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FACT SHEET

FUTURE WORLD OF WORK SERIES:

EVOLVING DEFINITION OF
EMPLOYEES

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INTRODUCTION

This factsheet is the second installment in the series exploring the Future World of Work, serving as a prelude to the HR community engagements that the SABPP is planning for on the **'HR Standards in the Future World of Work'**. The previous factsheet explored the future forms of organisations. The present factsheet explores the evolving definition of employees in the future world of work and the future forms of organisations therein. The factsheet first discusses the present definition of 'employee' within the statutory framework and the differentiation from 'independent contractor'. It then explores how these categories and their boundaries are being challenged in the evolving world of work through the debates on, and status of, platform workers. This demands critical reflection by the HR practitioner on the question of the nature or types of employment and employment relationships in the evolving world of work. The factsheet uses the discussion on the reinvention of organisations, work, and jobs to explore this. Through the discussion, the factsheet highlights the different perspectives that can serve as lenses for the HR practitioner to navigate, engage with, and make professional judgements on employment and the employment relationships in the present and future.



DEFINING EMPLOYEES AND EMPLOYMENT WITHIN THE STATUTORY FRAMEWORK

Historically, there have been continuous deliberations and contestations on the definition of ‘employees’, more specifically, on how one differentiates employees from ‘independent contractors’ and what is entailed in the employment relationship. This includes policy debates on labour relations as well as stakeholder agreements and disagreements on the nature and the applicability of (1) labour rights, (2) fair labour practices and due process, (3) protections on pay, working conditions, and unfair dismissals, and (4) safety nets afforded by the national legislative framework. The stakeholders are not just the presumptive ‘employer’ and ‘employee’. They include national states, employers and their associations and lobby groups, trade unions and other labour and lobby groups, and other interested public parties including multilateral organisations and forums such as the International Labour Organisation (ILO). Thus, labour relations and the attendant rights, regulation, and recourse need to be considered at the macro (global and national) and micro (industry, organisational and individual) levels.

There are two prominent bases of differentiating and defining the two categories, that of employee and independent contractor, in the legal context. These are (1) the form of contract and (2) the nature of employment *relationship* in practice. The first refers to whether the contract is for the rendering of personal services such as providing one’s labour at the discretion of the employer (*locatio conductio operarum*) or the delivery of a specific work, task, or result (*locatio conductio operis*). The second focuses on the actual relationship and is not circumscribed by the defined contract and the terms therein. The Labour Relations Act (LRA) provides an example of the factors considered on, or legal tests of, the nature of the relationship and, consequently, whether a person is an employee or independent contractor. These are discussed on the right.

SOUTH AFRICAN CONSTITUTION AND LEGISLATIVE FRAMEWORK

The post-Apartheid legislative framework has sought to deliberately reform labour relations in South Africa to address the historical disparities and inequities and “give effect to various constitutionally entrenched labour rights” (Venter, 2003, p148). This includes the provision in section 23 of the Constitution: “Everyone has the right to *fair* labour practices” (*italics added*). For this reason, the legislative framework aims to be comprehensive, “regulate *all* facets of the labour relationship” (*italics added, ibid*), and give voice and agency to individuals. It is within this framework that employees and their differentiation from independent contractors is defined. The relevant legislations include the:

- Labour Relations Act 66 of 1995 (LRA)
- Basic Conditions of Employment Act 75 of 1997 (BCEA)
- Employment Equity Act 55 of 1998 (EEA)
- Skills Development Act 97 of 1998 (SDA)
- Occupational Health and Safety Act 85 of 1993 (OHSA)
- Compensation for Occupational Injuries and Diseases Act 130 of 1993 (COIDA), and
- Unemployment Insurance Act 63 of 2001 (UIA).

The definition of an employee within the LRA and the attendant applicable factors or legal tests of the employment relationship is referenced predominantly. These are cited in the textbox on the next page.

