

**Regulatory Impact Assessment of
Selected Provisions of the:
Labour Relations Amendment Bill, 2010
Basic Conditions of Employment Amendment Bill, 2010
Employment Equity Amendment Bill, 2010
Employment Services Bill, 2010**

PREPARED FOR THE DEPARTMENT OF LABOUR AND THE PRESIDENCY

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Executive Summary

Chapter One deals with proposed amendments to deal with the increased number of atypical (or non-standard) workers and their vulnerability and insecurity. This priority was identified in research commissioned by the Department of Labour in 2002 and submitted to NEDLAC in 2004 but has not yet produced legislative reform. The pressing need to address these issues is reflected in the ANC's 2009 Election Manifesto, which makes a commitment to regulate abuses associated with contract work, sub-contracting, out-sourcing and labour broking. Certain of the provisions in the Bill that seek to give effect to the Manifesto can either not be implemented or have significant unintended consequences.

The underlying policy objective is the need to regulate non-standard work in a way that recognises its legitimate role in a modern economy but seeks to prevent it being used as a vehicle for exploitation. Non-standard work may involve "direct" employees (part-time and fixed-term workers) and those where more than one employer/client is involved (labour broking, out-sourcing, sub-contracting). The key factors contributing to the vulnerability of many atypical employees include employer restructuring, strategies to disguise employment, gaps and loopholes in the law, and poor enforcement.

Discrimination

Mechanisms for ensuring that these workers are not subject to unfair and discriminatory working conditions are examined. These seek to balance the need for protection, on the one hand, with the employer's discretion to take into account factors such as experience and skills in determining wages and other conditions of employment.

Fixed-term Contracts

The proposal to create a presumption of indefinite employment is explored. While this seeks to deal with the abuse of fixed-term contracts, it has been viewed as restricting the legitimate role of fixed-term contract for workers employed on time-bound projects or until a specified event occurs. It is pointed out that legislation can:

- identify the accepted categories in which fixed-term contracts are justified,
- limit the contracting period in other circumstances; and
- regulate abuses associated with the rehiring of employees on successive contracts rather than employing them indefinitely.

Many countries use a combination of these approaches so as to allow fixed-term contracts to play their legitimate economic role while preventing abuse.

According to the 2007 September Labour Force Survey, approximately 2.13 million workers or 16 percent of the total workforce were classified as fixed-term, temporary or seasonal workers. These workers will potentially be affected by the proposed amendment declaring temporary employment to be permanent. If the proposed amendment is implemented, a share of these more than two million workers will have to be employed permanently if the employer cannot show justification for continued temporary employment. Employers will incur time and financial costs associated with converting temporary/fixed-term contracts to permanent employment contracts (including extending benefits such as membership of a medical-aid and pension fund). This suggests an increase in the cost of doing business for employers and the higher this share is in relative and absolute terms, the greater the impact of this proposed amendment on the cost of doing business in the domestic economy. While permanent employment is expected to increase as a result of the amendment, it is likely that a proportion of contract workers will not be offered permanent positions, with a resulting decline in total employment (and therefore an increase in unemployment).

The amendment will benefit the proportion of the more than 2 million temporary workers who will become permanent employees as a result of the amendment. This means that those workers will not only be afforded protection against unfair dismissal, but they will also gain employment security and possibly access to benefits such as medical-aid and pension fund. In addition, the amendment will prevent employers from indefinitely employing vulnerable workers on less favourable terms utilising temporary or fixed-term contracts. Estimates from the 2007 suggest that almost 500 000 or a quarter of all temporary/fixed-term employees have been working for the same employer for more than three years. Furthermore, more than 300 000 employees have been working for the same employer for more than five years. While the estimates presented here should be treated with great caution due to the lack of supplementary information, they do suggest that a significant number of workers appear to have been employed for more than three or even more than five years by the same employer in a non-permanent position. The proposed amendment should improve job security for these workers.

Outsourcing and Sub-Contracting

The Bill's proposal for co-responsibility between parties to out-sourcing and sub-contracting arrangements would have the anomalous consequences of creating co-liability between parties involved in legitimate commercial transactions. It is suggested that labour legislation should confine itself to ensuring that these arrangements are not used to avoid labour law obligations or to disguise employment relationships. Different approaches including a "joint employer" approach where more than one parties exercise control over working conditions are explored.

Labour Broking

The proposals dealing with labour broking that are analysed are the proposed repeal of section 198 of the LRA which has regulated labour brokers (Temporary Employment Services) since 1983; changes to the definition of an "employee" and a new definition of an employer; as well as provisions in the Employment Services Bill dealing with Private Employment Agencies. These proposals would

effectively prohibit labour broking. A prominent risk is that this would violate the Constitution on two primary grounds. The first is that it would violate the protected right to choose a trade, occupation or profession freely. It is noted that a similar prohibition in Namibia was struck down on this basis. The second such risk is that the definitional changes would significantly narrow the scope of who qualifies to be an employee under labour law. This would not only violate the right to fair labour practices and place South Africa in breach of international obligations but also have serious destabilising effects in the labour market. This proposal was opposed in the consultation process by the representatives of both labour and business.

Drawing on international standards and comparative experience, options for regulating Temporary Employment Services are identified and analysed. Key issues that would need to be addressed include:

- the registration and control of agencies who place employees to work for “Other” either through the Department of Labour or through a statutory co-governance agency with stakeholder participation;
- identifying the categories of employees who can be employed by Temporary Employment Services by factors such as time, category of work; sector or earnings level;
- extending core labour rights including the exercise of organisational rights; participation in collective bargaining; non-discrimination and security of employment in an appropriate and effective manner to these placed employees.

It is pointed out that researchers have recommended that labour market intermediaries who actively facilitate the placement of young and other vulnerable workers should be promoted.

In Annexure One of the report four negative consequences or costs as a result of the repeal of section 198 of the LRA are highlighted. Firstly, depending on the extent of the demand for their labour, some of the workers currently employed by TES might lose their jobs if clients (employers) are unwilling to incur the administrative and other costs associated with directly employing these workers. While it is difficult to accurately quantify the Labour Broking Sector using official labour force data, a significant share of these workers are recorded in the official surveys in the sub-sector “Not Elsewhere Classified” within the Financial and Business Services Sector. In 2007, more than 600 000 workers were employed in this sub-sector, with the majority of them semi- or unskilled. While this number included workers not employed by labour brokers, it should also be highlighted that not all workers employed by labour brokers were recorded in this sub-sector, as this sector of employment is self-reported and individuals may report the sector applicable to the client and not the labour broker. Alternative estimates obtained through the Confederation of Associations in the Private Employment Sector (CAPES) suggest that almost 850 000 workers are currently employed by labour brokers. While it is difficult to accurately predict employers’ responses to the repeal of section 198, some of these workers may lose their jobs if employers are unwilling to employ them directly. Thus, while permanent employment may increase in response to the repeal of section 198, it is a fair assumption that total employment

will decline. This will not only contribute to increased levels of unemployment in the country, but also deprive the households attached to these workers of a valuable source of wage income.

Secondly, if clients would like to continue utilising the labour supplied by workers previously employed by TES, they would have to employ these workers directly and incur the associated time and financial costs, which may ultimately result in a significant increase in the cost of doing business. Specifically, evidence from the 2007 Labour Force survey suggests that the average wage of the TES employee was less than the national mean wage – this means that the fixed cost of hiring a worker will place a relatively higher burden on hiring lower-wage workers. The effect of significantly higher wage and hiring costs may thus also induce, in the aggregate, employers to hire fewer workers

Thirdly, the proposed repeal of section 198, coupled with the proposed change in the definitions of employee and the new definition of an employer may induce uncertainty in the labour market and would in all probability increase the number of cases referred to the CCMA, the Labour Courts and civil courts. The potential increase in the case-load of these institutions will have significant budgetary implications.

Finally, the proposed amendment means that substitute employees will now be considered employees of the client and each individual client will now have to register the employee under the Compensation for Occupational Injuries and Diseases Act (COIDA) and the Unemployment Insurance Act (UIF), which would impose additional administrative costs on the Unemployment Insurance Fund (UIF) and the Compensation Fund.

The aim of the proposed repeal of section 198 is the protection of vulnerable workers who are currently being exploited under temporary employment arrangements. While it is difficult to identify exploited workers in the TES sector using data from the official labour force surveys, estimates from the 2007 LFS suggest that possibly more than 100 000 workers could be considered vulnerable if their relative wage-levels are used as a proxy for exploitation. In addition, approximately 38 000 workers in this sub-sector did not have a written employment contract and their employers did not contribute to UIF on their behalf. The repeal of TES may result in the improvement of wage-levels and employment conditions of at least a share of these workers.

The total number of employees that will be affected by the new proposed definitions of employee and employer will be determined by the exact interpretation of the clause – specifically how the requirement of “direct supervision” will be interpreted. In the first quarter of 2010, 12.8 million workers were employed in the South Africa labour market, with almost 75 percent employed in the formal sector, while informal sector employment accounted for a further 16.4 percent. Approximately nine percent of the workforce (or 1,2 million workers) were employed in Private Households – the majority as domestic Workers.

The QLFS does not record much detail on the nature of the employment relationship, but if we assume that the majority of domestic workers working in Private Households are directly supervised by their employer, these workers will continue to be considered employees for the purposes of labour

legislation. The informal sector includes small enterprises with only one or two employees working for an employer, but it is not clear to what extent these workers are directly supervised by their employer. Overall then, with the possible exception of domestic workers in Private Households and some workers in the informal sector, the majority of workers currently considered as employees (thus more than 75 percent of the workforce) may possibly cease to be employees under the new definition and will therefore be excluded from all statutory labour rights.

The proposed amendment to the definition of an employee and the introduction of a definition of an employer will also impose additional costs on the CCMA, Labour Court and Civil Courts, as more cases to determine if a person is actually an employee according to the new definition will be referred to these institutions.

Chapter Two presents the Regulatory Impact Assessment (RIA) Options Analysis of the proposed revisions to the penalties structure for non-compliance in the Draft Employment Equity Amendment Bill. For purposes of the RIA options analysis, the focus is on the possible impacts of the proposed option to increase fines for non-compliance, and specifically on the proposal to link fines to the annual turnover of the employer. The proposed changes to penalty fees associated with EEA non-compliance point to potentially far reaching economic impacts. Ten percent represents a considerable proportion of annual turnover. A fine of this magnitude could pose a significant threat to the continued viability of a company. Possible unintended consequences may include the imposition of penalties contributing to company contraction and retrenchments, and even company closure, resulting in job losses and negative impacts on economic growth. An alternative option could be to link penalties for contravention of the Act to the employer's payroll.

Chapter Three deals with amendments which seek to combat unfair discrimination in respect of remuneration and other conditions of employment. It is noted that very few such claims have been brought. The proposed section 6(4) clarifies that cases of discrimination in terms and conditions of employment based on a proscribed ground such as race or gender can be lodged. The new section 6(5) allows the Minister of Labour, on the advice of the Employment Equity Commission, to publish a code of good practice identifying the factors that should be taken into account in assessing the value of work. Section 10(6)(b) seeks to facilitate lower-paid employees, earning below a prescribed earnings threshold, to bring discrimination cases in the CCMA rather than the Labour Court which is currently the case. The redrafted section 11 will further facilitate this category of unfair discrimination claims by making the burden of proof similar to that applied under PEPUDA. Proposed amendments to section 27 of the EEA will enable the Department of Labour to use the system for reporting on a wage differential as a mechanism for uncovering and combating discriminatory practices in respect of wages and remuneration. All of these amendments will facilitate the identification and combating of discriminatory practices.

Chapter Four analyses the proposed Employment Services Bill, focussing on section 10 dealing with foreign workers and section 11 dealing with the reporting of vacancies to the Employment Services of the Department of Labour.

While the provisions of section 10 seek to address the employment of foreigners in jobs that could be filled by South Africans, it is not evident how the proposed provisions are to be co-ordinated with the functions of the Department of Home Affairs in respect of the processing of work-permit applications for foreigner employees.

Section 11 deals with the reporting of vacancies and work opportunities by employers to the Public Employment Services (PES). It seeks to introduce a new mandatory obligation on employers to report vacancies which would be made explicit in regulation. This seeks to assist placing work-seekers who register under the Unemployment Insurance Act at labour centres. A mandatory obligation to report vacancies will impose major resource constraints on the Department of Labour; under-resourcing will have significant inefficiencies for both employers and employees if longer periods are taken to fill vacancies. Neither the Bill nor the Explanatory Memorandum provides a clear articulation of the policy objectives underpinning these provisions and the related resource implications. The Department has already commissioned a report which has concluded that the PESs are currently severely under-resourced in terms of funding, personnel and offices. It is pointed out that employers would utilise PESs as they involve no cost if they are sufficiently efficient.

In conclusion, it is noted that while the draft Employment Services Bill deals with both the provision of Public Employment Services through the Department of Labour and the regulation of Private Employment Services Agencies these topics could be included in separate legislation. It is suggested that legislation dealing with the regulation of Private Employment Services Agencies be developed so it can come into force simultaneously with any changes to the Labour Relations Act and other laws dealing with atypical employment. This would enable more detailed policy development work to be done on the supply and resourcing of public employment services.

Chapter Five presents a cost-benefit analysis of the amendments in the Draft Labour Relations Amendment Bill, 2010 which relates to the Commission for Conciliation, Mediation and Arbitration (CCMA). The objective of the majority of these amendments is to, specifically, promote access to speedy and efficient dispute resolution for vulnerable workers, and more generally, contribute to increased effectiveness and efficiency of the dispute resolution system.

In the majority of cases, the amendments will extend the jurisdiction of the CCMA and as a result increase the case-load of the Commission. This will, in turn, increase the operating budget of the CCMA. Whilst data constraints abound, the initial analysis suggest that in most cases the predicted financial costs to the CCMA are not fiscally unmanageable. In addition, the CCMA may be able to recoup some of the costs associated with certain amendments. Some possible unintended consequences, however, do remain – most notable the moral hazard problem around the Sheriff's deposit amendment.

In the main, however, these amendments would appear to be an attempt at simultaneously reinforcing the rights of vulnerable workers, whilst also increasing the efficiency and effectiveness of the dispute resolution system in particular and the industrial relations system in general.

Introduction

Following Cabinet's request for a Regulatory Impact Assessment (RIA) to be conducted on the Department of Labour's proposed new labour laws, the Employment Promotion Programme (EPP) commissioned a multi-disciplinary team to conduct the RIA. The project team comprises Professor Paul Benjamin (University of Cape Town), Professor Haroon Borat and Carlene van der Westhuizen (Development Policy Research Unit (DPRU) of the University of Cape Town) and SBP

The project team was mandated to undertake a Regulatory Impact Assessment (RIA) on four proposed pieces of legislation:

- The Draft Labour Relations Amendment Bill 2010
- The Draft Basic Conditions of Employment Amendment Bill 2010
- The Draft Employment Equity Amendment Bill 2010
- The Draft Employment Services Bill 2010

The Regulatory Impact Assessment (RIA) is an analysis of the likely effects of government regulations on the state, regulated entities, the economy and society as a whole. The application of RIA as a tool increases the move towards evidence based policy-making, and improves accountability and transparency in policy-making. It makes transparent the expected costs and benefits of options for different stakeholders and the implications for compliance as well as the cost of enforcement for government.

This enables decision-makers to assess whether regulations or legislation contribute to government's socio-economic objectives. The RIA exercise most importantly also helps in the identification of the optimum policy option for dealing with the said challenge by assessing the different or alternative policy options that emerge.

Professor Paul Benjamin's role was to provide a legal assessment of the following provisions:

- Provisions dealing with atypical employment in the Labour Relations Amendment Bill 2010 and the Basic Conditions of Employment Amendment Bill 2010
- Provisions dealing with equality and discrimination in the Employment Equity Amendment Bill 2010 and the Basic Conditions of Employment Amendment Bill 2010
- Sections 10 and 11 in the Employment Services Bill 2010

The role of SBP was to lead the process of stakeholder engagement to determine RIA option analysis on a limited number of significant provisions in the draft Bills. In consultation with the Department of Labour and the other members of the project team, it was agreed that the RIA options analysis would focus on specific provisions in respect of atypical employment (focusing in particular on the Draft Labour Relations Amendment Bill and to a lesser extent the Draft Basic Conditions of Employment

Bill), together with revisions to the penalties structure for non-compliance in the Draft Employment Equity Amendment Bill. In each case, the RIA would develop and assess a range of possible options to achieve the policy objective, based on international practice and views from social partners, and test the benefits, challenges and risks associated with different models.

The team from the DPRU was responsible for the cost-benefit analysis of certain provisions in the draft amendments to the bills. The specific objective was to explain certain key amendments in a way that can be understood by a non-legal audience and to ascertain and estimate the economic impact (both potential costs and benefits) associated with the amendments.

This report is structured as follows: Chapter One is the RIA Options Analysis of selected provisions in respect of atypical employment in the Labour Relations Amendment Bill 2010 and the Basic Conditions of Employment Amendment Bill 2010. The annexure to this chapter presents the cost-benefit analysis of the amendments related to the repeal of Temporary Employment Services, the changes in the definitions of an employee and employer, and the declaration of temporary employment to be permanent. Chapter Two is the RIA Options Analysis of the proposed revisions to the penalties structure for non-compliance in the Draft Employment Equity Amendment Bill. The legal assessment of the provisions dealing with equality and discrimination in the Employment Equity Amendment Bill 2010 is provided in Chapter Three, while Chapter Four presents the legal assessment of certain provisions in the Employment Services Bill 2010. The fifth and final chapter is a cost-benefit analysis of the amendments in the Draft Labour Relations Amendment Bill, 2010 which relates to the Commission for Conciliation, Mediation and Arbitration (CCMA).

Chapter One

Options Analysis: Protection of atypical employees

Assessment of selected provisions of the Labour Relations Amendment Bill 2010 and the Basic Conditions of Employment Amendment Bill 2010

By Professor Paul Benjamin and SBP¹

Policy Objective

The Labour Relations Amendment Bill 2010, the Basic Conditions of Employment Amendment Bill, 2010 and the Employment Equity Amendment Bill contain provisions that aim to ensure that vulnerable categories of workers receive adequate protection and are employed in conditions of decent work, by regulating sub-contracting, contract work and outsourcing. The Bills aim to ensure the protection of fundamental Constitutional rights including the right to fair labour practices, to engage in collective bargaining and the right to equality and protection from discrimination, for all categories of employees.

This Regulatory Impact Assessment (RIA) options analysis focuses on the Labour Relations Amendment Bill, which covers a range of 'atypical' employment arrangements, including employees engaged on fixed-term contracts, employees providing services that have been sub-contracted or outsourced, temporary employees, and employees of private sector Temporary Employment Agencies (TES).

The need to adapt labour legislation in response to the increased scale and exploitation of 'atypical' workers was identified in research commissioned by the Department of Labour in 2002 and submitted to NEDLAC in 2004 but which has not yet produced legislative reform. The pressing need to address these issues is reflected in the ANC's 2009 Election Manifesto, which makes a commitment to: "introduce laws to regulate contract work, subcontracting and out-sourcing, address the problem of labour broking and prohibit certain abusive practices" "in order to avoid exploitation of workers and ensure decent work for all workers as well as to protect the employment relationship." The manifesto also commits to introducing provisions "to facilitate unionisation of workers and conclusion of sectoral collective agreements to cover vulnerable workers in these different legal relationships and ensure the right to permanent employment for affected workers."

