

THE ESSENTIAL SERVICES COMMITTEE'S
GUIDELINE ON THE NEGOTIATION OF
MINIMUM SERVICES AGREEMENTS

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This document serves as a guideline only and does not constitute an exhaustive list of aspects or requirements for entering into lawful and valid Minimum Services Agreements. The reader of this document is in no way absolved from ensuring compliance with legal requirements and/or regulations that may not have been dealt with in this guideline.

These guidelines are prepared to comply with Section 70B (1) of the Labour Relations Act, 66 of 1995 and to set a standard for consistency in order to aid parties in preparing a Minimum Services Agreement, which is capable of being ratified by the Essential Services Committee.

The ESC has developed a template to serve as a guide for parties to use when negotiating a Minimum Services Agreement. This template requires parties to complete LRA from 4.8 (**Annexure A**) which details

the service that is designated, the post designations of employees who render essential services; the number of employees that must be at work; the number of employees who may participate in a strike, and a brief explanation.

PREAMBLE

The right to strike is enshrined in Section 23 of the Constitution, noting that this right is not absolute and may be limited in terms of section 36 wherein the limitation may be reasonable and justifiable in an open and democratic society as outlined in the Constitution, Act 108 of 1996.

The Labour Relations Act, 66 of 1995, ("the LRA") recognises the right to strike, but subjects the right to a number of limitations and, amongst others, provides that no person may partake in a strike if that person is engaged in an essential service.

In order to avoid unconstitutional prohibitions on the right to strike the LRA provides a mechanism by way of Minimum Services Agreements ("MSAs") to allow strikes to occur in services that are otherwise completely prohibited. The purpose of MSA guidelines is to balance the right to strike, with the right of provision of essential services during of labour dispute.

It is, however, the legal responsibility of the parties to a MSA to ensure that the service is carried out and not disrupted. Essential services must be maintained during a strike because if interrupted this would endanger life, personal safety and/or health of the whole or part of the population.

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1. INTRODUCTION

- 1.1. Essential services are those that if interrupted, would endanger the life, personal safety or health of the whole or any part of the population. In terms of the provisions of the LRA the Parliamentary Service and the South African Police Service are designated as essential services. The ESC is further authorised to designate other services as essential services in accordance with the provisions of Section 71 of the LRA.
- 1.2. It is acknowledged that not all employees in a designated essential service carry out essential services and therefore should not be precluded from striking. Not all the employees are necessary for the essential service to continue operating at an acceptable level.
- 1.3. Accordingly, where services have been designated as essential, the employers and employees or their trade unions may enter into MSAs in terms of the provisions of Section 72 of the LRA.
- 1.4. MSAs are prepared and adopted to regulate the maintenance of essential services, which services may not be interrupted during a strike or lock-out. A MSA is a collective agreement in terms of which the employer and its employees or their trade union identify and agree on providing a minimum quantity and quality of essential services during industrial action, sufficient to avoid the endangering of life, personal safety or health of the whole or any part of the population.

- 1.5. If the parties fail to reach agreement on minimum services, the ESC has the power to determine the minimum services to be maintained at all times. This is known as a Minimum Services Determination (“MSD”).
- 1.6. In order for a MSA to be valid and binding, the LRA requires the MSA to be ratified by the ESC. The primary purpose of the process of ratification is to ensure that the public’s interest in having access to the services are met. Accordingly, a workable collective agreement is required that will ensure that the basic needs of the public are met.
- 1.7. In addition to meeting the ESC’s obligations under section 70B(1) of the LRA, these guidelines are intended to facilitate the negotiation of MSAs and to provide information to assist the parties to understand the factors taken into consideration by the ESC when ratifying a MSA.

2. ABBREVIATIONS

- 2.1. The abbreviations used herein have the following meanings:

“CCMA”	Commission for Conciliation Mediation and Arbitration
“ESC”	Essential Services Committee
“ILO”	International Labour Organisation
“LRA”	Labour Relations Act, 66 of 1995
“MSA”	Minimum Services Agreement
“MSD”	Minimum Services Determination

2.2. Terms used herein have, for ease of reference, where applicable, been quoted from the LRA. It is the responsibility of the reader to ensure that when making use of these guidelines that the definitions are the current definitions as used in the LRA, which may be amended from time to time. The following terms are of relevance to these guidelines:

3. DEFINITIONS

'bargaining council'	means a bargaining council referred to in section 27 of the LRA and includes, in relation to the public service, the bargaining councils referred to in section 35 of the LRA
'collective agreement'	means a written agreement concerning terms and conditions of employment or any other matter of mutual interest concluded by one or more registered trade unions, on the one hand and, on the other hand- (a) one or more employers; (b) one or more registered employers' organisations; or (c) one or more employers and one or more registered employers' organisations
'essential service'	means- (a) a service the interruption of which endangers the life, personal safety or health of the whole or any part of the population; (b) the Parliamentary service; and (c) the South African Police Service

