

EMPLOYMENT ALERT

15 April 2013

EMPLOYERS URGED TO MAKE REPRESENTATIONS ON THE PROPOSED INCREASE OF THE EARNINGS THRESHOLD: UPDATED INFORMATION

Please disregard the contents of the Alert sent to you on Saturday, 13 April 2013. Below is the updated information.

On 8 April 2013, the Minister of Labour (Minister) announced that the Employment Conditions Commission (Commission) will consider representations on increasing the Earnings Threshold (Threshold) in the Basic Conditions of Employment Act, No 75 of 1995 (BCEA). Interested parties have until 7 May 2013 to make representations to the Commission. The Commission is a body established in terms of s59 of the BCEA, to advise the Minister on various matters, including those concerning basic conditions of employment.

The Threshold, determined by the Minister from time to time, is of crucial importance to employers and employees alike as employees earning in excess of this threshold do not enjoy the benefit of certain basic conditions of employment. These conditions include the right to extra pay for overtime, maximum ordinary hours of work per day and week, the right to meal intervals, payment for work done on Sundays and limitations on payment for work done on public holidays. Employees earning below the threshold are statutorily entitled to these rights and can demand payment for overtime, work done on Sundays and other rights that remain unaffected by the Threshold.

The Threshold is a significant factor influencing the labour cost of businesses. This is especially visible with many smaller and medium enterprises that struggle to keep this aspect of their operational expenditure under control. Every time the Threshold increases, employers have to audit their remuneration to ensure that employees who previously earned above the threshold still earn in excess of the new limit. Where employees who were previously excluded now

earn below the new Threshold, they are automatically entitled to the rights contained in the applicable sections of Chapter II of the BCEA listed above. This means that an employer could be forced to pay overtime to an employee to whom no overtime was payable under the current threshold. This will have a direct impact on the employer's labour cost component.

Employers who may be affected are advised to make representations to the Commission on the proposed increase. While employees would like to see the Threshold increase as much as possible, employers will dread a significant increase due to the additional cost associated with such a move. The current Threshold ([R183,008 per annum](#)) has been in place since June 2012.

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GREATER PROTECTION FOR FIXED TERM EMPLOYEES

The use of fixed term contracts of employment is a necessary cost for some employers, particularly those involved in seasonal businesses.

However, there has always been concern that these contracts allow employers to exploit employees engaged on a fixed term basis by denying them the benefit of statutory and/or contractual entitlements that other, permanent employees enjoy. As a reaction to this concern the current Labour Relations Act, No 66 of 1995 (LRA) included in its definition of a 'dismissal' the failure by an employer to renew a fixed term employment contract where the employee reasonably expected that the contract would be renewed. In such circumstances the contract is effectively renewed because a failure to do so entitles the employee to claim for unfair dismissal.

The Department of Labour has now proposed amendments to the LRA that provide even more protection to fixed-term employees. The proposed amendment to s186(b) provides that a failure by an employer to permanently retain an employee, who was engaged under a fixed term contract of employment and who reasonably expected to be permanently retained on the same or similar terms, constitutes a dismissal.

The above amendment now removes all doubt as to whether an employee who reasonably expects his fixed term contract to be renewed becomes a permanent employee, or merely has his fixed term contract renewed. If the employee reasonably expected his fixed-term contract to be renewed then it will effectively be renewed. If the employee reasonably expected his contract to be renewed on a permanent basis then that is what will happen.

It is further proposed in terms of a new s198B an employee employed on a fixed term contract for a period in excess of six months must not be treated less favourably than an employee employed on a permanent basis performing the same or similar work, unless there is a justifiable reason for the differential treatment. Contravention of the new s198B will have the effect that the employee shall be deemed to have been employed indefinitely.

Section 198B effectively means that employers cannot make use of fixed term contracts that last for more than six months. However, s198B will not apply to:

- employees earning in excess of the threshold prescribed by the Minister in terms of the Basic Conditions of Employment Act, No 75 of 1997 (currently R183,008.00 per annum),

- employees who are employed in terms of a statute, sectoral determination or collective agreement that permits the inclusion of a fixed term contract,
- employers that employ less than ten employees, or an employer that employs less than 50 employees and whose business has been in operation for less than two years, unless the employer conducts more than one business or the business was formed by the division or dissolution for any reason of an existing business.

Furthermore, the proposed new s198B provides that an employer may engage an employee on a fixed term contract of employment for a period in excess of six months only if the nature of the work for which the employee is engaged is of a limited or definite duration, or if the employer is able to demonstrate any other justifiable reason for fixing the term of the contract. The employer bears the onus of proving at any proceedings that there exists a justifiable reason for fixing the term of the contract and that such term was agreed.

The proposed new s198B provides a list of reasons which will be considered sufficient to establish the justifiability of fixing the term of a contract of employment. Accordingly, the fixing of the term of the contract will be justified under circumstances including the following:

- the employee is replacing another employee who is temporarily absent from work;
- the employee is engaged on account of a temporary increase in the volume of work which is not expected to endure beyond twelve months; or
- the employee is engaged to perform seasonal work.

The above amendments seek to achieve a balance that considers the commercial sustainability of businesses while protecting the interests of workers who earn less than R183,008.00 per annum. The underlying principle in the proposed s198B is justifiability. Employers must be able to justify fixing the duration of an employment contract.

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