The Bill contains provisions that seek to give effect to the Manifesto in a very literal and flawed manner. These include the repeal of Section 198, and changes to the definition of an employee and a new definition of employer which have the unintended consequence of reclassifying many employees as independent contractors. The clauses dealing with outsourcing and sub-contracting seek to impose

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Based on consultation with the Department of Labour, COSATU and affiliated unions, FEDUSA and affiliated unions, NACTU and affiliated unions and BUSA, together with desk research

invariable consequences on these transactions rather than regulating abuses. The RIA points to the severe risks posed by these draft clauses. It also analyses alternative approaches to addressing the issue in line with the relevant passage in the Manifesto: the need to regulate non-standard work in a way that recognises its legitimate role in a modern economy but seeks to prevent it being used as a vehicle for exploitation.

The Bill also seeks to adjust the law to ensure compliance with South Africa's obligations in terms of international labour standards. South Africa is a member of the International Labour Organisation (ILO) and has ratified a number of ILO Conventions. South Africa's labour laws need to comply with the ILO Constitution and relevant Conventions. Obligations include upholding the rights to freedom of association, to engage in collective bargaining and to equality at work. The ILO has developed a conceptualisation of decent work. It identifies four strategic objectives underpinning the decent work agenda: fundamental principles and rights at work and international labour standards; employment and income opportunities; social protection and social security; and social dialogue and tripartism.

The Bill seeks to update labour legislation to current developments in the labour market. At the time of preparing this report, there is a major strike in the public service. While the strike is a "protected" strike called in compliance with the dispute resolution procedures of the LRA, there are concerns that the spirit of the law is not being upheld. Of particular concern is the absence of minimum service agreements to ensure the provision of essential services such as healthcare, and the high level of strike-related violence. It would be appropriate for this event to be fully analysed to see if further amendments to the Act are required to promote the achievement of its goals of orderly collective bargaining and effective dispute resolution.

The Background

Regulation of the labour market needs to be understood in the broader context of government's commitment to labour-intensive economic growth, South Africa's high level of unemployment, and government capacity to implement and enforce regulatory requirements.

Statistics South Africa measures unemployment at 25,3 percent for the second quarter of 2010. Unemployment is disproportionately high among young people, at approximately 47 percent.² Quarterly Employment Statistics in June 2010 showed that between the First Quarter and the Second Quarter of 2010 employment contracted by 0,5 percent, or 61,000 jobs. In the Second Quarter of 2010 formal sector employment contracted by 1,4 percent or 129,000 jobs, with the largest contractions in construction (7,1 percent), transport (6,3 percent) and manufacturing (4,9 percent). In the same period, informal sector employment went up by 5,7 percent or 115,00 jobs.³

In parallel with a decline in formal sector employment figures, the South African economy has witnessed a steep increase in atypical employment since the mid-1990s. Between 2000 and 2010, the number of atypical employees increased from 1.55 million to 3.89 million, constituting 28 percent of

² P0211 - Quarterly Labour Force Survey (QLFS), 2nd Quarter 2010
³ <http://www.statssa.gov.za/keyindicators/QLFS>

total employment. This figure includes employees contracted directly to companies on various fixed-term arrangements, sub-contractors, and individuals employed through employment agencies. The Adcorp Employment Index March 2010 estimates that of the total number of atypical workers in South Africa's formal economy, 25.8 percent are employed through employment agencies (on both long- and short-term placements). The remainder are employed by companies directly without the use of an employment intermediary.⁴

The reasons behind this rise in atypical employment are varied. At individual firm level, they are likely to include a preference for increased flexibility in staffing arrangements, a response to cyclical or project-related changes in staffing needs, and outsourcing or sub-contracting of 'non-core' functions to increase efficiencies. However, there are also many documented examples of the use of atypical employment relationships to minimise or avoid employer obligations under labour legislation, and/or to lower wage bills and benefit entitlements. The limitation on the provision of benefits such as provident (or pension) funds and medical-aid cover to non-standard employees renders these employees and families increasingly insecure and exposed to risk and increases the burden on the state of providing social and health protection.

South Africa's current labour legislation, including the LRA, theoretically provides some protection to atypical employees. However, the absence of specific protections for particular categories of workers coupled with loop-holes in the law and inadequate enforcement of existing requirements renders these employees vulnerable to exploitation. Inadequate enforcement flows from a range of factors, including deficiencies in the system for enforcing CCMA awards, the scale of abuse, and a lack of resources and skills within the Department of Labour inspectorate.⁵ The table below provides a summary of existing legislative protection for standard and atypical workers.

⁴ Adcorp Employment Index March 2010. The Index draws on data from within the Adcorp group (permanent and temporary placements, job search times, work applications, etc.) and from industries and sectors in which the group operates (skills development levies, unemployment insurance claims, labour relations cases, etc.). The data uses population measures rather than sample survey methods. Department of Labour, 2010, p. 10.

⁵ Although not analysed in detail it is pointed out the LRA and BCEA Bills include amendments to certain criminal provisions. These require further consideration as they inter alia propose minimum penalties.

Table 1: Existing Legislative Protection for Permanent Employees and Part-Time, Temporary and Fixed-Term Employees⁶

Legal protection	Permanent	Atypical (part-time, temporary etc)
Wages	Sectoral determinations, no universal minimum wage	Sectoral determinations apply, no universal minimum wage
Annual leave	21 days per annum	1 day for every 17 days worked
Sick leave	30 days per 36 month cycle, non-cumulative	1 st 6 months of employment: sick leave accrues at a rate of 1 day for every 26 days worked. After 6 months: 30 days per 36 month cycle, non-cumulative
Statutory public holidays	Paid leave, or workers remunerated at prevailing overtime rates if they must be on duty	May be paid leave, or workers remunerated at prevailing overtime rates if they must be on duty, subject to terms of contract of employment
Family responsibility leave	1 day for every 86 days worked	1 day for every 86 days worked
Unionisation	Right to union membership guaranteed	Right to union membership guaranteed, but often difficult to exercise. Organisational rights cannot be achieved for workers who work at a workplace that is controlled by party other than their employer.
Unemployment insurance	Mandatory contribution of 1% of wages by employer and employee	Mandatory contribution of 1% of wages by employer and employee
Skills Development Levy	Mandatory contribution of 1% of payroll by employer	Mandatory contribution of 1% of payroll by employer
Pension	At employer's discretion	At employer's discretion
Medical-aid	At employer's discretion	At employer's discretion
COIDA	Mandatory based on annual payroll	Mandatory based on annual payroll
Termination	Due process to be followed. Subject to notice period. Large scale retrenchments subject to stricter regulation.	Due process to be followed. May occur on expiry of temporary contract unless contract is renewed for a further defined period. Notice not required where contract stipulates end date. Employees placed by temporary employment services have no effective protection against unfair dismissal

⁶ Business Position on Temporary Employment Services in South Africa: The case for flexible employment, August 2009, KNC and associates, submitted to Services SETA

Some of the key concerns which have prompted the proposed amendments to key pieces of labour legislation, including the LRA, include:

- Concerns about decent work in relation to atypical employment arrangements
- Differences in wages and benefits available to atypical workers compared to equivalent permanent staff
- Lack of access to benefits such as medical-aid, pensions, and maternity leave for atypical workers
- Limited access to training and development opportunities for atypical employees
- Insecurity of part time and temporary work
- Use of 'temporary' employment arrangements for workers who are employed/located with the same company for lengthy or indefinite periods
- Reported abuses of labour legislation by certain labour brokers and/or employers
- Dismissals of TES workers without following proper procedures (client companies are able to instruct an agency to replace a particular agency worker)
- Low rates of unionisation among atypical workers
- Bargaining council agreements are generally not applied to TES workers
- Some TES contracts exclude the right to strike
- Some TES contracts exclude the right to join a union.

Risk Assessment

Assessment of the scale of the problem and the appropriate intervention requires a clear distinction between types of atypical employment relationships, specifically:

- Flexible working arrangements such as fixed-term contracts, part-time or temporary work, with a direct relationship between the employer and employee
- Sub-contracted and outsourced arrangements, with varying levels of formality
- Use of TES to place workers at an end-user or client company, on the basis of a triangular employment relationship

Proposed amendments to the LRA impact on each of these relationships, and the potential risks and benefits associated with these, are discussed in detail below.

Consultation

Consultation to inform the options analysis was undertaken during August 2010. The following social partners were consulted during the process of identifying and developing options analysis in relation to the selected provisions:

- Department of Labour – Les Kettledas, DDG; Labour Policy & Labour Market Programmes; Thembinkosi Mkalipi, Senior Executive Manager: Labour Relations; Ian Macun, Executive Manager: Collective Bargaining
- Representatives of Business Unity South Africa (BUSA)
- Representatives of the Congress of South African Trade Unions (COSATU) and affiliated unions
- Representatives of Federation of Unions of South Africa (FEDUSA) and affiliated unions
- Representatives of National Council of Trade Unions (NACTU) and affiliated unions

I. Atypical Employees

An overarching objective of the proposed Labour Bills is to strengthen the protection of the rights of atypical⁷ workers to equality and protection from discrimination.

PROBLEM STATEMENT

Atypical workers, including TES employees, may be employed on lower wages and/or under less favourable employment conditions than permanent workers performing the same work or work of equal value.

STATUS QUO

A 2009 Policy Document tabled at NEDLAC acknowledges that discrimination between employees on the basis of their contractual status is currently not actionable in itself. “This has permitted employers to implement widespread and unjustified differentiation between employees on account of the basis on which they are hired. This violates the constitutional guarantee of equality and fair labour practices.”

⁷ The term ‘atypical employment’ is commonly used to refer to employment that does not conform to the norm of full-time indefinite (permanent) employment by a single employer at a single workplace. Many commentators have pointed out that atypical employment is now so widespread that the term is no longer appropriate to employees who are not in full-time employment.

The key challenges to be addressed include:

- Differences in wages and benefits provided to atypical workers compared to equivalent permanent staff
- Lack of access to benefits such as medical-aid, pensions, and maternity leave for atypical workers
- Limited access to training and development opportunities for atypical employees

DEPARTMENT OF LABOUR'S PROPOSED AMENDMENTS:

The Department of Labour aims to prevent unjustified discrimination in wages and working conditions on the basis of employee's contractual arrangements. A proposed new provision in the BCEA (s32(5)) would impose an obligation on employers to *"contribute the same benefits and afford the contract workers the same rights as enjoyed by permanent employees."* This provision, which deals with the protection of "contract workers," raises issues that apply equally to all "non-standard" employees. The provision would apply to discrimination between employees placed by TES and direct employees as well as discrimination by employing non-standard employees on less favourable terms and conditions than full-time employees.

RISKS

The current phrasing of the provision, that is, an obligation to *"contribute the same benefits and afford the contract workers the same rights as enjoyed by permanent employees"* is extremely broad. It is unclear what is included in "benefits." Benefits packages tend to be discretionary at firm level, or are determined through collective bargaining processes. Variations in benefits packages, across firms and within firms, make it very difficult to compare wages on an objective basis.

The provision may create a disincentive to employment. Industry statistics show that a large proportion of atypical employees, particularly temporary and TES employees are young people and a significant number are new entrants to the labour market. A provision that these employees should receive equal pay and equal benefits from the start of their employment fails to take into account the difference in skills and experience between these employees and others who have accumulated greater experience and expertise. There is a significant risk that such a provision will make it more difficult for first-time Job-seekers to enter the labour market.

One of the arguments that is raised in this context is that there is also a risk that broadening the grounds on which discrimination is prohibited could lead to a litigation floodgate. For instance, reference is made to the UK the number of wage discrimination cases brought annually before the UK's Employment Tribunals is roughly equivalent to the number of dismissal claims. However, these risks do need to be contextualised: one of the key drivers of "equal pay for work litigation" is that the legal profession conducts this litigation on a contingency basis because of the high value of settlements that can be concluded in the public sector in particular. This risk needs to be balanced against the fact that despite the "apartheid wage gap" and the Constitutional commitment to

eliminate discrimination only a handful of cases concerning wage discrimination on grounds of race have been brought. Proposals to address this are discussed in Chapter 3.

Four alternative approaches may be identified, which may overlap in their application:

1. Specific prohibitions on treating employees in the most common categories of “non-standard” employment (fixed-term contract, temporary and fixed-term contract workers; agency workers) less favourably than permanent employees;
2. Use of existing Bargaining Council minimum wages and graduation structures and sectoral determinations to drive equality for atypical workers
3. Flexibility in the initial employment period
4. Application of a threshold to protect the most vulnerable workers

a. Specific Prohibitions on Wage Discrimination in Respect of the Most Common Categories of “Non-Standard” Employment

The purpose of an “equal pay” clause is not to require, as is sometimes argued, that all employees doing the same work receive the same package but to ensure that employers determine wages and other conditions of employment on a fair and non-discriminatory basis. The law should require an employer to have a rational system that applies consistently to determine remuneration. The employer should be able to demonstrate that differentiation is based on relevant rational and objective criteria which would include factors such as skill and experience. This is consistent with the Constitution and the Employment Equity Act (EEA) which prohibit “unfair” discrimination. Wage discrimination which can be linked to a proscribed ground such as race or sex is unlawful discrimination under section of the Employment Equity Act.

Given the broad discretionary differences that are likely to apply to benefits packages, there appears to be an argument for confining the application of the equality provision to the narrower concept of “wages.” Certain benefits (particularly pension funds) may be inappropriate for short-term employees.

A more practical approach would be to compare wages in terms of wage bands, enabling provision for entry level wages in a particular band to be the same, while allowing for variations within the band based on skills and experience.

Legislation tends to take three approaches:

- Courts determine what grounds are considered to relevant objective criteria justifying differential pay.
- Certain specific grounds justifying discrimination are listed in the statute and the Court has a jurisdiction to determine others.

- Provision is made for a code of good practice which would set out the factors that would be taken into account.

Factors that are typically seen as justifying differences in pay include experience, seniority, and measures assessing quality and quantity of work performed. Internationally, the preferred approach tends to be not to have a closed list but allow objective criterion to be used to justify differentials provided that these do not constitute a proscribed ground for discrimination in terms of existing legislation. The Canadian Human Rights Act, for example, provides that: “In assessing the value of work performed by employees employed in the same establishment, the criterion to be applied is the composite of the skill, effort and responsibility required in the performance of the work and the conditions under which the work is performed.”

Legislation could specifically provide that TES employees should receive the same wages as direct employees of the employer performing the same work and that non-standard employees (such as fixed contract or part-time employees) should receive the same treatment as permanent employees. The principle that there should not be less favourable treatment of non-standard workers has been accepted in three European Union directives dealing with part-time workers, fixed-term contract workers and agency (TES) as well at national level in many countries. The approach underlying these laws is that legislation should permit beneficial flexibilities for both employers and employees that flow from permitting atypical and temporary employment while ensuring these employment relationships are not used to reduce conditions of employment or for labour law avoidance. The scope of the prohibition on less favourable treatment extends to issues such as access to training and consideration for permanent positions. These statutes permit differentiation when it can be justified on objective grounds.

Equal pay for equal work – Asian examples

China requires labour hire workers to be paid at the same rate as workers in the user firm who are engaged in similar work, and to receive the same overtime rates and benefits. If there is no similar position within the user firm, employees must be paid the same as employees in similar positions at a nearby place of work. In Korea, legislation enacted in 2008 requires employers to provide equal pay and benefits to hired workers.

b. Use of Existing Bargaining Councils and Sectoral Determinations to Determine Minimum Wages and Graduation Structures and to Drive Equality Considerations

Bargaining Council agreements can be used to determine minimum wages and benefits for temporary workers following the categories and grades used in these agreements. Where collective agreements cover categories of work performed by agency workers, collective agreements should apply to those workers. Where bargaining councils are not applicable, sectoral determinations could be applied.

A large proportion of atypical employees are however not covered by bargaining councils or sectoral determinations. In such cases, specific criteria could be defined to assist in the identification of

unjustified discrimination. These would include factors such as skills levels, experience, performance and competence.

c. Flexibility in the Initial Employment Period

In order to minimise disincentives to employment of inexperienced and young workers, there may be an argument for a graduated process, whereby wages and benefits are commensurate with length of service in a particular sector/industry, and/or in a particular company. This approach would legislate an appropriate period of time before equality becomes a formal legal recourse – in line with probationary principles and international good practice – in order to facilitate access to employment and skills acquisition. The learnership system under the Skills Development Act (SDA) already provides for unemployed learners to be employed on fixed-term contracts for the duration of the learnership at a reduced rate.

The four-phase model applied in the Netherlands provides a useful example of how such a process might operate.

A Phased Approach: The Dutch Model

The Netherlands employs a four phase model.

1st Phase (26 weeks) – The employment relationship ends if the assignment terminates or as a result of the sickness of the employee. The employee is insured against unemployment and sickness. The duration of this phase can be extended up to 52 weeks by collective agreement.

2nd Phase (12-18 months) – Employee is interviewed to ascertain training needs. Employees over the age of 20 begin to accumulate pension rights.

3rd Phase (18 months at a single enterprise or 36 months with various enterprises) – Employee has some employment security. Minimum duration of a fixed-term contract is three months, which may be renewed throughout phase. The employee is guaranteed full pay if no work is available. The employee is guaranteed full pay in case of sickness until the limited duration contract expires, or, if the contract is open-ended contract, for a maximum 52 weeks.

4th Phase – Open-ended contract, usual dismissal procedures must be observed.

Alternatively, if an employer offers a worker three consecutive fixed-term contracts of three months, or a number of fixed-term contracts of an accumulated duration of 36 months, then the worker becomes employed on an open-ended contract.

d. Application of a Threshold to Protect the most Vulnerable Workers

There may be an argument for applying an earnings threshold to a wage discrimination clause. Limiting discrimination on a proscribed ground by reference to wage would be unconstitutional because its effect would be to permit unconstitutional discrimination. However, where anti-discrimination protection is being expanded beyond the constitutional ambit, such a limitation may be appropriate. Higher paid employees have significant bargaining power and their remuneration packages are individually determined, which may lead to the negotiation of differential wages. Provided that these do not reflect a pattern of proscribed discrimination (that is, they are not based on race or gender etc.) an argument can be made that they should not be made to be justiciable as this will lead to massive judicial interference in the setting of remuneration.

II. Flexible Working Arrangements: Fixed-term Contracts

PROBLEM STATEMENT

Currently, wide-spread use is made of fixed-term contracts in many sectors of the economy, even where the employees concerned are in fact employed indefinitely, or where contracts are repeatedly renewed. (The extent of these contracts is itemised in the Annexure to this Chapter) The application of 'fixed-term' contracts may be used to deprive employees who are engaged for work of indefinite duration of security of employment. This form of labour rights abuse may occur in direct and triangular employment relationships.

STATUS QUO

At present, the LRA provides that dismissal means that an employee reasonably expected the employer to renew a fixed-term contract of employment on the same or similar terms but the employer offered to renew it on less favourable terms, or did not renew it.

To succeed with such a claim, the employee must establish objectively that he or she expected that the contract would be renewed and that, after taking into account all relevant factors, the expectation was reasonable. In the absence of these circumstances, the failure to renew a fixed-term contract irrespective of its duration is not an unfair dismissal.

