

DEPARTMENT OF LABOUR

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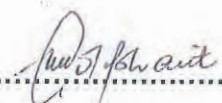
17 NOVEMBER 2017

**PUBLICATION OF THE BASIC CONDITIONS OF EMPLOYMENT AMENDMENT
BILL, 2017**

I, **MILDRED NELISIWE OLIPHANT**, Minister of Labour, intend introducing the Basic Conditions of Employment Amendment Bill, 2017, in the National Assembly shortly. The explanatory summary of the Bill is hereby published in accordance with Rule 276(b) & (c) of the Rules of the National Assembly.

The Bill seeks to amend the Basic Conditions of Employment Act, 1997 (Act No. 75 of 1997) so as to substitute and insert certain definitions; to provide for daily wage payments applicable to certain employees; to repeal the provisions dealing with sectoral determinations and Employment Conditions Commission; to extend the jurisdiction of the Commission for Conciliation, Mediation and Arbitration; to extend the provisions for monitoring and enforcement by the labour inspector to include enforcement of the provisions of the National Minimum Wage Act, 2017, the Unemployment Insurance Act and the Unemployment Insurance Contributions Act; to provide for claims for underpayment; to provide for transitional arrangements to regulate sectoral determinations currently in force and to strengthen collective bargaining in respect of the sectors regulated by those sectoral determinations; and to provide for matters connected therewith.

A copy of the Bill can be found on the website of the Department of Labour at <http://www.labour.gov.za/legislation/bills/proposed-amendment-bills>


.....**M N OLIPHANT, MP****MINISTER OF LABOUR**DATE: *02/11/2017*
.....

REPUBLIC OF SOUTH AFRICA

**BASIC CONDITIONS OF
EMPLOYMENT
AMENDMENT BILL**

*(As introduced in the National Assembly (proposed section 75); explanatory summary
of Bill published in Government Gazette 41257 of 17 November 2017)
(The English text is the official text of the Bill)*

(MINISTER OF LABOUR)

[B—2017]

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GENERAL EXPLANATORY NOTE:

- | | Words in bold type in square brackets indicate omissions from existing enactments.
- _____ Words underlined with a solid line indicate insertions in existing enactments.
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BILL

To amend the Basic Conditions of Employment Act, 1997, so as to substitute and insert certain definitions; to provide for daily wage payments applicable to certain employees; to repeal the provisions dealing with sectoral determinations and the Employment Conditions Commission; to extend the jurisdiction of the Commission for Conciliation, Mediation and Arbitration; to extend the provisions for monitoring and enforcement by the labour inspector; to include enforcement of the provisions of the National Minimum Wage Act, 2017, the Unemployment Insurance Act, 2001 and the Unemployment Insurance Contributions Act, 2002; to provide for claims for underpayment; to provide for transitional arrangements; to regulate sectoral determinations currently in force; to strengthen collective bargaining in respect of the sectors regulated by those sectoral determinations; and to provide for matters connected therewith.

BE IT ENACTED by the Parliament of the Republic of South Africa, as follows:—

Amendment of section 1 of Act 75 of 1997, as amended by section 1 of Act 11 of 2002, section 25 of Act 52 of 2003, section 53 of Act 11 of 2013 and section 1 of Act 20 of 2013 5

1. Section 1 of the Basic Conditions of Employment Act, 1997 (hereinafter referred to as the “principal Act”), is hereby amended—

(a) by the substitution for the definition of “basic conditions of employment” of the following definition:

“‘**basic conditions of employment**’ means a provision of this Act or sectoral determination that stipulates a minimum term or condition of employment, and includes the national minimum wage;”;

(b) by the substitution for the definition of “employment law” of the following definition:

“‘**employment law**’ includes this Act, any other Act the administration of which has been assigned to the Minister, and any of the following Acts:

(a) the Unemployment Insurance Act, [1966 (Act No. 30 of 1966)] 2001 (Act No. 63 of 2001);

- (b) the [Skills Development Act, 1998 (Act No. 97 of 1998)]
Employment Services Act, 2014 (Act No. 14 of 2014);
- (c) the Employment Equity Act, 1998 (Act No. 55 of 1998);
- (d) the Occupational Health and Safety Act, 1993 (Act No. 85 of 1993);
- (e) the Compensation for Occupational Injuries and Diseases Act, 1993 (Act No. 130 of 1993); or
- (f) the National Minimum Wage Act, 2017;”;
- (c) by the insertion after the definition of “month” of the following definition:
“**‘national minimum wage’** means the national minimum wage envisaged in section 4 of the National Minimum Wage Act, 2017;” and
- (d) by the insertion after the definition of “trade union representative” of the following definitions:
“**‘Unemployment Insurance Act’** means the Unemployment Insurance Act, 2001 (Act No. 63 of 2001);
“**‘Unemployment Insurance Contributions Act’** means the Unemployment Insurance Contributions Act, 2002 (Act No. 4 of 2002);”;

Amendment of section 3 of Act 75 of 1997

2. Section 3 of the principal Act is hereby amended by the substitution for subsection (3) of the following subsection:
“(3) This Act, except section 41, does not apply to persons employed on vessels at sea in respect of which the Merchant Shipping Act, 1951 (Act No. 57 of 1951), applies, except to the extent provided for in [a sectoral determination] the National Minimum Wage Act, 2017, read with section 62A.”.

Insertion of section 9A in Act 75 of 1997

3. The following section is hereby inserted in the principal Act after section 9:

“Daily wage payment

- 9A.** (1) An employee who works for less than four hours on any day must be paid for four hours work on that day.
- (2) This section applies to employees who earn less than the earnings threshold set by the Minister in terms of section 6(3).”.

Repeal of Chapters 8 and 9 of Act 75 of 1997

4. Chapters 8 and 9 of the principal Act are hereby repealed.

Insertion of section 62A in Act 75 of 1997

5. The following section is hereby inserted in the principal Act before section 63 under Part A of Chapter 10:

“Definitions

- 62A.** For the purpose of Chapter 10, an employee includes a worker as defined in section 1 of the National Minimum Wage Act, 2017.”.

