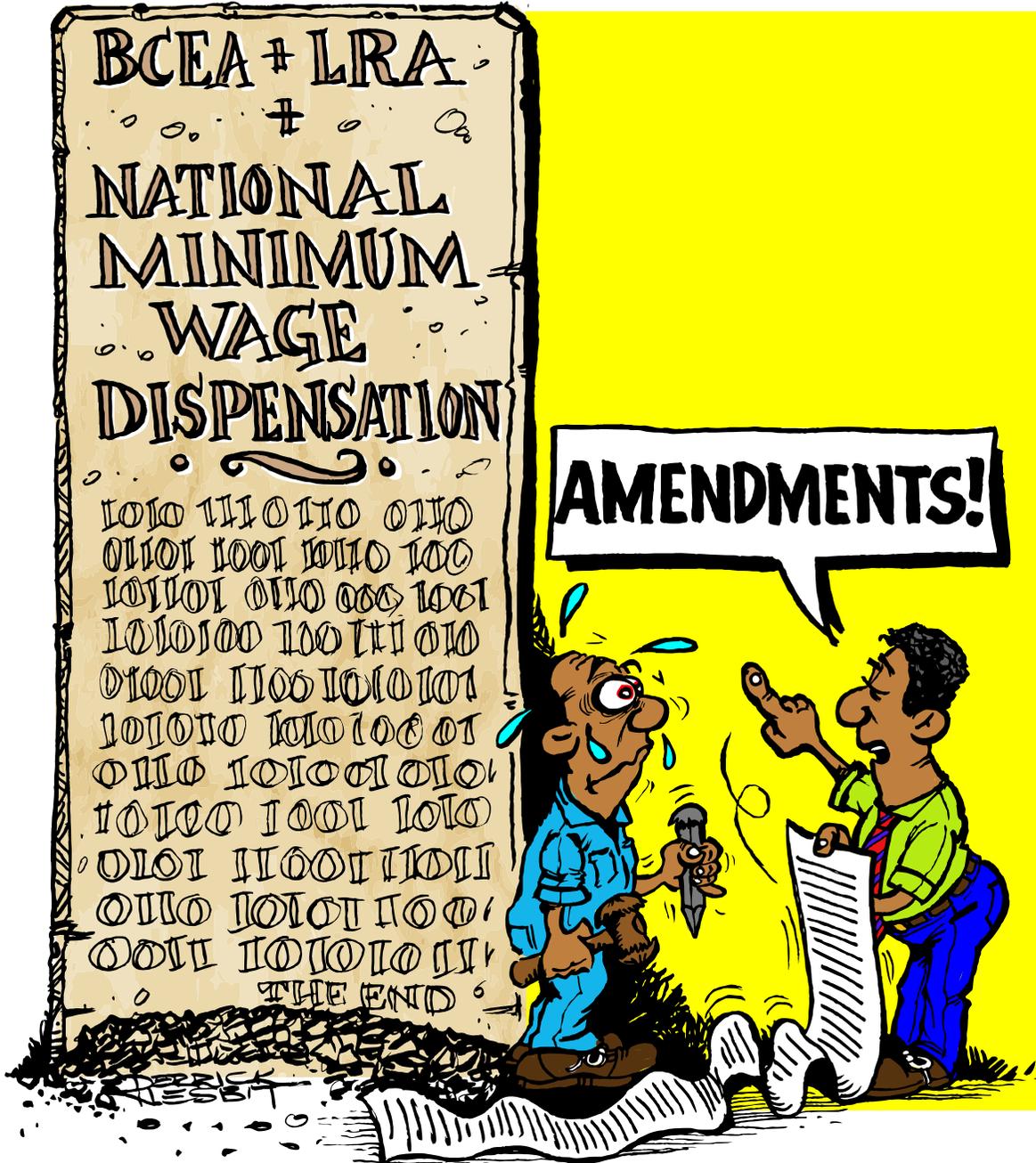


BCEA # LRA

NATIONAL  
MINIMUM  
WAGE  
DISPENSATION

LOLO IIO IIO OIO  
OIOI IOOI IIO IOO  
IOIIOI OIO OOS IOBI  
LOLOIOO IOO IIO OIO  
OIOOI IIOO IOIO IOI  
IOIOIO IOO IOO OI  
OIOO IOIO IOIO  
IOIOO IOOI IOO  
OIOI IOOO IOOI  
OIO IOIO IOO  
OOII IOIO IO II  
THE END

AMENDMENTS!



