

QUICK GUIDE TO NEW LRA SECTIONS 198A, B, C & D

GLOSSARY: TES (temporary employment service provider aka a labour broker); EE (employee); ER (employer); TS (temporary service ito s198A); FTC (fixed term contract ito s198B); PTE (part-time employee ito s198C); FTE (full-time employee ito s198C); EEA (Employment Equity Act); BCEA (Basic Conditions of Employment Act); BC (bargaining council).

APPLICATION OF NEW SECTIONS

- 1 Is the ER a genuine service provider or independent contractor providing cleaning or security services? If so they are excluded from ambit of amendments-s198A(1) / s198(1).
- 2 Is the EE earning below the BCEA threshold of R205 433.30pa? The amendments only apply to those earning below threshold-s198A(2); 198B(2)(a); 198C(2)(a). NB: *The existing s198 continues to apply to all EEs regardless of earnings.*
- 3 Sections 198B & C do not apply to ERs with less than 10 EEs, nor to ERs with less than 50 EEs who have been in business for less than 2 years (unless the ER has more than 1 business or the business was formed from other existing businesses)-ss198B(2)(b); 198C(2)(b).

JUSTIFIABLE REASONS for ss198A, B & C

- 4 Is the EE being treated on the whole less favourably than an EE performing the same or similar work? If not, this must be rectified. If EE is being treated less favourably, check if any of the following factors apply: seniority, experience, length of service, merit, the quality or quantity of work performed, or other criteria of a similar nature not prohibited by the EEA. If so the treatment is justifiable. NB: The onus is on TES/ER to provide the justifiable reason/s.

TEMPORARY SERVICES – s198A

- 5 Has EE been contracted to perform work for a client for period not exceeding 3 months? Is the EE a substitute for a temporarily absent employee? Is the EE being employed ito a BC collective agreement, sectoral determination or a notice published by Minister? If so, that is a “temporary service”-s198A(1), and EE is employed by EE of TES-s198(2) & s198A(2)(a).
- 6 If EE is not providing a TS and earnings are below threshold then EE is *deemed* to be EE of client after 3 months and employed on indefinite basis-s198A(3)(a)&(b). NB: The employment is not indefinite if there is a FTC-s198(3)(b)(ii).
- 7 Has the TES terminated the EE's service with a client in order to avoid the EE becoming an indefinite EE of client? If so that is an unfair dismissal-s198A(4) read with s186(b)(ii).
- 8 Ascertain names of the clients at which the EE has served with the TES and the duration of each stint.

FIXED TERM CONTRACTS – s198B

- 9 Have the parties concluded a FTC? Does the FTC terminate on the occurrence of a specified event, or the completion of task/project? If so

what is that event/task? How can one determine that the task or project has been completed? When did task/project commence? Does the FTC end on a fixed date that is not the EE's normal or agreed retirement date?-s198B(1). Was the date fixed in anticipation of the task/project being completed by that date?

- 10 The above section does not apply if the FTC is permitted by statute, a sectoral determination or collective agreement-s198B(2)(c).
- 11 Subject to above limitations an ER may enter into FTC or successive FTCs for longer than 3 months if – the nature of the work is of limited or definite duration; or the ER can demonstrate any other justifiable reason-s198B(3). If no justifiable reasons can be shown by ER then the FTC is deemed to be of an indefinite duration-s198B(5).
- 12 If the FTC is longer than 3 months then the EE must not be treated less favourably than an EE performing the same or similar work unless there are justifiable reasons-s198B(8). A FTC EE must also be provided with the same opportunities to apply for vacancies as indefinite term EEs-s198B(9).
- 13 If the FTC (or a renewal) endures for longer than 3 months it must be in writing and state the nature of the work that is of limited or definite duration, or the justifiable reason for fixing the term of the contract-s198B(6), failing which the contract is of indefinite duration-s198B(5). The onus is on ER to prove justifiable reason to fix the term of FTC and that the term was agreed-s198B(7).
- 14 Subject to any collective agreement, where a FTC is longer than 24 months and where the EE is “employed to work exclusively on a specific project of limited duration” then the ER must on expiry of the FTC pay severance pay of 1 week for each completed year-s198(1)(a). This provision applies retrospectively-s198B(10)(b). This obligation falls away if the ER offers the EE employment or finds employment with a different employer commencing on expiry of the FTC and on similar terms-s198B(11).
- 15 An EE placed by a TES with a client ito a FTC is not deemed to be an indefinite EE of the client-s198(3)(b)(ii).
- 16 If the EE has served ito more than 1 FTC, then ascertain the number and duration of each FTC.

