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EMPLOYMENT

The Basic Conditions of Employment Bill

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INTRODUCTION

The Basic Conditions of Employment Amendment Bill ("BCE Bill") introduces amendments to the Basic Conditions of Employment Act (75 pf 1997 ("BCEA") consequent to the enactment of the proposed National Minimum Wage Bill ("NMW Bill").

The purpose of the BCE Bill is to:

- repeal the provisions dealing with the making of Sectoral Determinations and the powers and functions of the Employment Conditions Commission;
- extend the provisions for monitoring and enforcement by the labour inspectorate to apply to the national minimum wage and unemployment insurance; and
- extend the jurisdiction of the CCMA to include enforcement procedures and claims for underpayment in terms of the BCEA, the national minimum wage, unemployment insurance legislation and claims arising from contracts of collective agreements. The BCE Bill was passed by the National Assembly and sent for concurrence to the National Council of Provinces.

BCE AMENDMENTS

The BCE Bill introduces section 9A into the BCEA, which provides that an employee or a worker who works for less than four hours on any day must be paid four hours work on that day. Section 9A applies to employees or workers who earn less than the earnings threshold set by the Minister in terms of section 6(3) of the BCEA, presently being R205,433.30.

The BCE Bill further provides that if any sectoral determination at the date of the promulgation of the NMWA, prescribes wages that are higher than the national minimum wage, the wages in that sectoral determination and the remuneration and associate benefits based on those wages must be increased proportionally to any adjustment of the national minimum wage.

Chapter 10 of the BCEA is amended by the insertion of section 62A, which stipulates that for the purpose of Chapter 10, an employee includes a worker as defined in section 1 of the NMWA.

The BCE Bill amends the functions of the labour inspector to include referring disputes to the CCMA concerning a failure to comply with the BCE Bill, the NMWA, the Unemployment Insurance Act ("UIA") and the Unemployment Insurance Contributions Act ("UICA"). The labour inspector may now appear on behalf of the Director-General in any proceedings in the CCMA or Labour Court concerning a failure to comply with the legislation referred to above.

The labour inspector's power to secure a written undertaking by the employer to comply with any provision of the BCEA in terms of section 68 of the BCEA has been amended to include a written undertaking for non-compliance with the NMWA, the UIA and the UICA.

The labour inspector may seek to obtain an agreement between the employer and the employee as to any amount owed to the employee in terms of the BCEA and the NMWA. The amendment also provides that if an employer fails to comply with a written undertaking given by the employer, the Director-General may request the CCMA to make the undertaking an arbitration award.

The labour inspector's power to issue a compliance order to an employer who has not complied with the provisions of the BCEA in terms of section 69 of the BCEA has been extended to include instances where an employer has not complied with the NMWA, UIA, and the UICA.

Section 73 of the BCEA, which presently allows for an order to be made an order of the Labour Court has been amended to allow for an order to be made an arbitration award. Accordingly, the Director-General may apply to the CCMA for a compliance order to be made an arbitration award if the employer has not complied with the order. The CCMA may issue an arbitration award requiring the employer to comply with the compliance order if it is satisfied that the compliance order was served on the employer, and the employer has not referred a dispute concerning the compliance order to the CCMA.

The BCE Bill inserts a new provision, section 73A, in the BCEA, which outlines claims for failure to pay any amount. An employee or worker, earning less than the prescribed threshold, may refer a dispute to the CCMA concerning the failure to pay any amount owing in terms of the BCEA, the NMWA, a contract of employment, a sectoral determination or a collective agreement. The CCMA must appoint a Commissioner to attempt to resolve by conciliation the dispute. The CCMA must commence arbitration of the dispute immediately after certifying that the dispute remains unresolved. An employee or worker, earning in excess of the prescribed threshold, may institute a claim concerning the failure to pay any amount in the Labour Court, the High Court, the Magistrates Court or the small claims court.

Section 74 of the BCEA, which outlines the consolidation of proceedings is amended to include reference to the NMWA. Further, the payment of interest by an employer on any amount due and payable as provided for in section 75 of the BCEA, as well as proof of compliance detailed in section 76 of the BCEA, is incorporated to reference the NMWA.

Section 76A provides that a fine may be imposed on an employer who paid an employee less than the national minimum wage. The amount of the fine will be the amount that is the greater of twice the value of the underpayment, or twice the employee's monthly wage. If an employer has failed to comply for a second or further time, the fine is an amount that is the greater of thrice the value of the underpayment, or thrice the employee's monthly wage.

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