Section 213 of the LRA defines an employee as:

- a. any person, excluding an independent contractor, who works for another person or for the State and who receives, or is entitled to receive, any remuneration; and
- b. any other person who in any manner assists in carrying on or conducting the business of an employer, and “employed” and “employment” have meanings corresponding to that of “employee”;

It elaborates in section 200A on the presumption as to who is an employee:

1. (1) Until the contrary is proved, a person, who works for or renders services to any other person, is presumed, regardless of the form of the contract, to be an employee, if any one or more of the following factors are present:
 - a. the manner in which the person works is subject to the control or direction of another person;
 - b. the person’s hours of work are subject to the control or direction of another person
 - c. in the case of a person who works for an organisation, the person forms part of that organisation;
 - d. the person has worked for that other person for an average of at least 40 hours per month over the last three months;
 - e. the person is economically dependent on the other person for whom he or she works or renders services;
 - f. the person is provided with tools of trade or work equipment by the other person; or
 - g. the person only works for or renders services to one person.

However, one needs to consider the nuances and differences in the definition of employees and employer obligations across the different legislations. For example, the definition in relation to employment; learning, training, and development; and occupational health and safety. The National Economic Development and Labour Council’s (NEDLAC, 2006) Code of Good Practice does provide some guidance in navigating and interpreting the legislations, as well as surfacing the variety of employment relations in the market, which include “disguised employment, ambiguous employment relationships, atypical (or non-standard) employment and triangular employment relationships” (p4).

The evolving world of work is challenging the boundaries and legal tests of the nature of the employment relationship. For example, the place of work may not always help to determine the nature of the employment relationship given the possibility of remote work and flexible work practices. The NEDLAC (2006) Code illustrates how one needs to take a holistic perspective. It states:

“The fact that a person does not work at the employer’s premises is not necessarily inconsistent with an employment relationship. It is conceivable that homeworkers, working from their own premises or those of fellow employees, are employees because of factors such as the *extent of control* that the employer exercises over the *manner in which they work*” (italics added, p23).

Similarly, one finds the principle of Dominant Impression Test (DIT) in common law where one needs to weigh different factors such as those specified in the LRA (cited in the above textbox). The NEDLAC Code provides descriptions of the factors that are frequently cited in court judgements, which are presented below.

EMPLOYEE

1. Object of the contract is to render personal services.
2. Employee must perform services personally.
3. Employer may choose when to make use of services of employee.
4. Employee obliged to perform lawful commands and instructions of employer.
5. Contract terminates on death of employee.
6. Contract also terminates on expiry of period of service in contract.

INDEPENDENT CONTRACTOR

Object of contract is to perform a specified work or produce a specified result.

Independent contractor may usually perform through others.

Independent contractor must perform work (or produce result) within period fixed by contract.

Independent contractor is subservient to the contract, not under supervision or control of employer.

Contract does not necessarily terminate on death of employee.

Contract terminates on completion of work or production of specified result.



THE STATUS OF PLATFORM WORKERS

There are heated public debates on whether platform and gig workers are employees or independent contractors¹ and, consequently, if they can be accorded labour rights, and voice and recourse for unfair labour and/or work practices. There are recent examples of this in Silicon Valley, which take place against the backdrop of the challenges to the lack of diversity within, and the labour practices of, 'tech firms', including the ability to organise and form employee unions. See, for example, the ***New York Times news story*** on worker activism in Silicon Valley and the journey of forming a union by full-time employees as well as contractors in one tech firm.

The most recent example is that of the California vote on, and approval of, 'Proposition 22'. It allows app-based ride-share and delivery drivers to be defined and treated as independent contractors. This means that as independent contractors they are not entitled to labour and compensation protections accorded under Californian state law.

"In voting to support [Proposition 22], Californians rejected the principles outlined in a 2018 State Supreme Court ruling and enshrined in a 2019 state law that said *workers who performed tasks within a company's regular business — and were controlled by the company and did not operate their own firms — must be treated as employees*. Under Prop. 22, gig workers are exempted from these rules and can continue to work *independently*" (italics added, Conger, 2020).

Two issues are highlighted in the California example, that of control and integration within the company and its regular or core business. The same issues may also apply to talent platforms. As with the app-based ride-share and delivery drivers, it is not just the simple algorithmic matching of supply and demand of employer-clients and so-called 'free agents'. In the case of the talent platforms, one does find

certain platforms evolving to develop a management system and member value proposition for both the employer-clients and free agents. The value proposition for free agents include brand and talent affiliation, mentoring, knowledge sharing and engagement, performance ranking and reward, career ladders and development, learning and development, and retention (Boudreau, Jesuthasan, & Creelman, 2015). These are the traditional HR value chain and employee life cycle interventions within firms, and the value proposition is akin to the employee value proposition that firms provide. Could these be interpreted as control and integration?

