# GENERAL NOTICE

**NOTICE 1112 OF 2010**

**DEPARTMENT OF LABOUR**

**LABOUR RELATIONS AMENDMENT BILL, 2010**

**BASIC CONDITIONS OF EMPLOYMENT AMENDMENT BILL, 2010**

**EMPLOYMENT EQUITY AMENDMENT BILL, 2010**

**EMPLOYMENT SERVICES BILL, 2010**

1. I, **NELISIWE MILDRED OLIPHANT**, Minister of Labour, hereby publish proposed amendments to the Labour Relations Act, 1995, the Basic Conditions of Employment Act, 1997, the Employment Equity Act, 1998 and an Employment Services Bill, 2010, for general information and comment.

2. I will also be tabling these bills at NEDLAC for consideration.

3. Submission of representations:

   a. All interested parties are invited to submit written comments on the draft bills.
   b. Such comments should be addressed to: **Mr. Thembinkosi Mkalipi**, Department of Labour, Private Bag X117, Pretoria, 0001, or faxed to 012 309 4156 or e-mailed to **Thembinkosi.Mkalipi@labour.gov.za** or **Maria.Briedenhann@labour.gov.za**

   c. Comments should reach the Department of Labour not later than 17 February 2011.

**N M OLIPHANT, MP**
**MINISTER OF LABOUR**
08/12/2010

REPUBLIC OF SOUTH AFRICA

# LABOUR RELATIONS AMENDMENT BILL

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*(As introduced in the National Assembly (proposed section 75); explanatory summary of Bill published in Government Gazette No. 33873 of 17 December 2010)*
*(The English text is the official text of the Bill)*

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(MINISTER OF LABOUR)

[B — 2010]

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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 Labour Relations Act, 1995 so as to substitute or insert certain definitions, to align the employment laws to ensure decent work by regulating sub-contracting, contract work and outsourcing, to amend the jurisdiction of the Labour Courts; to provide for the prohibition of certain abusive practices to workers, and to repeal a section; and to provide for matters connected therewith.**

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

**Substitution of section 43 of Act 66 of 1995, as amended by section 10 of Act 42 of 1996**

**1.** Section 43 of the Labour Relations Act, 1995 (hereafter referred to as the principal Act), is hereby amended by the substitution for subsection (3) of the following subsection:

"(3) If a statutory council concludes a *collective agreement* in terms of subsection (1)*(d)* or in respect of any matter referred to by subsection

(2), the provisions of sections 31, 32 and 33 apply, read with the changes required by the context.".

**Amendment of section 51 of Act 66 of 1995, as amended by section 11 of Act 42 of 1996 and section 12 of Act 12 of 2002**

**2.** Section 51 of the principal Act is hereby amended by the substitution for subsection (9) of the following subsection:

"(9) A *bargaining council* may, by *collective agreement*[,] —

(a) establish procedures to resolve any dispute contemplated in this section;

(b) provide for payment of a dispute resolution levy; and

(c) provide for the payment of a fee in relation to any conciliation or arbitration proceedings in respect of matters for which the Commission may charge a fee in terms of section 115(2A)(*l*).".

**Amendment of section 65 of Act 66 of 1995**

**3.** Section 65 of the principal Act is hereby amended by the substitution in subsection (1) for paragraph (*c*) of the following paragraph:

"*(c)* the *issue in dispute* is one that a party has the right to refer to arbitration or to the Labour Court in terms of *this Act* or any other employment law;".

**Amendment of section 115 of Act 66 of 1995, as amended by section 31 of Act 42 of 1996, section 6 of Act 127 of 1998 and section 22 of Act 12 of 2002**

**4.** Section 115 of the principal Act is hereby amended by—

*(a)* the deletion of the word "and" at the end of paragraph (*c*), the insertion of the word "and" at the end of paragraph (d) and the addition of the following paragraph:

"*(e)* review any rules made in terms of this section at least every second year;".

*(b)* the insertion in subsection (2) of the following paragraph after paragraph (b):

"*(bA)* if asked, assist a party to serve any notice or document in respect of conciliation or arbitration proceedings in terms of *this Act*;

*(bB)* if asked, assist a party to enforce an arbitration award that has been certified in terms of section 143(3);".

*(c)* the substitution in subsection (2A) for paragraph (*k*) of the following paragraph:

"*(k)* **[the right of any person or category of persons to represent any party]** the representation of parties in any conciliation or arbitration proceedings, including the limitation or prohibition of representation in those proceedings;".

