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## **EXPLANATORY MEMORANDUM**

### **LABOUR RELATIONS AMENDMENT BILL, 2010**

The Department of Labour is submitting the Labour Relations Amendment Bills for approval. This is a fifth amendment since the promulgation of the Labour Relations Act in 1995.

This Bill seeks to address the concerns raised in the ruling party's election manifesto which has committed the government to the following: "In order to avoid exploitation of workers and ensure decent work for all workers as well as to protect the employment relationship, introduce laws to regulate contract work, subcontracting and outsourcing, address the problem of labour broking and prohibit certain abusive practices."

In preparation for the publication of this Bill the Department of Labour and the representatives of organised business and labour undertook a labour law review. The proposed amendments to the Act can be grouped under the following themes –

- (a) responses to the increased informalisation of labour to ensure that vulnerable categories of workers receive adequate protection and are employed in conditions of decent work;
- (b) adjustments to the law to ensure compliance with South Africa's obligations in terms of international labour standards;

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- (c) ensuring that labour legislation gives effect to fundamental Constitutional rights including the right to fair labour practices, to engage in collective bargaining and right to equality and protection from discrimination;
- (d) enhancing the effectiveness of the primary labour market institutions such as the Labour Court, the CCMA and the Department's inspectorates;
- (e) rectifying anomalies and clarifying uncertainties that have arisen from the interpretation and application of the three statutes.

## **COLLECTIVE BARGAINING**

### **1 Statutory councils (section 43)**

The Act provides for statutory councils to be established in sectors in which employers' organisations and trade unions are unable to agree on the establishment of a bargaining council. Presently, statutory councils can ask the Minister to extend collective agreements concerning certain specified topics to all parties within their sector. It is proposed to amend section 43(1) to allow a statutory council to make such a request in respect of any collective agreement that it has concluded.

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**2 Bargaining councils (section 51)**

The amendment of section 51(9) allows a bargaining council to establish dispute resolution procedures for its sector by collective agreement. Section 51(9) is amended to clarify that such a collective agreement may provide for a dispute resolution levy as well as for the council to charge a fee for dispute resolution services. A fee may only be charged if the CCMA charges a fee for that service and may not exceed the fee charged by the CCMA.

**3 Limitation on rights to strike and lock-out.**

Section 65(1)(c) is amended to align the use of employment laws instead of labour Relations Act to broaden the scope of this provision. The insertion addresses the issue of referring the matters to the Labour Court only in matters referring to Labour Relations as the case now in the LRA and we want to include all employment laws.

**THE CCMA**

A range of amendments are made to the provisions dealing with the operation of the CCMA to facilitate the resolution of disputes and enhance the efficiency of the CCMA's operation.

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**4 CCMA rules (section 115 (2) and (2A))**

A number of amendments are proposed to the provisions empowering the Governing Body of the CCMA to make rules - the Governing Body is required to consider the adequacy of its rules at least every two years;

- 4.1 It is proposed that the CCMA should, on request, be able to assist a party to proceedings to serve documents on other parties and to enforce an arbitration award, if requested by a party to assist. These proposed functions will facilitate the operation of the CCMA. Presently, parties are obliged to serve documents themselves. There is evidence that employees are unable to serve documents or, where they have done so, they are unable to prove that there has been service. In these circumstances, it is appropriate that the CCMA should be able to utilise its resources to ensure that proper notification is given to parties so that they have the opportunity to decide whether to participate in proceedings and to prevent claims of non-service being used to frustrate dispute resolution. Secondly, many employees are unable to enforce awards in their favour because the practice of the Deputy Sheriffs is to require the payment of deposits before executing awards

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- 4.2 The amendment of subsection "2A (k)" seeks to empower the CCMA to make rules regarding representation, whether to allow or prohibit representation in any Conciliation or Arbitration proceedings. By doing that we want to give the CCMA discretion whether to allow or prohibit representation looking at the complexity of the matter.
- 4.3 The CCMA's function of providing training and assistance to stakeholders is extended to all employment legislation. (s115(3) CMA did not have these powers).

**5. Appointment of Commissioner to resolve dispute through Arbitration (section 136)**

The Commission is given the authority to appoint a Commissioner to arbitrate over matters that remain unresolved between the parties for 30 days or any further agreed period in order to facilitate speedy resolution of matters. As the case is now in the Principal Act the provision is open and we now want to put the time frames for a speedy resolution.

**6. Effect of arbitration awards (section 143)**

Proposed changes to section 143 would change the status of CCMA arbitration awards. The purpose of this is to facilitate the enforcement of awards by removing the need for a writ to be issued by the Labour Court before an award can be executed. In

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addition, if an award is executed for an amount of compensation that is within the Magistrate's Court jurisdiction, the fees for execution will be at the Magistrate's Court tariff rather than the High Court tariff. This will assist in the speedy resolution without taking the route of lengthy litigation. If you have an award you can have the writ issued immediately without making an application to the Labour Court if the employer fails to comply with the order.

