Summary and Explanation of the Labour Law Amendments

This summary and explanation represents the position after the Basic Conditions of Employment Amendment Act (Act 20 of 2013) (BCEA), the Labour Relations Amendment Act (Act 6 of 2014) and the Employment Equity Amendment Act (Act 47 of 2013) (EEA) were signed into law by the President. The Employment Equity Amendment Act came into operations 1 of August 2014. The dates on which the Basic Conditions of Employment Amendment Act and the Labour Relations Amendment Act will come into operation will be announced.

Basic Conditions of Employment Act

1. Insertion of Clause 33A – Prohibited conduct by employer

   a. Previous position

   The Act did not previously regulate the practice whereby an employer requires a prospective employee to give some form of payment to the employer or purchase his goods/services in exchange for employment. This conduct can be described as ‘buying’ employment and is currently not regulated by the Act.

   b. Amendment

   The new section outright prohibits an employer from accepting payment in exchange for employment. The Employer may also no longer require the employee to buy his company’s products in exchange for employment. An exception to this latter point is where the company employees are compelled to take part in a scheme and it can be shown that the employee receives a financial benefit or where the price of the goods or services provided through the scheme is fair and reasonable.

   c. Impact of amendment

   The first part of the section is straightforward; it outright prohibits an employer from ‘selling jobs’ to prospective employees. The second part is less clear; an employer may require an employee to buy goods or procure services from a specific employer but there must be a clear benefit to the employee. In other words, an employer may make it compulsory as a condition of employment to, for example, to
join the company medical-aid scheme. However, it must be shown that this medical aid scheme is beneficial to the employee or that price is fair and reasonable.

Please note that this amendment does not prohibit an employer from selling goods or providing services to his or her employees. For example, there is nothing in the amendment that prevents a farmer from having a farm shop for his workers. The employer must simply not require the worker to buy from his shops as a condition of his employment, if this is the practice, then the onus will be on the employer to show that there is a clear benefit to the employee.

2. Amendment of sections 44 to 47 – Regulation of work by children

a. Previous position

Previously, section 43 prohibits the ‘employment’ of children who are either under 15 years of age or below school leaving age (as determined by specific legislation to that effect). Even when the above two parameters are adhered to, a person may still not ‘employ’ a child where the work is inappropriate for that person’s age, or if it may place the child’s well-being, education, moral, physical or spiritual health in danger.

Section 44 previously granted the Minister the authority to make regulations regarding the conditions of employment of children who qualify to work under section 43. It also criminalises a contravention of these conditions by an employer.

Sections 45 and 46 empowered the Minister to make regulations regarding medical examinations of child employees; it also criminalises a contravention of the above sections or where the employer discriminates against a child due to his or her age, even though he or she qualifies to be employed. Where an employee’s age is in dispute, section 47 places the burden on the employer to prove that he or she was reasonably mislead as to the age of the child.

b. Amendment

Semantic amendments have been made to section 43. Wherever it previously stated “no person may employ” it now states “a person must not require or permit a child to work”.

Section 44 has also been amended to refer to ‘work’ instead of ‘employment’. In addition, a new subsection 1A has been introduced that allows the Minister to make regulations to give effect to South Africa’s international law obligations dealing with work by children.

Sections 45, 46 and 47 are amended by replacing the word “employ” with “work”.

c. Impact of amendment

The International Labour Organisation (ILO) uses the word “work” instead of “employment” in their instruments relating to child labour. The amendments to the BCEA are thus intended to align the terms in South Africa’s national legislation with the ILO’s standards. According to the ILO, certain ‘work’ such as collecting water and fuel wood may be regarded as child labour if it interferes with their education and development. A chore that takes up so much time that it interferes with the child’s schooling could also be considered child labour even though it falls outside of the conventional definition of formal
employment. The amendment is therefore more than purely semantic and may have an effect on what activities are deemed to be child labour or not. The ILO is currently devising a list regarding the type of chores and the time spent on those chores, that would be permissible.

The introduction of the new subsection is presumably intended to facilitate the integration of international treaties that have been approved and ratified by Parliament into our domestic law. Regulations opposed to legislative amendments could fast track the process of incorporating international child labour standards into our law. Despite their international law origins, these regulations should follow the same procedure as would be the case when promulgating ordinary regulations.

The semantic amendments to section 45, 46 and 47 will bring the Act in line with the ILO standards as explained above.

3. Amendment of Section 55 – Making of Sectoral determination

a. Previous position

Section 55 empowers the Minister to make a sectoral determination that would regulate, amongst other conditions of employment, the minimum wage for employees in that sector.

b. Amendment

Section 55 (4) (b) has now been amended to include a minimum “increase” in wages in addition to a minimum rate.

Section 55 (4) (g) has been amended so that the Minister can prohibit or regulate sub-contracting in addition to contract work through a sectoral determination.

Additional sub-clauses (o) and (p) have been introduced into section 55 (4). Sub-clause 55 (4) (o) is a consequential amendment that gives effect to the amended section 21 (8) of the Labour relations Act. The sub-clause empowers the Minister, through a sectoral determination, to set a threshold of representivity at which trade unions will automatically have organisational rights in the workplace. Sub-clause (p) will allow the Minister, through a sectoral determination, to establish methods whereby the conditions of service for labour tenants can be regulated.

Semantic changes were made to clause 55 (7) (b) but no substantive changes.

An additional clause 55 (8) is inserted. It states that the Minister may, subject to subsection 7, publish a sectoral determination that applies to all employers and employees who are not covered by any other sectoral determination.

c. Impact of amendment

The Amendment to section 55 (4) (b) can have a significant impact on businesses. Currently a sectoral determination will set the minimum wage that employees in a certain sector must be paid, however several employers pay certain employees (for example long serving employees) more than the minimum
wage. This means that the wages received by employees who already earn more than the prescribed minimum would also have to be increased by the amount prescribed by the Minister.

The additional section 55 (4) (o) is a consequential amendment which empowers the Minister to give effect to the amendment of section 21 (8) of the Labour Relations Act through a sectoral determination. The impacts of these two amendments will be discussed in detail when dealing with the Labour Relations Amendment Act. The introduction of sub-clause (p) will allow the Minister to also regulate the working conditions of labour tenants through a sectoral determination. It is unclear at this moment to what extent this will impact businesses or which conditions will be regulated. Labour tenants per definition do not receive monetary remuneration, but instead are allowed to cultivate their own crops and/or graze animals in exchange for providing their labour. Minimum or actual wages should logically not apply to them, but the situation is not 100% clear and is still being investigated.

Clause 55 (8) will allow the Minister to regulate minimum wage and employment conditions for employees who cannot be identified under any specific sector already covered by a determination. If the Minister decides to exercise the power granted to her by this provision, South Africa could see a universal minimum wage similar to that being implemented in the United States and elsewhere.

4. Amendment of Sections 68 - 73 – Monitoring and enforcement

a. Previous position

i. Section 68 currently mandates a labour inspector who has reasonable grounds to believe that an employer is not complying with any provision of this Act to enter into a written undertaking with the employer whereby he endeavours to rectify the suspected non-compliance.

ii. Section 69 empowers a labour inspector to issue a compliance order to an employer if he has reasonable grounds to believe that an Employer has not complied with a provision of the Act. The section prescribes the content of a compliance order and it must be delivered to the employer, to each affected employee and it must be displayed at the work place. An employer previously could comply with the order or object to it in terms of section 71.

iii. Section 70 previously set limitations on a labour inspector’s authority to issue a compliance order. Subsections (c) and (d) stated that a labour inspector may not issue a compliance order in respect of any amount payable to an employee if, (c) proceedings have been instituted to recover the amount or if already instituted, the proceedings have been withdrawn; and (d) that amount has been payable for over 12 months.

iv. Section 71 previously provided for a procedure whereby an employer could object to a compliance order by making a representation to the Director General. If an employer was unsuccessful in his objection to the Director General, the employer could appeal to the Labour Court in terms of section 72.
v. Section 73 allowed the Director General to apply to the Labour Court to make a compliance order an order of court in terms of section 158(1) (c) of the Labour Relations Act if the employer failed to comply with the initial compliance order. Alternatively, if the Employer objected to the compliance order by making representations to the Director General, and the DG decides to confirm his order, the DG may apply to have it made an order of court if the Employer did not appeal.

b. Amendment

i. The word “must” is replaced with the word “may” in clause 68 (1). In addition, a new sub-clause (b) has been introduced, which allows the Director General to make an application to court ordering the employer to comply with the undertaking.

ii. Section 69 (2) (d) has been deleted and an additional section 2A has been introduced. Section 2A allows a compliance order to set out a date by which all representations that the employer may wish to make to the Department or Labour Court must be served, and a date by which time the order may be made an order of the Labour Court if it has not been complied with. *It should be noted that the section still allows the employer to make ‘representations’ to the DG, however the official ‘appeal’ mechanism to the DG has been removed from the Act. It is therefore not clear what the purpose of these ‘representations’ are. It is not a formal, enforceable appeal to the DG, but perhaps an employer can still persuade the DG to withdraw the compliance order on good cause by making a representation)*

iii. In section 69 (3) (a) the words “Labour inspector must serve” has been replaced by the words “must be served”.

iv. The words “unless the employer objects in terms of section 71” have been removed from section 69 (5).

v. Section 70 has been amended by adding the word “unless” in (c), making the text read “unless those proceedings have been withdrawn. Subsection (d) is amended to add the words “or issued a compliance order in terms of section 69”.

vi. Sections 71 and 72 have been deleted in their entirety.

vii. Section 73 is amended to remove any reference to the Labour Relations Act, objections made by the employer to the DG and any references to an appeal by the employer to the Labour Court (which has been removed by the above
amendments). The DG is now empowered to apply directly to make the compliance order an order of court on the date so specified in the compliance order.

c. Impact of amendment

i. The word “may” now caters for the Labour Inspector to use discretion and decide whether or not a written undertaking should be entered into with the employer. Where an undertaking is entered into and the employer fails to comply with it, the DG must approach the court to enforce it. This means that an undertaking in terms of section 68 must be enforced in the Labour Court much the same way as a contract would be enforced in a civil court. It also guarantees further judicial oversight in the enforcement of the Act; instead of the labour inspector issuing a compliance order, the DG must approach the Labour Court to issue an order to the employer to comply with the undertaking.