*(d)* the insertion in subsection (2A) of the following paragraph after paragraph (*k*):

"*(kA)* the consequences for any party to conciliation or arbitration proceedings for not attending those proceedings;" and

*(e)* the substitution in subsection (3) for the words preceding paragraph *(a)* of the following words:

"**[If asked, the]** The Commission may provide *employees*, employers, registered *trade unions*, registered *employers' organisations*, federations of *trade unions*, federations of *employers' organisations* or *councils* with advice or training relating to the primary objects of *this Act* or any other employment law, including but not limited to—".

**Amendment of section 136 of Act 66 of 1995, as amended by section 9 of Act 127 of 1998**

**5.** Section 136 of the principal Act is amended by the substitution in subsection (1) for paragraphs (*a*) and (*b*) of the following paragraphs:

"*(a)* a commissioner has issued a certificate stating that the *dispute* remains unresolved or the 30 day period or any further period agreed between the parties has ended and the *dispute* remains unresolved; and

*(b)* within 90 days after the date on which that certificate was issued or the end of the 30 day period or any further period agreed between the parties, whichever is the later, any party to the *dispute* has requested that the *dispute* be resolved through arbitration. However, the Commission, on good cause shown, may condone a party's non-observance of that timeframe and

allow a request for arbitration filed by the party after the expiry of the 90-day period.".

**Amendment of section 143 of Act 66 of 1995, as amended by section 32 of Act 12 of 2002**

**6.** Section 143 of the principal Act is hereby amended by—

*(a)* the substitution for subsection (1) of the following subsection:

"(1) An arbitration award issued by a commissioner is final and binding and it may be enforced as if it were an order of the Labour Court, High Court or the Magistrate's Court, as the case may be, unless it is an advisory arbitration award."; and

*(b)* the insertion after subsection (3) of the following subsection:

"(3A) An arbitration award certified in terms of subsection (3) that orders a party to pay a sum of money has the status of a writ of execution of—

*(a)* the Magistrate's Court, to the extent that the award is in respect of an amount within the jurisdiction of the Magistrates Court;

*(b)* the High Court, to the extent that the award is in respect of an amount which exceeds the jurisdiction of the Magistrates Court.".

**Amendment of section 144 of Act 66 of 1995, as substituted by section 33 of Act 12 of 2002**

**7.** Section 144 of the principal Act is hereby amended by—

*(a)* the substitution for the heading of the following heading:

**"Variation and rescission of certificates, arbitration awards and rulings"**;

*(b)* the substitution for the words preceding paragraph *(a)* of the following words:

"Any commissioner who has issued a certificate in terms of section 135, an arbitration award or ruling, or any other commissioner appointed by the *director* for that purpose, may on that commissioner's own accord or, on the application of any affected party, vary or rescind an arbitration award or ruling—"; and

*(c)* the deletion of the word "or" at the end of paragraph *(b)*, the insertion of the word "or" at the end of paragraph *(c)* and the addition of the following paragraph:

*"(d)* if there is good cause on any other ground for the award or ruling to be varied or rescinded.".

**Amendment of section 147 of Act 66 of 1995, as amended by section 41 of Act 42 of 1996**

**8.** Section 147 of the principal Act is hereby amended by insertion after subsection (6) of the following subsection:

"(6A) Despite subsection (6), the Commission must appoint a commissioner to resolve the *dispute* in terms of *this Act* if—

*(a)* the *employee* is required to pay any part of the cost of the private *dispute* resolution procedures; or

*(b)* the person or body appointed to resolve the *dispute* is not independent of the employer.".

**Substitution of section 150 of Act 66 of 1995, as amended by section 35 of Act 12 of 2002**

**9.** The following section is hereby substituted for section 150 of the principal Act:

"**Commission may appoint commissioner to conciliate in the public interest**

**150.** (1) The Commission may appoint a commissioner who must attempt to resolve the *dispute* through conciliation whether or not that *dispute* has been referred to the Commission or a bargaining council—

*(a)* at the request of the parties; or

*(b)* if there is no request, if the *director* believes it is in the public interest to do so.

(2) Before appointing a commissioner in terms of this section, the Commission must consult—

*(a)* the parties to the *dispute*; and

(b) the secretary of a *bargaining council* with jurisdiction over the parties to the *dispute*.

(3) The *director* may appoint one or more commissioners to conciliate the *dispute*, who may include a person who has already conciliated in respect of that *dispute*.

(4) In addition, the *director* may appoint to assist in conciliating—

(a) one person from a list of at least five names submitted by the representatives of organised labour on the governing body of the Commission; and

(b) one person from a list of at least five names submitted by the representatives of organised business on the governing body of the Commission.

(5) Unless the parties to the *dispute* agree otherwise, the appointment of a commissioner in terms of this section, suspend the right of an *employee* to strike or an employer to lock-out, acquired in terms of Chapter IV.".

