



MASERUMULE

Corporate Employment Law

Where results matter

THE BASIC CONDITIONS OF EMPLOYMENT AMENDMENT BILL

A number of potential legislative changes were published in the Government Gazette on 17 November 2017 and form part of concerted conduct by the Department of Labour in attempting to bring about changes to the labour market and to labour relations and employment law. These are the amendments to the Basic Conditions of Employment Act 75 of 1997 (“BCEA”), by way of the Basic Conditions of Employment Amendment Bill, 2017 (“the Bill”), the Labour Relations Amendment Bill of 2017 to amend the Labour Relations Act 66 of 1995 (“LRA”), and the National Minimum Wage Bill of 2017, which was recently tabled in parliament. The Basic Conditions of Employment Amendment Act will take effect immediately after the National Minimum Wage Act has taken effect.

We have circulated a similar article on the proposed National Minimum Wage Bill, on 27 February 2018.

The primary amendments introduced by the Bill are the provision which it makes for daily wage payments for certain employees, the repealing of the provisions of the BCEA which deal with sectoral determinations and the Employment Conditions Commission and the proposed changes to the BCEA’s enforcement mechanisms, which include the extension of the jurisdiction of the CCMA, the extension of the authority of labour inspectors in respect of monitoring and enforcement and the provision made for the enforcement of the National Minimum Wage Act, once it comes into operation. The Bill has been published and introduced in the National Assembly for the first phase of discussion concerning its content. Before the amendments comes into effect, the Bill must be approved by parliament and signed into law by the President.

A noteworthy aspect of the proposed amendments is the prominent role which is ascribed to the CCMA in the enforcement of the BCEA, the National Minimum Wage Act, the Employment Services Act, 2014, the Unemployment Insurance Act, 2001 and the Unemployment Insurance Contributions Act, 2002.

Definitions and regulation of working time

The national minimum wage is defined in the Bill, with reference to the National Minimum Wage Act, and has been included in the definition of “*basic conditions of employment*” in the proposed amendments to the BCEA. In the Bill, the definition of “*employment law*” has been extended to include the Unemployment Insurance Act, the Employment Services Act and the National

Minimum Wage Act. The terms “*employee*” and “*worker*” may be used interchangeably in the context of both the National Minimum Wage Act and the monitoring and enforcement of compliance with the amended BCEA.

The Bill has inserted section 9A into the BCEA, which provides for a “*daily wage payment*”, stating that an employee, who earns below the threshold in terms of section 6(3) of the BCEA (currently R205 433.33 *per annum*), who works for less than four hours on any day, must be paid for four hours of work on that day. This is a significant provision for the protection of vulnerable workers. Currently, such provisions are only found in several sectoral determinations.

Sectoral determinations

- Chapters 8 and 9 of the BCEA are repealed in the Bill. These chapters deal, respectively, with the making of sectoral determinations by the Minister of Labour and with the Employment Conditions Commission, which advises the Minister on sectoral determinations and on matters concerning basic conditions of employment and the BCEA. The effect of the proposed amendments in so far as sectoral determinations are concerned, is that no new sectoral determinations will be able to be made by the Minister and existing sectoral determinations will remain in force, except to the extent that they prescribe wages below the national minimum wage.
- The Bill, further, provides that where a sectoral determination prescribes wages that are higher than the national minimum wage, the wages in that sectoral determination and the remuneration and associated benefits based on those wages, must be increased proportionally to adjustments to the national minimum wage. This will take place for a period of three years from the commencement of the National Minimum Wage Act.

Monitoring, enforcement and legal proceedings

- The amendment of a number of provisions of Chapter Ten of the BCEA are proposed, which affect compliance with the BCEA and enforcement thereof. These amendments include the extension of the powers of labour inspectors and the limitation thereof, in respect of monitoring and enforcement of compliance with the provisions of the BCEA, the National Minimum Wage Act, the Unemployment Insurance Act and the Unemployment Insurance Contributions Act. This includes proposed amendments to Section 69 of the BCEA, which concerns compliance orders, with the effect that compliance orders would be able to be issued in terms of section 69 in respect of employers’ failure to comply with the aforementioned four acts and no longer only with the BCEA.
- Compliance orders may be issued in respect of employers’ failure to comply with any employment law, however, those issued in respect of these aforementioned acts must be issued in terms of section 69 of the BCEA. Employers are required to comply with compliance orders within the period stipulated in the order, unless they refer a dispute to the CCMA within that period, challenging the compliance order.

