

13 AUGUST 2007

SOCPOL CIRCULAR NO. 96 / 07

TO: ALL MEMBERS OF THE STANDING COMMITTEE ON SOCIAL POLICY

COMMENTS ON THE DRAFT EMPLOYMENT SERVICES REGULATIONS

1. BUSA welcomes and applauds the effort of the Department of Labour to monitor supply and demand in the labour market.
2. Notwithstanding the above , BUSA submits the following:
 - 2.1. It is immediately apparent that the draft regulations will have a material impact on Private Employment Agencies. Given the size of their constituency we believe that it would not only have been appropriate but also beneficial for us to have been formally engaged in regard to the preparation of the Draft Regulations. Whilst we accept that the draft regulations have now been published it may very well still be prudent for us to enter into discussions pertaining to the regulations with the Director-General .
 - 2.2. Our members have expressed concern regarding the operational impact and appropriateness of some of the proposed regulations.
 - 2.3. In view of the fact that more than 80% of the registered Private Employment Agencies are SME's (around 2500), any onerous reporting and/or administrative obligations will undermine economic growth, job creation and poverty alleviation in the relevant sectors.
 - 2.4. It may also be constructive to note that NEDLAC's Labour Market Chamber is currently in the process of addressing labour market matters in respect of, inter alia, a-typical employment, possible regulations in respect thereof and the prospect of drafting codes of practice. It is therefore our considered view that it would be most appropriate to include deliberations around the published draft regulations into the NEDLAC process, particularly in respect of the matters of registration of Private Employment Agencies and the like. BUSA has raised this issue at the Nedlac Labour Market Chamber.

3. BUSA submits the following amendments to the draft Regulations:

3.1. **AD DEFINITIONS:**

3.1.1. Within the definition of “employer” there should be a distinction between the Private Employment Agency, as employer, and the Temporary Employment Service Agency’s client, being the entity to which the temporary assignees are assigned. As the definition currently stands the Private Employment Agency would fall into the definition of “employer” and “client” which, we submit, is an anomaly which was not within the Ministers contemplation.

3.1.2. Within the definition of “private employment services agency” reference is made:-

(a) to “Personnel Agencies, Temporary Employment Services, Labour Brokers and Labour Recruitment Agencies....”. We would submit that these references, and by implication differentiations, are not necessary and that the approach adopted in the Labour Relations Act (and other statutes) in which Temporary Employment Services (TES) is used as an all- encompassing definition should be adopted. We furthermore note that within this definition there is a reference to Permanent Placement Agencies. This inclusion is, we would submit, not correct as Permanent Placement Agencies do not act as employers and are agents;

(b) Insofar as the application of the proposed regulations are concerned, to the fact that “private employment services agency means a juristic person...”. As a result partnerships, sole proprietorships and trusts would therefore be excluded from having to comply with the regulations.

3.1.3 The reference to the word “could” in the definition of “placement opportunity” would, it is submitted, create an unnecessary burden on the Private Employment Services Agency and Employers. The reference to “could” should be replaced by a reference to “is”.

3.1.4 The definition of “work seeker” needs to be qualified in the sense that same should refer to a work seeker insofar as a specific Temporary Employment Services Agency is concerned. In addition same should be simplified and should merely refer to a candidate who has been placed by the Temporary Employment Services Agency or Employer.

3.2. **AD REGISTRATION**

3.2.1. Insofar as the registration is concerned it is noted that Private Employment Services must apply to be registered as such.

The regulations are silent as to:-

- (a) how the applications are to be processed from an administrative and timing perspective;
- (b) what powers, if any, the Director- General has insofar as the refusal of an application is concerned;
- (c) what specific remedies are open to the applicant in the event of their application being disallowed.

The questions raised in 3.2.1 (a) to (c) need to be addressed and commented on.

3.3. AD 2 (a)

The reference to “company” is in our opinion an incorrect reference. It would perhaps be better to simply require proof of the entity’s status.

3.4. Ad 2 (d)

We are at this juncture unable to comment in respect of 2 (d) as we are uncertain of what is being addressed by 2 (d).

3.5. Ad 2 (e)

3.5.1. In the introduction to 2(e) it is stated that the “... application referred to in sub-regulation (1) must comply with the following criteria”. The criteria are then listed in 2 (e).

3.5.2. We do not see how the “application” itself is able to comply with the criteria listed in 2(e) which list is comprised of a number of statutes.

3.5.3 If what is meant or envisaged by 2(e) is that the applicant must in fact comply with 2(e) then this in itself would present a number of problems and concerns, specifically with regards to determining compliance with, for example the Labour Relations Act. In particular the Regulations would need to define how compliance with the Labour Relations Act will be evaluated as such activities will pose greater challenges, and require greater discretion in establishing compliance than is the case with other statutes such as the Employment Equity Act, 1998 and the Skills Development Act, 1998.

3.6. Ad 2 (5) (a)

The reference to applicant in 2(5)(e) creates the impression that there may be a distinction between the Private Employment Services Agency and the applicant. We would suggest that the reference to applicant in 2(5)(e) simply be deleted.

3.7. Ad 2 (5) (b)

It is submitted that work seekers who have a work permit should be capable of being registered for employment.

