THE NEW DAWN

AMENDMENTS TO LABOUR LAWS

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The 2019 new year brings with it new labour laws.

NEW LEGISLATION:
The National Minimum Wage Act, No 9 of 2018

Most notably, in the new year, workers in South Africa are required to be paid no less than the national minimum wage introduced in the National Minimum Wage Act. These amendments aim to advance economic development and social justice by improving wages of the lowest paid workers and protecting them from unreasonably low wages. Employees becoming parents can also expect to benefit from more leave entitlements in the new year.

The Minister of Labour has also issued a code of good practice on collective bargaining, industrial action and picketing. The code emphasises the need for measures to prevent violent and prolonged strikes and lockouts and aims, among others, to promote peaceful industrial action free of violence and intimidation.

This brochure provides a simple overview of the important changes to the South Africa's labour laws and highlights what these changes mean for you.

THE CHANGES YOU NEED TO KNOW ABOUT

The National Minimum Wage Act, No 9 of 2018 (NMW Act) introduces a national minimum wage in South Africa. The effect of this is that every worker to which the NMW Act applies is entitled to be paid at least the national minimum wage by his or her employer. Employers can apply for an exemption from paying the national minimum wage. Non-compliance with the NMW Act may result in fines being imposed on the employer or referrals for claims for underpayment to the CCMA or appropriate court.

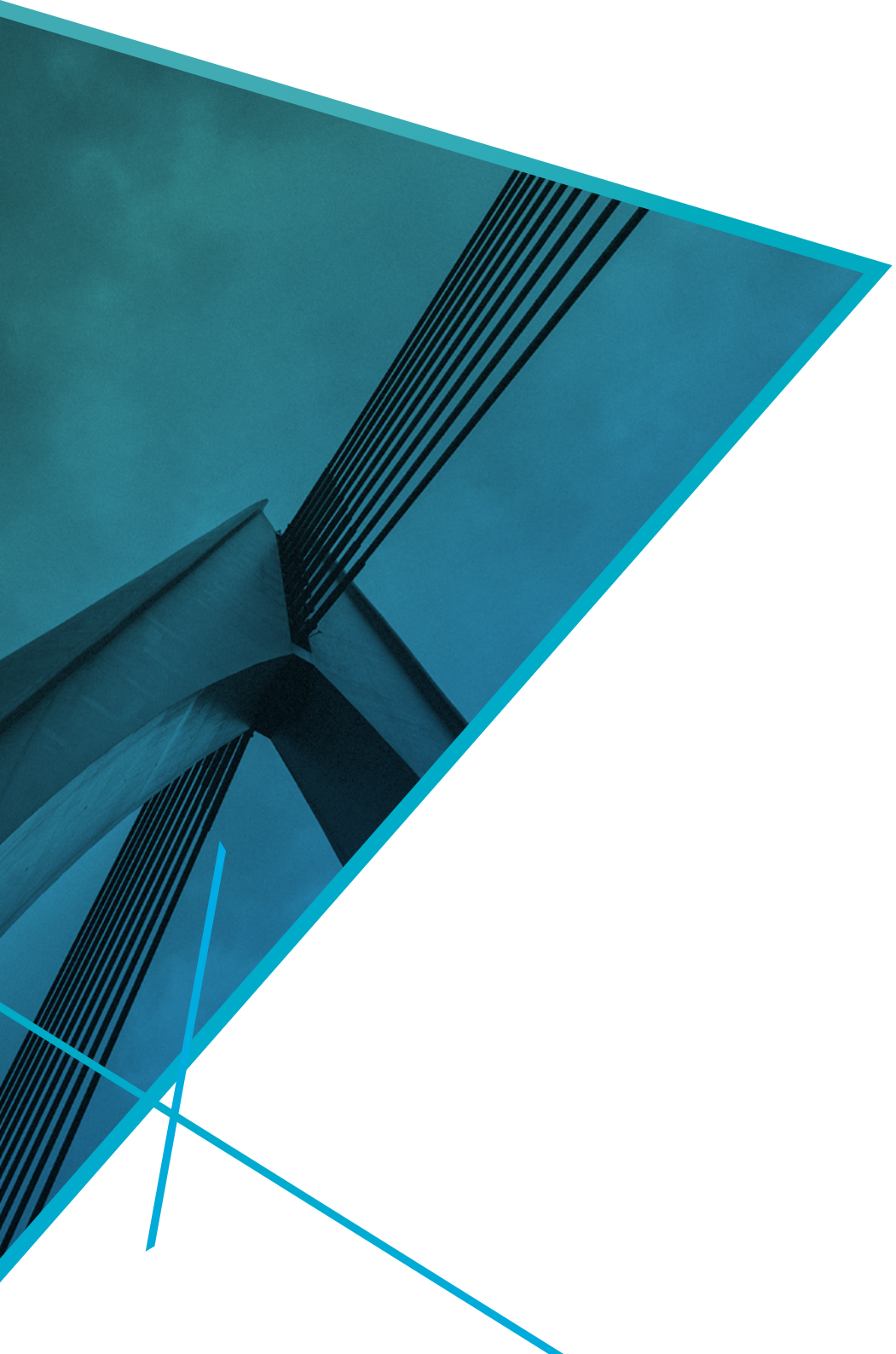
When does the National Minimum Wage Act come into operation?

