

## **The National Minimum Wage and the exemption process for employers**



***The much-anticipated and controversial National Minimum Wage Act (NMWA) was signed into law by President Ramaphosa on 26 November 2018 to commence on 1 January 2019.***

The *consequences of the National Minimum Wage Act* is that every employee in South Africa (**excluding** the category of employees under Section 6 (6), Schedule 1 of the NMWA) will be entitled to a minimum of R20,00 per hour of actual work.

Employers who are subject to a Bargaining Council Main Agreement or a Sectorial Determination that is below the national minimum wage will have to adjust their current rates accordingly. However, should an employer be unable to pay the said rate, the employer may apply for an exemption, which may be granted in favour of the employer.

In terms of **Section 15(1) of the National Minimum Wage Act -**

(1) An employer or a registered employer's organisation may, in the prescribed form or manner, apply for an exemption from paying the national minimum wage.

In terms of the Regulations to the National Minimum Wage Act, the following guidelines for the exemption process have been provided:

## Section 1 - Definitions

- **“delegated authority”** – means the Director-General: Labour or an employee in the public service whom the Minister has given power to grant exemptions in terms of section 15(3) of the Act read with section 85 of the Basic Conditions of Employment Act, 1997 (Act No. 75 of 1997);
- **“National Minimum Wage Exemption System”** – means the online exemption process contemplated in Regulation 6.

## Section 2 - Application for exemption from paying National Minimum Wage

- The Exemption Application must be lodged on the National Minimum Wage Exemption System in the form required by that System.
- An exemption may only be granted if the delegated authority is satisfied that-
  - a) the employer cannot afford to pay the minimum wage; and
  - b) every representative trade union representing one or more of the affected workers has been meaningfully consulted or, if there is no such trade union, the affected workers have been meaningfully consulted.
- The determination of whether an employer can afford to pay the minimum wage must be in accordance with the decision **process in Schedule 1** of the Regulations.
- In consulting with the representative trade union or the affected workers contemplated in sub-regulation (3), the employer must provide the bargaining council, union or, if there is no such union, the affected workers with a copy of the application to be lodged in terms of sub-regulation (2) downloaded from the National Minimum Wage System for that purpose.

## Consideration of the Exemption Application

- The delegated authority may grant exemption from paying the national minimum wage–
  - a) only from the date of the application for the exemption and specifying the period for which it is granted, which may not be more than 12 months;
  - b) specifying the wage that the employer is required to pay workers, which may not be less than the thresholds referred to in sub-regulation (7); and
  - (c) on the condition that advances the purposes of the National Minimum Wage Act.
- An exemption would only be considered if the employer confirmed compliance with applicable statutory payments and obligations, including but not limited to the Unemployment Insurance Fund, the Compensation Fund and any applicable Bargaining Council Main Collective Agreement.
- Any refusal of an exemption must be by notice published on the National minimum Wage Exemption System together with reasons for refusal.

## **Section 4 - Display of the Exemption**

An employer in respect of whom an exemption has been granted must–

- display a copy of the exemption notice conspicuously in the workplace where it can be read by the employees to whom the exemption applies;
- give a copy of the exemption notice to –
  - a) the representative trade union representing one or more of those workers;
  - b) every worker who requested a copy; and
  - c) the bargaining council.

The exemption process will have to be relied upon by many employers who may not be able to implement the *provisions of the National Minimum Wage Act*. SERR Synergy assists employers with regards to the process of the exemption, prepare the exemption application forms and consult with the union and/or employees. Thereafter we can provide an employer with the necessary guidance and assistance to submit the exemption application on the online system, once this system is active. We will be communicating detailed information to our clients early in January on how the new National Minimum Wage Act will impact on businesses.

*About the Author:* Jared Francis joined SERR Synergy in October 2016, and currently holds the title of KZN Labour Manager. He is an admitted attorney who has practised in KZN and Gauteng. He holds an LLB degree, a Post-Graduate Diploma in Industrial Relations and a Post-Graduate Certificate in Forensic Investigation from the University of KwaZulu-Natal. He also holds Post-Graduate Certificates in Advanced Labour Law, Corporate Law, Advanced Human Resource Management and Health and Safety from UNISA and has more than 10 years' experience in the legal and industrial relations fields respectively.

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