

REPUBLIC OF SOUTH AFRICA

BASIC CONDITIONS OF EMPLOYMENT AMENDMENT BILL

*(As amended by the Portfolio Committee on Labour (National Assembly))
(The English text is the official text of the Bill)*

(MINISTER OF LABOUR)

[B 70B—2001]

ISBN 0 621 31729 2

No. of copies printed 1 800

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.

BILL

To amend the Basic Conditions of Employment Act, 1997, so as to—
substitute certain definitions;
make certain textual alterations;
regulate the extension of overtime by collective agreement;
regulate the payment of contributions to benefit funds;
provide for the determination of categories of payment to calculate remuneration;
provide for employees whose contracts of employment terminate due to insolvency to receive severance pay;
specify circumstances under which ordinary hours of work can be varied;
provide for the appointment of alternate members from organised labour and business to the Employment Conditions Commission;
make further provision regarding the issuing of compliance orders;
clarify the basis for the calculation of interest;
confer specific powers on the Labour Court;
create a presumption as to who is an employee;
deem wage determinations to be sectoral determinations; and
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

1. Section 1 of the Basic Conditions of Employment Act, 1997 (hereinafter referred to as the principal Act), is amended by the substitution for the definition of “employment law” of the following definition: 5

“ ‘**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);
- (b) **[the Manpower Training Act, 1981 (Act No. 56 of 1981)]** the Skills Development Act, 1998 (Act No. 97 of 1998); 10
- (c) **[the Guidance and Placement Act, 1981 (Act No. 62 of 1981)]** 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);”.

Substitution of section 8 of Act 75 of 1997

2. The following section is substituted for section 8 of the principal Act:

“Interpretation of day

8. For the purposes of sections 9 [**10 and 11,** to 16, ‘day’ means a period of 24 hours measured from the time when the employee normally commences work, and ‘daily’ has a corresponding meaning.”. 5

Amendment of section 10 of Act 75 of 1997

3. Section 10 of the principal Act is amended by—

- (a) the substitution for subsection (1) of the following subsection:
 - “(1) Subject to this Chapter, an employer may not require or permit an employee to work— 10
 - (a) overtime except in accordance with an agreement;
 - (b) more than [—
 - (i) three hours’ overtime a day; or**
 - (ii)] ten hours’ overtime a week.”; 15**
- (b) the insertion after subsection (1) of the following subsection:
 - “(1A) An agreement in terms of subsection (1) may not require or permit an employee to work more than 12 hours on any day.”; and
- (c) the addition of the following subsection:
 - “(6) (a) A collective agreement may increase the maximum permitted overtime to fifteen hours a week. 20
 - (b) A collective agreement contemplated in paragraph (a) may not apply for more than two months in any period of 12 months.”.

Amendment of section 27 of Act 75 of 1997

4. Section 27 of the principal Act is amended by the substitution for subsection (5) of the following subsection: 25

“(5) Before paying an employee for leave in terms of this section, an employer may require reasonable proof of an event contemplated in subsection [1](2) for which the leave was required.”.

Amendment of section 28 of Act 75 of 1997

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5. Section 28 of the principal Act is amended by the deletion of subsection (2)(b).

Insertion of section 34A in Act 75 of 1997

6. The following section is inserted after section 34 of the principal Act:

“Payment of contributions to benefit funds

34A. (1) For the purposes of this section, a benefit fund is a pension, provident, retirement, medical aid or similar fund. 35

(2) An employer that deducts from an employee’s remuneration any amount for payment to a benefit fund must pay the amount to the fund within seven days of the deduction being made.

(3) Any contribution that an employer is required to make to a benefit fund on behalf of an employee, that is not deducted from the employee’s remuneration, must be paid to the fund within seven days of the end of the period in respect of which the payment is made. 40

(4) This section does not affect any obligation on an employer in terms of the rules of a benefit fund to make any payment within a shorter period than that required by subsections (2) or (3).” 45