Amendment of section 64 of Act 75 of 1997

6. Section 64 of the principal Act is hereby amended by the deletion in subsection (1) of the word “and” at the end of paragraph (d) and the insertion in that subsection of the following paragraphs after paragraph (d):
“(dA) referring disputes to the CCMA concerning failure to comply with this Act, the National Minimum Wage Act, 2017, the Unemployment Insurance Act and the Unemployment Insurance Contributions Act;
(dB) appearing 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 in paragraph (dA); and”.

Amendment of section 65 of Act 75 of 1997, as amended by section 17 of Act 37 of 2008

7. Section 65 of the principal Act is hereby amended—
- (a) by the deletion of paragraph (b) of subsection (1); and
 - (b) by the substitution in subsection (1) for paragraph (c) of the following paragraph: 5
- “(c) any place at which any person provides or purports to provide any employment services as defined in terms of the [Skills Development Act, 1998 (Act No. 97 of 1998)] Employment Services Act, 2014 (Act No. 4 of 2014)”;

Amendment of section 68 of Act 75 of 1997, as amended by section 13 of Act 11 of 2002 and section 9 of Act 20 of 2013

8. Section 68 of the principal Act is hereby amended—
- (a) by the substitution for subsection (1) of the following subsection: 15
- “(1) A labour inspector who has reasonable grounds to believe that an employer has not complied with any provision of this Act, the National Minimum Wage Act, 2017, the Unemployment Insurance Act or the Unemployment Insurance Contributions Act may endeavour to secure a written undertaking by the employer to comply with the provision.”;
- (b) by the substitution in subsection (2) for paragraph (a) of the following paragraph: 20
- “(a) may seek to obtain agreement between the employer and employee as to any amount owed to the employee in terms of this Act or the National Minimum Wage Act, 2017;”;
- (c) by the substitution for subsection (3) of the following subsection: 25
- “(3) If an employer fails to comply with a written undertaking given by the employer in terms of this section, the Director-General may apply to the [Labour Court for an order in terms of section 73 directing the employer to comply with the undertaking] CCMA to make the undertaking an arbitration award.”;

Amendment of section 69 of Act 75 of 1997, as amended by section 14 of Act 11 of 2002 and section 10 of Act 20 of 2013

9. Section 69 of the principal Act is hereby amended—
- (a) by the substitution for subsection (1) of the following subsection: 35
- “(1) A labour inspector who has reasonable grounds to believe that an employer has not complied with a provision of this Act, the National Minimum Wage Act, 2017, the Unemployment Insurance Act or the Unemployment Insurance Contributions Act may issue a compliance order.”;
- (b) by the substitution in subsection (2) for paragraphs (b) and (c) of the following paragraphs, respectively: 40
- “(b) [any] the provision of this Act and any other Act referred to in subsection (1) that the employer has not complied with, and details of the conduct constituting non-compliance;
- (c) any amount that the employer is required to pay to an employee, or in the case of a failure to pay the national minimum wage, the amount that the employer is required to pay to an employee in terms of section 76A;”;
- (c) by the deletion of subsection (2A);
 - (d) by the substitution for subsection (5) of the following subsection: 50
- “(5) An employer must comply with the compliance order within the time period stated in the order, unless the employer refers a dispute concerning the compliance order to the CCMA within that period.”;
- (e) by the addition of the following subsection: 55
- “(6) A dispute referred to the CCMA by the employer in terms of subsection (5) must be dealt with in terms of section 73.”;

Substitution of section 70 of Act 75 of 1997, as amended by section 15 of Act 11 of 2002 and section 11 of Act 20 of 2013

10. The following section is hereby substituted for section 70 of the principal Act:

“Limitations

70. A labour inspector may not issue a compliance order in respect of any amount payable to an employee as a result of a failure to comply with a provision of this Act or the National Minimum Wage Act, 2017, if—
- (a) the employee is covered by a collective agreement that provides for resolution by arbitration of disputes concerning amounts owing in terms of this Act;
 - (b) the employee [is employed in a category of employees mentioned in section 6(1)(a) or in respect of which a notice has been issued] earns in excess of the threshold prescribed by the Minister in terms of section 6(3); or
 - (c) any proceedings have been instituted for the recovery of that amount in the CCMA or a court, unless those proceedings have been withdrawn; or
 - (d) that amount has been payable by the employer to the employee for longer than 12 months before the date on which a complaint was made to a labour inspector by or on behalf of the employee or, if no complaint was made, the date on which a labour inspector first endeavoured to secure a written undertaking by the employer in terms of section 68 or issued a compliance order in terms of section 69.”.

Substitution of section 73 of Act 75 of 1997, as amended by section 16 of Act 11 of 2002, and substituted by section 13 of Act 20 of 2013

11. The following section is hereby substituted for section 73 of the principal Act:

“Order may be made [order of Labour Court] an arbitration award

73. (1) The Director-General may apply to the [Labour Court on the date specified in the compliance order in terms of section 69 (2A) (b) or, with further notice to the employer, on a subsequent date] CCMA for a compliance order to be made an [order of the Labour Court] arbitration award if the employer has not complied with the order.
- (2) After considering any representations made to it, the [Labour Court] CCMA may issue an [order] arbitration award in terms of subsection (1) requiring—
- (a) the employer to comply with the provisions of [this Act] an employment law;
 - (b) subject to section [70(d)] 76A, the payment of any amount owing to an employee; [or]
 - (c) the payment of a fine calculated in terms of Schedule 2 to this Act; or
 - (d) the payment of the amount that the employer is required to pay in terms of the Unemployment Insurance Contributions Act, including interest and penalties calculated in terms of section 12 and 13 of that Act.”.

Insertion of section 73A in Act 75 of 1997

12. The following section is hereby inserted in the principal Act after section 73:

“Claims for failure to pay any amount

- 73A. (1) Despite section 77, any person may refer a dispute to the CCMA concerning the failure to pay any amount owing to that person in terms of this Act, the National Minimum Wage Act, 2017, a contract of employment, a sectoral determination or a collective agreement.

(2) Subsection (1) does not apply to employees earning in excess of the threshold prescribed by the Minister in terms of section 6(3).

