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GOVERNMENT NOTICES • GOEWERMENTSKENNISGEWINGS

DEPARTMENT OF LABOUR

NO. R. 1393

19 DECEMBER 2018

LABOUR RELATIONS AMENDMENT ACT, 2018**REGULATIONS**

I, **MILDRED NELISIWE OLIPHANT** Minister of Labour, hereby under section 208 of the Labour Relations Act, 1995 (Act No. 66 of 1995) and after consulting NEDLAC, made the regulations in the Schedule with effect from **1 January 2019**.

**M N OLIPHANT, MP****MINISTER OF LABOUR**

12/12/2018

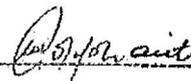
DEPARTEMENT VAN ARBEID

NO. R. 1393

19 DESEMBER 2018

**WYSIGINGS WET OP ARBEIDSVERHOUDINGE, 2018
REGULASIES**

Ek, **MILDRED NELISIWE OLIPHANT**, Minister van Arbeid vaardig hierby, kragtens artikel 208 van die Wet op Arbeidsverhoudinge, 1995 (Wet No. 66 van 1995) en na oorlegpleging met NEOAR, die regulasies in die Bylae hierby uit met ingang van **1 Januarie 2019**.

**M N OLIPHANT, MP
MINISTER VAN ARBEID**

12/12/2018

**REGULATIONS ISSUED IN TERMS OF SECTION 208 OF THE LABOUR
RELATIONS ACT 66 OF 1995**

PICKETING REGULATIONS

1 Definitions

In these regulations, unless the context indicates otherwise-

any word or expression to which a meaning has been assigned in the Labour Relations Act, 1995 (Act 66 of 1995) bears that meaning;

'bargaining council' means the bargaining council with the jurisdiction over the parties to the dispute;

'certificate of non-resolution' means the certificate contemplated in section 64(1)(a)(i) of the Act;

'Code' means any code of good practice published in terms of section 203 of the Act dealing with picketing;

'collective agreement' means any collective agreement that-

- (i) regulates picketing; and
- (ii) is binding on the trade union or employees party to the dispute

'conciliator' means in respect of a dispute that may give rise to a protected strike or lockout and referred to-

- (i) the Commission, a commissioner appointed by it to conciliate the dispute; or
- (ii) a bargaining council, a person appointed by it to conciliate the dispute:

'A dispute' means a dispute that may give rise to a protected strike or lockout and which has been referred to the Commission or a bargaining council in accordance with section 64(1)(a)

'the Act' means the Labour Relations Act, 1995 (Act 66 of 1995).

2 Agreement on picketing rules

- (1) The Commission or bargaining council must notify the parties to a dispute that, if the dispute is not resolved, a trade union may not engage in a picket unless-
 - (a) there is a collective agreement regulating picketing;
 - (b) an agreement on picketing rules is reached in the conciliation proceedings;
or
 - (c) picketing rules are determined by the Commission in terms of section 69(5) of the Act.
- (2) The Commission or bargaining council must in that notice request that the trade union submit a copy of any collective agreement regulating picketing to the conciliator.
- (3) If the appointed conciliator is satisfied that there is no collective agreement that regulates picketing, the conciliator must, before issuing a certificate of non-resolution, attempt to secure an agreement between the parties to the dispute on picketing rules using the default picketing rules as a basis.

3 Determining picketing rules

- (1) If there is no collective agreement and the parties to the dispute do not agree on picketing rules, the commissioner must determine the rules in accordance with the default picketing rules and in doing so must take account of-
 - (a) the particular circumstances of the workplace or other premises where it is intended that the right to picket is to be exercised;
 - (b) any relevant code of good practice; and
 - (c) any representations made by the parties during the course of the conciliation proceedings.
- (2) If the parties to the dispute fail to make representations for the purpose of determining picketing rules or provide the conciliator with the necessary information, the conciliator may-

- (a) in the case of the employer, designate the owner or senior manager of the employer as the person appointed in terms of clause 8.1 of the default picketing rules;
 - (b) in the case of the trade union, not determine the picketing rules until the information required in respect of the union convener and marshals has been submitted to the conciliator.
- (3) The conciliator must determine the picketing rules and issue them at the same time as the certificate of non-resolution is issued to them.

4 Binding nature of the picketing rules

A collective agreement is an agreement contemplated in section 69(4) and regulation 2(3), and picketing rules determined in terms of section 69(5) and regulation 3.

5 Distribution of picketing rules

- (1) If there is a collective agreement or an agreement reached in terms of section 69(4) of the Act and regulation 2(3), the agreement must be submitted by the trade union to-
- (a) the responsible officer appointed in terms of section 2(4) of the Regulation of Gatherings Act, 1993 (Act 205 of 1993);
 - (b) the member of the South African Police Services contemplated in terms of section 2(2) of that Act.
- (2) If the conciliator has determined picketing rules in terms of section 69(5) and regulation 3, the conciliator must in addition to the persons referred to in subregulation (1) give copies of the picketing rules to the parties to the dispute.
- (3) The employer party to the dispute must distribute copies of the picketing rules to-
- (a) its appointed representative and the managers on duty during the strike or lockout;

- (b) its security personnel or any private security company contracted to protect the employer's property and the safety of person on the property; and
 - (c) place copies of the rules on the notice boards to which employees have access.
- (4) The trade union party to the dispute must-
- (a) distribute copies of the picketing rules to its convenors and marshalls; and
 - (b) take the necessary steps to ensure that the convenors, marshals and picketers understand the rules.

DEFAULT PICKETING RULES

Established in terms of section 69(5) of the Labour Relations Act 66 of 1995 (“the LRA”)

NOTES

1. These Rules are default rules applicable if the employer and trade union parties to the dispute fail to conclude an agreement on picketing rules in terms of section 69(4) of the LRA. The Rules are made in terms of section 69(5) of the LRA and the Commissioner must impose these Rules, in the absence of agreement.
2. These Rules are intended to apply to protected pickets only. The Commissioner must ensure that all the requirements in terms of section 69 of the LRA for a lawful picket have been complied with before issuing these Rules, in particular that the picket is authorised.
3. These Rules are generic and intended to cover varying circumstances, including –
 - 3.1. when strike action or picketing has not yet commenced;
 - 3.2. when parties need to revisit picketing rules;
 - 3.3. different kinds of employment and workplaces.
4. These Rules include substantive and procedural rights of the parties deriving from the Act, which the Commissioner or the parties do not have the power to amend.
5. These Rules are intended to apply to secondary pickets as well as primary pickets, subject to the different procedural requirements that may apply.

1 LEGAL CONTEXT

- 1.1 These Rules are drafted in accordance with:
- 1.1.1 Section 17 of the Constitution of the Republic of South Africa, 1996, which guarantees the right to picket peacefully and unarmed;
 - 1.1.2 Section 69 of the LRA, which regulates the right of members and supporters of a registered trade union to picket;
 - 1.1.3 The Code of Good Practice on Collective Bargaining, Industrial Action and Picketing;
- 1.2 Where these Rules are silent, the relevant provisions of the Constitution, LRA and the Codes apply.
- 1.3 The meaning of terms defined in the LRA apply to the use of the terms in these Rules unless the context indicates otherwise.

2 PURPOSE OF THE PICKET

- 2.1 These Rules are determined in terms of section 69(5) of the LRA in the absence of an agreement between the parties to the dispute on picketing rules in respect of an authorised picket –
- 2.1.1 in support of the protected strike commencing / having commenced* on [date]
or
 - 2.1.2 in opposition to a lock-out by the employer commencing / having commenced* on [date]
or
- 2.2 in any protected secondary strike involving employers {name and address of the workplace(s) of those employers}.

3 CIRCUMSTANCES OF WORKPLACE

In establishing these Rules, the following circumstances of the workplace or other premises where pickets are intended have been taken into account:¹

¹ See s 69(5)(a). See also *Shoprite Checkers (Pty) Ltd v Commission for Conciliation, Mediation & Arbitration & others* (2006) 27 ILJ 2681 (LC) at par 31: "The matrix of permissible conduct that evolves ultimately as the picketing rules is a particular permutation that balances logistics, the nature of the business, the industrial

- 3.1 [It is necessary to itemise the particular nature of the circumstances relating to the nature of employment and the workplace that have been taken into account in formulating these rules]

4 LOCATION OF PICKET

- 4.1 The picket may only be held at the following places outside the employer's workplaces:

4.1.1 [details of the place or places within which a picket may be held at the address or addresses of the employer's workplace or workplaces described in Annexure A].

- 4.2 The picket may be held at the following places inside the employer's workplaces if the employer has agreed to a picket being held in those places:

4.2.1 [details of the agreed place or places inside the employer's premises described in Annexure A]

- 4.3 If the employer has not agreed to the picket being held within its premises, the Commissioner may determine that the picket be held within the following places in the premises if the Commissioner considers the employer's refusal to permit a picket inside its premises to be unreasonable:

4.3.1 [details of the place or places inside the employer's premises described in Annexure A]

- 4.4 If picketing is to take place within a shopping mall, business complex or business park in which employers share private or public premises, the Commissioner may, but only after consultation with all interested parties, determine that the picket be held within the following places and subject to such terms as the Commissioner considers reasonable:

4.4.1 [details of the place or places outside the mall, complex or business park described in Annexure A] and

4.4.2 [details of the place or places inside the mall, complex or business park described in Annexure A]

relations history of the enterprise and the union with the impact of the picket so that the rules are determined not too narrowly or too broadly to exacerbate industrial conflict or obstruct the substantive resolution of the dispute."

5 DETAILS OF PICKET

5.1 Date and duration

5.1.1 Picketing may begin at or after [time] on [date] and may continue until the settlement of the dispute, subject to clause 5.2.

5.1.2 Picketing may take place between [times] on every working day for the duration of the strike.

5.1.3 If there is any breach of clauses 4, 5.5 or 6 of these Rules, the trade union must suspend its picket until it has satisfied the Commissioner that it can exercise control over its picket.

5.2 Number of pickets

5.2.1 A maximum of [...] persons may take part in the picket at any given time at each location(s) specified in clause 4 above and set out in Annexure A.²

5.2.2 Only members of the trade union and other employees of the employer may take part in the picket.

6 NATURE AND CONDUCT OF PICKET

6.1 Picketers must at all times conduct themselves in a peaceful, unarmed and lawful manner and not interfere with the constitutional rights of other persons.

6.2 Subject to clause 6.3, picketers may –

6.2.1 carry placards;

6.2.2 hand out pamphlets;

6.2.3 chant slogans, sing and dance;

6.2.4 be addressed by union officials; and

6.2.5 approach and peacefully seek to persuade clients and customers of the employer, members of the public, other employees who are not on strike and replacement workers not to enter the premises and/or to support the strike.

6.3 The Commissioner may limit the activities limited in clause 6.2 in respect of specific locations and detail them in Annexure A.³

² The Commissioner may set different numbers of pickets for particular locations. For example, a Commissioner may set 10 pickets at a time outside a shopping mall or business complex but only two pickets outside the premises of the employer in the mall or complex.

- 6.4 Picketers may not –
- 6.4.1 forcefully prevent clients and customers of the employer, members of the public, other employees who are not on strike and replacement workers from entering or leaving the premises of the employer;
 - 6.4.2 commit any action which may be unlawful, such as intimidating, coercing, threatening or assaulting any person or causing damage to any property;
 - 6.4.3 wear masks; or
 - 6.4.4 have any dangerous weapons or inflammable materials in their possession.
- 6.5 For the purposes of these Rules, dangerous weapons includes the dangerous objects listed in clause 22(2) of the Code of Good Practice on Collective Bargaining and Industrial Action.

7 CONTROL OF PICKETS

- 7.1 The trade union must appoint a member or official as convenor with responsibility to oversee the picket as well as a person to oversee the picket in the absence of the convenor.
- 7.2 The convenor will at all times during the picket have a copy of these Rules in his possession for purposes of reference.
- 7.3 The employer will provide the convenor with the name and contact details, including mobile number, of the person appointed to represent the employer in matters related to the picket.
- 7.4 The trade union will also appoint the following number of marshals to monitor the picket at each location where it is taking place:
- 7.4.1 [number of marshals for each of the locations at which the picket is to take place]
- 7.5 The marshals will –
- 7.5.1 have the telephone numbers of the convenor and of the person appointed to oversee the picket in the absence of the convenor;
 - 7.5.2 wear armbands and/or vests to identify themselves as marshals; and

³ The Commissioner may for example limit the activity of a picket in a shopping mall or business complex to carrying placards and handing out pamphlets.

7.5.3 be present from the start to the end of each day of the picket.

7.6 The names and telephone numbers of the convenor and marshals must be set out in Annexure B.

7.7 Any change to a convenor and marshal must be sent by a text message to the persons listed in Annexure B.

8 EMPLOYER CONDUCT

8.1 The employer must –

8.1.1 appoint a person to liaise with the convenor and marshals on its behalf to ensure compliance with this agreement; and

8.1.2 receive communications as and when requested to do so by the union.

8.2 The employer or any person in authority at the workplace or acting on the employer's behalf may not –

8.2.1 in any way hinder or obstruct the lawful conduct of the picket;

8.2.2 undermine any employee's right to participate in the picket or discipline or threaten to discipline any employee for doing so;

8.2.3 engage in or permit conduct which is provocative or may incite conflict; or

8.2.4 carry a weapon of any kind while in contact with the pickets.