1 January 2019 except for certain sections which take retrospective effect from 1 May 2017.

Who does the NMW Act apply to?

The NMW Act applies to all workers and their employers. It does not apply to:

- Members of the South Africa Secret Service
- Members of the South African National Defence Force
- Members of the National Intelligence agency
- Volunteers



WHAT DO THE CHANGES MEAN FOR EMPLOYERS?

1. Increase in employee wages.

How much is the national minimum wage?

R20 per ordinary hour worked. Ordinary hours of work in the Basic Conditions of Employment Act, No 75 of 1997 (BCEA) are 45 hours a week. For a worker who works 45 hours per week, the national minimum wage equates to approximately R3,900 per month.

Farm workers on the other hand are entitled to a national minimum wage of R18 per hour and domestic workers are entitled to R15 per hour worked. The national minimum wage for workers employed on an expanded public works programme is R11 per hour worked.

Workers who have concluded learnership agreements in terms of s17 of the Skills Development Act, No 97 of 1998 are entitled to allowances depending on NQF level and credits already earned by the learner.

Does the definition of a domestic worker include a gardener?

A: Yes. A domestic worker in the NMW Act means *"a worker who performs domestic work in a private household and who receives, or is entitled to receive, a wage"*.

The definition includes:

- A gardener
- A person employed by the household as a driver of a vehicle
- A person who takes care of children, the sick, the frail, disabled or the aged
- Domestic workers employed or supplied by employment services

How is a wage calculated?

A wage refers to the amount of money payable to a worker for ordinary hours of work. The worker is entitled to the national minimum wage for the ordinary hours that s/he works each day. The following is not included when calculating a wage, unless specified otherwise in a sectoral determination:

- Transport, equipment, tool, food or accommodation allowance
- Payments in kind including provision of accommodation or boarding
- Bonuses, tips or gifts

Can a collective agreement be concluded whereby parties agree to pay workers a wage lower than the national minimum wage?

No

What happens if an employment contract provides for a higher wage than the one prescribed by the NMW Act?

The worker will be paid the amount set out in the employment contract to the extent that it is more favourable to the worker. If the employment contract provides for wages less than that prescribed in the NMW Act, the employer will be required to pay the worker more so that it complies with the NMW Act.

Is an employer permitted to make a deduction from a worker's wage which may result in the worker being paid less than the national minimum wage?

Yes, provided the deduction complies with s34 of the BCEA. In terms of s34(1) of the BCEA an employer may only make a deduction from an employee's remuneration if that employee has agreed in writing to the deduction or the deduction is required by law, collective agreement, court order or arbitration award.

Where the employee has agreed to the deduction in writing, the BCEA imposes limitations on the employer before it can deduct amounts from the employee's remuneration. One such limitation, that is echoed in the NMW Act is that the total deduction may not exceed one quarter of the employee's remuneration in money.

May an employer pay a worker less than the national minimum wage?

No, unless the employer is granted an exemption.

How does an employer apply for an exemption from paying the national minimum wage?

The Minister of Labour has published regulations relating to the exemption procedure.

In terms of the regulations, employers may apply online for an exemptionn at www.nmw.labour.gov.za. The system will be managed by the Department of Labour. A delegated authority will determine whether to grant the exemption. Details that need to be included in the exemption application include the employer's financial details. For example, in respect of a household, details must be provided of the annual household income and expenditure and other information prompted by the system. In respect of a business, financial statements for three years must be provided as well as other information prompted by the system.

An exemption will only be granted where the delegated authority granting the exemption is satisfied that the employer cannot afford the minimum wage and that every representative trade union representing the workers has been meaningfully consulted. If there is no trade union, then consultation must take place with the affected workers. When consulting, the employer must give a union or affected workers a copy of the exemption application to be lodged.

Exemption applications will only be considered if the employer confirms that it complies with applicable statutory payments like UIF for example.

Exemptions may not be granted for longer than 12 months and will specify the wage amount that the employer must pay the workers. The specified wage amount may not be less than 90% of the national minimum wage for workers, farm workers and domestic workers.

Can the exemption notice be withdrawn?

Yes, if the delegated authority is satisfied that:

- The exemption was granted based on information provided by the employer that was false or incorrect
- The employer is not complying with the exemption notice
- The financial position of the employer has improved, and the employer can afford to pay the national minimum wage
- There are other grounds that justify withdrawing the exemption notice

Importantly, any affected person may apply online for the exemption notice to be withdrawn.

Exemptions may not be granted for longer than 12 months and will specify the wage amount that the employer must pay the workers.

Will the National Minimum Wage be increased annually?

This depends on the recommendations made by the National Minimum Wage Commission (Commission) on the existing national minimum wage. Annually, the Commission must review the national minimum wage and recommend adjustments to the national minimum wage to the Minister. The Minister will then determine the adjustment to national minimum wage.

The NMW Act prescribes what the Commission must consider when conducting an annual review. Among the considerations are inflation, the cost of living and the need to retain the value of the minimum wage as well as the ability of employers to carry on their businesses successfully.