(3) An employee, other than the person referred to in subsection (1), may institute a claim concerning the failure to pay any amount contemplated in subsection (1) in either the Labour Court, the High Court or, subject to their jurisdiction, the Magistrates' Court or the small claims court." 5

Amendment of section 74 of Act 75 of 1997, as amended by section 17 of Act 11 of 2002 and section 14 of Act 20 of 2013

13. Section 74 of the principal Act is hereby amended by the substitution for subsections (1), (2) and (3) of the following subsections, respectively: 10

"(1) A dispute concerning a contravention of this Act or the National Minimum Wage Act, 2017, may be instituted jointly with proceedings instituted by an employee under Part C of this Chapter.

(2) If an employee institutes proceedings for unfair dismissal, the Labour Court or the arbitrator hearing the matter may also determine any claim for an amount that is owing to that employee in terms of this Act [if the claim has not prescribed] or the National Minimum Wage Act, 2017. 15

(3) A dispute concerning any amount that is owing to an employee as a result of a contravention of this Act or the National Minimum Wage Act, 2017, may be initiated jointly with a dispute instituted by that employee over the entitlement to severance pay in terms of section 41(6)." 20

Substitution of section 75 of Act 75 of 1997, as substituted by section 18 of Act 11 of 2002

14. The following section is hereby substituted for section 75 of the principal Act:

"Payment of interest 25

75. An employer must pay interest on any amount due and payable in terms of this Act or the National Minimum Wage Act, 2017, at the rate of interest prescribed in terms of section 1 of the Prescribed Rate of Interest Act, 1975 (Act No. 55 of 1975), to any person to whom a payment should have been made." 30

Substitution of section 76 of Act 75 of 1997

15. The following section is hereby substituted for section 76 of the principal Act:

"Proof of compliance

76. [(1)] In any proceedings concerning a contravention of this Act, the National Minimum Wage Act, 2017, or any sectoral determination, it is for an employer— 35

- (a) to prove that a record maintained by or for that employer is valid and accurate; or
- (b) who has failed to keep any record required by this Act or the National Minimum Wage Act, 2017, that is relevant to those proceedings, to prove compliance with any provision of this Act." 40

Insertion of section 76A in Act 75 of 1997

16. The following section is hereby inserted in the principal Act after section 76:

"Fine for not complying with national minimum wage

76A. Subject to section 76, a fine that may be imposed on an employer who paid an employee less than the national minimum wage, is an amount that is the greater of— 45

- (a) twice the value of the underpayment; or
- (b) twice the employee's monthly wage."

Amendment of section 77A of Act 75 of 1997, as inserted by section 19 of Act 11 of 2002

17. Section 77A of the principal Act is hereby amended by the deletion of paragraphs (a) and (c).

Amendment of section 78 of Act 75 of 1997

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18. The following section is hereby substituted for section 78 of the principal Act:

“Rights of Employees

78. (1) Every employee has the right to—

- (a) make a complaint to a trade union representative, a trade union official or a labour inspector concerning any alleged failure or refusal by an employer to comply with this Act or the National Minimum Wage Act, 2017; 10
- (b) discuss his or her conditions of employment with his or her fellow employees, his or her employer or any other person;
- (c) refuse to comply with an instruction that is contrary to this Act, the National Minimum Wage Act, 2017, or any sectoral determination; 15
- (d) refuse to agree to any term or condition of employment that is contrary to this Act, the National Minimum Wage Act, 2017, or any sectoral determination;
- (e) inspect any record kept in terms of this Act or the National Minimum Wage Act, 2017, that relates to the employment of that employee; 20
- (f) participate in proceedings in terms of this Act;
- (g) request a trade union representative or a labour inspector to inspect any record kept in terms of this Act and that relates to the employment of that employee. 25

(2) Every trade union representative has the right, at the request of an employee, to inspect any record kept in terms of this Act or the National Minimum Wage Act, 2017, that relates to the employment of that employee.”.

Substitution of section 80 of Act 75 of 1997

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19. The following section is hereby substituted for section 80 of the principal Act:

“Procedure for disputes

80. (1) If there is a dispute about the interpretation or application of this Part, any party to the dispute may refer the dispute in writing to [—

- (a) a council, if the parties to the dispute fall within the registered scope of that council; or 35
- (b) the CCMA, if no council has jurisdiction].

(2) The party who refers a dispute must satisfy [the council or] the CCMA that a copy of the referral has been served on all the other parties to the dispute. 40

(3) The [council or the] CCMA must attempt to resolve a dispute through conciliation.

(4) If a dispute remains unresolved, any party to the dispute may refer it to the [Labour Court for adjudication] CCMA for arbitration.

(5) In respect of a dispute in terms of this Part, the relevant provisions of Part C of Chapter VII of the Labour Relations Act, 1995, apply with the changes required by the context. 45

(6) For the purposes of this section, a party to a dispute includes a labour inspector.

Transitional provisions

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20. (1) Despite the repeal of Chapter 8 of the principal Act, any sectoral determination in effect at the commencement of the National Minimum Wage Act, 2017, remains in

force except to the extent that it prescribes a wage that is less than the national minimum wage set by the National Minimum Wage Act, 2017.

(2) Sections 56, 57 and 58 of the principal Act remain in force in respect of the sectoral determination contemplated in subsection (1) for as long as the sectoral determination has not been cancelled or suspended by the Minister as contemplated in section 56. 5

(3) If any sectoral determination already prescribes wages that are higher than the national minimum wage, the wages in that sectoral determination and the remuneration and associated benefits based on those wages must be increased proportionally to any adjustment of the national minimum wage in terms of the National Minimum Wage Act, 2017, for a period of three years from the commencement of the National Minimum Wage Act, 2017. 10

(4) Notwithstanding the provisions of any sectoral determination, an employer must pay a learner an allowance as prescribed in Schedule 2 of the National Minimum Wage Act, 2017, as is adjusted from time to time, from the date that the National Minimum Wage Act, 2017, comes into force. 15

(5) For the purpose of subsection (4)—

(a) **'learner'** means a learner as defined in Schedule 2 of the National Minimum Wage Act, 2017; and

