

MEMORANDUM OF OBJECTS

LABOUR RELATIONS AMENDMENT BILL, 2012

The Minister of Labour is tabling in Parliament Bills to amend the Labour Relations Act, 1995 (LRA) and the Basic Conditions of Employment Act, 1997 (BCEA). These two statutes, which form the cornerstone of South Africa's labour legislation, have not been amended since 2002. In preparation for the publication of these Bills the Department of Labour and the representatives of organised business and labour undertook a labour law review and have engaged in extensive consultations over a period of almost one year in Nedlac.

The proposed amendments to the Acts can be grouped under the following themes –

- (a) responses to the increased informalisation of labour to ensure that vulnerable categories of workers receive adequate protection and are employed in conditions of decent work;
- (b) adjustments to the law to ensure compliance with South Africa's obligations in terms of international labour standards;
- (c) ensuring that labour legislation gives effect to fundamental Constitutional rights including the right to fair labour practices, to engage in collective bargaining and right to equality and protection from discrimination;
- (d) enhancing the effectiveness of the primary labour market institutions such as the Labour Court, the CCMA, the Essential Services Committee and the labour inspectorate;
- (e) rectifying anomalies and clarifying uncertainties that have arisen from the interpretation and application of these two statutes in the past decade.

LABOUR RELATIONS AMENDMENT BILL, 2012

Amendment of section 21 of Act 66 of 1995

Certain amendments are made to adjust the circumstances under which a Commissioner may grant organisational rights to a trade union.

A Commissioner determining a dispute about organisational rights may consider the composition of the workforce, including the extent to which employees in the workplace are employed in non-standard employment, including through temporary employment services, on fixed term contracts, and in part time work. This provision is intended to promote the organisation of non-standard employees.

The section is also amended to broaden the discretion of a commissioner to award organisational rights in certain circumstances. A trade union that does not have a majority membership among employees a workplace may be awarded the right for its members to elect trade union representatives under section 14. For such an award to be made, the trade union must already have acquired the organisational rights referred to in sections 12 (trade union access to the workplace), 13 (deduction of trade union subscriptions or levies) and 15 (leave for trade union activities) and there must be no majority trade union in the workplace. This allows a commissioner to award the organisational right associated with trade union representatives in appropriate cases to a trade union with substantial membership where there is no majority trade union. The organisational right of disclosure of information (section 16) may be awarded to a non-majority trade union in similar circumstances in order to facilitate collective bargaining.

Arbitrators may award organisational rights to a trade union that does not meet a threshold established by a collective agreement concluded in terms of section 18 of the LRA between the employer and a majority trade union. The commissioner may overlook a threshold of this kind if applying it would unfairly affect another trade union and the trade union seeking the rights represents a significant interest or number of employees in the workplace. A commissioner applying the new provision will need to draw an appropriate balance between

LABOUR RELATIONS AMENDMENT BILL, 2012

the rights of the trade union wishing to exercise organisational rights and the rights of the majority trade union.

Finally, the section is amended to provide that, for the purpose of organisational rights, employees engaged by a temporary employment service may be regarded as forming part of the workplace either of the temporary employment service or of the client where they work. This is to remedy the situation where temporary employment service employees may only exercise their rights at the premises of the temporary employment service, which may be far away from their actual place of work.

Amendment of section 22 of Act 66 of 1995

This section is amended to ensure that where organisational rights may affect the rights and interests of third parties, such as the client of a temporary employment service or owner of the premises from which the employer operates, an arbitration award may bind those third parties as long as they have been given an opportunity to participate in the arbitration.

Amendment of section 32 of Act 66 of 1995

This section is amended to improve the speed and effectiveness of the exemption procedures associated with a collective agreement concluded in a bargaining council agreement that is extended to non-parties. The amendments also ensure the independence of an exemptions appeal body from the trade union and employer parties to the council.

The amendments also introduce a requirement that the Minister must allow an opportunity for public comment when considering whether to extend a bargaining council collective agreement where the parties to the bargaining council are only sufficiently representative (section 32(5)). When considering, whether the parties to a bargaining council are sufficiently representative, the Minister may take into account the extent to which there are employees within the sector employed in non-standard forms of employment.

LABOUR RELATIONS AMENDMENT BILL, 2012

Amendment of section 49 of Act 66 of 1995

This section is amended to clarify that a certificate specifying the level of representativeness of a bargaining council may be taken into account for any purpose under the Act, including a decision by the Minister whether or not to extend a collective bargaining agreement in terms of section 32.

Amendment of section 51 of Act 66 of 1995

This section is amended to provide for the funding of dispute resolution services of bargaining councils either by a levy required by collective agreement or by fees imposed on parties to a dispute in circumstances in which the CCMA is entitled to charge a fee.