2. There will be consequences for non-compliance.

What are the consequences if an employer fails to comply with the national minimum wage?

- A labour inspector may endeavour to secure an undertaking from the employer to comply with the NMW Act
- A labour inspector may issue a compliance order
- The employee can refer a claim to the CCMA provided s/he earns below the earnings threshold

If it is found that the employer has failed to pay the national minimum wage, the employer may be fined. The amount of the fine will be twice the amount of the underpayment or twice the employee's monthly wages, whichever is greater. The amount of the fine will increase for further non-compliance and is capped at three times the value of the underpayment or three times the employee's monthly wage, which ever is greater.

AMENDED LEGISLATION: THE BASIC CONDITIONS OF EMPLOYMENT ACT

Various provisions of the Basic Conditions of Employment Act, No 75 of 1997 (BCEA) are amended. These amendments arise from two acts, namely, the Basic Conditions of Employment Amendment Act, No 7 of 2018 (BCEAA) and the Labour Laws amendment Act, No 10 of 2018 (LLAA).

The NMW Act prescribes that no employee may be paid below the national minimum wage.

THE AMENDMENTS INTRODUCED BY THE BASIC CONDITIONS OF EMPLOYMENT AMENDMENT ACT (BCEAA)

When do the amendments take effect?

the amendments introduced by the BCEAA will be effective from a date immediately after 1 January 2019. This means that they will be effective from 2 January 2019.

The changes you need to know about

The Basic Conditions of Employment Amendment Act (BCEAA) introduces a daily wage payment for employees or workers earning below the threshold who work for less than than four hours a day.

It also introduces changes to provisions regulating sectoral determinations. The Employment Conditions Commission is disestablished and the National Minimum Wage Commission is established. The Commission is responsible for investigating conditions of employment in a sector, preparing a report and submitting the report to the Director-General and Minister for consideration before a sectoral determination is made.

There are also amendments relating to monitoring and enforcement. Labour inspectors can monitor and enforce compliance with provisions of the NMW Act, the Unemployment Insurance Act, No 63 of 2001 (UIF Act) and the Unemployment Insurance Contributions Act, No 4 of 2002 (UIF Contributions Act). They can, in addition to securing undertakings from employers or issuing compliance orders, refer disputes to the CCMA for non-compliance with BCEA, NMW Act, UIF Act, UIF Contributions Act.

The CCMA's jurisdiction is also extended by the amendments introduced in the BCEAA in that claims relating to a failure to pay an employee or worker in terms of the BCEA, the NMW Act, an employment contract, a sectoral determination or a collective agreement can now also be referred to the CCMA.

What the changes mean for employers

1. Potential increase in payment for employees who work less than four hours a day.

How much must I pay an employee who works less than four hours on any day?

The BCEAA has introduced a daily wage payment. Only where an employee earns less than the earnings threshold (currently R205,433 per annum) and if the employee or worker (as defined in the NMW Act) works less than four hours on any day, the employer must pay the employee for four hours work on that day.

2. Wages in sectoral determinations increased proportionally to national minimum wage adjustments.

What happens to existing sectoral determinations that establish basic conditions of employment for employees in a sector and area?

In terms of the BCEA, the provisions of a sectoral determination remain binding until they are amended or superseded by a new sectoral determination or suspended or cancelled by the Minister. This section of the BCEA has not been amended. So existing sectoral determinations remain binding.

However, where the sectoral determination prescribes wages that are higher than those prescribed by the NMW Act, when the NMW is adjusted, the wages in the sectoral determination, the remuneration and the associated benefits based on those wages must be increased proportionally to any adjustment to the national minimum wage.

This means that if the national minimum wage is increased by 2%, the wages in the sectoral determination and the remuneration and associated benefits based on those wages must be increased by 2%.

What if there is an existing sectoral determination that prescribes wages below the national minimum wage?

The NMW Act prescribes that no employee may be paid below the national minimum wage. The wages will need to be increased so that the employees are paid at least the national minimum wage.

3. Labour inspectors will monitor and enforce compliance with the BCEA, the NMW Act, the UIF Act and the UIF Contributions Act

When can a labour inspector endeavour to secure an undertaking from an employer?

When the labour inspector has reasonable grounds to believe the employer has not complied with the BCEA, the NMW Act, the UIF Act or the UIF Contributions Act.

What will happen if the employer fails to comply with the written undertaking secured by the labour inspector?

As a result of the amendments, the Director-General may now request the CCMA make the undertaking an arbitration award.

If the employer fails to pay an employee the national minimum wage, can a labour inspector issue a compliance order?

Yes, if the labour inspector has grounds to believe the employer has not complied with the NMW Act and if the labour inspector is not limited from doing so in terms of the BCEA. The labour inspector may also issue a compliance order if s/he has reasonable grounds to believe that the employer has not complied with the BCEA, the UIF Act or the UIF Contributions Act.

