



Paragraph (a) of the definition of "employee" was amended and expanded. For a natural person to be regarded as an "employee" in terms of the ETI Act, they will have to assist directly or indirectly in carrying on or conducting the business of the person they work for, receive remuneration from that person, and will have to be documented in the records of that employer as envisaged by section 31 of the Basic Conditions of Employment Act, 1997 (BCEA).

A new proviso was inserted into the definition of "monthly remuneration". Aspects of this insertion are still being clarified with SARS. It appears that the effect of this proviso is that payments that are not cash payments (e.g., fringe benefits) due and payable to the employee, will be disregarded from the determination of remuneration paid or payable to that employee.

This aligns with the new proviso inserted into section 6 of the ETI Act, which concerns "qualifying employees". The new proviso provides that if an employee is primarily studying while fulfilling the conditions of their employment contract during any month, they will not be regarded as a "qualifying employee". The exception to this is if the employer and employee have entered a learning programme as defined in the Skills Development Act, 1998.

These changes will likely prevent many students (not in learnership agreements with the employer) attending training institutions from falling within the meaning of "qualifying employees" in terms of the ETI Act and will, therefore, prevent employers from claiming ETI in respect of these students. Where employers persist with claiming ETI in these circumstances, the Budget 2022 also proposes to impose understatement penalties on any ETI that was improperly claimed.

Any measures in place to curb the abuse of the ETI project should not have the unintended consequence of excluding and prejudicing small businesses, which are fundamental to South Africa's economic growth and the success of the ETI project by alleviating the scourge of youth unemployment.

Amendment of section 1 of Act 26 of 2013, as amended by section 112 of Act 43 of 2014, section 93 of Act 15 of 2016, section 101 of Act 23 of 2018, section 78 of Act 34 of 2019 and section 2 of Act 13 of 2020

58. (1) Section 1 of the Employment Tax Incentive Act, 2013, is hereby amended— 15

(a) by the substitution in subsection (1) for the definition of “employee” of the following definition:

“ ‘**employee**’ means a natural person—

(a) who works for another person and in any other manner directly or indirectly assists in carrying on or conducting the business of that other person; **[and]** 20

(b) who receives, or is entitled to receive remuneration from that other person; and

(c) who is documented in the records of that other person as envisaged in the record keeping provisions in section 31 of the Basic Conditions of Employment Act, 1997 (Act No. 75 of 1997), 25

but does not include an independent contractor;”;

(b) by the substitution in subsection (1) for the definition of “monthly remuneration” of the following definition: 30

“ ‘**monthly remuneration**’— 30

(a) where an employer employs and pays remuneration to a qualifying employee for at least 160 hours in a month, means the amount paid or payable to the qualifying employee by the employer in respect of a month; or;

(b) where the employer employs a qualifying employee and pays remuneration to that employee for less than 160 hours in a month, means an amount calculated in terms of section 7(5): 35

Provided that in determining the remuneration paid or payable, an amount other than a cash payment that is due and payable to the employee after having accounted for deductions in terms of section 34(1)(b) of the Basic Conditions of Employment Act, 1997 (Act No. 75 of 1997), must be disregarded;” 40

(2) Subsection (1) comes into operation on 1 March 2022 and applies in respect of years of assessment commencing on or after that date.

“: Provided that the employee is not, in fulfilling the conditions of their employment contract during any month, mainly involved in the activity of studying, unless the employer and employee have entered into a learning programme as defined in section 1 of the Skills Development Act, 1998 (Act No. 97 of 1998), and, in determining the time spent studying in proportion to the total time for which the employee is employed, the time must be based on actual hours spent studying and employed.” 5

(2) Subsection (1) comes into operation on 1 March 2022 and applies in respect of years of assessment commencing on or after that date.

Keeping of records

31. (1) Every employer must keep a record containing at least the following information:

- (a) The employee's name and occupation; 15
- (b) the time worked by each employee;
- (c) the remuneration paid to each employee;
- (d) the date of birth of any employee under 18 years of age; and
- (e) any other prescribed information.

(2) A record in terms of subsection (1) must be kept by the employer for a period of 20 three years from the date of the last entry in the record.

(3) No person may make a false entry in a record maintained in terms of subsection (1).

(4) An employer who keeps a record in terms of this section is not required to keep any other record of time worked and remuneration paid as required by any other 25 employment law.

Employment Tax Incentive ("ETI") programme was introduced in January 2014 to promote employment, particularly of young workers.

The main aim of the programme is to reduce the cost of hiring young people between the ages of 18 and 29 through a cost sharing mechanism with Government. This is achieved by allowing the employer to reduce the amount of Pay-As-You-Earn (PAYE) they pay to the South African Revenue Service ("SARS"), while leaving the wage received by the qualifying employees unaffected.

In recent periods it has come to the Government attention that some taxpayers have devised certain schemes where they claim the ETI in respect of individuals who do not meet the definition of an employee as envisioned in the ETI Act.

In order to address the abuse of the ETI, the definition of "employee" was amended to ensure that the substance of the employment relationship will determine eligibility for the ETI claim, as opposed to its legal form.

This means that "work" must actually be performed in terms of an employment contract, and an employee must be documented in an employer's records as foreseen in the record keeping provisions contained in section 31 of the Basic Conditions of Employment Act 75 of 1997 ("BCEA").

Every employer must keep a record containing at least the following information about the employee as prescribed in section 31 of the BCEA, the employee's name and occupation; the time worked by each employee; the remuneration paid to each employee and such records must be kept by the employer for a period of three years from the date of the last entry in the record.

It is worth highlighting that all taxpayers claiming the ETI would be well advised to consult with professional tax advisors just like us at SNG Grant Thornton Tax Advisory to assess if they are claiming the ETI on "Employees" as envisaged in the new amendments to the ETI Act to avoid any penalties and/or interest.

The ETI Calculation Formulae that are Effective **from 1 March 2022:**

Monthly Remuneration	Formula First 12 Months	Formula Second 12 Months
R0 to R1 999,99	75% of Monthly Remuneration	37,5% of Monthly Remuneration
R2 000 to R4 499,99	R1 500,00	R750
R4 500 to R6 499,99	R1 500 – (75% x (monthly remuneration – R4500))	R750 – (37.5% x (monthly remuneration – R4 500))