ii. The deletion of section 69 (2) (d) is merely a consequential amendment to section 68 whereby the court must order an employer to comply with an undertaking, not the labour inspector. Section 2A effectively allows a labour inspector to set a deadline by which representations to the Labour Court or Department must be made. It is not sure what the consequences of non-compliance are because there does not seem to be any obligation on the DG or the Labour Court to take the representations into account, and it is made outside of court proceedings. Never the less, strict attention should be paid to the expiry date on the Compliance order. Furthermore, if the compliance is ignored it can automatically be made an order of court.

iii. The affect of the amendments to section 69 (3) (a) is that the labour inspector need not serve the document himself; presumably ordinary court procedure will apply. The phrase in section 69 (5) has been deleted because section 71 is deleted by the Amendment Bill.

iv. The effect of clause 70’s amendment is that a compliance order can now only be issued when an employee has instituted proceedings to recover monies owed if those proceedings have subsequently been withdrawn. The second amendment merely has the effect that a second compliance order cannot be issued for the same contravention.

v. The deletion of sections 71 and 72 means that an employer who is served with a compliance order has no procedure whereby to object to it. It somewhat contradicts the new section 2A which states that the compliance order may contain a date by which the employer must serve any ‘representations’ it may wish to give to the Director General or the Labour Court. However there seems to be no obligation on the side of the Department or the Labour Court to take it
into consideration. Section 73 makes provision for the Director General to access the labour court and make the compliance order an order of court; however, there is no corresponding provision comparable to the repealed section 72 that allows the employer to appeal to the Labour Court. Neither is there a general provision in the Act that states a person can apply to the labour court to settle any dispute arising out of this Act. The question that therefore remains to be answered is whether or not an employer can approach the labour court to dispute a compliance order? If so, what will his cause of action be?

This amendment might well fall foul of article 13 (2) of Convention 81 of the International Labour Organisation. C81, the Labour Inspection Convention, 1947 states that a labour inspector must have the necessary powers to ensure compliance, subject to the right of appeal to a judicial or administrative authority. It reads:

“2. In order to enable inspectors to take such steps they shall be empowered, subject to any right of appeal to a judicial or administrative authority which may be provided by law, to make or to have made orders requiring—”

In addition, section 34 of the Constitution states that “Everyone has the right to have any dispute that can be resolved by the application of law decided in a fair public hearing before a court or, where appropriate, another independent and impartial tribunal or forum”

The current amendments do not provide for an appeal either a court or an independent tribunal or forum as far as a compliance order is concerned. This could potentially amount to an unjustifiable limitation of section 34.

vi. The amendments to section 73 allow the DG to simply request the labour Court to make the compliance order an order of court on the date that the compliance order stated that the DG would apply. With the qualification regarding a pending appeal removed, it does not appear as if there is any way to stop the process.

The cumulative effect of the above amendments provide the Department of Labour with draconic powers to investigate, adjudicate and punish perceived non-compliance with employment conditions set out in the Act. In effect, the labour inspectors are permitted to investigate any employer for non-compliance and if there are reasonable grounds on which the inspectors believe that an employer is failing to comply with the Act, she can serve the Employer with a compliance order. In the compliance order, it will be stated that the employer must remedy the perceived default and if he fails to do so, the DG will apply to court to have the order made an order of court. The Employer may feel that there are good reasons why he is not complying or he may disagree with the conclusions drawn, however, his right to object and dispute the compliance order has been removed. If the Employer fails to comply with the order, irrespective of whether or not he has good reasons not to heed the order, he will be in contempt.
of court, which is a criminal offence. Throughout this entire process, it does not seem as if the Employer is afforded the right to present his case. If this interpretation is correct, the Amendment Bill will be in conflict with South Africa’s obligation under the ILO Convention 81 and offend the constitutionally protected principle that both sides have the right to be heard.

5. Amendment of section 74 – Consolidation of proceedings

   a. Previous position

   Where there is an ongoing dispute for unfair dismissal in terms of the Labour Relations Act as well as a dispute whereby the employee alleges that the employer owes him money in terms of the BCEA, this section allows the 2 procedures to be joined before the court. Subsection 2 qualified this by stating that
   (a) The claim is referred in compliance with section 191 of the LRA
   (b) The amount owing in terms of the BCEA has not been outstanding for longer than a year
   (c) No compliance order has been made and no other legal proceedings have been instituted to recover the amount owing.

   b. Amendment

   The qualifications in subsection 2 are deleted but the words “if the claim has not prescribed” have been added to end of subsection 2. Also, a new sub-clause 2A has been added, which states that “no compliance order may be issued or enforced and no other legal proceedings may be instituted or enforced in respect of any claim that has been determined in terms of subsection (2).”

   c. Impact of amendment

   Proceedings relating to the same employer and employee can now be joined without it having been referred in terms of the Labour Relations Act provided that the monetary claim has not prescribed.

6. Amendment of Section 77 – Jurisdiction of Labour Court

   a. Previous position

   This section established exclusive jurisdiction for the Labour Court to hear matters arising out of the BCEA, excluding matters relating to offences under the Act. It may also review administrative conduct related to the Act and has concurrent jurisdiction to hear matters relating to employment contracts. Any matter that falls within the exclusive jurisdiction of the Labour Court can be referred to it at any time if it is instituted in an ordinary civil court.

   b. Amendment

   The qualification relating to the Labour Court’s jurisdiction to hear offenses in terms of the BCEA have been removed. Also, an additional section 1A has been inserted which reads “The Labour Court has exclusive jurisdiction to grant Civil relief arising from a breach of sections 33A, 43, 44, 48, 90 and 92.”

   c. Impact of amendment
The Labour Court now has the exclusive jurisdiction to adjudicate on all offenses created by the BCEA. In addition, the Labour Court is granted exclusive jurisdiction to adjudicate on the new sections introduced by this Amendment Act, and moves the jurisdiction to hear matters relating to a breach of confidentiality, fraud, obstruction and undue influence away from the Magistrates Court and towards the Labour Court.

7. Amendment of Section 93 and schedule 2 – Offenses and penalties & Maximum permissible fine not involving an underpayment.

   a. Previous position

   Section 93 prescribes maximum terms of imprisonment for offenses created in terms of the Act and Schedule 2 sets the maximum fines.

   b. Amendment

   A maximum sentence for the new section 33A is set at 3 years whilst a contravention of section 43, 44, 46 & 48 has been increased from 3 years to 6 years. All fines in the second schedule have been trebled.

   c. Impact of amendment

   A person can now be penalised heavier for non-compliance with those provisions of the BCEA which create offenses. The fines needed to be adjusted for inflation to correctly reflect the seriousness of the infringement, however there is clearly an intention to punish non-compliance more heavily as the increase substantially exceeds an ordinary adjustment for inflation. In addition, maximum prison sentences have also been lengthened.

Labour Relations Amendment Act

8. Amendment of Section 1 – Purpose of Act

   a. Previous position

   The Act mistakenly referred to an object of the Act as giving effect to section 27 of the Constitution.

   b. Proposed Amendment

   Reference to section 27 has been replaced with section 23.

   c. Impact of amendment

   Section 27 refers to health care, food, water and social security. This was presumably a typographical error as the Act clearly gives effect to section 23, Labour Relations, and the amendment reflects this.

9. Amendment of Section 21 – Exercise of rights conferred
a. Previous position

Section 21 sets out the grounds upon which a registered trade union will be regarded as ‘representative’ within the workplace. Certain socio-economic rights flowing from this Act can only be exercised by a registered, ‘representative’ trade union. When there is a dispute as to whether a trade union is representative or not, subsection 8 mandates the commissioner to take a number of factors into consideration when arriving at his decision. The Commissioner must seek to limit the proliferation of trade unions and promote representivity, minimise the administrative and financial burden on the employer associated with multiple trade unions with organisational rights. He must also consider the nature of the workplace, nature of the organisational rights they seek to exercise, nature of the sector and location of the workplace and the organisational history of the workplace.

b. Proposed Amendment

An additional factor is added onto the list in subsection 8 that mandates the Commissioner to consider the composition of the workforce in relation to temporary employment services (TES), employees on a fixed term contract, part-time employees and other categories of non-standard employment.

In addition, the following new subsections have been added:

8A empowers the Commissioner, if there is a dispute regarding the exercise of any rights conferred by the Act, the authority to grant a trade union that does not represent the majority of workers in the workplace, representative status in terms of section 14. This status can only be granted if there is no other representative trade union in the workplace and the trade union already has the rights to access the workplace, deduct membership fees and have members take special leave to take part in union activities.

In addition, such a trade union may be granted the right to disclosure of information if the above rights have been granted and there is no representative union in the workplace that already has this right.

8B states that the above rights lapse if the trade union ceases to be the most representative in the workplace.

8C states that the same rights afforded in 8A above may be awarded to a registered trade union (or one or more acting jointly) that does not meet the requirements of being ‘sufficiently representative’, according to the applicable collective agreement. This is provided that all parties to the collective agreement have participated in the arbitration and the trade unions (or trade unions acting jointly) represent a significant interest or number of employees in the workplace.

8D states that the extension of rights afforded by 8C applies retrospectively to all disputes of this nature after the commencement of the LRA, irrespective of when the collective agreement was concluded.

A new section 21(12) is introduced into the Act. It states that a trade union who wishes to exercise its organisational rights on behalf of workers employed in terms of a TES, the workplace where there rights are exercised shall include the TES client’s premises.

c. Impact of amendment
These amendments, read together with the new section 55 (o) of the BCEA, effectively extends organisational rights to trade unions that do not represent the majority of workers in a workplace. The organisational rights include the right to access the workplace, deduct subscriptions from the employee’s pay, elect representatives, take leave to attend to trade union duties and be privy to confidential information. Crucially, it does not entitle that trade union to enter into collective agreements and there is no obligation on the owner to bargain collectively with such a trade union.