(b) **'allowance'** means an allowance as defined in Schedule 2 of the National Minimum Wage Act, 2017." 20

Short title and commencement

21. This Act is called the Basic Conditions of Employment Amendment Act, 2017, and takes effect on a date immediately after the National Minimum Wage Act, 2017, has taken effect. 25

MEMORANDUM ON THE OBJECTS OF THE BASIC CONDITIONS OF EMPLOYMENT AMENDMENT BILL, 2017

1. BACKGROUND

- 1.1 The Basic Conditions of Employment Amendment Bill, 2017 (“the Bill”), introduces amendments to the Basic Conditions of Employment Act, 1997 (BCEA), consequent to the proposed National Minimum Wage Act, 2017.
- 1.2 The primary amendments introduced by the Bill seek to—
 - (a) repeal the provisions dealing with the making of Sectoral Determinations and the powers and functions of the Employment Conditions Commission;
 - (b) extend the provisions for monitoring and enforcement by the labour inspectorate to apply to the national minimum wage and unemployment insurance; and
 - (c) extend the jurisdiction of the Commission for Conciliation, Mediation and Arbitration (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 or collective agreements.

2. CLAUSE BY CLAUSE ANALYSIS

Clause 1

- 2.1 Clause 1 of the Bill amends section 1 of the BCEA—
 - (a) by substituting the definition of “employment law” so as to include the Unemployment Insurance Act, 2001 (Act No. 63 of 2001), the Employment Services Act, 2014 (Act No. 14 of 2014), and the proposed National Minimum Wage Act, 2017; and
 - (b) by inserting the definition of “national minimum wage”, “Unemployment Insurance Act” and “Unemployment Insurance Contributions Act”.

Clause 2

- 2.2 Clause 2 of the Bill amends section 3 of the BCEA by the substitution for subsection (3), which refers to a sectoral determination, with a new subsection (3) that makes reference to the proposed National Minimum Wage Act, 2017.

Clause 3

- 2.3 Clause 3 inserts section 9A that deals with daily wage payment. Section 9A requires that an employee who works for less than four hours on any day is entitled to be paid for four hours’ work. This only applies to employees earning less than the threshold set by the Minister of Labour in terms of section 6(3) of the BCEA. The provisions to this effect are currently found in several sectoral determinations.

Clause 4

- 2.4 Clause 4 of the Bill repeals Chapters 8 and 9 of the BCEA. Chapter 8 deals with the making of sectoral determinations and Chapter 9 deals with the powers and functions of the Employment Conditions Commission.

Clause 5

- 2.5 Clause 5 of the Bill inserts section 62A that deals with definitions. It states that for the purpose of Chapter 10 of the BCEA, an employee includes a worker as defined in section 1 of the proposed National Minimum Wage Act, 2017.

Clause 6

- 2.6 Clause 6 of the Bill amends section 64 of the BCEA which deals with the functions of labour inspectors. The amendment seeks to insert new paragraphs (dA) and (dB) in subsection (1). The effect of paragraphs (dA) and (dB) is that the functions of a labour inspector will now include the referral of disputes to the CCMA, concerning non-compliance with the BCEA, the proposed National Minimum Wage Act, 2017, the Unemployment Insurance Act, 2001, and the Unemployment Insurance Contributions Act, 2002. The labour inspector will also be able to 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 in paragraph (dA).

Clause 7

- 2.7 Clause 7 of the Bill amends section 65 of the BCEA which deals with powers of entry. The amendment substitutes a reference to Skills Development Act, 1998 (Act No. 97 of 1998), in subsection (1)(c) with the Employment Services Act, 2014.

Clause 8

- 2.8 Clause 8 of the Bill amends section 68 of the BCEA so as to permit labour inspectors to obtain a written undertaking from an employer to comply with the proposed National Minimum Wage Act, 2017, the Unemployment Insurance Act, 2001, and the Unemployment Insurance Contributions Act, 2002, where the employer has not complied with the provisions of these Acts. Furthermore, the amendments authorise the Director-General to apply to the CCMA to make the undertaking made by the employer an arbitration award, where such an employer fails to comply with the undertaking.

Clause 9

- 2.9 Clause 9 of the Bill amends section 69 of the BCEA so as to—
- (a) extend the powers of a labour inspector to issue compliance orders to cover breaches of the proposed National Minimum Wage Act, 2017, the Unemployment Insurance Act, 2001, and the Unemployment Insurance Contributions Act, 2002; and
 - (b) permit employers who dispute the terms of a compliance order served on them to refer the matter to the CCMA for determination through arbitration. It should be noted that amendments have been proposed to the Labour Relations Act, 1995 (Act No. 66 of 1995), to regulate these proceedings.

Clause 10

- 2.10 Clause 10 of the Bill amends section 70 of the BCEA which imposes limitations on the labour inspector's powers. The effect of the amendment is that it limits a labour inspector's powers to issue a compliance order against an employer in respect of any amount payable to an employee due to a failure to comply with a provision of the BCEA or the proposed National Minimum Wage Act, 2017, if—
- (a) the employee earns more than the threshold prescribed by the Minister; or
 - (b) any proceedings have been instituted for the recovery of that amount in the CCMA or a Court.

Clause 11

- 2.11 Clause 11 of the Bill amends section 73 of the BCEA to authorise the Director-General of the Department of Labour to refer a compliance order that has not been complied with to the CCMA so as to be made an arbitration award.

Clause 12

2.12 Clause 12 of the Bill inserts section 73A which deals with claims for failure to pay any amount. The proposed new section 73A provides that employees earning below the threshold prescribed by the Minister of Labour in terms of section 6(3) of the BCEA may refer disputes to the CCMA concerning a failure to pay wages or any amount owing to them in terms of the BCEA, the proposed National Minimum Wage Act, 2017, collective agreement, contract or sectoral determination. It is envisaged that this will provide a cheaper and more expeditious method of resolving these disputes and will avoid these claims being split into proceedings before different forums. This right does not prevent employees from instituting a claim in the civil court. Employees earning above the BCEA earnings threshold retain their right to bring claims in the Labour Court or a civil court with jurisdiction (the High Court, the Magistrates Court or the Small Claims Court, depending on the amount of the claim).