What is emerging then is a confluence of HR value propositions, value chains, and interventions across organisational and platform boundaries. As will be discussed below, an ecosystem perspective challenges the traditional understanding of the firm, contracts therein, their value chains, and talent. This perspective was explored in the ***previous factsheet***, part of the future world of work series, and in the factsheet on the ***innovation and disruption dilemmas for firms and their HR functions***.

The discussion thus far on the Constitution, the legislative framework, and the legal differentiation and definition of employee and independent contractor provides the HR practitioner a **constitutionalist and legal rights perspective** as well as **democratic perspective** on employment and the employment relationship. The discussion that follows below explores the **ecosystem** as well as the **market** and **commercial perspectives** on employment and the employment relationship, where the imperatives are the firm's market creation or position, financial growth and sustainability, and value to shareholders respectively. These perspectives align the HR practitioner to the business strategy and the EXCO's shareholder mandate as mediated through the Board². The above perspectives, then, provide the HR practitioner with diverse lenses to navigate, engage with, and make professional judgements on employment and the various and possible employment relationships. This includes the complexities, contestations, and contrary demands at the micro and macro levels, and how HR practitioners position themselves and the **positions**³ they take up in relation to these.

1. In the UK this includes debates on a third category, that of 'workers', and the use of 'zero-hour contracts', where the firm uses these contracts for flexible labour and are not required per the contract to guarantee the worker a minimum number of hours of work per week and pay. See the ***case in South Africa*** on the legal challenges to the zero-hour contract in a particular firm.
2. The debate on shareholder versus stakeholder value as well as shareholder versus stakeholder capitalism poses critical questions around the Board and EXCO mandate.
3. See the factsheet on ***HR's place in the fourth industrial revolution*** on the various positions HR practitioners can possibly take up within organisations.

DEFINING EMPLOYEES AND EMPLOYMENT WITHIN THE CHANGING WORLD OF WORK

The many discussions on the future world of work point to the changes in employment and the employment relationship. Certain authors see it as the acceleration of the pace, extent, and impact of historical drivers of change, while others see it as a new transformative shift resulting from the fourth industrial revolution. Boudreau et al (2015), for example, suggest there is a long historical arc of the changes in employment and the employment relationship; arguing that job simplification, automation, employee/worker substitution, contractual flexibility, and the casualisation of labour are not new. What is new is the form thereof as the world of work is reinvented.

The drivers of the change include the *reinvention* of organisations, work (tasks or personal services rendered), jobs (the aggregation and organisation of tasks or personal services), workforce (with various forms of employment and employment relations), and workplace (sites of work or personal services) (Boudreau et al, 2015; Jesuthasan and Boudreau, 2018; Yeung and Ulrich, 2019). These reinventions have been variously explored in the previous SABPP factsheets in 2020.

REINVENTING ORGANISATIONS

The reinvention of organisations as ecosystems challenges the traditional theory of the firm and, one could argue, that it consequently challenges the traditional notions of contracts, relationships including employment relationships, the boundaries thereof, and how work is managed. As noted in the **previous factsheet**, the focus shifts to the capabilities of the ecosystem as a whole and the development and management thereof. The notion of an ecosystem does seem to question the ideas of pure independence of contractors and freedom

of agents. Here, one could also consider the platform and 'new economies' within which the ecosystems are embedded; more precisely, the ubiquity and monopoly of intermediary platforms owned by the large tech firms and other venture capital-backed firms. Thus, if one substitutes 'ecosystem' for 'firm', then does it mean that the legal test of working for or rendering services to one person/entity needs to be relooked at? How does the test reconcile employees with 'side hustles' and/or their own 'side businesses', especially with remote and flexible work practices? Does an organisation have control over an employee's posts and actions on platforms such as LinkedIn and Twitter?

The challenge and opportunity the reinvention presents are that of reimagining the HR value chain and employee life cycle. Boudreau et al (2015) point out that HR is embedded and "steeped in the language of employment" (p178) and the internalised employee lifecycle. This means that the transition from leading *employees* to leading *work* and *multiple stakeholders* and *relationships* will be a challenging one for HR and firms.