Factors that the courts have taken into account in determining whether an employee's expectation of a renewal was reasonable include:

- The wording of the contract
- Undertakings made by the employer or a representative of the employer to the employee
- Custom and practice in regard to renewing contracts
- The availability of the post

- The purpose or reason for having concluded the fixed-term contract
- The extent to which the employer gave reasonable notice to the employee
- The nature of the employer's business.

Section 186(1)(b) is the only restriction in South African labour law on the use of fixed-term contracts as a basis for employing workers for a limited period under a fixed-term contract. If the employer gives the employee reasonable notice that the contract will not be renewed, the employment terminates at the end of the fixed-term even if the job for which the employee was hired is still in existence. The employee has no right to a hearing before dismissal and no protection against unfair dismissal. The employer is able to replace the employee with another worker.

The available evidence indicates that employers in South Africa enjoy a considerable level of de jure and de facto flexibility to employ workers under fixed-term contracts.⁸

DEPARTMENT OF LABOUR'S PROPOSED AMENDMENT

The draft LRA Amendment Bill proposes extending the basis on which an employee engaged on a fixed-term contract can allege unfair dismissal to cover cases in which the employee alleges a reasonable expectation that the employer would offer him or her *indefinite employment* on the same or similar terms.

In addition, a new provision (s200B) would require that "an employee must be employed indefinitely, unless the employer can establish a justification for employment on a fixed-term."

The rationale for the clause is set out in the Explanatory Memorandum: "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 (for example, the building of a particular building, replacing a person who is on maternity, etc.) or on a task that lasts for a specific period. The purpose of this clause is to prevent the use of 'fixed-term' contracts as a basis for depriving employees who are engaged for work of indefinite duration of security of employment."

If an employee engaged under a fixed-term contract challenges the fairness of the termination of the contract, the employer must establish that it is fair by showing the reason for concluding a fixed-term contract.

RISKS

Fixed-term contracts are widely used at the global level as a legitimate mechanism to provide flexibility and responsiveness to changing labour force requirements, particularly on project work, and in sectors that are highly impacted by seasonality or cyclical activity.

⁸ Some 2,1 million employees are employed on fixed-term contracts. In contrast, between three and six per cent of the dismissal cases referred to the CCMA annually are identified as being about 'contract renewal'. This means that approximately 5 000 'contract renewal' unfair dismissal cases are referred to the CCMA annually.

The provision for a presumption that workers should be employed indefinitely, unless the employer can establish a justification for employment on a fixed-term, is very broad and vague as it is currently formulated in the Amendment Bill and therefore is open to misinterpretation.

The Explanatory Memorandum proposes that the clause would only apply to employees who are earning below a threshold set by the Minister of Labour. This qualification is however *not reflected* in the Bill. An earnings threshold is appropriate in the context of the regulation of fixed-term contracts as there are categories of indefinite employment (for example, Chief Executive Officers, Director Generals) in which fixed-term employment is appropriate.

ALTERNATIVE OPTIONS

Alternative approaches, which do not involve a presumption of indefinite employment, could include:

I) LIMIT THE APPLICATION OF FIXED-TERM CONTRACTS

Options include the following:

- (a) Specify the grounds justifying the conclusion of a fixed-term contract

In terms of this approach, the law would specify the grounds which justify the conclusion of a fixed-term contract. This could include employment as a substitute employee, employment on a project for a fixed-term, probation etcetera.

Germany provides a useful example – legislation specifically identifies a number of grounds which qualify as justification for use of fixed-term contracts, and cases in which companies are exempt from the requirements on objective grounds. A more targeted approach of this sort may be useful in minimising potential negative impacts and unintended consequences.

Requirement for fixed-term contracts to be justified – Germany

Germany requires all fixed-term contracts to be consistent with its Part-Time Work and Fixed-term Employment Relationships Act 2000. The Act provides that a fixed-term contract is only permissible if there is a 'good cause.' The Act contains an enumeration of potential objective grounds, specifically: The need for certain manpower is temporary only; the term is fixed in order to make it easier for an apprentice or post-graduate to get subsequent employment; the worker is employed in order to substitute for another worker; the nature of the work justifies the fixing of the term; the fixing of the term serves the purpose of testing the worker; or grounds related to the person of the worker which justify a fixed-term.

However, a fixed-term contract may also be lawful without justification, if it falls under one of two exceptional cases:

The contract is concluded for a limited period of up to two years with an employee who has not previously been employed by that employer;

The employer is a new company – this exception applies for four years from the formation of a new company.

A fixed-term contract must be made in writing. Fixed-term employees may not be treated worse than persons working indefinitely if no "sound reason" exists for doing so. Fixed-term employees must be informed of opportunities for indefinite employment. The employer is obliged to facilitate access for fixed-term workers to appropriate training opportunities.

If a fixed-term contract is sustained beyond the fixed date, the contract is presumed to have been extended indefinitely unless the employer objects immediately.

- (b) Limit the number of times that a fixed-term contract can be renewed/ extended, in the absence of an objective ground.

This could be done by regulation or collective agreements. Where contracts have been repeatedly rolled over, employees should have a right to fair dismissal (procedurally and substantively) when their employment contracts are terminated, and the onus should shift to the employer to justify termination of the contract.

Legal precedent from case law can assist in identifying cases of abuse. Factors to be considered in determining whether dismissal of fixed-term contractors constitutes unfair labour practice include: whether contracts have been repeatedly rolled over/renewed over an extended period of time; length of assignment; nature of the work and terms of the contract and reason for termination.

(c) Limit the period for which a fixed-term contract may extend. Employment beyond that period would be deemed to be indefinite.

Many countries set a maximum period for which a fixed-term contract can be concluded. This limit does not apply to contracts which can be objectively shown to justify a longer period.

The second and third approaches both suffer from the problem of perverse incentives – the termination of contracts shortly before the threshold period – and legislation should seek to minimise this.

These three approaches may be used in combination. It is also common for legislation regulating fixed-term contracts to be used to prevent employees hired in this manner being treated less favourably than other employees, as discussed earlier.

III. Sub-Contracting and Outsourcing

PROBLEM STATEMENT

In cases where workers are employed by a company that is sub-contracted by another company, the worker has limited recourse against the client company in cases of unfair labour practice.

STATUS QUO

Section 89 of the Compensation for Occupational Injuries and Diseases Act (COIDA) 1993, places obligations on a principal contractor, in respect of the employees of a sub-contractor. This requires the principal contractor to ensure that the sub-contractor registers the employees who work on the relevant contract with the Compensation Commissioner. If the sub-contractor fails to register them, the employees are deemed to be employees of the principal contractor for the purposes of COIDA and the Compensation Commissioner may require the principal contractor to pay the assessment due under COIDA in respect of those employees. The principal contractor can set-off or recover that amount from the sub-contractor.

Where “sub-contracting” amounts to the transfer of the whole or part of a business, trade, undertaking or service as a going concern, then the provisions of section 197 apply. This provides that employees who work in the business or service concerned transfer to the new employer on their existing terms and conditions of employment. Employee consent is not required for the transfer and an employee who refuses a transfer on these terms is not entitled to severance benefits.

If however a sub-contractor fails to pay its employees, for example, the employees have no recourse against the client company/principal contractor.

Outsourcing is regulated by section 197 of the LRA which provides that employees who are transferred as a result of the transfer of a business or part of a business must be employed by the new employer on the same terms and conditions of employment. A proposed amendment to section 197 will extend the application of section 197 to “second generation” transfers such as a change of service providers providing an outsourced service.

DEPARTMENT OF LABOUR’S PROPOSED AMENDMENT

The draft LRA Amendment Bill contains a new provision (s200C: Liability of client company in sub-contracting) whereby “An employee must have recourse against the employer and its client company in cases of unfair labour practice.” The clause proposes to hold a principal contractor liable for unfair labour practices committed by a sub-contractor to whom the principal contractor has sub-contracted. In addition, s186 (2) is amended to extend the definition of ‘unfair labour practice’ to specified unfair acts or omissions that arise between an employer and client company in sub-contracting cases and an employee.

RISKS

Outsourcing and sub-contracting of services such as security, cleaning and catering is a common business model in South Africa and internationally. There appears to be no international precedent for joint liability to be applied generally in the area of sub-contracting and outsourcing.

This is a critical area of opportunity for small business. Indeed, a number of innovative business linkage programmes, specifically designed to encourage large corporations to expand their value chains to include local and particularly small businesses, strongly advocate outsourcing and sub-contracting of this type. Similarly, government tender requirements may stipulate that a portion of the contract value is outsourced to Black Economic Empowerment (BEE) contractors.⁹ The model enables small businesses with specialised skills to access the supply chains of big business, and creates employment opportunities in the local area.

A regulatory requirement that the client business should share in the liability of its sub-contractors and outsourced service providers creates a significant disincentive to supply chain diversification, and could have a negative impact on small business and job creation.

The current proposals as set out in the Bill give rise to various legal ambiguities. The term ‘sub-contracting’ is not used elsewhere in South African legislation and various meanings could be ascribed to it. While sub-contracting may involve delegation to a third party of some, or all, of the work that the principal contractor has contracted to do, it may also be used to describe outsourcing arrangements.

⁹ Casualisation: A research report on the changing nature of work and proposals for improving conditions for atypical workers in South Africa, Department of Labour: Research, Policy and Planning Labour Market Policy, July 2004

The Amendment Bill contains no definition of the term “sub-contractor.” There is no indication as to the context in which it is used. The difficulty in ascertaining the meaning is exacerbated by the use of the term “client company” to describe the party that sub-contracts work. There are several difficulties with this term: firstly the relationship created by sub-contracting is not typically one involving a “client.” Secondly, the party to a sub-contracting arrangement may not be a company.

Subcontracting (in the conventional sense) usually occurs where the contracted work (for example, the construction of a building) requires a variety of skills. Sub-contracting is commonly used in building and construction where it is common practice for a “principal” contractor to contract with specialised sub-contractors to perform parts of a building project. In general, the principal contractor remains liable to the party with whom it has contacted for the performance of all aspects of the contract, including the work performed by sub-contractors.

Sub-contracting may involve a relationship between two substantial entities. For instance, a construction company may sub-contract a specific aspect of a construction project to a specialist company such as a roofing contractor. Typically, large mines also “sub-contract” specialist activities such as shaft-sinking.

Other types of sub-contracting may, however, be used to disguise employment. Construction is commonly characterised by “cascading” sub-contracting in which individual workers effectively hire other workers to assist them. It is possible that the case-law on the definition of an employee may provide a basis for holding that the principal contractor is in reality the employer because of the workers’ economic dependence on the employer. However, this is a recent development in case-law and cases concerning employment that has been disguised through sub-contracting have not yet been argued.

“Sub-contracting” may also be used as a device to divide a single business entity into more than one legal entity in order to avoid labour law obligation. A common example of this is in the Clothing Manufacturing Industry in which certain businesses are structured into a “design house” and an “employing company”. Although controlled by the same individuals, the ‘design house’ contracts with the ‘employing company’ to manufacture clothes. The “employing company” which is the legal employer of the workers concerned, generally has no assets. If the workers (or bargaining council) lodge a claim against the employer, it is wound-up and there are no assets that can be realised to satisfy the workers’ claim. In these circumstances, the courts have been willing to “pierce” the corporate veil and hold the “non-employer” company liable. However, this involves time-consuming and expensive litigation. Further difficulties may be caused by the fact that the assets are held by the individual directors rather than the legal entities.

While particular forms of sub-contracting may be used to avoid labour law, this does not flow merely from the fact that a sub-contracting relationship exists. It is therefore not appropriate to make blanket provisions for all forms of “sub-contracting.”

It would appear that the rationale underlying the proposed section 200C is to prevent “sub-contracting” being used to avoid labour law obligations. However, the need for such a clause is not triggered by the nature of the contracting relationship between the parties but rather by the fact that an attempt has been made to hide the identity of the true employer and to insulate that employer from its labour law obligations. Where it might be appropriate to hold that a “principal contractor” is the employer, this liability should extend to all aspects of labour law that are within the control of contractor/ employer.

ALTERNATIVE OPTIONS

A more targeted response would be to introduce what is termed a “joint employer” approach. Such an approach would provide that where a single employer has been divided into more than one legal entity in order to avoid labour law obligations, the court can rule that all those legal entities are responsible for compliance with labour law obligations. This would cover fraudulent “sub-contracting” and “outsourcing” which is designed to defeat the purpose of labour law. That obligation should extend to directors of a company or close corporation where that entity has been wound up to avoid payment of outstanding payments to employees.

This approach avoids the need to characterise the contracting relationship between the parties (for example, it will not be necessary to ascertain whether the relationship involves outsourcing or sub-contracting). The key question is whether the different employer entities constitute a single business or whether a corporate entity or individual has exercised control over a business.

The United States Joint Employment Model

The doctrine of joint employment has been developed in US law. The doctrine originated when courts began treating corporations engaged in a joint venture as joint employers of the workers hired to carry out the venture. Subsequently courts expanded the doctrine to cover a range of situations where control of the worker is shared. To hold the status of an employer in the US, you are required to meaningfully influence matters relating to the employment relationship such as hiring, firing or supervising. On the basis of this doctrine, it is possible to consider client companies as co-employers.¹⁰

The Supreme Court in *Boire v. Greyhound Corp.*, 376 U.S. 473 (1964), set the standard whereby, “where two or more employers exert significant control over the same employees—where from the evidence it can be shown that they share or co-determine those matters governing essential terms and conditions of employment— they constitute “joint employers” within the meaning of the NLRA.” (National Labor Relations Act –NLRA)

Joint employer relationships are found where, despite the absence of common ownership, one entity effectively and actively participates in the control of labour relations and working conditions for employees of the other entity. The Board has defined “essential terms and conditions of employment” as those involving such matters as hiring, firing, discipline, supervision, and direction of employees.¹¹ To establish joint employer status, it must be shown that the employer meaningfully affects essential terms and conditions of the temporary employees' employment, and that its involvement is more than minimal or routine.¹²

IV. Triangular Employment Relationships: Prevention of Unfair Labour Practice

CONTEXT

Use of contract employment agencies is increasing internationally. In Europe, private employment agencies have become the single fastest growing segment of many countries' labour markets. Contract employment growth ranged between 12 percent (UK) and 20 percent (Italy) per annum between 2001 and 2008.

Employment agencies have in the past been restricted or banned in many European countries. However, in response to changing employment patterns and the increasing need for flexibility in employment relationships, the large majority of bans and restrictions were lifted by the mid-1990s, and new regulatory frameworks were put in place to codify the manner in which such agencies conducted their activities. In 1997, the ILO adopted Convention C181 which provides guidelines on the scope and operations of private employment agencies.

¹⁰ Lars W Mitlacher 'The Role of Temporary Agency Work in different industrial relations systems – a comparison between US and Germany' *British Journal of Industrial Relations* 45:3 Sept 2007 p581-686.

¹¹ *Goodyear Tire & Rubber Co.*, 312 NLRB 676 (1993)

¹² *Goodyear Tire & Rubber Co.* at 676

In October 2009, a consensus document was adopted by the working groups of the ILO specifically tasked to deliberate on promoting ratification of the Convention 181. Key points of consensus include:

- Recognition of Private Employment agencies contribution to Labour Markets. The document recognises that private employment agencies can provide a range of labour market services that address the need for flexibility, including temporary work and payroll management that, if regulated appropriately, contribute to improved functioning of labour markets and fulfils specific needs for both enterprises and workers, and aims at complementing other forms of employment; that private employment agencies can create pathways to employment by helping Job-seekers enter or re-enter the labour market and providing greater work opportunities for more people, facilitating the transition from education and work, easing the transition between assignments and jobs by providing agency workers with vocational training, and promoting conversion between different types of work contracts, including shifts from TES to fixed-term or open-ended contracts; and improving life-work balance by providing flexible working time arrangements such as part-time work and flexible working hours.
- The need for effective regulation, monitoring and controls, covering areas such as a no-fee rule for jobseekers; non-discrimination for agency workers in terms of working and employment conditions; freedom of association and the right to collective bargaining; sectoral social dialogue and collective bargaining; prohibition of the replacement of striking workers by TES workers; clarity about benefits; and clarity about who is the employer.
- The need for enforcement of existing regulations by public authorities, including labour inspectorates, as well as the need for bipartite and tripartite compliance mechanisms.
- The need for examination of new ways to protect workers, including eligibility for retirement entitlements, seniority, portability of rights, benefits, and protection of workers as they move from one job to another.

It is important to bear in mind that the ILO uses the term “private employment agency” in Convention 181 to cover both firms which “offer services for matching offers of and applications for employment” without becoming a party to the resultant employment relationships, and firms which employ workers with a view to making them available to a third party (the user enterprise) to work under the instruction and supervision of the user enterprise.

It is the latter category which is referred to in South Africa as “labour brokers” or Temporary Employment Services and which is currently regulated by section 198 of the LRA. The concept of a “labour broker” was introduced into South African law by amendments to the LRA in 1983. Labour brokers were “deemed” to be the employers of individuals they placed with their clients provided the labour broker remunerated the employees. The Explanatory Memorandum to the 1983 Bill justified the introduction of the provision on the basis that firms within the growing labour hire sector had structured their relationships with the workers that they placed with clients so that these workers

were not receiving the protection of statutory wage-regulating measures.¹³ While the 1983 amendment clarified the identity of the employer of indirect employees, it gave rise to other problems. Employees became vulnerable to abuse by “fly-by-night” labour brokers. If a labour broker who had engaged workers for a client failed to pay them, the employees had no recourse against the client because the client was not their employer. If the employees could not locate the labour broker or the labour broker had no assets, there was no mechanism available to the employees to recover wages and other payments owing to them. As labour brokers are able to operate without significant assets and infrastructure, there is a significant risk of practices of this type occurring. As a result, the risk of non-compliance by labour brokers is borne by the employees and not the client.

Section 198 of the 1995 LRA retained the formulation that the labour broker (now referred to as the TES) is the employer of persons they place with a client to work subject to the control and supervision of the client if the employee’s remuneration is routed through the agency.¹⁴ As a result, a Temporary Employment Service (TES) may be the employer of a worker even though their ongoing relationship is confined to the TES paying the employee out of money received from the client and paying statutory deductions to the relevant institutions.

Section 198 of the LRA was intended to regulate the employment of employees who are supplied by *temporary* employment services to clients to perform temporary work. However, the provisions of section 198 have been widely used as a basis for indefinite employment relationships, with negative consequences for the labour rights of the employees concerned.

There are also documented cases of large employers employing their entire workforces through TES.¹⁵ Reported case law includes instances of employers ‘transferring’ their employees to TES,¹⁶ and employees who are unaware that their employer is in fact the TES.¹⁷ In the Agricultural Sector workers or former workers are appointed as “informal recruiters” and become the employer of the workers they recruit merely because the payment of wages is routed through the recruiter. The payments made to the recruiter often do not cover the minimum wages in terms of the Sectoral Determination.¹⁸ Section 198 can be used by employers to deprive employees of protection against unfair dismissals, to exclude them from collective bargaining and to apply less favourable terms and conditions of employment.

It is evident that many of the functions of employment agencies can be performed without the agency becoming a party to the employment relationship. However, the key stakeholders in the labour arena disagree as to the extent and circumstances in which it is appropriate for the agency to remain the employer of an employee who is working for someone else.

¹³ M Brassey and H Cheadle Labour Relations Amendment Act 2 of 1983 (1983) 4 ILJ 34 at 37

¹⁴ *LAD Brokers v Mandla* (2001)22ILJ 1813(LAC)

¹⁵ For example, East Rand Proprietary Mines (ERPM), 2002 – most of the mine’s workforce of 4000 was employed by a TES rather than by the mine-owners.