Clause 13

2.13 Clause 13 of the Bill amends section 74 of the BCEA to permit a claim for payment of the national minimum wage to be instituted jointly with proceedings in terms of Part C of Chapter 10 of the BCEA.

Clause 14

2.14 Clause 14 of the Bill amends section 75 of the BCEA so as to provide that an employer who fails to pay the national minimum wage must pay interest on any late payment calculated at the rate prescribed in the Prescribed Rate of Interest Act, 1975 (Act No. 55 of 1975).

Clause 15

2.15 Clause 15 of the Bill amends section 76 of the BCEA to extend the provisions concerning proof of compliance currently applicable to the BCEA, to the proposed National Minimum Wage Act, 2017. In terms of this section employers are required to prove the accuracy of wage records and to prove compliance if they have failed to keep the requisite records.

Clause 16

2.16 Clause 16 of the Bill inserts section 76A to provide for a fine for non-compliance with the national minimum wage. An employer who fails to pay the national minimum wage will be required to pay the employee an amount that is twice the value of the underpayment or twice the employee's monthly wage, whichever is the greater.

Clause 17

2.17 Clause 17 of the Bill amends section 77A of the BCEA so as to remove the powers of the Labour Court to make a compliance order issued by a labour inspector an order of Court. This function will now be performed by the CCMA which will have the power to make an arbitration award in order to enforce a compliance order.

Clause 18

2.18 Clause 18 of the Bill amends section 78 of the BCEA which deals with rights of employees. The amendment seeks to substitute the current section 78 with a similar section that makes reference to the proposed National Minimum Wage Act, 2017.

Clause 19

2.19 Clause 19 of the Bill amends section 80 of the BCEA to provide that disputes concerning the protection of employees against discrimination for enforcing their rights should be referred to the CCMA for both conciliation and arbitration. Currently, bargaining councils conciliate these disputes within their sectors.

Clause 20

2.20 Clause 20 of the Bill provides for the transitional provisions to regulate the operation of sectoral determinations once the proposed National Minimum Wage Act, 2017, comes into force. The effect of the transitional provisions is that—

- (a) sectoral determinations remain in force, except to the extent that they prescribe wages below the level of the national minimum wage;
- (b) the Minister of Labour may withdraw or amend sectoral determinations;
- (c) an employer must pay a learner an allowance as prescribed in Schedule 2 to the proposed National Minimum Wage Act, 2017, from the date the proposed National Minimum Wage Act, 2017, comes into force.

Clause 21

2.21 This clause provides for the short title and the commencement. The commencement Act is aligned with the commencement of the National Minimum Wage Act, 2017.

3. PARTIES CONSULTED

All affected stakeholders were consulted individually.

4. FINANCIAL IMPLICATIONS FOR STATE

There will be no cost implications to the State in relation to the implementation of the Act. The proposed amendments are purely of an administrative or technical nature.

5. PARLIAMENTARY PROCEDURE

5.1 The State Law Advisers and the Department are of the opinion that the Bill should be dealt with in terms of the procedure established by section 75 of the Constitution, since it does not contain provisions to which the procedure set out in section 76 of the Constitution applies. In *Tongoane and Others v Minister of Agriculture and Land Affairs and Others*¹, the Constitutional Court (“the CC”) definitively dealt with the question of tagging. The CC determined the proper test for tagging of the Communal Land Rights Act, 2004² (“the CLARA”), by analysing the provisions of the CLARA and found that CLARA, in substantial measure, affects indigenous law, customary law and traditional leadership which are areas of concurrent national and provincial legislative competence, and are functional areas listed in Schedule 4 to the Constitution. The CC held in paragraph 58 of the judgment that:

“... What matters for the purpose of tagging is not the substance or the true purpose and effect of the Bill, rather, what matters is whether the provisions of the Bill ‘in substantial measure fall within a functional area listed in schedule 4’. This statement refers to the test to be adopted when tagging Bills. This test for classification or tagging is different from that used by this court to characterise a Bill in order to determine legislative competence. This involves the determination of the subject matter or the substance of the legislation, its essence, or

¹2010 (8) BCLR 741 (CC).

²[Act No. 11 of 2004].

true purpose and effect, that is, what the [legislation] is about.”.
(Footnote omitted)

- 5.2 The CC held that the test for tagging must be informed by its purpose. Tagging is neither concerned with determining the sphere of government that has the competence to legislate on a matter, nor is the process concerned with preventing interference in the legislative competence of another sphere of government. The process is concerned with the question of how a Bill must be considered by the provinces and in the National Council of Provinces, and how a Bill must be considered by the provincial legislatures depends on whether it affects the provinces. The more it affects the interest, concerns and capacities of the provinces, the more say the provinces should have on its content.³ The CC further held as follows:

“[64] The purpose of tagging is therefore to determine the nature and extent of the input of provinces on the contents of legislation affecting them. Indeed, all the legislation mentioned in section 76(3) is legislation that substantially affects the interests of provinces.

[69] The tagging of Bills before Parliament must be informed by the need to ensure that the provinces fully and effectively exercise their appropriate role in the process of considering national legislation that substantially affects them. Paying less attention to the provisions of a Bill once its substance, or purpose and effect, has been identified undermines the role that provinces should play in the enactment of national legislation affecting them. The subject-matter of a Bill may lie in one area, yet its provisions may have a substantial impact on the interests of provinces. And different provisions of the legislation may be so closely intertwined that blind adherence to the subject-matter of the legislation without regard to the impact of its provisions on functional areas in Schedule 4 may frustrate the very purpose of classification.

[71] . . . ; the ‘substantial measure’ test permits a consideration of the provisions of the Bill and their impact on matters that substantially affect the provinces. This test ensures that legislation that affects the provinces will be enacted in accordance with a procedure that allows the provinces to fully and effectively play their role in the law-making process. This test must therefore be endorsed.

[72] To summarise: any Bill whose provisions substantially affect the interests of the provinces must be enacted in accordance with the procedure stipulated in section 76. Whether a Bill is a section 76 Bill is determined in two ways. First, by the explicit list of legislative matters in section 76(3)(a)-(f), and second by whether the provisions of a Bill in substantial measure fall within a concurrent provincial legislative competence.”.