Amendments to Chapter IV of the LRA

The key amendments in the Chapter concern procedural requirements for protected industrial action, and changes to the manner in which dispute resolution in essential services is regulated. The changes are intended to respond to unacceptable levels of unprotected industrial action, including strike action in essential services, and unlawful acts in support of industrial action, including violence and intimidation.

Amendment of section 64 of Act 66 of 1995

The section is amended to reintroduce the requirement of a ballot before a protected strike or lock-out may commence. The change is intended to prevent industrial action being staged if it enjoys only minority support, as violence or intimidation are more likely to occur under these circumstances.

Before calling a strike or lock-out, a trade union or employers' organisation must conduct a ballot of its members entitled to participate in the industrial action.

LABOUR RELATIONS AMENDMENT BILL, 2012

The strike or lock-out will be protected if a majority of those who vote in the ballot vote in favour of industrial action.

The 1956 LRA contained balloting requirements but these were not re-enacted in the 1995 statute. One of the principle reasons for this was that the balloting requirements had given rise to technical disputes over compliance and there was extensive litigation over this issue. This issue is dealt with by providing that a certificate of compliance issued by the Commission, a bargaining council or an accredited private agency will serve as proof that a ballot has been staged in compliance with the statutory requirements.

Amendment of section 65 of Act 66 of 1995

Amendments are proposed to this section to eliminate the anomalous distinction between disputes that can be adjudicated under the LRA in respect of which industrial action is currently restricted and those under other employment laws in respect of which there is no equivalent restriction.

Amendment of section 67 of Act 66 of 1995

An amendment to this section makes it clear that conduct in breach of a picketing agreement or picketing rules does not enjoy protection against civil legal proceedings under this section.

Amendment of section 69 of Act 66 of 1995

Amendments to this section seek to improve the regulation of picketing by making picketing rules binding on third parties such as the landlords of employers. This may result in a situation in which picketing is permitted to occur on property that is owned or controlled by such a third party, where this is

LABOUR RELATIONS AMENDMENT BILL, 2012

appropriate, but only where the third party has consented or has had an opportunity to be heard before the rules are made.

The amendments also confirm and elaborate on the access of parties to the Labour Court in the case of a dispute over compliance with picketing rules, and describe remedies that may be granted by the Labour Court. The Labour Court may, in appropriate cases, order compliance with picketing rules or vary the terms of a picketing agreement or rules. The Labour Court is further granted the power to suspend a picket or strike in appropriate circumstances. Likewise, the Court may suspend a lock-out or suspend an employer from engaging replacement labour during a strike or lock-out.

Amendment of sections 70 to 74 of Act 66 of 1995 and insertion of sections 70A to 70F of Act 66 of 1995 – Essential Services

Under the current dispensation numerous problems have been identified with the system for regulating dispute resolution in essential services. These include the scope of essential service determinations made to date, the small number of minimum service agreements ratified by the Essential Services Committee (ESC) and the high level of strike action within essential services. Many stakeholders have negative perceptions about the operation and administration of the ESC. Extensive amendments are proposed to address these problems.

Amendment of section 70 of Act 66 of 1995 – Establishment of the ESC

Section 70 provides for the establishment of the Essential Services Committee (ESC). While the ESC was brought into existence by the 1995 Act, its structure and functioning are to be significantly revised to enhance its legitimacy and efficacy.

Insertion of section 70A of Act 66 of 1995 – composition of the ESC

The ESC is to be composed of eight persons. The independent chairperson and deputy chairperson are to be appointed by the Minister, after consulting NEDLAC. The chairperson may be a senior commissioner of the CCMA while

LABOUR RELATIONS AMENDMENT BILL, 2012

the deputy chairperson must be a senior commissioner of the CCMA. This is to ensure that the ESC has someone who is always available to devote time to the functioning of the ESC.

The remaining six members of the ESC are nominated by the social partners at NEDLAC – two by each of Government, Labour and Business. The introduction of government nominees is an innovation to ensure that government is adequately represented on the ESC in its capacity as an employer, as a high proportion of essential service matters occur within the public service.

The criteria for appointment to the ESC are also specified and members must have suitable qualifications or experience in labour law, labour relations, commerce, industry or a sector of the economy, public affairs or the administration of justice.

Insertion of section 70B of Act 66 of 1995 – powers and functions of the ESC

The ESC is responsible for overseeing dispute resolution in essential service sectors. Its powers and functions are to:

- monitor the implementation and observance of essential service determinations and minimum service agreements and determinations;
- promote effective dispute resolution in essential services;
- develop guidelines for the negotiation of minimum service agreements.
- decide whether to institute investigations as to whether or not the whole or a part of any service is an essential service;
- manage the ESC's case load; and
- appoint panels to hear and determine matters.

LABOUR RELATIONS AMENDMENT BILL, 2012

The ESC must establish a panel to hear and determine a matter if requested to do so by a bargaining council. The ESC may also request the CCMA or any other appropriate person to conduct an investigation to assist the ESC in an investigation and to submit a report.