Amendment of section 35 of Act 75 of 1997

7. Section 35 of the principal Act is amended by the substitution for subsection (5) of the following subsection:

- “(5) (a) The Minister may, by notice in the *Gazette*, after consultation with the Commission and NEDLAC, determine whether a particular category of payment, whether in money or in kind, forms part of an employee’s remuneration for the purpose of any calculation made in terms of this Act. 5
- (b) Without limiting the Minister’s powers in terms of paragraph (a), the Minister may— 10
- (i) determine the value, or a formula for determining the value, of any payment that forms part of remuneration;
 - (ii) place a maximum or minimum value on any payment that forms part of remuneration; and
 - (iii) for the purposes of any calculation, differentiate between different categories of payment and different sectors. 15
- (c) Before the Minister issues a notice in terms of paragraph (a), the Minister must—
- (i) publish a draft of the proposed notice in the *Gazette*; and
 - (ii) invite interested parties to submit written representations on the draft notice within a reasonable period.”. 20

Amendment of section 37 of Act 75 of 1997

8. Section 37 of the principal Act is amended by the substitution for subsection (1) of the following subsection:

- “(1) Subject to section 38, a contract of employment terminable at the instance of a party to the contract may be terminated only on notice of not less than— 25
- (a) one week, if the employee has been employed for **[four weeks]** six months or less;
 - (b) two weeks, if the employee has been employed for more than **[four weeks]** six months but not more than one year;
 - (c) four weeks, if the employee— 30
 - (i) has been employed for one year or more; or
 - (ii) is a farm worker or domestic worker who has been employed for more than **[four weeks]** six months.
- (2) (a) A collective agreement may not permit a notice period shorter than that required by subsection (1). 35
- (b) Despite paragraph (a), a collective agreement may permit the notice period of four weeks required by subsection (1)(c)(i) to be reduced to not less than two weeks.”.

Amendment of section 41 of Act 75 of 1997

9. Section 41 of the principal Act is amended by the substitution for subsection (2) of the following subsection: 40

- “(2) An employer must pay an employee who is dismissed for reasons based on the employer’s operational requirements or whose contract of employment terminates or is terminated in terms of section 38 of the Insolvency Act, 1936 (Act No. 24 of 1936), severance pay equal to at least one week’s remuneration for each completed year of continuous service with that employer, calculated in accordance with section 35.”. 45

Amendment of section 50 of Act 75 of 1997

10. Section 50 of the principal Act is amended by—

- (a) the substitution for subsection (2) of the following subsection: 50

“(2) A determination in terms of **[section]** subsection (1)—

 - (a) may not be made in respect of sections 7, **[9,]** 17(3) and (4), 25, 43(2), 44 or 48 or a regulation made in terms of section 13; and
 - (b) may only be made in respect of section 43(1) to allow the employment of children in the performance of advertising, sports, 55 artistic or cultural activities.”; and

- (b) the insertion after subsection (2) of the following subsection:
- “(2A) A determination in terms of subsection (1) may only be made in respect of section 9 if—
- (a) the employees’ ordinary hours of work, rest periods and annual leave are on the whole more favourable to the employees than the basic conditions of employment in terms of sections 9, 10, 14, 15 and 20; and
 - (b) the determination—
 - (i) has been agreed to in a collective agreement;
 - (ii) is necessitated by the operational circumstances of the sector in respect of which the variation is sought and the majority of employees in the sector are not members of a registered trade union; or
 - (iii) applies to the agricultural sector or the private security sector.”.

Amendment of section 55 of Act 75 of 1997

11. Section 55 of the principal Act is amended by the substitution for subsection (6) of the following subsection—

- “(6) A sectoral determination in terms of subsection (1):
- (a) May not be made in respect of **[section]** section 7, 43(2), **[or]** 44 or 48;
 - (b) may only be made in respect of section 43(1) to allow the employment of children in the performance of advertising, sports, artistic or cultural activities;
 - (c) may not reduce the protection afforded to employees by sections **[9 and]** 17(3) and (4) and 25 or a regulation made in terms of section 13; and
 - (d) may vary the basic conditions of employment in section 9 in the circumstances contemplated by section 50(2A).”.

Amendment of section 60 of Act 75 of 1997

12. Section 60 of the principal Act is amended by the substitution for subsection (2) of the following subsection:

- “(2) The Minister must, in addition, appoint **[two more members]** to the Commission—
- (a) one **[of whom must be]** member and one alternate member nominated by the voting members of NEDLAC representing organised labour;
 - (b) one **[of whom must be]** member and one alternate member nominated by the voting members of NEDLAC representing organised business.”.

