

EMPLOYMENT ALERT

IN THIS ISSUE

AMENDMENTS TO LABOUR LEGISLATION SIGNED INTO LAW BY THE PRESIDENT

On 27 November 2018, the President of the Republic of South Africa signed various amendments to labour legislation into law. These amendments have been formally published in the Government Gazette for general information. The commencement date for the amendments is yet to be announced. This means that the amendments are not yet in force. The amendments will become law once the commencement date is formally announced in the Government Gazette.

WILL DRUNK DRIVING COST ME MY JOB?

1 December of each year officially marks the commencement of "the festive season" or, as some like to say, "the season to be jolly". The festive season is often characterised by overspending and excessive consumption, fuelling New Year's resolutions including self-made promises to either join a gym or utilise an existing membership more frequently than the preceding year.

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Broadly, the amendments will introduce new law (eg a national minimum wage) and change existing law (eg mechanisms for dispute resolution during strike action). The amendments are covered in four different pieces of legislation as follows:



The amendments deal with a range of labour issues summarised as follows:



National Minimum Wage Act (NMWA)

The NMWA aims to address the massive income disparities in the South African labour market by introducing a national minimum wage. The focus is therefore on low-earning employees. Deliberations on this topic began four years ago at the National Economic Development and Labour Council. This represents an historic moment in South Africa's labour dispensation as it is the first time that a national minimum wage has been introduced into the system.

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Employers who are unable to pay the minimum wage, due to business or financial constraints, will be able to apply for exemptions under the NMWA.



What is the National Minimum Wage?

Read together with certain sections of the Basic Conditions of Employment Amendment Act, a national minimum wage has been introduced. Through this Act, employees will be entitled to R20 for each ordinary hour worked. Different hourly rates apply to agricultural/farm workers (R18 per hour) and domestic workers (R15 per hour).

National Minimum Wage Commission

The NMWA establishes the National Minimum Wage Commission. The Commission will inter alia be responsible for reviewing the national minimum wage on an annual basis. In deciding on the annual adjustment, the following factors will be considered:

- cost of living;
- minimum living levels;
- alleviation of poverty;
- wage differentials and inequality;
- conditions of employment;
- health, safety and welfare of workers;
- employment levels;
- inflation;
- Gross Domestic Product growth;
- state of collective bargaining.

After the review process is complete, the Commission will be responsible for submitting written recommendations to the Minister of Labour regarding the proposed adjustment.

Exemptions

Employers who are unable to pay the minimum wage, due to business or financial constraints, will be able to apply for exemptions under the NMWA.

Basic Conditions of Employment Amendment Act (BCEAA)

Due to the introduction of a national minimum wage, certain provisions of the Basic Conditions of Employment Act, No 75 of 1997 (BCEA) have been affected. Therefore, the BCEAA inter alia incorporates certain provisions of the NMWA. The important provisions are highlighted below.

Failure to pay in terms of NMWA

In terms of the BCEAA, employers who fail to pay employees in line with the NMWA may be subject to a fine. The fine is calculated per employee as the greater amount of twice the value of the underpayment or twice the employee's monthly wage.

Employment Conditions Commission

The BCEAA disestablishes the Employment Conditions Commission and replaces it with the National Minimum Wage Commission.

Claim by employee for outstanding payments

The BCEAA provides a new mechanism to employees if an employer fails to pay any amount due to them. Such an employee can now institute a claim [at the Commission for Conciliation, Mediation and Arbitration (CCMA)] for such failure.

Michael Yeates was named the exclusive South African winner of the **ILO Client Choice Awards 2015 – 2016** in the category Employment and Benefits as well as in **2018** in the Immigration category.



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On the issue of picketing, the Minister of Labour released proposed picketing regulations for public comment.



Labour Relations Amendment Act (LRAA)

The LRAA changes various provisions of the Labour Relations Act, No 66 of 1995 (LRA). These changes mainly concern collective bargaining. The LRAA provides for the following:

- extension of bargaining council agreements to non-parties by the Minister of Labour;
- extension of funding agreements of bargaining councils;
- picketing through collective agreement or through prescribed picketing rules;
- extension of the meaning of ballot for a strike or lock-out to include a secret vote;
- creation of an advisory arbitration panel.

Advisory Arbitration Panel

The advisory arbitration panel has been established to resolve strikes (or lockouts) that are obstinate or violent. The panel may also intervene if there is potential for the strike (or lockout) to cause a local or national crisis. The panel will have the power to investigate the cause and circumstances of the strike (or lockout) and release an advisory arbitration award to assist the parties in resolving the dispute. The panel may only be established

if this is directed by the Minister of Labour or Labour Court. Importantly, the appointment of the panel does not interrupt or suspend the right to strike or recourse to a lockout (in accordance with the provisions of the LRA).

Picketing Regulations

On the issue of picketing, the Minister of Labour released proposed picketing regulations for public comment. These regulations were released in September 2018.

In its current form, the regulations provide that trade unions may not engage in a picket unless there is agreement on picketing rules. Such agreement can take the form of a collective agreement or the parties can engage in conciliation proceedings before the CCMA with a view to reaching an agreement on picketing. Alternatively, the CCMA can determine picketing rules to be followed by the parties.

The regulations include a set of "default picketing rules" which cover various issues relating to a specific picket including practical details, location, control, employer conduct, dispute resolution and police involvement. These rules will apply in the absence of a collective agreement (which covers picketing) or if the parties fail to reach agreement on picketing rules at the CCMA.

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CONTINUED

It is anticipated that the commencement date for the Acts will be 1 January 2019.