8.3 Ensure that any private security company employed by the employer complies with the requirements relating to such companies under the Code of Good Practice on Collective Bargaining and Industrial Action.

9 PICKETING ON EMPLOYER'S PREMISES

9.1 If picketing is to take place on the employer's premises, the employer must provide the trade union with written confirmation of the health and safety rules to be observed before, during and after the picket.

9.2 The employer must make the following facilities available before the commencement of the picket –

9.2.1 toilet facilities to be used by the participants in the picket;

9.2.2 running water to be used by participants for drinking and hygiene purposes;

- 9.2.3 appropriate shelter within the designated picketing area(s); and
 - 9.2.4 a telephone to be used by the convenor, marshals, shop stewards or other responsible union officials for purposes of ensuring the proper conduct of the picket.
- 9.3 Participants in a picket on the employer's premises shall, in addition to the requirements set out in paragraph 7 above –
- 9.3.1 remain within the designated picketing area(s);
 - 9.3.2 observe the health and safety rules and regulations applicable in the workplace;
 - 9.3.3 refrain from causing any damage to property or allowing any damage to be caused; and
 - 9.3.4 leave the premises and the facilities in the condition in which they found it.

10 DISPUTE RESOLUTION

- 10.1 Any dispute about the interpretation or application of these Rules or any alleged breach thereof shall be dealt with in accordance with section 69(8), (9), (10) and (11) of the LRA. This does not affect any other right that any person may have in terms of the LRA or any other law.
- 10.2 It is recorded that the employer, the union and persons taking part in the picket are subject to the protections and provisions set out in section 67 of the LRA.

11 POLICE INVOLVEMENT

- 11.1 These Rules do not affect the right of any person to ask the South African Police Service or any security organisation responsible for maintaining safety and security at the workplace to investigate or deal with any unlawful conduct or alleged unlawful conduct.
- 11.2 If this happens, the employer and the union undertake to cooperate with the police or security organisation in the performance of their duties and the union undertakes to do everything possible to ensure that its members and supporters will do the same.

12 TERMINATION

These Rules will remain in effect until the settlement of the dispute, the termination of the strike, termination of the picket by the union or until it is terminated or reviewed by mutual agreement, whichever may come first.

ANNEXURE A**DESCRIPTION OF PLACE OR PLACES FOR THE PICKET****Address/es**

1.
2.

Physical location⁴

- | | | |
|---------|---------------------|--------------------------|
| 3. | [number of pickets] | [limitation of activity] |
| 4. | [number of pickets] | [limitation of activity] |

⁴ The physical location may be described in words or drawn or both. So for example the location may be described as 5 metres from the entrance to the employers premises on XX road and extend no more than 2 metres onto the pavement – accompanied with a drawing to that effect.

ANNEXURE B
NAMES AND DETAILS OF PARTICIPANTS

Commissioner

1. [Name, email address and mobile telephone number]

Convenor

2. [Name, designation of status⁵, email address and mobile telephone number]

Employer representative

3. [Name of person appointed in terms of clause 8.1, designation of status, email address and mobile telephone number]

Marshalls

4. [Name, work number and mobile telephone number]
5. [Name, work number and mobile telephone number]
6. [Name, work number and mobile telephone number]
7. [Name, work number and mobile telephone number]

⁵ Whether a trade union official, shop steward or member. If a shop steward or member, then the employee's work number must be included]

DEPARTMENT OF LABOUR

NO. R. 1394

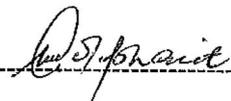
19 DECEMBER 2018

LABOUR RELATIONS ACT, 1995

REPEAL OF CODE OF GOOD PRACTICE ON THE HANDLING OF SEXUAL
HARASSMENT CASES

I, **MILDRED NELISIWE OLIPHANT**, Minister of Labour, hereby withdraw the Code of Good Practice on the Handling of Sexual Harassment Cases given under section 203(2) of the Labour Relations Act, 1995 (Act No. 66 of 1995) and issued by the National Economic Development and Labour Council under section 203(1) of the Act, as published under Government Notice No. R. 1367 of 17 July 1998.

The Code was replaced by Amended Code of Good Practice on the Handling of Sexual Harassment Cases in the Workplace published under Government Notice 1357 of 4 August 2005 in terms of the Employment Equity Act 55 of 1998.



MN OLIPHANT, MP
MINISTER OF LABOUR
12/12/2018

DEPARTMENT OF LABOUR

NO. R. 1395

19 DECEMBER 2018

LABOUR RELATIONS ACT, 1995

WITHDRAW THE LABOUR RELATIONS GUIDELINES ISSUED IN TERMS OF
SECTION 95(8)

I, **MILDRED NELISIWE OLIPHANT**, Minister of Labour, hereby withdraw the guidelines issued in terms of section 95(8) of the Labour Relations Act, 1995 (Act No. 66 of 1995) as published under Government Notice No. R. 1446 of 10 October 2003, with effect from **31 December 2018**.

..........
MN OLIPHANT, MP
MINISTER OF LABOUR
DATE: 12/12/2018...

LABOUR RELATIONS ACT, 1995**GUIDELINES ISSUED IN TERMS OF SECTION 95(8)**

I, **MILDRED NELISIWE OLIPHANT**, Minister of Labour, hereby under section 95(8) of the Labour Relations Act, 1995 (Act No. 66 of 1995) and after consulting NEDLAC, issue the guidelines in the Schedule hereto.



M N OLIPHANT, MP
MINISTER OF
LABOUR

12/12/2018

GUIDELINES ISSUED IN TERMS OF SECTION 95(8) OF THE LABOUR RELATIONS ACT, NO. 66 OF 1995

THE PURPOSE OF THIS DOCUMENT

Purpose

1. This document contains guidelines published by the Minister of Labour, in consultation with Nedlac, that are to be applied by the Registrar of Labour Relations in determining whether an applicant for registration in terms of the Labour Relations Act (LRA) is a genuine trade union or a genuine employers' organisation. In terms of section 95(7) of the Labour Relations Act, the Registrar may only register a trade union or an employers' organisation if the Registrar is satisfied that it is a genuine trade union or a genuine employers' organisation. In addition, in terms of section 106 (2A) of the LRA, the Registrar may cancel the registration of a trade union or an employers' organisation that is not, or has ceased to function as, a genuine trade union or employers' organisation, as the case may be.

Application

2. These guidelines deal separately with trade unions and employers' organisations.

Approach

3. In order to determine whether an organisation is genuine, it will be necessary for the Registrar to examine the actual operation of the organisation. In the case of an applicant, particular attention will have to be paid to the manner in which the organisation was established and formed. In the case of an existing organisation, attention will have to be paid to its actual activities and functioning. In evaluating whether a trade union or employer's organisation is genuine, the Registrar must take into account all relevant factors.
4. These guidelines are not concerned with evaluating whether the constitution of a trade union or employers' organisation complies with section 95(5) of the LRA.

TRADE UNIONS

The Definition of a Trade Union

5. The LRA defines a trade union as follows:

“An association of employees whose principal purpose is to regulate relations between *employees* and *employers*, including any *employers' organisations*.”

6. Therefore, an organisation cannot be registered as a trade union or continue to operate as a registered trade union unless –

- (a) it is *in fact* an association of employees;
- (b) the *principal* purpose of the activities is to regulate relations between its members and their employers (or employers' organisations representing those employers).

It will therefore be necessary to raise and examine the actual process of forming a trade union, its composition and membership and the activities it undertakes on behalf of its members. These issues are examined in greater detail in this document.

Formation of a trade union

7. The process followed to form a trade union can give important indications as to whether an organisation is a genuine trade union.

Key aspects of the process that should be examined include –

- the number of founding members who attended the inaugural meeting(s) to establish the trade union and who completed signed registers indicating their names and place of work;

- the means by which the constitution of the trade union was drafted and adopted;
- the election of an executive committee or council of members and the election of office-bearers.

The crucial issue that must be addressed is whether the formation of a trade union involved employees associating with one another to establish an organisation to regulate relations with their employer(s).

Qualification for membership of a trade union

8. In terms of section 95(5)(b) of the LRA, the constitution of a trade union must prescribe the qualifications for membership. There is no requirement in the LRA that a trade union confine its membership to employees in a particular sector or sectors of the economy or a particular geographical region. However, the failure to place appropriate qualifications on membership may indicate, together with other factors, that the trade union is not a genuine trade union.

Membership of a trade union

9. The LRA does not create any membership threshold that trade unions must meet to register. Nevertheless, the size of the membership may be an indication that a trade union is not a genuine trade union. It is

legitimate for trade unions to restrict their membership to small groups of workers; for instance, the employees of one employer or within one bargaining unit or a small trade or profession. However, an extremely small membership in relation to the number of employees qualified to join, may indicate that the trade union is not a genuine trade union.

10. When evaluating the membership of a trade union, attention should be paid to its history. The fact that the membership of a trade union with a long history of representing its members' interests has declined to small numbers is not an indication in itself that it has ceased to be a genuine trade union.
11. The primary purpose of a trade union is to regulate relations between employees and employers (or employers' organisations). In particular, this includes the regulation of these relationships through collective bargaining. A trade union will only be able to seek organisational rights in terms of the LRA or demand collective bargaining where it recruits members from the employees of particular workplaces or bargaining units. The fact that a trade union has not sought to gain a critical mass of members in any particular workplace or bargaining unit that would allow it to gain organisational rights may be an indication that the trade union is not a genuine trade union.
12. In order to have a primary purpose of regulating relations between employees and employers (or employers' organisations) a trade union must recruit as members employees who are in employment. The fact

that a significant proportion of a trade union's membership only become members after the termination of their employment is an indication, together with other factors, that the trade union is not a genuine trade union.

Activities of the trade union

13. A trade union may seek to regulate relations between its members and their employers and employers' organisations by –
 - (a) seeking and/or obtaining organisational rights in terms of chapter 3 of the LRA;
 - (b) seeking and/or obtaining recognition from employers as the collective bargaining representative of its members;
 - (c) submitting and negotiating in respect of demands on behalf of their members for approved wages and working conditions.

14. Failure to engage in these activities does not in itself indicate that a trade union is not a genuine trade union. There may be reasons why a trade union had not succeeded in gaining organisational rights or obtaining recognition. These may include difficulties in recruiting members and hostility from employers. However, the failure to seek to obtain organisational rights or recognition is a strong indication that the

trade union is not a genuine trade union as these rights provide the basic platform for representing members' interests.

15. It is a legitimate function of a trade union to seek to resolve grievances on behalf of its members, including those who have been dismissed, and it can be expected that all genuine trade unions would undertake activities in this regard. However, the fact that a trade union's activities solely, or to a large extent, consist of referring disputes and cases on behalf of its members to the CCMA, the Labour Court or other courts, is an indication that a trade union is not a genuine trade union.

Independence from employers

16. A trade union may only be registered and continue to operate as a registered trade union if it is independent. In terms of section 95(2), a trade union is not independent if it is under the direct or indirect control of any employer or employers' organisation and is not free of interference or influence of any kind from any employer or employers' organisation. Factors that would indicate that a trade union is not independent are -

- (a) That any of the officials or office-bearers of a trade union are also officials or office-bearers of an employers' organisation;

- (b) That the trade union operates from the same premises or shares facilities with an employers' organisation;
- (c) an employer assisted with the formation of the trade union or that the trade union operates as a "sweetheart" union (i.e. a trade union that exists to further the interests of the employer or to undermine independent trade unions).

Association of employees

17. A trade union must be an association of employees. Indicators that a trade union is an association of employees are –
- (a) the establishment and effective functioning of branches;
 - (b) the holding of regular meetings of members;
 - (c) the election of shop stewards or other trade union representatives in workplaces;
 - (d) the election of members as office-bearers

Association not for gain

18. In terms of section 95(5)(a) of the LRA a trade union must state in its constitution that it is an association not for gain. The purpose of this requirement is to prevent trade unions from being used as vehicles for enriching individuals or as a cover for profit-making businesses. In evaluating whether a trade union is a genuine trade union, it is important to examine the actual financial operation of the trade union. Among the factors that may indicate that a trade union is operating in fact for the gain of certain individuals are the following:

- (a) Unrealistically high salaries and allowances are paid to the officials, office-bearers or employees of the trade union.
- (b) Interest-free or low interest loans are made to officials, office-bearers or employees, and those loans are not repaid.
- (c) Family members of office-bearers or officials are employed by the trade unions.
- (d) Income earned by the trade union is not used for the benefit of the organisation and its members but is paid out to officials, office-bearers or employees.

19. It must be borne in mind that it is not inappropriate for trade unions to pay competitive salaries to attract competent and qualified officials and employees. Likewise, there may be circumstances in which established trade unions may decide to provide loans on favourable terms to their officials, office-bearers or employees.
20. Usually the major source of revenue for trade unions is a subscription usually paid on a monthly basis. In general terms this will be a flat rate payment or a payment expressed as a percentage of the members' income. Trade unions may have other sources of income, such as investments.
21. The financial arrangements made with members of a trade union on behalf of whom litigation, particularly dismissal disputes, is instituted, is an indication of whether the trade union may not be a genuine trade union or may be operating as an association for gain. Where a trade union charges its purported members a substantial proportion of the settlement reached in disputes, this may be an indication that the trade union is not a genuine trade union. This does not mean that it is not appropriate for genuine trade unions to require members to make realistic contributions to the costs of bringing cases on their behalf. However, the fact that a member is required to pay a substantial percentage of the settlement to the union, would be a strong indication that the organisation is not a genuine trade union.