One of the difficult questions the above discussion poses is whether the HR function needs to be reinvented as well, including the people and work practices and the management thereof in organisations or rather the ecosystem. Does it require a transformation in the HR profession (including the systemised knowledge defining the profession and the standards of good people practices) as well as the reimagining of the HR occupation and capabilities (including competencies and competence)? Does HR need to critically re-examine its core purpose, values, and principles that inform it? Or should HR inform and shape the reinvention of organisations in accordance with its present core purpose, values, and principles?

REINVENTING WORK AND JOBS

Jesuthasan et al (2018) and Bourdreau et al (2015) point out how firms are “deconstruct[ing] work” (p53), that is, disaggregating or unbundling tasks and work. This also means unbundling tasks and work from its aggregation and organisation in traditional jobs and occupations and exploring new ways of organising these. They point out that there are firms that are currently disaggregating tasks and work which allows these to be distributed, dispersed, and managed across internal talent and external talent platforms. They argue that other firms need to consider this to remain competitive and need to also consider the possibility of automation of repetitive, independent, and/or physical work or tasks where possible across these platforms. The reason is that this can help firms address skills shifts and gaps where and when required, providing firms with the flexibility and agility needed to create value and remain competitive. However, the authors also acknowledge that it could lead to the casualisation of ‘work’ and ‘workers’. This means that the casualisation could also make the category of employee redundant and make workers commodities.

The reinvention of work and jobs mean that there is no clear-cut, stable, and exhaustive job description, career pathing and development, and reporting lines for example. These are replaced by broad and diverse set of roles, flexible deployment, just-in-time development, and outcomes-based and multiple forms of reporting based on broad Objectives and Key Results (OKRs). Together with the introduction of project, decentralised and autonomous teams as well as firms as ecosystems, as discussed in the *previous factsheet*, the reinvention of work and jobs seems to blur the line of employee and independent contractor. It leads to many challenging questions and dilemmas. What is the limit of the flexible deployment and will it eventually lead to flexible contracts? Is the shift to OKRs creating a blend of employee and independent contractor as per the earlier discussion on different contracts? Is there now a demand for employees to be internal entrepreneurs as well? Is the burden of maintaining employability now fully transferred to the individual? Can this model of internal entrepreneurs or intrapreneurs and project-based work be generalised to the entire workforce and the

different types of work? Or will the unintended outcome of the disaggregation into specific tasks and resulting job simplification or elimination be the commodification of some workers as specific, time-bound skills?

As noted previously, these reinventions pose challenges and opportunities. One possible way to approach these is to consider the concept of descent work. The May 2020 factsheet on workforce transitions explored the ILO’s human-centred agenda for the future of work, an agenda of descent and sustainable work. The factsheet also explored the World Economic Forum’s (WEF, 2020) Charter of Principles for Good Platform Work. The WEF identifies the following issues for gig and platform workers: reasonable pay, social protection, safety nets, safety and wellbeing, fair working conditions, and having voice in decisions.

“Digital work/service platforms can offer affordable services to consumers, allow companies and clients greater opportunities to access talent, and provide flexible opportunities for earning income. But the rapid adoption of technology, innovation in business models and the diverse ways in which people work through platforms *pose challenges for the current rules and laws governing work and safety nets*” (italics added, WEF, 2020)

The citation of the above issues returns one full circle to the earlier discussion on the constitutionalist, legal rights, and democratic perspectives. As noted before, the South African legislative framework aims to be comprehensive, “regulate *all* facets of the labour relationship” (italics added, Venter, 2003, p148), and give voice and agency to individuals. The critical point is the necessity of stakeholder consultation and participation in organisation’s decisions. The challenge is how to evolve the legislative framework and the reinvention of organisations, work, and jobs to enable value creation and descent and sustainable work. How do you enable and regulate for fair practices but not hinder the evolving world of work, including the confluence of HR value propositions, value chains, and interventions across the blurring organisational and platform boundaries?

CONCLUSION

The future world of work entails fundamental changes in the anatomy and physiology of organisations and how work is done, which has implications for who does the work and the status of their relationship to the organisation. The factsheet explores the reinvention of organisations, work, jobs, and the workplace, and how these present both challenges and opportunities. The HR profession and practitioner can play an active role in helping to shape the future world of work and the reinvention. The SABPP sees this as the HR practitioner's duty to society. The HR Practitioner needs to critically reflect on the diverse lenses they and their respective organisations are using, and the positions they take up within their respective organisations.

EARN 1 CPD POINT

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