The revised picketing regulations have not yet been released by the Minister of Labour. However, this will not delay the promulgation of the LRAA.

Labour Laws Amendment Act (LLAA)

The LLAA amends the BCEA by introducing new forms of leave into the South African labour system. Parental leave, adoption leave and commissioning parental leave is now available to employees as follows:

- an employee, who is a parent of a child, is entitled to ten consecutive days of parental leave;
- an employee, who is an adoptive parent of a child below the age of two, is entitled to:
 - adoption leave of at least ten consecutive weeks; or
 - at least ten consecutive days of parental leave.
- an employee, who is a commissioning parent in a surrogate motherhood agreement, is entitled to:
 - commissioning parental leave of ten consecutive weeks; or
 - at least ten consecutive days of parental leave.

The LRAA also provides for unemployment insurance benefits to be paid to parents who take parental leave, adoption leave and/or commissioning parental leave.

The LRAA represents a progressive step for South Africa's labour system, particularly from the perspective of the quest to achieve gender equality in the workplace.

Next stage of legislative process

These Acts have been signed into law by the President of the Republic of South Africa. The Acts will become enforceable on the commencement dates announced in the Government Gazette.

It is anticipated that the commencement date for the Acts will be 1 January 2019.

CDH Employment Practice

WILL DRUNK DRIVING COST ME MY JOB?

The power to discipline employees flows from the contract of employment.

Does this mean that in all instances of misconduct outside of the workplace, an employer is powerless in respect of such conduct?



1 December of each year officially marks the commencement of “the festive season” or, as some like to say, “the season to be jolly”. The festive season is often characterised by overspending and excessive consumption, fuelling New Year’s resolutions including self-made promises to either join a gym or utilise an existing membership more frequently than the preceding year.

For those revellers who are yet to adopt a dogmatic approach to e-hailing to accommodate their transport needs, the festive season undoubtedly raises the risk of the dreaded onset of flashing blue lights whilst situated behind the wheel. Whilst the prospect of an arrest and possible prosecution seems daunting enough, what of the additional concern of possibly losing one’s job as a result of the arrest? Can this happen? If so, what are the guiding principles in terms of South African employment law?

The power to discipline employees flows from the contract of employment. This power is generally limited to the manner in which employees conduct themselves within a workplace *qua* employees. What happens outside of the workplace and in the private lives of such persons is generally speaking of no consequence to an employer. But does this mean that in all instances of misconduct outside of the workplace, an employer is powerless in respect of such conduct? What about those instances where fellow employees may be involved or where the nature of the misconduct perpetrated outside of the workplace has a detrimental impact on the employment relationship? The test therefore for whether conduct

may be regarded as work-related is the extent to which such conduct may affect the employment relationship and not whether the conduct at issue is covered by the employment contract (See *Malan v Bulbring NO* (2004) 25 ILJ 1737 (LC)).

By way of example, an employee who presented a fake Namibian driver’s license to the South African licensing authorities for conversion to a South African license was held to have committed an act of dishonesty (the obtaining of a driver’s license by fraudulent means) justifying the termination of the employment relationship nine years later upon the employer discovering the misconduct. The Labour Court held that the issue was the effect of the employee’s dishonest conduct on the employment relationship, of which mutual trust is an essential element in both the private and public sectors (See *City of Cape Town v SALGBC* (2011) 32 ILJ 1333 (LC)). A further example may be where an employee’s conduct committed outside of the workplace, such as an employee sexually harassing an employee of a supplier of the employer, may constitute conduct detrimental to the employer’s business and worthy of dismissal (See *P and B* (unreported IMSSA award dated 15 September 1993)).

WILL DRUNK DRIVING COST ME MY JOB?

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Employers wanting to discipline their employees for misconduct conducted outside of the workplace, have to establish not only the commission of the offence (misconduct) on a balance of probabilities, but also the extent to which such conduct is said to detrimentally affect the employment relationship.

In summary, employers wanting to discipline their employees for misconduct conducted outside of the workplace, have to establish not only the commission of the offence (misconduct) on a balance of probabilities, but also the extent to which such conduct is said to detrimentally affect the employment relationship. In many instances, an offence such as driving under the influence of alcohol would not necessarily impact negatively on the employment relationship, there being no question of dishonesty or such type offenses which usually go to the heart of the employment relationship.

In those instances, however, where an employee is employed as a driver, and depending on the nature of the circumstances in which an arrest may have been made, it may be easier for an employer to draw a causal connection between the nature of the misconduct (the arrest) and the employment relationship. In all instances, it is the employer who bears the onus of ensuring that any dismissals are both procedurally and substantively fair in accordance with the requirements of the Labour Relations Act, 1995.

Gavin Stansfield





Employment Strike Guideline

Find out what steps an employer can take when a strike is unprotected.

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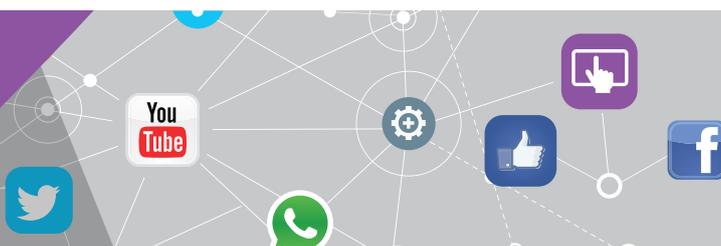
Recognised Faan Coetzee as Lawyer of the Year for Employment Law (Johannesburg).

Recognised Peter Hesseling as Lawyer of the Year for M&A Law (Cape Town).

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