Insertion of section 70C of Act 66 of 1995 – appointment of panels

The ESC must appoint a panel to preside over each matter that is before it. The panel may consist of either three or five persons, depending upon the complexity of the issue involved. The panel includes a presiding member and either two or four assessors.

The chairperson or deputy chairperson of the ESC may preside over a panel hearing. In addition, a presiding member may be appointed from a list of senior commissioners that have been trained for this purpose.

The presiding member of the panel determines questions of law and procedure, including whether a matter is a question of law or procedure. The assessors only make decisions on questions of fact. As the assessors will have knowledge or experience of the sector concerned, their participation will promote effective decision-making and enhance the legitimacy of the ESC.

The Act provides for the panel to be composed in several ways. In the case of a three person panel, the assessors must be either:

- Two members of the ESC – one from a person nominated to the essential services committee by organised labour and one from the nominees of organised business or government. If the matter involves the state in its capacity as employer, the “employer” assessor must be a government nominee; if it involves the private sector, that assessor must be from organised business’ nominations to the ESC.
- One person nominated from the trade union parties to the proceedings before the panel and one person from the employer parties to the proceedings.

LABOUR RELATIONS AMENDMENT BILL, 2012

If the panel is composed of five persons, the ESC must appoint two of its members to serve as its assessors and invite the employer and trade union parties participating in the hearing to each nominate an assessor. The assessor nominated by either the trade union or employer parties to the proceedings may be a member of the ESC.

Insertion of section 70D – powers and functions of a panel

The powers and functions of panels appointed by the ESC are to:

- conduct investigations as to whether or not the whole or a part of any service is an essential service;
- determine whether or not to designate the whole or a part of that service as an essential service;
- determine disputes as to whether or not the whole or a part of any service falls within the scope of a designated essential service;
- determine whether or not the whole or a part of any service is a maintenance service;
- ratify a collective agreement that provides for the maintenance of minimum services in a service designated as an essential service; and
- determine, in accordance with the provisions of the Act, the minimum services required to be maintained in the service that is designated as an essential service.

The decision or finding of the majority of the panel is the decision of the ESC.

LABOUR RELATIONS AMENDMENT BILL, 2012

Insertion of section 70E of Act 66 of 1995 – jurisdiction and administration of the ESC

The ESC has jurisdiction throughout South Africa and is based in the CCMA's head office. It is administered by the CCMA and the director of the CCMA is the accounting officer of the CCMA. The director is required to allocate adequate resources to the ESC in order for it to perform its functions. The ESC is to be financed primarily through the budget allocated to the CCMA

The Director appoints staff to the ESC after consulting the ESC and governing body of the CCMA. The governing body determines the remuneration and other terms and conditions of staff of the ESC. The Minister of Finance determines the allowances of members of the ESC, assessors and persons appointed to investigate matter for the ESC

Insertion of section 70F of Act 66 of 1995 – ESC Regulations

The Minister of Labour may make regulations concerning any matter related to the functioning of the ESC and its panels.

Insertion of section 71A of Act 66 of 1995 – public officials exercising authority in the name of the state

The International Labour Organisation (ILO) recognises that the right to strike of public officials exercising authority in the name of the state may be limited, despite the fact that their work does not fit into the strict definition of an essential service. "Public officials exercising authority in the name of the state" is defined as customs' officials, immigration officers, judicial officers and officials working in the administration of justice.

The amendments provide that these officials will be deemed to be within an essential service if a minimum service agreement that covers them is ratified or determined by the ESC. Provisions are put in place that allow for the negotiation and mediation of a minimum service agreement, and if no agreement can be

LABOUR RELATIONS AMENDMENT BILL, 2012

concluded, the determination of the minimum services for the maintenance of the services provided by these officials.

Amendment to section 72 of Act 66 of 1995 – Minimum Services

Provision is made for the negotiation and mediation of minimum service agreements. These acquire validity and become binding once ratified by a panel appointed by the ESC. In the absence of a ratified minimum service agreement, a panel may determine the minimum services required for the maintenance of essential services. A minimum service determination is valid until varied or revoked; however, it may not be varied or revoked for a period of 12 months unless the relevant trade union and employers agree to this.

In order to promote interest arbitration and protect employees from an overly broad minimum service designation, the Bill provides that a minimum service designation will not apply if the majority of employees concerned vote to be covered by the broader essential service designation. This will have the result that there can be no strike or lock-out in the service concerned and all unresolved interest disputes will be subject to compulsory arbitration.

Insertion of section 103A of Act 66 of 1995

This new section is introduced to permit the Labour Court to make an order placing a trade union or employers' organisation under administration in circumstances such as if the trade union is unable to perform its functions. The application may be made by the trade union or employers' organisation concerned or by the Registrar of Labour Relations. The section provides an alternative to the winding up procedure in section 103 and provides for a more appropriate process if the circumstances facing the trade union or employers' organisation are capable of being remedied.