Amendment of section 68 of Act 75 of 1997

13. Section 68 of the principal Act is amended by the insertion after subsection (1) of the following subsection:

- “(1A) A labour inspector may endeavour to secure a written undertaking by the employer to comply with subsection (1) either by—
- (a) meeting with the employer or a representative of the employer; or
 - (b) serving a document, in the prescribed form, on the employer.”.

Amendment of section 69 of Act 75 of 1997

14. Section 69 of the principal Act is amended by the substitution for subsection (3) of the following subsection:

- “(3) (a) A labour inspector must **[deliver]** serve a copy of the compliance order **[to]** on the employer named in it, and **[to]** on each employee affected by it **[or, if this is]** unless this is impractical, and on a representative of the employees.
- (b) The failure to serve a copy of a compliance order on any employee or any representative of employees in terms of paragraph (a) does not invalidate the order.”.

Amendment of section 70 of Act 75 of 1997

15. Section 70 of the principal Act is amended by the substitution for paragraph (d) of the following paragraph:

“(d) that amount has been payable by the employer to the employee for longer than 12 months from 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.”.

Amendment of section 73 of Act 75 of 1997

16. Section 73 of the principal Act is amended by the deletion of subsection (3). 10

Amendment of section 74 of Act 75 of 1997

17. Section 74 of the principal Act is amended by the substitution for subsection (2) of the following subsection—

“(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 15 that is owing to that employee in terms of this Act if—

- (a) the claim is referred in compliance with section 191 of the Labour Relations Act, 1995;
- (b) the amount **[has]** had not been owing by the employer to the employee for longer than one year prior to the dismissal; and 20
- (c) no compliance order has been made and no other legal proceedings have been instituted to recover the amount.”.

Substitution of section 75 of Act 75 of 1997

18. The following section is 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 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.”.

Insertion of section 77A in Act 75 of 1997 30

19. The following section is inserted after section 77 of the principal Act:

“Powers of Labour Court

77A. Subject to the provisions of this Act, the Labour Court may make any appropriate order, including an order—

- (a) making a compliance order issued in terms of this Act, an order of the Labour Court, on application by the Director-General in terms of section 73(1) or 73(2); 35
- (b) condoning the late filing of any document with, or the late referral of any dispute to, the Labour Court;
- (c) confirming, varying or setting aside all or part of an order made by the Director-General in terms of section 71(3), on appeal by the employer in terms of section 72; 40
- (d) reviewing the performance or purported performance of any function provided for in terms of this Act or any act or omission by any person or body in terms of this Act, on any grounds permissible in law; 45
- (e) making a determination that it considers reasonable on any matter concerning a contract of employment in terms of section 77(3), which determination may include an order for specific performance, an award of damages or an award of compensation;

- (f) imposing a fine in accordance with Schedule 2 to this Act or for any contravention of any provision of this Act for which a fine can be imposed; and
- (g) dealing with any matter necessary or incidental to performing its functions in terms of this Act.”.

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Amendment of section 83 of Act 75 of 1997

20. Section 83 of the principal Act is amended by the substitution for subsection (1) of the following subsection:

“(1) The Minister may, on the advice of the Commission and by notice in the *Gazette*, deem any category of persons specified in the notice to be—

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(a) employees for purposes of the whole or any part of this Act, any other employment law other than the Unemployment Insurance Act, 1966 (Act No. 30 of 1966), or any sectoral determination;

(b) contributors for purposes of the whole or any part of the Unemployment Insurance Act, 1966.”.

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Insertion of section 83A in Act 75 of 1997

21. The following section is inserted after section 83 of the principal Act:

“Presumption as to who is employee

83A. (1) A person who works for, or renders services to, any other person is presumed, until the contrary is proved, to be an employee, regardless of the form of the contract of employment, if any one or more of the following factors is present:

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(a) The manner in which the person works is subject to the control or direction of another person;

(b) the person’s hours of work are subject to the control or direction of another person;

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(c) in the case of a person who works for an organisation, the person is a member of that organisation;

(d) the person has worked for that other person for an average of at least 40 hours per month over the last three months;

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(e) the person is economically dependent on the other person for whom that person works or renders services;

(f) the person is provided with tools of trade or work equipment by the other person; or

(g) the person only works for or renders services to one person.

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(2) Subsection (1) does not apply to any person who earns in excess of the amount determined by the Minister in terms of section 6(3).

