

Table of Contents

Basic Conditions of Employment Amendment Act, 2018	2
Act 7 of 2018	2
1. 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	2
2. Amendment of section 3 of Act 75 of 1997	3
3. Insertion of section 9A in Act 75 of 1997	3
4. Amendment of section 51 of Act 75 of 1997	3
5. Amendment of section 52 of Act 75 of 1997	3
6. Amendment of section 53 of Act 75 of 1997	4
7. Amendment of section 54 of Act 75 of 1997	4
8. Repeal of Chapter 9 of Act 75 of 1997	4
9. Insertion of section 62A in Act 75 of 1997	4
10. Amendment of section 64 of Act 75 of 1997	4
11. Amendment of section 65 of Act 75 of 1997, as amended by section 17 of Act 37 of 2008	5
12. 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	5
13. 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	5
14. 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	6
15. 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	6
16. Insertion of section 73A in Act 75 of 1997	6
17. 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	7
18. Substitution of section 75 of Act 75 of 1997, as substituted by section 18 of Act 11 of 2002	7
19. Substitution of section 76 of Act 75 of 1997	7
20. Insertion of section 76A in Act 75 of 1997	8
21. Amendment of section 77A of Act 75 of 1997, as inserted by section 19 of Act 11 of 2002	8
22. Amendment of section 78 of Act 75 of 1997	8
23. Substitution of section 80 of Act 75 of 1997	9
24. Transitional provisions	9
25. Short title and commencement	9

South Africa
Basic Conditions of Employment Act, 1997
Basic Conditions of Employment Amendment Act, 2018

Act 7 of 2018

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Assented to on 23 November 2018

Commenced on 2 January 2019 by Act 7 of 2018

Note: See section 25

[This is the version of this document from 27 November 2018.]

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.

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 certain provisions dealing with sectoral determinations and to disestablish 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, 2018, 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:-

1. 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

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 "Commission" of the following definition:

"**Commission**' means the **[Employment Conditions Commission]** National Minimum Wage Commission established by section **[59 (1)] 8** of the National Minimum Wage Act, 2018;"

(c) 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); and
- (f) the [National Minimum Wage Act, 2018](#);";

(d) 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, 2018](#)"; and

(e) 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 \(Act No. 4 of 2002\)](#);"

2. Amendment of section 3 of Act 75 of 1997

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](#), [section 62A](#) and [chapters 3, 4, 5 and 6](#), **[does]** do 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 and the [National Minimum Wage Act, 2018](#), read with [section 62A](#)."

3. Insertion of section 9A in Act 75 of 1997

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

"Daily wage payment

9A. (1) An employee or a worker as defined in [section 1](#) of the [National Minimum Wage Act, 2018](#), 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 or workers who earn less than the earnings threshold set by the Minister in terms of [section 6\(3\)](#)."

4. Amendment of section 51 of Act 75 of 1997

Section 51 of the principal Act is hereby amended by the addition of the following subsections:

"(3) If any sectoral determination at the date of the promulgation of the [National Minimum Wage Act, 2018](#), 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, 2018](#).

(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, 2018](#), as is adjusted from time to time, from the date that the [National Minimum Wage Act, 2018](#), comes into force.

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

(a)'learner' means a learner as defined in Schedule 2 of the [National Minimum Wage Act, 2018](#); and

(b)'allowance' means an allowance as defined in Schedule 2 of the [National Minimum Wage Act, 2018](#)."

5. Amendment of section 52 of Act 75 of 1997

Section 52 of the principal Act is hereby amended-

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

"(1) Before making a sectoral determination, the Minister must direct the **[Director-General] Commission** to investigate conditions of employment in the sector and area concerned.";

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

"The **[Minister must] Commission must, on its own accord or on the direction of the Minister, as contemplated in subsection (1)**, determine terms of reference for the investigation, which must include-";

(c) by the substitution for subsection (3) of the following subsection:

"(3) The **[Minister] Commission** must publish a notice in the *Gazette* setting out the terms of reference of the investigation and inviting written representations by **[members of]** the public."; and

(d) by the substitution in subsection (4) for paragraph (a) of the following paragraph:

"(a) direct the **[Director-General] Commission** to conduct an investigation; or".

6. Amendment of section 53 of Act 75 of 1997

Section 53 of the principal Act is hereby amended-

(a) by the substitution in subsection (1) for the words preceding paragraph (a) of the following words:

"For the purposes of conducting an investigation in terms of section 52(1), the **[Director-General] Commission** may-"; and

(b) by the substitution for subsection (2) of the following subsection:

"(2) A person may not refuse to answer any relevant question by the **[Director-General] Commission** that he or she is legally obliged to answer.".

7. Amendment of section 54 of Act 75 of 1997

Section 54 of the principal Act is hereby amended by the substitution for subsections (1) and (2) of the following subsections, respectively:

"(1) On completion of an investigation, and after considering any representations made by members of the public, the **[Director-General] Commission** must prepare a report.

(2) A copy of the report must be submitted to the **[Commission for its] Director-General for his or her information and the Minister for consideration**."