LABOUR RELATIONS AMENDMENT BILL, 2012

Amendment of section 111 of Act 66 of 1995

This section is amended to clarify an issue that has been the subject of litigation in the Labour Courts. The amendment provides that a trade union or employers' organisation whose registration has been cancelled by a decision of the Registrar of Labour Relations is not entitled to continue to function pending the outcome of an appeal against the decision of the Registrar.

Amendment of Section 115 of Act 66 of 1995

This section is amended to introduce what are primarily formal amendments to the powers of the Commission. One change empowers the Commission to provide purely administrative assistance to lower paid employees in the delivery of notices or documents relating to proceedings in the Commission. Often such employees are unable to serve referral documents on their employer. Another change empowers the Commission to make rules to regulate the consequences of a party's failure to attend conciliation or arbitration proceedings. This change has been necessitated by the Labour Appeal Court's interpretation of the CCMA's rule-making powers. In addition, the section is amended to clarify the powers of the Commission to make rules regulating the rights of parties to be represented in proceedings before the Commission.

Amendment of section 138 of Act 66 of 1995

This amendment removes a requirement that original arbitration awards must be lodged with the Registrar of the Labour Court. This has proved to be unnecessary and administratively burdensome.

LABOUR RELATIONS AMENDMENT BILL, 2012

Amendment of section 143 of Act 66 of 1995

Amendments to this section are intended to further streamline the mechanisms for enforcing arbitration awards of the Commission and to make these mechanisms more effective and accessible. Firstly, an award which has been certified by the Commission can be presented to the Deputy-Sheriff for execution if payment is not made. This removes the need for the current practice in terms of which parties have a writ issued by the Labour Court. This has proved to be time-consuming and expensive, particularly for applicants in a centre where there is no Labour Court. Secondly, in the case of awards such as reinstatement which are enforced by contempt proceedings in the Labour Court, the need to have an arbitration award made an order of the Labour Court before contempt proceedings can be commenced is removed. Finally, the enforcement of awards to pay money will occur in terms of the Rules and Tariffs applicable to the Magistrate's Court, thus simplifying and reducing the costs of these proceedings. These amendments are anticipated to simplify and expedite the enforcement of arbitration awards by the Commission and bargaining councils.

Amendment of section 144 of Act 66 of 1995

This section is amended to bring the Act into line with decisions of the Labour Court holding that the common law grounds which allow for rescission on good cause apply to proceedings before the Commission.

Amendment of section 145 of Act 66 of 1995

This section is amended by introducing certain measures intended to reduce the number of review applications that are brought to frustrate or delay compliance with arbitration awards, and to speed up the finalisation of applications brought to the Labour Court to review arbitration awards.

At present, a review application does not suspend the operation of an arbitration award. This often results in separate or interlocutory applications to stay

LABOUR RELATIONS AMENDMENT BILL, 2012

enforcement of awards pending review proceedings. It is proposed that the operation of an arbitration award would be suspended if security is provided by the applicant in an amount specified in the provision, or any lesser amount permitted by the Labour Court.

In order to prevent delay by applicants, the amended provisions require that an applicant must apply for a date for the hearing of a review application within six months of commencing proceedings. Judgment in review matters must be handed down within six weeks unless there are exceptional circumstances.

Finally, a new subsection provides that a review application interrupts the running of prescription in respect of an arbitration award.

Amendment of section 147 of Act 66 of 1995

This section is amended to require the Commission to resolve disputes even where the parties have agreed to private dispute resolution if, in the case of lower paid employees, the employee is required to pay any part of the cost of private dispute resolution, or, in the case of all employees, the person appointed to resolve the dispute is not independent of the employer.

Substitution of section 150 of Act 66 of 1995

This amendment extends and regulates the circumstances in which the Commission may intervene to attempt to resolve disputes by conciliation at the request of the parties or where this is in the public interest, even if conciliation has already been attempted. The purpose of the provision is to empower the Commission to intervene when appropriate in protracted disputes in an effort to secure their resolution in the public interest. The Commission's intervention does not affect the parties' entitlement to strike or lock-out.

LABOUR RELATIONS AMENDMENT BILL, 2012

Amendment of section 151 of Act 66 of 1995

This is a formal amendment to align the LRA with other statutory developments.

Amendment of section 154 of Act 66 of 1995

These amendments provide for the tenure of Labour Court judges, who are currently appointed for a fixed term, and regulate their remuneration on the same basis as High Court judges. These amendments are contained in a Schedule to the Superior Courts Bill, 2011 but have been included in this Bill because of the delays involved in the finalisation of the Superior Courts Bill.

