

SECTION 198A-D OF THE LABOUR RELATIONS ACT (Non-standard employment)

PURPOSE OF SECTIONS 198A - D

The purpose is to regulate non-standard work. The emphasis is on protecting three categories of non-standard employees. These categories are –

- employees employed by a Temporary Employment Service (TES or commonly known as labour brokers section (Section 198A).
- fixed-term contract employees (Section 198B).
- part-time employees (Section 198C).

Normally such employees enjoy very little or no benefits in comparison to employees employed on a permanent basis or for an indefinite period.

UNDER WHAT CIRCUMSTANCES ARE THEY PROTECTED?

The protection in Sections 198A, 198B and 198C is only applicable from 01 January 2015 and to employees who earn below the earnings threshold as prescribed by the Minister in terms of section 6(3) of the Basic Conditions of Employment Act, and the majority of protections only apply after an employment period of 3 months.

SECTION 198A: LABOUR BROKER EMPLOYEES

The section contains a new definition of “temporary service”. The employee works for -

- the client of the TES for a period not exceeding three months;
- as a substitute for an employee temporarily absent, e.g. an employee on maternity leave or on sabbatical leave and who intends to return to work; or
- in a category of work and for any period of time where the service is determined to be a temporary service (either as per a collective agreement concluded in a bargaining council or a sectorial determination or in a Ministerial Notice).

SECTION 198A PROTECTION

A new type of dismissal is provided for, which is a termination by the TES (whether by TES or client) of employees on assignment with a client-

- to avoid deemed employment, or
- because an employee exercised a right in terms of the LRA.

SECTION 198B: FIXED TERM CONTRACTS

A fixed term contract is defined as a contract of employment that terminates on –

- the occurrence of a specified event;
- the completion of a specified task or project; or
- a fixed date, other than an employee’s normal or agreed retirement age, subject to other conditions listed below.

The section does not apply under the following circumstances:

- where the employee earns more than the BCEA threshold.
- where fixed-term contracts are permissible in terms of a statute or collective agreement or sectoral determination.
- an employer who employs less than 10 employees.
- an employer who employs less than 50 employees and where the business has been in operation for less than 2 years.

An employer can employ an employee on fixed term contracts or successive fixed term contracts for longer than 3 months only if -

- nature of work is of a limited duration; or
- the employer can demonstrate any other justifiable reason for fixing the term of the contract.

SECTION 198B PROTECTION

Employment in breach of Section 198B (3) is deemed to be of an indefinite duration and employees are considered permanent. Employees must be provided with equal access to opportunities to apply for vacancies from day one of their employment (not only after 3 months).

Fixed-term contract employees may not be treated less favourably than permanent employees unless there are justifiable reasons (Section 198B(8)(a)).

It must be noted that a referral in terms of s198B will result in a declaratory order only and no other relief can be granted (unless a dispute about an unfair dismissal has been referred as well). Once a declaratory relief is obtained, the next step would be to refer a dispute in terms of an unfair labour practice dispute regarding benefits or a dispute in terms of s6(4) EEA.

Furthermore, where an employee has worked on a fixed term contract on the same project for a period exceeding 24 months, the employer

must pay the employee, on expiry of the contract, one week’s remuneration for each completed year of the contract.

SECTION 198C: PART TIME EMPLOYEES

A part-time employee is an employee who is remunerated wholly or partly by reference to the actual time the employee works and who works fewer hours than a comparable full time employee.

The section does not apply to the following:

- where the employee earns more than the BCEA threshold or works less than 24 hours.
- during the first 3 months of employment with the same employer.
- an employer who employs less than 10 employees.
- an employer who employs less than 50 employees and where the business has been in operation for less than 2 years.

SECTION 198C PROTECTION

Part-time employees may not be treated less favourably than full time employees unless there are justifiable reasons (Section 198D (2)).

Employees must be provided with equal access to training and skills development and equal access to opportunities to apply for vacancies.

SECTION 198D: DISPUTE RESOLUTION

Disputes about the interpretation and application of sections 198A, B and C may be referred to the CCMA or Bargaining Council as an:

- interpretation and application dispute within 6 months after the act or omission occurred.
- dismissal or unfair labour practice disputes within existing time frames, i.e., 30 days and 90 days respectively.

TRANSITIONAL PROVISIONS

The protection applies to all non-standard employees from 01 January 2015 if the contract was entered into from 1 January 2015 or thereafter. If the contract was entered into before 1 January 2015, the protection is applicable from 1 April 2015.

RELEVANT LEGISLATION

- Labour Relations Act 66 of 1995 as amended
- <http://www.labour.gov.za/DOL/legislation/regulations/basic-conditions-of-employment/regulations-and-notices>
- Basic Conditions of Employment Act 75 of 1997 as amended.