



'n Goedgekeurde lid van die AHI-Werkgewersorganisasie/An Approved member of the AHI Employers' Organisation

**Comments drafted by HR City, member of the AHI Employers' Organization**

30 November 2017

TO: The Department of Labour  
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**RE: Comments on proposed amendments to the Basic Conditions of Employment Act, the Employment Equity Act as well as the draft Minimum Wage Bill as published on the 17<sup>th</sup> of November 2017.**

**Introduction:**

HR City has, as its' members a number of employer's across South Africa who are represented in terms of the constitution of the Employer's Organization by HR City.

Following the publication of the draft Bills and Invitation for comments under Government Gazette 10779, we have compiled a summarized list of comments addressing the draft amendments and Bill inclusive of concerns surrounding these proposed changes to Labour Legislation.

**Comments on the Proposed Amendments to the Basic Conditions of Employment Act (Act 75 of 1997):**

**1. Section 1: Definitions**

- a. **Basic Conditions of Employment:** This definition seeks only to enact the inclusion of the proposed Minimum Wage Act and, accordingly is noted.
- b. **Employment Law:** This definition seeks only to enact the inclusion of the proposed Minimum Wage Act and other pieces of employment legislation and, accordingly is noted.
- c. **National Minimum Wage:** This definition seeks only to enact the provisions of the proposed Minimum Wage Act and, accordingly is noted.
- d. **Unemployment Insurance Act & Unemployment Insurance Contributions Act:** These inclusions seek to define these Acts as should have been properly conducted at their inception and is noted.

**2. Section 3: Application of this Act**

- a. This proposed amendment seeks to delete Sectoral Determinations (As does the Minimum Wage Bill). By failing to take into consideration the unique circumstances present in individual sectors, factors such as sectoral employment rates will be negatively affected.
- b. There must be provisions to exempt certain sectors from certain provisions and by now enforcing a global "ideal" across sectors, many employer's will no longer be able to employ the same amount of employees which will negatively impact on employment.



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### 3. Section 9A: Daily Wage Payment

- a. This new Section will have a direct cost on employment, specifically in circumstances of contingency and ad-hoc work. An example would be a gardening service only contracting-in additional labour for one or two hours will no longer be able to feasibly do so and therefore abandon their business altogether.
- b. A further concern here is that where an employee reports for duty but absente himself after a shorter period now becomes entitled to payment of a higher rate illegally. This undermines the common law principle of "no-work-no-pay" and creates an untenable burden on employers.
- c. At the very least exemptions for piece-work or emergency overtime as well as post desertions (Absenteeism) should be incorporated into the proposed wording.

### 4. Repeal of Chapters 8 and 9: Sectoral Determinations

- a. Our concerns regarding the removal of Sectoral Determinations from the South African Labour Milieu are noted herein above under the proposed amendment to Chapter 3.
- b. We would suggest that Sectorial Determinations be retained in their current form and provide sector-wide exemptions to certain provisions to the Basic Conditions of Employment Act and Minimum Wage Act.

### 5. Section 62A: Definitions

- a. This reference is superfluous as well as unnecessarily complicated. The current wording in the Minimum Wage Bill references the Basic Conditions of Employment Act's definition, why should the Basic Conditions of Employment Act seek to refer to its own definition through another act?

### 6. Section 64: Functions of Labour Inspectors

- a. By enacting legislation which allows Labour Inspectors to refer disputes to the CCMA, it undermines the current role of CCMA Officers who already have the capacity and responsibility of doing just that. Furthermore, by giving jurisdiction to the already overburdened CCMA, these amendments will have the effect of further delaying the principle of speedy dispute resolution on which the CCMA was founded.
- b. By creating the additional burden on Labour Inspectors to appear on behalf of Employees in the CCMA, the Department of Labour would need to spend substantial funds in training their Inspectors to also be litigants. This furthermore remains in direct conflict with Section 200 of the Labour Relations Act as well as Rule 25 of the Rules for the Conduct of Proceedings before the CCMA. This is another unattainable goal.

