

# EMPLOYMENT ALERT

## LET OUR STRIKE GUIDELINES BE THE STARTING POINT FOR YOUR STRIKE STRATEGY

At Cliffe Dekker Hofmeyr we pride ourselves in providing our clients with practical solution driven information in line with the current challenges faced by our clients.

Due to the increase in strikes and strike violence in South Africa, our employment practice developed useful strike guidelines for our clients' benefit. These guidelines will provide clients with practical information about strikes, lock-outs and picketing and answer some of the more complex questions around these topics. The guidelines are definitely the starting point when considering a strike strategy and when preparing for industrial action. Our strike guidelines can be accessed on our website.

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### LARGE SCALE RETRENCHMENTS: INDEPENDENT FACILITATORS AS OPPOSED TO CCMA APPOINTED FACILITATORS? YOU DECIDE

The purpose of s189A of the Labour Relations Act, No 66 of 1995 is to regulate large scale retrenchments. In large scale retrenchments, an employer is obliged to consult with the appropriate consulting parties and engage in a meaningful joint consensus seeking process aimed at reaching agreement on a number of issues including measures to avoid, minimise and mitigate the adverse effects of the anticipated retrenchments, selection criteria and severance pay.

# LARGE SCALE RETRENCHMENTS: INDEPENDENT FACILITATORS AS OPPOSED TO CCMA APPOINTED FACILITATORS? YOU DECIDE

Where facilitation is selected in accordance with s189A of the LRA, it follows that facilitation must take place at an early stage to ensure effective and fair process.

It allows the parties to own the process and structure the timing of the facilitation meetings in order to achieve an expeditious and effective outcome.



The purpose of s189A of the Labour Relations Act, No 66 of 1995 (LRA) is to regulate large scale retrenchments. In large scale retrenchments, an employer is obliged to consult with the appropriate consulting parties and engage in a meaningful joint consensus seeking process aimed at reaching agreement on a number of issues including measures to avoid, minimise and mitigate the adverse effects of the anticipated retrenchments, selection criteria and severance pay. This process seeks to enhance the effectiveness of consultation in large scale retrenchments by avoiding unnecessary disputes. Where facilitation is selected in accordance with s189A of the LRA, it follows that facilitation must take place at an early stage to ensure effective and fair process.

The primary role of a facilitator is to manage the consultation process. The duty to consult rests primarily on the employer and not the facilitator. The facilitator has certain obligations which are contained in the Facilitation Regulations, (2002) (the Regulations) that have been issued by the Minister of Labour in terms of s189A(6) of the LRA. This includes an obligation to hold at least four facilitation meetings, unless consensus is reached at an earlier point in the process.

In the case of *Edcon v Steenkamp and Others* (2015) 36 ILJ 1469 (LAC), the Labour Appeal Court held that one of the key innovations introduced by s189A of the LRA is that the consultation process can be conducted by an independent facilitator. Although this case went as far as the Constitutional Court this particular point was not challenged.

Section 189A(3) of the LRA provides that the CCMA must appoint a facilitator to assist the parties in two instances, firstly if the employer has requested facilitation in its s189(3) notice or, secondly if the consulting parties representing the majority of the employees who the employer contemplates dismissing have requested facilitation and notified the CCMA accordingly within fifteen (15) days of the issuing the s189(3) notice.

Section 189A(4) of the LRA allows the parties to agree to appoint an independent facilitator. In such cases, the facilitation should be conducted in terms of the Regulations.

The *Edcon* case recognised that the parties are not obliged to submit to facilitation and may opt not to do so. Facilitation will only be obligatory if the employer or the other consulting parties have requested it, or if there is an agreement to appoint a facilitator in terms of s189A(4) of the LRA.

The appointment of an independent facilitator has advantages, namely the parties can agree to the identity of the facilitator, who is a specialist in this field and would be best suited in the prevailing circumstances. The time frame for the consultation process can be expedited and becomes more flexible as there is no unnecessary delays or restrictions due to the strain placed on the resources of the CCMA. It allows the parties to own the process and structure the timing of the facilitation meetings in order to achieve an expeditious and effective outcome.

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*Fiona Leppan and Nicholas Gangiah*



## Employment Strike Guideline

**Find out when a lock-out will be protected.**

 [Click here to find out more](#)

CHAMBERS GLOBAL 2014 - 2017 ranks our Employment practice in Band 2: Employment.

Aadil Patel ranked by CHAMBERS GLOBAL 2015 - 2017 in Band 2: Employment.

Hugo Pienaar ranked by CHAMBERS GLOBAL 2014 - 2017 in Band 2: Employment.


Fiona Leppan ranked by CHAMBERS GLOBAL 2017 in Band 3: Employment.

Gillian Lumb ranked by CHAMBERS GLOBAL 2017 in Band 4: Employment.



Michael Yeates named winner in the **2015 and 2016 ILO Client Choice International Awards** in the category 'Employment and Benefits, South Africa'.



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### BBBEE STATUS: LEVEL THREE CONTRIBUTOR

Cliffe Dekker Hofmeyr is very pleased to have achieved a Level 3 BBBEE verification under the new BBBEE Codes of Good Practice. Our BBBEE verification is one of several components of our transformation strategy and we continue to seek ways of improving it in a meaningful manner.

This information is published for general information purposes and is not intended to constitute legal advice. Specialist legal advice should always be sought in relation to any particular situation. Cliffe Dekker Hofmeyr will accept no responsibility for any actions taken or not taken on the basis of this publication.

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