

REPUBLIC OF SOUTH AFRICA

LABOUR RELATIONS AMENDMENT BILL

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

(MINISTER OF LABOUR)

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 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)(I)."

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."

<u>It is a criminal offence to contravene the following provisions</u>	<u>Minimum applicable fines</u>	<u>Minimum term of imprisonment</u>
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 referral 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*.