¹⁶ *NUMSA v Genlux Lighting* [2009] 3 BLLR 245 (LC); *NUMSA obo Ketlhoilwe v Abankedisi Labour Brokers* (Labour Court, Case No: JS1284/01).

¹⁷ *Vitapront Labour Brokers CC v SACCAWU & Others* [2000] 2 BLLR 238 (LC)

¹⁸ *Rotten Fruits: South African Workers Pay a High Price for Profits* published by Woman on Farms Project (WFP) (2005) available at <http://www.wfp.co.za>.

PROBLEM STATEMENT

Triangular employment relationships risk undermining the labour rights of employees, in respect of their ability to impose liability on the client company in cases where the TES agency has defaulted on its obligations, and in their ability to contest dismissal by the client company.

STATUS QUO

An end-user may use the services of a TES to have workers placed, for varying lengths of time, at the end-user company. This creates a triangular employment relationship. The TES has an employment contract with the worker and pays the worker's wages. The TES has a contract with the client company which specifies the tasks and period for which the worker is required, and the fees to be paid to the TES. The worker is employed by the TES, but is under the day-to-day management of the end-user. The TES is responsible for management of wages, leave, statutory compliance and other obligations relating to the employment relationship.

Section 198 of 1995 makes the end user jointly and severally liable for breaches of the BCEA, Sectoral Determinations, Collective Agreements and Arbitration Awards. If a TES fails to pay amounts owing to its employees, the client for whom the employees worked is liable to make those payments – regardless of whether the client has paid the TES or not. In theory, this joint and several liability transfers the risk of the TES defaulting on its obligations from the employee to the client. However, the Labour Court has held that a client cannot be sued directly in the CCMA or Labour Court as it is not an employer. The employee can only proceed against the client if it has obtained a judgment or award against the TES which the TES declines to pay. In practice, vulnerable workers are seldom able to exhaust these procedures in order to hold the client accountable.

End-users are able to instruct a TES to replace a particular agency worker, with no obligation on the TES to find a new placement for the worker. Because the TES is the employer, the worker can only challenge the TES' termination of their services, and not the decision by a client to terminate their assignment. As employees are not guaranteed work by a TES, they have no effective protection against unfair dismissal, even when they have worked for one client for a considerable period of time. The client's decision to request an agency to withdraw an employee is conveyed from client to agency in terms of their commercial arrangement and therefore falls beyond the reach of labour law.

There is therefore a need to provide a more accessible form of protection for vulnerable workers against abuses by TES and client companies where these occur.

DEPARTMENT OF LABOUR PROPOSED AMENDMENT

Proposed amendments to the LRA repeal section 198, insert a new definition of ‘employer’¹⁹ and amend the definition of ‘employee.’²⁰ The draft Employment Services Bill is proposed to deal with the regulation of private employment agencies.

The proposed amendments seek to prevent any form of triangular employment relationship by providing that only a person who directly supervises the work of the employee may be that person’s employer. It is envisaged that this will preclude the operation of TES because the essence of “labour broking” is the supply of employees to work under the supervision of another (the client).

The Explanatory Memorandum to the LRA states that by repealing section 198 the Department of Labour wishes 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.”

RISKS ASSOCIATED WITH NEW DEFINITIONS OF EMPLOYER AND EMPLOYEE

i) RISK TO EXISTING EMPLOYEE RIGHTS

The Bill’s conceptualisation of employee requires that a person who works for another is only an employee if he or she is employed by or works for an employer; *and* is remunerated by the employer²¹; *and* works under the direction and supervision of an employer. (In the definition of “employer” these concepts are merged as “direct supervision”). These requirements are cumulative.

Under existing law, the employer’s right of control is not a definitive requirement to be an employee. The proposed definition elevates “direction and supervision” by an employer to be a mandatory requirement to be a statutory employee. If this definition comes into effect, many workers who are currently classified as “employees” but who are not directed or supervised in the way they work will cease to be employees for the purposes of all labour legislation and will therefore be excluded from all statutory labour rights.

This is particularly true of employees who work away from the office. For example, workers such as taxi-drivers, truck-drivers and commercial travellers are not considered to be under the “direction and supervision” of their employers. This amounts to an unjustifiable limitation of the rights of excluded workers (that is, employees who are not directly supervised by their employers) to receive those protections guaranteed to “workers” in terms of the Labour Relations clause of the Bill of Rights

¹⁹ ‘Employer’ means any person, institution or organisation, including government who employs and provides work to an employee, directly supervises, remunerates or tacitly or expressly undertakes to remunerate such employee for services rendered by such employee.

²⁰ ‘Employee’ means any person who is employed by or who works for an employer and who receives or is entitled to receive any remuneration and who works under the direction and supervision of an employer.

²¹ Although the element of “remuneration” is mentioned in part (a) of the current definition of an employee, the fact that part (b) of the definition includes “other” persons who assist the employer in carrying on the business means that categories of workers such as unpaid workers in family businesses fall within the definition of an employee.

(section 23).²² There are thus severe unintended consequences to this approach in terms of the impact on direct employment. The provisions could be interpreted as violating the constitutionally protected labour rights of employees, and could be set aside as unconstitutional. The extent of the unintended consequences is revealed by the fact that those trade unions who favour a ban on labour broking do not support the approach of the Bill on this issue because of the negative consequences it will have for their members.

ii) EMPLOYER WILL HAVE TO BE DETERMINED ON A CASE-BY-CASE BASIS

International experience shows that the definition of “employee” is not a satisfactory basis for regulating triangular employment. The prime example of this is the UK, where the contractual test remains the basis for determining who the employer of an “agency” employee is. The case-law is uncertain with the courts having found on different occasions that the employee is employed by the agency, by the client, by both and by neither. The reason for this is that the definition has evolved for the purpose of distinguishing employees from independent contractors; it is not designed to serve the purpose of distinguishing whether the agency supplying workers or the client for whom they work is the employer, particularly where both exercise some measure of supervision of the employee.

In practice, many employees are supervised in their work by both the agency and the client for whom the employee works. For instance, the agency may supervise general aspects of the employee’s duties while the client will supervise the day-to-day performance of tasks in the client’s workplace. It is not clear how the Bills’ proposals will deal with this situation. This could lead to the conclusion that neither party is the employer because supervision is shared and neither the “agent” nor the “client” exercises the full responsibilities of an employer.²³ However, it is more likely that the employer who controls the workplace in which the employee is working will be classified as the employer because that employer more directly supervises the employee. There are many situations in which this will produce an anomalous result. One example is businesses that hire out expensive equipment such as earth-moving equipment or cranes. These businesses supply an employee to operate the equipment who is fully trained to perform that task. However, it is the client who will instruct the employee as to what tasks he or she should undertake. The proposed “direct supervision” test will have the anomalous result that it is the “client” who is the employer.

The effect of repealing section 198 will be that the question of who the employer is will have to be dealt with on a case-by-case basis. This will cause uncertainty and increase the scope for avoidance, as well as increasing litigation to the detriment of employees. The major beneficiaries will be unscrupulous employers who have an interest in disguising the employment relationship.

²² In *South African National Defence Union v Minister of Defence* 1999 (4) SA 469 (CC) the Constitutional Court held that s. 23 used the term ‘worker’ primarily in the context of employment. However, the conditions of enrolment of members of the Defence Force were in many respects akin to the conditions of persons employed under contracts of employment and therefore Defence Force members were “workers” as contemplated by section 23.

²³ The English courts have adopted this approach in certain cases.

A narrowing of the definition of who is an employee risks destabilising the labour market. The determination of who is an employee has been an area of relative certainty since the enactment of the presumption of employment contained in section 200A of the LRA and section 83A of the BCEA in 2002 and NEDLAC's adoption of a Code of Good Practice: Who is an Employee in 2006. The proposed changes do not take these developments into account. They are further likely to lead to an increased level of disputes in the CCMA, the Labour Courts and the Civil Courts (Magistrates' Court and High Court).²⁴

The inclusion of "remuneration" as an essential element of employment will also allow for employers to use the issue of who remunerates the employee as a means of disguising employment. The fact that an employer must both "directly supervise" and "remunerate" an employee will make it easier for employers to disguise the real employer through activities such as contracting out.

The effect will be to encourage new forms of labour law avoidance as employers argue that certain employees are not subject to their supervision. For example, employers could split their business into two or more legal entities and arrange matters so that the actual employer has no assets to cover claims. The proposed new definition will make this method of labour law avoidance easier to achieve as the employer can structure its operation so that supervision is undertaken through the "shell". The only beneficiaries of this change will be employers who seek to gain advantage by disguising employment. Employees and compliant employers will be at a disadvantage.

The proposed new definition of an employee is inconsistent with the presumption of employment. It is also inconsistent with the proposed new definition of an "independent contractor" included in the Bills which provides that 'independent contractor' means a person who works for or supplies services to a client or customer as part of the person's business, undertaking or professional practice."

The proposed changes would place South Africa in breach of a number of ILO Conventions that it has ratified, including the core conventions which form part of the ILO's Declaration on Fundamental Principles and Rights of Work such as Convention 87 of 1948 (Convention concerning Freedom of Association and Protection of the Right to Organise),²⁵ the Right to Organise and Collective Bargaining Convention (No 98); Convention 100 on Equal Remuneration and Convention 111 on Discrimination (Employment and Occupation). This would place South Africa in breach of its obligations as a member country under the Constitution of the ILO and undoubtedly lead to complaints being referred to the ILO.

²⁴ Workers who cease to be employees because of the change in the definition of an employee will be forced to litigate in the civil courts as they will fall outside of the jurisdiction of the CCMA and Labour Court.

²⁵ Convention 87 of 1948 (Convention concerning Freedom of Association and Protection of the Right to Organise) guarantees the right of 'workers and employers, without distinction whatsoever' to establish and join organisations of their own choosing without previous (state) authorisation. The Freedom of Association Committee of the Governing Body of the ILO has held that the criterion for determining whether this right covers persons is not based on the existence of an employment relationship and that self-employed workers in general should enjoy the right to organise. International Labour Office *Freedom of Association* (4th ed, International Labour Office, Geneva, 1996) 51

It is therefore recommended that the current definition of an employee should be retained. The law in this area is relatively stable and the wide-textured nature of the definition has allowed for its progressive development by the specialist labour courts. In addition, the proposed new definition of an “independent contractor” included in the Bills should be enacted. This will assist the courts to draw an appropriate distinction between who is an employee and who is not and ensure that only the genuinely self-employed will be excluded.

RISKS ASSOCIATED WITH AN EFFECTIVE BAN ON TES

I) REDUCED FLEXIBILITY FOR EMPLOYEES

TES provides support for a portion of the employment market that wants “flexibility” and temporary assignments. First-time work seekers, part-time students, women that have particular needs in respect of family obligations, older persons who do not want permanent placements, and groups of people with specific needs or specialist qualifications or experience may benefit from and actively prefer temporary placements. There is also potential for TES to provide workplace skills, vocational skills, learnerships and work experience to these employees. An effective ban on TES would deprive employees genuinely seeking job flexibility and opportunities to gain experience in terms of the possible types of employment opportunities available to them.

II) RIGHT TO CHOOSE TRADE, OCCUPATION OR PROFESSION FREELY

An effective ban on TES risks violating the constitutionally guaranteed right of TES to conduct their trade – which would result in the relevant provisions being set aside as unconstitutional. The provisions would prevent a person or agency that places employees to work for its clients from being the employer of those employees. While these provisions do not involve an express prohibition on TES, its effect is the same as a prohibition.

In evaluating whether legislation violates any provision of the Bill of Rights, the Constitutional Court examines the substance of the relevant provisions. The cumulative effect of the relevant provisions could be interpreted as a violation of section 22 of the Constitution which grants every citizen the right to choose their trade, occupation or profession freely. While this section permits the practice of a trade, occupation or profession to be regulated by law, a provision that effectively prohibits the relevant activity does not amount to the regulation of that activity.

Accordingly, these provisions would have to be shown to be “reasonable and justifiable” in terms of section 36 of the Constitution (the “limitations clause”). While the purpose animating these clauses (the prevention of abuses practiced by labour brokers) is an important purpose, this is not sufficient to justify the clause. The central constitutional issue is whether a complete phasing out of TES is proportionate to this purpose or whether there are less restrictive means or more targeted mechanisms to achieve the purpose. To survive an adverse constitutional finding, the State would have to make out a case that these abuses could not have been eliminated by way of regulation.

In evaluating whether a prohibition is reasonable and justifiable as contemplated by section 36 of the Constitution, the court would have regard to the international law,²⁶ specifically the International Labour Organisation Convention 181 dealing with Private Employment Agencies, 1998, which covers the practice of labour hire. The ILO accepts the operation of temporary employment agencies in a regulated environment provided that this does not result in a diminution of the rights of employees. Accordingly, international law will not provide support for an argument in favour of a prohibition on labour broking. The Department will therefore have to argue that despite the relevant ILO instruments, the abuses of labour broking in the South African context are such that they cannot be guarded against by regulation.

The court will also have regard to the approach to TES in other countries. As noted above, the overwhelming trend in other countries is to permit the operation of temporary employment agencies who are the employers of employees they place with clients while seeking to give these employees the same protection as other employees.

Recent case-law in Namibia is pertinent. In December 2009, Namibia's highest court, the Supreme Court, held that the blanket prohibition of labour hire (agency work) was a disproportionate and unconstitutional response to the abuses associated with labour hire.²⁷ The Court found that the prohibition violated the right of labour hire firms to conduct their businesses, even though Namibian law had not previously recognised and regulated labour hire. In effect, the Namibian Supreme Court held that the abuses associated with labour hire could be dealt by regulation and therefore a prohibition was a disproportionate response. The following statement reflects its approach:

“If properly regulated within the ambit of the Constitution and Convention No. 181, agency work would typically be temporary of nature; pose no real threat to standard employment relationships or unionisation and greatly contributes to flexibility in the labour market. It will enhance opportunities for the transition from education to work by workers entering the market for the first time and facilitate the shift from agency work to full-time employment.”

iii) RISK OF JOB LOSSES AND INCREASED UNEMPLOYMENT

The banning of TES, and the removal of flexibility that this implies, could create disincentives to labour-intensive economic growth. The government has made a strong commitment to labour-intensive economic growth, as evidenced in policies such as ASGISA. However, a decline in labour market flexibility could see employers moving toward increased mechanisation and capital intensive production methods, at the expense of job creation.

²⁶ The court is not confined to instruments that are binding on South Africa.

²⁷ *Africa Personnel Services (Pty) Ltd v Government of Republic of Namibia and Others* [2009] NASC 17. The judgment can be accessed at www.saflii.org/na/cases/NASC/2009/17.pdf

Similarly, companies with short-term placement needs, to cover workers on maternity leave, sick leave or study leave for example, rely heavily on the ability of TES agencies to quickly identify and place an appropriate person in the role for as long as needed. If the TES facilitation role is removed, and temporary placement becomes a more onerous or lengthy process, many companies may choose to manage in the absence of the relevant employee, by allocating his work among colleagues or putting tasks on hold, for example – with negative impacts for job creation and productivity.

Banning of TES may also make it more difficult for lower skilled workers to access potential work opportunities, in circumstances in which it is more difficult to approach individual clients directly for job opportunities. In this regard, it is worth noting that a 2008 Report commissioned by the Department of Labour recommended that:

“The Department of Labour should facilitate the introduction of labour market intermediaries (LMIs) who do not replace employers through a commercial contract but, instead, recruit among the unemployed, especially the youth, train them and then place them in decent jobs. This involves the creation of labour market institutions that are more active and aggressive in their relations to both sides of the labour market.”²⁸

IV) INCREASED ADMINISTRATIVE BURDEN FOR EMPLOYERS AND EMPLOYEES

The proposed provision requires that persons who are placed as temporary employees and are supervised by the client will be employees of the client, no matter how short-term their relationship with the client. Thus a substitute employee who comes in for a period as short as a single day, to work subject to the “direction and supervision” of a client, will be the employee of that client for the purposes of all labour legislation. An employee who makes a career of being a replacement (or any other form of temporary work) will have many employers. There are a large number of employees who fall into this category. As the ILO has pointed out, this group includes a large number of women who use this form of work as a mechanism for balancing work and family responsibilities and young workers who use these forms of work as mechanisms for gaining experience and gaining exposure to employers who may consider employing them permanently. Trade unions however point out that the dominant reality in South Africa is that the largest number of female workers performing agency work are in long-term insecure and low-paid work.

This has significant disadvantages for employers. As the same definitions are to be included in both COIDA and UIF, each individual client will have to register the employee under these two Acts, and will be responsible for contributions for every employee even if the employment relationship was for just a few days.

²⁸

E Webster (et al) *Making Visible The Invisible: Confronting South Africa's Decent Work Deficit* (2008).at 95.

If the employee is not paid correctly, he or she will have to sue each individual employer. The employee will also be responsible for ensuring that their tax affairs are in order – they will need to collect IRP5s from each client that has employed them over each twelve month period.

The provision will also impose significant additional administrative costs on public institutions, in particular the Unemployment Insurance Fund and the Compensation Fund. Statutory collections may be significantly undermined, since the relevant authorities will need to collect UIF, Workman's Compensation, and skills development levies from a wide array of clients – including individuals and families who have engaged temporary workers for any length of time.

One proposal made in the RIA consultation process was that administrative obligations such as compliance with UIF, COIDA, payment of skills levies and deduction of PAYE could be placed on the agency while the core labour law responsibilities relating to dismissal and collective bargaining should be placed on the client. It is possible for many of the administrative aspects associated with employment to be transferred to specialist agencies that are not the employer of the employees concerned.

v) INCREASED INFORMALITY AND CASUALISATION

The proposed provisions will not effectively regulate the so-called 'bakkie brigade.' Employers requiring short-term arrangements and flexibility may choose informal arrangements in the absence of an accessible TES sector. The extent that individuals and/or companies collect workers from the side of the road or outside the factory gate for the purposes of short term labour may thus increase rather than decrease as a result of a ban on TES. In the absence of comprehensive inspections, informalisation of this sort would be extremely difficult to address. Individual workers would be no better off for having been 'employed' directly by the client, since the employment relationship would be informal and unregulated.

ALTERNATIVE APPROACHES

The policy objective underpinning the proposed amendments is to ensure that workers who perform temporary work, including placement by an agency at a client, receive protection against unfair dismissal and other unfair labour practices that are consistent with the constitutionally mandated right to fair labour practices.

There are a number of legislative mechanisms that could enable realisation of this objective, without prohibiting TES agencies to supply workers to work for clients in circumstances where this is economically beneficial to the client and/or a preferred employment arrangement for the employee.

A key criterion is to ensure that TES workers receive the same protections as equivalent employees who are engaged directly by the employer. Where necessary, these provisions must be tailored to the particular circumstances of triangular employment in a manner that complies with the requirements of the limitations clause (section 36) of the Constitution.

Legislation could require all labour brokers to register, subject to minimum requirements contained in the LRA and regulations. Any contractual arrangement between a “client” and an unregistered labour broker would be invalid if the labour broker was not properly registered, and the client company would be liable for all statutory and contractual labour obligations towards the temporary assignees given the fact that there would be no “legal” relationship between the client and the labour broker.