**Substitution of section 157 of Act 66 of 1995, as amended by section 14 of Act 127 of 1998**

**10.** The following section is hereby substituted for section 157 of the principal Act:

**"Jurisdiction of Labour Court**

**157.** (1) Subject to the Constitution the Labour Court has exclusive jurisdiction in respect of—

*(a)* a matter that is required to be determined by the Labour Court in terms of *this Act* or any other employment law;

*(b)* the interpretation or application of any employment law;

*(c)* a *dispute* concerning the termination of a contract of employment;

*(d)* a constitutional matter arising from employment or labour relations;

*(e)* subject to section 145, review any administrative action taken in terms of *this Act* or any employment law;

*(f)* a *dispute* between a trade union or an employers organisation and a member or applicant for membership of the union or organisation, as the case may be, about an alleged non-compliance with the constitution of the union or organisation or section 25(5)*(b)*;

*(g)* hear and determine any appeal in terms of section 35 of the Occupational Health and Safety Act, 1993 (Act No. 85 of 1993); and

*(h)* any other matter arising from employment or labour relations.

(2) If the CCMA or a *bargaining council* has exclusive jurisdiction in a particular matter, no party may refer such matter to the Labour Court before finalisation by the CCMA or a bargaining council.

(3) If proceedings concerning any matter contemplated in terms of subsection (1) are instituted in a court or tribunal that does not have jurisdiction in respect of that matter, that court or tribunal may at any stage refer those proceedings to the Labour Court for determination.".

**Amendment of section 158 of Act 66 of 1995, as amended by section 44 of Act 42 of 1996 and section 36 of Act 12 of 2002**

**11.** Section 158 of the principal Act is hereby amended by—

*(a)* the substitution in subsection (1) for paragraph *(b)* of the following paragraph:

"*(b)* order compliance with any provision of *this Act* or any employment law;".

*(b)* the deletion in subsection (1) of paragraphs *(e), (g), (h)* and *(i);* and

*(c)* the insertion after section (1A) of the following subsection—

"(1B) No decision may be taken on review in respect of conciliation or arbitration proceedings under the auspices of the Commission or any *bargaining council* with jurisdiction in respect of a matter contemplated in section 65(1)*(c)* until the *dispute* has been determined by the Commission or a bargaining council.".

**Amendment of section 186 of Act 66 of 1995, as amended by section 95 of Act 75 of 1997 and section 41 of Act 12 of 2002**

**12.** (1) Section 186 of the principal Act is amended by—

*(a)* the substitution in subsection (1) for paragraph *(b)* of the following paragraph:

"*(b)* an *employee* engaged under a fixed term contract of employment reasonably expected the employer—

(i) to renew a fixed term contract of employment on the same or similar terms but the employer offered to renew it on less favourable terms, or did not renew it; or

(ii) to offer the *employee* an indefinite contract of employment on the same or similar terms but the employer offered it on less favourable terms, or did not offer it, where there was reasonable expectation;"; and

*(b)* the substitution in subsection (2) for the words preceding paragraph *(a)* of the following words:

"'unfair labour practice' means any unfair act or omission that arises between an employer and client company in sub-contracting cases and an *employee* involving—".

**Insertion of section 187A in Act 66 of 1995**

**13.** The following section is hereby inserted in the principal Act after section 187:

"**Limitation on application of Chapter VIII**

**187A.** An *employee* earning in excess of an amount determined by the *Minister* by notice in the *Gazette*, may not refer labour *disputes* in respect of the provisions of sections 185, 186, 188, 189, 189A and 197 to the CCMA."

**Amendment of section 188A of Act 66 of 1995**

**14.** Section 188A of the principal Act is hereby amended by—

*(a)* the substitution for the heading of the following heading:

"**[Agreement for pre-dismissal arbitration] Inquiry by arbitrator**";

*(b)* the substitution for subsection (1) of the following subsection:

"(1) An employer may, with the consent of the *employee* or in accordance with a *collective agreement*, request a council, an accredited agency or the Commission to appoint an arbitrator to conduct an **[arbitration]** inquiry into allegations about the conduct or capacity of that *employee*.";

*(c)* the substitution for subsection (4) of the following subsection:

(4) *(a)* An *employee* may only consent to **[a pre-dismissal arbitration]** an inquiry in terms of this section after the *employee* has been advised of the allegation referred to in subsection (1) **[and in respect of a specific arbitration]**.

