

EMPLOYMENT

The National Minimum Wage Bill

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INTRODUCTION

The NMW Bill has been passed by the National Assembly and sent for concurrence to the National Council of Provinces. The implementation date of the NMW Bill will be announced after the NCOP's select committee considers the NMW Bill. The NMW legislation is intended to provide for a national minimum wage; to establish a National Minimum Wage Commission; to review and annually adjust the national minimum wage and provide for exemption from paying the national minimum wage. It is important to consider the version of the Bill as it is now.

NMW BILL PROVISIONS

The NMW Bill applies to all workers and their employers, except members of the South African National Defence Force, the National Intelligence Agency, the South African Secret Service; and volunteers who perform work for another person without remuneration. It applies to any person who works for another and who receives, or is entitled to receive, any payment for that work whether in money or in kind.

Every worker will be entitled to payment of a wage not less than the national minimum wage. Employers will be obligated to pay workers this wage.

The payment of the national minimum wage cannot be waived and overrides any contrary provision in a contract, collective agreement, sectoral determination or law.

The national minimum wage must constitute a term of the worker's contract, unless the contract, collective agreement or law provides for a more favourable wage. An employer's unilateral change of wages, hours of work or other conditions of employment in connection with the implementation of the national minimum wage will be regarded as an unfair labour practice.

The calculation of the national minimum wage is the amount payable in money for ordinary hours of work, excluding:

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

In this instance "ordinary hours of work" means the hours of work permitted in terms of section 9 of the Basic Conditions of Employment Act 75 of 1997 ("BCEA") (currently 45 hours per week) or in terms of any agreement in terms of section 11 or 12 of the BCEA.

A worker is entitled to receive the national minimum wage for the number of hours that the worker works on any day. An employee or worker who works for less than four hours on any day must be paid for four hours on that day, which is applicable to employees or workers who earn less than the earnings threshold set by the Minister over time.

If the worker is paid on a basis other than the number of hours worked, the worker may not be paid less than the national minimum wage for the ordinary hours of work.

Any deduction made from the remuneration of a worker must be in accordance with section 34 of the BCEA, provided that the deduction made in terms of section 34(1)(a) of the BCEA does not exceed one quarter of a worker's remuneration.

An employer or employer's organisation registered in terms of section 96 of the Labour Relations Act 66 of 1995 ("LRA"), or any other law, acting on behalf of a member, may apply for exemption from paying the national minimum wage. The exemption process provided for in the regulations to the NMW Bill must be complied with when doing so.

A National Minimum Wage Commission is established by the NMW Bill. It functions to:

- review the national minimum wage and recommend adjustments;
- investigate and report annually to the Minister on the impact of the national minimum wage on the economy, collective bargaining and the reduction in income differentials and make such information publicly available;
- investigate income differentials and recommend benchmarks for proportionate income differentials;
- set medium term targets for the national minimum wage within three years of the commencement of the NMW Bill;
- advise the Minister on measures to reduce income differentials or any other matter on which the Minister requests the Commission's advice;
- advise the Minister on sectoral determinations; and
- advise the Minister on any matter concerning basic conditions of employment.

The Commission must review the national minimum wage annually and make recommendations to the Minister on any adjustment of the national minimum wage. The recommendations must consider: inflation, the cost of living and the need to retain the value of the minimum wage; wage levels and collective bargaining outcomes; gross domestic product; productivity; ability of employers to carry on their businesses successfully; the operation of small, medium or micro-enterprises and new enterprises; the likely impact of the recommended adjustment on employment or the creation of employment; and any other relevant factor.

The national minimum wage is R20 for each ordinary hour worked.

Farm workers, domestic workers, and workers employed on an expanded public works programme are, however, entitled to a minimum wage of R18, R15, and R11 per hour respectively.

Workers who have concluded learnership agreements contemplated in section 17 of the Skills Development Act 97 of 1998 are entitled to the allowances contained in Schedule 2 of the NMW Bill.

A "farm worker" means a worker who is employed mainly or wholly in connection with farming or forestry activities, and includes a domestic worker employed in a home on a farm or forestry environment and a security guard on a farm or other agricultural premises, excluding a security guard employed in the private security industry in terms of the Private Security Industry Regulation Act 56 of 2001.

A "domestic worker" means a worker who performs domestic work in a private household and who received, or is entitled to receive, a wage and includes: a gardener; a person employed by a household as a driver of a motor vehicle; a person who takes care of children, the aged, the sick, the frail or the disabled; and domestic workers employed or supplied by employment services.

The Commission must, within 18 months of the commencement of the NMW Bill, conduct a review of the national minimum wage of farm workers and domestic workers. In addition, the Minister must, within two years of the commencement of the NMW Bill, determine an adjustment of the national minimum wage of farm workers and domestic workers. The national minimum wage in respect of workers in the expanded public works programme must be increased proportionately to any adjustment of the national minimum wage.

THE REGULATIONS TO THE NATIONAL MINIMUM WAGE BILL

An employer or a registered employer's organisation may assist its members to apply to the delegated authority,^[1] for an exemption from paying the national minimum wage.

The application must be lodged on the National Minimum Wage Exemption System ("Exemption System") in the prescribed form.

An exemption may only be granted if the delegated authority is satisfied that the employer cannot afford to pay the minimum wage, and every representative trade union has been meaningfully consulted or if there is no such trade union, the affected workers have been meaningfully consulted. The consultation process requires the employer to provide the other parties with a copy of the exemption application to be lodged on the online system.

The determination of whether an employer can afford to pay the minimum wage must be in accordance with the Commercial, Household, or Non-Profit Organisations Financial Decision Process outlined in Schedule 1 of the Regulations to the National Minimum Wage Bill.

The delegated authority may grant an exemption from paying the national minimum wage only from the date of the application for the exemption. The exemption must specify the period for which it is granted, which may not be more than 12 months.

The delegated authority must specify the wage that the employer is required to pay workers, which may not be less than 90% of the national minimum wage.

The delegated authority may grant an exemption on any condition that advances the purposes of the National Minimum Wage Act.

An employer exempted from paying the national minimum wage must display a copy of the exemption notice conspicuously at the workplace where it can be read by all employees to whom the exemption applies.

A copy of the exemption notice must be given to the representative trade union, every worker who requests a copy, and the bargaining council.

The delegated authority may withdraw an exemption notice if:

- the employer has provided false or incorrect information that has led to the granting in its application for an exemption;
- the employer is not complying with the exemption notice;
- the employer's financial position has improved to the extent that the employer is able to pay the national minimum wage; or
- there are other justifiable grounds for withdrawing the exemption notice.

Any affected person may apply to the delegated authority for the withdrawal of an exemption notice by lodging an application on the online system in the prescribed format. Before the delegated authority makes the decision to withdraw an exemption notice, the delegated authority must also be satisfied that the employer has been consulted, and the representative trade union or affected workers have been given access to the application lodged.

If an exemption notice is withdrawn, the delegated authority must issue a notice of withdrawal on the Exemption System.

CONCLUSION

The National Minimum Wage Bill is likely to be implemented in early 2019. Employers who are unable to pay the national minimum wage should begin the process of collating all the necessary documents to be submitted on the Exemption System. If you require any further information on the Regulations to the National Minimum Wage Bill, do not hesitate to contact us.

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[1] Delegated authority means the Director General: Labour or an employee in the public service to whom the Minister has given power to grant exemptions.



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