The introduction of a registration requirement would provide a measure of broad protection to ensure that employees supplied by TES have the same protections as other workers. Specific requirements associated with registration could include doctrines of co-responsibility, equal remuneration and anti-discrimination provisions and access to organisational rights and collective bargaining.

This approach could allow for prohibition or restriction of agency work in specific sectors or types of work on grounds such as the need to avoid exploitation or the protection of health and safety.

It has been proposed that all TES could be required to:

- Join an industry association²⁹
- Sign for commitment and adherence to a code of conduct that regulates matters such as dismissals, skills development and benefits
- Have written contracts with their staff (permanent and temporary)
- Contribute to a pension fund for their employees, after a specified period of time in employment
- Abide by bargaining council and collective agreements where applicable
- Contribute to a fidelity fund specific to the sector
- Have indemnity insurance
- Abide by a Code of good practice
- Disclose fees charged for placements of different types

The Department of Labour’s limited inspection capacity has been identified as a critical challenge, undermining efforts to monitor compliance and enforce existing legislative requirements. According to government’s social partners, the inspectorate appears to be under-valued within the Department, with insufficient skills and resources to carry out its mandate effectively. This raises the issue of the Department of Labour’s capacity to administer and enforce the registration requirements for TESs.³⁰

²⁹

³⁰ It is unlikely that such an obligation could be influenced through legislation as it could violate freedom of association principles. There are currently in excess of 6000 TESs.

In light of limited departmental capacity, it may be useful to consider the establishment of a public-private partnership, to support and supplement the existing inspectorate. Such a public-private partnership, or co-regulatory body, could comprise representatives of government, business and labour. The model currently in use in the Netherlands could be considered as a possible example (each industry contributes a levy based on a sum equivalent to the proportion of TES workers in its total workforce, which funds a business-labour regulatory body which focuses on TES employees). Similar bodies in South Africa include the CCMA Governing Body and University Councils, for example.

This body would need to develop, implement and monitor both

- Administrative regulation (registration, licensing, compliance monitoring, adherence to code of ethics, investigation), and
- Workplace issue regulation and protection from unfair labour practices (including regulation of hours of work, equal treatment, period of placements, number of roll-overs, take back clauses, and so on). This could be regulated through a broad legislative framework, supplemented by a collective agreement between the social partners (limited to workers who are not already covered by Bargaining Council agreements or Sectoral Determinations).

Such a body could also be responsible for supporting enforcement of requirements, and for making recommendations for de-registration of non-compliant TES to the Minister of Labour. The body could be responsible for inspections (in conjunction with the Department of Labour), developing and enforcing reporting requirements, and providing an arbitration mechanism to adjudicate disputes referred to it.

Registration requirements could include registration with all statutory bodies such as COID, UIF, SDL and Bargaining Councils, BBBEE accreditation, sound financial standing and subjection to a Code of Good Practice. Where Bargaining Councils and Sectoral Determinations have jurisdiction, these agreements would take precedence over and above any additional requirements imposed by the co-regulatory body.

Registration requirements could also include minimum training requirements for agency staff – applicable to permanent and temporary workers.³¹ A statutory council could be funded through levies imposed on the industry.³² The details would have to be determined: bargaining councils for instance are funded by a levy paid by both employers and employees; SETAs are funded from a portion of skills levy paid by employers.

Trade union officials could be formally mandated to play an inspection role within their particular sectors, to supplement inspection capacity. The trade union officials could be mandated to carry out inspections and to report any contraventions to the co-regulatory body and/or the Department of

³¹ South Africa's TES industry has recently developed a certification process, in conjunction with Services SETA, with which all practitioners will be required to comply (on a voluntary basis)

³² The industry has levied a 0.1 percent levy on members' payroll in anticipation of such a body

Labour. Pending the establishment of a co-regulatory model, it would be necessary for the Department of Labour to deal with the registration of TESs.

RISKS

Legislative amendments alone may not be sufficient to provide agency employees with the requisite protections. Additional protections may be required in subordinate forms of regulation such as extended bargaining council agreements, sectoral determinations and exercises of administrative discretion (such as variation determinations).³³

The efficacy of the proposed regulatory framework depends upon there being effective and accessible avenues for employees to enforce their rights. The Bill contains several amendments that will assist employees to enforce claims that are within the jurisdiction of the CCMA and prevent employers delaying this through review proceedings in the Labour Court.³⁴

It is crucial to ensure that the proposed co-regulatory body has appropriate capacity, and buy-in from all social partners, in order to effectively monitor compliance and enforce the code of conduct. Registration and licensing criteria will need to be clearly stated, to enable a capacitated inspectorate to conduct effective monitoring and enforcement.

There is a risk that, if the co-regulatory body proves administratively costly, it may result in an increase in the fees charged for TES placements, thereby creating a disincentive to this type of employment.

ii) CO-RESPONSIBILITY

In circumstances in which agency work is permitted, the agent and client should be responsible for any failure by the other party to comply with their obligation to the employee in terms of labour legislation. The employee should be entitled to recover any non-payment from either party. This ensures that the risk of non-compliance rests with the contracting parties and not the employees. Parties to these arrangements may place appropriate insurance and liability clauses in their contracts but these arrangements may not impact on the rights of the employees.

Legislation could be drafted to clearly set out the principle of co-responsibility and to specify how far liability extends. The legislation could provide that the employee may institute proceedings against either party in the appropriate forum (that is, CCMA or Labour Court), and that for the purposes of determining effective relief, the CCMA and Labour Court have jurisdiction in respect of the placement agreement. This would address the current situation whereby the Labour Court has held that a client company cannot be sued directly in the CCMA or Labour Court as it is not an employer.

³³ Many bargaining councils have developed rules for the use of placed labour in their sectors

³⁴ The Bill's purpose of expediting dispute resolution will be assisted by a provision requiring employers to review CCMA awards to put up security in respect of an award of reinstatement or compensation

RISKS

There are potentially legal risks in extending joint liability to cover matters of unfair dismissal, on the grounds that dismissal is generally understood to take place between one employer and an employee(s). These matters are adjudicated at Arbitration or the Labour Court and as such require proof of procedural and substantive fairness which must be defended by employer (the TES).

III) ALLOW FLEXIBILITY IN THE INITIAL EMPLOYMENT PERIOD

The argument has been made that the fact that (subject to the rules on probation) employees have full dismissal protection from the inception of their employment has served as a disincentive for new employment. In some instances employers have used TES to supply employees as an alternative to the legislated probation process. If the TES employee proves suitable, he or she is then engaged by the employer; if not the assignment is terminated. This is seen as being less onerous than the requirements for probation set out in the Code of Good Practice: Dismissal.³⁵

In order to encourage new appointments and prevent abuse of the probationary process, an alternative approach may be to provide for a qualifying period, for example six months, (applicable to both direct and indirect employees) in which employees have more limited protection. This could involve the application of a simplified dispute resolution process during this period, and/or a waiver of ordinary unfair dismissal protections (other than automatically unfair dismissals). In order to prevent the abuse of terminating and re-employing just before the expiry of the six months of employment in order to avoid the onset of the protections, the period of service could be calculated to include all previous service with the employer or a related employer. Provision could be made to shorten or lengthen the period of six months through sectoral collective agreements, sectoral determination or Ministerial discretion to cater for the special needs of institutions such as universities, banks, and doctors in respect of whom a longer probationary period is justified. The introduction of a qualifying period would provide a more clear-cut basis for regulating the entry of employees into employment than the current probation provisions and is in line with international practice.³⁶

IV) ENSURE EFFECTIVE PROTECTION FROM UNFAIR DISMISSAL FOR TES EMPLOYEES

TES employees should receive the same level of protection against unfair dismissal and unfair labour practices as other employees. As noted above, despite theoretical protection against unfair dismissal for TES workers, the protracted nature of the legal process effectively means such workers have no effective security of employment. Legislation is therefore needed to operationalise this protection effectively.

³⁵ The Code permits a “less compelling” standard of evidence to be used for assessing the fairness of a performance-related dismissal during probation. The Code’s approach to probation has been criticised because of the lack of certainty of the “less compelling” standard, the fact that it only applies to issues of performance and not to the employee’s suitability in the workplace as well as the extent of the employer’s obligations in respect of evaluation, instruction, training, guidance and counselling. (See H. Cheadle “Regulated Flexibility: Revisiting the LRA and the BCEA” (2006)27 *ILJ* 663.)

³⁶ A. Bronstein “International and Comparative Labour Law: Current Challenges” (Palgrave MacMillan, International Labour Organisation, 2009)

An employee who is placed in work for a client on an *ongoing* basis should have the same degree of protection as other employees of that client. In other words, a decision to withdraw that employee from employment should comply with the same requirements of procedural fairness applicable to “direct” employees. Any order for reinstatement or compensation would operate in respect of the client for whom the employee worked.

An employee who is placed to perform “*temporary*” work with a client should have the same remedies as other employees, subject to certain exceptions that take into account the nature of this form of employment. It would not appear feasible to extend full dismissal protection to employees who are assigned or work for short periods. The client would be entitled to terminate the assignment on a ground that constitutes a valid reason for the dismissal of the employee. If an assignment with a client is terminated for an unacceptable reason such as discrimination or trade union membership, these employees should have the same protection as other employees. The agency would be entitled to include provisions in its contractual arrangements with its clients specifying the circumstances in which the agent would be able to recover the costs of this compensation from its clients.

Legislation could be drafted to require that TES, as a condition of registration, must have adequate reserves in place, together with appropriate professional indemnity insurance cover, to ensure they have the financial resources to service awards arising from matters of unfair dismissal.

Similarly, all TES could be required to make a compulsory contribution to a fidelity fund, as part of their registration requirements. This would enable TES employees to claim against the fund in cases of unfair dismissal or other abuses of fair labour practice.

It may also be possible to use such a fund to pay a minimum wage to TES employees between assignments, or to provide for skills acquisition opportunities in conjunction with the relevant industry SETAs.

RISKS

Care should be taken to ensure that the extension of dismissal protection does not lead to a large amount of litigation arising out of the termination of employees who are placed on short-term placements who do not suffer any significant financial loss as a result of the termination of the assignment.

v) LIMIT TES TO ‘GENUINELY TEMPORARY’ PLACEMENTS

Legislation may be developed to provide that any employee who is placed to work for a client by an agency should be an employee of the client if his or her work for that client is not, or ceases to be, of a

‘temporary’ nature. This approach is currently adopted under certain laws including the Employment Equity Act.³⁷

Employees who are assigned by an agency to perform work that is classified by the statute as genuinely “temporary” would be employees of the agency provided that a range of statutory criteria are met. This allows for a temporary worker on the books of a TES who undertakes short-term assignments at client companies, for example when staff members are absent or if there is a temporary demand for extra capacity.

These workers have a closer and more continuous relationship with the agency than with any of the businesses with whom they are placed to work. It is the agency that is likely to provide the employee with training or benefits such as medical-aid and pension and it is the agency with whom the employee is likely to negotiate about her rates. Likewise, it is the agency that should be required to register the employee with statutory schemes such as COIDA and UIF (as is currently the case).³⁸ This approach creates efficiencies by saving employers the administrative burden and related costs of hiring each temporary employee, no matter how short the duration of their service.

There are also significant benefits for employees. If these workers were to be classified as the employees of each client for whom they worked, they would have numerous employers and would be required to recover any under-payment from the individual clients. Each client would be required to register them as employees for the purposes of schemes such as UIF and COIDA. This would impose a significant administrative burden on both employer and employees.

Risks

There are practical difficulties associated with efforts to define who qualifies as a “temporary” employee. As noted in the discussion above, the use of a specific time-period to differentiate between ‘temporary’ and ‘permanent’ workers may be problematic, given that such periods may vary to a few days, to six months for a worker filling in for someone on maternity leave, to several years for a specific project. The definition of ‘temporary’ may be an issue of considerable contention.

³⁷ In terms of section 57(2) of the EEA, for the purposes of an employer’s obligations in respect of affirmative action, a person supplied by a TES is considered to be an employee of the client if they are placed with the client for an indefinite period or for a period of three months or longer.

³⁸ A service which demonstrates the social benefit of the TES being the employer is that of nursing personnel who provide home-based round-the-clock health-care for the aged or other ill persons. Currently, specialised agencies provide nurses to perform these functions. Such an agency falls within the definition of a TES in terms of section 198 of the LRA and is therefore the employer of these nurses even though they are working for the patient or the family. This arrangement has major benefits for the family who can request the service from the agency. If this were not the case, the family would have to hire three or four nurses to ensure round the clock coverage. When the patient passes away or recovers, the nurses will be allocated to a different assignment as and when it becomes available. The agency will pay the employee’s UIF and COIDA contributions as well payments to schemes agreed upon contractually. If it were not for section 198, the nurses would be the employees of the individual families they work for and would be required to follow up non-payments against each family. The Namibian Supreme Court points out that permitting “agency work” enables a State to respond “in the context of economic activities triggered by pandemics, disasters, national emergencies or the temporary extension of certain public services to address a particular public need or event”. (*Africa Personnel Services (Pty) Ltd v Government of Republic of Namibia and Others* [2009] NASC 17 at para 116)

The differentiation between temporary and permanent workers may create “perverse incentives” to terminate relationships with employees within the mandated ‘temporary’ period, in order to avoid the obligations imposed by the worker being deemed ‘permanent.’ This risk is particularly significant in respect of unskilled workers, since companies have less to lose in starting from scratch with a new employee.

vi) ALLOW TES ONLY IN DEFINED CATEGORIES OF WORK

A number of countries have adopted an approach to the regulation of agency work that restricts TES to operating only in specified categories of work. Typically such categories are by their nature temporary or of short duration. These include:

- Short-term contracts of a specified duration³⁹
- Substitutes for employees when workers are absent due to illness, vacation, training or leave
- Placements for specified periods to meet fluctuations in demand for labour (including seasonal work) or to cope with emergency situations.

In some countries, labour brokers may operate only at the higher end of the labour market, acting as an intermediary for workers with specialised skills.

In these circumstances, the outsourcing of the recruitment and administrative function offers considerable flexibility and savings. It also permits employees who desire this sort of flexibility to work on an ongoing basis by performing a series of short-tem placements.

Under this approach, agency work is prohibited unless it is expressly permitted. This requires administrative determination of categories of work in which agency work is permitted. Bargaining council agreements and sectoral determinations could contain provisions indicating what forms of agency work are permitted in the relevant sectors. The Minister could have the power to issue notices authorising agencies to provide workers in respect of specific categories of work.

Bargaining Councils could play an important role under this approach (certain sectors already have Bargaining Council agreements that include specific clauses relating to the use of TES).⁴⁰

RISKS

A restriction on TES in specific categories of work may run into various verification problems. Clear regulations would need to be developed, in consultation with affected industries, to ensure clarity about when TES may or may not be used. The approach would require a range of demarcations

³⁹ No recommendation is made at this stage as to the maximum duration for work to be classified as “temporary”.

⁴⁰ In August 2010, following an eight day strike in the motor manufacturing industry, the Automobile Manufacturers Employers Organisation (Ameo) and Numsa reached a deal in terms of which the use of labour brokers in the car manufacturing industry would be discontinued by January 2011. Pre-existing agreements would be permitted to run the course but could not be renewed.

between different types of work in which TES is or is not permitted, which may give rise to disputes and litigation over the interpretation of definitions and boundaries. There would also need to be a mechanism for applications to the Minister or another regulatory authority to permit TES to operate in emerging sectors.

V. Triangular Employment Relationships: Organisational Rights and Collective Bargaining

PROBLEM STATEMENT

Atypical workers, including TES workers, tend to have very low levels of unionisation. Employees placed by TES (as well as many employees in situations of outsourcing and sub-contracting) face challenges exercising their organisational rights and engaging collective bargaining, because they are required to engage with the agency as the employer, rather than the client company, which, in the case of longer term placements, is effectively their place of work. Intervention is required to enable TES employees to effectively exercise their organisational rights and engage in collective bargaining in respect of both the TES and the client for whom they work.

STATUS QUO

All employees have the right to join a union and to participate in the union's lawful activities. Registered trade unions are able to obtain statutory organisational rights provided they obtain sufficient representation among employees in a particular workplace.

Unionisation levels are, however, very low in cyclical sectors, and among TES employees. This pattern is reflected at the global level – on average less than three percent of temporary workers belong to a union.

Unions find it difficult to recruit temporary workers to union membership and to retain them during periods of non-placement, when they are not earning and cannot pay membership fees. It is difficult for unions to represent these workers and to bargain on their behalf.

In terms of section 12 of the LRA trade unions that are sufficiently representative are able to gain access to the employer's workplace (subject to reasonable conditions) to recruit members and serve the interests of their members. This provision assumes that it is the employer who controls the workplace. However, unions have difficulty accessing employees placed by a TES at their workplace as the 'workplace' is controlled by the client company rather than the agency who is their employer in terms of section 198 of the LRA. This is also the case with many other workers in outsourced arrangements or who work in workplaces that are situated on the premises of another. Temporary workers also, by their nature, move around a great deal. Mechanisms are needed to enable improved access to agency, temporary workers and outsourced workers by unions.

A number of bargaining councils have sought to regulate the operation of TES within their sectors. However, increases in TES have had a negative impact on trade union representativeness. The non-extension of agreements exacerbates the potential for exploitation of placed employees because of the absence of minimum wages for non party employers within the bargaining council's registered scope.

There are documented cases of agencies and client companies undermining agency workers rights to participate in union activities. These include provisions in agency contracts that workers may not join unions and/or may not participate in strike action, and dismissal or transfer of agency workers from the client company when such workers are seen to be engaged in union activities. Outsourcing arrangements may include similar provisions.

DEPARTMENT OF LABOUR PROPOSED AMENDMENT

One provision in the Bills explicitly seeks to facilitate the organisation of vulnerable workers. This is the proposed section 55(4) (o) of the BCEA which would permit sectoral determinations to set a threshold of representativeness for a registered trade union to have the organisational rights of access to workplaces and deduction of trade union subscriptions for all workplaces covered by the sectoral determination.

Other proposed amendments to organisational rights provisions include amending the definition of the workplace to accommodate the circumstances of atypical workers. The Minister would be able to take the presence of atypical workers into account when extending collective bargaining agreements in respect of bargaining councils.

The policy document tabled by the Department of Labour at NEDLAC in 2009 proposed additional amendments to facilitate trade union organisation among atypical workers, in particular workers placed by TESs. These proposals are not reflected in the Bills because of the proposal to repeal section 198.

ALTERNATIVE OPTIONS

I) VOLUNTARY AGREEMENTS

Effective voluntary mechanisms could be developed to ensure proper organisational rights and collective bargaining rights. A possible model is the FEDUSA-CAPES Memorandum of Understanding (MOU)⁴¹, which aims to enable parties to establish proper bargaining arrangements, and expedited dispute resolution mechanisms to cover TES workers. The MOU also provides for the establishment of call centres, which would enable unions to access potential members from the TES databases. It is however yet to be seen how the MOU will operate in practice.

