directors of a company:

- The CEO and CFO of each company shall prepare a statement to accompany the audit report to certify the appropriateness of the financial statements and disclosures contained in the report.
- It is unlawful for any officer or director to take action to mislead any auditor, for the purpose of rendering the financial statements materially misleading

The Securities Exchange Commission (SEC) may prohibit, any person from acting as an officer or director of a company if the SEC has found that such person's conduct "demonstrates unfitness" to serve as an officer or director of any such issuer.

## **Title IV – Enhanced Financial Disclosures**

This Section deals with the quality of an audit report:

- Each financial report shall reflect all material correcting adjustments identified by a registered accounting firm.
- The SEC shall issue rules providing that pro forma financial information must be presented so as not to contain untrue statements or omit to state material facts.

A company's annual report shall contain an internal control report, which shall:

- State the responsibility of management for establishing and maintaining an adequate internal control structure and procedures for financial reporting; and

- Contain an assessment, as of the end of the issuer's fiscal year, of the effectiveness of the internal control structure and procedures of the issuer for financial reporting.

Each auditor shall attest to, and report on, the assessment made by the management of the issuer.

### **Title VIII: Corporate and Criminal Fraud Accountability Act of 2002**

- It is a felony (offence) to destroy or create documents which will mislead a federal investigation.
- Auditors are required to maintain "all audit or review work papers" for five years.
- The statute of limitations on securities fraud claims is extended to the earlier of five years from the fraud, or two years after the fraud was discovered, from three years and one year, respectively.
- Employees of companies and accounting firms are extended whistleblower protection that would prohibit the employer from taking certain actions against employees who lawfully disclose private employer information to, among others, parties in a judicial proceeding involving a fraud claim.

A new crime for securities fraud provides for penalties of fines and up to 10 years imprisonment.

### **Title IX - White Collar Crime Penalty Enhancements**

- Maximum penalty for mail and wire fraud increased from 5 to 10 years.
- Creates a crime for tampering with a record or otherwise impeding any official proceeding.
- SEC given authority to seek court freeze of extraordinary payments to directors, offices, partners, controlling persons, agents of employees.
- SEC may prohibit anyone convicted of securities fraud from being an officer or director of any publicly traded company.
- Financial Statements filed with the SEC must be certified by the CEO and CFO. The certification must state that the financial statements and disclosures fully comply with provisions of the Securities Exchange Act and that they fairly present, in all material respects, the operations and financial condition of the issuer.

Maximum penalties for violations of this section are a fine up to \$5,000,000 and/or imprisonment up to 20 years

### **Corporate fraud and accountability**

It is a crime for any person to tamper with an object to be used in official proceedings or hinder the official proceeding, and may incur up to 20 years in prison and a fine.

The SEC is authorized to freeze the payment of an extraordinary payment to any director, officer, partner, controlling person, agent, or employee of a company during an investigation of possible violations of securities laws.

The SEC may prohibit a person from serving as an officer or director of a public company if the person has committed securities fraud.

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