



ESSENTIAL SERVICES COMMITTEE

Revolutionising Workplace Relations

THE ESSENTIAL SERVICES GUIDELINES ON THE NEGOTIATION OF MINIMUM SERVICES AGREEMENTS IN THE PUBLIC SERVICE

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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.

PREAMBLE

The right to strike is enshrined in Section 23 of the Constitution, Act 108 of 1996 (“the Constitution”). However, this right is not absolute and may be limited by a law of general application to the extent that such limitation may be reasonable and justifiable in an open and democratic society.

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 which are otherwise completely prohibited.

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.

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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 regulations:

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

'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. BACKGROUND

- 4.1. The ESC determined the framework for minimum services in the Public Service. In its determination ruling, the ESC indicated that it would issue guidelines so as to assist parties in their negotiations of minimums to be maintained during a strike
- 4.2. Minimum services exist to balance the right to strike with the need of providing essential services.
- 4.3. Minimum Services must be seen in the context of restoring the right to strike lost under Section 65(1)(d).

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 parties must conclude the Minimum services per provincial department or per workplace.
 - 5.4.1.1. Where the agreement / determination is per provincial department it must include numbers of employees per post designation who may strike and number of employees who must be at work during a strike for all employer workplaces in that province.
 - 5.4.1.2. Where an agreement is for a specific workplace, it must clearly identify numbers of employees who may strike per post designation and number of employees who must be at work during a strike.
 - 5.4.2 The parties must in negotiating the minimum service levels factor in any applicable legislation, regulations or any form of prescripts that prescribes the number of employees required to render the service.
 - 5.4.3. The MSA must be detailed and unambiguous. This means that:

- a) 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;
 - iii) In circumstances where the service is rendered on shift basis the MSA must reflect the staffing levels per shift and the minimum number of employees per shift, the number of employees who are off duty and those that may participate in strike action; and

5.4.4. The MSA must be in English;

5.4.5. The original MSA must be submitted to the ESC;

5.4.6. The MSA must contain a clear dispute resolution mechanism, which includes the 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

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 parties may refer the matter to the PSCBC for conciliation. If, however, the parties still cannot reach an agreement in conciliation, the matter may be referred to the ESC for determination. Parties must be aware that the information submitted during the negotiation process and the PSCBC conciliation may be used by the ESC in making its determination on the minimum services to be maintained in the essential service.
- 5.8. The parties should negotiate and agree on the terms of the working groups

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;
- 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 different 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 the 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.

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 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.

6.2.5 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 is able to 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 CCMA commissioners and 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.