

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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LRA BILL: EXTENSION OF BARGAINING COUNCIL AGREEMENTS TO NON-PARTIES

The LRA Bill seeks to amend s32 to provide a process and criteria for the extension of bargaining council agreements to non-parties by the Minister of Labour. We explore what is envisaged.

LRA BILL: EXTENSION OF BARGAINING COUNCIL AGREEMENTS TO NON-PARTIES

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This power can be exercised where the Minister is concerned that a failure to extend could undermine collective bargaining at a sectoral level.



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The Current Position

A bargaining council may request the Minister of Labour to extend a collective agreement concluded in a bargaining council to non-parties that fall within the scope of the bargaining council. Such non-parties must be identified in the request made to the Minister. Two requirements must be met for such a request to be valid:

- one or more registered trade unions whose members constitute the majority of members of the unions that are party to the bargaining council have voted in favour of such extension at a meeting of that bargaining council; and
- one or more registered employer organizations, whose members employ the majority of the employees employed by members of the employer organizations that are party to the bargaining council, have likewise voted in favour of such extension at that bargaining council meeting.

The Minister must also be satisfied that the following factors are met before exercising the power to extend:

- the majority of all employees who, upon extension of the collective agreement, fall within its scope and are members of the trade unions party to the bargaining council;
- the members of employer organizations that are parties to the bargaining council, upon the extension

of the collective agreement, employ the majority of employees who fall within the scope of the collective agreement;

- the bargaining council must make allowance for an effective exemption procedure so that non-parties can apply for exemptions from the provisions of the collective agreement and these exemptions must be dealt with swiftly (within 60 days); and must allow for an independent body to hear and decide appeals where such exemption is declined (within 30 days);
- the provisions of the collective agreement must not discriminate against non-parties.

Despite the above, the Minister is given the power to extend a collective agreement if the parties to the bargaining council are not in the majority but are sufficiently representative. This power can be exercised where the Minister is concerned that a failure to extend could undermine collective bargaining at a sectoral level. When determining sufficient representivity, the Minister must consider a number of aspects such as:

- the composition of the workforce in the sector;
- the extent to which employees work for temporary employment services;
- the number of employees on fixed-term contracts, or engaged in other non-standard employment categories.

LRA BILL: EXTENSION OF BARGAINING COUNCIL AGREEMENTS TO NON-PARTIES

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The Minister would be able to renew such collective agreements if a failure to do so might negatively impact sectoral collective bargaining.



Court Challenges

In recent years there have been a number of cases where employers have challenged the validity of such Ministerial extensions, for example:

- *NEASA v Minister of Labour* (2012)2 BLLR 198 (LC) where the issue was whether all the statutory requirements for an extension had been met by the Minister. The Labour Court ruled against NEASA in its urgent application for an interdict, but NEASA went on to succeed in subsequent review proceedings. Certain of those statutory requirements were not met and the Minister's decision was set aside.
- *Valuline CC v Minister of Labour* (2013)34ILJ 1404 (KZP) where the Minister failed to rely on objective evidence to test the level of representivity of the employer parties to the collective agreement that was sought to be extended.
- *Free Market Foundation v Minister of Labour & Others* (2016)8 BLLR 805 (GP) where the High Court held that such extensions to non-parties were not unconstitutional but a request to extend constituted reviewable administrative action in appropriate circumstances.