Federation affiliations

22. The fact that a trade union is affiliated to a federation of trade unions, the other members of which are genuine trade unions, is an indicator that the trade union is a genuine trade union.

EMPLOYERS' ORGANISATIONS

Definition of an employers' organisation

23. The LRA defines an employers' organisation as follows:

"Any number of employers associated together for the purpose, whether by itself or with other purposes, of regulating relations between *employers and employees or trade unions*".

24. Therefore, an organisation cannot be registered as an employers' organisation or continue to operate as a registered employers' organisation unless –

- (a) the employers who are members of the organisation have in fact associated together;

(b) the purposes for which they have associated together include regulating relations between employers and employees or trade unions.

25. It will therefore be necessary to examine the actual process of forming an employers' organisation as well as its composition and membership and the activities it undertakes on behalf of its members.

Formation of an employers' organisation

26. The process followed to form an employers' organisation can give important indications as to whether the employers who are members of the organisation have associated together. The key aspect of the process that should be examined include –

- the number and/or size of the founding members who attended the inaugural meeting to establish the employers' organisation;
- the means by which the constitution of the employers' organisation was drafted and adopted;
- the election of executive committee or council members and the election of office-bearers.

27. The crucial issue that must be addressed is whether the formation involved employers associating with one another to establish an employers' organisation.

Qualification for membership of an employers' organisation

28. In terms of section 95(5)(b) of the LRA, the constitution of an employers' organisation must set out the qualifications for admission to membership. There is no requirement in the LRA that an employers' organisation should confine its membership to employers in a particular sector or sectors of the economy or a particular geographical region. However the failure to place appropriate qualifications on membership may be an indication, together with other factors which are discussed below, that the employers' organisation is not a genuine employers' organisation. Where an employers' organisation has extremely wide qualifications for membership, it is appropriate to consider whether its members are in reality associating with each other for the purpose of regulating relations between themselves and their employees or the trade unions.

Membership of an employers' organisation

29. The LRA does not create any membership threshold that employers' organisations must meet to register. Nevertheless, the size of the membership (in terms of number of employers or number of employees

employed by them) may be an indication that the employers' organisation is not a genuine employers' organisation. It is legitimate for employers' organisations to restrict their membership to employers in small sectors of the economy.

Activities of an employers' organisation

30. The operation of an employers' organisation must involve employers associating with one another, *inter alia*, for the purpose of regulating relations between themselves and their employees or the trade unions to which the employees belong. This would be the case where the employer members meet together for the purposes of jointly engaging in collective bargaining with trade unions. The fact that the activities of the employers' organisation consist largely or solely of individual consultations between the employers who are members and officials of the employers' organisation, would be an indication that the employers' organisation is not a genuine employers' organisation.

Independence from trade unions

31. The fact that an employers' organisation is under the direct or indirect control of a trade union is an indication that it is not a genuine employers' organisation. Factors that would indicate that the employers' organisation is under the control of a trade union are -

- (a) that any of the officials or office-bearers of the employers' organisation are officials or office-bearers of a trade union;
- (b) that the employers' organisation operates from the same premises and shares facilities with a trade union.

Association not for gain

32. In terms of section 95(5)(a) of the LRA an employers' organisation must state in its constitution that it is an association not for gain. The purpose of this requirement is to prevent employers' organisations from being used as vehicles for enriching individuals or as a cover for profit-making in business. In evaluating whether an employers' organisation is a genuine employers' organisation, it is important to examine its actual financial operation. Among the factors that may indicate that an employers' organisation is in fact operating for the gain of individuals are the following:

- (a) Unrealistically high salaries or allowances are paid to the officials, office-bearers or employees of the employers' organisation.
- (b) Interest-free or low interest loans are made to officials, office-bearers or employees, and those loans are not repaid.

- (c) Family members of office-bearers or officials are employed by the employers' organisation.
 - (d) Income earned by the employers' organisation is not used for the benefit of the organisation and its members but is paid out to officials, office-bearers or employees.
33. It must be borne in mind that it is not inappropriate for employers' organisations to pay competitive salaries to competent and qualified officials and employees. Likewise, there may be circumstances in which established employers' organisations may decide to provide loans and favourable terms to their officials, office-bearers or employees.
34. Usually the major source of revenue for employers' organisations is likely to be a subscription paid on a regular basis. The financial arrangements made with members of an employers' organisation in respect of litigation, particularly dismissal disputes, may be an indicator whether the employers' organisation is in fact operating for the gain of certain individuals.

DEPARTMENT OF LABOUR

NO. R. 1396

19 DECEMBER 2018

CODE OF GOOD PRACTICE: COLLECTIVE BARGAINING, INDUSTRIAL ACTION AND PICKETING

Notice is hereby given in terms of section 203(2) of the Labour Relations Act, 1995 (Act 66 of 1995), that the National Economic Development and Labour Council (NEDLAC) has issued under section 203(1) of that Act a code of good practice: collective bargaining, industrial action and picketing as set out in the Schedule.



M N OLIPHANT, MP
MINISTER OF LABOUR

12/12/2018

**CODE OF GOOD PRACTICE: COLLECTIVE BARGAINING,
INDUSTRIAL ACTION AND PICKETING**

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PART A: INTRODUCTION

1. Intention and interpretation

- (1) This Code of good practice is intended to provide practical guidance on collective bargaining, the resolution of disputes of mutual interest and the resort to industrial action. It is intended to be a guide to those who engage or want to engage in collective bargaining or who seek to resolve disputes of mutual interest by mediation, conciliation, arbitration or as a means of last resort, industrial action.
- (2) Any person interpreting the Labour Relations Act, 66 of 1995 (Act) must take this Code into account. This includes employees, trade unions, employers, employers' organisations, the registrar of labour relations, conciliators, arbitrators and judges.
- (3) The legal context within which this Code should operate is explained in the text. While every effort is made to ensure that the explanations in the Code are accurate, any interpretation of the law advanced in this Code is always subject to what the courts ultimately determine.
- (4) This Code must not be interpreted as imposing any unconstitutional limitation on the right to strike or the recourse to lockout as provided for in the Act or applied in a way that undermines the right to strike or the employers' recourse to lockout.
- (5) This Code is intentionally general as circumstances may differ and a departure from its norms (subject to the requirements of the Act) may be justified under circumstances such as: the size and nature of the workplace; the nature and form of the collective bargaining relationship; and the nature of the sector.

2. Context

- (1) Violence during strikes and lockouts requires serious measures to prevent violence and to induce a behaviour change in the way employees, employers and the police and private security, engage with each other during a strike or a lockout.
- (2) The role and conduct of the South African Police Services and the private security services in strikes and lockouts needs to be addressed and clarified and brought to the attention of all role players.

- (3) Prolonged and violent strikes have a serious detrimental effect on the strikers, the families of the strikers, the small businesses that provide services in the community to those strikers, the employer, the economy and community. Serious measures are needed to induce a behaviour change in the way that trade unions and employers and employers' organisations engage with each other in the pre-negotiation, negotiation and industrial action phases of collective bargaining.
- (4) The measures must promote orderly and effective collective bargaining and include measures to proactively and constructively resolve disputes prior to industrial action and to explore all genuine options to resolve a dispute as speedily as possible.

3. Purpose

- (1) In line with the Ekurhuleni Declaration¹ and the purpose of the Act, the purpose of this code is to –
- (a) strengthen and promote orderly collective bargaining by-
 - (i) promoting trust and mutual understanding and constructive engagement;
 - (ii) promoting the maximum involvement of workers and worker representatives in negotiations;
 - (b) recognise the importance of workplace democracy and dialogue and promoting employee participation in decision-making in the workplace;
 - (c) promote the proactive, effective, constructive and speedy resolution of labour disputes;
 - (d) promote the peaceful resort to a strike or a lockout free of intimidation and violence; and
 - (e) proactively promote steps to avoid or prevent prolonged or violent strikes and lockouts.

¹ The Declaration signed by the NEDLAC constituencies on 4 November 2014 at Ekurhuleni, Gauteng Province.

PART B: COLLECTIVE BARGAINING

4. Collective bargaining and disputes of mutual interest

- (1) Collective bargaining is a voluntary process in which organised labour in the form of trade unions and employers or employers' organisations negotiate collective agreements with each other to determine wages, terms and conditions of employment or other matters of mutual interest. The collective bargaining process may be established institutionally, by agreement or in practice.
- (2) The Act provides an *institutional* form for sectoral bargaining in the form of bargaining councils by providing machinery for the voluntary establishment of a bargaining council by trade unions and employer organisations in a sector and their registration as such by the Registrar of Labour Relations if their constitution provides for the scope, membership, governance, the negotiation of collective agreements and dispute procedures in accordance with the Act.
- (3) The Act provides for collective bargaining by *agreement* in a number of ways:
 - (a) It specifically empowers bargaining councils to determine by way of a collective agreement what matters for collective bargaining may be devolved to the level of the workplace.
 - (b) It permits multi-employer bargaining arrangements and provides for the enforceability of collective agreements entered into in such arrangements.
 - (c) It permits collective bargaining at the level of the workplace and the enforceability of collective agreements at this level. The typical form is the recognition agreement which includes a negotiation and dispute procedure to regulate the collective bargaining relationship between the employer and the trade union or unions that may affect one or more workplaces of the employer.
 - (d) In circumstances where there is no bargaining council or agreement to bargain, a group of workers or a trade union may bargain collectively as a matter of practice by making a demand on an employer under threat of a strike. Similarly, an employer or employers' organisation may make demands and threaten to unilaterally introduce them under a threat of a lockout. In each case, before any industrial action may be engaged in, the dispute must be referred for conciliation to the Commission for Conciliation Mediation and Arbitration (the CCMA) or to a bargaining council with jurisdiction. The

conciliation of such a dispute is in effect a facilitated exercise in collective bargaining, the object of which, is a settlement agreement (in the case of demands made by or against a group of workers) or a collective agreement (in the case of demands made by or against a trade union).

- (4) There is no constitutional or statutory duty to bargain. Collective bargaining under the Act is voluntary and employers (other than the State) and trade unions are permitted to determine their collective bargaining relationships in the institutional form of bargaining councils at sectoral level (the form promoted by the Act) or by way of a recognition agreement at multi-employer or workplace level. However, once having established a collective bargaining relationship in the form of a bargaining council constitution or a recognition agreement, the parties have thus by agreement implicitly committed themselves to a duty to bargain and the duty to bargain under such circumstances does not arise statutorily but contractually.
- (5) In so far as the State is concerned, although the establishment of a structure of collective bargaining is statutorily determined, its constitution is determined by the State as employer and the trade unions. The duty to bargain, too, does not arise statutorily but contractually from the agreed bargaining council constitution.

5. Fundamental commitments

- (1) The following constitute fundamental commitments on the part of trade unions and their members, trade union federations, employers and employers' organisations for orderly and constructive collective bargaining and peaceful industrial and protest action –
- (a) to promote trust and develop mutual understanding and constructive engagement in their engagements with each other;
- (b) to promote the importance of democracy and dialogue at the level of the workplace;
- (c) to promote maximum participation and accountability in the preparation for, the conduct and the conclusion of negotiations by –
- (i) members and worker representatives of the trade union party to the negotiations in terms of the Act;
- (ii) if represented by an employers' organisation, the members of that organisation;

- (d) to take all the necessary measures to ensure the competence of negotiators appointed to represent the parties to the negotiations;
 - (e) to adhere to the principles of good faith bargaining; and
 - (f) that violence, intimidation, damage to property and the use of dangerous weapons in the pursuit of collective bargaining, industrial action or protest action is condemned in the strongest terms and should not be tolerated in the workplace, on picket lines or in any conduct related or incidental to such industrial and protest action;
 - (g) that dangerous weapons have no place in industrial action and cultural instruments should not be used to intimidate or cause harm;
 - (h) that the parties commit to prioritising and dealing with violence related conduct in industrial and protest action in an expeditious manner.
- (2) In the context of the constitutional right to picket peacefully and unarmed and applying the relevant factors listed in section 3(2) of the Dangerous Weapons Act, 15 of 2013 to determine whether a person intends to use the object as a dangerous weapon, a dangerous weapon is any object that could be used to injure or threaten a person or damage property. In the context of a picket there is no other justifiable use for the possession or display of such an object.
- (3) The relevant factors in the context of a picket listed in section 3(2) of the Dangerous Weapons Act are as follows:
- (a) The place and time where the person is found;
 - (b) The behaviour of the person, including the making of any threat or the display of intimidatory behaviour;
 - (c) The manner in which the object is carried or displayed;
 - (d) Any other relevant factors, including any explanation the person may wish to provide for his or her possession of the object provided that this does not impose an obligation on the person to explain the possession of the object.

6. Promotion of collective bargaining

- (1) ILO Convention 98 on Collective Bargaining requires governments to take measures appropriate to national conditions to encourage and promote the full development and utilisation of machinery for voluntary negotiation between

employers or employers' organisations and workers' organisations, with a view to the regulation of terms and conditions of employment by means of collective agreements.