- 5.3 To determine whether the provisions of the Bill in substantial measure fall within a functional area listed in Schedule 4, the Bill ought to be considered against the provisions of the Constitution relating to the tagging of Bills as well as against the functional areas listed in Schedule 4 and Schedule 5 to the Constitution. It is apparent from the provisions of the Bill that the Bill seeks, amongst others, 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

³See fn 1 above at para [60].

labour inspectorate to apply to the National minimum wage and unemployment insurance and extend the jurisdiction of the Commission for Conciliation, Mediation and Arbitration (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 or collective agreements. The aforesaid are matters that are not listed in either Schedule 4 or 5 to the Constitution. The Bill is thus an ordinary Bill not affecting provinces and should be tagged as a section 75 Bill.

- 5.4 The State Law Advisers are also of the opinion that it is not necessary to refer the Bill to the National House of Traditional Leaders in terms of section 18(1)(a) of the Traditional Leadership and Governance Framework Act, 2003 (Act No. 41 of 2003), since it does not contain provisions pertaining to customary law or customs of traditional communities.

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Department:
Planning, Monitoring and Evaluation
REPUBLIC OF SOUTH AFRICA

**SOCIO-ECONOMIC IMPACT ASSESSMENT SYSTEM (SEIAS)
FINAL IMPACT ASSESSMENT TEMPLATE (PHASE 2)**

BASIC CONDITIONS OF EMPLOYMENT BILL, 2017

DEPARTMENT OF LABOUR

The Final Impact Assessment: Department of Labour - Basic Conditions of Employment Bill.

The Final Impact Assessment provides a detailed assessment of the Basic Conditions of Employment Bill 2017 that introduces amendments to the Basic Conditions of Employment Act 1997 (BCEA). These amendments follow the introduction of the new Minimum Wage Bill. The BCEA makes provision for the regulation of minimum wages in sectors through the mechanism of sectoral determinations. With the introduction of a national minimum wage, the status of sectoral determinations and other aspects of the BCEA are changed. The primary amendments in the BCE Bill therefore aim to do the following:

- i. Repeal the provisions dealing with the making of Sectoral Determinations and the powers and functions of the Employment Conditions Commission;
- ii. Extend the provisions for monitoring and enforcement by the labour inspectorate to apply to the minimum wage and unemployment insurance;
- iii. Extend the jurisdiction of the Commission for Conciliation Mediation and Arbitration (CCMA) to include enforcement procedures and claims for underpayment in terms of the BCEA, the minimum wage, unemployment insurance legislation, and claims arising from contracts or collective agreements.

The BCEA Bill follows a two year engagement process between government, organised business and organised labour in the National Economic Development and Labour Advisory Council (NEDLAC) to address the challenges of labour market stability and wage inequality as posed by the President in his State of the Nation Address in June 2014. In February 2017 an agreement on the introduction of a national minimum wage was concluded and amendments to the BCEA were drafted simultaneously with the drafting of a National Minimum Wage Bill. Both bills were tabled in NEDLAC for further engagement in May 2017 and the work of the task team established to deal with the bills was concluded in August 2017.

1. The problem Statement/ Theory of Change

1.1. Give summary of the proposal, identifying the problem to be addressed and the root (causes) of the problem that will be addressed by the new rule.

a) **Summary of the proposal (Summary Background of the proposed policy/bill/regulations/ other):**

Background

The introduction of a national minimum wage requires change to the existing legislative landscape for the regulation of basic conditions of employment in South Africa. The Basic Conditions of Employment Act of 1997 has established and enforced basic conditions of employment and provided for the variation of basic conditions of employment. The model in the BCEA is for a sectoral determination to establish basic conditions of employment, including minimum wages, for employees in a sector and area. The process of arriving at a sectoral determination involves the staff of the Employment Standards Directorate in the Department of Labour conducting an investigation and preparing a report for consideration by the Employment Conditions Commission (ECC). The ECC, a tripartite body consisting of employer and trade union representatives as well as independent experts, advises the Minister who will make the final determination. Enforcement and legal proceedings are dealt with by labour inspectors in terms of the powers and procedures provided for in the BCEA.

In contemplating a national minimum wage, the policy and legislative approach has been to provide for a national minimum wage that forms the minimum floor for wages. The national minimum wage cannot be varied by contract, collective agreement or law. It is therefore envisaged that the national minimum wage will replace the minimum wages that have been set through sectoral determinations for particular sectors. The National Minimum Wage Bill also establishes the National Minimum Wage Commission which is intended to review the national minimum wage and to make recommendations for adjustment to the Minister of Labour. In

line with these provisions, the relevant chapters of the BCEA that deal with sectoral determinations and the Employment Conditions Commission are repealed.

The BCEA will continue to regulate basic conditions of employment and will provide for enforcement measures, including for non-compliance with the National Minimum Wage Bill. It is therefore envisaged that the National Minimum Wage Act and the BCEA will be closely related or complementary pieces of legislation.

The amendments to the BCEA are primarily aimed at the following:

- i. To repeal the provisions dealing with the making of Sectoral Determinations and the powers and functions of the Employment Conditions Commission;
- ii. To extend the provisions for monitoring and enforcement by the labour inspectorate to apply to the minimum wage and unemployment insurance;
- iii. To extend the jurisdiction of the CCMA to include enforcement procedures and claims for underpayment in terms of the BCEA, the minimum wage, unemployment insurance legislation, and claims arising from contracts or collective agreements;
- iv. To create transitional provisions to regulate sectoral determinations currently in force.

