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Newsflash

NMW Bill and LRA, BCEA Amendment Bills

The Minister of Labour gazetted the National Minimum Wage (NMW) Bill and LRA, BCEA Amendment Bills on Friday 17 November 2017. The NMW Bill is filed under Worklaw's legislation section on www.worklaw.co.za. Contact the Worklaw office if you would like copies of the other Bills.

It is interesting that these Bills have been published together. It has been suggested that the proposed amendments to the LRA which, amongst other issues, address employer concerns over protracted strikes and strike related violence through advisory arbitration procedures, are in some respects a 'quid pro quo' for the implementation of the new national minimum wage.

The time period for any comment on the Bills is 30 November 2017 – a mere 13 days after publication. Having dragged their feet on publishing the Bills, this does seem a very short period and one wonders how committed government is to meaningful consultation on these matters before finalising the amendments.

This newsflash provides an overview of the key amendments. We have tried to get this out to Worklaw subscribers as quickly as possible – some of the sections are in our view clumsily drafted (there appear to be some drafting errors and incorrect cross references to sections) and accordingly difficult to comprehend, and the summary below represents our initial views on these matters. We have also tried to avoid getting too 'technical' at this stage, and the aim of this newsflash is to provide a broad overview of the key features of the Bills. We may provide a more detailed analysis at a later stage.

A. National Minimum Wage Bill

Schedule 1 to the NMW Bill provides for the implementation of a national minimum wage of R20 per hour to be implemented from 1 May 2018, provided that the minimum wage for –

- farm workers shall be R18 per hour;
- domestic workers shall be R15 per hour;
- workers on an expanded public works programme shall be R11 per hour.

The Act will apply to all workers and their employers, except members of the SANDF, the NIA and the Secret Service.

"*Wage*" is defined as the amount of money payable to a worker in respect of ordinary hours of work, and in terms of s5 excludes-

- any payment made to enable a worker to work, including any transport, equipment, tool, food or accommodation allowance;
- any payment in kind including board or accommodation;
- gratuities, including bonuses, tips or gifts; and
- any other prescribed category of payment.

S4(6) prescribes that it is an unfair labour practice for an employer to unilaterally alter wages, hours of work or other conditions of employment, in implementing the national minimum wage.

A National Minimum Wage Commission is established in terms of s8 & s9, and the Commission is required in terms of s6(1) to review the national minimum wage annually, with adjustments to take effect on 1 May each year. S7 sets out the factors the Commission must consider each year in reviewing the minimum wage.

S15 creates a procedure to apply for exemptions from paying the national minimum wage. The Minister has made it clear in public statements that exemptions will not be granted to sectors, but may for example be available to new businesses starting up.

B. LRA Amendment Bill

B.1 Advisory arbitration to resolve strikes/lockouts

In an endeavour to resolve strikes or lockouts that are intractable, violent or that may cause a local or national crisis, new sections 150A-D provide for the establishment of an advisory arbitration panel that will on an expedited basis investigate the cause and circumstances of the strike or lockout, and make an advisory award to assist the parties to resolve the dispute.

B.1.1 Appointment of the panel

The CCMA director may under s150A(1) appoint a panel to 'facilitate' a dispute on application by one of the parties or on the director's own accord, and after consultation with the parties. Confusingly the panel, in terms of s150A(3), may only facilitate a resolution of the dispute if directed to do so by the Minister, on application by one of the parties, if ordered to do so by the Labour Court, or by agreement between the parties. (We think this confusion may be created by drafting errors which presumably will be corrected.)

Unless agreed between the parties, the director may only appoint the panel if-
(a) the strike / lockout is no longer functional to collective bargaining, having continued for a protracted period with no resolution imminent;
(b) there is an imminent threat of constitutional rights being violated through violence or damage to property; or
(c) the strike / lockout has the potential to cause a national or local crisis.

The Labour Court may order a panel to facilitate a dispute on application by parties materially affected, but only under the circumstances in (b) and (c) above.

B.1.2 Composition of the panel

The panel will consist of a senior commissioner and 2 assessors, the employer and union party to the dispute each appointing an assessor; failing which the director appoints the assessor(s) from a prescribed list nominated by Nedlac.

B.1.3 Functioning of the panel

The chairperson of the panel, after consultation with the assessors, can conduct the arbitration in a manner he/she considers appropriate and with a minimum of legal formalities, to make an advisory award fairly and quickly. The chairperson is given the powers of a commissioner under s142 and has powers to order disclosure of relevant and necessary information.