- (2) The Act promotes collective bargaining in a number of ways by-
 - (a) encouraging collective bargaining at sectoral level by providing a statutory framework for collective bargaining in the form of bargaining councils;
 - (b) permitting collective bargaining in single and multi-employer workplaces;
 - (c) providing for organisational rights at the level of the workplace.
- (3) Nothing in the Act prevents collective bargaining at a national level to set thresholds for collective bargaining at sectoral and workplace levels provided that it is by agreement.
- (4) The Government and the federations of trade unions and employer organisations in NEDLAC undertake to engage on a periodic basis to develop legislative and other measures to promote collective bargaining at centralised, sectoral and workplace levels and to deepen the representativeness of trade unions and employer organisations.

7. Principles of good faith bargaining

- (1) Every trade union, employer, employers' organisation and the negotiators appointed to represent them commit themselves to adhere to the principles of good faith bargaining and mutual respect set out below.
- (2) Disclosure of information is essential for a trade union to effectively engage in collective bargaining. All relevant information should be disclosed to the trade union on request and subject to confidentiality and clause 12 of the Act.
- (3) All demands and responses to those demands from a party should be in writing.
- (4) A party may only add a new demand during the course of negotiations if the new demand is introduced for the purpose of finding a settlement and only with the agreement of the other party.
- (5) An employer should not unilaterally alter terms and conditions of employment during the course of negotiations prior to deadlock being reached in terms of any collectively agreed dispute procedure, failing which, when a period of 30 (thirty)

days has lapsed after the referral of the dispute to the CCMA or Bargaining Council, or a certificate of non-resolution has been issued.

- (6) Negotiations should be conducted in a rational and courteous manner and disruptive or abusive behaviour must be avoided.
- (7) Parties should attend agreed negotiation meetings unless there is a good reason for not attending, in which case the party that cannot attend should give reasonable notice of its non-attendance to avoid wasteful expenditure and inconvenience to the other party or parties to such negotiations.
- (8) A party should engage each other in a constructive manner and not unreasonably conduct itself prior to or during negotiations in a manner that has the effect of unreasonably delaying negotiations by failing to agree dates and times for negotiation meetings, failing to attend agreed meetings, changing negotiators, failing to secure a mandate or refusing to modify demands.
- (9) Parties should be prepared to modify demands and responses during the course of negotiations.
- (10) Parties should endeavour, as far as possible, to ensure that their negotiators remain the same throughout the course of negotiations and that they are properly mandated to modify their demands and responses.
- (11) Mandating processes should be conducted in facilities that are conducive to collective bargaining. Employers should assist this mandating process by providing facilities where possible and time off as per the Act or any collective agreement for trade union officials or worker representatives to meet and if need be ballot members as provided for in the Act. If provided, the trade union should not unreasonably refuse to use the facilities and time off.
- (12) Without interfering with a trade union or employers' organisation's right to communicate with its members as they consider best, the negotiators should endeavour to present the demands or responses provided by the other side as accurately as possible.
- (13) Without interfering with the right of the trade union to communicate with the members of an employers' organisation and an employer with its employees, the trade union or employer should not undermine the bargaining status of union or organisation as the case may be.

- (14) An employer should not bypass a recognised trade union and deal directly with employees before deadlock or a reasonable period after deadlock in respect of the matters that are subject of the negotiations in order to allow the trade union to communicate with employees.
- (15) The parties should consider escalating the negotiations to a higher level of management or union office bearer within their respective organisations to avoid a deadlock and the resort to industrial action through seeking to settle the differences or exploring the possibility of voluntarily referring the dispute to binding or advisory arbitration.
- (16) The parties should remain open to continue negotiations after a dispute has been declared.

8. Development and support for negotiators

- (1) Parties to collective bargaining under the Act commit themselves and their members to develop competent negotiators to engage in collective bargaining by –
 - (a) supporting the establishing of training courses on this Code by recognised training institutions to train negotiators in collective bargaining; and
 - (b) requiring negotiators to undergo such training;
- (2) Each trade union, employer or employers' organisation should identify specific individuals for training and appointment as negotiators.
- (3) Each employer should grant reasonable paid time off for an employee identified as a negotiator in terms of (2) above, unless training for collective bargaining, industrial action and picketing is sufficiently provided for in terms of an existing agreement.
- (4) Negotiators of parties should on a regular basis, either jointly or separately, attend training courses using the same training materials and conducted by recognised training institutions, trade unions or employers' organisations.

9. Preparing for negotiations

- (1) Subject to the democratic procedures contained in the collective agreement or the constitutions of trade unions and employers' organisations, their respective

leaderships should in preparation for the union's or employer or employers' organisations' demands or responses to the extent that it is necessary –

- (a) to conduct proper research into the state of the economy, sector, and ability of individual employers, particularly small, medium and micro-enterprises and new enterprises, the cost of living, the alleviation of poverty and reduction of wage differentials and inequality, and the likely impact of any proposal or response on employment and health, safety or welfare of employees;
 - (b) to determine whether there is a need for disclosure of information in order to prepare a demand or response;
 - (c) to take advice from labour market experts on employment effects of a proposed demand or response;
 - (d) to take advice on settlement rates generally and specific to the sector;
 - (e) to consider whether any demand or response reduces inequality of treatment; and
 - (f) to consider whether the demand or response or the extent of the demand or response cannot be obtained differently through a reconfiguration of the demand or response by linking increases to productivity or eliminating vertical inequality by agreeing to longer term agreements.
- (2) If a trade union considers it necessary for an employer to disclose information for the purpose of formulating its demands, it should request the employer in writing to disclose the information at the earliest opportunity and in accordance with guidelines set out in clause 12 of this Code.
 - (3) In order deal with expectations and introduce a sense of realism on the part of members, the information acquired in the preparation of the demands or responses must be conveyed to members in order that in securing a mandate for negotiations members are fully informed.
 - (4) The parties should formally appoint negotiators for specific negotiations and ensure that they participate in the preparation for negotiations including the formulation of demands or responses and the mandating process.
 - (5) A party should in writing advise other parties to the negotiations of the names of their appointed negotiators.

- (6) Each party should in preparation for negotiations consider the manner in which the negotiations are to be conducted, including whether to appoint and use a facilitator given the history of prior negotiations or the nature of the demands or responses and a timetable for the negotiations.

10. Submission of demands and responses

- (1) A party should submit its demands in writing or in accordance with any agreed negotiation procedure or practice and in good time and well in advance of any established implementation date.
- (2) The submission should include –
- (a) the demand or demands in a clear and concise form;
 - (b) an outline of its demands;
 - (c) any request for or response to a request for the disclosure of relevant information made in terms of this Code;
 - (d) a proposed timetable for the negotiations which should include alternative dates and times for a pre-negotiation meeting; and
 - (e) the names and details of its appointed negotiators.
- (3) The party in receipt of a written demand from a trade union should –
- (a) acknowledge the receipt in writing;
 - (b) inform the other party of when it should in accordance with any agreed negotiation procedure or practice respond to the demands or make demands itself; and
 - (c) agree or propose alternative dates and times for the pre-negotiation meeting.
- (4) A party responding to a demand should submit in writing its response or any demand of its own to the other party and include in its response –
- (a) its response in clear and concise form;
 - (b) any demand it may have of its own;
 - (c) an outline of its response and demands;

- (d) any response or request for disclosure of information made in terms of this Code;
- (e) a response to the proposed timetable for the negotiations; and
- (f) the names and details of its appointed negotiators.

11. Commencement of negotiations

- (1) Subject to any agreed procedures and the nature and size of the bargaining unit, the negotiators should consider holding pre-negotiation meeting/s to –
 - (a) agree to a timetable for the negotiations;
 - (b) decide whether or not to appoint and use a facilitator and if so, agree on a facilitator or request the CCMA or a bargaining council with jurisdiction to appoint a facilitator;
 - (c) consider any request for disclosure of information made in terms of the Act and this Code; and
 - (d) commit themselves to a good faith declaration by signing the model declaration in Schedule A to this Code.
- (2) At the first negotiation meeting, each party should present a full motivation for its demands and responses.

12. Use of facilitators

- (1) Parties to collective bargaining should consider the appointment of a facilitator/s by mutual agreement to facilitate negotiations by –
 - (a) including the appointment and use of facilitators in negotiation procedures contained in bargaining council constitutions and recognition agreements;
 - (b) considering the appointment and use of a facilitator in the preparation for negotiations; and
 - (c) raising the appointment and use of a facilitator with the other party before negotiations commence.
- (2) Although it is advisable for parties to a course of negotiations to appoint a facilitator from the beginning of the negotiations, negotiators should be free to raise the appointment of a facilitator at any time during the course of negotiations

if it could assist the successful conclusion of the negotiations, particularly in order to break a deadlock.

- (3) Facilitators should be appointed to continue facilitation even after a dispute is declared and particularly if one or both the parties to the negotiations engage in industrial action.
- (4) Trade unions, employers and employers' organisations that engage in collective bargaining on a regular basis should consider the appointment of a facilitator or a panel of facilitators to facilitate their negotiations and their relationship from one course of negotiations to the next.

13. Disclosure of information

- (1) Disclosure of information of relevant and credible information is essential for rational collective bargaining and effective consultation at the level of the workplace. It is an essential ingredient for winning cooperation of employees and building a culture of trust.
- (2) Section 16(2) of the Act gives a trade union with majority of employees in the workplace as members the right to require the disclosure of relevant information that should allow the trade union to engage effectively in collective bargaining or consultation. The information has to be relevant to the issues being negotiated or consulted on. So for example the financial information of an employer become relevant if the employer motivates its demand or its refusal to accept a trade union demand on the grounds of its inability to pay or the employer motivates its need to retrench on the grounds of financial difficulties. But not all relevant information needs to be disclosed. Section 16(5) lists four exceptions:
 - (a) Legally privileged information².
 - (b) Information the disclosure of which would entail a contravention of a law or a court order.
 - (c) Personal information concerning an employee without that employee's consent.

² Such as the communications between an employer and its lawyers in respect of any anticipated or pending litigation.

- (d) Confidential information that if disclosed might cause substantial harm to the employer or an employee such as information that may constitute a threat to the employer's security or affect its competitiveness. There are alternatives to the disclosure of such information such as agreeing to an auditor or arbitrator to assess whether the standpoint relied on in the negotiations or the consultations is supported by the information which the employer does not wish to disclose.
- (3) Although the statutory right to disclosure in section 16 is limited to registered trade unions with a majority of the employees in the workplace as members, employers should disclose information in accordance with section 16 to any trade union with which it negotiates at the level of the workplace subject to the ability of the employer party to access the information, and the requisite agreement by the trade union not to disclose confidential information to third parties or to agree to a trusted auditor or arbitrator to have access to the information to determine whether the standpoint that may be relied on in the negotiations or consultations is supported by the information.
- (4) Just as this Code urges the disclosure of credible and relevant information by employers in order to promote rational negotiations, so does it urge trade unions to use the information received responsibly and to take that information into account when formulating demands or responses or when deciding to declare a dispute.

PART C: WORKPLACE DEMOCRACY AND DIALOGUE

14. Object

The object of promoting workplace democracy and dialogue is to develop a culture of mutual respect and trust between those who manage the enterprise and those who work for it. Dialogue, with a view to consulting employees in the decision-making process on issues other than those pertaining to collective bargaining³ should be encouraged.

³ Such as those listed in section 84(1) and 86(1) of the LRA including the restructuring of the workplace, the introduction of new technology and new work methods, changes to the organisation of work, plant

15. Measures to promote employee participation and dialogue in the workplace

- (1) Trade unions, employers and employers' organisations must take the necessary measures to promote workplace democracy and dialogue in the workplace. These measures may, in terms of the Act, include –
- (a) recognising employee representatives elected or appointed by a trade union that the employer recognises or one that represents a significant interest or a substantial number of employees in the workplace;
 - (b) granting reasonable access and facilities to trade union officials of such trade unions;
 - (c) promoting employee and trade union participation in consultative forums such as –
 - (i) health and safety committees under section 19 of the Occupational Health and Safety Act, 85 of 1993 and section 25 of the Mines, Health and Safety Act, 29 of 1996;
 - (ii) employment equity structures contemplated in section 16 of the Employment Equity Act, 55 of 1998;
 - (iii) Skills development forums or related workplace committees, where such structures exist or are established;
 - (iv) workplace forums as contemplated in sections 80 and 81 of the Act;
 - (d) in the absence of a workplace forum contemplated in sections 80 or 81 of the Act –
 - (i) establishing consultative forums in the workplace by collective agreement including a bargaining council agreement;
 - (ii) extending the terms of reference of the health and safety and employment equity structures to include certain of the consultation matters listed in sections 84 and 85 of the Act.

closures, mergers and transfers of ownership, retrenchments, exemptions, production development, disciplinary codes, workplace rules, changes to employer controlled social benefit schemes etc.