**7. Rescission and variation of certificates, arbitration awards and rulings (section 144)**

8. The power of Commissioners to rescind or vary erroneous or improperly obtained rulings and awards is extended to cover the issue of certificates at the conclusion of conciliation and not only the arbitration awards. The grounds on which certificates, rulings and arbitration awards can be varied or rescinded are extended to include "good cause". (s144(d)) This is consistent with the jurisprudence of the Labour Court on this issue.

**9. Agreements in respect of private arbitration (s 147 (6))**

The CCMA provides employees with access to expedite dispute resolution without any charge. However, there has been a practice by certain employers to seek to avoid these provisions

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by, for instance, requiring employees in their contracts of employment to agree to share the costs of arbitrations. While these clauses are not enforceable and the CCMA is entitled to hear these disputes, a new sub section (6A) is inserted to clarify that the CCMA must deal with such a dispute if a private dispute resolution procedure either requires the employee to pay the costs of the arbitration or the arbitrator is not independent of the employer.

**10. Intervention in disputes in the public interest (section 150)**

Amendments are proposed to extend the power of the CCMA to intervene to resolve disputes in the public interest. Presently, this can only be done with the consent of both parties and it is proposed that this could be done in other disputes after the Director of the CCMA has consulted with the parties. This power has been used to provide conciliation in high profile disputes which have given rise to industrial action or the threat of industrial action.

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## **LABOUR COURT**

### **11. Jurisdiction and powers of the Labour Court (sections 157 and 158)**

(a) The jurisdiction of the Labour Court is clarified and expanded. The Labour Court's exclusive jurisdiction is extended to the interpretation of all employment laws, all matters concerning the termination of contracts, constitutional matters arising from employment or labour relations and reviews of administrative actions in terms of any employment law. It is also clarified that, in line with the jurisprudence of the Constitutional Court, the Labour Court will have exclusive jurisdiction for issues of labour law in the public service. These changes will prevent "forum shopping" by parties as well as prevent the emergence of conflicting jurisprudence in the specialist Labour Court and the High Court. (s. 157(1))

(b) Provisions dealing with the jurisdiction of the Labour Court which were initially included in section 158 (which deals with the court's powers) are to be moved to section 157. In addition, the review powers of the Labour Court are adjusted to be consistent with PAJA. (s 158(1) (g)) This applies to reviews other than those dealing with

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arbitration awards. Similar amendments are made to other labour legislation.

(c) Decisions made during conciliation and arbitration hearings may only be reviewed after the conclusion of the arbitration. (s 158(1)(b)) This provision is introduced to prevent the obstructive use of piece-meal reviews to delay dispute resolution in the CCMA(s 158 (1B)). This amendment is justified by the need to ensure that the CCMA is able to resolve disputes in an expeditious manner.

(d) The Labour Court Rules Board is required to review the Labour Court rules at least once every two years.

## **DISMISSAL**

### **9. Changes in dismissal law (sections 186 )**

Amendments are proposed to clarify aspects of the law on unfair dismissal. These are –

Basis on which an employee engaged on a fixed term contract can allege unfair dismissal is extended to cover cases in which the employee alleges a reasonable expectation that the employer would offer him or her indefinite employment; (s

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186(b)(ii) This is in line with the Manifesto to regulate the contract work.

Section 186 (2) is a consequential to the new section 200C introduced to address the issue of liability of client company to the actual employer in cases of unfair labour practice. The reason for this amendment is that as it stands in the Principal Act unfair labour practice refers to the employer only.

**11. Limitation on application of Chapter VIII (section 187 A)**

The amendment seeks to exclude employees earning more than the prescribed threshold from referring their labour disputes to the CCMA. This will ensure that vulnerable employees are not prejudiced because of the delays caused by the volume of complaints from employees who can afford to approach the courts.

**12. Enquiry by arbitrator (section 188A)**

- (a) The concept of the “pre-dismissal arbitration” introduced in 2002 is renamed as an enquiry by an arbitrator. While this procedure in terms of which an arbitrator chairs an internal enquiry into allegations about an employee’s conduct or capacity offers considerable potential savings to employers and employees by avoiding a duplication of

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internal enquiries and arbitration hearings, little use has been made of it. In order to facilitate more extensive use, it is proposed that collective agreements should be able to provide for inquiries by an arbitrator. This will allow employers and trade unions to agree on using this form of enquiry in disciplinary codes that are established by collective agreement.

- (b) In addition, an enquiry of this type is made mandatory on the request of either the employer or the employee in two cases. The first is if the employee alleges that the dismissal would be automatically unfair because the employee is seeking to dismiss the employee for exercising a protected right under section 5 of the LRA. The second is “whistle-blower” cases in which the employee alleges that an employer is seeking dismissal in response to a protected disclosure under the Protected Disclosures Act. The latter type of case can give rise to protracted litigation over whether the employer is entitled to conduct an enquiry. This can be abused by persons other than genuine “whistle-blowers” to delay legitimate disciplinary processes. An enquiry by an arbitrator will ensure that there is an immediate investigation into the substance of the allegations and will lead to a very much quicker resolution of these disputes.