This proliferation of trade unions in the workplace can hamper meaningful engagement between employers and employees as it blurs the lines of official communication. The employer will be within his rights to only engage with the trade union that represents the majority of employees in the workplace, this fact may well be confused by employers and unions alike. The labour unrest in the agricultural sector experienced recently was further complicated by uncertainty regarding the mandate of trade unions to speak on behalf of the farm workers. This problem will be exacerbated by the amendments because a farmer may now be faced with a multitude of unions with organisational rights, but not necessarily the right to bargain collectively on behalf of the majority of workers.

In addition, competing trade unions will need to compete for membership so that they can be the representative union which engages with the employer. The possible negative effects of inter-union rivalry were recently seen in the mining sector. The amendments will not only put tremendous strain on the relationship between members of different trade unions within the same labour force, but also place strain in the relationship between the employer and the employee as competition and in fighting undermines the legitimacy of any engagements between the employer or employers organisation and the representative trade union. In addition to the increased administrative burden that increased representation places on the employer, the employer may become alienated from certain employees if he or she only engages with one trade union and not the other.

10. Amendment of Section 22 – Disputes about organisational rights

a. Previous position

As per section 22, any party to a dispute regarding organisational rights other than the dispute referred to in section 21 above, may refer the matter to the CCMA. The party who refers the dispute must serve copies on all parties to the dispute. The CCMA must first attempt to solve the dispute by conciliation, failing which it can resort to arbitration.

b. Proposed Amendment

The amendment Act introduces a sub-clause (5) which extends the benefit of an arbitration award to the employees of a TES as well as to the client. It is also extended to any other person who controls access to the workplace provided that person participated in the arbitration proceedings.

c. Impact of amendment

With organisational rights being extended to workers supplied in terms of a TES (see the amendments to section 28 (1) (b) above), it is a logical consequence thereof that they be included in an arbitration award relating to organisational rights they might enjoy. An essential aspect of organising into trade unions is the right to access the workplace where the union’s members are. In the instance where
access is not controlled by the employer, the decision is extended to whoever controls access. Failure to do so would render the arbitration award un-executable.

11. Amendment of Section 32 – Extension of collective agreement concluded in bargaining council

a. Previous position

Section 32 allows a bargaining council to request the Minister, if certain conditions are met, to extend the ambient of the collective agreement to persons who are not parties to the council, provided that the employment organisations and trade unions party to the council vote in favour of the extension. Section 3 prescribes a number of preconditions which must be present before the Minister may extend the collective agreement. Specifically, section 3(e) states that the collective agreement must make provision for an independent tribunal to hear and decide an appeal brought against the bargaining council’s refusal to allow a non-party to be exempted or the withdrawal of such an exemption granted by the bargaining council. According to subsection 5, the Minister may extend the agreement even if the majority representative trade unions and employers organisations in the council do not vote in favour if the parties represented in the council are sufficiently representative within the scope of the bargaining council and the Minister is satisfied that a failure to extend the agreement will undermine the collective bargaining in the sector as whole.

b. Proposed Amendment

An additional precondition is added to the list in section 3. The Minister may not extend the collective agreement unless the bargaining council has a procedure in place whereby non-parties can apply for exemption from the provisions of the collective agreement. After receiving an application, the council must make a decision within 30 days.

Section 3(e) is amended by restricting the independent body to 30 days in making their decision.

After section 3, an additional section 3A is added. It holds that no representative, office-bearer or official of a trade union or employer’s organisation party to the bargaining council can participate in the appeal body.

2 further prerequisites are added to subsection 5; the minister first also publish a notice in the Government Gazette stating his intentions to extend the collective agreement and invite public comment to be submitted within 21 days. The Minister must apply his mind and consider the public comments before the agreement can be extended in terms of section 5.

Also, a new section 5A is added to guide the Minister in deciding if the parties are sufficiently representative within the scope of the bargaining council. It states that the Minister must also take TES, fixed-term contract employees, part-time employees and other forms of non-standard employment into account in deciding if the parties in the bargaining council are representative of the sector.

Finally, an additional sub-clause 11 is added. It states that the bargaining council who has a collective agreement extended must ensure that the independent appeal body is able to determine appeals within the 30 day period.
c. Impact of amendment

The impact of these amendments is generally positive. Several amendments provide more clarity and certainty in the appeal body’s ability to hear applications for exemption. Further restrictions, such as the fact that no official of the trade unions or employees organisations may be involved in the appeal body, provide welcome checks and balances that can help ensure the appeal body’s impartiality. The time frames also help to provide an applicant with certainty and can provide a legal platform whereby he can compel the appeal body to provide him with an answer. Mandating the Minister to consider whether or not the parties at the bargaining council represent TES, fixed-term contract employees and temporary employees as factors is in line with the Amendment Act’s goal of extending protection and representation to non-permanent workers. Their inclusion in section 21 (8) and various other sections of the amendment Act makes this a logical amendment.

The amendment now obliges the Minister to invite public consultation where she wishes to extend a collective agreement to employees not represented in the bargaining council and the parties did not vote in favour of it.

12. Amendment of Section 49 – Representativeness of council

a. Previous position

Where a bargaining council has had a collective agreement extended in terms of section 32, section 49 (2) placed an obligation on that council to inform the registrar annually of the number of employees covered by the agreement, the number of employees who are members of the trade unions party to the agreement and the number of employees who are employed by members of the employers organisations that are parties to the agreement.

According to subsection 3, where any bargaining council receives a request from the registrar, they must supply the following information within the time period specified by the registrar;

- Number of employees that fall within the registered scope of the council;
- number of employees that are members of a trade union represented in the council;
- number of employees employed by a member of an employer’s organisation represented in the council.

According to subsection 4, where the representativeness of a bargaining council has been determined, it will be deemed to be determined for the following year as well.

b. Proposed Amendment

In addition to the information listed in subsection 2, the council must now also inform the registrar on an annual basis of the information listed in subsection 3.

In light of the above amendment, subsection 3 is amended to exclude councils covered by subsection 2. Subsection 4 is amended to specify that such a determination will be valid for any purpose in terms of this Act, including a decision by the Minister in terms of sections 32(3)(b), 32(3)(c) and 32(5).

c. Impact of amendment
In addition to the data specified in subsection 2, the council must now annually report to the registrar the number of employees employed within the registered scope of the council, number of employees who are members of trade unions that are parties to the council and the number of employees employed by members of the employer’s organisations that are parties to the council.

Since bargaining councils having a collective agreement must now report on the factors listed in subsection 3 annually, it would be a duplication of work if they were required to report on the same factors upon request. As a result, bargaining councils having a collective agreement are now excluded from subsection 3.

Impact of subsection 4

13. Amendment of Section 51 – Dispute resolution functions of council

a. Previous position

Subsection 9 merely stated that the bargaining council can establish its own procedures regarding dispute resolution by collective agreement.

b. Proposed Amendment

Subsection 9 has been replaced by a section stating that the bargaining council can establish its own procedures to resolve a dispute, provide for payment of a dispute resolution levy and provide for the payment of a fee in relation to conciliation or arbitration proceedings in exactly the same way as the CCMA may, and it may not exceed the fee charged by the CCMA.

c. Impact of amendment

The amendment formalises the council’s functions a dispute resolution mechanism and allows it to charge a fee for that service that is in line with the fees charged by the CCMA.

14. Amendment of Section 65 – Limitations on right to strike or recourse to lock-out.

a. Previous position

Section 65 (1) (c) stated that no person may take part in a strike or lock-out if either party has the right to refer the dispute to the Labour Court in terms of the Labour Relations Act.

Similarly, section 65 (3) (b) stated that no one may take part in a strike or lockout if the dispute relates to any determination made in terms of the Wage Act, which regulates the dispute, within a year of such a determination being made.

b. Proposed Amendment

Subsection (1) (c) has been amended to extend this limitation to any dispute that can be settled by the Labour Court in terms of any employment law.

The words “wage Act” has been replaced by “Chapter 8 of the Basic Conditions of Employment Act”.

c. Impact of amendment
According to section (1) (c), if a dispute relating to any employment law can be resolved by the Labour Court, the employees or employer must first attempt to solve the matter in the Labour Court before the employees will be allowed to strike or the employer allowed to lock-out his employees. It can now apply to a dispute regarding the BCEA, EEA etc, and not just the LRA as was previously the case.

Chapter 8 of the BCEA regulates minimum wages by way of a sectoral determination. The BCEA repealed the Wage Act in its entirety and chapter 8 regulates the functions previously regulated by the Wage Act. The Amendment to the LRA thus brings it in line with other employment laws. The amendment simply removes reference to the Wage Act as it has been repealed.

15. Amendment of Section 69 - Picketing

a. Previous position

The section previously allowed picketing in any public place including outside the employer’s premises, but only inside the employer’s premises if the Employer has consented thereto. Alternatively, if the commission holds that the employer has unreasonably withheld consent, then it may authorise the employees to picket inside the employers premises.

b. Proposed Amendment

The Act is amended to allow employees to picket in a public place not owned by the employer if that person has had the opportunity to make representations to the CCMA. Such a person can also refer a dispute on the matter to the CCMA.

An additional subsection 12 has been added which details the type of relief that the CCMA can grant, as well as the procedure to follow if a dispute relating to picketing has been referred.

c. Impact of amendment

The effect of the latter amendment is that employees are only allowed to picket on premises not owned by their employer if the owner of that other premise has had the opportunity to make a representation to the CCMA.

Whenever a dispute relating to picketing has been referred to the CCMA, there is now certainty as to the nature of the relief that can be obtained, the procedure that is to be followed and the fact that the CCMA may condone shorter notice periods in the procedure in a number of circumstances.

16. Introduction of Sections 70A to 70F – Essential services committee

a. Previous position

Special provisions apply to the right of employees employed in essential services’ right to strike. Originally section 70 created an essential services committee to investigate and determine which services and employers are in fact essential services.

b. Proposed Amendment
Separate and detailed sections have been enacted to regulate the committees;

- composition (70A)
- powers and functions (70B)
- appointment of panels (70C)
- powers and functions of panels (70D)
- jurisdiction (70E); and
- Regulations (70F).

c. **Impact of amendment**

The amendments will regulate the essential services committee.

17. **Amendment of Section 115 v – Functions of the Commission for the Conciliation, Mediation and Arbitration (CCMA)**

a. **Previous position**

Under subsection (1), the CCMA has to resolve disputes referred to it through conciliation, if that fails then through arbitration, it must assist in the establishment of workplace forums and compile and publish information and statistics.

