

Unlocking labour laws

Important new labour bills

Can you tell me about the proposed amendments to our labour laws. What is likely to change? Is it good or bad for labour?

There are three amendment bills: Basic Conditions of Employment Amendment Bill, Labour Relations Amendment Bill and Employment Equity Amendment Bill and a new bill for a new law, the Employment Services Bill, all published in December 2010.

At present the bills are in the public arena for comment, and still have to be introduced into the parliamentary law-making process. The bills are therefore *not law* and depending on the debates between major stakeholders further amendments may be proposed.

Three key debates have raged over recent months.

The first has been that of 'decent jobs' versus 'any job at all'.

The second debate has been about the value of labour brokers who are providers of employment for some 500 000 people according to the Confederation of Associations in the Private Employment Sector. Cosatu (Congress of South African Trade Unions)

however is of the view that labour brokerage is the 'new slavery'.

The third debate is the possible impact in the employment equity terrain which could, as the Democratic Alliance and Solidarity have warned, lead to job losses for one million coloured workers in the Western Cape and 300 000 Indian workers in KwaZulu-Natal. The Minister of Labour, Mildred Oliphant has however given her assurance that that is not the intended consequence of the amendments.

The proposals are the most significant shake up of the labour law landscape since the mid-1990s. The bills are largely labour friendly and should be welcomed by the trade union movement.

The conditions of vulnerable workers is strengthened and workers in temporary or part-

time positions improved. These improvements though are at cost to employers which may cause job losses. Job losses are a major concern to Cosatu. Cosatu's Patrick Craven, stated in his 2010 end of year address that, 'Since the beginning of 2009 we have lost 1.17 million jobs, plunging 5.85 million more family members into the ranks of the poor. This represents a job loss bloodbath'.

It remains to be seen whether the bills will help or hinder the ANC's intention to create five million new jobs over the next ten years.

Basic Conditions of Employment Amendment Bill

The bill *obliges employers to contribute the same benefits to contract workers as to permanent workers*. This amendment will be welcomed by workers on fixed-



term contracts who will enjoy benefits such as medical aid and pensions previously only enjoyed by permanent workers.

The bill proposes *setting a threshold for representativeness for registered trade unions in workplaces covered by sectoral determinations*. The Minister of Labour may make sectoral determinations affecting terms and conditions of employment for sectors where there is low trade union membership and usually low wages.

The minister has made determinations in sectors such as security guards, domestic workers, taxi drivers and forestry workers. In future when the minister makes determinations s/he may set a threshold of representativeness for unions to have organisational rights in the sector such as access to workplaces and deductions for union subscriptions from members. This will enable unions to engage employers in collective bargaining and to represent employees in disciplinary and grievance processes.

At this point there is no indication of what the threshold for representativeness will be.

In respect of enforcement and *penalties for ignoring clauses of the BCEA*, the Bill does away with compliance orders and empowers labour inspectors to issue fines, and if fines are not paid within 21 days the inspector can lay criminal charges against employers. The SAPS may accompany an inspector to workplaces to check whether an employer has complied with statutory obligations.

If the bill becomes law, an employer who contravenes any provisions relating to, for example, hours of work, overtime, meal breaks or Sunday pay may be fined a minimum of R10 000 or face a minimum of 12 months imprisonment. An employer who bars an inspector from entry to the workplace faces identical penalties.

Clearly the minister wishes to compel compliance with the BCEA.

Labour Relations Amendment Bill

Under the amendments there is *greater protection for employees on fixed-term contracts*.

The definition of 'dismissal' has been extended so an employee on a fixed-term contract may claim to be unfairly dismissed if the employee expected the employer to offer a permanent contract of employment on similar terms and conditions to those under the fixed-term contract, but did not.

A further more fundamental provision obliges an employer to place fixed-term employees on a permanent/indefinite contract unless the employer can justify maintaining the employee on a fixed-term contract. Employers will no longer be able to get away with employing staff on fixed-term contracts to keep labour costs low through excluding employees from benefits which permanent employees enjoy, or to have greater flexibility when it comes to hiring and firing.

If however there is a genuine economic reason to have employees on fixed-term contracts, such as in the construction or agricultural industries where workers are employed for a particular project or for a particular season, then employers may still do so.

In a major change to labour laws the proposed LRA amendment would see *high income earners excluded from the protections they previously enjoyed* under the LRA. An income threshold has not yet been set. This would mean that such employees would not be able to refer a dispute about a dismissal (except for an automatically unfair dismissal), unfair benefits, training, retrenchments, a transfer of a business to the CCMA or Labour Court for relief.

There has been criticism of senior executives taking up a

disproportionate amount of time and resources in the CCMA at the expense of giving priority to low-income earners who are in a vulnerable economic position. Such a provision would however be open to constitutional attack as the right to fair labour practices applies to 'everyone' even high flying CEOs.

The LRA amendment proposes to *expand the functions of institutions*. Bargaining Councils may charge a fee for conciliation or arbitration services, similar to that charged by the CCMA. The CCMA may if requested assist parties to serve notices or documents or to enforce arbitration awards certified by the director. This will assist workers to enforce favourable awards against employers who often duck and dive and avoid their obligations to reinstate or pay workers compensation following unfair dismissal.

If an employee is required to contribute to the fee of a private arbitrator and is dismissed then the employee may refer a dispute to the CCMA. The CCMA must appoint a commissioner to attempt to resolve the dispute. The CCMA must also appoint a commissioner if the person or body appointed to resolve a dispute is not independent of the employer (such as a firm of attorneys which regularly represents the employer). This provision closes a loophole which employers enjoyed to contract out of the CCMA and proceed by way of private arbitration.