- The proposed amended section 73 of the BCEA provides for the CCMA to make a compliance order an arbitration award, on application by the Director-General of Labour after considering representations, where the employer has not complied with the order. These amendments would see the Director-General no longer being able to apply to the Labour Court for the compliance order to be made an order of court in terms of section 73.
- Section 70 of the BCEA is amended in the Bill, to extend the scenarios in which labour inspectors are prohibited from issuing compliance orders to include those where the employee earns in excess of the statutory threshold and where proceedings have been instituted in the CCMA or a court for the recovery of the amount in question and the referral is yet to be adjudicated.
- In addition, the proposed amendments provide that disputes concerning failure to comply with the aforementioned four acts would be able to be referred to the CCMA by labour inspectors in terms of section 64 of the BCEA.
- The proposed amendment to section 64 is significant, as it seems to have the effect that labour inspectors are empowered to refer disputes directly to the CCMA which concern the BCEA, the National Minimum Wage Act and the other two aforementioned acts, without first being required to attempt to obtain an undertaking, without issuing a compliance order and without involving the Director-General.
- In terms of the amended BCEA, an undertaking sought from an employer by a labour inspector in terms of section 68 would include those given by an employer to comply with the National Minimum Wage Act, the Unemployment Insurance Act and the Unemployment Insurance Contributions Act, in addition to those given in relation to the BCEA. The amended section 68 provides for such an undertaking to be made an arbitration award by the CCMA on application by the Director-General, if the employer fails to comply with its undertaking. The position in the current section 68 of the BCEA regarding an employer's non-compliance with an undertaking is that the Director-General may approach the Labour Court for an order against the employer in terms of section 73, without any recourse to the CCMA being provided for.
- The inclusion of section 73A into the BCEA by the Bill, is likely to have a significant practical impact, as it is envisaged that it will provide a cheaper and more expeditious method of resolving a wide range of employment-related disputes, and will mean avoiding claims being split into proceedings before different forums. It makes provision for employees, who earn below the statutory threshold, to refer a dispute to the CCMA concerning the failure to pay any amount owing to the employee in terms of the BCEA, the National Minimum Wage Act, a contract of employment, a sectoral determination or a collective agreement. For example, section 73A would allow an employee to approach the CCMA where his or her salary has not been paid, whereas currently such a dispute would have to be adjudicated by the courts. This could lead to a significant increase in

the number of referrals to the CCMA, whereas previously these matters would have had to be resolved only through costly litigation, a resource which is not available to all employees. This recourse to the CCMA would not prevent employees from instituting claims in the civil courts. The right of employees, who earn above the statutory threshold, to bring claims in the Labour Court or in a civil court with jurisdiction, as set out in section 77 of the BCEA, remain unaffected by the proposed addition of section 73A to the BCEA.

- Section 74 of the BCEA is amended in the Bill to allow for the joint institution of disputes concerning contraventions of the National Minimum Wage Act, in addition to those concerning contraventions of the BCEA, together with proceedings instituted by employees under Part C of Chapter Ten of the BCEA, which concerns the “*protection of employees against discrimination*”.
- Furthermore, the amended section 74 provides that the arbitrator or the Labour Court hearing an unfair dismissal claim would also be able to determine any claim for an amount that is owing in terms of the National Minimum Wage Act, in addition to an amount owing in terms of the BCEA. The amended section 74 would also allow for disputes concerning any amount owing to an employee as a result of a contravention of the National Minimum Wage Act, in addition to an amount owing in terms of the BCEA, to be instituted jointly with a dispute instituted by the employee regarding his or her entitlement to severance pay in terms of section 41(6) of the BCEA.
- Employees would be able to refer all disputes concerning the protection of employees against discrimination for enforcing their rights in terms of the BCEA to the CCMA for conciliation, in terms of the amended section 80 of the BCEA, whereafter they may be referred for arbitration, if unresolved. Currently, bargaining councils conciliate these disputes within their sectors of industry.
- Section 78 of the BCEA, which provides for “*rights of employees*” is amended in the Bill, to incorporate the National Minimum Wage Act into its provisions. Of note is section 78(1)(a), which would add alleged failure or refusal by an employer to comply with the National Minimum Wage Act to such a failure or refusal in respect of the BCEA as being matters in respect of which every employee has the right to make a complaint to a trade union representative, a trade union official or a labour inspector.

Author: Miles Chennells
Maserumule Corporate Employment Law

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www.masconsulting.co.za