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Sweeping Labour Law Changes Afoot

The Minister of Labour recently released proposals that will significantly change labour legislation in South Africa. The Basic Conditions of Employment Amendment Bill, the Labour Relations Amendment Bill, the Employment Equity Amendment Bill and the Employment Services Bill have the potential to represent the most fundamental changes to labour legislation since the African National Congress came to power in 1994 and will transform regulation impacting employee-employer relationships.

What follows is a summary of the proposed amendments, with a particular focus on the implications for employers.

The Basic Conditions of Employment Amendment Bill (BCEA Bill)

The BCEA Bill repeals the existing provisions dealing with temporary employment services (that is, labour brokers). This does not mean that labour broking will be banned outright, but the changes mean that the client is in effect the employing entity, which will provide a disincentive to making use of labour broking arrangements.

The BCEA Bill also seeks to restrict the use of fixed-term employment by requiring that such workers receive benefits of similar or equal value to benefits given to permanent employees. This may mean, for example, that fixed-term employees must receive medical aid and pension/provident fund contributions if such benefits are afforded to permanent employees.

Employers who currently require an employee to contribute to the cost of company uniforms may have to rethink such practices; the BCEA Bill prohibits any requirement that an employee or prospective employee make any payment to, or purchase any goods from, their employer.

The BCEA Bill substantially increases the penalties that can be imposed on employers for non-compliance with the Act. At present if labour inspectors allege that an employer is in breach of the Act, they initially require an undertaking of compliance, which if not forthcoming, is followed by a compliance order. The BCEA Bill does away with such procedures and effectively makes non-compliance a criminal offence. Such is the quality of the drafting, some breaches of the Act are said to carry a "*minimum term of one year's imprisonment*".

The Labour Relations Amendment Bill (LRA Bill)

The Explanatory Memorandum relating to the LRA Bill is particularly noteworthy. It suggests that the government's focus, or what is referred to as the "*ruling party's election manifesto*", is to ensure "*decent*" work for all workers.

The LRA Bill represents widespread changes to the operations of the Commission for Conciliation, Mediation and Arbitration (**CCMA**) and the Labour Court.

New procedures at the CCMA will include:

- the use of “con-arbs” will be extended (currently restricted to misconduct cases) to be the preferred method of dealing with all disputes;
- employees earning in excess of a remuneration threshold will be excluded from referring disputes to the CCMA (at this stage we do not know what that remuneration threshold will be);
- greater powers are given to enforce arbitration awards (in other words, to ensure that employers comply with awards);
- a reduction in the circumstances in which employers can rely on private dispute resolution procedures (which effectively oust jurisdiction of the CCMA);
- an extension of the circumstances in which redundant employees can ask the CCMA to arbitrate their dispute, rather than approach the Labour Court for adjudication (a much longer and usually more costly process); and
- employees on fixed-term contractual arrangements will have great scope to refer unfair dismissal claims.

The authority of the Labour Court will be widened such that it will have exclusive jurisdiction to determine disputes involving the interpretation of employment laws, all matters concerning the termination of contracts and constitutional matters arising from employment relations. In part these amendments are intended to prevent employees from approaching the High Court rather than the Labour Court, but so wide are the powers given to the Labour Court – or so poor is the drafting – that if taken at face value, these changes could put the CCMA out of business.

The LRA Bill, as the explanatory note suggests, also seeks to “*to provide for the prohibition of certain abusive practices to workers*”. Most notably the LRA Bill aims to achieve this by also repealing existing provisions impacting labour brokers. Importantly for all employers, like the BCEA Bill, the LRA Bill also restricts the use of fixed-term contracts by requiring that all employees are retained on a permanent basis, unless the employer can establish a justification for the use of a fixed-term employment contract.

The Employment Equity Amendment Bill (EEA Bill)

Proposed amendments to the *Employment Equity Act* 1998 are widespread and are not good news for employers, particularly those who are found to be in breach of their employment equity obligations. The changes include:

- the definition of unfair discrimination has been extended to take account of circumstances where there is a difference in terms and conditions of employment between employees of the same employer performing the same or substantially the same work or work of equal value;
- changes to the power of labour inspectors in enforcing the Act; and
- vastly increased fines of non-compliance that may include a fine of 2% of turnover for first-time offenders, up to 10% of turnover for repeat offenders.

The Employment Services Bill (ES Bill)

The ES Bill is a new piece of legislation that, amongst other things, represents the Government’s efforts to address South Africa’s high unemployment rate. It aims to do this by requiring all employers to notify the Department of Labour of a job vacancy (as

well as the filling of that vacancy) and the formation of a body called the Employment Services Board that will register and match job seekers.

The ES Bill also takes aim at labour brokers and includes a requirement that a “private employment agency” be registered and licensed. Such is the definition of a private employment agency that recruitment agencies will also be caught by these provisions.

Finally, the ES Bill seeks to restrict employers’ ability to employ foreign workers. Amongst other things, employers will have to make submissions to the Department of Labour as to why a South African citizen cannot be employed and it will become an offence to dismiss a South African citizen as a result of having employed a foreign worker.

Reaction to the Bills

The Bills have come under widespread criticism, particularly by employer organisations. Business Unity SA have called for a complete redrafting of the Bills, suggesting that they contain “*contradicting provisions, recommendations that go against the government’s own assessment, and a disrespect for a process that undermines the social dialogue process*”.

Attempts to end the practice of labour broking have also been criticised, particularly after the leaking of a report commissioned by the government that suggested such attempts were unconstitutional and in violation of international conventions signed by South Africa.

The Editor of the *Financial Mail*, Barney Mthombothi, has been perhaps the most vocal of critics. In his view, “*the idea that we can legislate our way to better and more employment will leave the economy in ruins*”. He suggests that the very people who cannot create jobs – government and organised labour – are driving the debate on employment policies and he singles out the ES Bill for thinking that “*takes us from mere bureaucratic meddling to implacable Stalinist social engineering*”.

What’s Next?

The Department of Labour has undergone a period of public consultation on the amendments and the Bills will be sent to the National Economic Development and Labour Council (“**NEDLAC**”) for debate and probable amendment.

It is too early for employers to panic, as the final legislative amendments may differ greatly to the current content in the Bills. However, prudent employers will study the Bills closely and begin planning for what will undoubtedly be a very different employment landscape when the changes take effect.

Workplace Strategies is a Cape Town-based consultancy with expertise in labour law interpretation and compliance. For more information see www.workplacestrategies.co.za or contact info@workplacestrategies.co.za.