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**13. Conciliation through arbitration (Con-arb) proceedings (section 191 (5) )**

The “con-arb” process allows arbitration proceedings to commence immediately after the end of conciliation phase. This change, which was introduced in 2002, has contributed to a significant reduction of the period taken to resolve disputes. However, in terms of section 191(5), either party may object to a dispute being dealt with in terms of the “con-arb” process. CCMA statistics show that objections to “con-arb” are lodged in roughly 30% of cases significantly delaying the resolution of disputes. It is proposed that all disputes should be dealt with by “con-arb” unless the commissioner and all the parties agree that “con-arb” is not appropriate or the commissioner concludes that it is unreasonable. This will ensure that an increasing proportion of cases are dealt with through “con-arb” while more complex cases can be postponed to allow the parties to prepare.

**14. Individual dismissals for operational requirements (section 191(12))**

The right of dismissed employees to refer an “individual” operational requirements dismissal to arbitration is clarified. This is necessitated by conflicting Labour Court decisions on

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the matter. In addition, employees of employers with less than 10 employees will be able to refer retrenchments to the CCMA for arbitration.

**15. Transfers of businesses as a going concern (section 197)**

The application of section 197 to “second generation” transfers in which work that has been previously outsourced is transferred from one service provider to another is clarified. This change is consistent with a purposive construction of the provision by the Labour Appeal Court

**16. Temporary Employment Services (repeal of section 198)**

The repeal seeks to address the unintended consequences of s 198 which brought about the confusion in its application. The labour brokers manipulated this section and operated under the auspices of this section and therefore by repealing this section we want to address the Manifesto which states that we must address the problem of Labour broking. The challenge with this section is that CCMA and the Labour Courts have difficulties in identifying who is the employer.

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## **PROVISIONS PROTECTING VULNERABLE EMPLOYEES –**

### **17. Presumption of who is an employee (section 200A)**

This is an amendment to the principal act where the presumption of who is an employee was only referred to the Labour Relations Act and now we want to extend it to include any other employment law. This is to align all labour laws.

### **18. Declaring Temporary Employment to be permanent (section 200B)**

The Bill proposes a declaration of indefinite employment. In other words, an employer that engages employees on a fixed-term basis will have to demonstrate a justification for doing so. Such a justification will be present if the employee was engaged to work on a specific task (eg: the building of a particular building, replacing a person who is on maternity, ect.) or on a task that lasts for a specific period. The purpose of this clause is to prevent the use of “fixed term” contract as a basis for depriving employees who are engaged for work of indefinite duration of security of employment. It is proposed that the clause should only apply to employees who are earning below a threshold set by the Minister of Labour (section 200B). As a result, the presumption will not

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impact on the use of fixed term contracts in respect of managerial and other senior employees.

**19. SECTION 200 (C) LIABILITY OF CLIENT COMPANY IN SUB-CONTRACTING**

Proposed section 200C addresses the issue of employees to have recourse against client companies in cases of unfair labour practices in sub-contracting.

**20. Confidentiality (section 201)**

The deletion seeks to align with the table provided in the new section 209 which deals with offences and penalties. There is no need for these provisions as they are addressed in the table.

**21. NEDLAC and Codes of Good Practice (section 203)**

The Minister may place proposals before NEDLAC for new codes of good practice or to revise existing codes. If the NEDLAC stakeholders are unable to reach consensus on a code of good practice after six months of consultations, the Minister will be empowered to issue a code of good practice. This provision seeks to ensure that codes of good practice are

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updated and balances the importance of stakeholder consultation with the requirements of good governance.

## **22. Offences and Penalties (section 209A)**

The amendment seeks to strengthen compliance of Labour Relations Act and enforcement by Labour inspectors. The new provision will also empower inspectors to issue fines and lay criminal charges to that employer who contravenes section 201 and 205 of this Act. It also gives time frames in order to expedite the process.

## **23. New definitions (section 213)**

A new definition of the term “contract of employment” clarifies that any contract or arrangement in terms of which an employee, as defined in the LRA, is a contract of employment. This clarifies an uncertainty that has arisen from the fact that the statutory definition of an employee is broader than the equivalent common law concept. The need for this has been identified in several Labour Court decisions as well as by the SA Law Commission. At the same time, a new definition of an “independent contractor” is inserted to ensure that the fraudulent “independent contracting” is not used to disguise employment relationships.

In addition, the definitions of an “employment law” addresses the reference to the old Labour Relations Act, and adding the Basic

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Conditions of Employment as one of the legislations administered by the Minister of Labour and to remove the Skills Development Act as it is no longer assigned to the Minister of Labour.

the term “serve” (serving of documents and notices) to be consistent with other employment laws.

Other definitions that were amended are:-

Employee, employer, and the workplace are defined for alignment with other employment laws as defined in Occupational Health and Safety Act, to extend the definition to address the new developments in the labour market.

#### **24. Transitional provisions**

A transitional provision to require the Minister to invite representations three months before the repealed section 198 comes into effect on categories of “temporary work” in which placement by temporary employment services to address those temporary placements that are already in place should be permitted is proposed. In addition, provisions to phase in the revised jurisdiction of the Labour Court are included.