Subsection (2) (b) obliges the CCMA to assist a party to obtain legal advice, assistance or representation if requested.

Subsection 2A (k) awarded the CCMA the power to make rules regarding the representation of any persons or category of persons that appear before the CCMA.

The CCMA also has an advisory role. If asked, the CCMA may provide information and guidance on the LRA.

b. **Proposed Amendment**

In subsection (1), an additional function has been added, namely to review any rules made under this section every 2 years.

The new subsection (2) obliges the CCMA to assist a party in serving the required documents if that party earns less than a threshold prescribed in the BCEA.

The reference to a “category of persons” has been deleted in subsection 2A (k) and it now explicitly states that the CCMA may make rules limiting a person’s rights to legal representation. In addition, the CCMA can make rules regarding the consequences for not attending a hearing before the CCMA.

With regard to its advisory role, the CCMA may now act on its own accord and play an advisory role with regards to any employment law.

c. **Impact of amendment**

The roles and functions of the CCMA have been expanded and clearly defined.
18. Amendment of Section 144 – Variation and recession of arbitration awards and rulings

a. Previous position

Section 144 allows a commissioner who has awarded an arbitration award or ruling on own account, or if so requested, amend an order on one of three grounds, namely; if it was wrongly made in the absence of any party, if there is ambiguity or an obvious error or omission or if it is granted on the basis of a mistake common to the parties.

b. Proposed Amendment

A fourth ground is introduced, namely if it is made in the absence of any party, on good cause shown.

c. Impact of amendment

This amendment opens the door for an effected party to have the order set aside if he was not present at the arbitration. There is however an onus on the party seeking to have the order set aside to provide good reasons why he or she was not present. For example, the documents were never served.

19. Amendment of Section 145 – Review of Arbitration Awards

a. Previous position

Section 145 provides for an arbitration award to be reviewed by the Labour Court if the Commissioner committed misconduct in relation to his/her duties, if a gross irregularity in the proceedings occurred or if the Commissioner exceeded his powers.

b. Proposed Amendment

An additional 5 subsections [(5)-(10)] have been inserted to further regulate a review by the Labour Court. Procedurally, the amendment sets a time limit of 6 months after receiving an arbitration award within which the aggrieved party must apply for a court date. The Labour Court can condone a late application on good cause. After hearing the application, the Labour Court must hand down judgement as soon as possible.

Subsections (7) and (8) state that the institution of review proceedings does not suspend the operation of the arbitration award unless the applicant can furnish sufficient security to the court’s satisfaction. The Act gives guidance to the court in that ‘sufficient’ security will be equivalent to 24 month’s remuneration or an amount equal to the disputed arbitration award. The above only applies to arbitration awards issued after the commencement of the Amendment Act.

c. Impact of amendment

The procedural aspects are largely self-explanatory. What is worth noting is that review proceedings do not suspend the operation of the award. In other words, if you believe that there are grounds to review the decision by an arbitrator, and you chose to take the matter on review to the Labour Court, you will still have to comply with the arbitrator’s decision until such time as when the court can decide whether to set it aside or not. The only exception is where you can give the court security, which will seemingly
be a deposit equivalent to 24 month’s wages or the actual amount awarded as compensation by the arbitrator.

20. Amendment of Section 147 – Performance of dispute resolution functions by CCMA in exceptional circumstances

   a. Previous position

According to subsection 6, The CCMA may refer a matter to a private dispute resolution mechanism at any time during the proceedings if it becomes apparent that there was an agreement compelling the parties to seek private alternative dispute resolution.

   b. Proposed Amendment

Subsection 6A now provides for financial assistance to be given to an employee who earns less than the prescribed amount in the BCEA where the matter is referred to private alternative dispute resolution. The same assistance is also given where the body appointed is not independent from the employer.

   c. Impact of amendment

Employment contracts often contain a standard clause whereby the employer and employee agree to refer any dispute to mediation or arbitration. Where such a clause comes to light during proceedings in the CCMA, the matter may be deferred in terms of the existing section 147 (6). The new section 147 (6A) allows the CCMA to provide the employee with financial support if the employee is obliged to contribute to the costs of settling the dispute in terms of the employment contract. Financial support will only be provided to employees that earn below the threshold set by the BCEA. Alternatively, if the dispute body that the matter is referred to is not independent from the employer, for example if it is an internal disciplinary committee, the employee may be given financial support.

21. Amendment of Section 157 – Jurisdiction of Labour Court

   a. Previous position

The Labour Court does not have exclusive jurisdiction if the LRA requires it to be resolved through arbitration.

   b. Proposed Amendment

This section has been amended to extend to “any employment law” in addition to the LRA.

   c. Impact of amendment

The Labour Court will no longer have exclusive jurisdiction where any employment law requires a matter to be resolved by arbitration.

22. Amendment of Section 158 – Powers of Labour Court

   a. Previous position
This section sets out the powers of the Labour Court required to perform its functions. Amongst other things, the Labour Court is empowered to order compliance with any provision of the LRA and sit as an arbitrator if it becomes apparent that the dispute ought to have been referred to arbitration. In addition, conciliation or arbitration proceedings taking place under the auspices of the CCMA or a bargaining council can be reviewed by the Court at any time. If a case is referred to the Labour Court and it becomes apparent that the matter should first have been sent to arbitration, the court may, with the permission of the parties, sit as an arbitrator.

**b. Proposed Amendment**

In addition to making compliance orders in terms of the LRA, the Labour Court can now issue compliance orders in terms of any employment law.

An additional section 1B has been introduced that prohibits the Labour Court from reviewing conciliation or arbitration proceeding of the CCMA or bargaining council before the relevant proceeding has been finalised.

Subsection 2B has been amended so that the Labour Court no longer needs the parties’ permission to sit as an arbitrator, if the court deems it expedient to do so, then it can act on its own accord.

**c. Impact of amendment**

Several standard-form employment contracts contain a clause that obliges the parties to refer disputes to arbitration. If a dispute is directly referred to the Labour Court, the court may decide to act as an arbitrator instead of sending the matter to a private arbitrator, in this case it will not have the same powers it ordinarily enjoys but rather have powers equivalent to that of an arbitrator.

### 23. Amendment of Section 161 – Representation before Labour Court

**a. Previous position**

Whilst appearing before the Labour Court, a party may be represented by a legal practitioner, a director or employee of that person, any member, office-bearer or official of that party’s registered trade union or employer’s organisation, a designated official of the official of a council or the Department of labour.

**b. Proposed Amendment**

The word “member” has been removed and an additional qualification has been added, namely that no office-bearer or official of a registered trade union or employers organisation may charge a fee for the service unless authorised by the court.

**c. Impact of amendment**

One can no longer be represented by an ordinary member of a trade union or employer’s organisation; such a person must be an official or an office-bearer such as the secretary-general or a shop steward. In addition, such a person may not charge a party to the proceedings a fee for such representation.

### 24. Amendment of Section 187 – Automatically unfair dismissals
a. **Previous position**

If dismissal was used as a tool by which the employer could force the employee to accept a demand in respect of a matter of mutual interest, it is deemed to be an automatically unfair dismissal.

b. **Proposed Amendment**

The wording of this provision has been changed but the meaning of the provision is substantially the same. The old wording stated that it would be automatically unfair if an employee is dismissed to compel the employee to accept a demand by the employer on a matter of mutual interest. The new wording states that it would be an automatically unfair dismissal if the employee is dismissed for a refusal by the employee to accept a demand of mutual interest.

c. **Impact of amendment**

The amendment does not change the substantive reasoning behind the provision. If an employer dismisses an employee if he/she fails to accept a demand regarding a matter of mutual interest, the dismissal is deemed to be automatically unfair.

25. **Amendment of Section 188A – Agreement for pre-dismissal arbitration**

   a. **Previous position**

Where an employer intends to dismiss an employee for conduct or capacity, the employer may first, with the consent of the employee, request a council, accredited arbitration agency or the CCMA to conduct arbitration on the capacity or conduct of that employee as a preliminary step.

According to subsection 5, the employee in question must appear in person or be represented by

   (a) a co-employee;

   (b) a director or employee, if the party is a juristic person;

   (c) any member, office bearer or official of a that party’ registered trade union or registered employer’s organisation; or

   (d) a legal practitioner, on agreement between the parties.

Subsection 8 stated that the provisions of sections 143 (effect of arbitration awards) and 146 (Exclusion of Arbitration Act) apply to an award made in terms of this section.

Subsection 9 states that the arbitrator must direct what action should be taken in light of the evidence presented and with reference to the criteria of fairness.

Subsection 10 states that a private agency or council can only perform the arbitration functions in terms of this section if they have been accredited for this purpose, and if the employer or employee is not a party to the council.

   b. **Proposed Amendment**
The Amendment Act has changed the heading to “Inquiry by arbitrator”. Where Subsection (1) previously required the employee’s consent as an absolute requirement, the words “or in accordance with a collective agreement” have been inserted. Also, Subsection 1 required the accredited agency or CCMA to conduct arbitration into the allegations. This has been amended so that the agency or CCMA must appoint an arbitrator to conduct an investigation into the allegations. Consequently, throughout the section, reference to “arbitration” has been replaced with reference to an “investigation”.

The words “Any member” in subsection 5 (c) has been deleted. In 5 (d), the words “or if permitted by the arbitrator in accordance with the rules regulating representation at an arbitration before the Commission (CCMA)” have been inserted.

Subsection 8 has been reworded but remains substantively the same, the only exception being a qualifier that sections 143 and 146 will now apply with the changes required by the context.

Subsections 9 and 10 have remained substantively the same, the words “for this purpose” has simply been replaced with “for this arbitration” throughout.