*(b)* Despite any other provision in *this Act* **[subparagraph *(a)*,]**—

(i) an *employee* earning more than the amount determined by the *Minister* in terms of section 6(3) of the *Basic Conditions of Employment Act* at the time, may **[consent]** agree in a contract of employment to the holding of **[a pre-dismissal arbitration in a contract of employment]** an inquiry in terms of this section;

(ii) a *collective agreement* may provide for an inquiry to be held in terms of this section.";

*(d)* the substitution in subsection (5) for the words preceding paragraph (a) of the following words:

"In any **[arbitration]** inquiry in terms of this section a party to the *dispute* may appear in person or be represented only by—";

*(e)* the substitution for subsection (8) of the following subsection:

"(8) The ruling of the arbitrator in an inquiry has the same status as an arbitration award and the provisions of sections 143 to 146 apply with the changes required by the context to any ruling made by an arbitrator in terms of this section. ";

*(f)* the substitution for subsection (9) of the following subsection:

"(9) An arbitrator conducting an **[arbitration]** inquiry in terms of this section must, in the light of the evidence presented and by reference to the criteria of fairness in the Act, **[direct]** rule as to what action, if any, **[should]** may be taken against the *employee*.";

*(g)* the substitution for subsection (10) of the following subsection:

"(10) *(a)* A private agency may only appoint an arbitrator to conduct an **[arbitration]** inquiry in terms of this section if it is accredited for **[this purpose]** arbitration by the Commission.

*(b)* A council may only appoint an arbitrator to conduct an **[arbitration]** inquiry in terms of this section in respect of which the employer or the *employee* is not a party to the council, if the council has been accredited for **[this purpose]** arbitration by the Commission."; and

*(h)* the addition of the following subsections:

"(11) Despite subsection (1), if an *employee* alleges that the holding of an inquiry contravenes the Protected Disclosures Act, 2000 (Act No. 26 of 2000), or that the employer has contravened section 5 of *this Act*, that *employee* or the employer may require that an inquiry be conducted by arbitration under this section—

(a) into allegations by the employer into the conduct or capacity of that *employee*; or

(b) in respect of any contemplated dismissal for operational requirements.

(12) The holding of an inquiry by a arbitrator in terms of this section and the suspension of an *employee* on full pay pending the outcome of such an inquiry do not constitute an occupational detriment, as contemplated in the Protected Disclosures Act, 2000 (Act No. 26 of 2000).".

**Amendment of section 191 of Act 66 of 1995**

**15.** Section 191 of the principal Act is hereby amended by—

(a) the substitution for subsection (5A) of the following subsection:

"(5A) Despite any other provision in the Act, the council or Commission must commence the arbitration immediately after certifying that the *dispute* remains unresolved unless—

(a) the commissioner and the parties agree otherwise;

(b) the commissioner concludes that it is unreasonable for the arbitration to commence immediately, after considering—

(i) the nature of the questions of law raised by the *dispute*;

(ii) the complexity of the *dispute*; and

(iii) the public interest."; and

(b) the substitution for subsection (12) of the following subsection:

"(12) An *employee* dismissed by reason of the employer's *operational requirements* may elect to refer the *dispute* either to arbitration or to the Labour Court if—

*(a)* the employer followed a consultation procedure that applied to that *employee* only, irrespective of whether that procedure complied with section 189;

*(b)* the employer's *operational requirements* for the dismissal relate to that *employee* only; or

*(c)* the employer employs less than 10 *employees*."

**Amendment of section 197 of Act 66 of 1995, as amended by section 49 of Act 12 of 2002**

**16.** Section 197 of the principal Act is hereby amended by the substitution in subsection (1) for paragraph *(b)* of the following paragraph:

"*(b)* '**transfer**' means the transfer of a business **[by]** from one employer ("the old employer") to another employer ("the new employer") as a going concern.".

**Repeal of section 198 of Act 66 of 1995**

**17.** Section 198 of the principal Act is hereby repealed.

**Amendment of section 200A of Act 66 of 1995**

**18.** Section 200A of the principal Act is hereby amended by the substitution for subsection (1) of the following subsection:

"(1) Until the contrary is proved, for the purposes of *this Act* and any employment law, a person, who works for or renders services to, any other person, is presumed, regardless of the form of the contract, to be an *employee*, if any one or more of the following factors are present:".

**Insertion of section 200B in Act 66 of 1995**

**19.** The following sections are hereby inserted in the principal Act after section 200A:

"**Declaring Temporary Employment to be permanent**

**200B.** An *employee* must be employed permanently, unless the employer can establish a justification for employment on a fixed term.

**Liability of client company in sub-contracting**

**200C.** An *employee* must have recourse against the employer and its client company where there is unfair labour practice.".

**Amendment of section 201 of Act 66 of 1995, as amended by section 49 of Act 42 of 1996**

**20.** Section 201 of the principal Act is hereby amended by the deletion of subsection (3).

**Amendment of section 203 of Act 66 of 1995, as amended by section 52 of Act 12 of 2002**

**21.** Section 203 of the principal Act is hereby amended by the addition of the following subsections:

"(5) The *Minister* may table proposals in NEDLAC—

*(a)* for a code of good practice; or

*(b)* to amend or replace any code of good practice.