Amendment of section 157 of Act 66 of 1995

This is a formal amendment that excludes the jurisdiction of the Labour Court to adjudicate disputes that are required, not only by the LRA but by any other employment law, to be determined by arbitration.

Amendment of section 158 of Act 66 of 1995

The powers of the Labour Court are clarified and amended in certain respects. The amendments clarify that it is only in exceptional circumstances that the Labour Court may deal with review applications against decisions or rulings of the Commission before a matter has been finalised in the Commission. This seeks to limit the use of piece-meal review applications during arbitration proceedings as a mechanism for delay. In addition, when the Labour Court deals with a matter under the powers conferred by subsection 158(2) it will not do so as an arbitrator, but as the Court. This means that any challenge to the Court's decision will be by way of appeal to the Labour Appeal Court, and not on review to the Labour Court. Finally, the amendment provides a period within which judgements of the Labour Court must be handed down.

LABOUR RELATIONS AMENDMENT BILL, 2012

Amendment of section 159 of Act 66 of 1995

Formal amendments to this section are intended to ensure that a Rules Board for the Labour Court is appointed and meets regularly.

Amendment of section 161 of Act 66 of 1995

The section is amended to deal with the problem of labour consultants appearing in proceedings before the Labour Court under the guise of membership of, or being an official of, a trade union or employer's organisation, or of another permitted category, when in fact they appear in a professional capacity and seek to charge fees for that appearance.

Amendment of section 168 of Act 66 of 1995

This amendment allows Labour Court judges to be appointed to act in the Labour Appeal Court. This is intended to ensure that the Labour Appeal Court functions as a specialist institution.

Amendment of section 186 of Act 66 of 1995

This section is amended to remove an anomaly in the definition of dismissal which meant that employees engaged for a fixed term could claim dismissal on expiry of the term only if they could show that they reasonably expected the employer to renew the fixed term, but not if they could show that they reasonably expected to be retained in indefinite employment. The amendment also clarifies that the termination of employment is a dismissal, whether or not there is a formal or written contract of employment.

LABOUR RELATIONS AMENDMENT BILL, 2012

Amendment of section 187 of Act 66 of 1995

This section is amended to remove an anomaly arising from the interpretation of section 187(1)(c) in *National Union of Metalworkers of SA v Fry's Metals (Pty) Ltd* (2005) 26 ILJ 689 (SCA) which held that the clause had been intended to remedy the so-called "lock-out" dismissal which was a feature of pre-1995 labour relations practice. The effect of this decision when read with decisions such as *Chemical Workers Industrial Union & others v Algorax (Pty) Ltd* (2003) 24 ILJ 1917 (LAC) is to discourage employers from offering re-employment to employees who have been retrenched after refusing to accept changes in working conditions.

The amended provision seeks to give effect to the intention of the provision as enacted in 1995 which is to preclude the dismissal of employees where the reason for the dismissal is their refusal to accept a demand by the employer over a matter of mutual interest. This is intended to protect the integrity of the process of collective bargaining under the LRA and is consistent with the purposes of the Act.

Substitution of section 188A of Act 66 of 1995

Certain formal amendments are made to facilitate the use of CCMA commissioners to conduct disciplinary enquiries (currently referred to as pre-dismissal enquiries). The amendment seeks to promote the enquiries by arbitrators, which avoid the need to have both an enquiry and an arbitration hearing, by allowing their introduction through collective agreement. In addition, the section is amended to avoid disputes where an employee claims that the holding of an enquiry into allegations of misconduct, and suspension pending such an enquiry, breaches the provisions of the Protected Disclosures Act. By permitting either party to insist on an enquiry under this section the amended provision reduces the risk of collateral litigation, including High Court litigation, which has been common in these circumstances.

LABOUR RELATIONS AMENDMENT BILL, 2012

Insertion of section 188B of Act 66 of 1995

This section is inserted to create more flexibility for employers in dealing with the dismissal of high earning employees. It does so without detracting from the rights of these employees not to be dismissed for reasons that would be automatically unfair under section 187, or their rights to seek redress for unfair labour practices defined in section 186.

At the heart of the change is the disproportionate cost, complexity, and impact on an employer's operations of procedures to terminate the employment of high earning employees in circumstances where the reason for doing so may not fall clearly and neatly within the fair reasons for dismissal specified in section 188(1)(a)(i) and (ii). By way of example, an employer may reasonably and fairly wish to replace a senior executive to secure a change in tone and culture within the leadership team, because the executive does not fit or no longer fits within the leadership team, because internal or external circumstances have changed, or because the employer wants to embark on a new direction for the business or enterprise. These reasons do not comfortably fall within the reasons for dismissal specified in section 188, but are widely recognised as legitimate reasons to replace senior employees. In addition, senior executives in practice exercise the role of employer in many respects, and usually occupy a special position of trust in relation to the employer.