The additional subsections 11 and 12 have been inserted. Subsection 11 states that when an employee in good faith alleges that an inquiry will contravene the Protected Disclosures Act, either party may require an inquiry to be made in terms of this section into the conduct or capacity of the employee. Subsection 12 merely states that a suspension on full pay pending the outcome of the enquiry does not constitute an occupational detriment as contemplated in the Protected Disclosures Act.

c. Impact of amendment

The new heading does not appear to change the intention of the section; an ‘inquiry’ is a more accurate reflection of the procedure prescribed by the section. The amendment to subsection 1 is significant in that it is no longer an absolute requirement that the employee must consent to the inquiry. It appears as if an employer will be entitled to request such an inquiry if the parties are bound by a collective agreement that permits employers to request the enquiry, even if the individual employee in question did not specifically consent to it.

In line with earlier amendments in the Act, the employee is no longer capable of being represented by any other member that belongs to the same registered trade union as him/her. If such an employee is represented by his/her trade union, it must be by an office bearer or official of that trade union.

The new section 11 seeks to protect whistle-blowers from reprisal by their employers. The Protected Disclosures Act seeks to promote whistle-blowing in the workplace by employees where their employers are taking part in unlawful activities. The Act promotes this by making platforms available to report unlawful activities and by protecting the employees from being victimised or intimidated by employers into not disclosing the activities. Section 11 caters for the following situation. Where an employee believes that her employer is requesting an inquiry by an arbitrator/pre-dismissal arbitration because he wants to dismiss or punish her for being a whistle blower, the employee may request the arbitrator to look into the reasons why the employer requested the inquiry. In effect, the employee may request an inquiry into the inquiry by the employer.

Section 12 merely states that a suspension with full pay does not constitute an occupational detriment in terms of the Protected Disclosures Act. An occupational detriment occurs when an employee is subject
to any disciplinary action, dismissed, suspended, demoted, harassed, intimidated, transferred against her will or refused a transfer as a form of punishment for whistle-blowing against the employer. In other words, where an investigation in terms of this section is ongoing, it cannot be regarded as an occupational detriment in itself.

26. Amendment of Section 189A – Dismissals based on operational requirements by employers with more than 50 employees

a. Previous position

Section deals at length with the procedures that need to be complied with when a large company intends to retrench more than 10% of its workforce. The section mandates consultation between the employer and employee in these situations. Subsection 2 (c) specifically makes provision for the consulting parties to agree on a variation of the consultation period.

According to section 19, if a large company’s decision to retrench a number of employees in terms of this section is referred to the labour court, the dismissal will only deemed fair if:

a) The dismissal was to give effect to a requirement based on the employer’s economic, technological, structural or similar needs;

b) The dismissal was operationally justifiable on rational grounds;

c) There was a proper consideration of alternatives; and

d) Selection criteria were fair and objective.

b. Proposed Amendment

An additional point (d) has been added into subsection 2 that prohibits a consulting party from unreasonably refusing to extend the consultation period if that extension is required to ensure meaningful consultation.

Section 19 has been deleted in its entirety.

c. Impact of amendment

The amendment is intended to facilitate meaningful consultation. By prohibiting a party from unreasonably refusing an extension in time, parties are prevented from using the procedures as a mere ‘rubber-stamping’, in other words an either party may not treat the consultation period as a mere waiting period after which the retrenchment can proceed. Meaningful consultation must take place and the consultation process must be extended if necessary.

Subsection 19 previously limited the court’s discretion by providing a closed list of reasons that would permit a large company with 50 plus employees to retrench employees. If the company’s reasons fell outside of those four reasons, it would be deemed an unfair dismissal. Now that the subsection has been deleted, it would seem as if large companies are treated in exactly the same way as small companies with regards to the substantive fairness of dismissals due to the operational requirement of
the employer. The position is therefore regulated by section 189 (7) which simply requires the selection
criteria to be agreed upon by the parties, or if not agreed upon it merely needs to be fair and objective.

27. Amendment of Section 190 – Date of Dismissal

a. Previous position

Section 190(1) states that an employee is dismissed on the date that the contract of employment is
terminated, or on the date that the employee leaves the service of the employer. Subsection (b) deals
with irregular dismissals such as a failure to renew a fixed-term contract or a renewal on less favourable
terms, failure to allow an employee to resume work or an employer’s refusal to reinstate an employee.

b. Proposed Amendment

An additional point (d) is added to subsection 2 which states that if an employer terminates
employment on notice, the employee is deemed to be dismissed on the date when the notice expires, or
if earlier, on the date that all of the employee’s outstanding salary is paid.

c. Impact of amendment

If an employee is dismissed by notice, the date of dismissal is the earlier of the date in the notice or the
date on which all outstanding salary is paid.

28. Amendment of Section 191- Disputes about unfair dismissals and unfair labour practices

a. Previous position

If an employee alleges that she was unfairly dismissed or subjected to an unfair labour practice, the
dispute may be referred to the council if parties fall within the registered scope of the council, or to the
CCMA. According to subsection 5, if the council or commissioner certifies that the dispute remains
unresolved, or if 30 days have passed since the referral, the council or CCMA must arbitrate the dispute.

According to Subsection 12, an employee may refer the dispute to either arbitration or the Labour Court
if she is the only employee dismissed due to the operational requirements of the employer, following on
the consultation period.

b. Proposed Amendment

If the parties agreed to a period in excess of the 30 days stated in subsection 5, the council or CCMA
must wait until the expiration of the agreed time frame before the dispute can be arbitrated.

Subsection 12 is amended to the effect that an employee who is dismissed due to the operational
requirements of the employer may refer a dispute to arbitration or the Labour Court if;

(a) The employer followed a consultation procedure that applied to her only, irrespective if the
procedure complied with section 189;
(b) The employer’s operational requirements led to that employee’s dismissal only; or
(c) The employer employs less than 10 employees, irrespective of how many are dismissed.
c. Impact of amendment

The amendment to section 5 merely gives legal effect to a period agreed upon by the parties. If the parties to a dispute agree to resolve the dispute over a period exceeding 30 days, the amendment compels both parties to honour that agreement as the council or commissioner will not arbitrate the dispute before the agreed time lapses, unless the council or CCMA certified that the dispute remains unresolved.

The amendments to subsection 12 makes it easier for an employee dismissed due to the operational requirements of the employer to access the Labour Court or refer the matter to arbitration. Previously, the employee had to be the only one dismissed and the consultation process had to have been followed. After the amendment, the aggrieved employee need only be the only employee dismissed for that reason or the only employee consulted, or simply works for an employer who employs less than 10 employees. If any of the above 3 conditions are present, the employee can refer the dispute to the Labour Court or for arbitration.

29. Amendment of Sections 198 to 198D – REGULATION OF NON-STANDARD EMPLOYMENT AND GENERAL PROVISIONS

a. Previous Position

Chapter 9 previously held the heading of “GENERAL PROVISIONS”

Prior to the Amendments, the only form of non-standard employment specifically dealt with in section 198 was Temporary Employment Services (TES). A TES is defined in the section as a person who, for reward, procures for or provides to a client other persons who render services or provide work to the client, and who are remunerated by the TES. An independent contractor is specifically excluded from falling under the definition of TES. Although the TES remains the employer, the client as well as the TES are jointly and severally liable for any contravention of the BCEA, a wage agreement concluded in terms of the Wage Act or a collective agreement concluded in a bargaining council or an arbitration award that regulates terms and conditions of employment.

The employment conditions of other non-standard employees are not regulated specifically, and are for all intents and purposes treated the same way as permanent employees.

b. Proposed Amendment

The Heading of Chapter 9 has been changed to “REGULATION OF NON-STANDARD EMPLOYMENT AND GENERAL PROVISIONS”

Temporary Employment Service (TES)

Section 198 has been amended by replacing the reference to the repealed Wage Act with a reference to a sectoral determination in terms of the BCEA. In addition, the words “render services to” have been removed from the definition of a TES.

Substantively, sections 4A to 4F have been inserted to provide more certainty and protection to employees of TES.
Subsection 4 currently makes the client and employer jointly and severally liable towards the employee. 4A gives substance to this position by stating that an employee may institute proceedings against the client, the TES or against both. Similarly, a labour inspector may enforce compliance against the TES, the client or against both and an award made against either the TES of client can be enforced against either.

4B provides for written particulars of employment to be provided to an employee of a TES. This provision will apply to all new TES employees after the commencement of the Amendment Act, for existing employees, the TES has a 3 month window period after which written particulars must be provided to all employees.

4C states that the TES employee’s conditions of service must reflect any legal requirement, collective agreement or sectoral determination that is applicable to the client. 4D states that the applicability of any such conditions on the TES employee must be determined with reference to the sector and area in which the client is engaged.

4E states that a dispute as envisioned in 4D may be made by the Labour Court or an arbitrator, and it may make an appropriate order or award.

4F requires all TES to be registered in terms of the applicable legislation, but a failure to register does not exclude the application of this section.

Section 198 A further regulates the application of section 198. A temporary service in terms of this section means work that does not exceed 3 months or as a substitute for an absent employee (a “temp” as they are often referred to). A definition in a sectoral determination or collective agreement may deviate from the definition and still be regarded as a temporary service. The section is also qualified as it does not apply to employees earning above the threshold set in the BCEA.

Subsection 3 makes an important distinction; if an employee performs a temporary service as defined above, she is an employee of the TES. If not; then she is deemed to be an employee of the client and will be entitled to the same benefits as a permanent employee of that client who performs the same or similar work.

Certain categories of work can be deemed to be temporary work by a collective agreement or by the Minister, after consultation with NEDLAC, through a notice or in a sectoral determination in this order of preference. Once again, employers are given a 3 months window period following the enactment of his Amendment Act after which the provisions of this section will apply regardless of when the employee started work.

Other non-standard forms of employment

198B – Fixed term contracts with employees earning below earning threshold
Definition and application

A fixed term contract for the purposes of this section means employment that terminates on the occurrence of a specific event, the completion of a specific task or project or a fixed date other than the employee’s normal or agreed retirement age. Employees who earn above the threshold prescribed by the BCEA are once again excluded, as are employers who employ less than 10 people or less than 50 people but have been operating for less than 2 years.

Importantly, an employee whose fixed-term contract is permitted by any statute, sectoral determination or collective agreement is also excluded from this section.

Substantive provisions

In terms of subsection 3, an employer will only be justified in employing a person on a fixed term contract that exceeds 3 months if the nature of the work is of a limited or definite duration or if the employer can demonstrate that there is some other justifiable reason for fixing the contract rather than employing the person on a permanent basis.