(6) If NEDLAC fails to reach consensus on any proposal to change, replace or issue a code of good practice within six months of the commencement of consultations, the *Minister* may publish in the Government *Gazette* the relevant change, replacement or code of good practice in accordance with the provisions of this section.

(7) A code of good practice issued by the *Minister* in terms of subsection (6) has the same status as a code of good practice issued by NEDLAC in terms of this section.".

**Insertion of section 209A in Act 66 of 1995**

**22.** The following section is hereby inserted in the principal Act after section 209:

**"Offences and penalties**

**209A.** Any person who contravenes or fail to comply with section 201 and 205 is guilty of an offence and is liable to a fine or imprisonment or both such fine and imprisonment as listed in the table below.".

| **It is a criminal offence to contravene the following provisions** | **Minimum applicable fines** | **Minimum term of imprisonment** |
|---|---|---|
| Section 201 | R10 000.00 | 12 months |
| Section 205 | R10 000.00 | 12 months |

**Amendment of section 213 of Act 66 of 1995, as amended by section 52 of Act 42 of 1996, section 54 of Act 12 of 2002 and section 43 of Act 30 of 2007**

**23.** Section 213 of the principal Act is hereby amended by—

*(a)* the insertion after the definition of **"collective agreement"** of the following definition:

" **'contract of employment'** means—

*(a)* a common law contract of employment; or

*(b)* any other agreement or arrangement under which a person agrees to work for an employer but excluding a contract for work as an independent contractor;";

*(b)* the substitution for the definition of an **"employee"** of the following definition:

"'**employee**' means any person employed by or working for an employer, who receives or is entitled to receive any remuneration, reward or benefit and works under the direction or supervision of an employer;";

*(c)* the insertion after the definition of **"employer"** of the following definition:

"'**employer**' means any person, institution, organisation, or organ of state who employs or provides work to an employee or any other person and directly supervises, remunerates or tacitly or expressly undertakes to remunerate or reward such employee for services rendered;";

*(d)* the substitution 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]**;

*(c)* the Employment Equity Act, 1998 (Act No. 55 of 1998);

*(d)* the Occupational Health and Safety Act, 1993 (Act No. 85 of 1993); **[and]**

*(e)* the Compensation for Occupational Injuries and Diseases Act, 1993 (Act No. 130 of 1993); and

*(f)* the Basic Condition of Employment Act, 1997 (Act No. 75 of 1997);";

*(e)* the insertion after the definition of **"essential service"** of the following definition:

"'**independent contractor**' means a person who works for or supplies services to a client or customer as part of the person's business, undertaking or professional practice;"; and

*(f)* the substitution for the definition of **"serve"** of the following definition:

"'**serve**' means to send by registered post, telegram, telex, telefax or to deliver by hand and:

*(a)* in respect of the Labour Courts, any other method of service specified in the Rules of the Labour Court;

*(b)* in respect of the Commission, any other method of service specified in the Rules of the Commission;".

**Transitional provisions**

**24.** (1) Notwithstanding the provisions of this Act, any proceedings instituted in any court or tribunal before the commencement of *this Act* must be dealt with as if the principal Act had not been amended.

(2) Nothing in this section precludes a court or tribunal from referring any such proceedings to the Labour Court for determination in terms of section 157(4) of the principal Act as amended by *this Act*.

(3) Until the Rules Board for Labour Courts contemplated in section 159 of the principal Act makes rules concerning the referal of matters from other courts in terms of section 157(4) of the principal Act as amended by *this Act*, the registrar of the Labour Court must submit a referred matter in chambers to a judge of the Labour Court give a directive as to how the proceedings should be conducted in the Labour Court.

(4) The *Minister* must publish a notice in the *Gazette* notifying the public when section 198 will cease to operate.

**Short title**

**25.** This Act is called the Labour Relations Amendment Act, 2010, and comes into operation on a date fixed by the President by proclamation in the *Gazette*.

# EXPLANATORY MEMORANDUM

## LABOUR RELATIONS AMENDMENT BILL, 2010

The Department of Labour is submitting the Labour Relations Amendment Bills for approval. This is a fifth amendment since the promulgation of the Labour Relations Act in 1995.

This Bill seeks to address the concerns raised in the ruling party's election manifesto which has committed the government to the following: "In order to avoid exploitation of workers and ensure decent work for all workers as well as to protect the employment relationship, introduce laws to regulate contract work, subcontracting and out-sourcing, address the problem of labour broking and prohibit certain abusive practices."