The uncertainty created by the application of section 188 in these situations leads to significant inflexibility and inefficiency at the top levels of a business or state enterprise. At the same time, the cost of asserting discipline and performance standards at senior levels is notoriously difficult to manage, and conflict at this senior executive level that results from efforts to terminate employment imposes significant constraints, measured in cost and efficiency, on both public and private sector employers.

The primary rationale for providing statutory protection against unfair dismissal, and for providing remedies for unfair dismissal as a species of unfair labour practice, is the inequality of bargaining power between employer and employee.

LABOUR RELATIONS AMENDMENT BILL, 2012

Providing uniform protection against unfair dismissal to lower skilled or lower paid employees, on the one hand, and highly skilled or highly paid executives, on the other, fails to recognise the significant difference in bargaining power that employees in these categories have in negotiating employment contracts and in dealing with their employers during employment.

Senior executives and highly paid employees are generally able to influence to a material extent the terms on which they are engaged, and to make decisions about whether and on what terms to take up employment with a particular employer.

A number of comparable foreign jurisdictions exclude the application of dismissal protection to senior executive or highly paid employees. The amended section opts to apply the new provisions to employees earning above a specified remuneration threshold rather than by reference to their status or role within the employer's enterprise. This approach will avoid the need for disputes about whether employees fall inside or outside an identified class of employee, that may give rise to costly collateral litigation.

It is intended that the remuneration threshold will be a relatively high threshold, in excess of R1 million per annum, with the actual threshold to be determined by the Minister from time to time taking into account the considerations set out in subsection (4) of the new section. The amendments do not preclude the termination of employment of high earning employees summarily or on shorter notice where this is justified applying the provisions of section 188. In that event these employees, like all others, will be entitled to exercise the remedies provided by the LRA. Where employers elect, however, to give the minimum period of notice or any longer period provided for in the contract of employment, this will be deemed to be fair for the purposes of section 188, though it would not affect any claim brought under section 187.

The amendments seek to draw a fair balance between the rights and economic interests of employers, enabling employers to achieve efficiency and flexibility at

LABOUR RELATIONS AMENDMENT BILL, 2012

senior levels, and the rights and interests of highly paid employees, who remain protected against arbitrary or summary action.

A transitional provision will make the new regime applicable to existing contracts of employment of employees earning above the threshold after two years. This will provide all parties with an opportunity to reconsider and, where necessary, to renegotiate the terms of the employment relationship during that period.

Amendment of section 189A of Act 66 of 1995

The section is amended to preclude a party from unreasonably refusing to agree to extend the period for consultation over a proposed retrenchment. It is also amended by deleting subsection (19), which set out the test for determining the substantive fairness of a dismissal under section 189A. Specifying the test to be applied in section 189A retrenchments has led to uncertainty about whether and to what extent this should apply to cases of retrenchment where section 189 applies. The courts should retain their discretion to develop the jurisprudence in this area in the light of the circumstances and facts of each case and to articulate general principles applicable to all retrenchment cases.

Amendment of section 190 of Act 66 of 1995

The section is amended to eliminate uncertainty about the date of dismissal if an employee is dismissed on notice but paid all outstanding salary due to him or her before expiry of the notice period.

Amendment of section 191 of Act 66 of 1995

The section is amended to cater for any agreed extension of the conciliation period. The jurisdiction of the CCMA to arbitrate disputes about dismissals for

LABOUR RELATIONS AMENDMENT BILL, 2012

operational requirements involving only one employee is clarified. In addition, the CCMA will have jurisdiction to arbitrate disputes about dismissals for operational requirements involving small employers - those employing less than 10 employees. This is aimed at providing cheaper and less formal adjudication in these circumstances.

Amendments to Chapter IX of Act 66 of 1995 – non standard employees

Substantive amendments are made to Chapter IX to protect three categories of non-standard employees: employees placed by temporary employment services (TESs), employees engaged on fixed term contracts and part-time employees. Sections 198A, B and C extend significant protections to employees earning under the section 6(3) BCEA earnings threshold who are employed in these categories of work. The majority of these protections are only extended to employees after they have been in employment for six months. This creates an appropriate balance between the need to protect vulnerable employees against the potential for abuse and the need to permit short-term flexibility.

Amendment of section 198 of Act 66 of 1995 and insertion of section 198A – Temporary Employment Services

Section 198 has been amended, and a new section and further provisions introduced into the LRA, in order to address more effectively certain problems and abusive practices associate with temporary employment services (TES)¹, or what are more commonly referred to as “labour brokers”. The amendments further regulate the employment of persons by a TES in a way that seeks to balance important Constitutional rights. The main thrust of the amendments is to restrict the employment of more vulnerable, lower-paid workers by a TES to

¹ The South African Government’s *Medium Term Strategic Framework for 2009 to 2014* (para 36.2)

LABOUR RELATIONS AMENDMENT BILL, 2012

situations of genuine and relevant “temporary work”, and to introduce various further measures to protect workers employed in this way.

