

Amendments to the Basic Conditions of Employment Act

The proposed amendments to the Basic Conditions of Employment Act 75 of 1997 and the Labour Relations Act 66 of 1995 resulted from a process of reviewing labour legislation and labour market policy. The conclusion upon completion of the process was that the labour market policy is fundamentally sound and that the labour legislative framework is sufficient. Some aspects that require amendment to give effect to the following objectives were however identified:

- To improve the application and enforcement of the Basic Conditions of Employment Act and the Labour Relations Act;
- To ensure that legislation remains in line with the changing labour market environment;
- To address the unintended consequences of some legislative provisions, which often raise negative perceptions concerning labour market policy; and
- To render the legislative framework more receptive and flexible for essential job creation.

At the same time, any amendments should support the following important policy considerations:

- Advancement and development of small businesses
- Increased protection of vulnerable employees
- Decreasing the negative perceptions of investors

The draft bill was published in July 2000 for comment and negotiations at NEDLAC. Negotiations at NEDLAC lasted about a year and were supported by the intervention of the Millennium Labour Council. Agreement was reached by the end of July 2001 on most of the proposed amendments. The bill was submitted to Cabinet after negotiations at NEDLAC with organised labour and business were completed and Cabinet approved the Draft Bill on Basic Conditions of Employment on 22 August 2001.

Whether the existing amendments are comprehensive enough to give effect to the abovementioned needs and ideals, is yet to be seen and evaluated in practice. It is probably too early to speculate.

The desired adjustments are covered by the amendments to legislation, the collective bargaining process between employers and trade unions, as well as via future sectoral or ministerial determinations that may change conditions of employment in respect of certain sectors, areas and circumstances.

The following amendments to the existing Basic Conditions of Employment Act are of practical significance to employers and employees (it is being presumed that the amendments approved by Cabinet would be adopted by Parliament):

Overtime

- The daily restriction on working overtime of three hours per day falls away. The number of working hours (normal and overtime) per day are however still limited to 12 hours.

The existing arrangement of three hours maximum overtime per day, had the unintended consequence of preventing an employee from working more than three hours on those days on which the employee would normally not have worked. The result was that an employee who worked from Mondays to Fridays, could not work longer than 3 hours on a Saturday or Sunday. This shortcoming is thus now being rectified.

- The maximum overtime per week remains 10 hours. Employers and trade unions may however now conclude a collective agreement in order to increase the weekly limit on allowable overtime from 10 to 15 hours. This amendment gives parties more room to regulate working hours by means of collective agreements and will at the same time reduce the administrative burden on the Department of Labour. Such a collective agreement may however not be valid for more than 2 months in any 12 month period.

Notice of termination of service

- Currently, a contract may be terminated by one week's notice during the first 4 weeks of service and by 2 weeks' notice for the remainder of the first year's service.

The minimum notice period for termination of service is reduced from 2 weeks to 1 week during the first six months of service. This is in line with the proposed probation period for which provision was made in the amendments to the Labour Relations Act.

Domestic and farm workers are entitled to 1 week's notice if their services are terminated within the first 6 months and 4 weeks' notice if they have been employed for longer than 6 months. In addition, the possibility of reducing the notice period by means of a collective agreement is limited to 2 weeks for those who are otherwise entitled to 4 weeks' notice.

Normal working hours

- The Minister is vested with the power to increase normal working hours of 45 hours by ministerial or sectoral determination if (1) the previous working hours arrangements are more advantageous as a result of the existence of a collective agreement, (2) where is it essential due to the operational circumstances of a specific sector or (3) in the case of the agriculture and private security sectors.

Definition of remuneration

- The Minister is vested with the power to, after consulting NEDLAC, determine which type of payments should be included in the definition of remuneration for the purposes of any calculation under the Act.

The Basic Conditions of Employment Act establishes a framework for the calculation of payment for overtime, annual leave, notice, severance pay and sick-leave. The calculation of payments for leave, notice and severance pay is based on the statutory definition of "remuneration". Unfortunately, this definition caused much uncertainty because of its vagueness. The Minister is now able to bring clarity in this regard. It is expected that the following items will be specifically included in the definition of remuneration: increases, car allowance, housing allowance/subsidy, shift allowance if shifts are worked regularly, support allowance if it is received regularly, overtime remuneration if overtime is worked regularly, discretionary bonuses related to the employee's performance if they are received regularly, and the employer's contributions to medical and retirement funds. What would probably be excluded from remuneration are among others: a transfer allowance, discretionary payments that are not related to the employee's working hours or work performance, entertainment allowances, cell phone allowance and inconvenience allowances.

The amendments will considerably facilitate the calculation of remuneration and reduce disputes on this aspect.

Deductions and transfers

- Any employer who makes a deduction from the employee's remuneration for transfer to a benefit fund (pension, provident, retirement, medical or any similar fund) must make such transfer within 7 days after the deduction (unless the rules of the fund stipulate a shorter period). The same approach applies to any contribution that the employer makes to any similar fund on behalf of the employee.

Termination of employment at insolvency

- Employees whose services are terminated due to the employer's insolvency, are entitled to severance pay of at least one week's remuneration for each completed year of service.

Some of the original proposals in respect of the amendment, such as the normalisation of work on Sundays, were withdrawn. Another important amendment to the Basic Conditions of Employment Act, as well as the Labour Relations Act, is an attempt to address the practice whereby employment contracts are changed into a so-called independent contractor's contract in order to change employees into independent contractors, without changing the essence of the employment relationship. This aspect, with specific reference to the distinction between an employee and an independent contractor, is discussed in a subsequent article.