In preparation for the publication of this Bill the Department of Labour and the representatives of organised business and labour undertook a labour law review. The proposed amendments to the Act 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 and the Department's inspectorates;

(e) rectifying anomalies and clarifying uncertainties that have arisen from the interpretation and application of the three statutes.

## COLLECTIVE BARGAINING

### 1 Statutory councils (section 43)

The Act provides for statutory councils to be established in sectors in which employers' organisations and trade unions are unable to agree on the establishment of a bargaining council. Presently, statutory councils can ask the Minister to extend collective agreements concerning certain specified topics to all parties within their sector. It is proposed to amend section 43(1) to allow a statutory council to make such a request in respect of any collective agreement that it has concluded.

## 2 Bargaining councils (section 51)

The amendment of section 51(9) allows a bargaining council to establish dispute resolution procedures for its sector by collective agreement. Section 51(9) is amended to clarify that such a collective agreement may provide for a dispute resolution levy as well as for the council to charge a fee for dispute resolution services. A fee may only be charged if the CCMA charges a fee for that service and may not exceed the fee charged by the CCMA.

## 3 Limitation on rights to strike and lock-out.

Section 65(1)(c) is amended to align the use of employment laws instead of labour Relations Act to broaden the scope of this provision. The insertion addresses the issue of referring the matters to the Labour Court only in matters referring to Labour Relations as the case now in the LRA and we want to include all employment laws.

## THE CCMA

A range of amendments are made to the provisions dealing with the operation of the CCMA to facilitate the resolution of disputes and enhance the efficiency of the CCMA's operation.

## 4 CCMA rules (section 115 (2) and (2A))

A number of amendments are proposed to the provisions empowering the Governing Body of the CCMA to make rules - the Governing Body is required to consider the adequacy of its rules at least every two years;

4.1 It is proposed that the CCMA should, on request, be able to assist a party to proceedings to serve documents on other parties and to enforce an arbitration award, if requested by a party to assist. These proposed functions will facilitate the operation of the CCMA. Presently, parties are obliged to serve documents themselves. There is evidence that employees are unable to serve documents or, where they have done so, they are unable to prove that there has been service. In these circumstances, it is appropriate that the CCMA should be able to utilise its resources to ensure that proper notification is given to parties so that they have the opportunity to decide whether to participate in proceedings and to prevent claims of non-service being used to frustrate dispute resolution. Secondly, many employees are unable to enforce awards in their favour because the practice of the Deputy Sheriffs is to require the payment of deposits before executing awards

4.2 The amendment of subsection "2A (k)" seeks to empower the CCMA to make rules regarding representation, whether to allow or prohibit representation in any Conciliation or Arbitration proceedings. By doing that we want to give the CCMA discretion whether to allow or prohibit representation looking at the complexity of the matter.

4.3 The CCMA's function of providing training and assistance to stakeholders is extended to all employment legislation. (s115(3)) CMA did not have these powers).

**5. Appointment of Commissioner to resolve dispute through Arbitration (section 136)**

The Commission is given the authority to appoint a Commissioner to arbitrate over matters that remain unresolved between the parties for 30 days or any further agreed period in order to facilitate speedy resolution of matters. As the case is now in the Principal Act the provision is open and we now want to put the time frames for a speedy resolution.

**6. Effect of arbitration awards (section 143)**

Proposed changes to section 143 would change the status of CCMA arbitration awards. The purpose of this is to facilitate the enforcement of awards by removing the need for a writ to be issued by the Labour Court before an award can be executed. In

addition, if an award is executed for an amount of compensation that is within the Magistrate's Court jurisdiction, the fees for execution will be at the Magistrate's Court tariff rather than the High Court tariff. This will assist in the speedy resolution without taking the route of lengthy litigation. If you have an award you can have the writ issued immediately without making an application to the Labour Court if the employer fails to comply with the order.

## 7. Rescission and variation of certificates, arbitration awards and rulings (section 144)

8. The power of Commissioners to rescind or vary erroneous or improperly obtained rulings and awards is extended to cover the issue of certificates at the conclusion of conciliation and not only the arbitration awards. The grounds on which certificates, rulings and arbitration awards can be varied or rescinded are extended to include "good cause". (s144(d)) This is consistent with the jurisprudence of the Labour Court on this issue.

## 9. Agreements in respect of private arbitration (s 147 (6))

The CCMA provides employees with access to expedite dispute resolution without any charge. However, there has been a practice by certain employers to seek to avoid these provisions

by, for instance, requiring employees in their contracts of employment to agree to share the costs of arbitrations. While these clauses are not enforceable and the CCMA is entitled to hear these disputes, a new sub section (6A) is inserted to clarify that the CCMA must deal with such a dispute if a private dispute resolution procedure either requires the employee to pay the costs of the arbitration or the arbitrator is not independent of the employer.