The LRA Bill

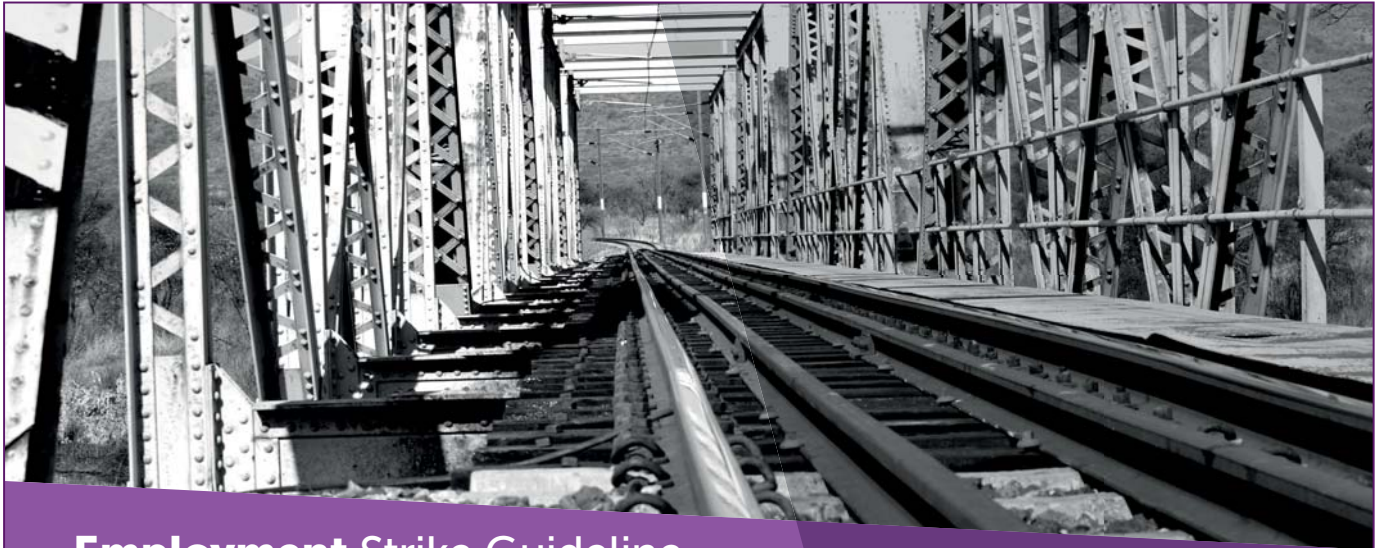
The proposed LRA Bill seeks to make challenges of this nature more difficult to mount. The function to determine the levels of representivity would now shift from the Minister to the Registrar of Labour Relations. It will be up to the Registrar to provide sufficient proof of

the levels of representativeness of the parties concerned. This will ultimately be determined by an accurate assessment of applicable membership figures.

With regard to funding agreements, such as the MEIBC training and education scheme and its collective agreement regulating collective bargaining levies, the Minister would be able to renew such collective agreements if a failure to do so might negatively impact sectoral collective bargaining. An agreement may be renewed for 12 months at the request of a party to the bargaining council where the underlying agreement has expired or where the parties have not concluded a replacement collective agreement within 90 days of its expiry. There are procedural steps to be followed as the Minister would be duty bound to publish such intention to renew in the Government Gazette calling for submissions to be made before a decision to renew is determined. Such a decision is susceptible to review in a court with competent jurisdiction.

Much turns on levels of representivity and the change of dynamics in union membership. Recently, the Casual Workers' Advice Office (CWAO) has claimed that registered trade unions represent only 24% of South Africa's workforce and that the trade union federations at NEDLAC represent far fewer employees than they did previously. The LRA Bill clearly has this in mind when trying to protect the objective of sectoral negotiations and orderly collective bargaining.

Fiona Leppan and Bheki Nhlapho



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.

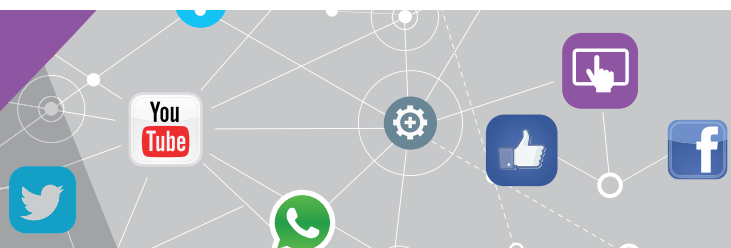
Hugo Pienaar ranked by CHAMBERS GLOBAL 2014 - 2017 in Band 2: Employment.

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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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