The labour inspector cannot issue a compliance order if the following limitations exist:

- The employee earns above the BCEA earnings threshold
- Proceedings have been instituted for the recovery of the amount in the CCMA or a court
- The amount has been made payable by the employer to the employee for longer than 36 months before the date the complaint was made to the labour inspector

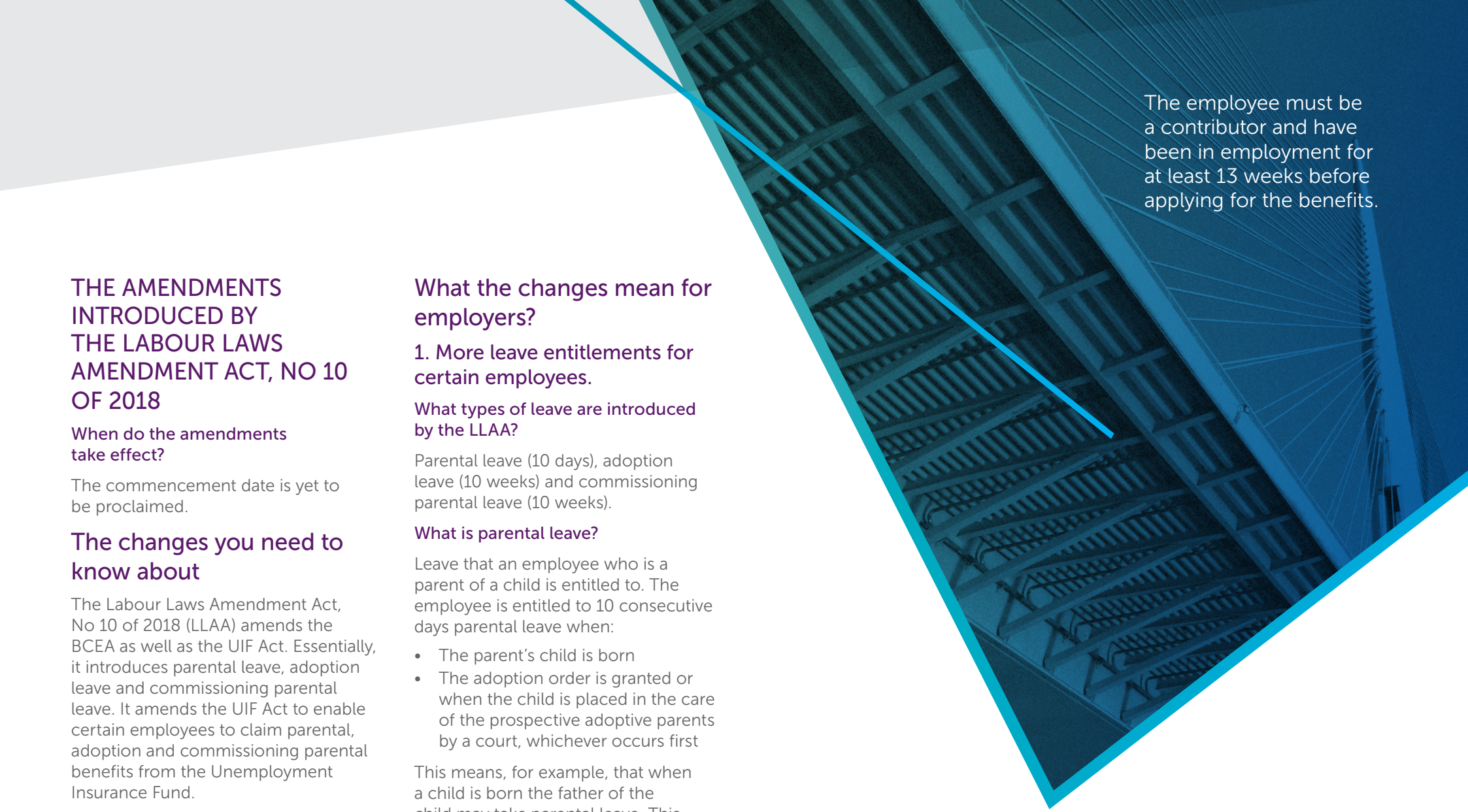
Must the employer comply with the compliance order?

Yes. However, if an employer refers a dispute to CCMA within the time period stated in the compliance order, the employer need not comply with the order. If the employer does not refer a dispute relating to the compliance order and does not comply with the order the Director-General may apply to the CCMA to have the compliance order made an arbitration award.

4. Additional litigation for claims for underpayment.

Can an employee or worker only refer a claim for underpayment of the national minimum wage to the CCMA?

No. The jurisdiction of the CCMA has been extended and it can hear claims relating to underpayment arising from employment contracts, collective agreements, the BCEA and sectoral determinations, provided the employee or worker earns below the earnings threshold. In essence, the employee earning below the earnings threshold can refer a dispute to the CCMA to claim the outstanding payment amount.



The employee must be a contributor and have been in employment for at least 13 weeks before applying for the benefits.

THE AMENDMENTS INTRODUCED BY THE LABOUR LAWS AMENDMENT ACT, NO 10 OF 2018

When do the amendments take effect?

The commencement date is yet to be proclaimed.

The changes you need to know about

The Labour Laws Amendment Act, No 10 of 2018 (LLAA) amends the BCEA as well as the UIF Act. Essentially, it introduces parental leave, adoption leave and commissioning parental leave. It amends the UIF Act to enable certain employees to claim parental, adoption and commissioning parental benefits from the Unemployment Insurance Fund.