Employment Equity Amendment Bill

Under the proposed amendments the *ambit of unfair discrimination is widened*.

The bill has clarified that any income differential between people performing the same work or work of equal value that is based on race, sex or HIV status or any other ground in the Constitution will be regarded as unfair and prohibited. In principle and practice, black

workers performing the same work as white workers must receive the same salary and benefits.

The bill deals with the *failure to submit plans and report which comply with the EEA*. The director general may approach the Labour Court to impose a fine on an employer if the employer fails to prepare an employment equity plan which complies with the law; fails to submit an employment equity report; or fails to comply with a compliance order issued by a labour inspector.

However the minister has deleted the schedule setting out the fines which may be imposed, so there is uncertainty as to what the size of the fine may be.

Employment Services Bill

The LRA amendment bill will *delete provisions applicable to labour brokers from the BCEA and the LRA*. Deleting the provisions does not however do away with labour brokers. The minister has however introduced a new bill, the Employment Services Bill, to regulate labour brokers.

The bill proposes *regulating labour brokers*. It requires brokers (referred to as 'private employment agencies') to register with the Department of Labour (DoL). Only if and when the department issues a licence to the broker may they operate. The minister has still to prescribe the criteria for registering brokers.

A labour broker may not charge a worker a fee for services, but may charge the employer. The employer in turn may not deduct an amount from a worker's wage for labour broking services. The client of the broker will become the 'employer' of the worker. This will help clarify the employment relationship between the three parties (the worker, the broker and the client) and enable better protection for workers from unfair dismissals by the client/employer.

Labour brokers will have to

improve their administration and keep information about workers on their books for at least five years.

Labour brokers will have time to adjust to the new laws as they will be able to continue operating for three years from the commencement of the Act. When the Act will commence is still uncertain. Labour brokers will therefore continue to operate, but in a regulated manner. This is unlikely to appease Cosatu who wants a total ban on brokers

Cosatu released a statement earlier this year explaining, 'It is a big myth, propagated by the DA and its ideological friends in business and the media, that labour brokers create jobs. On the contrary only those companies actively involved in production and service delivery create jobs and they would still require the same number of workers if there were no labour brokers. The lions' share of the of money is creamed off by broking companies, with only peanuts going to the workers, who receive poverty pay, minimal or no benefits and have no job security. That is why we call it a form of modern slavery.'

Under the bill the DoL will have to provide *public employment services*. These services will be free of charge and aim to match work seekers with available work opportunities, register work seekers, register job opportunities, and assist workers to access social security benefits. Special emphasis is given to youth, people with disabilities and people living in rural areas.

The bill also aims to facilitate information sharing among employers, SETAs (Sector Education & Training Authorities) and training providers.

Employers will be required to notify the DoL of new positions within 14 days of the position becoming vacant. If an employer does not do this then they will be liable to a minimum fine of

R15 000. The employer must also notify the director general when the vacancy has been filled. The intention is to match work seekers with vacancies.

The *preference for employing South Africans over foreigners* is clear in the bill. No foreigner without a valid work permit may be employed, and the minister will regulate the categories of work where foreigners may be employed (probably categories where there is a skills shortage).

An employer must prove that they have tested the local labour market before employing a foreigner and must prepare a skills transfer programme to encourage skills transfer from the foreigner to a South African. An employer who employs a foreigner without taking into account the new provisions may be liable to a prison sentence of a minimum of two years or double the salary paid to the illegal workers since their appointment.

The above provisions are in our immigration laws, and will appear in our labour law for the first time.

The bill will establish *new institutions*. The bill establishes a stakeholder driven Employment Services Board with representatives of organised labour, business and communities. The board will advise the minister on employment trends and statistics, employment schemes and opportunities and other matters related to employment services.

The bill also establishes a body called Productivity South Africa which will promote a culture of productivity in workplaces and improve competitiveness of enterprises. These initiatives do not themselves create jobs but make the operation of the labour market more efficient.

IMPLICATIONS OF BILLS

For contract/fixed-term workers the bills when they become law, will improve their position

enormously. Employers may need to place these employees into permanent positions unless they can justify keeping them on contract. They will enjoy the same benefits as permanent workers.

Also contract workers will enjoy stronger protection against unfair dismissals particularly if they can show that they had a reasonable expectation of permanent employment but the employer ended their services. Workers employed by labour brokers are likely to get a better deal – higher wages and better protection against unfair dismissals.

High earners may lose protection if the minister sets a salary threshold which will exclude them from using the LRA.

There is little in the bills to appease employers. There will be increased costs to improve the position of contract workers.

Private arbitrations as a means of alternative dispute resolution and avoiding cumbersome CCMA processes is under threat. The penalties and fines for non-compliance with labour laws have increased.

For unions their members on contract will enjoy better protections. Unions will have greater scope to engage with sectors where the minister makes sectoral determinations. Unions will have institutional avenues to improve the position of members and workers by engaging in the Employment Services Board and Productivity South Africa as well as with DoL's implementation of public employment services.

The criteria for registration and licensing of labour brokers have not been established and unions may wish to engage in this debate to influence the criteria.

CONCLUSION

The intention of the amendments is to strengthen the position of employees, especially contract workers and labour broker employees. Although this comes at cost to employers the minister intends to establish new institutions to improve productivity at the workplace, match job seekers with vacancies and encourage better cooperation between training institutions, employers and SETAs. **LE**

Copies of the four bills are available on the Department of Labour's web site (www.labour.gov.za).

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