

MEMORANDUM OF OBJECTS

BASIC CONDITIONS OF EMPLOYMENT AMENDMENT BILL, 2012

The Minister of Labour is tabling in Parliament Bills to amend the Labour Relations Act, 1995 and the Basic Conditions of Employment Act, 1997. The most significant amendments proposed to the BCEA are to bring the provisions regulating child labour in line international standards and to improve the mechanisms for enforcement of basic conditions of employment, including minimum wages.

Amendment of section 1 (Definitions)

The definitions of “sector” and “serve” are to be revised.

Insertion of section 33A

Employers are to be prohibited from requiring or accepting any payment from an employee or potential employee in respect of their employment or the allocation of work to the employee.

A further prohibition is introduced to prevent employees being required to purchase goods from their employer or a business or person nominated by their employer. However, this restriction does not apply to schemes in terms of which employees receive a financial benefit through the purchase of goods, products or services at a fair and reasonable price.

Breaches of these provisions are a criminal offence.

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Amendment of sections 43 to 47

The provisions in the BCEA dealing with the prohibition and regulation of child labour are to be extended to cover all work by children and not only work by children as employees. This change is required to achieve full compliance with South Africa's obligations under the relevant international labour standards as well as to create consistency with the Constitution and other legislation protecting the rights of children. Section 44 is amended to enable the Minister of Labour to make any regulations that are necessary to give effect to South Africa's obligation in terms of any international law instrument dealing with child labour.

In addition, section 93 is amended to increase the maximum jail sentence for a breach of child labour offences to six years.

Amendment of section 55

The powers of the Minister and the Employment Conditions Commission in respect of sectoral determinations are clarified and adjusted. These are –

- a) the Minister may issue an “umbrella” sectoral determination covering employers and employees who are not covered by any other sectoral determination or by a bargaining council collective agreement;
- b) a sectoral determination may prescribe minimum increases in remuneration;
- c) a sectoral determination may prohibit or regulate the sub-contracting of work;

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- d) a sectoral determination may prescribe a threshold of representativeness for a registered trade union to have the organizational rights of access to employer premises and deduction of trade union subscriptions in respect of workplaces covered by the sectoral determination. Section 19 of the LRA has similar provisions applicable to trade unions that are parties to a bargaining council;
- e) the sectoral determination for the agricultural sector may specify methods for determining the value of a labour tenant's right to occupy or use part of a farm for the purposes of the Land Reform (Labour Tenants) Act 3 of 1996;
- f) the Minister's power to make a sectoral determination in a sector in which a statutory council has been established is clarified.

Amendments to sections 68 to 73

The process for enforcing compliance with the provisions of the BCEA has proved to be extremely cumbersome and time-consuming. This has contributed to a situation in which there is a significant level of non-compliance with the BCEA and with minimum wages and other conditions of employment set in sectoral determinations. While the overall framework for enforcing compliance with the BCEA is maintained, amendments are made to sections 68 to 73 to remove bottle-necks and delays from the enforcement process.

The NEDLAC parties are of the view that jurisdiction for claims concerning non-compliance with the Act and sectoral determinations should be transferred from the Labour Court to the CCMA. However, as this will have a significant impact

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on the case-load of the CCMA, the social partners believe that an investigation of the implications of such a change should be undertaken before any legislative change is made.

Amendment to section 68

The mandatory requirement that inspectors must seek to secure a written undertaking from defaulting employers to comply with the Act before issuing a compliance order is removed. While seeking to obtain a written undertaking remains part of the statutory enforcement process, making this stage discretionary will prevent habitually non-compliant employers from using this as a basis for resisting enforcement processes.

If an employer fails to comply with a written undertaking that it has given, the Department of Labour will be able to apply directly to the Labour Court to enforce compliance with the undertaking.

Amendment to section 69

Section 69 is amended to provide that a compliance order may specify the date –

- (a) by which the employer must make any representations it wishes to make as to why it is not in breach of the BCEA;
- (b) on which the Department of Labour will apply to the Labour Court to have the order made into a court order if the employer does not comply with the order.

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These amendments are intended to expedite the process for enforcing compliance with the BCEA while allowing the employer an adequate opportunity to state its case in representations to the Labour Court.

Amendment to section 70

Section 70 dealing with the limitations on the power of inspectors to issue compliance orders is clarified. These amendments are of a technical nature.

Repeal of sections 71 and 72

The procedure in terms of which an employer is able to make objections to the Director -General concerning a compliance order is removed from the Act. Any objections that employers have to compliance orders, that are contested by the Department of Labour, will now be adjudicated by the Labour Court.

Amendment to section 74

The jurisdiction of the Labour Court and the CCMA to adjudicate on claims under the BCEA in the course of hearing an unfair dismissal case are to be broadened to cover any claim by the employee under the BCEA that has not prescribed. Once the Court or arbitrator has determined the matter, no compliance order or other proceedings can be continued or brought in respect of the claim. This will avoid “splitting” of claims and thus prevent the unnecessary duplication of proceedings for employers and employees. It will also ensure the most effective use of the resources of the Labour Court, CCMA and Department of Labour.

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Amendment to section 77

The jurisdiction of the Labour Court is clarified by specifying that it has jurisdiction to grant civil remedies (such as interdicts) in respect of matters which are criminal offences. This clarifies that the Labour Court can, for instance, interdict an employer from requiring children to work in breach of the child labour provisions of the Act.

Amendment to section 93

The maximum term of imprisonment for an offence involving child labour or forced labour is increased from three years to six years, and the maximum term of imprisonment in respect of an offence under section 33A is set at 3 years.

Amendment to Schedule 2

The maximum penalties that may be imposed for a breach of the BCEA not involving an underpayment are increased by 200%. These penalties have not changed since the Act first came into effect.