

# EMPLOYMENT ALERT

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## LABOUR LAW AMENDMENTS: NO MORE PROTECTION FOR SENIOR EXECUTIVES?

All employees, irrespective of their seniority, have the right not to be unfairly dismissed.

This right emanates from s23 of the Constitution which states that everyone has the right to fair labour practices, and from s185 of the Labour Relations Act, No 66 of 1995 (LRA) which prohibits unfair dismissals. In terms of the LRA, if an employee believes that he was dismissed for an unfair reason, or in accordance with an unfair procedure, that employee may refer a dispute to the CCMA/Labour Court and claim reinstatement and/or compensation.

However, Parliament's Portfolio Committee on Labour (Labour Committee) has proposed various amendments to the LRA in the form of the Labour Relations Amendment Bill (LRAB). One such amendment proposes the insertion of a new s188B. This new section will stipulate that employees who earn in excess of a certain amount of money (the current proposal is R1 million per year) will no longer be afforded the protection of the general unfair dismissal provisions of the LRA.

The new s188B will state that a dismissal will be deemed substantively and procedurally fair if an employee earning more than R1 million per year is given at least three months' notice of his or her dismissal, or if notice is not given, then compensation equal to at least three months' salary. However, these employees will still be afforded protection against unfair labour practices (such as disputes relating to the provision of benefits or suspensions) and against dismissals which are automatically unfair (such as dismissals based on racial discrimination or pregnancy).

When this provision comes into law it will apply to all new contracts of employment and will not initially apply to contracts concluded before this date. However, two years after it comes into operation this provision will apply to all contracts irrespective of when they were concluded.

The explanatory memorandum to the LRAB states that this new provision is designed to create more flexibility for employers in dealing with the dismissal of high earning employees (senior

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executives) while still providing these employees with protection from unfair labour practices and automatically unfair dismissals.

The proposed change to the LRA is a means of addressing the disproportionate cost, complexity, and impact on employers who wish to dismiss senior executives for reasons unrelated to misconduct or incapacity. For example, an employer may wish to replace a senior executive to realise change within the leadership team, to remove an executive who no longer fits the required mould, to counter a change in internal or external circumstances, or because the employer wants to embark on a new direction for the business.

The Labour Committee therefore appears to recognise that senior executives may not be as deserving of legal protection as are vulnerable workers at the lower end of the salary scale. This may be because senior executives are usually highly qualified and capable of finding alternative employment. They may also have greater financial resources and better bargaining power when it comes to negotiating with their employer.

However, the Constitution provides that all persons have the right to fair labour practices (s23) and the right to be treated equally before the law (s9). This means that the new section 188B of the LRA may be ripe for a Constitutional challenge because it denies senior executives a right which is afforded to all other employees. If the provision is ever challenged a court would need to decide whether the right to fair labour practices encompasses the right of senior executives not to be unfairly dismissed, and whether dismissing a senior executive on 3 months' notice (for any reason at all) may properly be described as 'fair' within the Constitutional meaning of the word.

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