- (2) The promotion of employee and trade union involvement in consultative forums should not undermine collective bargaining or existing workplace arrangements. In order to ensure that these forums are not used to by-pass collective bargaining structures and processes, the forums should where appropriate be designed as follows:
- (a) There should be a clear distinction between the structures of collective bargaining (bargaining councils, negotiation procedures in recognition agreements) and the structures of consultative forums which may be elected and inclusive of the different occupational categories irrespective of union membership.
 - (b) There should be a clear distinction between the matters that form the subject of collective bargaining (such as terms and conditions of employment) and the subject matter of consultation such as employment equity plans, health and safety plans, plans to restructure or introduce new technology or work methods, and plans to change the organisation of work. The list of matters set out in sections 84 and 85 of the Act constitute a useful basis for any agreement on what the trade union and the employers wish to include as matters for consultation.
 - (c) There should be a clear understanding that the processes and outcomes of collective bargaining and consultation are different. In collective bargaining, the process is negotiation with the outcome being a collective agreement. In consultation, the process is one of informed discussion with the outcome of ensuring that workers' interests and representations are taken into account in the making of managerial decisions. Although there may be consensus at the end of a consultation process, it is not a collective agreement and a trade union not happy with the outcome remains free to declare a dispute and, after conciliation, call a strike.
- (3) In the absence of a recognised trade union or a trade union representing a substantial number of employees in a workplace, a workers' committee may be established subject to the following:
- (a) It may not be established in order to pre-empt or compete with a trade union representing the employees in the workplace.
 - (b) It should include any trade union representatives elected by union members.

- (c) It should be dissolved if a trade union acquires the right to trade union representatives under section 14 of the Act.

PART D: INDUSTRIAL ACTION: STRIKES AND LOCKOUTS

16. Constitutional context

- (1) The right to engage in collective bargaining and the right of workers and employers to take industrial action is constitutionally protected. The right to engage in collective bargaining is a right that trade unions, employers and employers' organisations share. Workers have the right to strike and the Constitutional Court has held that the right to engage in collective bargaining implicitly recognises the employer's right to exercise some economic power, which may include the right to lockout.
- (2) Like all rights, the right to engage in collective bargaining (including the recourse by employers to exercise economic power) and the right to strike may be limited by legislation provided that the limitation is reasonable and justifiable. The limitations imposed on the right to strike and lockout seek to make a strike or lockout the last resort or unnecessary because of other judicial or arbitral remedies or to protect society from strikes in essential services, the interruption of which may affect the health and safety of the population.
- (3) It is in this context that the right to strike and the recourse to lockout must be understood. Unlike most other rights in the Bill of Rights, the right to strike and the right to lockout is a right to cause economic harm.
- (4) However, prolonged and violent strikes have a serious detrimental effect on the strikers, the families of the strikers, the small businesses that provide services in the community to those strikers, the employer, the economy and community.
- (5) Workers exercising the right to strike or the right to protest action and employers exercising the recourse to a lockout must therefore recognise the constitutional rights of others⁴.

⁴ Constitutional rights include:

i Section 12(1) 'Everyone has the right to freedom and security of the person, which includes the right- ... (c) to be free from all forms of violence from either public or private sources.' This refers to the right of people not to be threatened with or subjected to violence.

ii. Section 16 'Everyone has the right to freedom of expression ... (that) does not extend to (b) incitement of imminent violence; or (c) advocacy of hatred ...' Refers to the right to express oneself during industrial action, but not in a manner that incites violence or constitutes hate speech.

17. Disputes in respect of which industrial action may be exercised

Disputes of right, mutual interest and those involving socio-economic interests

- (1) The Act distinguishes between three kinds of dispute: disputes of right; disputes of mutual interest; and disputes involving the socio-economic interests of workers:
- (a) A dispute of right is a dispute that the Act or other employment laws require to be settled by arbitration or adjudication. An example of a dispute of right is a dispute arising from a contravention of a collective agreement or an employment law such as unfair dismissal, unfair discrimination, and underpayment of wages. It can be described as a dispute concerning existing rights.
- (b) A dispute of mutual interest on the other hand is a dispute concerning employment or labour relations that cannot be resolved through enforcing existing rights. It can be described as a dispute to create new rights. A dispute of mutual interest is the legitimate scope of a collective bargaining agreement and the matters which may legitimately form the subject of a protected strike or lockout.
- (c) A dispute involving the socio-economic interests of workers, permits protest action in matters that extend beyond matters that form the subject matter of collective agreements. These disputes though must be distinguished from purely political strikes which the Act does not afford any protection.
- (2) The distinction between a rights and a mutual interest dispute can be demonstrated by a few examples:
- (a) If an employer pays an employee less than the rate of pay stipulated in a collective agreement or the amount stipulated in an employment law, a

iii. Section 17 'Everyone has the right, peacefully and unarmed, to assemble, to demonstrate, to picket and to present petitions.' This refers to the right of workers to demonstrate and picket in a peaceful and unarmed manner.

iv. Section 18 'Everyone has the right to freedom of association.' This refers to the right of a worker to participate or not to participate in the strike or lockout.

v. Section 25 'No one may be deprived of property except in terms of a law of general application'. This refers to the right not to be threatened with or subjected to damage of property.

vi. Section 23(1) 'Everyone has the right to fair labour practices.' Refers to the right not to be penalised for engaging in a protected strike or lockout.

dispute over the underpayment is a dispute of right that may be referred to the CCMA, a bargaining council or the Labour Court for adjudication.

(b) A dispute of interest on the other hand is a dispute over a demand that the employees or employer has no legal right to, such as a demand for an increase in wages or a change in hours of work. These kinds of dispute can only be resolved by agreement, which may be induced by a threat or the exercise of a strike or lockout. There are two exceptions – disputes of interest in essential services must be referred to arbitration; and the parties to a dispute of interest may by agreement refer the dispute to arbitration. The following are examples of a dispute of interest:

- (i) A dispute over what next year's wages are going to be;
- (ii) A dispute over a new collective agreement or the renewal of an expired agreement;
- (iii) A dispute over shorter working hours or higher overtime rates of pay;
- (iv) A dispute over the introduction of a new shift system.

(3) The distinction between a dispute of mutual interest and a dispute of interest is important because as a rule, the Act limits the right to strike to matters of mutual interest. There are two exceptions. A dispute over organisational rights or a proposed retrenchment in some circumstances may either be determined, on the one hand by the CCMA (organisational rights) or the Labour Court (retrenchment disputes) or, on the other hand, by the exercise of the right to strike. For example, if a registered trade union does not have sufficient or majority representativeness (depending on the nature of the organisational right), it has no statutory right to those organisational rights but the Act specifically permits a trade union to strike—i.e. the creation of a new right, in this case granting a minority trade union an organisational right by collective agreement rather than by operation of statute.

What disputes may form the subject matter of a strike or lockout

(4) Apart from the two exceptions relating to organisational rights and retrenchment in certain circumstances, the dispute must be one of mutual interest. Accordingly, rights disputes (other than the two exceptions) do not constitute matter that can form the subject matter of a protected strike or lockout.

- (5) Not all mutual interest disputes however may form the subject matter of a protected strike or lockout. The Act limits the right to strike and recourse to lockout in respect of the following:
- (a) In breach of a peace clause in a collective agreement;
 - (b) If the trade union and employer or employers' organisation have agreed to refer the dispute to arbitration;
 - (c) If the employees, trade union, employer or employers organisation make an unlawful demand. An unlawful demand for example is a demand by workers that an employer dismiss a fellow employee. That would be unlawful because it would require the employer to contravene the fair dismissal provisions in the Act. Another example is the demand by an employer that employees work longer overtime hours than permitted in the BCEA.

18. Conciliation of mutual interest disputes

- (1) Section 64(1) of the Act requires all disputes of mutual interest that may result in a strike or a lockout to be referred to conciliation. There is one exception – the unilateral change to terms and conditions of employment if an employee or a trade union gives notice not to introduce the alteration or, if introduced, to restore the original terms and conditions.
- (2) The trade union and employer parties to a mutual interest dispute must attend the conciliation meetings convened by the CCMA or the bargaining council with jurisdiction.
- (3) The primary object of the conciliation is to try to resolve the dispute without resort to industrial action. The parties must in good faith endeavour to settle the dispute, failing which, the commissioner or conciliator must propose alternative means to do so, such as arbitration, including advisory arbitration.
- (4) If the parties fail to settle the dispute or agree on an alternative method to resolve it, a secondary object of conciliation is to-
- (a) to record the demands in respect of which the workers, trade union, employer or employers' organisation intend to take industrial action;
 - (b) to agree on the following:
 - (i) the need for maintenance or minimum services, if necessary;

- (ii) the lines of communication between the conciliator (or facilitator if there is one), the union, the employer and the police; and
- (iii) Strike and picketing rules.

19. Ballot of members

- (1) The Act does not require the conduct of a ballot as requirement for a protected strike or lockout. Section 67(7) of the Act states quite explicitly that the failure by a registered trade union or registered employer organisation to conduct a ballot may not give rise to any litigation that will affect the legality and the protected status of a strike.
- (2) The obligation to ballot flows instead from the constitution of a registered trade union or employers' organisation. The constitutional obligation flows from the requirement in section 95(5) (p) of the Act that a trade union or employers' organisation that seeks registration must provide in its constitution for the conduct of a ballot before the calling of a strike or lockout. That ballot must be a secret ballot.
- (3) Registered trade unions and employers' organisations are obliged to comply with their constitutions even though the failure to do so does not have the consequence of invalidating the protected status of the strike or lockout..

20. Notice of the commencement of the strike or lockout

- (1) The notice of the commencement of a strike or lockout must be in writing and given at least 48 hours after the issue of a certificate of outcome or the expiry of thirty days in the case of private employers and seven days in case of the state as employer.
- (2) Since the object of notice is to allow the other party to put its house in order and limit the negative consequences of industrial action to loss of production on the part of employers and the loss of income on the part of employees, the parties should agree to a notice period, notwithstanding the minimum periods set out in the Act, that is of sufficient duration to allow the employer to shut down its plant or services without damage to property and to allow the employees to make the necessary arrangements to face a period of no income..
- (3) The notice must include –

- (a) the date and time when the strike or lockout is to commence;
 - (b) the demands which the other party is being required to meet, which demands may not be different to those on which the parties deadlocked.
- (4) The notice does not have to include the following information:
- (a) Which employees are to go on strike;
 - (b) In which division of the employer's workplace the strike is going to be called.
- (5) If a strike or lockout does not commence on the date stated in the notice, the trade union or employers' organisation should issue a further notice stating the date and time of commencement if it intends to strike or lockout unless there is an agreement, that should not be unreasonably withheld, to extend or shorten the notice to allow for further negotiations.
- (6) The failure to issue a further notice, or strike or lockout after a notice is issued in terms of 19(5) herein, may lead to an inference that the trade union or employers' organisation has waived or abandoned its right to strike or lockout.

21. Who may strike

- (1) Any employee, including employees who are not members of the union calling the strike, may join a protected strike. There are only two exceptions:
- (a) Essential service workers or any agreed minimum services within an essential service;
 - (b) Maintenance service workers
- (2) If a service has been declared an essential service by the Essential Service Committee in terms of section 71 of the Act, the trade unions in that service and the employers can conclude a minimum services agreement on the particular categories within that service and number of employees to perform that service during the strike. If a minimum services agreement is not concluded, the Essential Services Committee may determine such minimum services under section 72(2) of the Act. Employees within agreed or determined minimum services are not permitted to strike.
- (3) A trade union and employer may enter into a maintenance service agreement in order to avoid material physical damage to the working area, plant or machinery arising from a strike. If there is no agreement, the employer may apply to the

Essential Services Committee for a determination. Employees falling within such a determination are not permitted to strike. Depending on whether the all or a substantial number of employees are prohibited from striking as a result, the committee may refer the dispute to arbitration.

22. Strikes or lockouts in respect of employees residing on employer premises

- (1) Employees residing in accommodation provided by their employer are entitled to exercise their fundamental rights including their freedom of association not only at the workplace but also in their living quarters⁵.
- (2) During a protected and peaceful strike or lockout, the employer, at the request of the employee, should not discontinue payment in kind in respect of accommodation, the provision of food and other basic amenities of life such as the provision of water and heating. The parties may regulate this by way of a collective agreement as provided for in section 34(1)(b) of the Basic Conditions of Employment Act (BCEA) and which may include provisions for the employer to recover such payment in kind by way of deductions from an employee's wages after the industrial action.
- (3) The employer may recover the monetary value of the payment in kind made at the request of the employee during the strike or lockout from the employee in terms of the BCEA and Act.
- (4) Freedom of association in the context of employees residing at their place of work, means –
 - (a) the right of an employee to choose either –
 - (i) to strike or not to strike; or
 - (ii) to participate or not to participate in a collective decision to resist a lockout;
 - (b) that every employee must respect the right of other employees –

⁵ The ILO Workers' Housing Recommendation 115 of 1961.

- (i) to strike or not to strike;
 - (ii) to participate or not to participate in a collective decision to resist a lockout;
 - (c) to work or not to work during the strike or lockout;
 - (d) the right of every employee not to be interfered with, threatened with or intimidated when entering or exiting the workplace, commuting to and from the workplace, in their living quarters (if provided by the employer) or their homes or within their communities.
- (5) Every employee must respect the right to freedom of movement in particular –
- (a) the right of management to enter and exit its premises;
 - (b) the right of non-striking workers to enter and exit the workplace and their living quarters and to use public transport;
 - (c) the right of third parties to enter and exit the employer's premises and do business with the employer;
 - (d) an employer's right to continue and maintain production, subject to the restrictions on replacement labour contained in section 76 of the Act;
- (6) All parties must take all reasonable steps to ensure that their employees and members comply with (4) and (5) above.
- (7) Nothing in this clause restricts a lawful and peaceful picket on the employer's premises in accordance with section 69 of the Act and Part E: Picketing.

