

TO BAN OR NOT TO BAN

Labour Brokers” (Temporary Employment Services – TES)

During the 10th annual congress of COSATU numerous threats were made that section 77 mass action would be implemented in order to persuade Government to ban “Labour Brokers” (Temporary Employment Services – TES).

This comes after the recent Parliamentary Portfolio Committee (PPC) on Labour, where Temporary Employment Service (TES) providers came under fire. During these proceedings TES providers were referred to as human traffickers and later in the day as drug dealers.

The purpose of the PPC was to allow equal presentation opportunity from organized labour and the TES industry regarding the future of TES providers in South Africa. According to APSO numerous irregularities were allowed by the Chair, Ms Lumka Yengeni, leading to an official complaint to the President of South Africa, Mr. Jacob Zuma.

As can be expected this issues will cause heated arguments for some time to come.

During July 2009 the Minister of Labour, Mr. Membathisi Mdladlana, made some proposals regarding changes to the Labour Relations Act as well as the Basic Conditions of Employment Act in a discussion document that was submitted to NEDLAC for discussion.

Based on the contents of this document it seems as if the regulation of the industry is planned instead of outright banning it.

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Please bear in mind that the changes discussed below are still just outlined proposals published in the discussion document. You will have to decide for yourself if the proposals made by Government are just maybe a ban in disguise.

1. All TES should be required to register subject to minimum requirements contained in the LRA and regulations. Any contractual arrangement between a “client” and an unregistered TES would be invalid.

The Minister of Labour should have the regulatory power.

- 1.1 After consultation with the ECC to prohibit Labour Broking in specific sectors of the economy;
- 1.2 After consultation with the NEDLAC, to establish a participative governance structure for the TES industry.
2. The joint and several liabilities of the TES and client for compliance with legislative and contractual obligations to the employee should be retained. (But) In order to allow for effective exercise of this right, an employee should be able to institute proceedings against the TES and the client or both in the CCMA, a Labour Court or any other court having jurisdiction. The joint and several liabilities should be extended to cover compliance with the employer’s obligations under the LRA and in terms of the contract of employment.
3. Employees should be able to argue that an entity other than their direct employer is jointly and severally liable for compliance with the employer’s obligations under labour law if that entity exercises a significant degree of control over that employer.
4. Employees who are placed by a TES should have the following core rights in respect of TES:

- Employees of a TES should remain employees during periods in respect of which they are not placed by a client;
 - A TES should be required to conclude a written contract with each employee who it proposes to place;
 - A TES should be required to supply an employee with written particulars for each placement it makes.
5. Employees placed in employment with a client (for work of indefinite duration) should have unfair dismissal protection in respect of the termination of their services by the client.
 6. Probation should be regulated by legislation specifying a qualifying period during which ordinary unfair dismissal protections should not apply to new employees. During this period employees would be protected against automatic unfair dismissals. The qualifying period should be six months with scope for variation in the light of the concerns of particular sectors or professions.
 7. All contracts of employment concluded with employees earning below a defined earnings threshold should be presumed to be of indefinite duration unless the employer can demonstrate that the contract was concluded for a fixed term defined in the contract and the employer had an operational justification for doing so.
 8. The anti-discrimination provisions in the Employment Equity Act should be amended to provide an effective remedy for unjustified discrimination in wages and working conditions on the basis of the contractual arrangements in terms of which employees are engaged. This should include discrimination between employees placed by a TES and direct employees as well as discrimination by employing non-standard employees on less favorable terms and conditions than full-time employees.
 - 9.1 Legislative changes should be made to enable employees placed by TES to gain organizational rights and engage in collective bargaining in respect of both the TES and client for whom the work.
 - 9.2 A sectoral determination should provide for trade unions that meet representivity thresholds to obtain organizational rights at work places within the sector.
 - 9.3 The extent to which employees are placed by TES and of other categories of non-standard employees should be a factor in determining the representivity of trade unions for the purpose of extending bargaining council agreements.
 - 9.4 The Minister of Labour should be enabled to enact a sectoral determination applicable to low-skill workers not covered by any other determination of a bargaining council agreement.
 - 9.5 The Minister of Labour should be enabled to enact sectoral determinations applying to employees within the registered scope of the bargaining council but not covered by a bargaining council agreement.

From the above it is clear that it is the intention of Government to place much more responsibility on the TES provider as well as the client.

One of the most popular reasons for outsourcing labour is the benefit of a flexible workforce associated with the operational requirements of the client.

The proposed changes will drastically reduce such flexibility and will place an increased responsibility on the client towards the temporary employee in terms of relevant acts, as well the employment contract that the TES entered with the employee.

One can ask if it would still be to the benefit of the client to pay a TES for such a service.

If one closely look at point 8 above it is clear that the intention is to ensure that wages that are paid to temporary employees are the same as those of permanent employees unless sufficient reasons exist for a difference in wages.

The implication of this is that minimum wages are effectively prescribed for temporary employees, even if the business of the client does not fall under a bargaining council or sectoral determination.

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More responsibility is also placed on the shoulders of the TES by the following proposed changes.

- First of all TES providers must register with the Department of Labour in order to legally do business.
- In addition to this it is proposed that the current definition of section 186 of the LRA to be changed in order to avoid TES providers from arguing that a temporary contract of employment naturally expired due to the client requesting the removal of the worker.
- Temporary workers will remain employees of the TES during periods which they are not placed with a client. Without getting too technical one must ask how this is going to be possible if the employee has more rights in terms of section 186 (as stated above) but still remains an employee of the TES? One further needs to ask the question whether it will be considered to be an unfair labour practice if the wage of the temporary employee is changed during the periods that he does not work at a client and whether the TES will have to continue to pay the temporary employee a salary during such periods.

The changes to probation will make it easier for employers (both TES and direct employment by a company) to dismiss new employees that are under probation. During the proposed 6 months probation period employees will only be protected against automatic unfair dismissals which seems to be reasonable and at least in favor of the employer, but if one carefully looks at the rest of the discussion document one will note the following:

“Halton Cheadle in a widely-quoted 2006 paper advocates regulating probation by a statutory provision that ordinary unfair dismissal protections (i.e. other than automatic unfair dismissals) should not apply to employees with less than 6 months service. In order to prevent the abuse of terminating and re-employing just before the expiry of the 6 months of employment in order to avoid the onset of the protections, the period of service should include all previous service with the employer or a related employer.”

The last comment regarding the discussion document relates to the use of fixed term contracts. The use of fixed terms contracts will not be allowed unless the employer can prove that a legitimate operational requirement necessitates the use of fixed term contracts.

Effectively this means that an employee may no longer be appointed on a fixed term contract for a “probationary” period prior to being offered permanent employment. It further suggests that all temporary workers earning below a threshold (same as UIF threshold) must be appointed on “open” or “indefinite” employment contracts that have no end dates.

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