There are a few statutory exceptions that are deemed to justifiable reasons, these are;

- Replacing another employee absent from work (a temp);
- Employed on account of a temporary increase in work which is not expected to last longer than 12 months;
- A student or recent graduate employed for training or work experience;
- A person employed exclusively to work on a project;
- A non-citizen with a limited duration work permit;
- Seasonal work;
- A job creation scheme;
- A person employed in a position funded by an external source for a limited period;
- A person who has reached retirement age.

Where an employer can justify a fixed term contract that exceeds 3 months either generally as in subsection 3, or if it falls under an automatic exception in subsection 4, subsection 8 states that the employee “must not be treated less favourably” than a permanent employee performing the same or similar work, unless there is a justifiable reason for different treatment.

The resulting position can be summarised as follows; section 198B creates a presumption of permanent employment where a fixed-term contract exceeds 3 months in length. The wording of the provision makes it clear that all employees employed in terms of a fixed-term contract exceeding 3 months are regarded as permanent employees unless the employer can justify the extended time period because the nature of the work is limited, or for some other justifiable reason. If the employee falls within a category listed in subsection 4, the employer is deemed to have justified it.

Where the employer successfully justifies the contract, that employee can continue to be employed on a fixed-term basis. However despite the above, when that employee works for longer than 3 months she
automatically becomes entitled to receive the same pay and benefits as a corresponding permanent employee who does the same or similar work unless there is a justifiable reason for different treatment.

Fixed contract employees are also entitled to written particulars of employment and must receive an equal opportunity to apply for a permanent post when it becomes available. Also, persons employed on a fixed term contract in excess of 24 months to work exclusively on a project that has a limited duration must be paid out 1 week’s pay for every year worked at the end of their contracts.

Any employee who has been working for longer than 3 months on a fixed-term contract at the time when this provision is enacted will be entitled to equal pay and benefits but they will not be entitled to back pay if they have already worked more than 3 months on a fixed-term contract when this provision comes into operation.

Section 198 – Part time employees

Part time employees are afforded several of the same rights as TES employees and fixed-contract employees, namely that they must receive equal treatment to permanent employees. This requirement becomes binding on the 18th of November, 2014 for employees who were already employed when the Amendment Act came into operation.

A part time employee is defined as an employee who is remunerated wholly or partly by reference to the time that the employee works and who work less hours than a full time employee. Employees earning above the BCEA threshold are excluded as well as employees at a workplace with less than 10 employees, or less than 50 but the business has been operating for less than 2 years.

c. Impact of Amendment

The amended heading reflects the intention of the legislature and the importance attached to formalising the employment of non-standard employees. In addition, the amendments regarding TES and Temporary employees are self explanatory. For the purposes of this section the focus will be on the impact that the amendments will have on other forms of non-standard employment such as fixed-term contract workers.

Although there are still some reservations about the legality of it, it seems clear from the explanatory memorandum that the Department intends to extend the same benefits and pay enjoyed by permanent employees to fixed-term contract employees doing the same or similar work. After a period of three months, whether they are deemed permanent employees or justified as fixed-term employees, their pay and benefits would need to be adjusted unless the employer can justify different treatment.

In the agricultural sector, the nature of the work is such that the demand for labour fluctuates dramatically between seasons. The overwhelming majority of farmers cannot afford to employ enough workers on a permanent basis to satisfy the demand for labour during the harvesting season. As a result, fixed-term contracts for seasonal workers form an integral part of employment in the agricultural sector.

Seasonal workers are often employed for a period exceeding 3 months. There is a strong possibility that an employer can justify a fixed-term contract exceeding 3 months for seasonal fruit-picker for example, because the nature of the work (fruit picking) is limited (by the harvest season). Fortunately, seasonal
workers are specifically listed in subsection 4 so an employer is automatically justified in employing seasonal workers on a fixed-term contract exceeding 3 months.

Farm workers, including seasonal workers, are covered by a sectoral determination that regulates minimum wages, deductions and housing standards amongst other things. The sectoral determination only prescribes minimum conditions of employment, not actual conditions of employment. Several employers provide their long serving employees with more favourable remuneration and benefits. According to section 198(B)(8)(a) an employee employed on a fixed term contract for more than three months (or any other period determined by a sectoral determination or collective agreement concluded at a bargaining council) must be treated on the whole not less favourably than an employee on an indefinite contract performing the same or similar work, unless there is a justifiable reason for treating the employee differently. What will be regarded as constituting “on the whole not less favourably” remains to be seen and will need to be clarified by case law.

There is however an important proviso to this section; employees doing the same work must not be treated less favourably than an employee employed on a permanent basis performing the same or similar work, unless there is a justifiable reason for different treatment. A cue could be taken from the BCEA. The BCEA allows an employer to discriminate with regards to remuneration on grounds such as seniority, experience, skills and performance. Even though an experienced or more skilled employee may perform the same work, the BCEA allows an employer to reward an employee and pay him more for his services as he has more to offer in that position. An employer is therefore justified in giving a higher rate of remuneration to such an employee, despite being assigned the same work as junior employees. These are examples recognised by the BCEA where an employer is justified in treating employees on the same job level differently. These grounds could conceivably be regarded as justifiable reasons for different treatment between permanent employees and employees on with a fixed-term contract that exceeds 3 months. Justifiable reasons for different treatment includes where different treatment is a result of the application of a system that takes into account:

- Seniority, experience, or length of service
- Merit
- The quality or quantity of work performed
- Any other criteria of a similar nature not excluded by Employment Equity Act

Insertion of Section 198D – General provisions applicable to section 198A to 198C

d. Proposed Amendment

Section 198D states that any dispute arising from the interpretation or application of sections 198A, B & C may be referred to the CCMA or a bargaining council for conciliation, thereafter for arbitration.

Importantly, the section states that for the purposes of sections 198A(5), 198B(3) and 198C(3)(a), a justifiable reason includes different treatment as a result of:

a) Seniority, experience or length of service;
b) Merit;
c) Quality or quantity of work performed;
d) Any other criteria of a similar nature

That is not prohibited by section 6(1) of the BCEA.

Furthermore, the dispute must be referred in writing within 6 months and a copy of the referral must be served on every party to the dispute. If the dispute remains unsolved for 90 days after the conciliation, it may be referred to arbitration, although the time period may be extended on good cause shown.

e. Impact of Amendment

The qualification in 198D(2) goes some way in assisting an employer to justify a fixed-term contract for an employee as it gives an open list of recognised, reasonable grounds. Unfortunately, it does not appear to apply to section 198B(8), which states that fixed-term contract employees must not be treated less favourably (in terms of remuneration and benefits) than permanent employees.

The remainder of the subsections deal with procedural aspects to a dispute in terms of the relevant sections.

Employment Equity Amendment Act

30. Amendment of Section 1 – Definitions

a. Previous position

- A “designated employer” was previously defined as an employer who either employs more than 50 people or less than 50 people but has an annual turnover equal to or greater to a small business in terms of schedule 4. It also includes a municipality and an organ of state but excludes local spheres of government, the SANDF, secret service or an employer bound by a collective agreement.

- A “designated group” previously only included black people, women and people with disabilities.

- “Serve” or “submit” was in terms of the definition limited to delivery by hand, registered post, or electronic communication that can be printed out.

b. Amendment

- Besides the amending the section so that local spheres of government are no longer excluded, schedule 4 has been amended to set new thresholds for employers who employ less than 50 people. All thresholds have been trebled.
• “designated group” has now been qualified, it only refers to black/female/disabled people who became citizens by birth, decent, or by naturalisation before 27 April 1994 or were not allowed to do so by apartheid policies.

• The minister can now make regulations regarding manners of service or submission.

  c. Impact of Amendment

• The amendment has adjusted the threshold for agriculture form R2 million per year to R6 million. This means that an employer will in the agricultural sector will qualify as a “designated employer” if he employees 50 people or more, or if he employs less than 50 people but has an annual turnover of R6 million or more. The adjustment is suggested to be largely in line with inflation.

• Employment equity will now no longer apply to people who were not actually affected by apartheid. For example, a foreigner, irrespective of race, gender or disability, will not qualify for EE. This provision is intended to prevent employer from satisfying their EE requirements by hiring black people from other countries. There are however concerns that an able bodied white male will not be treated more favourably than a foreigner because they both do not contribute towards EE.

31. Amendment of Section 2 – Purpose of this Act

  a. Previous position

Section 2 included as a purpose the promotion of affirmative action to ensure equitable representation in all levels and categories of work.

  b. Amendment

The Words “categories” has been deleted.

  c. Impact of Amendment

32. Amendment of Section 6 – Prohibition of Unfair Discrimination

  a. Previous position

• Subsection 1 prohibited unfair discrimination against an employee in any policy or practice on any of the grounds listed in section 9 (3) of the Constitution.

  b. Amendment

• In addition to the stated grounds, an employer can now no longer discriminate unfairly on “any other arbitrary ground”.

• A new section 4 has been added which states that discrimination in pay based on a listed ground between employees doing the same or similar work is considered to be unfair. The Minister may prescribe criteria by which to determine what similar work or work of equal value is.
c. Impact of Amendment

- The effect of this amendment is unclear; the department apparently felt that the listed grounds have all been tested and exhausted in court cases, hence the generalised prohibition. This clause does bring in some uncertainty as to what grounds would be arbitrary or not? The ground should however not really matter as the Constitution does not allow the arbitrary limitation of a person’s fundamental right to equality in any event. If there is no purpose for the limitation for example, then irrespective of the ground, it would probably not pass constitutional muster.

- In line with the amendments to the LRA and BCEA, this provision is intended to bring in the concept of equal pay for equal work. In order to achieve this, differing pay for equal work based on a restricted ground is deemed to be unfair discrimination. Our previous comments on the topic are equally relevant here. One should be able to pay workers who do the same work different amounts based on their relative skill, experience etc. This provision will not necessarily prohibit this as skills, experience etc are not prohibited grounds. The only prohibited ground that may cause a problem is age, but only if an employer regards age as an indication of experience.