Summary of proposal

The proposed **amendments to the Basic Conditions of Employment Act** deal with the following areas:

- i. **Guaranteed Minimum hours of work**

A new section provides that an employee who works for less than four hours on any day is entitled to be paid for four hours' work. There are currently provisions for minimum hours of work in some sectoral determinations and in collective agreements. The guaranteed minimum hours will apply in the case where the worker is employed, but on any particular day where there are circumstances beyond the control of the employee that prevent work being performed. It is envisaged that the minimum hours of work will apply to workers earning below a

threshold of R40 per hour, although this will be introduced in the Regulations to the BCEA.

ii. Sectoral Determinations and Employment Conditions Commission

These chapters are deleted from the BCEA as they are being replaced by the national minimum wage, the National Minimum Wage Commission and transitional provisions that will set a certain period for the continued operation of sectoral determinations.

iii. Monitoring, Enforcement and Legal Proceedings

The provisions for monitoring and enforcement of the Act by labour inspectors and the mechanisms for legal proceedings arising from non-compliance are extended to apply to the national minimum wage and unemployment insurance.

The jurisdiction of the Commission for Conciliation Mediation and Arbitration (CCMA) is extended to include enforcement procedures and claims for underpayment in terms of the BCEA, the minimum wage and unemployment insurance legislation.

In terms of the changes, inspectors will be able to secure an undertaking from employers who have not complied with the national minimum wage. If an employer fails to comply with the written undertaking, the inspector may apply to the CCMA to have the undertaking made an arbitration award.

Inspectors may also issue compliance orders in relation to non-compliance with the national minimum wage and provisions of the Unemployment Insurance Act and Unemployment Insurance Contributions Act.

A new provision is made in the BCEA to enable employees earning below the threshold prescribed by the Minister of Labour to refer disputes about failure to pay wages or any underpayment to the CCMA for arbitration. The provision makes this referral by employees possible in relation to the BCEA, the minimum wage, a

collective agreement, a contract or a sectoral determination. The intention of this provision is to provide a cheaper and more expeditious method of resolving disputes over payment and underpayment and to avoid claims being split into proceedings before different forums. Employees earning above the earnings threshold will retain the right to bring claims in the Labour Court or a civil court with jurisdiction.

The CCMA is empowered to issue an arbitration award to enforce compliance orders thus removing the power of the Labour Court to make a compliance order by an inspector an order of court.

New penalties for not complying with the national minimum wage are introduced. These require that an employer who fails to pay any worker at least the minimum wage must pay an amount that is the greater of –

- Twice the value of the underpayment; or
- Twice the employee's monthly wage.

iv. Transitional provisions

The transitional provisions provide for the sectoral determinations to remain in force, except to the extent that they prescribe wages that are below the minimum wage.

The wages in sectoral determinations, as well as remuneration and benefits associated with those wages, will be increased in proportion to the adjustment of the national minimum wage for a period of three years.

The Sectoral Determination 5: Learnership remains in force and the learner allowances will be adjusted by the National Minimum Wage Commission as part of the annual review process.

The Sectoral Determination 10: Children in the Performance of Advertising, Artistic and Cultural Activities also remains in force.

b) Problem/s and root causes that the proposal is trying to address

Identified Problem	Root causes
Compliance with the national minimum wage.	Lack of knowledge, lack of willingness, inability to pay prescribed minimum wage, poor enforcement.
Accessible and efficient enforcement measures.	Increased number of workers covered by the national minimum wage and limited enforcement capacity.

1.2. Describe the intended outcomes of the proposal

At a strategic level, the overall intended outcome of the proposal is to ensure an optimal level of compliance with the national minimum wage and to ensure that workers can enforce claims for non-payment or underpayment in the most effective manner possible.

1.3. Describe the groups that will benefit from the proposal, and the groups that will face the cost. These groups could be described by their role in the economy or in society. As a minimum, consider if there will be specific benefits or costs for the poorest households (earning R 7000 a month or less); for black people, youth or women; for small and emerging enterprise; and /or for rural development. Add more rows if required.

Groups that will benefit	How will they benefit?
Workers	<p>The proposed amendments are intended to provide measures that will enhance compliance with the payment of the minimum wage by employers.</p> <p>The amendments also introduce enforcement measures that will be easier for workers to pursue.</p>

Groups that will bear the cost or lose	How will they incur the costs or lose?
CCMA	Costs associated with increased case load arising from disputes arising from the new national minimum wage.
Government (DOL inspectorate)	Costs associated with monitoring and enforcing the implementation of the national minimum wage

1.4. Describe the behaviour that must be changed, main mechanisms to achieve the necessary changes. These mechanisms may include modifications in decision making process systems; changes in procedures; educational work; sanctions; and or incentives. Also identify groups inside or outside government whose behaviour will have to change to implement the proposal. Add more rows if required.

Groups inside Government	Behaviour that must be changed (Current Behaviour)	Main mechanism to achieve the necessary changes
DOL inspectorate	Inspections and investigations in relation to sectoral determinations	Training
CCMA	Case management excluding minimum wage	Training

Groups outside Government	Behaviour that must be changed (Current Behaviour)	Main mechanism to achieve the necessary changes
Employers and Employer associations	Payment of wages below legislated minimum wage.	National Minimum Wage Bill and amendments to Basic Conditions of Employment Act that deal with enforcement.

1.5. Report on consultations on the proposal with the affected government agencies, business and other groupings. What do they see as the main benefits, costs and risks? Do they support or oppose the proposal? What amendments do they propose? And have these amendments been incorporated in your proposal?

Consultation took place during 2015-2016 under the auspices of NEDLAC and via a Committee of Principals chaired by the Deputy President. Government was represented

in the Committee of Principals by the Ministers of Labour, Finance, Economic Development, Trade and Industry and Small Business. The NEDLAC consultations were facilitated by a Senior Commissioner of the CCMA who provided regular reports to the Committee of Principals on the work of the task team. These reports recorded areas of agreement and disagreement between the constituencies represented in the task team. In April 2016, the Task Team on Wage Inequality deadlocked over the proposed level at which that national minimum wage should be set. The Committee of Principals agreed to the establishment of an Advisory Panel which was tasked with interrogating the research that had been carried out and to recommend a meaningful level or range for the first national minimum wage. The Advisory Panel was established by the Deputy President and submitted its report in August 2016. The process culminated in the adoption of a Declaration on Wage Inequality and Labour Market Stability (attached as **Annexure A**) and an Agreement on the Introduction of a National Minimum Wage in February 2017. Since the February agreement, the Department of Labour submitted a draft National Minimum Wage Bill and amendments to the Basic Conditions of Employment Act to NEDLAC for consideration. A task team was established and has deliberated on all aspects of the BCEA Amendments.