What the changes mean for employers?

1. More leave entitlements for certain employees.

What types of leave are introduced by the LLAA?

Parental leave (10 days), adoption leave (10 weeks) and commissioning parental leave (10 weeks).

What is parental leave?

Leave that an employee who is a parent of a child is entitled to. The employee is entitled to 10 consecutive days parental leave when:

- The parent's child is born
- The adoption order is granted or when the child is placed in the care of the prospective adoptive parents by a court, whichever occurs first

This means, for example, that when a child is born the father of the child may take parental leave. This leave used to form part of the family responsibility leave but that is no longer the case.

Is parental leave paid or unpaid?

The employer does not pay the employee for the parental leave. However, the employee can apply for parental benefits in terms of the UIF Act. The employee must be a contributor and have been in employment for at least 13 weeks before applying for the parental benefits.

Is parental leave only for a father?

No. Employees who are parents of a child are entitled to parental leave. For example, in a same sex relationship between two females, the female giving birth to the child will be entitled to maternity leave and the other female parent will be entitled to parental leave.

What is adoption leave?

Leave that an adoptive parent of a child is entitled to. The adoptive parent is entitled to 10 consecutive weeks unpaid adoption leave when the adoption order is granted, or the child is placed in the care of the prospective adoptive parent by a court.

The adoptive parent is only entitled to the adoption leave if the child is below the age of two.

Who pays for the adoption leave?

The adoption leave is not paid by the employer. The employee can apply for payment of adoption benefits from the UIF and must be a contributor in employment for at least 13 weeks before applying for the benefits.

In circumstances where there are two adoptive parents, does each parent get 10 weeks adoption leave?

No. One parent is entitled to adoption leave and the other is entitled to parental leave. The adoptive parents must choose who will take which type of leave. This means that if one of the adoptive parents works for an employer, the employer cannot dictate that the employee is only entitled to parental leave if the employee elects to take adoption leave and the other adoptive parent has not elected that option.

What is commissioning parental leave?

Leave that a commissioning parent in a surrogate motherhood agreement is entitled to. A commissioning parent is someone who enters into a surrogate motherhood agreement with a surrogate mother.

A surrogate motherhood agreement is an agreement "*between a surrogate mother and a commissioning parent in which it is agreed that the surrogate mother will be artificially fertilised for the purpose of bearing a child for the commissioning parent and in which the surrogate mother undertakes to hand over such a child to the commissioning parent upon its birth, or within a reasonable time thereafter, with the intention that the child concerned becomes the legitimate child of the commissioning parent*".

The commissioning parent is entitled to at least 10 weeks commissioning parental leave when a child is born. The leave is unpaid, and the employee may apply to the UIF fund for commissioning parental benefits. In order to apply the employee must be a contributor and have been in employment for at least 13 weeks before applying for the benefits.

As with adoption leave, where two commissioning parents are party to the surrogate motherhood agreement, one parent is entitled to commissioning parental leave and the other to parental leave.

2. The employer will not be paying for the new leave entitlements.

The LLAA amends the UIF Act to provide unemployment benefits to certain employees taking parental, adoption and commissioning parental leave.

In terms of the UIF Act a contributor (someone was or is employed, to whom the UIF Act applies and can prove that s/he has made contributions) can claim certain benefits. The LLAA extends the benefits to parental benefits, adoption benefits and commissioning parental benefits.

How much will the employee be paid in respect of parental, adoption or commissioning parental benefits?

Parental, adoption or commissioning parental benefits will be paid at 66% of the earnings of the beneficiary subject to the maximum income threshold in the UIF Act

AMENDED LEGISLATION: THE LABOUR RELATIONS ACT

The Labour Relations Amendment Act, No 8 0f 2018 (Amendment Act) amends the Labour Relations Act. The Minister also issued a code of good practice: Collective bargaining, industrial action and picketing (the Code) providing guidance on collective bargaining, resolving mutual interest disputes and resorting to industrial action.

The Code requires each party to give a full motivation of its demands and responses.

When do the amendments take effect?

1 January 2019

The changes you need to know about

1. A new Code on collective bargaining, industrial action and picketing was introduced.

The Code is aimed at promoting orderly collective bargaining, effective and speedy resolution of disputes, peaceful strikes and lockouts and the prevention of prolonged violent industrial action. It recognises that measures are required to change the way that trade unions, employers and employer's organisations engage with each other during pre-negotiation, negotiation and industrial action stages of collective bargaining.

The Code on collective bargaining

The Code deals with collective bargaining and introduces principles of good faith bargaining. It also requires parties to collective bargaining to commit to the development of negotiators to participate in collective bargaining by supporting the establishment of training courses on the Code and requiring negotiators to attend such training. Negotiators are required to be formally appointed for specific negotiations and involved in the preparation of negotiations including formulating demands or responses.

It requires that trade unions and employer's organisations prepare for negotiations by for example conducting research on the state of the economy, the ability of employers, cost of living and by taking advice on settlement rates.