33. Amendment of Section 8 – Psychological testing and other similar testing

a. Previous position

Psychometric testing has to comply with three prerequisites; namely it has to be scientifically shown to be valid and reliable, can be applied fairly and is not biased against any group or employee.

b. Amendment

A fourth requirement is introduced; it must now be certified by the HPCSA.

c. Impact of Amendment

34. Amendment of Section 10 – Disputes concerning this chapter

a. Previous position

In terms of section 10, any dispute other than a disputed dismissal can be referred to the CCMA if the parties consent to it. If conciliation in the CCMA cannot solve the matter, either party can refer the matter to the labour court, or arbitration if both parties agree.

b. Amendment

A provision has been introduced allowing an employee to refer an alleged sexual harassment matter to the CCMA, in addition, if the employee earns less than the amount prescribed by the Minister in terms of section 6 (3) of the BCEA, then he/she can refer any matter to the CCMA. An award made by the
CCMA on these matters may be taken to the Labour Court on appeal within 14 days. Non compliance with the time period can be condoned on good cause shown.

c. Impact of Amendment

The new provisions facilitate cheaper and quicker dispute resolution for vulnerable employees. It seems that an employee alleging sexual harassment is afforded special to permission to refer the matter directly. Also, employees earning less than the prescribed amount are allowed to refer a matter to the CCMA irrespective of the nature of the dispute, this is presumably done to allow employees who cannot afford legal representation in the Labour Court a chance to resolve labour issues through the CCMA. An award made can be taken to the Labour Court on Appeal.

35. Amendment of Section 11 – Burden of Proof

a. Previous position

Whenever unfair discrimination is alleged, it is presumed to be unfair and the employer has the burden to prove that it was fair.

b. Amendment

This section has been qualified and expanded on. When unfair discrimination is alleged based on a listed ground; the employer must now prove that it either did not happen, or that it was fair and justifiable. However where it is not based on a listed ground but simply on an ‘arbitrary ground’, the complainant must prove that the conduct is not rational, amounts to discrimination, and is not fair.

c. Impact of Amendment

This amendment was reportedly agreed to by all of the social partners at NEDLAC. The amendment does not substantially alter the previous position because the employer still has the onus to prove that discrimination on a listed ground was fair. It merely regulates the new ‘arbitrary ground’ introduced by this act. In other words, if the employee cannot identify on what ground he/she was discriminated against or if the ground does not fall within one of the grounds that existed previously, the employee must prove that it was unfair.

36. Amendment of Sections 15 - 19 – Affirmative Action measures

a. Previous position

Section 15 mandates affirmative action measures to ensure that suitably qualified persons from designated groups have equal opportunities and are equitably represented in all occupational categories and levels in the workforce of a designated employer. Sections 16 – 19 regulate this process by providing for consultation, disclosure of information and analysis.

b. Amendment

All reference to ‘categories’ have been removed.

c. Impact of Amendment
Previously, designated employers has to specify the demographics in their company/organisation according to the level where they were employed, for example middle management, top management etc, as well as indicate the demographics in different categories such as clerical, technical, professional etc. This second category has now been removed. As a result, employers will have to reassess the horizontal structuring of their organisation so as to ensure maximum representivity of designated groups on the desired levels only. In other words, the Department will now only consider the representative numbers on each level in order to arrive at a BEE score. It will no longer matter how many employees from a designated group are employed to do clerical, technical, professional work etc, it only matters at which level of management the employees in question are.

37. Amendment of Section 20 & 21 – Employment Equity Plans and the reporting thereof

a. Previous position

• Section 20 mandates all designated employers to prepare and submit an employment equity plan wherein the state of the employer’s affirmative action, the objectives and means by which to achieve the objectives must be stated.

• The Act previously made a distinction between designated employers that employed 150 or more people, and those that employed fewer that 150 (between 149 and 50 or less than 50 if it’s turn over exceeds the threshold). It used to be the position that the larger designated employer had to prepare an employment equity report and submit it to the DG of Labour every year, whilst the smaller designated employer only had to do so every second year. The annual or biannual reports have to be submitted on the first working day of October.

b. Amendment

• The new section 20 (7) introduces a fine where a designated employer fails to prepare or implement an employment equity plan. The amended schedule 1 imposes prescribes a fine that is the greater of R1,5 million or 2% annual turnover for a first contravention, R1,8 million or 4% if an employer has failed to prepare or implement a plan for the 2nd time, R2,1 million or 6% if the employer fails do so twice within 3 years or if the employer has also contravened another provision in the Act within the previous 12 months, R 2,4 million or 8% if the employer fails 3 times within 3 years, or R2,7 million or 10% if the employers fails to do so 4 times within 3 years.

• All designated employers, irrespective of whether they employ more or less than 150 employees, must now submit a report to the DG of Labour every year.

• Where an employer becomes a designated employer between the last day of April and the first day of October, that employer need only submit a plan the following year.

• If an employer cannot due to good reason submit a report on time, he must notify the DG in writing before the last day of that preceding August stating reasons why he will not be able to comply.
• The DG will be able to apply to the Labour Court to impose a fine as stated above if the employer fails to submit a report, fails to notify the DG with reasons why he will not be able to comply, or if the reasons are false or invalid.

c. Impact of Amendment

These amendments greatly strengthen the Department of Labour’s powers to force implementation of employment equity. The distinction between designated employers who employ less or more than 150 employees have been done away with. The new position is that all designated employers must have an employment equity plan and must submit an employment equity report with the prescribed content to the DG of Labour on the 1st of October every year. Failure to do so can result in extraordinarily high fines varying between R1,5 million or 2% annual turnover and R2,7 million or 10% annual turnover, whichever is the greatest. If there are valid reasons why an employer will not be able to submit a report in time, it is crucial that this is communicated to the DG in writing by the end of August in any specific year. At this stage it is not clear what reasons will be regarded as valid, but if there are any doubts then a labour law practitioner should be consulted because the same exorbitant fines can be levied if the reasons supplied are not valid.

38. Amendment of Section 27 – Income differentials

a. Previous position

Section 27 states that a designated employer who submit an employment equity report must also submit a statement to the Department of Labour detailing the remuneration and benefits afforded to employees in each employment category and level. Where the discrepancies in remuneration are disproportionately large, the employer must take measures to remedy this and the Employment Equality Commission may conduct investigations to this effect and advise the Minister accordingly.

b. Amendment

An employer now only needs to submit a statement of the remuneration and benefits of each level, and no longer each category. Where previously an employer only needed to take measures to remedy disproportionate levels of remuneration, he now needs to take steps where there appears to be unfair discrimination regarding the conditions of employment. In other words, where the benefits received are also disproportional between levels, the employer must remedy this.

c. Impact of Amendment

Where an employer submits a statement to the Department of Labour along with the Employment Equity report, the employer now only needs to state the pay and benefits received in the different levels of the company (middle and top management for example), and no longer the different categories of employees (clerical, technical, professional etc). However, where there is a large discrepancy in pay or benefits between different levels to the extent where it may constitute unfair discrimination, an employer must indicate what steps are being taken to remedy the situation.

39. Amendment of Section 36 – Undertaking to comply
a. Previous position

The section mandates a labour inspector to enter into a written undertaking with a designated employer who has failed to consult with his employees regarding affirmative action, fails to inform his employees, keep records assign a senior manager to implementing affirmative action or fails to submit the required reports and employment equity plan.

b. Amendment

The affirmative action provisions have been amended to remove all distinctions between large and small designated employers in that all designated employers have to submit a report each year. This section has subsequently been amended to reflect this change.

In addition, the word ‘must’ has been replaced with ‘may’, so that the provision now reads; a labour inspector may request and obtain a written undertaking...

Finally, a new sub-clause 2 has been inserted that allows the DG of Labour to make an application to the Labour Court to have a written undertaking made an order of court if the designated employer does not comply with the undertaking within the agreed upon timeframe.

c. Impact of Amendment

The word ‘may’ means that a labour inspector is given discretion whether or not he wished to first obtain a written undertaking from the employer, or if he wants to proceed directly to issuing a compliance order. The effect of this amendment is that a designated employer does not have the right to insist on a written undertaking to comply; instead the labour inspector can proceed directly to the more stringent enforcement mechanisms provided for.

Where a labour inspector elects to enter into a written undertaking with a designated employer and that employer fails to honour the undertaking within the time agreed to by the parties, the undertaking can be made an order of court. If the employer still fails to comply with this order, then he or she will be committing the crime of contempt of court.

40. Amendment of Section 37 – Compliance orders

a. Previous position

Previously, a compliance order could only be issued if the designated employer refused to enter into a written undertaking or did so but failed to comply with it.

Previously, the labour inspector herself needed to serve the compliance order on the designated employer.

Previously, the only defence for not complying with a compliance order within the prescribed timeframe was the fact that an appeal had been lodged with DG.

b. Amendment
In light of the fact that a labour inspector now has discretion whether or not to enter into a written agreement, the grounds permitting a labour inspector to issue a compliance order has been amended. Unlike before, it is no longer a requirement that the labour inspector attempted to obtain a compliance through a written undertaking. Instead, a labour inspector can now merely issue a compliance order if a designated employer has failed to comply with sections 16, 17, 19, 22, 24, 25 or 26.

The compliance order can be served in accordance with the Act; it need no longer be served by the labour inspector personally.

The defence has been removed because an employer’s right to appeal a compliance order to the DG has been done away with.

c. Impact of Amendment

Previously, a designated employer was afforded two chances to rectify his mistake. Firstly through a written undertaking and if he defaults on this, then through a compliance order, after which it can be made an order of court if the compliance order is not heeded, hence the employer had two chances.

This amendment read together with the amendment to section 36 allows affords a designated employer only one chance to rectify his mistake before compliance is sought. If the designated employer is offered a chance and enters into a written undertaking, then as soon as he defaults the Department of Labour can enforce it through the Labour Court. Alternatively, the labour inspector may issue a compliance order directly at the first instance where the employer failed to comply. If the designated employer does not heed the compliance order, it can be made an order of the Labour Court.

As stated above, the amendments are incidental to the fact that an employer’s right to appeal a compliance order to the DG has been done away with. This means that the DG can approach the Labour Court to make the compliance order an order of court if the time has elapsed and the employer has not rectified the mistake. The right to appeal is dealt with in more detail elsewhere.