## 10. Intervention in disputes in the public interest (section 150)

Amendments are proposed to extend the power of the CCMA to intervene to resolve disputes in the public interest. Presently, this can only be done with the consent of both parties and it is proposed that this could be done in other disputes after the Director of the CCMA has consulted with the parties. This power has been used to provide conciliation in high profile disputes which have given rise to industrial action or the threat of industrial action.

## LABOUR COURT

### 11. Jurisdiction and powers of the Labour Court (sections 157 and 158)

(a) The jurisdiction of the Labour Court is clarified and expanded. The Labour Court's exclusive jurisdiction is extended to the interpretation of all employment laws, all matters concerning the termination of contracts, constitutional matters arising from employment or labour relations and reviews of administrative actions in terms of any employment law. It is also clarified that, in line with the jurisprudence of the Constitutional Court, the Labour Court will have exclusive jurisdiction for issues of labour law in the public service. These changes will prevent "forum shopping" by parties as well as prevent the emergence of conflicting jurisprudence in the specialist Labour Court and the High Court. (s. 157(1))

(b) Provisions dealing with the jurisdiction of the Labour Court which were initially included in section 158 (which deals with the court's powers) are to be moved to section 157. In addition, the review powers of the Labour Court are adjusted to be consistent with PAJA. (s 158(1) (g)) This applies to reviews other than those dealing with

arbitration awards. Similar amendments are made to other labour legislation.

(c) Decisions made during conciliation and arbitration hearings may only be reviewed after the conclusion of the arbitration. (s 158(1)(b)) This provision is introduced to prevent the obstructive use of piece-meal reviews to delay dispute resolution in the CCMA(s 158 (1B)). This amendment is justified by the need to ensure that the CCMA is able to resolve disputes in an expeditious manner.

(d) The Labour Court Rules Board is required to review the Labour Court rules at least once every two years.

## DISMISSAL

### 9. Changes in dismissal law (sections 186 )

Amendments are proposed to clarify aspects of the law on unfair dismissal. These are –

Basis on which an employee engaged on a fixed term contract can allege unfair dismissal is extended to cover cases in which the employee alleges a reasonable expectation that the employer would offer him or her indefinite employment; (s

186(b)(ii) This is in line with the Manifesto to regulate the contract work.

Section 186 (2) is a consequential to the new section 200C introduced to address the issue of liability of client company to the actual employer in cases of unfair labour practice. The reason for this amendment is that as it stands in the Principal Act unfair labour practice refers to the employer only.

**11. Limitation on application of Chapter VIII (section 187 A)**

The amendment seeks to exclude employees earning more than the prescribed threshold from referring their labour disputes to the CCMA. This will ensure that vulnerable employees are not prejudiced because of the delays caused by the volume of complaints from employees who can afford to approach the courts.

**12. Enquiry by arbitrator (section 188A)**

(a) The concept of the "pre-dismissal arbitration" introduced in 2002 is renamed as an enquiry by an arbitrator. While this procedure in terms of which an arbitrator chairs an internal enquiry into allegations about an employee's conduct or capacity offers considerable potential savings to employers and employees by avoiding a duplication of

internal enquiries and arbitration hearings, little use has been made of it. In order to facilitate more extensive use, it is proposed that collective agreements should be able to provide for inquiries by an arbitrator. This will allow employers and trade unions to agree on using this form of enquiry in disciplinary codes that are established by collective agreement.

(b) In addition, an enquiry of this type is made mandatory on the request of either the employer or the employee in two cases. The first is if the employee alleges that the dismissal would be automatically unfair because the employee is seeking to dismiss the employee for exercising a protected right under section 5 of the LRA. The second is "whistle-blower" cases in which the employee alleges that an employer is seeking dismissal in response to a protected disclosure under the Protected Disclosures Act. The latter type of case can give rise to protracted litigation over whether the employer is entitled to conduct an enquiry. This can be abused by persons other than genuine "whistle-blowers" to delay legitimate disciplinary processes. An enquiry by an arbitrator will ensure that there is an immediate investigation into the substance of the allegations and will lead to a very much quicker resolution of these disputes.

## 13. Conciliation through arbitration (Con-arb) proceedings (section 191 (5) )

The "con-arb" process allows arbitration proceedings to commence immediately after the end of conciliation phase. This change, which was introduced in 2002, has contributed to a significant reduction of the period taken to resolve disputes. However, in terms of section 191(5), either party may object to a dispute being dealt with in terms of the "con-arb" process. CCMA statistics show that objections to "con-arb" are lodged in roughly 30% of cases significantly delaying the resolution of disputes. It is proposed that all disputes should be dealt with by "con-arb" unless the commissioner and all the parties agree that "con-arb" is not appropriate or the commissioner concludes that it is unreasonable. This will ensure that an increasing proportion of cases are dealt with through "con-arb" while more complex cases can be postponed to allow the parties to prepare.