### 7. Section 65: Powers of entry

- a. This proposed amendment seeks to enact labour legislation which had already changed in 2004 and therefore is note as such.

### 8. Section 68: Securing an Undertaking:

- a. The inclusion of related labour legislation is noted, save to state that such inclusions will further burden the CCMA, especially in light of the current lack of skills and knowledge within the Department of Labour.





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- b. The inclusion of the Minimum Wage Act is noted.
- c. This amendment seeks to move jurisdiction from the Labour Court to the CCMA and our concerns regarding this have already been noted herein above, this having been stated, will also have the effect of further increasing the work load of the CCMA in that by not allowing a review process prior to the issuing of an arbitration award, it requires review processes which still refer processes to the Labour Court. A better resolution would be to allow Arbitration prior to the issuing of an Arbitration Award in order to ensure that an actual breach has occurred and not just the vague belief of a Labour Inspector.

#### 9. Section 69: Compliance Order

- a. The inclusion of additional Labour Legislation is noted.
- b. This amendment is welcomed, save insofar as it creates a burden on the CCMA in that it eliminates the vague wording currently contained in compliance orders.
- c. The deletion of Subsection 2A is worrisome in that it again removes necessary instructions regarding the right of review or remedy that an Employer may have in the instance of an error on the part of a Labour Inspector.
- d. This amendment does seek to finally allow a form of inexpensive review of the errors made by Labour Inspectors, and is welcomed save to restate the impact that this will have on the already overburdened CCMA.
- e. This again makes it extremely difficult for the employer to defend against erroneous allegations on the part of the Labour Inspector in that no arbitration takes place prior to the issuing of such an award, the wording should rather allow for a formal arbitration prior to the issuing of an arbitration award.

#### 10. Section 70: Limitations

- a. The deletion of Subsection a seeks to undermine the supremacy of collective arrangements reached in respect of specific exemptions to the Acts. Specifically this has the effect of making collective agreements non-binding on parties.
- b. By deleting the exemptions already granted in terms of the Basic Conditions of Employment Act to specific forms of employment (Managerial Employees and Employees who determine their own hours of work), this amendment seeks to force a situation already contemplated in these comments regarding the minimum payment of four (4) hours for employees not actually entitled and not actually performing functions for such periods.
- c. The inclusion of the CCMA is noted, save to reiterate the comments surrounding this herein above.
- d. By deleting the clause relating to estoppel of older infringements, the possible liability of a company possibly increased, factoring in considerations such as transfers of employment in terms of Section 197 of the Labour Relations Act, an Employer may now find themselves liable for payments of such a nature as to warrant the liquidation of a business and by implication the huge losses of employment that go with this. This exemption was originally placed in the Act for a reason and must be retained.

#### 11. Section 73: Order may be made an Arbitration Award

- a. Our comments on this have already been noted herein above.





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## 12. Section 73A: Claims for failure to pay any amount

- a. Save to restate the administrative burden, no new comments on this section exist.

## 13. Section 74: Consolidation of Proceedings

- a. Noted.
- b. Noted save to state that the exclusion of claims which have prescribed undermines the foundational legal principles of the Republic and cannot stand as legally sound.

## 14. Section 75: Payment of Interest

- a. Noted.

## 15. Section 76: Proof of Compliance

- a. Noted.

## 16. Section 76A: Fine for not complying with the national minimum wage

- a. The use of a fine as a deterrent is noted, however by applying a fine as stated in its' current form, such a fine, where an employer may have made a small underpayment of one hour due to an honest error would result in a fine of twice the employee's monthly wage. This is an unreasonable requirement and should be reduced for a first offence.

## 17. Section 77A: Powers of Labour Court

- a. The administrative deletion of Subsection (a) is noted, however the deletion of Subsection (b) should rather be reworded to continue to allow review of cases, there could exist an interpretation that no review of CCMA arbitration awards issued under this act may be reviewed which undermines juristic procedure.