'lock-out'	means the exclusion by an employer of employees from the employer's workplace, for the purpose of compelling the employees to accept a demand in respect of any matter of mutual interest between employer and employee, whether or not the employer breaches those employees' contracts of employment in the course of or for the purpose of that exclusion
'minimum service'	means an acceptable level of service that is sufficient to ensure that during a strike no person's health, safety or life is endangered
'ratified minimum service' or 'determined minimum service'	means the minimum number of employees in a designated essential service who may not strike in order to ensure that the life, personal safety or health of the whole or part of the population is not endangered.
'strike'	means the partial or complete concerted refusal to work, or the retardation or obstruction of work, by persons who are or have been employed by the same employer or by different employers, for the purpose of remedying a grievance or resolving a dispute in respect of any matter of mutual interest between employer and employee, and every reference to 'work' in this definition includes overtime work, whether it is voluntary or compulsory
'trade union'	means an association of employees whose principal purpose is to regulate relations between employees and employers, including any employers' organisations;

4. LEGAL FRAMEWORK

- 4.1. The Constitution and the LRA, together with the regulations promulgated in terms thereof, in particular the ESC Regulations promulgated in Government notice 38317, form the basis of the legal framework for entering into MSAs.
- 4.2. In this regard, particular notice must be taken of Section 72 of the LRA, which regulates MSAs and MSDs.
- 4.3. When minimum services are required, the ILO has specific requirements described as compensatory guarantees. One of these guarantees concerns the definition of what should constitute a minimum service and is intended to prevent the abuse of the principle by authorities and employers. There must be compliance with a three-fold standard, being:
 - trade unions, along with employers and the public authorities, should be able to participate in defining the minimum service;
 - the minimum service should be confined to operations that are strictly necessary to avoid endangering the life or basic living conditions of the whole or part of the population; and
 - the minimum services to be maintained should be established clearly, applied strictly, and made known to those concerned in due time.

So, for those workers in respect of whom minimum services may be required, such restrictions can only be imposed provided that the guarantees listed above are implemented. Failure to respect these guarantees will render strike restrictions incompatible with Convention 87 of the ILO.

A Minimum Services Agreement is comprised of two parts:

- Part A being the main body of the agreement which deals with dispute resolution, replacement labour and the duration of the Agreement.
- Part B is a form that will indicate the minimum number of employees rendering an essential which is to be maintained during industrial action.

5. NEGOTIATING PROCESS

- 5.1. Parties (employers and employees) rendering essential services are required to negotiate and conclude MSA's.
- 5.2. Negotiating MSA's follows the same process and structure as negotiating collective agreements, however, there are certain pertinent issues that parties would have to note when negotiating and concluding such MSA's.
- 5.3. The ESC may give parties a specific timeframe in which to negotiate and conclude MSA's. In the event that parties do not conclude the MSA within the allocated timeframe, the ESC may determine the minimum services to be maintained.
- 5.4. In negotiating MSA's, parties must note the following (although this is not an exhaustive list):
 - 5.4.1. The MSA must be detailed and unambiguous. This means that:
 - a) The MSA needs to detail all the affected positions in the organogram and clearly state which ones fall within the (designated) essential service;
 - b) Parties must be clear on the process that is to be followed during a strike, i.e.:
 - i) The number of employees who can strike and their respective job categories;
 - ii) The number of employees who may not strike, and their respective job categories. If the employees are to alternate being on duty, the minimum numbers in each job category must still be maintained; and
 - iii) How the issue of replacement labour is to be dealt with.

- 5.4.2. The MSA must be in English;
- 5.4.3. The period of duration of the MSA must be indicated (agreements must be for a limited duration, preferably not more than five years);
- 5.4.4. The MSA must contain a clear dispute resolution mechanism, which includes the following:
 - a) A clause that the MSA must be ratified in order for it to be valid and binding on the parties. In the absence of such ratification a strike will be in contravention of section 65 (1) (d) of the LRA and will be unprotected; and
 - b) How disputes on the interpretation/application and enforcement of the MSA will be dealt with.
- 5.5. When parties have completed their negotiations and concluded the MSA, the agreement needs to be submitted to the ESC, together with motivation on why it should be ratified. The ESC will consider the MSA, including the public interest factor, and if the MSA meets the requirements for ratification, the ESC will ratify it.
- 5.6. In the event that the MSA does not meet the requirements for ratification, the ESC will refer it back to the parties for further negotiation within a specified period, indicating the areas requiring further attention.

