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Highlights of the BCEA Amendment Bill

Introduction

The proposed amendments to the BCEA and LRA will bring about sweeping changes to a number of areas of labour law. In this contribution we highlight some of the key changes that are in the offing. Future contributions will focus more extensively on those amendments which we believe will have the greatest practical impact on employers.

Payment for employment prohibited: employers may not require employees to pay them in order to be given employment or specific work. Employers may also not require employees to purchase services, goods or products supplied by the employer or someone nominated by the employer, except if (a) there is an agreement requiring the employee to belong to a scheme that involves the purchase of goods, services or products; (b) from which the employee receives a financial benefit (e.g. medical aid or retirement fund); (c) the price of the goods, services or products is fair and reasonable; and (d) the purchase is not prohibited by another statute.

Prohibition of child labour: a 'child' is defined in the existing Act as someone under the age of 18 years of age. The amendments prohibit all work by children under the age of 15, irrespective of the capacity in which they might be required to work, i.e. as employees, independent contractors.

Sectoral Determinations (SD's): the Minister is given extensive new powers with regard to SD's. These include the power to –

- issue an 'umbrella' SD covering employers and employees not yet covered by another SD or bargaining council agreement. Coupled with a new definition of 'sector' to include all employers and employees covered by a SD, this, at least in theory, allows the Minister to issue a SD that covers all employers and employees not already covered by a SD, bargaining council agreement or agreement reached in a statutory council. It opens the door for a national minimum wage to be established;
- not only determine minimum *rates* of remuneration, as is the case at present, but also minimum *increases* in remuneration;
- prohibit certain types of work, i.e. task-based work, piecework, work from home, sub-contracting and contract work;
- determine a level of representativeness within a sector that would allow a union with that level of representativeness in the sector to automatically qualify for certain organisational rights (subscriptions and union rights of access) in respect of *all* workplaces covered by the SD, irrespective of the union's representivity in any particular workplace.

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Enforcement of BCEA: the amendments seek to expedite the process for enforcing compliance with the BCEA's provisions, while still permitting employers who are allegedly in default an opportunity to make representations. It will no longer be compulsory for inspectors from the Department of Labour to obtain a written undertaking to comply from a defaulting employer before issuing a compliance order – it now becomes a discretionary step. If such an undertaking has been asked for and given, but not complied with, it won't be necessary for the inspector to first issue a compliance order before approaching the Labour Court to enforce compliance: the inspector may approach the court directly. The same applies where, in the absence of a written undertaking having been requested, a compliance order has been issued but not complied with. Any representations that an employer wishes to make will now be decided by the court and no longer the Director-General of the department.

Monies owed under the BCEA claimable in unfair dismissal proceedings: currently employees who claim for unfair dismissal but who are also owed monies i.t.o. the BCEA (e.g. remuneration, leave pay, etc.) must specifically claim such monies when referring their unfair dismissal claim to conciliation. An amended s 74(2) now provides that such monies may be claimed as part of the unfair dismissal proceedings if it has not prescribed. Once the arbitrator of the court as determined the matter, no compliance order or any other proceedings may be brought in respect of that claim.

Comment:

Employers who do not comply with the provisions of the BCEA or a Sectoral Determination will no longer be able to delay or escape enforcement proceedings as the path from inspection to enforcement has been shortened considerably. While this is to be welcomed, there is a concern over the capacity of the Labour Court to deal with an ever-increasing work load.

The major change, in our view, involves the Minister's new powers with regard to Sectoral Determinations: they may now be issued generally to apply to all employers and employees irrespective of the fact that they do not operate in a discreet industry or service. In addition, such determinations may prescribe both minimum remuneration and minimum increases in remuneration. The floor' of rights for collective bargaining purposes is thereby lifted – unions, who may now also gain certain organisational rights that they would not otherwise have had – are likely to use the minimum rates and increases as a (minimum) threshold for their wage demands. Finally, the restriction on the use of temporary, part-time and labour sub-contracting in the LRA now has its equivalent in the amendment that allows the Minister by way of a SD to restrict or prohibit such work.

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