⁴¹ The Federation of Unions of South Africa (FEDUSA) and the Confederation of Associations in the Private Employment Sector (CAPES) have signed a Memorandum of Understanding (MOU)

RISKS

Voluntary mechanisms are not a substitute for an appropriate regulatory structure and would not deal with the problem of abuse by agencies and clients who seek to use non-standard work as a basis for disguising employment or to exploit workers. The scope for collective agreements to provide a basis for protecting atypical workers is further minimised by the low level of trade union membership among these groups of workers.

ii) EXTENSION OF COLLECTIVE AGREEMENTS

Collective agreements concluded or extended in terms of sections 23 and 32 of the LRA could be made applicable to placed employees working within the workplace in respect of which the collective agreement has been concluded. This would prevent employers using placed workers at lower rates than are provided in the collective agreements applicable to their own employees and would assist to prevent less favourable treatment of these employees. Extension of collective agreements to agency employees is therefore a mechanism for preventing the less favourable treatment of employees as discussed elsewhere.

iii) IMPLEMENTATION OF ORGANISATIONAL RIGHTS

The provisions giving effect to organisational rights, in particular, the right of access to the workplace should be revised to ensure that any award of organisational rights is binding not only on the employer but the party who controls access to the workplace. This would include a client for whom agency workers supplied by a TES work, as well as employers who have outsourced or sub-contracted work which continue to be performed on premises which they control. A strong argument can also be made that the constitutional entrenchment of labour rights requires that employees of TESs should be able to assert organisational rights against both the TES and the client. CCMA arbitrators conducting arbitration in respect of organisational rights should be able to take into account the extent of non-standard employment in a workplace in making awards. Finally, the CCMA has the power to issue guidelines to provide guidance to employers, trade unions and Commissioners and the development of a guideline on the interpretation of the organisational rights provisions would be of considerable benefit.

iv) TRIPARTITE NEGOTIATING BODY

A negotiating body comprising representatives of government, business and labour could be established with responsibility for negotiating on behalf of the TES industry. The model currently in use in the Netherlands could be considered as a possible example (each industry contributes a levy based on a sum equivalent to the proportion of TES workers in its total workforce, which funds a business-labour body which negotiates on behalf of TES employees).

Risks

A negotiating body of this type would differ from bargaining councils and would have to be established by statute. If a co-regulatory body is established it is possible for it to have “collective bargaining” functions which might result in agreements being submitted to the Minister of Labour, who would be able to promulgate them in a manner that is similar to the promulgation of sectoral determinations. It is likely that such a body would apply only to “temporary” workers who work successively for many clients.

Annexure One

Amendments in the LRA Related to TES, the Definitions of Employee and Employer; and Temporary Employment: A Cost- Benefit Analysis

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I. Introduction

The objective of this Section of the report is to ascertain and estimate the economic impact (both potential costs and benefits) associated with the provisions in the Labour Relations Amendment Bill 2010 related to the repeal of Temporary Employment Services, the new definitions of an employee and an employer, as well as the declaration of temporary employment to be permanent. It should be noted here that the focus of the analysis is on the impact of the provisions in the Bill and *not* the options suggested in Chapter One.

Each of the amendments is discussed in the following manner: Firstly, the actual amendment is shown as it appears in the Amendment Bill, with underlined words/sections indicating insertions in existing enactments; secondly, a brief explanation or interpretation of the amendment is given; and finally the associated costs and benefits are discussed.

II. Amendments Related to Temporary Employment Services

LRA: Repeal of Section 198 of Act 66 of 1995

Section 198 of the principal Act is hereby repealed

I) Explanation/Interpretation⁴²

Section 198 of the LRA is intended to regulate the employment of employees who are supplied by temporary employment services (TES) or agencies to clients to perform temporary work. In this triangular employment relationship, the employee is paid by the TES or agency, but works on the premises of the client. The provisions of Section 198, however, have been widely used as a basis for indefinite employment relationships with, in some cases, serious negative consequences for the labour rights of the employees involved. Employees who are engaged in this manner have no effective security of employment, may be employed on wages and terms of conditions of employment that are less favourable than those applicable to the direct employee of the client performing the same work.

⁴²

This section draws directly from Benjamin, P. 2010a.

These atypical employees would also not be covered by collective agreements negotiated by the direct employees of the client.

The amendment proposes to repeal Section 198 entirely. In practice, however, this does not mean that triangular employment relationships will cease to exist. These relationships will continue to exist, but the agency will no longer be considered the employer of the workers they supply to the client. Agencies can continue to supply and match clients with employees, but the repeal of Section 198 means that the client will have to employ the workers directly. This means that the employment contract will be between the worker and the client, and no longer between the TES and the worker.

II) Costs / Negative consequences

As highlighted above, workers who are placed as temporary employees and supervised by the client will now be considered “direct” employees of the client, irrespective of how short the term of the employment relationship is. For example, if a substitute employee is supplied by an agency for one day only, but the employee works under the direction and supervision of the client, that worker will be considered the employee of the client for the purposes of all labour legislation for that one day. Four possible negative consequences can be highlighted here. Firstly, depending on the extent of the demand for their labour, some of the workers currently employed by TES might lose their jobs if clients (employers) are unwilling to incur the administrative and other costs associated with directly employing these workers. Secondly, if clients would like to continue utilising the labour supplied by workers previously employed by TES, they would have to employ these workers directly and incur the associated time and financial costs, which may ultimately result in a significant increase in the cost of doing business.

Thirdly, the proposed repeal of Section 198, coupled with the proposed change in the definitions of employee and the new definition of an employer (the amendments relating to the change in these definitions will be discussed in detail in the next section) may induce uncertainty in the labour market and would in all probability increase the number of cases referred to the CCMA, the Labour Courts and civil courts. A third negative consequence is therefore the potential increases in the case-load of these institutions.

Finally, the proposed amendment means that substitute employees will now be considered employees of the client and each individual client will now have to register the employee under the Compensation for Occupational Injuries and Diseases Act (COIDA) and the Unemployment Insurance (UIF) Act which would impose additional administrative costs on the Unemployment Insurance Fund (UIF) and the Compensation Fund, given that the unit cost of temporary and part-time workers who move across a multitude of employers, is no longer fixed.

Each of these costs/negatives consequences is discussed in greater detail below.

i) POTENTIAL JOB LOSSES AND NEGATIVE IMPACT ON EMPLOYMENT CREATION

As highlighted above, if clients (employers) are unwilling to employ workers previously employed by TES, the repeal of Section 198 might be associated with job losses in the TES sector. Below we attempt to illustrate the potential impact of the appeal of TES by considering the contribution of this sector to employment creation since 1995, as well as its current share in total employment.

Table 2 presents the sectoral distribution of employment change in South Africa since 1995. It is clear from the results below that employment growth in the post-apartheid era has been unevenly distributed across the various sectors of the economy, with most of the growth concentrated in the tertiary sector, which accounted for 96 percent of the increase in employment over the period. This is a crucial result: It suggests that of the 3.4 million net new jobs created since 1995 in South Africa, close to 3.3 million of these were in the tertiary sectors. Furthermore, by 2009, tertiary sectors accounted for the highest share of total employment, at 70.4 percent.

In particular, our results suggest that aggregate employment growth in post-apartheid South Africa has been driven by the Financial and Business Services Sector on the one hand, and the Wholesale and Retail Trade Sector on the other. The data shows that these two main sectors alone accounted for close to 2.3 million of the 3.4 million new jobs created in South Africa over the 14-year period between 1995 and 2009.

Table 2: Sectoral Distribution of Employment Change

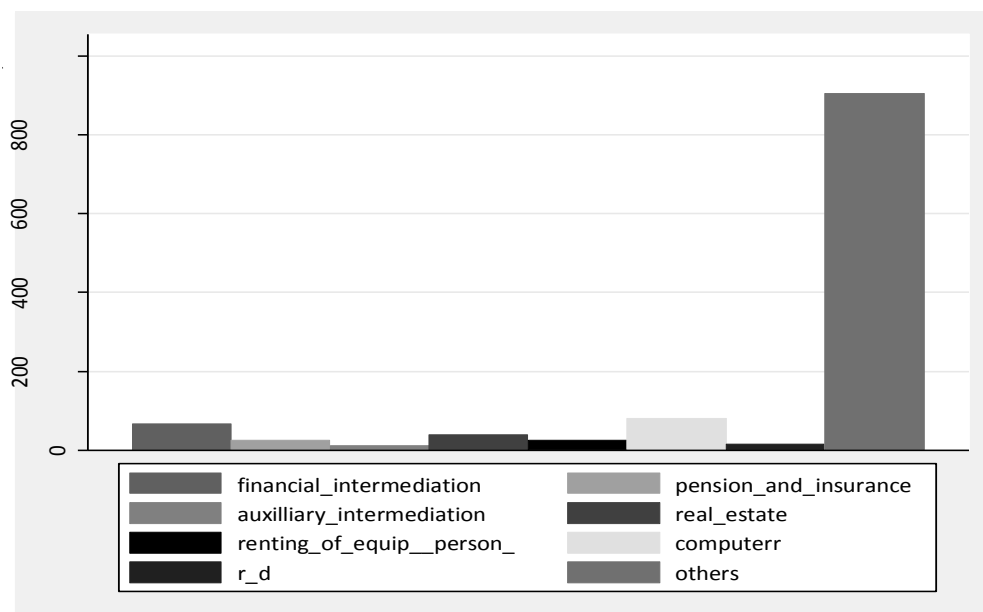
	1995		2001		Q32009		AAG	Change	
	'000s	Share	'000s	Share	'000s	Share	1995 - 2009	'000s	Share
Primary	1,696	17.9	1,732	15.5	952	7.4	-2.4	-744	-22
Agriculture	1,247	13.2	1,178	10.5	653	5.1	-1.7	-594	-17.3
Mining	449	4.8	554	5	299	2.3	-2.9	-150	-4.4
Secondary	1,988	21.00%	2,348	21	2,861	22.2	3.1	873	25
Manufacturing	1,452	15.40%	1,620	14.5	1,723	13.4	1.6	271	7.9
Utilities	86	0.90%	94	0.8	81	0.6	-0.2	-5	-0.2
Construction	449	4.80%	634	5.7	1,057	8.2	7.7	608	17.7
Tertiary	5,774	61.00%	7,058	63.1	9,064	70.4	4.4	3,290	96
Retail	1,684	17.80%	2,454	22	2,852	22.1	6.9	1,168	34.1
Transport	483	5.10%	546	4.9	737	5.7	3.8	254	7.4
Finance	592	6.30%	1,035	9.3	1,682	13.1	8.3	1,090	31.8
Community, Social and Personal Services	2,205	23.30%	1,989	17.8	2,627	20.4	2.6	422	12.3
Private Household	809	8.60%	1,034	9.2	1,166	9.1	2.7	357	10.4
Total	9,458	100%	11,179	100	12,883	100	2.8	3,425	100

Source: OHS 1995; OHS 1997; LFS September 2000-2007; QLFS Quarter 1-4, 2008 and Quarter 1-3, 2009 (StatsSA)

Note: AAG is the average annual growth rate, estimated as the average of the growth rates from 1995 to 2009. Other and unspecified categories are not shown here.

The figure below illustrates the change in employment, in absolute terms, for those coded sub-sectors within Financial and Business Services. The data suggests a key result: Of the total number of jobs created within this sector since 1995, the overwhelming majority of these have been in the sub-category defined simply as 'Business Services Not Elsewhere Classified'. Specifically, the data indicates that over the 1995-2009 period, 77 percent of all the jobs created within Financial and Business Services were created in this 'Business NEC' or 'Other' sub-sector. Put differently, of the close to 1.2 million jobs generated in this sector, about 900 000 emanated from the 'Other Financial and Business Services'.

Figure 1: Change in Employment, 1995-2009: Financial and Business Services, by Sub-Sector



Source: OHS 1995; OHS 1997; LFS September 2000-2007; QLFS Quarter 1-4, 2008 and Quarter 1-3, 2009 (StatsSA)

Closer inspection of this category reveals that it consists in the main of activities noted officially in the codebook as:

“labour recruitment and provision of staff; activities of employment agencies and recruiting organisations; hiring out of workers (labour broking activities); disinfecting and exterminating activities in buildings; Investigation and security activities; building and industrial plant activities; photographic activities; packaging activities; other business activities; credit rating agency activities; debt collecting; agency activities; stenographic, duplicating, addressing, mailing list or similar activities; other business activities”

We would argue here that despite the detailed list in this category, in the main, the dominant forms of activity and therefore employment growth, have been within the employment agency, labour brokering and security services activities. Based on these estimates above then, this result would suggest that job growth within the Financial and Business Services main sector, has effectively been driven by the rapid rise in two nodes of economic activity – security services and labour brokers. The rise in the use of employment agencies, for long noted in public debates in South Africa and of course the context for these proposed amendments, is now powerfully evident in these numbers. There would be important caveats here: Firstly, that clearly outside of employment agencies and security services, other activities within this sub-sector would have generated employment. Hence, the approximately 900 000 jobs within this sub-sector would not all be representative of security workers and labour broker employees. Secondly, given the fact that this sector of employment is self-reported by individuals within the survey, the growth in labour broker employment in particular may be an

under-estimate of the true growth in jobs within the labour broker sub-sector.⁴³ Thirdly, many of these jobs may not be “new” in the sense that the labour broker employee is performing work that was formerly performed by an employee employed directly in a sector such as manufacturing or mining.

Thus, while it is difficult to accurately quantify the Labour Broking Sector and its past contribution to employment creation, the results above do suggest that by repealing temporary employment services, a major source of job creation over the past 14 years would potentially be lost and almost certainly curtailed.

Below we extend the analysis to consider the possible extent of *job losses* if the proposed amendment is implemented.

The industry category “Not Elsewhere Classified” within the Financial and Business Services Sector is again used as a proxy for the sector which will be most affected by the repeal of TES. Again, it should be highlighted that this category does include a range of activities other than labour brokering. Furthermore, many employees of TES may be classified under other sectors due to the fact that a worker may be unaware that he/she is in fact employed by a labour broker and not by the client.

II) TEMPORARY EMPLOYMENT: OCCUPATIONAL, WAGE AND HIRING COST CONSIDERATIONS

According to the September 2007 Labour Force Survey, 634 000 workers were employed in the “Not Elsewhere Classified” category of Financial and Business Services (In this section, data from the 2007 September LFS is utilised as subsequent LFSs did not collect any wage data. In order to ensure consistency, data from 2007 is used throughout the section). This accounted for almost 43 percent of employment in the Financial and Business Services Sector and for approximately five percent of the total workforce in 2007.

Table 3 compares the occupational composition of this sub-sector with the occupational composition of aggregate employment. In the “Not Elsewhere Classified” category within Financial and Business Services, more than 50 percent of workers were classified as sales and services workers, with almost 17 percent classified as elementary workers. Clerical workers accounted for almost ten percent of employment in this sub-sector. In total, these three occupations represented 77 percent of total employment recorded in the “Not Elsewhere Classified” category within the Financial and Business Services Sector. Unskilled workers and service-related occupations would therefore seem to dominate the employment distribution within the labour brokering sub-sector.

⁴³ For example, one could expect that a respondent employed through a labour broker to work on a construction site, or as an elementary worker for a mining company, would indicate his/her sector of employment to a fieldworker as Construction or Mining – rather than the Financial & Business Services.

Table 3: Comparison of Occupational Distribution: Financial and Business Services "Not Elsewhere Classified vs Aggregate Employment

Occupation Group	Fin & Bus Services: "Not Elsewhere Classified"		Total Employment	
	Number	Share (%)	Number	Share (%)
Managers	49,948	7.87	1,011,873	7.6
Professionals	61,733	9.72	2,360,695	17.74
Clerical Workers	61,098	9.62	1,188,791	8.93
Service and Sales Workers	320,937	50.56	1,605,491	12.07
Agr. & Fishing Workers	390	0.06	340,906	2.56
Craft & Trade Workers	17,465	2.75	1,838,667	13.82
Operators & Assemblers	18,138	2.86	1,202,975	9.04
Elementary Workers	104,788	16.51	2,692,695	20.24
Domestic Workers			1,023,409	7.69
Unspecified	297	0.05	40,680	0.31
Total	634,794	100	13,306,182	100

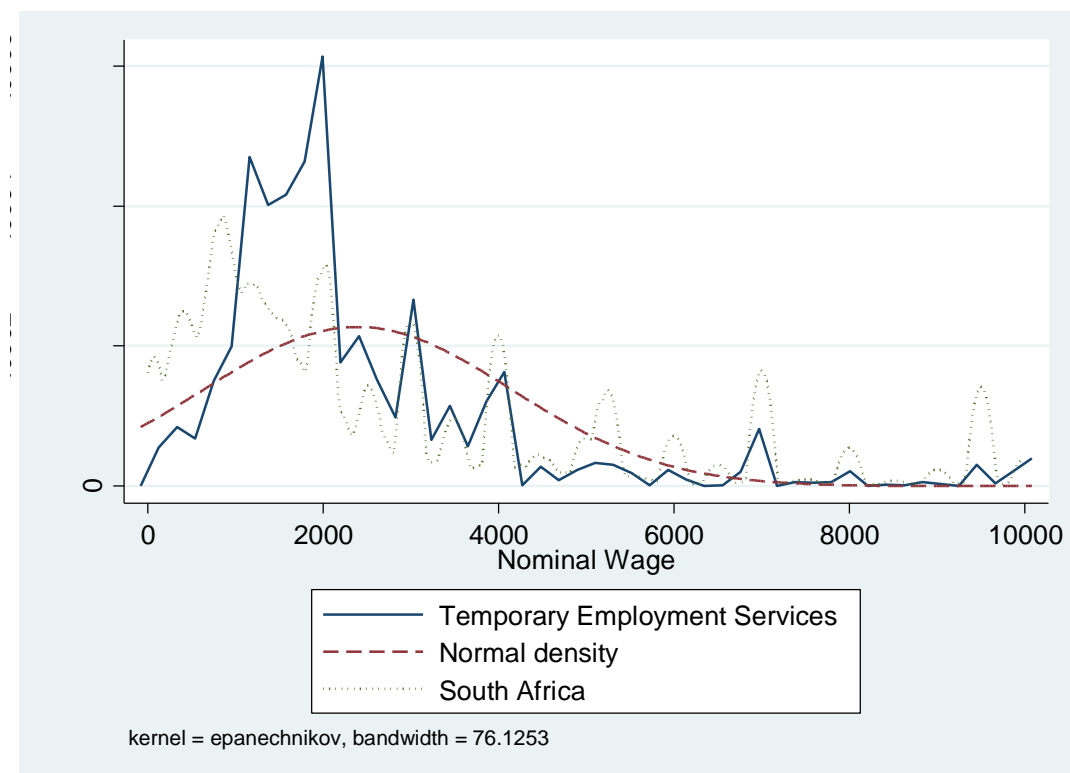
Source: Labour Force Survey 2007 September (StatsSA), Own Calculations

The occupational composition of this sub-sector differed significantly from the occupational composition of aggregate employment in the same year. Sales and services workers only accounted for approximately 12 percent of total employment, while elementary workers accounted for just more than a fifth of the national workforce. The evidence therefore suggests that sales and service workers are over-represented in the "Not Elsewhere Classified" category within Financial and Business Services Sector in comparison to the aggregate level and, in addition, that elementary workers are slightly under-represented in comparison with their share in aggregate employment.

It is generally accepted that the most vulnerable workers in triangular employment relationships are those employed or supplied by so-called "fly-by-night" labour brokers (also colloquially known as the "bakkie brigade"). These workers are typically unskilled and therefore classified as elementary workers in the labour force survey. The results above, however, suggest an under-representation of elementary workers in the sub-sector which includes temporary employment services.