- 5.7. If an agreement cannot be negotiated, the ESC may permit the parties to refer the matter to the CCMA or a bargaining council with jurisdiction. If, however, the parties still cannot reach an agreement, the ESC may appoint a panel to determine the minimum services that are required to be maintained in the essential service. The CCMA or the bargaining council, as the case may be, will be required to submit a detailed report on the outcome of the conciliation efforts that took place between the parties for the consideration of the ESC. In this regard, parties must be aware that the information submitted during the negotiation process may be used by the ESC in making its determination on the minimum services to be maintained in the essential service.
- 5.8. Section 72 (8) of the LRA also creates an opportunity for parties that are in the process of negotiating a MSA to, subject to any applicable collective agreement, refer a dispute arising from those negotiations to the CCMA or a bargaining council having jurisdiction for conciliation and, if an agreement is not concluded, to the ESC for determination.
- 5.9. The procedure for resolving disputes is prescribed in Section 73 of the LRA and the ESC Regulations published under Government Gazette number 38317 of 2014. Any party may refer a dispute to the ESC in terms of Section 73 of the LRA.
- 5.10. The CCMA does not have the authority to arbitrate a dispute about the conclusion of a MSA. The authority to determine the dispute lies within the exclusive jurisdiction of the ESC.
- 5.11. The alternative method of dispute resolution for parties that are precluded from participating in a strike or lock-out, because they are involved in essential services, is to refer the matter to interest arbitration in terms of the provisions of Section 74 of the LRA. This process allows one party, with or without the agreement of the other parties, to refer a dispute in an essential service to arbitration. Section 74, however, does not apply where minimum services have been agreed and ratified, or determined by the ESC (subject to the exception referred to in Section 72 (5) and (6) of the LRA).

6. RATIFICATION OF MSA'S

The ESC requires the following minimum requirements to be adhered to before a MSA can be ratified:

BASIC REQUIREMENTS FOR RATIFICATION

6.1 STRUCTURE:

- 6.1.1. The service must be a designated essential service and the MSA must only relate to employees employed in an essential service;
- 6.1.2. The MSA must be in writing and must be clear and readable (unambiguous);
- 6.1.3. Where industry specific terms are used, such terms must be clearly defined in the MSA;
- 6.1.4. Bearing in mind that the MSA will have to be considered by members of the ESC it is required that the MSA be concluded in English;
- 6.1.5. The original MSA must be submitted and must be attached to a duly completed Form LRA 4.8;
- 6.1.6. The MSA must be signed by every party to the agreement and each and every page to the MSA must be initialed by all signatories;
- 6.1.7. The MSA cannot be concluded for an indefinite period. Therefore, the parties must clearly indicate the duration of the MSA. The period of the agreement should not exceed five years.

6.2 SUBSTANCE:

- 6.2.1 The minimum services agreed upon should be of such a nature that a level of production or service should be maintained at which the life, personal safety or health of an individual or the public as a whole will not be endangered. The ESC must be convinced that the minimum service offered is sufficient to ensure that the life, personal safety or health of an individual or the public as a whole will not be endangered.
- 6.2.2 The ESC must be provided with sufficient supporting evidence to allow the ESC to make an informed decision as to whether the minimum service agreed upon is adequate in order to ensure that the essential service will continue to be delivered and the interests of the public protected.
- 6.2.3 The MSA must address the following items relating to the minimum service:
- a) An organogram of the employer's organisation must be submitted detailing the total staff complement and indicating the number of employees per job grade. The organogram must further depict which positions are involved in essential services and which are not. In this regard, the positions which are intended to be the minimum service must also be indicated. Actual numbers must be used and not percentages;
 - b) A description of the essential services rendered by the employees i.e. what are the core obligations of the service. In this regard, information must be submitted of the total number of employees involved in delivering the essential service (this can be indicated on the abovementioned organogram);
 - c) Information on whether the whole or a part of the service is an essential service;

- d) Details of the duration that the services may safely be interrupted, if at all; and
- e) Details of the extent to which an essential service can safely be reduced to a minimum service, with a clear description of the duties that will be performed in the positions and/or job categories designated as part of the minimum service, i.e. what services will be rendered and by whom.

6.2.4 How the issue of replacement labour is to be dealt with must be addressed in the MSA.

6.2.5 Bearing in mind that each service has its own unique public interest considerations, the parties to a MSA must address the public interest applicable to their area of service delivery in their motivation for the ratification of the MSA. In this regard, parties negotiating an MSA must be aware that the public's interest is of primary concern.

6.2.6 The ESC can also request further relevant written submissions or oral evidence from the parties relating to any matter relevant to the request for ratification. The parties must also be aware that information submitted during this process may be utilized by the ESC in making its determination.

7. ASSISTANCE PROVIDED BY THE ESC

The ESC may on request provide the following assistance to parties regarding the negotiation and conclusion of MSAs:

7.1 Provide MSA templates for specific sectors/workplaces;

7.2 Training of bargaining council panelists;

- 7.3 Training of parties regarding the process of negotiating MSAs and the substantive law applicable to MSAs; and
- 7.4 Advice of a general nature and guidance as it relates to MSA's.
- 7.5. Provides facilitation to concluding MSA's to parties.