

HIGH-LEVEL BUSA SUBMISSION ON THE NATIONAL MINIMUM WAGE BILL, BASIC CONDITIONS OF EMPLOYMENT AMENDMENT BILL AND LABOUR RELATIONS AMENDMENT BILL

16 MARCH 2018

INTRODUCTION

BUSA welcomes the opportunity to provide input to the Portfolio Committee on Labour on the on the National Minimum Wage, Basic Conditions of Employment and Labour Relations Amendment Bills to Parliament (the Labour Law Amendment Bills).

BUSA is a confederation of business organisations including chambers of commerce and industry, professional associations, corporate associations and unisectoral organisations. It represents a cross spectrum of South African business, large and small across the economy on macro-economic and high-level issues that affect it at national and international levels. BUSA's function is to ensure that business plays a constructive role in the country's economic growth, development and transformation and to create an environment in which businesses of all sizes and in all sectors can thrive, expand and be competitive.

As the principal representative of business in South Africa, BUSA represents the views of its members in a number of national structures and bodies, both statutory and non-statutory.

THE NEDLAC AGREEMENTS

BUSA represented business in the Labour Relations Stability and Wage Inequality processes convened under the Committee of Principals, led by then Deputy President Ramaphosa, and the two technical task teams at the National Economic Development and Labour Council (NEDLAC). The process took over three years and extensive and rigorous engagement gave rise to a robust set of agreements.



The deliberations have been extensive, and a comprehensive package of agreements has been reached between the government, organised labour, community and organised business constituencies within NEDLAC. Significant compromises have been made by all constituencies in order to arrive at the package of agreements. It is important to note that all NEDLAC constituencies have agreed to abide by the agreements that have been reached.

BUSA stands behind the agreements reached as documented in the NEDLAC Report on the Labour Law Amendment Bills (21 November 2018), recognising the importance of labour relations stability; addressing wage inequality and exceptionally low wages in the context of the high levels of unemployment, poverty and inequality in South Africa.

THE NATIONAL MINIMUM WAGE BILL

BUSA has agreed to a level of R20/hour with the understanding that this will not be immediately affordable to many businesses, particularly start-up and smaller businesses that do not enjoy economies of scale and experience. The accessibility and functionality of the exemption system is thus a critical element of the Bill.

While much evidence pointed to the fact that an economic efficient minimum wage would have been much lower than R20/hr, BUSA recognises the important role that the NMW will play in securing a fairer wage income as well as its significant contribution towards addressing wage inequality for the most vulnerable in the labour market. It has agreed to the level of R20/hr recognising that the risk of job loss as a result of the implementation of the NMW Bill must be avoided at all costs. R20/hr will affect at least 40% of low wage earners and potentially put such jobs at risk if NMW is not implemented with the care of a fully functional exemption system, and the phase in periods that have been agreed to.

Critical elements of the agreement, as outlined in the NEDLAC Report include:

- The Bill will apply to workers and employees, thereby expanding the application of the Bill beyond the normal definition of employee. (We note the error that has been acknowledged in this regard by the Department in relation to the version tabled before Parliament).
- The initial NMW will be set at R20/hour, with only lawful deductions permitted. Farm (including Forestry) and Domestic Workers will start at R18/h and R15/hr respectively

and will be brought up to 100% of the NMW over 2 years, unless the evidence indicates a longer timeframe is required. The Expanded Public Works employee minimum earnings will be set at R11 p/h. Learnerships will be excluded.

- The NMW will be reviewed and adjusted with respect to evidence of economic and social factors, taking into account the needs of workers as well as those of businesses. These assessments will be evidence based, based on criteria that is generally endorsed by the ILO and incorporated into legislation of countries globally that have minimum wage systems. In particular, it was agreed that the NMW adjustments will endeavour to retain the value of the NMW, while also taking into account the impact on business, recognising that business is the main driver of employment in the economy. Whilst a progressive improvement on the value of the minimum wage towards a living wage is, of course desirable, this cannot be viewed in isolation and must be seen in the context of other factors, particularly that of job creation and employment levels. Should employment levels increase substantially, dependency ratios will decrease and the level of the national minimum wage could conceivably be adjusted progressively slower.
- A medium term target will be set within 3 years (recognising however, that the setting of a medium target was not recommended by the panel who instead recommended an annual adjustment based on the evidence before the NMW Commission).
- A NMW Commission will be established, consisting of a chairperson and 3 representatives from labour, business and community and 3 independent experts appointed by the Minister of Labour. Any minority position will be recorded accurately in the report of the Commission, including the view of independent experts.