Figure 2 below compares the wage distribution of the workers in the sub-sector which includes TES with the wage distribution of all the employed in 2007 (a kernel density distribution is a smoothed approximation and the distribution of wages). The mean and median nominal wages in current prices for those working in the "Not Elsewhere Classified" category within Financial and Business Services Sector were R3 720 and R2 000 respectively. At the aggregate employment level, the mean and median wages were slightly higher, at R 4 639 and R2 015 a month respectively. These results suggest that employees in the sub-sector which includes TES earned slightly less than the national average. Hence, whilst there certainly are a significant number of unskilled workers employed through temporary employment service in a legal and no doubt illegal manner, it should be evident that these workers are under-represented relative to national labour market trends.

Figure 2: Kernel Density Distribution of Monthly Nominal Wages, 2007



Source: Labour Force Survey 2007 September (StatsSA), Own Calculations

Indeed, the wage distributions above make it visually clear that the distribution for TES employees (or strictly those in the “Not Elsewhere Classified” component of Financial and Business Services) is to the left of the national distribution. Indeed, closer inspection of the data illustrates that there is a larger concentration of workers with a monthly wage of between R1 000 and R2 000 a month in the sub-sector which includes TES.

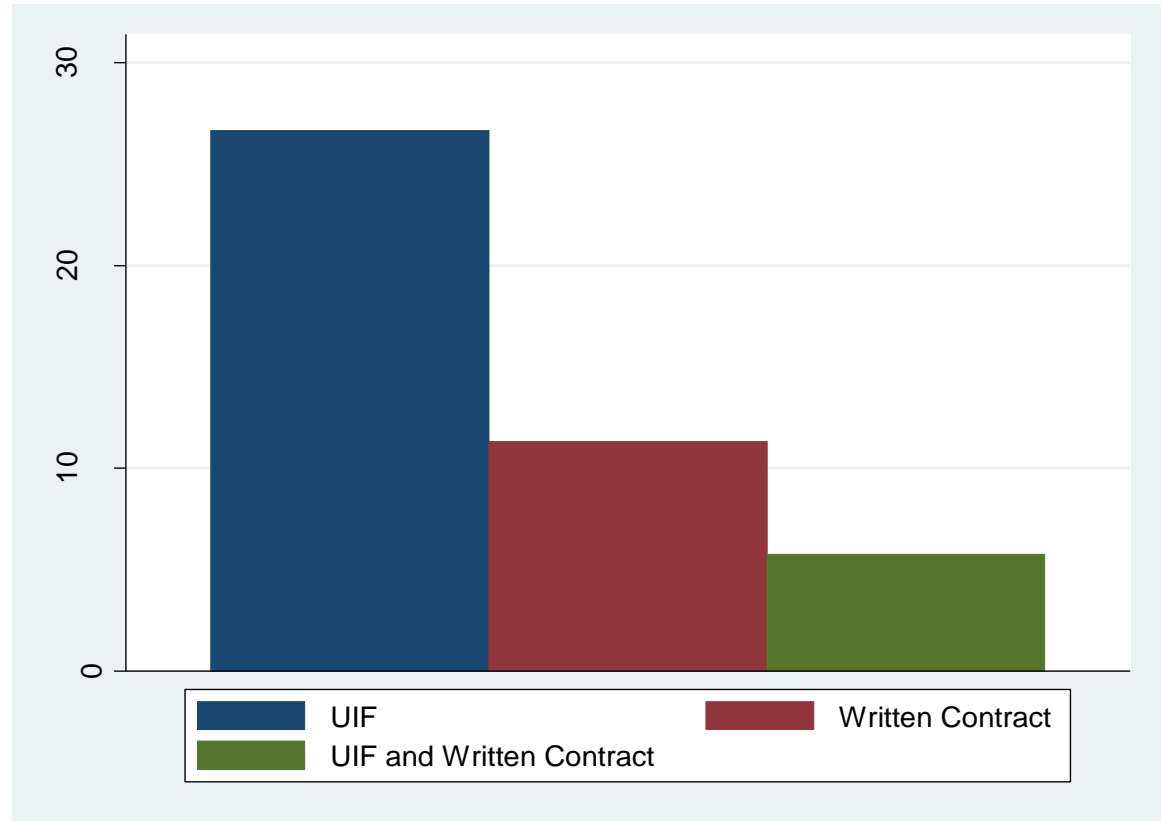
Ultimately though, the above suggests that in the first instance, a proposed amendment which may reduce employment will affect workers who are on average lower wage earners than the mean employee in society. Secondly, it may also suggest that given that the additional fixed hiring costs for TES employees will be increased through the proposed amendments – lower wage workers are effectively becoming more expensive to hire, particularly where the hiring is for a short period.

As discussed above, if Section 198 is repealed, employers will no longer have access to flexible work arrangements through labour brokers. While TES can still source and supply substitute workers, the employers will now have to directly employ these workers, incurring the time and financial costs associated with hiring workers. This includes costs incurred by the human resources and financial departments of a company in drawing up an employment contract with the employee, as well as registering the employee for UIF and COIDA. In addition, employers may then have to extend benefits such as medical-aid and pension fund contributions to workers who would now be permanently employed, further increasing the cost of employment.

The ratio of the administrative costs to wages increases as additional lower wage workers are hired. Some of the administrative costs associated with hiring an employee remain the same irrespective of the wage and skill level of the worker. This implies that it is relatively more “expensive” in terms of administrative costs as share of the wage bill, to hire lower wage workers.

The Labour Force Survey collects limited information on the terms and conditions of employment, but does record whether a worker has a written contract and whether the employee contributes to the UIF on behalf of the employee. The evidence below shows that in 2007, approximately eleven percent of workers in the economic sub-sector which includes TES did not have a written contract. Approximately 27 percent of the employees in this sub-sector indicated that their employees did not contribute to the UIF. Finally, only six percent of workers indicated that they did not have a contract and that their employees did not contribute to UIF. This proportion corresponds to about 38 000 workers.

Figure 2: Absence of Conditions of Employment for Financial and Business Services, “Not Elsewhere Classified” Employees, 2007: Share without UI or Written Contract



Source: Labour Force Survey 2007 September (StatsSA), Own Calculations

To summarise then, it is very difficult to accurately estimate the total number of workers employed in the TES industry using official labour force data. It can, however, be assumed that a significant share of these workers are recorded in the official surveys in the sub-sector “Not Elsewhere Classified” within the Financial and Business Services Sector. As discussed above, this sub-sector accounted for a significant share in total employment growth since 1995 and can therefore be considered a key driver of job creation in the South African labour market. In addition, more than half of the 600 000 workers employed in this sub-sector in 2007 were sales and service workers, while only about 17 percent were elementary workers. This result suggests that semi-skilled sales and services workers are over-represented in the TES sector and elementary workers under-represented in comparison with the occupational breakdown at national level.

Whilst the lack of a contract or contribution to UIF does not appear to be a problem within the TES sector, the differential wage distributions are important. Hence, if the average wage of the TES employee is below that of the national mean – the fixed cost of hiring a worker places a relatively higher burden on hiring lower-wage workers. The effect of significantly higher wage and hiring costs may thus induce, in the aggregate, employers to hire fewer workers.

While it is difficult to accurately predict employers' responses to the repeal of Section 198, some of these workers might therefore lose their jobs if employers are unwilling to employ them directly. Thus, while permanent employment might increase in response to the repeal of Section 198, it is a fair assumption that total employment will decline. This will not only contribute to increased levels of unemployment in the country, but also deprive the households attached to these workers of a valuable source of wage income. The industry association, Confederation of Associations in the Private Employment Sector (CAPES), reports that in its interactions with the National Employer Forum in Namibia, they noted that at least 30 percent of the atypical employees lost their employment when the ban on labour brokers was announced.⁴⁴ As companies still needed the labour, illegal and informal/ underground employment resulted with less tax collection, more employee abuse and the like.

Evidence supplied by the TES Industry

Statistics obtained through the Confederation of Associations in the Private Employment Sector (CAPES) suggest that more than 3.5 million workers have been placed by TES since 2000 and that half of these workers were previously unemployed and that at any given point in time almost a million employees are managed by agencies.

More specifically, figures supplied by CAPES suggest that there are currently 849 646 labour broker workers in South Africa (including workers employed by unregistered and non-compliant agencies). The number of workers employed by non-compliant agencies is estimated at approximately 340 000.

⁴⁴ The “ban” never came into effect as it was suspended pending a legal constitutional challenge and ultimately set aside.

III) INSTITUTIONAL COSTS (INCLUDING UIF, COIDA AND CCMA)

A number of institutions will experience increases in costs as a result of increases in administrative tasks or case-load.

If Section 198 is repealed, as discussed earlier, the client/employer will be responsible for registering the employee for UIF, as well as COIDA if applicable. Currently, for example, specialised agencies provide the nursing personnel who offer home-based care to ill or elderly people. These nurses provide care for as long as required, but the agencies pay their UIF and COIDA contributions, as well as any other contributions to medical-aid or other schemes as per the employment contract. The nursing personnel are therefore employed by the agency and are placed by the agency on successive assignments. If Section 198 is repealed, these nurses will have to be employed directly by each person they care for or that person's family. The family will also be responsible for the nurse's UIF and COIDA contributions. This will increase the administrative costs of the UIF and COIDA as each employer will now have to register the nurse separately, whereas the agency currently only has to register the employee once (Benjamin & SBP, 2010). As noted above then, the unit costs associated with registering an employee (through a TES) on the UIF or COIDA systems would no longer hold if the amendments were vetted. Specifically then, the administrative costs incurred by these institutions in registering employees and then incurring additional costs associated with employees' changing employment status must be a key consideration of the proposed amendments.

The repeal of Section 198 does not mean that triangular employment arrangements will become unlawful and it has been suggested that parties in the labour market would continue to make use of triangular employment relationships, and that they would attempt to shape these in a manner that minimises their obligations (Benjamin & SBP, 2010). It is further expected that in these relationships the identity of the employer might sometimes be unclear. This will lead to an increase in litigation and specifically in the number of cases referred to the CCMA, Labour Court and civil courts. While relevant data from the Labour Court and the civil courts is not available, the impact of an increase in the case-load of the CCMA can be illustrated.

For example, if we assume a ten percent increase in the number of referrals to the CCMA, the impact on the operating budget of the Commission can be illustrated, using data from the 2009/2010 financial year. In 2009/2010 153,657 cases were referred to the CCMA – a ten percent increase thus implies that more than 15 000 additional cases would have been referred to the CCMA. The CCMA estimates that in the 2008/2009 financial year the average cost per case referred was R2 334. Using this cost as a proxy for the 2009/2010 financial year, it means that if 15 000 additional cases were referred to the CCMA, the Commission's total expenditure on cases referred would have increased by more than R35 million. As discussed previously, the average cost per case increases by approximately R3 400 when a case proceeds beyond the referral stage. If we assume that approximately 20 percent of the referred cases would have been outside the jurisdiction of the CCMA (based on the 2009/2010 estimates), the CCMA would have had to hear 12 000 additional cases, which implies a further increase of R40.8 million in the CCMA's expenditure. Overall then, as a result of this amendment, the

CCMA would have required an additional budget allocation of approximately R75 million, which corresponds to 26 percent of the Commission's 2009/2010 budget allocation

III) Benefit

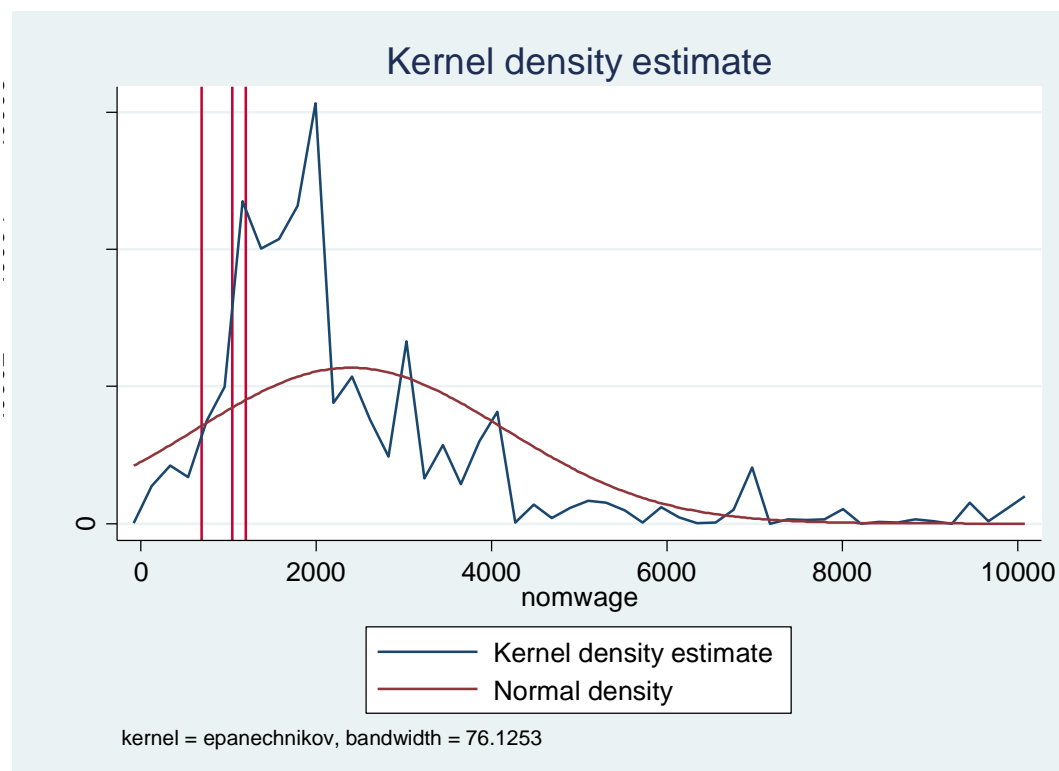
The aim of the proposed repeal of Section 198 is the protection of vulnerable workers who are currently being exploited under temporary employment arrangements. Some of the workers employed under these arrangements have no security of employment and often earn less than their permanently employed co-workers. In addition, they often have very limited or no protection under the labour law.

Again, it is very difficult to identify exploited or vulnerable workers in the TES sector using data from the official labour force surveys. As discussed above, the majority of these workers are recorded within the “Not Elsewhere Classified” category within the Financial and Business Services Sector. In an attempt to estimate the share and number of workers who may be considered vulnerable to exploitation, we utilise wage levels as a proxy for vulnerability. In other words, we estimate the number of workers who could be considered vulnerable, given a pre-determined wage threshold.

Figure 4 below again presents the wage distribution of all employees classified in the “Not Elsewhere Classified” category within Financial and Business Services according to the September 2007 Labour Force Survey. In order to identify the share and number of workers who could potentially be considered vulnerable to exploitation, we estimate the number of workers earning below selected points on the wage distribution. Here we consider three points, namely the 5th, 10th and the 15th percentile of the wage distribution. Put differently, we propose that the bottom five, ten or 15 percent of wage earners might be considered vulnerable to exploitation.

The reference lines in the figure illustrate the mean wages of the workers at the three points of the wage distribution, at R700, R1 044 and R1 200 a month respectively. Put differently, the bottom five percent of workers in the sub-sector which includes TES earned R700 a month or less, the bottom ten percent of workers earned R1 044 or less, while the bottom 15 percent of workers earned R1 200 a month or less. In terms of the corresponding number of workers, if the wage level at the fifth percentile is used as the reference line, approximately 28 775 workers can be considered vulnerable to exploitation. If the reference line is set at the tenth percentile, almost 64 000 workers can be considered vulnerable, while approximately 107 662 workers earned R1 050 a month or less.

Figure 3: Kernel Density Distribution with Reference Lines, 2007



Source: Labour Force Survey 2007 September (StatsSA), Own Calculations

The above illustrates that, depending on the wage level which is used to identify vulnerable workers, possibly more than 100 000 vulnerable workers are currently employed in the sub-sector which includes TES. The repeal of TES, and its consequences, might result in a proportion of these workers being offered permanent employment with all the associated benefits and protection under the labour legislation.

In addition, it was shown above that approximately 38 000 workers in this sub-sector did not have a written employment contract and their employers did not contribute to UIF on their behalf. If these lack of “employment conditions” is taken as a proxy for vulnerability, the repeal of TES may again result in the improvement of employment conditions of at least a share of these 38 000 workers.

Again, while the individual workers will benefit from more secure employment, the households attached to these workers will also benefit from having access to a secure source of wage income.

Amendments Related to the Definition of Employee and Employer

LRA: Amendment of section 213 of Act 66 of 1995

Section 213 of the principal Act is hereby amended by the:

(c) *Substitution for paragraph (11) of the definition of an “employee”*

“Employee” means any person who is employed by or who works for an employer and who receives or is entitled to receive any remuneration and who works under the direction and supervision of an employer.

(d) *Insertion of paragraph 12 of the definition of an “employer”*

“Employer” means any person, institution or organisation, including government who employs and provides work to an employee, directly supervises, remunerates or tacitly or expressly undertakes to remunerate such employee for services rendered by such employee.

I) EXPLANATION/INTERPRETATION

According to the explanatory memorandum, the definition of employee is amended and the definition of employer is added “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.”⁴⁵ According to the new definition of employee, a person is only an employee if he/she works for, or is employed by an employer *and* is remunerated by the employer *and* works under the direction and supervision of an employer. The last two concepts are merged into “direct supervision” in the proposed definition of an employer (Benjamin & SBP, 2010).

II) COSTS/NEGATIVE CONSEQUENCES

As a result of the requirements listed in the new definitions of employee and employer, a person is only considered an employee if all the requirements are present.

It is very difficult to estimate the total number of employees that will be affected by the proposed definition as it is unclear exactly how the clause will be interpreted, and specifically how the requirement of “direct supervision” will be interpreted. The clearest and simplest examples of potentially affected employees are those who work away from the office and are not under the direct supervision of their employers, such as taxi-drivers, truck-drivers and commercial travellers (Benjamin & SBP, 2010).