## 18. Section 78: Rights of Employees

- a. Noted.

## 19. Section 80: Procedures for disputes

- a. The exclusion of bargaining councils in favor of the CCMA creates an additional burden on the CCMA which has already been catered for by bargaining councils, this effectively undermines the powers of such bargaining councils and seeks to further remove the sectorial needs as already contemplated herein above.

## 20. Transitional Provisions:

- a. The required minimum increase to existing agreements again seeks to undermine the principles of collective bargaining enshrined therein, explicitly ignoring the inherent give and take nature of such arrangements. This is untenable and an affront to the legal principles related to collective labour harmony.



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## **Comments on the Proposed Amendments to the Labour Relations Act (Act 66 of 1995):**

### **1. Section 32: Extension of collective agreements concluded in bargaining council**

- a. Noted.
- b. Noted save to state that it would be untenable to enforce such extensions on non-parties who have not been granted an opportunity to make representations as to why they should not be included on such extensions, otherwise leaving it open for so-called parties to abuse such extensions.
- c. See comments in subparagraph (b) hereof.
- d. Noted.
- e. Noted save to state that by giving the registrar the sole discretion in these instances should again account for submissions made by possibly affected parties.
- f. The change is welcomed as the registrar is better equipped for this type of enquiry, however the invitation of affected parties must be included.
- g. Noted.
- h. Noted.

### **2. Section 32A: Renewal and extension of funding agreements**

- a. Noted, save to state a recommendation that exemptions be allowed on application.

### **3. Section 49: Representativeness of Council**

- a. Using current representativeness to forecast two years forward is not a reasonable metric. The scope and dynamic nature of business in South Africa, including specifically the manner in which trade unions trade members makes this proposed extension problematic. It will result in increased labour unrest in that unions will strike due to their demands not being heard due to their non-membership in a council where they have, as their members the majority of the employees.
- b. Noted.

### **4. Section 69: Picketing**

- a. Noted and welcomed.
- b. Noted and welcomed.
- c. Noted and welcomed.
- d. Noted and welcomed.
- e. Noted.



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## 5. Section 70F: Regulations for Essential Services Committee

- a. Noted.

## 6. Section 72: Minimum Services

- a. Noted.
- b. Noted, save to state that this definition should be expanded, an example of an excluded minimum service would be a situation where, for example the future of operations of the business could be impacted, ie the need to continue pumping water in an underground mine failing which the mine may collapse or otherwise not be able to resume operations at the conclusion of the picket as contemplated in Section 75 under Maintenance Services.

## 7. Section 75: Maintenance Services

- a. This proposed amendment gives unilateral powers without a reasonable mechanism for appeals in its' current form, a recommendation is made that a minor arbitration may resolve this shortcoming.

## 8. Section 95: Requirements for registration of a Trade Union or Employer's Organization

- a. Noted.

## 9. Section 99: Duty to keep records

- a. The use of the term "or any other prescribed record" is vague and misleading, this should be clarified and defined in the act.
- b. Noted.

## 10. Section 100: Duty to provide information to registrar

- a. See comments in proposed amendment to Section 99 herein above.

## 11. Section 108: Appointment of registrar of labour relations

- a. Noted and welcomed.

## 12. Section 116: Governing body of commission

- a. Noted.

## 13. Section 127: Accreditation of councils and private agencies

- a. Noted

## 14. Section 128: General provisions relating to accreditation

- a. Noted



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## 15. Section 135: Resolution of disputes through conciliation

- a. Noted, save to state that the five (5) day period may be too short and should be extended to a longer period.

## 16. Sections 150A, 150B, 150C and 150D

- a. Noted, save to state that such process cannot exclude remedies for default in terms of established picketing rules as this process could estop the enforcement of such an agreement in its' current form.

## 17. Section 208A: Delegations

- a. Noted.