8. Repeal of Chapter 9 of Act 75 of 1997

Chapter 9 of the principal Act is hereby repealed.

9. Insertion of section 62A in Act 75 of 1997

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, 2018](#)."

10. Amendment of section 64 of Act 75 of 1997

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, 2018](#), 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".

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

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:

"(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 \(Act No. 97 of 1998\)\] \[Employment Services Act, \\(Act No. 4 of 2014\\)\]\(#\);](#)"

12. 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

Section 68 of the principal Act is hereby amended-

- (a) by the substitution for subsection (1) of the following subsection:

"(1) A labour inspector who has reasonable grounds to believe that an employer has not complied with any provision of this Act, [the \[National Minimum Wage Act, 2018\]\(#\), 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:

"(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 \[National Minimum Wage Act, 2018\]\(#\)](#);"; and

- (c) by the substitution for subsection (3) of the following subsection:

"(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] request** 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](#)."

13. 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

Section 69 of the principal Act is hereby amended-

- (a) by the substitution for subsection (1) of the following subsection:

"(1) A labour inspector who has reasonable grounds to believe that an employer has not complied with a provision of this Act, [the \[National Minimum Wage Act, 2018\]\(#\), 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:

"(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:

"(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."; and

(e) by the addition of the following subsection:

"(6) A dispute referred to the CCMA by the employer in terms of subsection (5) must be dealt with in terms of section 73."

14. 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

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, 2018, 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);]

[(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 made payable by the employer to the employee for longer than [12] 36 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.".]

15. 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

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) The CCMA may issue an arbitration award in terms of subsection (1) requiring the employer to comply with the compliance order, if it is satisfied that-

(a) the compliance order was served on the employer; and

(b) the employer has not referred a dispute in terms of section 69(5)."

16. Insertion of section 73A in Act 75 of 1997

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 employee or worker as defined in section 1 of the [National Minimum Wage Act, 2018](#), may refer a dispute to the CCMA concerning the failure to pay any amount owing to that employee or worker in terms of this Act, the [National Minimum Wage Act, 2018](#), a contract of employment, a sectoral determination or a collective agreement.

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

(3) An employee or worker, other than the employee or worker 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.

(4) The CCMA must appoint a Commissioner in terms of section 135 of the [Labour Relations Act](#), to attempt to resolve by conciliation any dispute that is referred to the CCMA in terms of subsection (1).

(5) The CCMA must commence the arbitration of a dispute contemplated in subsection (1) immediately after certifying that the dispute remains unresolved in terms of [section 135\(5\)](#)."

17. 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

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

"(1) A dispute concerning a contravention of this Act or the [National Minimum Wage Act, 2018](#), 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, 2018](#).

(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, 2018](#), may be initiated jointly with a dispute instituted by that employee over the entitlement to severance pay in terms of [section 41\(6\)](#)."

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

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

"Payment of interest

75. An employer must pay interest on any amount due and payable in terms of this Act or the [National Minimum Wage Act, 2018](#), 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."

19. Substitution of section 76 of Act 75 of 1997

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, 2018](#), or any sectoral determination, it is for an employer-

(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, 2018](#), that is relevant to those proceedings, to prove compliance with any provision of this Act."

20. Insertion of [section 76A](#) in [Act 75 of 1997](#)

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

"Fine for not complying with national minimum wage

76A. (1) 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-

(a) twice the value of the underpayment; or

(b) twice the employee's monthly wage.

(2) For second or further non-compliances, a fine that may be imposed on the employer is an amount that is greater of-

(a) thrice the value of the underpayment; or

(b) thrice the employee's monthly wage.

(3) The Minister may issue guidelines on the determination of whether a non-compliance is a second or further non-compliance, as envisaged in subsection (2).

(4) The Department must maintain and publish on its official website, on a quarterly basis, a list of all employers who were issued with compliance orders."

21. Amendment of [section 77A](#) of [Act 75 of 1997](#), as inserted by [section 19](#) of [Act 11 of 2002](#)

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

22. Amendment of [section 78](#) of [Act 75 of 1997](#)

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, 2018](#);

(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, 2018](#), or any sectoral determination;

(d) refuse to agree to any term or condition of employment that is contrary to this Act, the [National Minimum Wage Act, 2018](#), or any sectoral determination;

(e) inspect any record kept in terms of this Act or the [National Minimum Wage Act, 2018](#), that relates to the employment of that employee;

(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.

(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, 2018](#), that relates to the employment of that employee."

23. Substitution of section 80 of Act 75 of 1997

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

(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.

(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.

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

24. Transitional provisions

With effect from the date of the establishment of the National Minimum Wage Commission established by section 8 of the [National Minimum Wage Act, 2018](#)-

- (a) the Employment Conditions Commission established by section 59 of the principal Act, is hereby disestablished;
- (b) the functions of the Employment Conditions Commission are hereby transferred to the National Minimum Wage Commission; and
- (c) the term of office of the members of the Employment Conditions Commission lapses.

25. Short title and commencement

This Act is called the Basic Conditions of Employment Amendment Act, 2018, and takes effect on a date immediately after the [National Minimum Wage Act, 2018](#), has taken effect.