## 14. Individual dismissals for operational requirements (section 191(12))

The right of dismissed employees to refer an "individual" operational requirements dismissal to arbitration is clarified. This is necessitated by conflicting Labour Court decisions on

the matter. In addition, employees of employers with less than 10 employees will be able to refer retrenchments to the CCMA for arbitration.

## 15. Transfers of businesses as a going concern (section 197)

The application of section 197 to "second generation" transfers in which work that has been previously outsourced is transferred from one service provider to another is clarified. This change is consistent with a purposive construction of the provision by the Labour Appeal Court

## 16. Temporary Employment Services (repeal of section 198)

The repeal seeks to address the unintended consequences of s 198 which brought about the confusion in its application. The labour brokers manipulated this section and operated under the auspices of this section and therefore by repealing this section we want to address the Manifesto which states that we must address the problem of Labour broking. The challenge with this section is that CCMA and the Labour Courts have difficulties in identifying who is the employer.

## PROVISIONS PROTECTING VULNERABLE EMPLOYEES –

### 17. Presumption of who is an employee (section 200A)

This is an amendment to the principal act where the presumption of who is an employee was only referred to the Labour Relations Act and now we want to extend it to include any other employment law. This is to align all labour laws.

18. Declaring Temporary Employment to be permanent (section 200B)

The Bill proposes a declaration of indefinite employment. In other words, an employer that engages employees on a fixed-term basis will have to demonstrate a justification for doing so. Such a justification will be present if the employee was engaged to work on a specific task (eg: the building of a particular building, replacing a person who is on maternity, ect.) or on a task that lasts for a specific period. The purpose of this clause is to prevent the use of "fixed term" contract as a basis for depriving employees who are engaged for work of indefinite duration of security of employment. It is proposed that the clause should only apply to employees who are earning below a threshold set by the Minister of Labour (section 200B). As a result, the presumption will not

impact on the use of fixed term contracts in respect of managerial and other senior employees.

## 19. SECTION 200 (C)LIABILITY OF CLIENT COMPANY IN SUB-CONTRACTING

Proposed section 200C addresses the issue of employees to have recourse against client companies in cases of unfair labour practices in sub-contracting.

## 20. Confidentiality (section 201)

The deletion seeks to align with the table provided in the new section 209 which deals with offences and penalties. There is no need for these provisions as they are addressed in the table.

## 21. NEDLAC and Codes of Good Practice (section 203)

The Minister may place proposals before NEDLAC for new codes of good practice or to revise existing codes. If the NEDLAC stakeholders are unable to reach consensus on a code of good practice after six months of consultations, the Minister will be empowered to issue a code of good practice. This provision seeks to ensure that codes of good practice are

updated and balances the importance of stakeholder consultation with the requirements of good governance.

## 22. Offences and Penalties (section 209A)

The amendment seeks to strengthen compliance of Labour Relations Act and enforcement by Labour inspectors. The new provision will also empower inspectors to issue fines and lay criminal charges to that employer who contravenes section 201 and 205 of this Act. It also gives time frames in order to expedite the process.

## 23. New definitions (section 213)

A new definition of the term "contract of employment" clarifies that any contract or arrangement in terms of which an employee, as defined in the LRA, is a contract of employment. This clarifies an uncertainty that has arisen from the fact that the statutory definition of an employee is broader than the equivalent common law concept. The need for this has been identified in several Labour Court decisions as well as by the SA Law Commission. At the same time, a new definition of an "independent contractor" is inserted to ensure that the fraudulent "independent contracting" is not used to disguise employment relationships.

In addition, the definitions of an "employment law" addresses the reference to the old Labour Relations Act, and adding the Basic

Conditions of Employment as one of the legislations administered by the Minister of Labour and to remove the Skills Development Act as it is no longer assigned to the Minister of Labour.

the term "serve" (serving of documents and notices) to be consistent with other employment laws.

Other definitions that were amended are:-

Employee, employer, and the workplace are defined for alignment with other employment laws as defined in Occupational Health and Safety Act, to extend the definition to address the new developments in the labour market.

## 24. Transitional provisions

A transitional provision to require the Minister to invite representations three months before the repealed section 198 comes into effect on categories of "temporary work" in which placement by temporary employment services to address those temporary placements that are already in place should be permitted is proposed. In addition, provisions to phase in the revised jurisdiction of the Labour Court are included.