23. Peace and stability and communication during a strike or a lockout

- (1) In accordance with the guideline that the parties should develop rules regulating peaceful and protected industrial action, which includes picketing, those rules, depending on the circumstances, may include the establishment of a peace and stability committee made up of union officials, shop stewards, employer representatives, the conciliator or facilitator, a person representing the private security company and a person appointed by the South African Police Services in accordance with the Accord.
- (2) At the very least, the rules should include the following:

- (a) The trade union, employer or employers' organisation should identify persons and alternates with whom the parties can communicate during a strike or lockout and provide each other with contact details.
- (b) The contact details of the trade union and employer representatives should be forwarded to the conciliator or facilitator in order that the conciliator or facilitator is able to re-institute negotiations during the course of the strike or lockout.
- (c) The employer should then request the South African Police Services to appoint a police officer in accordance with the Accord with whom the trade union and employer representatives can liaise during the currency of the strike and to provide that person with the contact details of the employer and trade union representatives and those of the conciliator or facilitator.
- (d) If there is a significant private security presence, the employer should ensure that a person with authority in the private security company is identified as a representative and that that person's contact details are forwarded to the trade union, the conciliator or facilitator and the South African Police Services.

PART E: PICKETING

24. Introduction

- (1) This Part of the Code is intended to provide practical guidance on picketing in support of any protected strike or in opposition to any lockout. It is intended to be a guide to those who may be contemplating, organising or taking part in a picket and for those who as employers or employees or members of the general public that may be affected by it.
- (2) Section 17 of the Constitution recognises the right to assemble, to demonstrate, to picket and to present petitions. This constitutional right can only be exercised peacefully and unarmed. Section 69 of the Act seeks to give effect to this right in respect of a picket in support of a protected strike or a lockout.
- (3) Any person interpreting or applying the Act in respect of any picket must take this Part of the Code into account. This is the effect of section 203 of the Act. This applies to employers and their employer organisations, employees and their trade

- unions, the Commission, Labour Court, the Labour Appeal Court, private security services and the South African Police Services.(include supporters and landlord)
- (4) This Part of the Code does not apply to all pickets and demonstrations in which employees and trade unions may engage. It applies only to pickets held in terms of section 69 of this Act. That section has four elements:
- (a) The picket must be authorised by a registered trade union;
 - (b) Only members and supporters of the trade union may participate in the picket;
 - (c) The purpose of the picket must be to peacefully demonstrate in support of any protected strike or in opposition to any lockout;
 - (d) The picket may only be held in a public place outside the premises of the employer or, with the permission of the employer, inside its premises. The permission of the employer may be overruled by the CCMA, if the permission is unreasonably denied. The factors to be taken into account to determine whether permission is unreasonably denied are set out in clause 29 of this Code.
- (5) If the picket complies with these four elements then the ordinary laws regulating the right of assembly do not apply. These laws include the common law, municipal by-laws and the Regulation of Gatherings Act, 205 of 1993.
- (6) A picket conducted by an unregistered trade union or for purposes other than to demonstrate in support of a protected strike or a lockout is not protected by section 69 of the Act. The lawfulness of that picket or demonstration will depend on compliance with the ordinary laws regulating public gatherings referred to in sub-clause (5).

25. Authorisation

- (1) A picket contemplated in section 69 of the Act must be authorised by a registered trade union.
- (2) The authorisation must be made in accordance with the trade union's constitution. That means that there must either be a resolution authorising the picket or a resolution permitting a trade union official to authorise a picket in terms of section 69(1). It should be formal and in writing.

- (3) A copy of the resolution authorising the picket ought to be served on the employer before the commencement of the picket.
- (4) The authorisation applies only to its members and its supporters.

26. Purpose of the picket

- (1) The purpose of the picket is to peacefully encourage non-striking employees and members of the public to oppose a lockout or to support strikers involved in a protected strike. The nature of that support can vary. It may be to peacefully encourage employees not to work during the strike or lockout. It may be to peacefully dissuade replacement labour from working. It may also be to persuade members of the public or other employers and their employees not to do business with the employer.
- (2) The strike must be a protected strike. In normal cases, employees picket at their own place of work or other designated areas as agreed by the parties, or provided for by the CCMA in support of their strike against their own employer. Cases do arise, however, where employees picket at their own place of work in support of a strike between another employer and its employees. This is what is contemplated in section 66 of the Act as a "secondary strike". In this case, in order to be protected, the picket must further satisfy the requirements of a lawful secondary strike in terms of section 66. This is because the definition of "secondary strike" in the section includes "conduct in contemplation or furtherance of a strike". A picket is "conduct in contemplation or furtherance of a strike."
- (3) The requirements for a protected secondary strike are-
 - (a) the strike that is to be supported by the secondary strike must itself be a protected strike;
 - (b) the employer of the employees taking part in the secondary strike must have received written notice of the proposed picket at least 7 days prior to its commencement; and
 - (c) the nature and extent of the secondary strike must be reasonable in relation to the possible direct or indirect affect that the secondary strike may have on the business of the primary employer.

- (4) If a picket is in support of an unprotected strike, the picket is not protected by section 69 of the Act.
- (5) Pickets may be held in opposition to a lockout. Section 69(1) does not distinguish between protected and unprotected lockouts. This means that a picket may be held in opposition to both a protected and an unprotected lockout.

27. No picketing unless rules agreed or determined

No picket in support of a protected strike or in opposition to a lockout may take place unless rules have been agreed or determined by the CCMA in terms of section 65(9) of the Act.

28. Agreed picketing rules

- (1) A registered trade union and employer or employer organisation should seek to conclude a collective agreement on standing picketing rules to regulate pickets in support of a protected strike or in opposition to a lockout.
- (2) The following matters should be considered in such a collective agreement –
 - (a) the nature of the authorisation and its service upon the employer;
 - (b) the notice of the commencement of the picket including the place, time and the extent of the picket;
 - (c) the nature of the conduct in the picket;
 - (d) the number of picketers and their location;
 - (e) the modes of communication between marshals and employers and any other relevant parties;
 - (f) the conduct of the pickets on the employer's premises; and
 - (g) this code of good practice and the Default Picketing Rules annexed to this Code.
- (3) If the parties to a dispute giving rise to a protected strike or lockout have not concluded a collective agreement regulating pickets, the parties must endeavor to agree picketing rules before the commencement of the protected strike or lockout taking into account the factors referred to in sub-item (2). The trade union or employer may request the Commission to facilitate such an agreement in terms of section 69(4) of the Act.

29. Default picketing rules

- (1) If there is no collective agreement on picketing rules or no picketing rules agreed during the conciliation process, the Commission must determine picketing rules in accordance with the Default Picketing Rules determined in terms of section 69(9) of the Act.
- (2) In terms of section 69(9)(b) of the Act, rules determined under clause (1) are binding on the trade union, its members and supporters, and the employer.

30. Pickets on employer premises or in other designated areas

- (1) A picket may take place on the employer's premises or other designated area with the permission of the employer. The permission may not be unreasonably withheld. In order to determine whether the decision of the employer to withhold the permission is reasonable, the factors, which should be taken into account, include-
 - (a) the nature of the workplace e.g. a shop, a factory, a mine etc;
 - (b) the particular situation of the workplace e.g. distance from place to which public has access, living accommodation situated on employer premises, etc;
 - (c) the number of employees taking part in the picket inside the employer's premises;
 - (d) the potential for violence and other unlawful acts;
 - (e) the areas designated for the picket;
 - (f) time and duration of the picket;
 - (g) the proposed movement of persons participating in the picket;
 - (h) the proposals by the trade union to exercise control over the picket; and
 - (i) the conduct of the picketers.

31. Dissemination of picketing rules

Employers, employer organisations and trade unions must take measures to disseminate the picketing rules which may include measures-

- (a) placing the rules on notice boards; and

(b) distributing copies of the rules to employees and private security officers.

32. Conduct in the picket

- (1) Although the picket may be held in any place to which the public has access, the picket may not interfere with the constitutional rights of other persons.
- (2) The trade union must-
 - (a) appoint convenors and marshals to monitor and control the picket as set out in the picketing rules;
 - (b) provide the convenors, marshals with the agreed or determined picketing rules; and
 - (c) take measures to ensure that the convenors, marshals and picketers understand those rules.
- (3) The picketers must conduct themselves in a peaceful, unarmed and lawful manner. They may –
 - (a) carry placards;
 - (b) chant slogans; and
 - (c) sing and dance.
- (4) Picketers may not –
 - (a) forcefully prevent or intimidate suppliers, clients and customers of the employer, members of the public, employees who are not on strike and replacement workers from entering or leaving the premises of the employer;
 - (b) commit any unlawful action, such as intimidating, coercing, threatening or assaulting any person or causing or threatening to cause any damage to any property whether belonging to the employer or not;
 - (c) incite violence;
 - (d) wear masks; or
 - (e) have any dangerous weapons or objects in their possession.

33. Peace obligation and the role of police

- (1) It is not the function of the police to take a view of the merits of a particular strike or lockout. Their role is to uphold the law and keep the peace. The law does, however, give the police the power to take measures that may be reasonably necessary to ensure that a strike and picket remains peaceful, unarmed and orderly. In exercising these measures –
- (a) the police may only intervene with any person/s who –
- (i) the police reasonably believe is in possession of a firearm or dangerous weapon;
 - (ii) displays a firearm or dangerous weapon;
 - (iii) has committed or threatens to commit an assault or damage to property;
 - (iv) intimidates or threatens any person entering or leaving the employer's property;
 - (v) unlawfully prevents the employer or another person from conducting their business or from working or not working;
 - (vi) blocks any vehicle or person from entering or leaving the employer's premises;
 - (vii) breaks into or enters the employer's property without the employer's permission;
 - (viii) threatens or commits an act of public violence; or
 - (ix) commits any action prohibited by a court order.
- (b) the police may only disperse a picket or gathering if –
- (i) there is reasonable cause to believe that persons involved in the picket or gathering may engage in any of the crimes referred to in (a) above; or
 - (ii) the picket or gathering has been interdicted under a court order and the court orders the police to enforce court order;
 - (iii) persons involved in the picket or gathering commits or threatens to commit an act of public violence;

- (2) In the context of the constitutional right to picket peacefully and unarmed and applying the factors listed in section 3(2) of the Dangerous Weapons Act, 15 of 2013 to determine whether a person intends to use the object as a dangerous weapon, a dangerous weapon is any object that could be used to injure or threaten a person or damage property. In the context of a picket there is no other justifiable use for the possession or display of such an object. Cultural implements carried by picketers must clearly not be carried or used in a manner intended to intimidate or cause harm.
- (3) Fundamental to promoting peaceful industrial action and peaceful lockouts, is implementing the principle of seeking to resolve disputes as to the conduct of participants through negotiations.
- (4) The police have no responsibility to enforce the Act or any picketing rules. They have no responsibility to enforce the terms of a court order interdicting a strike or a picket unless ordered to do so by a court. The police may, however, assist the sheriff in serving a court order if the police think that there may be a breach of the peace.
- (5) Members of the police assigned to monitor strikes, lockouts and pickets should where necessary conduct a threat analysis-
 - (a) should adopt a non-threatening presence;
 - (b) be sensitive to the potential presence of persons with disabilities and to consider their safety and security when acting to disperse any picket or gathering;
 - (c) should use minimum force and non-lethal equipment such as shields, rubber bullets, water cannons, stun grenades and tear gas⁶;
 - (d) should take into account that the use of that equipment can result in serious injury and even death;
 - (e) may only use that equipment –
 - (i) after non-violent means have failed;

- (ii) to the extent necessary, subject to prevailing circumstances and in compliance with the law and all police regulations; and
- (iii) in a proportional and lawful manner.

34. Peace obligation and role of private security

- (1) The role of private security is to protect the property of the employer and client and ensure the safety of persons on the property. Private security officers have no right to intervene in a strike or a picket or to enforce the Act or any picketing rules made under them.
- (2) A private security officer does not have the powers of the police but may arrest in terms of section 42 of the Criminal Procedure Act, 51 of 1977 just as any other private person may do, a person participating in the picket or gathering –
 - (a) who commits a Schedule 1 offence in the officer's presence or the officer reasonably suspects the person of doing so such as public violence, malicious injury to property and assault when a dangerous wound is inflicted;
 - (b) who the officer reasonably believes to have committed an offence and is escaping from or being freshly pursued by a person who the officer reasonably believes has the authority to arrest;
 - (c) who the officer sees engaged in a fight;
 - (d) if authorised by the employer, any person committing an offence on the employer's property.
- (3) A private security officer may pursue a person referred to in (a) above.
- (4) Any person arrested by a security officer in these circumstances must be brought as soon as possible to a police station.
- (5) Every employer that contracts with a private security company must ensure that –
 - (a) the company is registered as a security service provider in terms of the Private Security Industry Regulation Act, 56 of 2001;
 - (b) it complies with the legislation and codes of conduct relating to the private security industry and the requirements of the Private Security Regulatory Authority;

- (c) its security officers tasked with protecting property of the employer during the course of industrial action are adequately trained in crowd management and the provisions of this Code in order to ensure that they act appropriately if conflict escalates during the course of industrial action.

35. General rights, obligations and immunity

- (1) A person who takes part in a picket protected in terms of the Act does not commit a delict or a breach of contract. This means that the employer may not sue a person or a union for damages caused by a picket held in compliance with section 69 of the Act and the applicable picketing rules.
- (2) The employer may not take disciplinary action against an employee for participating in a picket in compliance with section 69 of the Act and the applicable picketing rules. If an employee's conduct during a picket constitutes misconduct the employer may take disciplinary action in accordance with the Act.