Pre-negotiation meetings are suggested where, among others, parties should commit to signing a good faith declaration and deciding on whether to use a facilitator.

The Code emphasises that disclosure of information is essential for trade unions to engage effectively in collective bargaining and it urges that credible and relevant information be disclosed by the employer and responsible use of such information by trade unions.

What does the Code say about how should demands be made?

The Code sets out how demands ought to be made and how to respond to them. Demands must be in writing or according to an agreed procedure. The following must be included in the submission:

- Clear and concise demands
- Outline of demands
- Request for relevant information to be disclosed
- Proposed timetable for negotiations
- Times and dates for a pre-negotiation meeting
- Details of negotiators appointed

What does the Code say about what an employer should do upon receipt of a demand from a trade union?

In terms of the Code, an employer should acknowledge receipt of the demand in writing, indicate when it will respond and agree or suggest alternative dates for a pre-negotiation meeting.

The Code requires a response to a demand to be clear and concise, set out any demands, outline responses and demands, include a response relating to any requests for information and proposed negotiation timetables. It also requires that a response set out the details of the appointed negotiators.

What should happen at the first negotiation meeting?

The Code requires each party to give a full motivation of its demands and responses.

Must information only be disclosed to a majority trade union?

The right to disclosure of information is limited to a majority trade union. The Code, however, encourages employers to either disclose information to any trade union it negotiates with subject to the trade union agreeing not to disclose confidential information or agree to an auditor or arbitrator to access the information to see whether the stance in negotiation is supported by information.

The Code on Industrial Action

The Code identifies the differences and the importance of the differences between disputes of right, mutual interest and socio-economic interests of workers.

In terms of the Code:

A dispute of right is a dispute that relates to existing rights and that the LRA or other employment laws require be resolved by adjudication or arbitration. An example is a dispute relating to an unfair dismissal or where an employer pays an employee less than the amount set out in employment law or an employment contract.

A dispute of mutual interest is a dispute to create new rights and can form the subject of a protected strike or lockout. An example of such a dispute is a dispute about increase in wages or a change to working hours.

A dispute relating to socio economic interests of workers allows protest action that extends beyond matters that form the subject matter of collective agreement.

In terms of the Code parties should develop rules to regulate peaceful and protected industrial action. The rules may include what the Code refers to as the peace and stability committee.

Why is the distinction between a rights and mutual interest dispute important?

The distinction is important because the LRA only permits strikes in respect of disputes of mutual interest. This rule however is subject to two exceptions: disputes over organisational rights or retrenchments in some circumstances may be the subject of a strike.

What examples does the Code give of disputes of mutual interest?

The Code lists the following examples of disputes of interest:

- A dispute relating to what the next years wages will be
- A dispute relating to a new collective agreement or renewing an expired agreement
- A dispute about a new shift system

Who would be part of a peace and stability committee?

Union officials, shop stewards, employer representatives, a conciliator or facilitator, a person appointed by the South African Police Service and a person representing a private security company.

What should be included in the rules regulating peaceful and protected industrial action?

According to the Code, at the very least:

- The employer or employers' organisation and trade union are required to identify people with whom parties can communicate during the industrial action and share their contact information among the parties
- The contact details must also be given to the conciliator or facilitator so that they can re-institute negotiations
- The employer must ask the South African Police Service (SAPS) to appoint a police officer with whom the employer and trade union can communicate during the industrial action and will provide the appointed police officer with the contact details of the trade union and employer representative and the contact details of the conciliator of the facilitator
- If there is a private security presence, the employer must provide the contact details of the private security representative to the trade union, conciliator or facilitator and SAPS

2. Secret ballot must be conducted before a strike or lockout.

Trade unions and employer organisations who apply for registration must have adopted a constitution meeting the requirements in the LRA. One of the requirements is that the constitution must provide that before calling a strike or lock-out, the trade union or employer's organisation must conduct a ballot of members in respect of whom it intends to call the strike or lock-out. The LRA has been amended to clarify that a ballot means any system of voting by members that is recorded and secret. The LRA now also requires every registered trade union and employer's organisation to keep the ballot papers or any documentary or electronic record of the ballot for a period of three years from the date of every ballot.

The Minister has issued guidelines on balloting for strikes or lockouts (Guidelines). The Guidelines set out procedures that should be followed when conducting a secret ballot. These include reasonable notice that a ballot will be held. Three days is considered to be reasonable notice. The ballot papers must clearly phrase the question that is the subject of the ballot and must contain no information that would make it possible to identify voters. The ballot must be conducted in terms of a voters' roll of members who are in good standing. There must be a scrutineer. Ballot boxes must be provided, and members must be able to mark the ballot paper and place it in the ballot box without their vote being seen by another person.

Will a failure to conduct a ballot invalidate the protected nature of the strike or lockout?

No, but trade unions and employers' organisations are required to comply with their constitutions.

3. Picketing Rules are required before a picket.

The essence of the amendments pertaining to picketing is that that picketing rules must be established before a picket may take place. If there is no collective agreement regulating picketing, the conciliating commissioner will try to get the parties to agree on picketing rules in the conciliation process. If no such agreement is concluded, the commissioner will determine the picketing rules using the default picketing rules as a basis at the same time as issuing the certificate of non-resolution.