JUSTIFIABLE REASONS for FTCs only

- 17 The conclusion or renewal of a FTC longer than 3 months will be justified where an EE is – a) replacing another temporarily absent EE; b) is employed due to a temporary increase in work of up to 12 months; c) a student or recent graduate employed for the purpose of being trained or to gain work experience to enter a job or profession; d) employed to work exclusively on a specific project of limited or defined duration; e) a non-citizen granted a work permit for a defined period; f) employed to perform seasonal work; g) employed on an official public works scheme or similar job creation scheme; h) employed in a position funded by an external source for a limited period; i) has reached the normal or agreed retirement age in that business-s198B(3)&(4).

PART-TIME EMPLOYEES – s198C

- 18 A PTE is an EE who is remunerated wholly or partly by reference to the time that the EE works fewer hours than a comparable FTE-s198C(1)(a). A FTE is an EE who works wholly or partly by reference to time worked and who is identified as a FTE by custom or practice-s198C(1)(b)(i), in the same workplace as PTE or any other workplace of ER-s198C(6). This does not include a FTE whose hours are reduced for operational reasons-s198C(1)(b)(ii).
- 19 This section does not apply to PTEs who work less than 24 hour per month or during an EE's first 3 months of continuous employment-s198C(2)(c)&(d).
- 20 Whether the treatment meted out to PTEs is less favourable must be determined with reference to FTEs performing same or similar work – s198C(3)(a).
- 21 The ER must also provide PTEs with similar access to training and skills development as provided for comparable FTEs, and provide them with the same opportunities to apply for vacancies-s198C(3)(b)&(5).

GENERAL & DISPUTE RESOLUTION-s198D

- 22 Other than a dispute about a dismissal ito s198A(4) (ie a dismissal for purposes of avoiding an EE becoming an indefinite EE of the client or the EE exercised a right given by the Act), the dispute must be referred to the CCMA or BC within 6 months. Dismissal disputes must be referred within normal 30 day period.
- 23 A FTC EE is to be taken to have been dismissed where the EE had a reasonable expectation of indefinite employment but where he was given a renewal-s198A(4) / s186(b)(ii).
- 24 Sec 198(4A) read with s198(4) provides that the client of a TES is jointly and severally liable for non-compliance with a collective agreement, award, BCEA or sectoral determination and as such the EE may bring proceedings against either TES or client or both. This liability is not relevant iro dismissals because the client is deemed (s198A(3)(b)) to be the ER and proceedings must brought against it.
- 25 In terms of new amendments to s 21 and in order to determine the representation of a trade union, all classes of employees must be taken into account including non-standard EEs at the premises of client or TES.

TRANSITIONAL ARRANGEMENTS – ss198A(9), 198B(8)(b) & 198C(4)

- 26 **Sec198A:** If EE providing a TS was employed to work for a client before 1.1.2015 then these EEs acquire s198A rights from 1.4.2015. If an EE has been engaged after 1.1.2015 then such EE acquires such rights immediately. **Sec198B:** If the FTC was concluded before 1.1.2015 then EE acquires s198B rights on 1.4.2015. If the FTC was concluded after 1.1.2015 then such rights are acquired immediately. **Sec198C:** If a PTE commenced employment before 1.1.2015 then that EE acquires s198C rights from 1.4.2015. If the PTE commences after 1.1.2015 then the EE acquires such rights immediately.