3.8. Ad 2 (5) (c)

- 3.8.1. While we recognise and appreciate the need to safeguard certain information pertaining to the client it must similarly be appreciated that the business of the Temporary Employments Services Agent is predicated on the ability of being able to match the correct employer with the correct work seeker. The practical effect of this is that certain information will have to be disclosed to both the work seeker and the employer to ensure the correct match.
- 3.8.2. The manner in which 2 (5) (c) is drafted, requires prior to the disclosure of information, both the written consent of the work seeker and / or the employer as well as that such disclosure must be in terms of statute.
- 3.8.3. This Regulation could, we submit, potentially have the effect of crippling the industry in which our constituents operate.
- 3.8.4. At the very least the reference to “and” in 2 (5) (c) should be referenced “and/or”.

3.9. Ad 2 (6)

- 3.9.1. The requirement for Private Employment Agencies to re-apply in the event of changes of ownership and/ or physical address and/ or website is both impractical, and not necessary. Conversely such Regulation would undoubtedly have an adverse effect on the Private Employment Agency.
- 3.9.2. In addition, the draft Regulations are silent on:-
 - (a) what constitutes a change of ownership. By way of example if a minority shareholder were to sell their shares in an entity would this constitute “a change of ownership”. In light of the above we would submit that “change of ownership” be defined;
 - (b) whether during the re-application process the business is able to continue trading.

3.10. Ad 2(7)

The ILO Conventions and Recommendations generally oppose the charging of fees to work-seekers. We would support the abolition of fees being charged to any work-seekers as the proposed fee structures are open to abuse. However, in respect of point 2(5)(d) there should be a provision for fees for contractual deductions such as transport costs and the like.

3.11. Ad 2(7) and 2(5)(d)

It must be noted that the Nursing Legislation prescribes that fees be recovered from the assignees of Nursing Agencies and not from the clients. Hence, there would have to be an exception in respect of the charging of fees.

3.12. As a general point, we record our concern that the Labour Centres were previously focused on addressing matters concerning the unemployed and disabled in conjunction with UIF facilities whereas there now appears to be clear “scope creep” and overlap with certain Private Employment Agency industry organisations. The potential impact thereof needs to be addressed in discussion between the parties and as set out in the introduction we request a formal engagement before the Regulations are finalised.

4. **Keeping of records by a Private Employment Services Agency.**

4.1 **Ad 3 (1)**

4.1.1. It is proposed that the keeping of records should only be in respect of candidates that are offered a position, and then only in respect of the position so offered.

4.1.2. It should be noted that the record-keeping of employers and employees should, in any event, be available to the Department of Labour on the existing systems and/or reporting databases rather than on the draft form(s) – options need to be operationally acceptable.

4.1.3. The words “*placement opportunity*” requires clearer definition and the possibility of Private Employment Agencies posting such opportunities on a website maintained by Department of Labour could be considered. In any event, the transferring of data should be electronic.

4.2. **Ad 3(3):**

4.2.1 Insofar as the requirement pertaining to the reporting is concerned we see no reason as to why this responsibility should be attended to by the owner/ manager.

4.2.2. In addition, the requirement that such reporting should take place within 24 hours (which in itself is insufficient) of a placement opportunity becoming available, will pose significant strain on the administrative capabilities of the Private Employment Agency.

It is submitted that Private Employment Agencies should rather have access to the Department of Labour Database and attempt to place the said candidates. In any event, the reporting period needs to be longer, if it remains.

Point 3(4): This provision is impractical as some records may be in archives.

4.3. It is submitted that it should be a prerequisite to registration that the private employment agency is a member of an Association who is a member of CAPES.

5. Insofar as the cancellation is concerned, and given the severe implications and consequences of a cancellation for the Private Employment Services Agency it is imperative that provision needs to be made for the Private Employment Services Agency to be in position to:-

5.1. present its case, so to speak, prior to the cancellation;

- 5.2. challenge the basis upon which it is alleged that the registration is to be revoked.
- 5.3. It is suggested that an appeal process also be contained within the regulations so as to ensure that the principles of fairness and equity are adhered to.
- 5.4. Clear time periods need to be provided within which representations, and if applicable, decisions are eventually challenged.
- 5.5. **Ad 4 (g)**
 - 5.5.1 It is provided for that the registration may be cancelled in the event of a request being made in writing by -
 - (a) the owner or manager of an entity;
 - (b) any interested person;
 - (c) judicial manager of the company; or
 - (d) Master of the High Court
 - 5.5.2 In dealing with the above we advise as follows:-
 - (a) There is a need to ensure that the dictates of the *audi alteram partem* doctrine are adhered to, and in the event of a written request being made which is aimed at securing the cancellation of the Private Employment Services Agency then in such event, should this be contested by the Private Employment Agency then such Private Employment Agency should be given the opportunity to respond to the written request for its cancellation.
- 5.6 It is also suggested that given CAPES' intimate knowledge of the industry as well as the fact that it represents a large constituency within the industry that CAPES assist the Department with any de-registration processes.

BUSA extends a hand in partnering the Department of Labour in this regard. We would value an opportunity to make a team of experts in Private Employment Services available to you, should you wish to explore these submissions and any other matters.