Affected Stakeholders	What do they see as main <u>benefits, costs and risks?</u>	Do they <u>support or oppose the proposal?</u>	What <u>amendments</u> do they propose?	Have these amendments been <u>incorporated in your proposal?</u>
1. Department of Labour and CCMA	Improved compliance with minimum wage and simpler enforcement mechanisms. Costs are primarily associated with training and	Support.	N/A	N/A

	increased case load for the CCMA.			
2. Business- Business Unity South Africa, Black Business Council.	Benefits are associated with a simpler minimum wage system. Costs are associated with penalties for non-compliance. Risks relate to the pursuit of legal cases by workers and possible increases to wages in Sectoral Determinations over the next three years.	Support	Definition of employee to be retained. Jurisdiction of Labour Court to be retained for issuing of court orders. Ability of Inspectors to issue compliance orders for wage claims going back 3 years.	No
3. Organised Labour- COSATU, NACTU, FEDUSA.	Improved enforcement provisions in BCEA in relation to national minimum wage. No costs or risks.	Support	Criminalization of non-compliance with national minimum wage. Retention of Sectoral Determinations.	No SD's retained for 3 year period.
4. Civil Society- Community constituency as represented at NEDLAC.	Improved enforcement provisions in BCEA in relation to minimum wage. No costs or risks.	Support	Criminalization of non-compliance with national minimum wage.	No

1.6. Describe possible disputes arising out of the implementation of the proposal, and system for settling and appealing them. How onerous will it likely be for members of the public to lodge a complaint and how burdensome and expeditious is the proposed dispute-settlement procedure?

Disputes are likely to arise in relation to underpayment of wages and/or non-payment of wages owing to workers. The amendments make it simpler and easier for workers to lodge complaints relating to wage disputes and for inspectors and the CCMA to deal with these disputes.

The process for dispute resolution is made much simpler through the amendments.

2. Impact Assessment

2.1. Describe the costs and benefits of implementing the proposal to the groups identified in point 1.5 above, using the following chart. Add more rows if required

Group	Implementation Costs	Costs of changing behaviour	Costs/Benefits from achieving desired outcome	Comments
Government	Training costs for the inspectorate and publicity campaigns are estimated at R650 000.00.	Inspectorate will be required to enforce compliance.	Improved compliance with minimum wages.	Should improved compliance be achieved over time, improved household income and expenditure can be expected.
CCMA	Estimated at R20.8m for training activity, advocacy and increase in case load.	Estimated at R20.8m for training activity, advocacy and increase in case load.	Costs will be associated with training, advocacy and case load increase. Benefits will derive from enhanced capacity to deal with new areas of dispute resolution and support.	Cost estimates for the CCMA have been used to request additional funding for the entity.

2.2. Describe the changes required in budgets and staffing in government in order to implement the proposal. Identify where additional resources would be required for implementation. It is assumed that existing staff are fully employed and cannot simply absorb extra work without relinquishing other tasks.

There is no envisaged change in staffing in government. An increase in the workload of the CCMA is anticipated associated with implementation of the amendments to the BCEA in the next two years. Although it is not anticipated that this will result in additional personnel as opposed to utilising the cohort of full-time and part-time commissioners, a request for additional funding in the amount of R20.8 million has been submitted for consideration in the MTEC process.

2.3. Describe how the proposal minimises implementation and compliance costs:

The proposal includes measures for enforcement and dispute resolution that are more streamlined by, for example, making provision for the CCMA to arbitrate on pay disputes rather than using the Labour Court.

The move to a national minimum wage and replacing minimum wage regulation on a sector basis also simplifies enforcement for the inspectorate and compliance by employers.

3. Managing Risk

3.1. Describe the main risks to the achievement of the desired ends of the policy/bill/regulations/other and/ or to the national priorities (aims) that could arise from adoption of the proposal. Also describe the measures taken to manage the identified risks. Add more rows if necessary.

Identified Risk	Mitigation Measures
Non-adherence to the Declaration on Wage Inequality and Labour Market Stability	Pressure to be exerted on parties through the Committee of Principals

3.2. Describe the mechanisms included in your proposal for monitoring implementation, evaluating the outcomes, and modifying the implementation process if required. Estimate the minimum amount of time it would take from the start of the implementation process to identify a major problem and remedy it.

Mechanisms:

The proposal will be monitored through CCMA operational reporting as well as through the activities of the Department of Labour inspectorate. This monitoring and reporting does not need to be included in the proposal as it is part of the operations of both the CCMA and the Department.

It is estimated that major problems in implementation will be detected very quickly as it concerns wages and remuneration. The time taken to remedy it will depend on the dispute resolution and enforcement processes.

4. Summary

4.1. Summarise the impact of the proposal on the main national priorities

National Priority	Impact
1. Social Cohesion	Improved standard of living.
2. Security (Safety, Financial, Food, Energy and etc.)	Enhanced food security for those workers that benefit from the national minimum wage.
3. Economic Growth	N/A
4. Economic Inclusion (Job Creation and	Greater equality in earnings for lower income workers

Equality)	expected through the enforcement of the minimum wage.
5. Environmental Sustainability	N/A

4.2. Identify the social and economic groups that would **benefit most** and that would **bear the most cost**. Add more rows if required.

Main Beneficiaries	Main Cost bearers
Employees and workers	Employers
Government	Government

4.3. In conclusion, summarise what should be done to reduce the costs, maximise the benefits, and mitigate the risks associated with the policy/bill/regulations/other. Note supplementary measures (such as educational campaigns or provision of financing) as well as amendments to the draft itself, if appropriate. Add more bullets if required.

A well-publicised and well-coordinated implementation of the national minimum wage in 2018 should mitigate risks by creating advance awareness, giving certainty and managing expectations. Such steps should also serve to maximise the benefit of the national minimum wage by ensuring maximum compliance by employers.

4.4. Please identify areas where additional research would improve understanding of the costs, benefits and/ or risks of the policy/bill/regulations/other:

For the purpose of building SEIAS body of knowledge please complete the following:

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