Amendment of section 198 of Act 66 of 1995 – general provisions regulating temporary employment services

Section 198 continues to apply to all employees. It retains the general provisions that a TES is the employer of persons whom it employs and pays to work for a client, and that a TES and its client are jointly and severally liable for specified contraventions of employment laws.

A number of further general protections are introduced:

- An employee bringing a claim for which a TES and client are jointly and severally liable may institute proceedings against either the TES or the client or both and may enforce any order or award made against the TES or client against either of them.
- A labour inspector acting in terms of the BCEA may secure and enforce compliance against the TES or the client, as if it were the employer, or both.
- A TES may not employ an employee on terms and conditions of employment not permitted by the LRA, a sectoral determination or a collective agreement concluded at a bargaining council that is applicable to a client for whom the employee works.
- The Labour Court or an arbitrator may now rule on whether a contract between a TES and a client complies with the LRA, a sectoral determination or applicable bargaining council agreement and make an appropriate award. There have been rulings that these agreements lie beyond their jurisdiction.

LABOUR RELATIONS AMENDMENT BILL, 2012

- A TES must be registered to conduct business, but the fact that it is not registered is no defence to any claim instituted in terms of the section.
- A TES must provide an employee assigned to a client with written particulars of employment that comply with section 29 of the BCEA.

Insertion of section 198A of Act 66 of 1995 – temporary employment services for employees earning below earnings threshold

The new section 198A introduces key additional protections for more vulnerable workers. It applies only to employees who earn on or below the threshold prescribed in terms of section 6(3) of the BCEA.

Employees in this category are employees of the TES for the purposes of the LRA only if they are employed to perform genuinely temporary work, defined in the new section as “temporary services”. If they are not employed to perform temporary services, they are deemed for the purposes of the LRA² to be employees of the client and not the TES. This means that, for the purposes of the LRA, employees are treated as the employees of the client if they work for a period in excess of six months. The only exception to this is employees who work as a substitute for an employee of the client who is temporarily absent. Temporary services may also be regulated by a collective agreement concluded in a bargaining council, a sectoral determination, or a Ministerial notice.

To prevent abuse of the six month period that constitutes temporary work, the section provides that a termination by a TES of an employee’s assignment with a client for the purpose of avoiding deemed employment by the client constitutes a dismissal. This means that the fairness of the termination of an assignment may be challenged in terms of the LRA.

² Including for purposes of freedom of association, organisational rights, collective bargaining, strikes and lock-outs, workplace forums, trade unions and employers’ organisation, dispute resolution, unfair dismissals and unfair labour practices.

LABOUR RELATIONS AMENDMENT BILL, 2012

Employees deemed under this provision to be employees of the client must be treated on the whole not less favourably than employees of the client who perform the same or similar work, unless there is a justifiable reason for different treatment. This means, for example, that if an employee is procured by a TES for a client for six months, but is kept on after the expiry of the six month period, then that employee must, unless there is a justifiable reason for different treatment, be paid the same wages and benefits as the client's other employees who are performing the same or similar work. The amendments set out in section 198D what may constitute a justifiable reason for this purpose.

Insertion of section 198B of Act 66 of 1995 – fixed-term contracts for employees earning below earnings threshold

An amendment to section 186 – explained earlier - provides additional protection against dismissal for all employees employed on fixed term contracts.

Like section 198A, the new section 198B introduces additional protection for more vulnerable workers and applies only to employees who earn on or below the threshold prescribed in terms of section 6(3) of the BCEA. The section does not apply to employees who are employed in terms of a statute, sectoral determination or collective agreement that permits the conclusion of a fixed term contract. In addition, and in order to accommodate new and small businesses, the section does not apply to:

- an employer that employs less than 10 employees;
- an employer that employs less than 50 employees and whose business has been in operation for less than two years

These exclusions do not apply if the employer conducts more than one business or the business was formed by the division or dissolution for any reason of an existing business.

LABOUR RELATIONS AMENDMENT BILL, 2012

An employer is permitted to employ an employee to whom the new section applies on a fixed term contract or successive fixed term contracts for up to six months. An employee may be employed on a fixed term contract for a longer period if the nature of the work for which the employee is engaged is of a limited or definite duration or the employer can demonstrate any other justifiable reason for fixing the term of the contract. The period of six months may be varied by a sectoral determination or a collective agreement concluded at a bargaining council.

The section sets out a non-exhaustive list of ten justifiable reasons for fixing the term of a contract.

An employee to whom the section applies who is employed for a period longer than six months is deemed to be employed for an indefinite period unless the nature of the work is of a limited or definite duration or the employer can demonstrate any other justifiable reason for fixing the term of the contract.