ANNEXURE A**GOOD FAITH DECLARATION**

In the negotiations between:

[Name of union or unions]

and

[Name of employer, employers or employers' organisation]

on

[Short description of the matters for negotiation⁷]

I, ...[name], [capacity] of the [name of entity] declare that-

- 1 I will engage in the negotiations with [name of entity on the other side] in good faith with the sincere intention of concluding a collective agreement if possible.
- 2 I will adhere to the principles of good faith bargaining contained in the Code on Collective Bargaining and Industrial Action.
- 3 I will treat the negotiators representing the [*name of the other entity on the other side*] with respect and conduct the negotiations in a rational, constructive and courteous manner.

⁷ Such as: 'Wage Agreement for 2016/17' or 'Employer's restructuring proposal dated'.

- 4 I will not deliberately delay negotiations by failing to respond quickly to communications, to agree dates and times for negotiation meetings, to attend negotiating meetings, and to attending meetings without a mandate.
- 5 I will, accordingly, ensure to the best of my ability that I and the other members of our negotiating team –
 - 5.1 will attend agreed negotiating and conciliation meetings and, if for good reason we are unable to do so, I will ensure that reasonable notice of our non-attendance is given to avoid wasteful expenditure and inconvenience.;
 - 5.2 are properly mandated when we attend negotiation and conciliations meetings.
- 6 I will faithfully communicate any proposals or counterproposals arising from negotiations to our [*members/mandating structures/board/executive committee*]
- 7 I will not conduct myself in any way that may constitute conduct that undermines the negotiations.

Signed on [date] at [place]

[Name and contact details]

ANNEXURE B**DEFAULT PICKETING RULES⁸****1 PARTIES TO THE dispute**

1.1 The parties to the dispute giving rise to the strike/lockout⁹ are:¹⁰

.....[name]

.....[name]

2 BINDING NATURE

2.1 These Rules are binding on the parties to the dispute and their officers, officials, members and supporters.

2.2 Nothing in these Rules prevents the parties to the dispute agreeing to their own rules to replace or amend these Rules.

2.3 These Rules must be interpreted in accordance with-

2.3.1 sections 17, 18 and 23 of the Constitution;

2.3.2 section 69 of the Labour Relations Act, 66 of 1995 (Act);

2.3.3 The Code of Good Practice: Picketing (Code)

2.4 Where these Rules are silent, the relevant provisions of the Act and the Code apply.

3 PURPOSE OF THE PICKET

3.1 The only purpose of the picket is to approach and peacefully seek to persuade the following persons to support the strike or oppose the lockout by temporarily withholding their services from, supplying goods and materials to, or working for the employer/s:

3.1.1 service providers, clients and customers of the employer;

3.1.2 members of the public; and

⁸ Picketing may only take place in terms of s69. Gatherings related to unprotected strikes are subject to the provisions of the Regulation of Gatherings Act.

⁹ Delete whichever is not applicable unless both a strike and a lockout are in place.

¹⁰ Commissioner to fill in the names of the parties to the dispute giving rise to the strike.

3.1.3 employees who are not on strike (other than essential or minimum service employees) and replacement workers.

4 LOCATION OF PICKET AND NUMBER OF PICKETERS¹¹

- 4.1 A picket may *only* be held at the places designated in Annexure A.
- 4.2 Only members and supporters of the strike may take part in the picket.
- 4.3 A picket at any designated location may not exceed the maximum number of members or supporters determined by the Commissioner in that Annexure.

5 DURATION AND TIME OF PICKET

- 5.1 The picket may only commence at or after the commencement of the strike or lockout.
- 5.2 The picket may only take place during daylight hours.¹²

6 NATURE AND CONDUCT OF PICKET

- 6.1 Picketers must at all times conduct themselves in a peaceful, unarmed and lawful manner and not interfere with the constitutional rights of other persons
- 6.2 Subject to clause 6.3, picketers may for the purposes of the picket –
 - 6.2.1 carry placards;
 - 6.2.2 hand out pamphlets;
 - 6.2.3 chant slogans, sing and dance;
 - 6.2.4 be addressed by union officials and supporters; and
 - 6.2.5 wear trade union t-shirts, hats, caps, badges and other paraphernalia.
 - 6.2.6 approach and peacefully engage suppliers, clients, customers, employees (other than essential or minimum service employees)

¹¹ The Commissioner must determine the location of the pickets and the number of picketers in each designated location in accordance with section 69(5) and (6) of the LRA, clauses XX of the Code and any relevant court decision.

¹² The Commissioner may amend this rule if the employer works night shift or the picket is rendered ineffective because the employer has arranged for its suppliers, customers and clients to enter the premises at night.

and replacement workers not to enter the premises and support the strike or oppose the lockout.

- 6.3 Any limitations on the activities listed in clause 6.2 in respect of specific locations are detailed in Annexure A.¹³
- 6.4 Picketers may not –
- 6.4.1 In performing the activities contemplated in clause 6.3 use hate or defamatory speech or incite violence;
 - 6.4.2 forcefully prevent or appear to prevent suppliers, clients and customers of the employer, members of the public, employees who are not on strike and replacement workers from entering or leaving the premises or any part of the premises of the employer;
 - 6.4.3 commit any unlawful action, such as intimidating, coercing, threatening or assaulting any person or causing or threatening to cause any damage to any property whether belonging to the employer or not;
 - 6.4.4 wear masks; or
 - 6.4.5 have any dangerous weapons or objects in their possession.
- 6.5 For the purposes of these Rules, dangerous objects or weapons includes any object that could be used to injure or threaten a person or damage property. In the context of a picket there is no other justifiable use for the possession or display of such an object, in particular any of the following objects:
- 6.5.1 Knives, spears, pangas, bush knives or any similar object;
 - 6.5.2 Sticks and knobkieries¹⁴ whether made of metal or wood;
 - 6.5.3 Whips and sjamboks;
 - 6.5.4 Bricks, stones or any similar object that can be thrown or propelled in a manner that can cause injury or damage to property;
 - 6.5.5 Any inflammable substance;

¹³ The Commissioner may, for example, limit the activity of a picket in a shopping mall or business complex to carrying placards and handing out pamphlets.

¹⁴ To be discussed further.

6.5.6 Any liquid, foam or similar substance that can be sprayed or extruded to cause injury or damage to property.

7 CONTROL OF PICKETS

- 7.1 Union officials and managers are accountable and should be available to resolve problems may the need arise.
- 7.2 The name and contact details of the Commissioner responsible for the conciliation of the dispute giving rise to the strike or lockout and these Rules is set out in Annexure B.
- 7.3 The names and contact details of the trade union convenor/s of the picket and the employer representative/s are listed in Annexure B¹⁵.
- 7.4 The convenor/s of the picket is responsible for overseeing the picket and ensuring that the picket complies with the rules.
- 7.5 The trade union must appoint one marshal for every ten picketers to monitor and control the picket at each designated location. The full names and contact details of the marshals are listed in Annexure B.
- 7.6 The convenors, marshals and employer representatives must be present from the start to the end of the picket each day.
- 7.7 The convenor, the marshals and the employer representative must-
- 7.7.1 at all times during the picket have a copy of these Rules in their possession;
- 7.7.2 wear the armbands or vests described in Annexure B to identify themselves as convenors or marshals¹⁶; and
- 7.7.3 be present from the start to the end of each day of the picket.
- 7.8 The names and telephone numbers of the convenor and marshals must be set out in Annexure B.
- 7.9 Any change to a convenor, employer representative and marshal must be sent by a text message to the persons listed in Annexure B.

¹⁵ The Commissioner must list the names and contact details of the convenor/s and employer representative/s in Annexure B.

¹⁶ The Commissioner to describe the armbands or vests identifying the members or officials as convenors and marshals.

7.10 The trade union must ensure that its members and supporters who participate in a picket wear the identification described in Annexure B.¹⁷

7.11 The trade union must train its convenors and marshals on the Code and the Rules and their responsibilities to ensure a lawful and peaceful picket.

8 EMPLOYER CONDUCT

8.1 The employer or any person in authority at the workplace or acting on the employer's behalf may not –

8.1.1 in any way hinder or obstruct the lawful and peaceful conduct of the picket;

8.1.2 undermine any employee's right to lawfully and peacefully participate in the picket or discipline or threaten to discipline any employee for peacefully and lawfully doing so;

8.1.3 engage in or permit conduct which is provocative or may incite conflict; or

8.1.4 carry a dangerous weapon of any kind while in contact with the picketers.

8.1.5 use hate or defamatory speech or incite violence

8.2 The employer must ensure that any private security company employed by the employer complies with the requirements relating to such companies under the Code of Good Practice on Collective Bargaining and Industrial Action.

8.3 The employer must ensure reasonable access to toilet facilities and drinking water to persons participating in a picket

9 PICKETING ON EMPLOYER'S PREMISES OR IN OTHER DESIGNATED AREAS

9.1 If picketing is to take place on the employer's premises or other designated areas, the employer must, where applicable provide the trade

¹⁷ The Commissioner to describe the T-shirts, hats, badges or other forms of identification of participants in the picket in Annexure B.

union with written confirmation of the health and safety rules to be observed before, during and after the picket.

9.2 Participants in a picket on the employer's premises or in any other designated area must, in addition to the requirements set out in clauses 6 and 7 above –

9.2.1 remain within the designated picketing area(s);

9.2.2 observe the health and safety rules and regulations applicable in the workplace;

9.2.3 refrain from causing any damage to property or allowing any damage to be caused; and

9.2.4 leave the premises and the facilities in the condition in which they found it.

10 FAILURE TO COMPLY WITH THESE RULES

10.1 Any person may refer a dispute concerning the interpretation or application of these Rules to the Commissioner responsible for the conciliation of the dispute giving rise to the strike or lockout and these Rules.

10.2 The Labour Court may suspend a picket at one or more designated locations if these Rules have not been complied with in terms of section 69(12)(c) of the Act.

11 DISPUTE RESOLUTION

11.1 Any dispute about the interpretation or application of these Rules or any alleged breach thereof shall be dealt with in accordance with section 69(8), (9), (10) and (11) of the Act or section 158(1)(g) of the Act. This does not affect any other right that any person may have in terms of the Act or any other law.

11.2 It is recorded that the employer, the union and persons taking part in the picket are subject to the protections and provisions set out in section 67 of the Act.

12 POLICE INVOLVEMENT

12.1 These Rules do not affect the right of any person to ask the South African Police Service or any security organisation responsible for maintaining safety and security at or near the workplace to investigate or deal with any unlawful conduct or alleged unlawful conduct.

12.2 If this happens, the employer and the union undertake to cooperate with the police or security organisation in the performance of their duties and the union undertakes to do everything possible to ensure that its members and supporters will do the same.

13 TERMINATION

These Rules will remain in effect until the settlement of the dispute, the termination of the strike, termination of the picket by the union or until it is terminated or reviewed by mutual agreement, whichever may come first.

ANNEXURE 1**DESCRIPTION OF PLACE OR PLACES FOR THE PICKET****Addresses and location/s of pickets and number of picketers****Address/es or location of the picket**

1.

2.

Physical location of pickets at each address¹⁸

.....	[number of pickets]	[limitation of activity]
.....	[number of pickets]	[limitation of activity]

Duration and times of pickets - Date/s and times that pickets may be held at each address and physical location

Address /physical location times of pickets (hours during which pickets may be held at each address and physical location)

1.

2.

¹⁸ The physical location may be described in words or drawn or both. So for example the location may be described as 5 metres from the entrance to the employers premises on XX road and extend no more than 2 metres onto the pavement – accompanied with a drawing to that effect.

ANNEXURE 2**NAMES AND DETAILS OF PARTICIPANTS****Commissioner**

1. [Name, email address and mobile telephone number]

Convenor

[Name, designation of status¹⁹, email address and mobile telephone number]

Employer representative

[Name of person appointed in terms of clause 8.1, designation of status, email address and mobile telephone number]

Marshalls

[Name, work number and mobile telephone number]

¹⁹ Whether a trade union official, shop steward or member. If a shop steward or member, then the employee's work number must be included]

ACCORD
ON
COLLECTIVE BARGAINING AND INDUSTRIAL ACTION

Preamble

Recognising the constitutional rights-

- the freedom and security of individuals
- the freedom to assemble peacefully and unarmed,
- the freedom of association
- to strike and
- to engage in collective bargaining,

Recognising the constitutional obligations on the State to respect, protect, promote and fulfill those rights

Recognising the principles stated in the Ekurhuleni Declaration on 4 November 2014, the parties to this Accord affirm-

- that the constitutional right to strike and the statutory right to lockout must be peaceful, free of intimidation and violence, including violence and intimidation that may be associated with police action
- strike action by workers and trade unions is a legitimate exercise of power to pursue demands
- prolonged strike action has the potential to cause serious harm not only to strikers and their employers but also to others inside and outside the workplace

The Parties and signatories to this Accord commit themselves and their members to this Accord.