The National Minimum Wage Bill, the Labour Relations Amendment Bill and the Basic Conditions of Employment Amendment Bill were adopted by the National Assembly on 29 May 2018. These Bills have been sent for processing by the National Council of Provinces and the SALLR team fully expects them to be promulgated as Acts by the time that we hit the road with the upcoming *South African Labour Law Reports'* 34<sup>th</sup> annual seminar.

The SALLR team has therefore made the decision to open this year's annual SALLR seminar with a critical analysis of these amendments, providing practical solutions to anticipated problems and, lastly, clarifying potential uncertainties that we have identified. The SALLR team has been hard at work preparing PowerPoint presentations and flow diagrams dealing with these amendments – isn't it, in any case, what you expect from us?

In the meantime, we have identified the issues as set out hereunder that will form the basis of our presentations during the upcoming SALLR seminar. You are invited to peruse same and, should you have any queries in this regard, you may, in the interim, contact Dr Brian van Zyl directly on 041 373 4322 or, alternatively, [pa@vanzyrudd.co.za](mailto:pa@vanzyrudd.co.za).

#### AMENDMENTS TO THE BASIC CONDITIONS OF EMPLOYMENT ACT

- The consequences of the amendment to the term 'basic conditions of employment'
- The content of a daily wage payment
- The consequences of including the National Minimum Wage Act as an 'employment law' in the BCEA
- The implications of the amended functions of labour inspectors to refer disputes to the CCMA as well as appearing on behalf of the DG at the CCMA
- The amended circumstances under which a labour inspector may attempt to secure a written undertaking by an employer to comply with the BCEA, the National Minimum Wage Act, the Unemployment Insurance Act and the Unemployment Insurance Contributions Act
- The amended route to be followed where there is non-compliance with a written undertaking
- The consequences of the amended circumstances under which a labour inspector may issue a compliance order
- The general principle is that an employer must comply with a compliance order within the time period so prescribed in such compliance order – how will the exception to this general principle be applied in practice?
- What are the limited grounds upon which a labour inspector may not issue a compliance order?

- What are the consequences of the amended provisions regulating compliance orders so made arbitration awards?
- The jurisdiction of the CCMA to make a compliance order an arbitration award in respect of compliance with the statutory provisions, the payment of amounts due, the payment of a fine as well as the payment of interest
- The powers of the labour court to review, in terms of section 77(2) of the BCEA, on any grounds permissible in law, the performance or purported performance of any function or an act or omission or any person in respect of the BCEA
- For the first time, a distinction has been made in the dispute path to be followed by employees earning below and above the threshold as contained in section 6(3) of the BCEA – what approach is to be adopted in respect of a dispute where money is allegedly owing to a person in terms of the BCEA, the National Minimum Wage Act, a contract of employment, a sectoral determination or a collective agreement if such person earns below the aforesaid threshold? On the other hand, if such person earns above the aforesaid threshold, what approach should be adopted in respect of the labour court, the high court, the magistrates' court or the small claims court?
- It is apparent that a contravention of the BCEA or the National Minimum Wage Act may be a cause of action jointly with the following causes of action in the same proceedings:
  - protection of employees against discrimination
  - unfair dismissal
  - a claim for severance pay – the practical implications of this approach will be analysed
- The effect of the amendment that procedures regulating disputes about the interpretation or application of sections 74 to 77A of the BCEA are no longer to be adjudicated by the labour court but are indeed to be arbitrated by the CCMA

#### AMENDMENTS TO THE LABOUR RELATIONS ACT

- Prior to the amendments, the representativeness requirements for a collective agreement to be extended in terms of s32(2) of the LRA entailed that the trade union party to the agreement must represent the majority of employees and, furthermore, that the members of the employers' organisations party to the agreement must employ the majority of employees within the scope of the agreement. The effect of the amendment is that the representativeness requirement will be complied with if one or the other of the above criteria has been met – how is the principle of coverage, rather than strict representativeness, to be applied in practice?
- The original intention of the LRA was that representativeness of bargaining councils and their constituent parties should be determined annually by the registrar of labour relations – subsequent to the amendments, it is apparent that

a different course of action will be followed, namely, that each and every time a bargaining council refers a collective agreement to the minister for extension such representativeness will be determined – are there any exceptions to this rule?