An employer who employs an employee to whom the section applies on a fixed term contract or who renews or extends a fixed term contract must do so in writing and must state the reason that justifies the fixed-term nature of the employment contract.

An employer bears an onus to prove in any relevant proceedings that there is a justifiable reason for fixing the term of the contract and that the term was agreed.

The new section contains additional protections for employees to whom it applies:

- An employee employed on a fixed-term contract for more than six months (or whatever period is determined by a sectoral determination or collective agreement concluded at a bargaining council) must be treated on the whole not less favourably than an employee on an indefinite contract performing the same or similar work, unless there is a justifiable

LABOUR RELATIONS AMENDMENT BILL, 2012

reason for treating the employee differently. What may constitute a justifiable reason for this purpose is dealt with in section 198D.

- An employer must provide an employee employed on a fixed term contract with the same access to opportunities to apply for vacancies as it provides to an employee employed on an indefinite contract of employment.
- If a fixed term of longer than 24 months can be justified under the section, the employer must, on expiry of the contract and subject to the terms of any collective agreement regulating the issue, pay the employee one week's remuneration for each completed year of the contract. The employer is not obliged to make this payment if, prior to the expiry of the fixed-term contract, it offers the employee employment or procures employment for the employee with a different employer which commences no later than 30 days after expiry of the contract and on the same or similar terms.

Insertion of section 198C of Act 66 of 1995 – part-time employment of employees earning below earnings threshold

Guided by provisions regulating part-time employees in the European Union, and the ILO Convention on Part-time Work (Convention 175, 1994), this section regulates the work of vulnerable part-time employees.

As with the new sections 198A and 198B, section 198C applies only to employees who earn on or below the threshold prescribed in terms of section 6(3) of the BCEA. For reasons specific to part-time employment, it does not apply to employees who ordinarily work less than 24 hours a month, or during the first six months of employment. And, as with section 198B, to accommodate new and small businesses the section does not apply to:

- an employer that employs less than 10 employees;

LABOUR RELATIONS AMENDMENT BILL, 2012

- an employer that employs less than 50 employees and whose business has been in operation for less than two years, unless the employer conducts more than one business or the business was formed by the division or dissolution for any reason of an existing business.

The new section defines part-time and comparable full-time employees, and requires employers to:

- Treat part-time employees on the whole not less favourably than comparable full-time employees doing the same or similar work, unless there is a justifiable reason for different treatment. What constitutes a justifiable reason for differentiation is dealt with in section 198D.
- Provide part-time employees with access to training and skills development that is on the whole not less favourable than the access applicable to comparable full-time employees.
- Provide part-time employees with the same access to opportunities to apply for vacancies as full-time employees.

Insertion of section 198D of Act 66 of 1995 – general provisions applicable to section 198A to 198C

This new section provides that disputes about the interpretation or application of sections 198A to 198C may be referred to the CCMA or a bargaining council with jurisdiction for conciliation and, if not resolved, to arbitration.

A justifiable reason for different treatment (referred to in each of the new sections 198A, 198B and 198C) includes different treatment which is a result of the application of a system that takes into account:

- seniority, experience or length of service;
- merit;

LABOUR RELATIONS AMENDMENT BILL, 2012

- the quality or quantity of work performed;
- any other criteria of a similar nature not prohibited by section 6(1) of the Employment Equity Act, 1998.

Amendment of section 200A of Act 66 of 1995

An amendment to this section extends the application of the presumption in the section as to who is an employee to other employment laws, and to a provision of the Insolvency Act dealing with rights of employees of insolvent employers.

Insertion of section 200B of Act 66 of 1995

A new section is inserted to prevent simulated arrangements or corporate structures that are intended to defeat the purposes of the LRA or any other employment law, and to provide for joint and several liability on the part of persons found to be employers under this section for any failures to comply with an employer's obligations under the LRA or any employment law. This is particularly important in the context of subcontracting and outsourcing arrangements if these arrangements are subterfuges to disguise the identity of the true employer.

Amendment of section 203 of Act 66 of 1995

An amendment to this section permits the Minister of Labour to issue a code of good practice to be published in the Government Gazette where parties to NEDLAC have not been able to reach agreement on the code. The Minister can only do this if proposals relating to the code have been tabled at NEDLAC and NEDLAC has reported to the Minister that it has been unable to reach agreement on the code.

LABOUR RELATIONS AMENDMENT BILL, 2012

Amendment of section 213 of Act 66 of 1995

The definition section is amended by updating the reference to the Unemployment Insurance Act, and by amending the definition of what constitutes “service” of documents that are delivered in terms of the LRA by incorporating reference to rules made for the Labour Court, the Commission and bargaining councils.

Amendment of item 27 in Part H of Schedule 7 of Act 66 of 1995

This is a formal amendment to the transitional provisions to correct a typographic error introduced in the 2002 Amendment Act.