41. Repeal of Sections 39 and 40 – Objections against compliance order and Appeal from Compliance order.

a. Previous position

As with the corresponding sections in the BCEA, section 39 previously allowed a designated employer to object to a compliance order by lodging an objection with the DG. The DG could amend or rescind the compliance order or reject the complaint and order the employer to comply within a certain time period, failing which the DG could approach the Labour Court to make his order an order of court. If the designated employer’s objection to the DG is unsuccessful, he could appeal to the Labour Court by virtue of section 40.

b. Amendment

The owner’s right to object to a compliance order has been done away with, as has his ability to appeal to the Labour Court if his objection to the DG is not successful.

c. Impact of Amendment
These two key provisions have not been replaced with any appeal mechanisms. The result is that the labour inspector is left with entirely draconian powers. Firstly, he can decide whether or not the employer should be afforded the opportunity to enter into a written undertaking to comply or if a compliance order should be issued straight away. Where a compliance order is issued, the employer will be punished with a court order if he does not rectify the deemed problem within a certain time. It does not matter whether or not the employer had a good reason not to comply because he can no longer object to the DG nor appeal to court on the merits. In other words, the labour inspector can decide that an employer is guilty of contravening the Act by failing to satisfy his duties and the employer cannot object or appeal the decision. In addition, there is not even an obligation on the labour inspector to hear the employer’s side of the story. These powers are draconian and may offend the constitutional principle that both sides have the right to be heard.

Issuing a compliance order will qualify as administrative action in terms of the PAJA, however this is no substitution for appeal because the merits of the matter cannot be decided upon in review proceedings. During review proceedings, the court can merely look at lawfulness, procedural fairness or the reasonableness of the decision. If there is a justifiable reason why the employer could not comply with his duties under the Act, the court cannot hear it sitting in review proceedings if it falls outside of the 3 listed grounds. With no other avenue, the employer will simply have to be punished without being proven to be in the wrong.

According to the discussions in the portfolio committee, the Department indicated that it is their job to respond to letters and queries so even though there is no longer a formal appeal and objection structure, a designated employer must still write to the DG and explain why he was not able to comply. It is in both the Department’s and employer’s interests to avoid panelising employers who have legitimate reason why they could not comply.

42. Amendment of Section 42 – Assessment of compliance

a. Previous position

Section 42 gives guidelines to the DG of Labour and any other person implementing the Act on how to assess if an employer is in fact complying with his Employment Equity Plan. Amongst the factors, the DG must look at the extent to which suitably qualified people from designated groups are equitably represented in each category an level of the company taking into consideration;

- The demographic profile of the national and regional economically active population;
- The pool of suitably qualified people from which the employer can choose;
- Economic and financial factors relevant to the sector;
- Present and anticipated economic and financial circumstances of the employer;
- Number of present and planned vacancies that exist in the various categories and levels.

One can also look at the progress made by other designated employers operating under comparable circumstances in the same sector. Also, the efforts made by the employer to implement his employment equity plan, the extent to which the designated employer has eliminated employment barriers for people from designated groups and any other prescribed factor.

b. Amendment
In considering the extent to which suitably qualified people from designated groups are equitably represented, the DG can now only have regard at the demographic profile of the national and regional economically active population. All the other factors that may influence representation such as the pool of suitably qualified people, economic realities of the sector and employer, as well as the number of present and planned vacancies must be disregarded.

The DG can also no longer judge an employer’s compliance by looking at the progress that other employers in the sector have made. Instead, the DG must look at what steps the employer has made to train suitably qualified people from designated groups. The DG can however look at the steps taken by an employer to appoint and promote suitably qualified persons from designated groups.

c. Impact of Amendment

The amendment indicates that the Department of Labour can no longer regard it as an excuse to say that an employer cannot employ sufficient people from designated groups in all levels because there is a lack of skilled people from designated groups available to fill that vacancy. If there is a lack of skilled people from designated groups available, then the onus seems to be on the employer to train them, because the amendment does allow the DG to look at the reasonable steps taken to train suitably qualified persons from designated groups.

Similarly, an employer can also no longer defend unequal representation in all levels by citing the financial strain that it would place on the company, or the financial situation that the sector as a whole finds itself in. It is also noticeable that an employer will no longer be judged according to the performance of the sector and other companies in the sector, but solely on compliance with the law. In light of this amendment, it is suggested that an employer should focus on obtaining specialist advice instead of looking at best-practice within the sector or judge itself by the performance of the sector as a whole.

43. Amendment of Section 45 – Failure to comply with the Director-General’s recommendation

a. Previous position

Previously, where an employer failed to comply with a request made by the DG in terms of sections 43(2) or 44(b), the DG could refer the matter to the Labour Court where after the court would sanction the non-compliance in terms of its own structures, procedure and discretion.

b. Amendment

Instead of merely referring the matter to the Labour Court, the DG must now make an application to the Labour Court for an order directing the employer to comply, or if the employer fails to justify his failure to comply then the DG can ask the court to impose a fine in accordance with schedule 1.

If the employer notifies the DG in writing that it does not accept her recommendation, then the DG must institute proceedings within 90 days in the case of a request or 180 days in the case of a recommendation. The employer may only challenge and dispute the DG’s recommendation in the court proceedings instituted against him by the DG.

c. Impact of Amendment
Instead of passing the responsibility to the Labour Court, the DG is now responsible to institute court proceedings against a designated employer who does not comply, or who indicates that he does not accept the DG’s request or recommendation. The employer will still dispute the matter in the Labour Court; the only difference is that the DG will be the other party in the proceeding with the court as the adjudicator instead of the court itself following up on the matter. All the social partners at Nedlac agreed to this amendment.

44. Amendment of Section 48 – Powers of Commission in arbitration proceedings

a. Previous position

Under the previous section 48, the CCMA had an unfettered discretion to make any appropriate arbitration award that gives effect to the provisions of this Act.

b. Amendment

The section has been qualified by the introduction of a subsection 2 which states that an amount of money rewarded to an employee who has been unfairly discriminated against may not exceed the amount stated in the sectoral determination made by the Minister in terms of the BCEA.

c. Impact of Amendment

Where the CCMA finds that an employee has been unfairly discriminated against with regards to pay, the amendment caps the CCMA’s discretion in awarding a monetary arbitration award. The money received may not exceed the amount determined in the sectoral determination. Where previously only the Labour Court could decide on matters relating to sexual harassment, the CCMA can now also make an arbitration award.

45. Amendment of Section 50 – Powers of Labour Court

a. Previous position

Section 46 deals with the Labour Court’s powers in general. Amongst other powers, the court can review the performance of any function provided for in the Act.

b. Amendment

Instead of stating that the court can review the performance of a function in terms of the Act, the amendment states more generally that the court can review an administrative action done in terms of the Act.

In addition, the Amendment Act prescribes that any fine payable in terms of the Act must be paid into the National Revenue Fund.

c. Impact of Amendment

The direct effect on employers is limited. Although the provision has been reworded, it remains substantively the same.
46. Amendment of Section 53 – State contracts

a. Previous position

Section 53 mandates all organs of state to assess an employer’s compliance with chapters 2 and 3 of the Act as a prerequisite to entering into agreements with that employer to furnish supplies or services to that organ of state or to hire or let anything to that organ of state.

b. Amendment

The Amendment Bill introduces a new subsection 5 that allows the Minister to set out factors in a code of good practice that must be taken into consideration when assessing these employers’ compliance with chapter 2 or 3.

c. Impact of Amendment

Employers wishing to enter into supply agreements with organs of state should take notice of the code of good practice and ensure that they comply with chapters 2 and 3.

47. Amendment of Section 55 – Regulations

a. Previous position

The previous section 55 (2) mandated the Minister to make regulations regarding separate and simplified forms and procedures in respect of employers who employ less than 150 people as far as their obligations in terms of sections 19, 20, 21, 25, 26 goes.

b. Amendment

The word “must” have been replaced with “may”.

c. Impact of Amendment

The Minister now has discretion whether or not to promulgate simpler forms and procedures for employees who employ less than 150 people.

48. Amendment of Section 56 – Delegations

a. Previous position

Section 56 generally dealt with the minister’s authority to delegate powers in terms of this Act. Previously, he could not delegate the power to issue a certificate of compliance with chapter 2 or 3 to an employer who wishes to enter into contracts with organs of state.

b. Amendment

The Minister is now allowed to delegate this power.

c. Impact of Amendment
If the Minister delegates the power to issue these certificates, then hopefully the process of assessment prior to a government contract will be quicker.

49. **Amendment of Section 59 & 61 – Breach of confidentiality and obstruction, undue influence and fraud**

   a. **Previous position**
   - Any person who breaches the confidentiality and releases confidential information whilst performing any function in terms of this Act can be fined up to R10 000.
   - A person who obstructs, unduly influences or provides fraudulent information in terms of this Act can be fined up to R10 000.

   b. **Amendment**

   The Fine has been adjusted to R30 000

   c. **Impact of Amendment**

   This adjustment is in line with the adjustment of all fines in the Act.

50. **Insertion of Section 64A – Amendment of annual turnover thresholds in schedule 4**

   a. **Previous position**

   The sector-specific thresholds that would determine if an employer who employs less than 50 people is a ‘designated’ employer or not is listed in schedule 4.

   b. **Amendment**

   The amendment allows the Minister, after consultation with the CCMA, to amend the thresholds by publication in the gazette.

   c. **Impact of Amendment**

   This amendment allows the Minister to easily adjust the thresholds in reaction to inflation. Previously, the schedule to the Act had to be amended by enacting an Amendment Act.

51. **Amendment of Schedule 1 – MAXIMUM PERMISSIBLE FINES THAT MAY BE IMPOSED FOR CONTRAVENTING THIS ACT**

   a. **Previous position**

   The Schedule prescribes a fine according to the frequency of non-compliance with the Act. The more regularly an employer does not comply, the more the fine becomes.

   b. **Amendment**

   The monetary amounts of the fines have been trebled, whilst the percentage turnover has remained the same.
c. Impact of Amendment

The fines are extensive and can in cases of repeated, severe non-compliance exceed the total annual profit of a large designated employer. Employers are therefore encouraged to comply with the Act as the sanctions are very high.