The Minister of Labour also published Picketing Regulations that take effect on 1 January 2019 (Picketing Regulations) as well as default picketing rules. The default picketing rules are applicable if the parties fail to conclude a picketing rules agreement and the commissioner must impose the rules. The Code also deals with picketing.

The commissioner may also determine picketing rules on an urgent basis on application from a trade union if it referred a dispute about a unilateral change to the terms and conditions of employment and the employer has not restored the original terms and conditions or stopped the implementation of the change to terms and conditions of employment, or the employer has given notice to commence an unprotected lockout.

May a picket take place if there are no picketing rules?

No

What will the commissioner take account of when determining picketing rules?

The commissioner must take account of any relevant code of good practice, the particular circumstances of the workplace or premises where it is intended that the right to picket will be exercised and representations made by the parties at conciliation.

Where can employees picket?

Outside the employer's premises in any place to which the public have access or inside the employer's premises if the employer gives permission. In terms of the amendment, when the commissioner determines the picketing rules, s/he may also authorise the picket at a public place controlled by a person other than the employer if that person has had an opportunity to provide representations before the commissioner who determines the rules. The commissioner may also authorise picketing on the employer's premises if the commissioner is satisfied the employer's permission was unreasonably withheld.

How will a commissioner determine if the permission was unreasonably withheld?

In terms of the Code, the factors that will be taken into account include:

- The nature of the workplace
- The situation of the workplace
- Number of employees partaking in the picket inside the employer's premises
- Potential for violence
- Areas designated for the picket
- Time and length of the picket
- Proposed movement of those participating in the picket
- The trade unions proposals to control the picket
- The picketer's conduct

What happens if picketing rules are not complied with?

A dispute may be referred in writing to the CCMA if there is a material breach of the collective agreement or agreement pertaining to picketing rules or of picketing rules determined by the commissioner. If the dispute is not resolved at conciliation, any party to the dispute may refer it to the Labour Court. The Labour Court can grant relief that is just and equitable which may include directing compliance with the picketing agreement or rule, varying the agreement or rule or suspending a picket.

What may picketers not do in a picket?

Picketers may not:

- Incite violence
- Wear masks
- Have dangerous weapons or objects in their possession
- Prevent or intimidate the employer's clients or suppliers, non-striking employees and replacement labour from leaving or entering the employer's premises
- Commit unlawful action

4. An advisory arbitration panel may be established by the director of the CCMA

Amendments have been introduced to deal with lengthy violent strike action. The amendments permit the director of the CCMA to establish an advisory arbitration panel. The circumstances of the strike or lockout will be considered by the panel and an advisory award will be established aimed at helping the parties resolve the dispute. The award will, among others, set out recommendations for the resolution of the dispute and the parties will have seven days to accept or reject the award. The award is binding on parties who accept it or persons to whom it has been extended to by the Minister.

When will an advisory arbitration panel be established?

A: The director must appoint an advisory arbitration panel if ordered to do so by the Labour Court or if the parties to the dispute agree to the panel being established.

The director may also appoint an advisory arbitration panel on his/her own accord or on application by a party to the dispute.

If a party to the dispute applies for an advisory arbitration panel to be established or the Minister directs that a panel be established, before establishing the panel, the director must have grounds to believe one or more of the listed circumstances exist:

(i) *"The strike or lockout is no longer functional to collective bargaining in that it has continued for a protracted period of time and no resolution of the dispute appears to be imminent;*

(ii) *there is an imminent threat that constitutional rights may be or are being violated by persons participating in or supporting the strike or lockout through the threat or use of violence or the threat of or damage to property; or*

(iii) *the strike or lockout causes or has the imminent potential to cause or exacerbate an acute national or local crisis affecting the conditions for the normal social and economic functioning of the community or society."*

When will the Labour Court order the director to establish an advisory arbitration panel?

The Labour Court will order the director to establish a panel if there is an application to the Labour Court by a person or association materially affected by the circumstances in (ii) or (iii) above and the Labour Court considers that the circumstances in (ii) and (iii) exist.

Who is appointed to sit on the advisory arbitration panel?

A senior commissioner will be appointed as the chairperson, and two assessors (one appointed by the employer and the other by the trade union).

What happens if the employer or the trade union does not appoint an assessor?

The director must appoint an assessor from lists provided by NEDLAC.

What if the employer or trade union refuses to participate in the proceedings of the panel?

The director is required to appoint a person with the requisite expertise to represent the interests of that party refusing or failing to participate in the proceedings.

Does the appointment of the panel interrupt or suspend the right to strike or lockout?

No

What will an award set out?

A report on factual findings, recommendations to resolve the dispute, motivations as to why the recommendations should be accepted, the seven-day period within which the parties must either accept or reject the award.

Can a party reject the award?

Yes, but before doing so the trade union or employer's organisation must in accordance with its constitution, consult with its members. Any rejection is required to be motivated.

What if a party does not accept or reject the award within the prescribed time period?

If a party fails to accept or reject the award within seven days, the party is deemed to have accepted the award.

Can a party to the dispute request the panel to reconvene to explain the award?