The panel must issue an award within 7 days of the arbitration hearing or any reasonable period extended by the director, taking into account the urgency of the dispute. Note that the appointment of the panel does not suspend the right to strike / lockout. If the panel cannot achieve consensus, the chairperson issues the award on behalf of the panel.

B.1.4 The arbitration award

The award must report on factual findings, make recommendations to resolve the dispute, and motivate why it should be accepted by the parties. The parties are given 7 days to indicate acceptance or rejection of the award, failing which they are deemed to have accepted it, provided that a party may apply to the chairperson to extend this period by up to 5 days. The parties are given time to consider the award before it is made publicly available by the Minister within 4 days of it being issued.

A party must consult with its members before rejecting an award, and must motivate any rejection of an award. A party is not prevented from requesting the panel to reconvene, to seek an explanation of the award or to mediate a settlement of the dispute based on the award or a variation thereof.

The award is only binding on a party and its members if it has accepted the award or is deemed to have accepted it. A binding award is given the status of a collective agreement. Bargaining councils may extend such awards to cover non parties in terms of the LRA.

In summary, aside from technical problems resulting from the current drafting of these new provisions (which hopefully will be addressed), we have 2 major concerns over this new attempt to resolve protracted strikes and strike related violence. Firstly, we are concerned that the new process may as much extend strikes as curtail strikes: a union that perceives it is not going to achieve its demands through collective bargaining, may hold out on strike in an attempt to ‘win the battle’ through the arbitration process.

Secondly, whilst the process aims to be quick and flexible, in reality it could take 30 to 40 days for the process to be completed – and considering that this process will presumably only commence after a strike has already been running for some time. If it takes 3 days for the chairperson and assessors on the panel to be appointed, a further 7 days for the arbitration hearing to be arranged and finalised, 7 days for the award to be issued after the hearing, a further 7 days (which can be extended to 12 days) for the parties to decide whether to accept or reject the award, plus any further delays asking the panel to reconvene and mediate, one can quickly see how a month or more will have gone by before the process yields results.

B.2 Summary of other proposed LRA amendments

There is too much content to cover all the amendments in this newsflash, but we thought we would provide subscribers with a quick summary of what we think are the other more relevant changes:

- New s135(2A)-(2C) provide for the extension of the 30 day conciliation period by up to 5 days, to ensure a meaningful conciliation process.

- S69 is amended to prohibit picketing unless there are picketing rules in place. A commissioner conciliating a dispute must determine picketing rules (using the default picketing rules in the Code as a guide), taking into account the parties' representations, if there are no picketing agreement in place.

- S95 and s97 relating to strike ballots as required by a union's constitution, are amended to provide that any such ballot shall be secret, and what constitutes documentary evidence of proof of the outcome of the ballot is widened.

- S127 & s128 are amended to provide that accredited bargaining councils or private agencies may only appoint persons to resolve disputes if that person has CCMA accreditation.

- S72 & s75 are amended to provide for the ratification of minimum service agreements by a panel appointed by the Essential Services Committee, and the definition of minimum services; the appointed panel may also vary or rescind a designation of a maintenance service.

C. BCEA Amendment Bill

The BCEA is to be amended, largely to cater for the implementation on the national minimum wage. The following changes are proposed:

- Basic conditions of employment are defined to include the national minimum wage, which will be enforced as such under the Act.

- A new s9A provides that an employee who works less than 4 hours on a day, must be paid for 4 hours on that day.

- Chapters 8 & 9 that previously dealt with Sectoral Determinations and the Employment Conditions Commission, are repealed. The Commission now falls under the Minimum Wage Act – see above.

- S64 is amended to provide that labour inspectors, in enforcing compliance with the Act, may refer disputes to the CCMA over failures to comply with the Act. Their functions are expanded to include appearing at CCMA or Labour Court proceedings in this regard.

- Amendments to s68(3) provide that if an employer fails to comply with a written undertaking given under that section, the Director General may now apply to the CCMA (and not the LC as previously stated) to give the undertaking the status of an arbitration award.

- A new s73A provides that any person may refer a dispute to the CCMA over a failure to pay wages.

- A new s76A provides for fines for not paying the national minimum wage, being the greater of –
    - twice the value of the underpayment, or
    - twice the employee's monthly wage.

- S80 now refers disputes relating to employees' rights and protection against discrimination under the Act, to the CCMA for arbitration and no longer the Labour Court

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