Notwithstanding the agreements reached, business remains concerned about the impact of the NMW Bill on smaller and formalising businesses, as well as new emerging enterprises. The systems and processes need to be implementable for businesses of all sizes and across all sectors of the economy.

Business further submits that there was a drafting oversight in failing to exclude as agreed:

- individuals that are at work purely for the purposes of gaining work experience, and not working, for the purposes of the minimum wage.
- Individuals that work on a voluntary and unpaid basis / for a stipend in a not for profit charitable organisation.

THE BASIC CONDITIONS OF EMPLOYMENT AMENDMENT BILL

- The minimum guarantee of 4 hours pay per shift has been agreed to, even if less hours are worked. The NMW Commission will investigate the feasibility and impact of increasing this to 5 hours, within 2 years of the implementation of the NMW. The minimum of 4 hours will apply up to an earning of between R40 – R60 p/hr to be determined by the Minister. This is based on the recommended by the panel and agreed to as a compromise.
- The Sectoral Determinations will retain all non-wage provisions, with remuneration associated benefits being converted into a % of the NMW so that they will be automatically adjusted with the annual adjustment of the NMW. Minimum wages above that of the NMW will be retained for a 3 year period only, in order to enable collective bargaining thereafter.
- The CCMA will be empowered to conciliate and arbitrate NMW disputes, including scheduling of con-arbs. Importantly there will be a right to appeal the final award. The right to appeal is particularly important given that this process was previously adjudicated by the Court, and significant implications of fines pertaining to the NMW. It is submitted in this regard that the Court can and does effectively use cost orders to penalise employers should they be found to have abused the right to appeal.
- Compliance order provisions have been extended from 1 year to 3 years.
- Exemptions will be user-friendly to ensure that start-ups, small and medium enterprises can access the exemption process. There will be a 30 day turnaround period, and the exemption may be granted for up to 12 months.

Business is most concerned about the functionality of the exemption system as a mechanism to ensure that those businesses that genuinely are unable to afford the NMW are provided with the opportunity to apply for exemption. This is particularly pertinent for start-ups, small and medium enterprises.

Business is moreover concerned that the exemption system should provide relatively easier pathways for exemption for employer organisations and parties to bargaining council agreements. This will strengthen organisations of collective bargaining, thereby indirectly incentivising collective bargaining as required by the Constitutional right to collectively bargain. It is in this regard that business is in favour of a differentiated process of exemptions where

there are bargaining council agreements thereto. Such process would need to be supported by the union and employer parties to the agreement.

Business is also submits that there was a drafting oversight in failing to transfer the functions of the current Employment Conditions Commission in relation to Sectoral Determinations to the NMW Commission, thereby enabling a continued review of Sectoral Determinations and ensuring their relevance and applicability as sectors and work adapts and changes.

THE LABOUR RELATIONS AMENDMENT BILL

The NEDLAC parties agreed to a Labour Relations Accord, LRA Amendments and a Code of Good Practice on Collective Bargaining, Industrial Action and Picketing. The package of agreements is foundational towards the achievement of labour relations stability based on the principles of trust, mutual respect, accountability and respect for the right to strike, alongside other Constitutional rights.