Yes. A party can also request the panel to reconvene to mediate a settlement or vary the award.

Is the award binding and who does it bind?

The award will be binding on the party and its members who accepted the award or who are deemed to have accepted the award. If the award is extended by the Minister in terms of s32 of the LRA it will be binding on persons who are not members of the parties to the council or on persons who have rejected the award.

5. Extension of 30-day conciliation period on application.

In terms of the amendments the 30 day conciliation period may also be extended by the director of the CCMA on application if the parties don't agree to an extension. Either a commissioner or party may apply to the director of the CCMA for an extension of the conciliation period which may not exceed five days.

When would the director grant the extension?

If the director is satisfied that the extension is necessary to ensure meaningful conciliation, a refusal to agree to the extension is unreasonable and there are reasonable prospects of reaching an agreement.

Where the State is an employer can an application be made for an extension?

No

6. Extension of collective agreements.

There are amendments relating to the extension of collective agreements concluded in a bargaining council. The amendments provide a process and criteria for the Minister to extend bargaining council agreements to non-parties.

The Minister must extend a collective agreement to non-parties if several requirements are met. Included in the requirements is that both parties meet representativity requirements that upon the extension, the trade union party to the agreement must represent the majority of the employees and members of the employers' organisations party to the agreement will be found to employ a majority of the employees who fall within the scope of the collective agreement. As a result of the amendments, only either the trade union or the members of the employer organisation must meet the representativity requirement.

In terms of the LRA, despite the majority representativity requirement, the Minister may still extend the collective agreement if the parties are sufficiently representative with the registered scope of the bargaining council. Subsequent to the amendments, the Registrar will determine whether the parties are sufficiently representative and in doing so will consider the composition of the workforce in the sector, including the extent to which there are employees assigned to work by temporary employment services, fixed term contract employees, part-time employees or employees in other categories of non-standard employment. The determination of representativeness constitutes sufficient proof of representativeness of the council for two years following the determination.

7. Renewal and extension of funding agreements.

Bargaining council activities are funded by levies payable by industry employees and employers. The amendment aims at addressing the fact that bargaining councils, their pensions and other funds are regulated by collective agreements and the failure to renew such agreements threatens the existence of the bargaining council and funds.

In terms of the amendments, the Minister has the power to renew and extend funding agreements at the request of the parties for up to 12 months.

What is a funding agreement?

A funding agreement is defined as a collective agreement that is concluded in a bargaining council and that includes a provision to fund:

(i) The operational and administrative activities of the bargaining council;
(ii) a dispute resolution fund;
(iii) a training or education scheme; or
(iv) pension, provident, medical aid, sick pay, holiday, unemployment and training schemes or funds or any similar schemes or funds for the benefit of one or more of the parties to the bargaining council or their members.

When will the Minister renew a funding agreement?

If any party to a bargaining council so requests, the Minister may renew a funding agreement where it has expired or where parties have not concluded a collective agreement to renew or replace the funding agreement before 90 days of its expiry. The agreement may be renewed for up to 12 months and the Minister must be satisfied that the failure to renew the agreement may undermine collective bargaining at sectoral level.

MARKET RECOGNITION

Our Employment Law team is externally praised for its depth of resources, capabilities and experience.

Chambers Global 2014–2024 ranked our Employment Law practice in Band 2 for employment. *The Legal 500 EMEA 2020–2024* recommended the South African practice in Tier 1. *The Legal 500 EMEA 2023–2024* recommended the Kenyan practice in Tier 3 for employment.

The way we support and interact with our clients attracts significant external recognition.

Aadil Patel is the Practice Head of our Employment Law team, and the Head of our Government & State-Owned Entities sector. *Chambers Global 2024* ranked Aadil in Band 1 for employment. *Chambers Global 2015–2023* ranked him in Band 2 for employment. *The Legal 500 EMEA 2021–2024* recommended Aadil as a 'Leading Individual' for employment and recommended him from *2012–2020.*

The Legal 500 EMEA 2021–2024 recommended Anli Bezuidenhout for employment.

Chambers Global 2018–2024 ranked Fiona Leppan in Band 2 for employment. *The Legal 500 EMEA 2022–2024* recommend Fiona for mining. *The Legal 500 EMEA 2019–2024* recommended her as a 'Leading Individual' for employment, and recommended her from *2012–2018.*

Chambers Global 2021–2024 ranked Imraan Mahomed in Band 2 for employment and in Band 3 from *2014–2020. The Legal 500 EMEA 2020–2024* recommended him for employment.

The Legal 500 EMEA 2023–2024 recommended Phetheni Nkuna for employment.

The Legal 500 EMEA 2022–2024 recommended Desmond Odhiambo for dispute resolution.

The Legal 500 EMEA 2023 recommended Thabang Rapuleng for employment.

Chambers Global 2024 ranked Njeri Wagacha in Band 3 for FinTech. *The Legal 500 EMEA 2022–2024* recommended Njeri for employment. *The Legal 500 EMEA 2023–2024* recommends her for corporate, commercial/M&A.

BBBEE STATUS: LEVEL ONE CONTRIBUTOR
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.

PLEASE NOTE
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