(3) If a proposed or existing work arrangement involves persons who earn amounts equal to or below the amounts determined by the Minister in terms of section 6(3), any of the contracting parties may approach the CCMA for an advisory award about whether the persons involved in the arrangement are employees.”.

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Amendment of section 87 of Act 75 of 1997

22. Section 87 of the principal Act is amended by the addition of the following subsection:

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“(4) A Code of Good Practice issued in terms of this section may provide that the Code must be taken into account in applying or interpreting any employment law.”.

Amendment of Schedule 3 to Act 75 of 1997

23. Schedule 3 to the principal Act is amended by—

(a) the substitution for item 9 of the following item:

“Wage determinations

9. (1) Any wage determination and any amendment to a wage determination made in terms of section 15 of the Wage Act, 1957, in force immediately before the commencement of **[this Act remains in force for the period of its operation in terms of section 18 of that Act, and may be extended or amended as if that Act had not been repealed]** the Basic Conditions of Employment Amendment Act, 2001 (hereafter referred to as a ‘wage determination’) is deemed to be a sectoral determination made in accordance with section 55 of this Act. 5

(2) Any provision in a wage determination stipulating a minimum term or condition of employment is deemed to be a basic condition of employment defined in section 1 of this Act. 10

(3) The Minister may amend, cancel, suspend, clarify or correct any wage determination in accordance with Chapter Eight of this Act. 15

(4) The provisions of a wage determination may be enforced in accordance with Chapter Ten of this Act.

(5) Any prosecution concerning a contravention of, or failure to comply with, a binding wage determination or licence of exemption from 1 November 1998 until the commencement of the Basic Conditions of Employment Amendment Act, 2001, which prosecution commenced prior to or within three months of the commencement date of the Basic Conditions of Employment Amendment Act, 2001, must be dealt with in terms of the Wage Act, 1957, as if the Wage Act, 1957, had not been repealed. 20

(6) The Director of Public Prosecutions having jurisdiction is deemed to have issued a certificate in terms of section 23(3)(a) of the Wage Act, 1957, in respect of any contravention or failure contemplated in subitem (5) in respect of which no prosecution is commenced within three months of the commencement date of the Basic Conditions of Employment Amendment Act, 2001.”; 25

(b) the substitution for item 10 of the following item:

“Exemptions to wage determination

10. Any licence of exemption granted **[to] in respect of** a wage determination in terms of section 19 of the Wage Act, 1957, in force immediately before the commencement of this Act **is deemed to be withdrawn as from a date six months after the commencement date of the Basic Conditions of Employment Amendment Act, 2001 [remains in force for the period of the determination, or until withdrawn in terms of section 19(5) of that Act, as if that Act had not been repealed.]”.** 35

Short title and commencement

24. This Act is called the Basic Conditions of Employment Amendment Act, 2001, and comes into operation on a date determined by the President by proclamation in the *Gazette*.

MEMORANDUM ON THE OBJECTS OF THE BASIC CONDITIONS OF EMPLOYMENT AMENDMENT BILL, 2001

1. PURPOSE OF BILL

The main object of the Bill is to amend the Basic Conditions of Employment Act, 1997 (Act No. 75 of 1997) ("the Act"), to adjust basic conditions of employment and to improve the implementation of the Act.

2. OBJECTS OF BILL

2.1 Clause 1 of the Bill amends the definition of "employment law" in section 1 of the Act to reflect the enactment of new labour legislation since the BCEA came into effect.

2.2 Clause 2 of the Bill amends section 8 of the Act to clarify the meaning of the terms "day" and "daily" for sections 12 to 16. The clarification should prevent abuse of arrangements for averaging working time.

2.3 Clause 3 of the Bill amends section 10 of the Act to—

- * remove the daily limit on overtime in section 10(1) and add a new section 10(1A) which provides that an agreement to work overtime may not result in an employee working more than a total of 12 hours (both ordinary and overtime) on any day;
- * enable an employer and a trade union to conclude a collective agreement by extending the weekly limit on permissible overtime to 15 hours for two months in any 12-month period.

2.4 Clause 4 of the Bill amends section 27 of the Act to rectify the incorrect reference in section 27(5) to subsection (1) instead of subsection (2).

2.5 Clause 5 of the Bill amends the Act by inserting a new section 34A to oblige employers to pay over deductions from employees' salary in respect of benefit funds and the employer's contributions to these funds within 7 days of the deduction being made or the end of the period for which the contribution is made, respectively.