- The thrust of the amendments regulating picketing is aimed at prohibiting a picket unless there are picketing rules in place and the trade unions are permitted to participate in creating such picketing rules – therefore, a commissioner conciliating a dispute, or a person appointed by a bargaining council to conciliate a dispute that may lead to a strike or lockout, may determine picketing rules if there is no existing collective agreement in place regulating picketing or the commissioner has failed to secure an agreement on picketing before the expiration of the conciliation period – entailing, in essence, that picketing rules must be determined before a certificate of non-resolution has been issued. What approach should be adopted by the respective parties in order to cater for this altered landscape?
- It is apparent that, in determining picketing rules, the commissioner, as the default position, must determine picketing rules in line with annexure 'B' of the Code of Good Practice: Collective Bargaining, Industrial Action and Picketing – obviously, the default position is only to be determined after taking into account representations from both parties. What should be the content of the respective parties' representations in this regard?
- Under what circumstances may a direct application be made to the CCMA on an urgent basis to determine picketing rules?
- In terms of s95(5)(p) of the LRA, a trade union and employer's organisation that seeks registration have to make provision in their respective constitutions requiring a ballot of members before respectively embarking on a strike or a lockout. The new s95(9) of the LRA has been inserted to clarify that a ballot means any system of voting by members that is recorded and secret. This obviously has been inserted to ensure good governance and secrecy. Section 99 of the LRA, which deals with records that registered trade unions and employers' organisations must keep and which includes ballot papers, has also been amended to include the attendance register and other prescribed records and other forms of documents or electronic records of a ballot – does this mean, as indicated in the popular press, that, before a trade union may embark on a protected strike, its members must have participated in a recorded and secret ballot?
- For the first time, the 30-day conciliation period may be extended in order to ensure meaningful conciliation – what are the exceptions and what is the process to be followed?
- In the scenario where a strike or lockout is no longer functional to collective bargaining, it has continued for a protracted period and no resolution appears to be imminent or there is an imminent threat that constitutional rights may or are being violated during the strike or lockout through the threat or use of violence or damage to property or the strike or lockout is causing or may cause an acute national or local crisis in respect of social and economic

considerations, the director of the CCMA may establish an advisory arbitration panel – what are the dispute-resolution paths to be followed in order for such advisory arbitration panel to be established?

- Does the appointment of such advisory arbitration panel interrupt or suspend the right to strike or recourse to lockout?
- Under which circumstances may the labour court make an order directing the director of the CCMA to establish such advisory arbitration panel?
- What is the effect of the advisory arbitration award being rejected by one of the parties to the dispute?
- And lastly, in respect of the strike ballot requirements: a number of trade unions and employers' organisations have been registered in the past without strike ballot requirements in their respective constitutions, in contravention of section 95(5)(p), read with section 95(9) of the LRA. Pending the required consultation between the registrar of industrial relations and these trade unions or employers' organisations and pending the issuing of a directive as to the period within which the amendments to the respective constitutions are to be effected, what approach is to be adopted to the requirement of a secret ballot before a strike or lockout can take place?

#### NATIONAL MINIMUM WAGE DISPENSATION ('NMWA')

- What is the content of the national minimum wage?
- To what extent may the national minimum wage be altered by a contract, collective agreement or law?
- To what extent is an employer entitled to unilaterally alter hours of work or other conditions of employment in implementing the national minimum wage?
- How is an employee's wage to be calculated for the purposes of the NMWA?
- What is the procedure where an employer or registered employers' organisation wishes to apply for an exemption from paying the national minimum wage?
- What learnership allowances are to be paid to learners in terms of schedule 2 of the NMWA?

Attached hereto also find the registration form for the upcoming *South African Labour Law Reports'* 34<sup>th</sup> annual seminar – the full brochure is available on our website ([www.sallr.co.za](http://www.sallr.co.za)) or can be obtained from Taryn Frank on 041 373 4322 or [pa@vanzylrুদ্ধ.co.za](mailto:pa@vanzylrুদ্ধ.co.za).