Parties to the Accord

1. NEDLAC constituencies
2. The trade union parties to the Accord are:
 - 2.1. The trade union federations that are represented on the National Economic Development Labour Advisory Council (NEDLAC);
 - 2.2. The trade unions and the members of such trade unions that are members of those federations;
 - 2.3. The trade unions and their members that do not belong to any of those federations that have signed this Accord.
3. The employer parties to the Accord are:
 - 3.1. The federations of employer associations that are represented on NEDLAC;
 - 3.2. The employer associations of those federations;
 - 3.3. The employer associations and members of those associations that are not members of those federations that have signed this Accord; and
 - 3.4. Any employers that are not members of those associations, that have signed this Accord
4. The Government
 - 4.1. The Government in so far as it is directly or through its agencies and institutions required to implement this Accord.
 - 4.2. The State, in its capacity as employer at national, provincial and local level, and as employer in State Owned Enterprises.
5. Agencies
 - 5.1. Commissioner for Conciliation Mediation and Arbitration;
 - 5.2. Bargaining Councils;
 - 5.3. Sector Education and Training Authorities;
 - 5.4. The National Skills Authority;
 - 5.5. The Private Security Industry Regulatory Authority.

6. Other Private Sector Organisations and Institutions;
 - 6.1. The federations of private security companies;
 - 6.2. Private security companies that have signed the Accord; and
 - 6.3 Trade unions in the private security industry.

All parties to this Accord commit:

7. In the case of violence, intimidation, and the threat of harm to person or property associated with industrial action, to build capacity; expedite processes and assign sufficient and senior staff to the resolution of issues.

Employer and trade union undertakings

8. The employer and trade union parties to the Accord and their members undertake-
 - 8.1. to abide by and implement the Code of Good Practice: Collective Bargaining, Industrial Action and Picketing;
 - 8.2. to abide by the terms of collective agreements;
 - 8.3. to mutually respect all parties and to uphold the principles of good faith bargaining and the law;
 - 8.4. that during the course of negotiations, dispute resolution processes and strike or lockout action make public statements calling on all members that they must always act in compliance with this Code and in a law abiding and peaceful manner.
 - 8.5. to secure that their negotiators undergo the training contemplated in the Code of Collective Bargaining and Industrial Action including refresher training at regular intervals;
 - 8.6. to secure that any bargaining council to which they belong signs the Accord;
 - 8.7. encourage parties to only contract with security companies that abide by the Accord and Code of Good Practice on Collective Bargaining, Industrial Action and Picketing ;
 - 8.8. to only make lawful requests of employees of private security companies;
 - 8.9. to refrain from acting in a manner that makes any conflict worse, and;
 - 8.10. to monitor and evaluate, together with government and under the auspices of NEDLAC, whether the commitments made here are effective

in promoting the principles contained in the Preamble.

Employer and trade union declaration against violence, loss of life or harm to persons and property

9. The trade union and employer parties to the Accord and their members hereby-
- 9.1. declare that the resort to violence, intimidation, loss of life or threat of harm to persons and property under all circumstances and more particularly during strikes, lockouts, pickets and protest action is intolerable;
 - 9.2. undertake to take all necessary measures to prevent violence, intimidation and damage to property and, if it does occur, to take all the steps necessary to discourage such conduct and to comply with a court order interdicting the violence, intimidation or damage to property;
 - 9.3. declare that they are committed to adhering to the provisions of the Code of Good Practice Collective Bargaining and Industrial Action and the related declaration on good faith bargaining.

Role of Public Order Policing in strikes, lockouts, pickets and protest action

10. SAPS, in relation to Public Order Policing undertakes-
- 10.1. to comply with the Code of Collective Bargaining and Industrial Action and the Code of Good Practice on Picketing in so far as those Codes apply to it and to take the necessary steps to ensure that its members do so;
 - 10.2. to ensure sufficient capacity and that its members assigned to monitor strikes, lockouts, pickets and protest action are trained in public order policing and those Codes;
 - 10.3. that its presence at strikes, lockouts, pickets and protest action is minimal and unobtrusive unless there is good cause for it to be otherwise;
 - 10.4. that its members will refrain from acting in a manner that escalates the conflict and will only use minimum force and make use of non-lethal weapons to prevent or respond to breaches of the Codes;
 - 10.5. to ensure monitoring and engagement with employees and employers participating in a strike, lockout, picket or protest action.

- 10.6. to investigate and submit for prosecution any perpetrators of violence, intimidation or damage to property on an expedited basis.

Role of private security companies

11. The private security companies that are bound by the Accord undertake-
 - 11.1. to comply with the Code of Collective Bargaining, Industrial Action and Picketing in so far as those Codes apply to them and to take the necessary steps to ensure that their employees do so;
 - 11.2. to ensure that its security officers tasked with protecting property during industrial action are adequately trained in crowd management and the Code of Collective Bargaining and Industrial Action in order to ensure that they act appropriately if conflict escalates during the course of industrial action;
 - 11.3. that the presence of its security officers at strikes, lockouts, pickets and protest action does not escalate conflict and is minimal and unobtrusive unless there is good cause for it to be otherwise; and
 - 11.4. that its security officers are only armed with non-lethal weapons to prevent or respond to breaches of the Code.

Role of the CCMA and Bargaining Councils

12. The CCMA and bargaining councils undertake to provide-
 - 12.1. dispute resolution and prevention services contemplated in giving effect to the Code of Collective Bargaining and Industrial Action and the Code of Good Practice on Picketing;
 - 12.2. training of negotiators in accordance with that Code based on the materials provided by the CCMA and adapted for the sector by that Council;
 - 12.3. workplace capacity building programs and services to trade union and employer representatives as may be provided for in terms of its existing policies and procedures;
 - 12.4. services to support the establishment of workplace participatory structures where parties have agreed to the establishment of such structures.

Role of Department of Higher Education and Training (DHET) National Skills Fund (NSF) and Sector Education and Training Authorities (SETAs)

13. The DHET, NSF, SETAs undertake to facilitate and make funding available for the training of negotiators in their respective sectors. This training should be developed by the CCMA and appropriately adapted for a sector by that SETA.

Signed by:

Date:

DEPARTMENT OF LABOUR

NO. R. 1397

19 DECEMBER 2018

LABOUR RELATIONS AMENDMENT ACT, 2018**GUIDELINES ISSUED IN TERMS OF SECTION 95(9)**

I, **MILDRED NELISIWE OLIPHANT**, Minister of Labour, hereby under section 95(9) of the Labour Relations Amendment Act, 2018 (Act No. 8 of 2018) and after consulting NEDLAC, issue the guidelines in the Schedule hereto.



M N OLIPHANT, MP
MINISTER OF
LABOUR

12/12/2018

GUIDELINES ON BALLOTING FOR STRIKES OR LOCKOUTS ISSUED IN TERMS OF SECTION 95 (9) OF THE LRA

1. These guidelines are published in terms of section 95 (9) of the Labour Relations Act (Act 6 of 1995) ("LRA").
2. In terms of section 95 (5) (q) of the LRA, the constitution of every trade union or employers' organisation must provide that trade union or employers' organisation, before calling a strike or lock-out, must conduct a ballot of members in respect of whom it intends to call the strike or lock-out.
3. Section 95(5)(p) provides that a member of a trade union or employers' organisation may not be disciplined or have their membership terminated for a failure or refusal to participate in a strike or lock-out if no ballot was held or, if a ballot was held, a majority of members did not vote in favour of a strike or lock-out.
4. Section 95 (9) provides that a ballot includes any system of voting by the members of a trade union or employers' organisation that is recorded and is in secret.
5. A trade union that has obtained organisational rights in terms of section 12 of the LRA is entitled to conduct a ballot of its members at the employers' premises, subject to such conditions as time and place that are reasonable and necessary to safe guard life or property or to prevent undue disruption of work in terms of section 19 of the LRA. Trade unions that are parties to bargaining councils in respect of all workplaces within the registered scope of the Council have this right, regardless of their level of representativeness within a particular workplace.

6. A trade union that does not have the right of access to a workplace in terms of section 12 of the LRA or a collective agreement may nevertheless request an employer to permit a ballot on its premises.
7. Unless stipulated in a collective agreement, there is no requirement for a trade union to obtain the consent of the employer to hold a ballot.
8. A ballot must be conducted in accordance with the provisions of this Act and the constitution of the trade union or employers' organisation.
9. The following are indicative of the procedures that should be followed when conducting a secret ballot:

Notice

- 9.1. Reasonable notice must be given to members of the holding of a ballot. Notice may be given to employees by direct communication, including emails or SMSes, or by the display of notices at the workplace and at trade union offices. While there is no fixed standard, a period of three days would generally be considered to be reasonable notice.
- 9.2. The notice must specify the time and the place of the ballot.

Ballot papers

- 9.3. The question that is the subject of the ballot must be clearly phrased, and must be consistent with the terms of the dispute referral.
- 9.4. Ballot papers must be prepared in accordance with any applicable union or employer organisation's Constitutional provisions.
- 9.5. Ballots must not contain any information that would make it possible to identify voters.

Voter's roll

- 9.6. A ballot must be conducted in terms of a voters' roll of those members who are in good standing in terms of the union's constitution that the union proposes to call on strike. The voters' roll may be derived from the union's membership records or from the employer's records. The voters' roll identifies which members are entitled to vote and must be marked to ensure that members vote once only.
- 9.7. In the case of an electronic ballot conducted by email or SMS, the voters' roll must reflect the email address or mobile phone number of the members concerned and must be scrutinized and conducted by the CCMA or any independent organisations. The CCMA or any independent organisation must keep the records of balloting for three months and thereafter submit to the trade union for record keeping.
- 9.8. In the case of a postal ballot, the voters' roll must reflect the postal addresses of the members and the CCMA or any independent organisation must keep the postal ballots for three months and thereafter submit to the trade union for record keeping.
- 9.9. A trade union may elect to ballot members outside of the bargaining unit in respect of which it proposes to call a strike or to ballot non-members within the bargaining unit. However, those ballots must be conducted and recorded separately from the ballot of members in respect of whom the trade union proposes to call on strike.

Scrutineers and observers

- 9.10. A union may employ independent scrutineers to conduct or observe the ballot. However, there is no obligation to do so, unless provided for in a collective agreement or the trade union's constitution. In all the ballots there will be a scrutineer.

- 9.11. There is no requirement on a trade union to permit employer observers at a ballot, unless s provided for in a recognition or other collective agreement.

Balloting and counting

- 9.12. The union must provide ballot boxes for a secret ballot. Members listed on the voters' roll must receive a ballot paper and be able to mark it and place it in an unmarked ballot box without their vote being observed by any other person.
- 9.13. Ballots may be counted at the voting place, at a union office or at another place determined by the Independent Scrutineer. Where the ballot boxes are transported to another place, they must be sealed.

Records of ballot

- 9.14. Records of voting must be retained for a period of three years. These records include the voters' rolls, ballots in sealed ballot boxes or other containers and any documents used to calculate the outcome of the ballot.
- 9.15. In the case of electronic ballots, appropriate records must be retained.

Transitional provisions

10. Section 19 (1) of the Labour Relations Amendment Act, 2018 requires the Registrar of Labour Relations, within 180 days of the Act coming into effect, to –
- 10.1. consult with the national office bearers of trade unions and employers' organisations which have constitutions that do not provide for the conducting of a secret ballot before calling a strike or lockout;
- 10.2. issue a directive to those trade unions and employers' organisations as to the period within which their constitutions must be amended to ensure compliance with the requirement for conducting a secret ballot.

11. In terms of section 19 (2) of the Labour Relations Amendment Act, 2018, until such time as a trade union or employers' organisation complies with the directive to change its constitution, it must conduct a secret ballot of its members before calling a strike or lockout, as the case may be.

12. A model clause to achieve compliance with the requirement to hold a secret ballot before engaging in a strike or lockout is attached as Annexure A.

ANNEXURE ONE**DRAFT CLAUSE FOR TRADE UNION/EMPLOYERS' ORGANISATION
CONSTITUTIONS ABOUT SECRET BALLOTS IN RESPECT OF STRIKES OR
LOCKOUTS****Ballots about a strike/ lockout**

- 1 Despite any other provision in this Constitution –
 - 1.1 a strike/lockout may only be called in terms of this Constitution after a secret ballot has been conducted of those members in respect of whom the strike/lockout is called;
 - 1.2 a member shall not be disciplined or have their membership terminated for failure or refusal to participate in a strike/lockout if –
 - 1.2.1 a secret ballot was not held about the strike/lockout;
 - 1.2.2 a secret ballot was held, but a majority of the members who voted did not vote in favour of the strike/lockout.
- 2 The documentary or electronic record of a ballot about a strike/lockout must be retained for three years from the date of the ballot.

WARNING!!!

To all suppliers and potential suppliers of goods to the Government Printing Works

The Government Printing Works would like to warn members of the public against an organised syndicate(s) scamming unsuspecting members of the public and claiming to act on behalf of the Government Printing Works.

One of the ways in which the syndicate operates is by requesting quotations for various goods and services on a quotation form with the logo of the Government Printing Works. Once the official order is placed the syndicate requesting upfront payment before delivery will take place. Once the upfront payment is done the syndicate do not deliver the goods and service provider then expect payment from Government Printing Works.

Government Printing Works condemns such illegal activities and encourages service providers to confirm the legitimacy of purchase orders with GPW SCM, prior to processing and delivery of goods.

To confirm the legitimacy of purchase orders, please contact:

Anna-Marie du Toit (012) 748-6292 (Anna-Marie.DuToit@gpw.gov.za) and

Siraj Rizvi (012) 748-6380 (Siraj.Rizvi@gpw.gov.za)

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