2.6 Clause 6 of the Bill amends section 35 of the Act to give the Minister, after consulting the ECC, the power to determine by notice in the *Gazette* whether particular types of payment should be included in, or excluded from, the calculation of remuneration.

2.7 Clause 7 of the Bill amends section 37 of the Act to set the minimum period of notice at one week during the first six months of employment and to provide that a collective agreement may reduce the period of notice of employers who have worked for more than one year, to not less than two weeks.

2.8 Clause 8 of the Bill amends section 41 of the Act so that employees whose contracts of employment are terminated in terms of section 38 of the Insolvency Act, 1936 (Act No. 24 of 1936), when their employer is sequestrated or liquidated are entitled to severance pay.

2.9 Clause 9 of the Bill amends section 50 of the Act to—

- * include maternity leave as a condition of employment that cannot be varied by a Ministerial determination;
- * allow the Minister to vary the 45-hour week on condition that ordinary hours of work, overtime, meal intervals, rest periods and annual leave are on the whole more favourable than those contained in the Act. A variation may only be granted if there is collective agreement or it is necessitated by the operational circumstances of the sector or applies to the agricultural or private security sectors.

2.10 Clause 10 of the Bill amends section 55 of the Act to—

- * include maternity leave and the prohibition of child and forced labour as conditions of employment that cannot be varied by the Minister through a sectoral determination;
- * allow the Minister to vary the 45-hour week in respect of sectoral determinations in the same circumstances as Ministerial determinations.

2.11 Clause 11 of the Bill amends section 60 of the Act to allow for the appointment of alternate members from organised labour and business to the Employment Conditions Commission.

2.12 Clause 12 of the Bill amends section 68 of the Act to clarify how an inspector may issue a written undertaking.

2.13 Clause 13 of the Bill amends section 69 of the Act to clarify how an inspector may issue a compliance order.

2.14 Clause 14 of the Bill amends section 70 of the Act to clarify the limitations on inspectors issuing compliance orders.

2.15 Clause 15 of the Bill amends section 73 of the Act to align the Act with proposed changes to the Labour Relations Act, 1995 in respect of which it is now proposed that arbitration awards should have the same status as orders of the Labour Court.

2.16 Clause 16 of the Bill amends section 74 of the Act to clarify that a claim in terms of the Act may only be instituted jointly with unfair dismissal proceedings in respect of claims arising in the year before the dismissal.

2.17 Clause 17 of the Bill amends section 75 of the Act to clarify the basis for calculating interest payments.

2.18 Clause 18 of the Bill amends the Act by inserting a new section 77A to confer specific powers on the Labour Court to enforce the Act.

2.19 Clause 19 of the Bill amends section 83 of the Act by—

- * extending the application of provision whereby certain categories of workers can be deemed to be employees for the purposes of any other employment law other than the Unemployment Insurance Act, 1996 (Act No. 30 of 1966);
- * inserting a new section 83A which provides for a series of rebuttable presumptions concerning proof of whether an employment relationship exists, provides for NEDLAC to issue a Code of Good Practice in this regard and for the CCMA to issue an advisory award about whether persons involved in particular work arrangements are employees or not.

2.20 Clause 20 of the Bill amends section 87 of the Act to permit a Code of Good Practice issued in terms of the Act to provide that it be taken into account when any employment law is interpreted or applied.

2.21 Clause 21 of the Bill amends Schedule 3 of the Act to deem wage determinations to be sectoral determinations with effect from six months of the Act coming into effect to enable them to be enforced in terms of the Act.

2.22 Clause 22 of the Bill amends schedule 3 to the Act.

2.23 Clause 23 of the Bill provides for the short title and the date of commencement of the Bill.

3. Departments and bodies consulted:

Department of Public Service and Administration
 Department of Minerals and Energy
 National Treasury
 Department of Justice and Constitutional Development
 Organised Business and Labour at NEDLAC
 Members of the public through invitations for public comments.

Financial implications for State

None.

Parliamentary procedure

The State Law Advisers and the Department of Labour are of the opinion that the Bill should be dealt with in terms of the procedure set out in section 75 of the Constitution since it contains no provision to which section 74 or 76 of the Constitution applies.

Printed by Creda Communications

ISBN 0 621 31729 2