The LRA Amendment Bill provides for a number of important provisions that have been secured by the Nedlac agreements:

- Strengthening collective bargaining by enabling extension of collective agreements on lower representivity requirements by one of the parties to the agreement.
- Strengthening provisions that enable the regulations to set criteria that bargaining councils must take into account, thereby providing the enabling provisions to focus more attention on smaller businesses.
- Enabling renewal and extension of funding agreements in bargaining councils thereby ensuring continuity thereof.
- Providing for compulsory default picketing rules in the absence of an agreement or collective agreement in this regard. The provision ensures that there is no delay in the right to strike, but that no strike should proceed in the absence of picketing rules being established.
- Rectification of provisions relating to minimum services and essential services.
- To make the requirement for a strike ballot to be in secret explicit. To make provision for a transitional process towards compulsory secret balloting for strike action.
- To stipulate the requirement for independence of the registrar of labour relations.

- To make provision for advisory arbitration under circumscribed circumstances permissible in terms of ILO prescripts and the constitution, namely:
 - that the strike or lock-out is no longer functional to collective bargaining because it has continued for a protracted period of time and no resolution of the dispute is imminent;
 - there is an imminent threat that constitutional rights may or are being violated by strikers or their supporters through the threat or use of violence or the threat of or damage to property; or
 - the strike or lock-out causes, or has the imminent potential to cause or exacerbate, an acute local or national crisis affecting the conditions of the normal social and economic functioning of the community or society.
- To enable a period of no more than 5 days extension to the 30 day CCMA conciliation period if necessary to ensure meaningful conciliation.

In reviewing the detailed provisions of the LRA Amendment Bill, there appear to have been some drafting omissions that the parties overlooked at the time. We submit that consideration should be given to the following issues in order to give effect to the NEDLAC agreements that have been reached:

- Advisory arbitration - where there is more than one trade union or more than one employer that is party to the dispute it does not appear to be regulated adequately. For example, what if there is a wage strike involving two unions and/or two employers and one of the employers applies for the appointment of an advisory arbitration in terms of subsection 150A(1). Presumably both unions and both employers are party to the wage dispute and should be entitled (or required) to take part in the advisory arbitration process. In addition, how are assessors appointed in this situation is not explicit. Further, it is not clear what would be the impact in a multi-union environment when one union accepts the award or is deemed to have done so, whether the other unions will or will not be bound by the award.
- Subsection 150D(1) states that the advisory award is binding on a party to the dispute and its members if one or more trade unions that were party to the dispute accept the award or are deemed to have accepted the award and one or more employers' organisations that are party to the dispute accept the award or are deemed to have accepted the award. Subsection 150D(1) states that the advisory award is binding on a

party to the dispute and its members if one or more trade unions that were party to the dispute accept the award or are deemed to have accepted the award and one or more employers' organisations that are party to the dispute accept the award or are deemed to have accepted the award.

- Subsection 150D(1) states that the advisory award is binding on a party to the dispute and its members if one or more trade unions that were party to the dispute accept the award or are deemed to have accepted the award and one or more employers' organisations that are party to the dispute accept the award or are deemed to have accepted the award. There is no corresponding provision whether the employer party to the dispute is an employer, rather than an employers' organisation.
- Subsection 150D(1) states that the advisory award is binding on a party to the dispute and its members if one or more trade unions that were party to the dispute accept the award or are deemed to have accepted the award and one or more employers' organisations that are party to the dispute accept the award or are deemed to have accepted the award.

CONCLUSION

BUSA reiterates its commitment to abide by the NEDLAC agreements having been a party thereto. BUSA submits that it is important to maintain the delicate and interrelated package of compromises that have been reached by the NEDLAC constituencies.

We emphasise that it is important for the amendments to be supported by sufficient resourcing of the institutions that will be required to support their implementation: The Department of Labour Inspectorate; the CCMA; and the NMW Commission in particular. Significant capacity building, awareness raising and communication is required to ensure that the Labour Law Amendments are fully and effectively implemented.

The package of agreements marks a substantial shift in the tone of labour relations and a new era of understanding between labour and business in relation to our respective roles in the labour market. The package of Labour Law Amendments enhances and enriches the Constitutional right to fair labour practices and we believe they will go a long way towards improved workplace relations, higher productivity and competitiveness of South African businesses, regardless of size or sector.