

EXPLANATORY MEMORANDUM ON THE BASIC CONDITIONS OF EMPLOYMENT AMENDMENT BILL, 2010

1. BACKGROUND

This Bill is the second amendment since the promulgation of the Basic Conditions of Employment Act, 1997 (Act No. 75 of 1997), (Act).

2. OBJECTS OF BILL

2.1 The Bill seeks to—

- (a) address government's commitment to avoid exploitation of workers;
- (b) ensure decent work for all workers;
- (c) protect the employment relationship;
- (d) introduce laws to regulate contract work, sub-contracting and out-sourcing;
- (e) address the problem of labour broking;
- (f) prohibit certain abusive practices; and
- (g) effect certain consequential amendments as a result of the insertion of new definitions and to effect certain textual corrections.

2.2 Definitions

Clause 1 of the Bill seeks to substitute or insert certain definitions to align the Act with other legislation.

2.3 Payment of remuneration

Clause 2 of the Bill provides that employers must contribute benefits of equal or similar value to fixed term contract workers as the benefits afforded to its permanent employees.

2.4 Prohibited conduct

2.4.1 Clause 3 of the Bill seeks to prohibit employers from seeking, requiring or accepting any benefit or payment from an employee or a prospective employee in respect of their employment or the allocation of work to the employee. There are recent reports that employees working for a company operating parking meters for the Cape Town City Council were required to make a payment to the employer in order to secure employment for the day.

2.4.2 Employers are also prevented from requiring an employee or a prospective employee to purchase any goods from a business that the employer operates or from any other business or person nominated by the employer. Clauses preventing this potentially exploitative practice are found in many bargaining council collective agreements.

2.5. Prohibition of work by children

2.5.1 Clause 4 of the Bill seeks to prohibit and regulate the exploitation of children. Clause 4 prohibits work by children as an employee or independent contractor if the child is under the minimum school leaving age or the age of 15 years. This amendment is required to achieve full compliance with South Africa's obligations under the relevant International Labour Standards as well as to create consistency

with the Constitution and other legislation protecting the rights of children. In addition, the maximum prison term for breach of child labour provision is increased from three to six years.

2.5.2 Breach of this proposed provision is a criminal offence.

2.6. Sectoral determinations

The powers of the Minister and the Employment Conditions Commission in respect of sectoral determinations are clarified and adjusted. **Clause 9** proposed the following changes—

- (a) the Minister may issue an “umbrella” sectoral determination covering employees not covered by any other sectoral determination or by a bargaining council collective agreement;
- (b) a sectoral determination may apply to bargaining councils in respect of matters not dealt with by collective agreements concluded by the bargaining council;
- (c) a sectoral determination may prescribe minimum increases in remuneration; and
- (d) a sectoral determination may prescribe a threshold of representativeness for a registered trade union to have the organisational rights of access to employer premises and deduction of trade union subscriptions in respect of workplaces covered by the sectoral determination. Currently only a bargaining council agreement can include such a provision.

2.7 Functions of Labour Inspectors

Clause 10 of the Bill amend the functions of the labour inspector by deleting the provision that provides for a labour inspector to secure undertakings and issue compliance orders when endeavoring to ensure compliance with an employment law. This is aligned with other employment laws.

2.8 Powers of Entry

Clause 11 of the Bill seeks to provide for an interpreter, a member of the South African Police or any other assistant to accompany the labour inspector when performing his or her functions under this Act. The need for labour inspectors to be accompanied by members of the Police stems from certain incidents that the inspectors are threatened and physically assaulted and refused entry to premises to execute their mandate. In ensuring good communication between labour inspectors and employers during inspections, there is a need for interpreters to accompany the inspectors to overcome language barriers.

2.9 Repeal of sections 68; 69; 70; 71; 72 and 73

Clause 12 of the Bill seeks repeal certain sections of the Act to address the delay caused by issuing of undertakings and compliance orders by inspectors. It has been identified that the employers are abusing these provisions and use them as delaying tactics.

2.10 Joinder of BCEA claims with unfair dismissal cases

The jurisdiction of the Labour Court and the CCMA to adjudicate on matter arising from the provisions of the Act in the course of hearing an unfair dismissal case is

extended to cover a claim for an amount owing to the employee under the Act if that claim has not prescribed. Once the Court or arbitrator has determined the matter, no compliance order or other proceedings can be continued or brought in respect of the claim. This will avoid the need to “split” claims and prevent the unnecessary duplication of proceedings and will also ensure the effective use of the resources of the Labour Court, CCMA and the Department.

2.11 Jurisdiction of Labour Court

Clause 14 of the Bill seeks to amend sections 77(1) and 77(3) of the Act. Certain aspects of the jurisdiction of the Labour Court are repealed as the provisions relating to the Court’s jurisdiction are to be consolidated in amendments to section 157 of the Labour Relations Act. The jurisdiction of the Labour Court to review administrative actions in terms of the Act is aligned with the Promotion of Administrative Justice Act, 2000 (Act No. 3 of 2000).

2.12 Penalties

Clause 17 seeks to impose heavy penalties for offences and contravention of the provisions of this Act.

2.13 Repeal of section 95

Clause 18 seeks to repeal the transitional provisions in the Act which are no longer relevant.

3. CONSULTATION

None.

4. FINANCIAL IMPLICATIONS

None.

5. PARLIAMENTARY PROCEDURE

5.1 The Department of Labour and the State Law Advisers are of the opinion that this Bill must be dealt with in accordance with the procedure established by section 75 of the Constitution since it contains no provision to which the procedure set out in section 74 or 76 of the Constitution applies.

5.2 The State Law Advisers are of the opinion that it is not necessary to refer this Bill to the National House of Traditional Leaders in terms of section 18(1) (a) of the Traditional Leadership and Governance Framework Act, 2003 (Act No. 41 of 2003), since it does not contain provisions pertaining to customary law or customs of traditional communities.