

Below is an outline on some of the more noteworthy changes to the current legal landscape.

Limitation of remedies for high-paid employees

One of the standout proposed amendments to the LRA is the limitation of available remedies for high paid employees in the case of unfair dismissals. The current proposal is that employees earning R1,800,000 per annum and above will be regarded as high paid employees. This earnings threshold is applicable for the period May 2024 to April 2025 and will be adjusted annually on 1 May in line with the consumer price index.

Such high paid employees shall only be entitled to compensation as a remedy for unfair dismissals, except in the case of automatically unfair dismissals, where these employees will still be entitled to reinstatement as a remedy.

Further, the proposal is to cap the compensation awarded to high paid employees for unfair dismissals and unfair labour practices, save for automatically unfair dismissals and unfair labour practices.

Test for procedural fairness in dismissals

A further proposed amendment to the LRA is the insertion of a new section 188(3) so as to clarify that the test for the procedural fairness, other than in instances of dismissal for operational requirements, is whether the employee had a fair and reasonable opportunity to respond to the reason for the dismissal.

This approach is in line with the draft Code of Good Practice on Dismissal which signals a departure from an overly formalistic and adversarial pre-dismissal process, in favour of a more balanced and overall fair opportunity to be heard.

Qualifying period of employment in order to secure statutory protection against unfair dismissals

Echoing previous attempts to amend the LRA by limiting the protections afforded to new employees, the proposals include amending the LRA to introduce a three month qualifying period (or a reasonable and operationally justifiable longer period of probation provided for in the contract of employment) during which period the protections afforded to new employees against unfair dismissal will be limited to claims involving automatically unfair dismissal or unfair discrimination.

This proposal aims to encourage the hiring of new employees, especially young employees with no prior work experience.

Large-scale retrenchment process

It is further proposed that urgent applications challenging the procedural fairness of large-scale retrenchments will no longer be provided for in the LRA and the LRA be amended to allow for all aspects of retrenchment dismissals to be challenged after the process has been concluded.

Moreover, it is proposed that the LRA be amended to allow disputes concerning the fairness of large-scale retrenchments to proceed to the Labour Court for adjudication without first having been referred to conciliation, in circumstances where facilitation has occurred.

Increase in minimum statutory severance pay

The proposal is to increase the minimum statutory severance pay an employee is entitled to in the event of retrenchment, in terms of the BCEA, from one weeks' remuneration to two weeks' remuneration for each completed year of service.

It is also proposed that this increase will only apply to completed years of service following the effective date of this proposed amendment to the BCEA.

Revising the of unfair labour practice definition

In order to reduce the disputes related to unfair labour practices which may be brought before the Commission for Conciliation, Mediation and Arbitration and Bargaining Councils, the deletion of sub-sections 186(2)(a) and (c) of the LRA is proposed. This would effectively eliminate disputes pertaining to the promotion, demotion, probation, training and the provision of benefits as well as the refusal to reinstate or re-employ a former employee.

If this proposal is introduced into law, unfair labour practice disputes would be confined to unfair suspensions, unfair disciplinary action short of dismissal and protected whistleblowing.

In order to curb any possible adverse effects of this amendment, specifically in relation to existing collective agreements dealing with promotion disputes, a transitional period of one year is proposed, which would maintain the application of sub-section 186(2)(a) and (b) of the LRA in the public service.

Extended definition of employee

In order to extend the right to freedom of association as well organisational and bargaining rights to a wider category of employees, a new schedule 11 to the LRA is proposed, which will define an “employee” as “an individual, other than an employee as defined in section 213 of the [LRA], who works personally for a person that is not a client or customer of any profession, business or undertaking carried on by that individual”.

This broader definition attempts to, in particular, afford workers for e-hailing services or food delivery services greater protections.

The extended definition of an employee is also proposed to form part of the BCEA, which would allow the Minister of Employment and Labour to gazette sectoral determinations in respect of the basic terms and conditions of employment for this broader category of employee.

‘On-Call’ Workers

A new section 9B of the BCEA is proposed to deal with employees who are obliged to hold themselves available for work, but are not guaranteed work by their employer.

This new section requires, *inter alia*, that the employer specify certain particulars in the employee’s written particulars of employment, including the guaranteed and maximum hours for each period in respect of which the employee must be available for work, the period of time which the employee must be available to work, the notice period to the employee to report for work and the notice period of any cancellation of work. These notice periods must be reasonable having regard to certain factors.

Exclusion of start-up businesses from Bargaining Council agreements

A proposed insertion of section 32(12) and (13) in the LRA would provide that an employer of a new business would be exempt from conditions of employment that have been provided for in extended bargaining council agreements. This exemption would apply to businesses which, *inter alia*, have been in operation for less than two years and which employ less than 50 employees.

This exemption would, however, not apply in instances where a new employer has taken over transfer of a business as a going concern, as contemplated in section 197(1) of the LRA, or where a business has been created out of an existing business.

Conclusion

The Amendment Bills still need to make their way through the parliamentary process, which includes publishing the Amendment Bills for public comment. The proposed amendments in the NEDLAC Report will likely be debated further, especially in those instances where the proposals are not supported by all three social partners, and further amendments can be anticipated.

While it will take some time before the proposed amendments become law, it is crucial for employers to keep abreast of any developments in the labour law sphere so as to ensure that employers are not caught off guard by significant changes in the labour law landscape and to ensure that proper preparations can be made to avoid uncertainty and unnecessary disputes.



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