## 18. Transitional Provisions

- a. Noted



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## **Comments on the Proposed Minimum Wage Act:**

### 1. Section 4(4):

- a. In its current form, this section means that even the exemptions contained in this very act, are not legal and cannot be enforced. Suggest rewording this section.
- b. Additionally, the enforcement of such a national minimum wage will result in high job losses in the domestic worker, farm worker and forestry sectors as the minimum wage constitutes an increase of up to 30% of the current wages in those sectors, such an increase will result in employers of domestic workers no longer being able to pay their domestic workers and terminating them. This is the very reason why exemptions are necessary for certain categories of employees or employers, specifically where such employment arrangements are in favor of reducing unemployment.

### 2. Section 4(6):

- a. The current wording of this definition suggests that it is both illegal not to pay the minimum wage but also to increase the wage of an employee earning below the minimum wage without his/her consent. It effectively makes it illegal to comply with a law and must be reworded.

### 3. Section 5: Calculation of wage

- a. The current wording of minimum wage is at odds with the definition of remuneration contained in the BCEA and LRA and cannot exist in this form. Either those definitions must also be amended to reflect this definition or vice versa.
- b. A further comment on this point is that an employer, typically in the farming sector makes up the difference in minimum wage and actual remuneration by giving the employee gifts of produce or providing accommodation, by excluding these considerations, the actual cost of employment will increase dramatically, further resulting in huge increases in unemployment.
- c. The change in the calculation of wage that states that an employee paid in a manner other than hours worked must be more than hours worked is also untenable in the view of working arrangements such as piece work where an employee is paid for the completion of a specific task, such m<sup>2</sup> painted, etc. Not only is this contrary to practice in many sectors but also seeks to motivate an employee to work slower than necessary in order to reap the maximum payment for the minimum work. This cannot be implemented in its' current form.

### 4. Section 15: Exemptions

- a. The application of exemptions is currently illegal in terms of the definitions of the proposed act.

### 5. Schedule 1: National Minimum Wage

- a. The National Minimum Wage is extremely high and will impact negatively on various existing collective agreements and sectoral determinations.





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- b. Sectors which will be impacted most heavily are hospitality where an employee's tips form part of their remuneration and private security where employees are paid far lower than the proposed minimum wage. These increased overheads will leave employers with no alternative but to reduce their workforce. This has already been demonstrated during the implementation of the 2014 Farm Workers minimum wage which saw a huge reduction in employment in that sector following the implementation of an increased minimum wage.
- c. Even taking the above into consideration, the fact that the minimum wage for domestic workers in increased from R 12.42 per hour to R 15.00 per hour (20 %) means that a large amount of private households will not be able to afford the luxury of a domestic worker anymore. Especially when measured against the increased cost of living necessitated by an already corrupt and broken government. The act in its' current form will see a dramatic rise in unemployment and a further collapse of government.

#### 5. Schedule 2: Learnership Allowances

- a. The increase in learnership allowances will have the net effect of discouraging employers from making use of learnership, resulting again in a reduction of skills training as well as employment.



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## SUMMARY ON COMMENTS

1. *The proposed amendments are in direct conflict of the Labour Relations Act which states "To provide simple procedures for the resolution of labour disputes."*
2. *All the role players have commented that business and investors will lose confidence, resulting in employers abolishing positions of temporary workers.*
3. *Under the current labour legislation one will find sufficient regulations if managed/regulated properly and these rigid changes to legislation is unnecessary.*
4. *Dr. Anthea Geffrey of the SAIRR stated: "Turning the screws even tighter will eliminate job growth prospects and make it difficult for Government to generate 5 million jobs in the next ten years – people can't eat a piece of legislation."*
5. *Out of these actions of the Department of Labour, it is clear that their intention is to hide the impact of certain amendments by intentionally not discussing it in public.*
6. *It is clear that the implementation of these Bills will be handled in the same devious way that has become known to the Government in pushing other legislation through Parliament without considering objections from the public.*

Signed in Middelburg on this 28<sup>th</sup> day of November 2017.

Eben van Deventer  
AHI Member on behalf of Employers