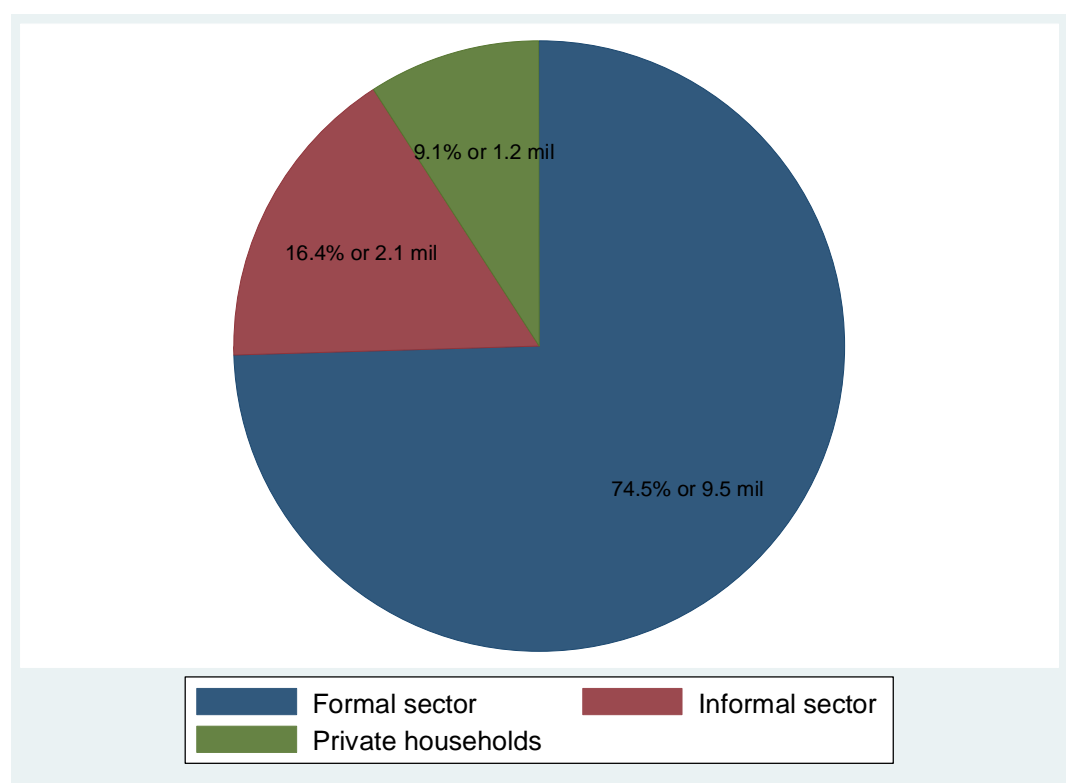
In reality, however, many workers may no longer be considered employees and will as such no longer receive protection under the labour laws. It has been suggested that unscrupulous employers will take

⁴⁵ It should be noted that while the specific reference here is to the amendment in the LRA, all four bills contain the amended definition of “employee” and the proposed new definition of “employer”.

advantage of provisions of the new definition to structure their workplace in such a way that they can avoid all the provisions of the labour legislation (See Benjamin & SBP, 2010). For example, an employer can split their business into two or more entities with different structures responsible for supervision and remuneration respectively.

The figure below shows that in the first quarter of 2010, 12.8 million workers were employed in the South Africa labour market (Statistics South Africa, 2010). Almost 75 percent of the workforce were employed in the formal sector, while informal sector employment accounted for a further 16.4 percent. Approximately nine percent of the workforce (or 1,2 million workers) were employed in Private Households. The majority of these workers were employed as Domestic Workers.

Figure 5: Composition of Total Employment, South Africa 2010



Source: QLFS 2010 (StatSA); Own Calculations

The Quarterly Labour Force Survey (QLFS) does not record much detail on the nature of the employment relationship and it is therefore difficult to identify the employees “directly supervised” by their employer. If we assume that the majority of Domestic workers working in Private Households are directly supervised by their employer, these workers will continue to be considered employees for the purposes of labour legislation. The Informal Sector includes small enterprises with only one or two employees working for an employer, but again it is not clear to what extent these workers are directly supervised by their employer. Overall then, with the possible exception of domestic workers in Private Households and some workers in the Informal Sector, the majority of workers currently considered as

employees may possibly cease to be employees under the new definition and will therefore be excluded from all statutory labour rights.

The proposed amendment to the definition of an employee and the introduction of a definition of an employer will impose costs on institutions such as the CCMA, Labour Court and Civil Courts. Additional disputes will be referred to the CCMA in order to determine if a person is actually an employee according to the new definition. While it is difficult to predict the actual increase in the number of cases referred to the CCMA, the increased case-load will have significant time and cost implications for the Commission. It has previously been estimated that a ten percent increase in the number of cases referred to the CCMA will be associated with a 26 percent increase in the Commission's budget allocation.

On the other hand, workers who are no longer considered to be employees in terms of the new definitions will have to refer their workplace related disputes to the Magistrate and High Courts. While it is difficult to quantify the impact, these institutes will face increases in their case-load as a result of the additional cases referred to them.

The CCMA does not charge a fee for hearing a labour dispute, and depending on the nature of the disputes, it can be resolved in as little as half-a-day, and in most cases no longer than two days. Employees and employers will now have to incur the costs associated with acquiring legal representation when bringing matters to the civil courts. Estimates obtained from a legal expert indicate that the fee for drafting an application to the Court is approximately R7 000, while the fee for actual representation in the Court will be R26 000 for the first day and R12 000 per day for any subsequent days. In addition, litigation in the civil courts is also a much lengthier process than the average dispute resolution process at the CCMA.

To conclude, while the costs of the proposed amendment is difficult to quantify, as Benjamin has highlighted (Benjamin & SBP, 2010; personal communication), the proposed new definitions of employee and employer will have an enormous destabilising effect on industrial relations environment in particular, and the South African labour market in general.

III) BENEFITS

The proposed new definitions of employee and employer will have very little benefit for any parties in the labour markets. Some unscrupulous employers may benefit from splitting their businesses in two or more entities so that the actual employer has no assets to cover potential claims (Benjamin & SBP, 2010).

The CCMA may, in theory, benefit from more cases being referred to civil courts. While this can imply a reduction in the Commission's case-load, this may be offset by the increase in cases referred to the Commission to determine whether a person is an employee under the new definition.

Declaration of Temporary Employment to be Permanent

LRA: Insertion of a new section after 200A of Act 66 of 1995

The principal Act is hereby amended by the insertion after section 200A of the following sections;

"Section 200B Declaring Temporary Employment to be permanent

An employee must be employed indefinitely, unless the employer can establish a justification for employment on a fixed-term."

i) EXPLANATION/INTERPRETATION

This amendment proposes a declaration of indefinite employment and an employer who wishes to engage employees on a fixed-term basis will have to demonstrate a justification for doing so. According to the explanatory memorandum, such a justification will be present if the employee is engaged to work on a specific task (such as the construction of a particular building or replacing a person on maternity leave or a task that lasts for a specific period). The amendment therefore seeks to limit the use of fixed-term contracts to appropriate cases (Benjamin & SBP, 2010). It also implies that the clause can be used by employers as a defence against an unfair dismissal claim by an employee. If an employee claims that the termination of his/her temporary contract was unfair, the employer can show that it is fair by demonstrating the reason for the fixed-term contract (Benjamin & SBP, 2010).

The explanatory memorandum further states that "the purpose of this clause is to prevent the use of a fixed-term contract as a basis for depriving employees who are engaged for work of indefinite duration of security of employment." Put differently, the purpose of the amendment is to prevent the use of fixed-term contracts as a mechanism for depriving employees of protection against unfair dismissal (Benjamin & SBP, 2010).

While the amendment proposes indefinite employment unless the employer can establish a justification for the use of a fixed-term contract, the memorandum accompanying the Bill also proposes that the clause should only apply to employees who are earning below a certain threshold set by the Minister of Labour. The intention here is that the amendment would not impact on the use of fixed-term contracts in respect of managerial and other senior employees. No threshold amount is, however, proposed.

ii) COSTS/NEGATIVE CONSEQUENCES

According to the 2007 September Labour Force Survey (StatsSA), just less than 60 percent of the workforce were employed in permanent positions. Five percent, or almost 700 000 employees, were employed on a fixed-term contract, while ten percent, or almost 1.4 million workers, were employed on a temporary contract. A further 81 000 or 0.6 percent of the employed were classified as seasonal workers. In total, approximately 2.13 million workers or 16 percent of the workforce were classified as

fixed-term, temporary or seasonal workers. These workers therefore constitute the share of the workforce that would potentially be affected by the proposed amendment.⁴⁶

Table 4: Type of Employment Contract, 2007

Occupation Group	Absolute Number ('000)	Share (%)
Permanent	7,877	59.19
Fixed-Term	686	5.15
Temporary	1,360	10.22
Casual	888	6.67
Seasonal	81	0.61
Not Applicable	2,325	17.47
Don't Know/Unspecified	90	0.68
Total	13,306	100

Source: Labour Force Survey 2007 September (StatsSA), Own Calculations

The table below shows that almost 30 percent of these workers were employed as Elementary Workers, with approximately 17 percent employed as Craft and Trade Workers. Almost 300 000 Domestic Workers indicated that they were employed on a fixed-term/temporary contract, although this is indicative of the unique nature of this fairly dominant sector-occupation cell in the South African context.

Only 1.35 percent of employees on a fixed-term or temporary contract were Managers, while just more than eight percent were employed as Professionals.

⁴⁶

The Annual Report of the Commission for Employment Equity also contains information on the extent of temporary employment. In 2009 only employers with 150 or more employees were required to submit Employment Equity reports to the Department of Labour and the data in the 2009/2010 Annual Report therefore only reflects the workforce profiles of large employers. The 2009/2010 Annual Report draws on information from 3 369 reports and 4 426 972 employees are covered. The Report shows that approximately 14 percent of these employees are considered temporary. In addition, temporary employees accounts for almost 28 percent of terminations. No information is available on whether the termination was a dismissal or resignation (Department of Labour, 2010).

Table 5: Occupational Composition of Workers Employed on a Temporary or Fixed-Term Contract (including Seasonal Workers), 2007

Occupation Group	Absolute Number	Share (%)
Managers	28,710	1.35
Professionals	176,432	8.29
Clerical Workers	143,786	6.76
Service and Sales Workers	283,578	13.33
Agriculture & Fishing Workers	12,237	0.58
Craft & Trade Workers	365,240	17.17
Operators & Assemblers	200,588	9.43
Elementary Workers	620,048	29.15
Domestic Workers	295,405	13.89
Unspecified	946	0.04
Total	2,126,970	100

Source: Labour Force Survey 2007 September (StatsSA), Own Calculations

No information is available on the tasks performed by these workers, and we therefore cannot estimate the share of employees who could legitimately be employed on a fixed-term contract. It has been suggested, however, that seasonal work would be considered a legitimate reason for a fixed-term contract if the work is linked to specific agricultural periods such as the harvesting period or to the increased demand for retail workers over the Christmas season.

If the proposed amendment is implemented, a share of the more than two million workers described above will, however, have to be employed permanently, with employers incurring the time and financial costs associated with hiring these workers as permanent employees. Workers engaged on a temporary/fixed-term contract are generally not members of the company's medical-aid and pension fund. In converting temporary/fixed-term contracts to permanent employment contracts, the employer will have to extend these benefits to the employees involved. This suggests an increase in the cost of doing business for employers. A more accurate assessment of the rise in the cost of doing business therefore is dependent on the proportion of labour costs attributable to non-wage costs. The higher this shares in relative and absolute terms, clearly the greater the impact on this proposed amendment on the cost of doing business in the domestic economy.

The proposed amendment would therefore again increase the wage bill of employers. As discussed earlier, South Africa's wage-employment elasticity is estimated to be approximately 0.7, implying that a one percent increase in wages will be associated with a 0.7 percent decrease in employment. In other words, for every one percent increase in an employer's wage bill as a result of this amendment, the employer will decrease its workforce by 0.7 percent. Overall then, the increased financial burden on employers might contribute to an increase in unemployment.

A related consequence is that employers might simply not want to employ all the current contract workers in permanent positions. While permanent employment is expected to increase as a result of the amendment, it is likely that a proportion of contract workers will not be offered permanent positions, with a resulting decline in total employment (and therefore an increase in unemployment).

In addition, the amendment will have other negative consequences which are difficult to quantify. If the use of fixed-term contracts is only permitted under very specific conditions, the labour market may become less fluid, as turnover could decline significantly. Put differently, permanent employees may become locked into the workplace and this may result in an “insider-outsider” phenomenon, with permanent employees enjoying more favourable employment conditions and employers subsequently unwilling to employ “outsiders” who could be very costly, if the employer wants to or needs to reduce employment in future periods. This outcome may also, ultimately, result in a decline in workplace productivity.

III) BENEFITS

As highlighted above, the purpose of the amendment is to prevent the use of fixed-term contracts as a basis for depriving employees, who have been working for an indefinite period, of the right to protection against unfair dismissal.

The amendment will benefit the proportion of the more than 2 million temporary workers who would become permanent employees as a result of the amendment (We continue to utilise data from the 2007 September Labour Survey, as the subsequent Quarterly Labour Force Surveys only distinguish between permanent and non-permanent employees, with no further detail regarding the status of the non-permanent employees). This means that those workers will not only be afforded protection against unfair dismissal, but they will also gain employment security and possibly access to benefits such as medical-aid and pension fund. In addition, the amendment will prevent employers from indefinitely employing vulnerable workers on less favourable terms utilising temporary or fixed-term contracts.

Table 6 presents the number of workers who have been employed on a fixed-term or temporary contract and who have been working for their current employer for more than three years and more than five years respectively.

Table 6: Fixed-Term Contract and Temporary Workers: Current Employer for More than Three and Five Years Respectively, 2007

	More than 3 Years		More than 5 Years	
Occupational Group	Number	Share (%)	Number	Share (%)
Managerial	9,734	1.99	2,330	0.76
Professional	38,716	7.93	15,997	5.21
Clerical	32,059	6.57	20,819	6.78
Service	45,220	9.27	25,435	8.29
Agriculture & Fishing	3,173	0.65	2,452	0.8
Craft & Trade	76,638	15.71	44,062	14.36
Operators & Assemblers	55,924	11.46	39,456	12.86
Elementary	135,550	27.78	90,668	29.55
Domestic Workers	90,938	18.64	65,629	21.39
Total	487,951	100	306,848	100

Source: Labour Force Survey 2007 September (StatsSA), Own Calculations

It should be noted that we do not have any information on the terms of these employees' contracts and whether they have been employed for the period utilising one or multiple contracts. The results do suggest, however, that almost 500 000 or a quarter of all temporary/fixed-term employees have been working for the same employer for more than three years. Furthermore, more than 300 000 employees have been working for the same employer for more than five years. In both cases, Elementary Workers account for almost 30 percent of these workers. Domestic workers also account for a relatively large share of these workers.

While the estimates presented here should be treated with great caution due to the lack of supplementary information, they do suggest that a significant number of workers appear to have been employed for more than three or even more than five years by the same employer in a non-permanent position. The proposed amendment should improve job security for these workers.

Chapter Two

Options Analysis: Employment Equity Act Penalties for Non-Compliance

Assessment of Selected Provisions of the Employment Equity Amendment Bill 2010

By SBP⁴⁷

Policy Objective

The Employment Equity Amendment Bill 2010 aims to make adjustments to the law to ensure compliance with South Africa's obligations in terms of international labour standards; ensure that the legislation gives effect to fundamental Constitutional rights including the right to equality and protection from discrimination; and to increase fines for non-compliance with legislation.

For purposes of the Regulatory Impact Assessment (RIA) options analysis, the focus is on the possible impacts of the proposed option to increase fines for non-compliance, and specifically on the proposal to link fines to the annual turnover of the employer.

The Background

The Employment Equity Act seeks to promote equal opportunity and fair treatment in employment through the elimination of unfair discrimination, to promote affirmative action measures to redress disadvantages in employment experienced by designated groups, and to ensure their equitable representation in all occupational categories and levels in the workforce.

The Act applies to all employers and workers (with specified exceptions). Provisions for affirmative action apply to designated employers, that is, employers with 50 or more workers, or whose annual income is more than the amount specified in Schedule 4 of the Act. It applies to municipalities, organs of State, employers ordered to comply by a bargaining council agreement and any employers who volunteer to comply.

In order to implement affirmative action measures, a designated employer must consult with employees; conduct an analysis of employment policies, practices, procedures, and working environment so as to identify employment barriers that adversely affect members of designated groups; prepare an Employment Equity plan; and report to the Director General on progress made in the implementation of the plan.

⁴⁷

Based on consultation with the Department of Labour and BUSA, together with desk research

The Employment Equity Plan must have objectives for each year of the plan. It must include affirmative action measures, have numerical goals for achieving equitable representation, have a timetable for each year, have internal monitoring and evaluation procedures, including internal dispute resolution mechanisms and identify persons, including senior managers, to monitor and implement the plan.

The Director General may conduct a review to determine whether an employer is complying with the Act. On completion of the review, the Director General (DG) may make recommendations in writing stating the steps that the employer must take in connection with the implementation of the equity plan in order to ensure compliance with the EEA and the period within which those steps must be taken. If the DG is not satisfied with the steps that an employer has taken, the DG may refer the employer's conduct to the Labour Court. The Labour Court has the powers to make any appropriate orders, award compensation or impose fines.

Risk Assessment

Ten years after promulgation of the Act, progress in achieving Employment Equity (EE) is slow. The tenth Commission for Employment Equity (CEE) Annual Report, 2009-2010 highlights a lack of progress. The report, which covers April 2009 to March 2010, is based on analysis of 3,369 Employment Equity reports, and covers almost 4.5 million employees. It finds that White males still dominate the top echelons of the workplace. At the top-management level, the representation of Whites is nearly six times their Economically Active Population (EAP) of 12 percent, whereas Africans are nearly six times below their EAP of 73 percent. The workplace population distribution is similarly skewed toward White males at the senior-management level, and at the professionally qualified level, in the private sector. The report finds that recruitment at all top three levels favours Whites, particularly males, in the private sector. Promotions at the top three levels also favour White people, particularly males.

According to the CEE Report, transformation has been fairly static, particularly at the top-management level, over the past nine years. It recommends amendments to the Employment Equity Act to deal more harshly with non-compliance, including speedier prosecution, and heftier fines for non-compliance.

A key assumption in raising the penalties associated with non-compliance is that this will encourage a behavioural change in companies, toward improved compliance. However, increased penalties alone might not make a substantive impact on levels of compliance. There are, however, a number of factors which should be taken into account, including the capacity of the Department of Labour to engage effectively with companies to monitor and support compliance, the Department's capacity to effectively enforce legislative requirements, mitigating criteria to be assessed in cases of under-performance against EE targets (including factors such as availability of skills, affordability, premiums commanded by qualified candidates from Historically Disadvantaged Individuals (HDI), and high staff turnover), and the objectivity of compliance reviews.

It should also be noted that existing sanctions are not effectively applied. Section 53 of the EEA deals with state contracts, and provides that companies may not tender for government work in the absence of the relevant EEA certification.⁴⁸ Absence of the required certification is sufficient grounds to reject a tender proposal or to cancel a contract. This clearly provides a severe economic sanction for non-compliance – but the provision has not been promulgated yet.

Options analysis: Penalties for EEA non-compliance

OPTION 1: MAINTAIN STATUS QUO

Under the current provisions of the Employment Equity Act, the Labour Court may impose fines on the employer if it finds that an employer has not complied with the Act. Schedule 1 sets out the maximum permissible fines that may be imposed for contravening the Act (contravention of any provisions of sections 16, 19, 20, 21, 22 and 23). These fines have not been adjusted since promulgation of the Act.

• No previous contravention	R500,000
• Previous contravention in respect of same provision	R600,000
• Previous contravention within the previous 12 months or 2 previous contraventions in respect of same provision within 3 years	R700,000
• Three previous contraventions in respect of same provision within 3 years	R800,000
• Four previous contraventions in respect of same provision within 3 years	R900,000

The Department could maintain the status quo in respect of a system of graduated penalties set at fixed Rand rates, but adjust the Schedule to increase the Rand amounts payable for each category of non-compliance. This would meet the imperative of increasing penalties for compliance, without the need for significant changes to the manner in which penalties are determined.

⁴⁸

Section 53 has not been brought into effect. The Section could be put into operation by Presidential proclamation.

This would be coupled with measures to improve monitoring and enforcement of compliance as per the proposed Bill, including:

- Increasing the frequency of reporting for medium sized firms to enable more rigorous monitoring⁴⁹
- Increasing the powers of labour inspectors (s37)
- Simplifying enforcement procedures to reduce procedural delays

Efforts would also be needed to improve the enforcement capacity of the Department of Labour in terms of current legislative requirements and penalty provisions.

RISKS ASSOCIATED WITH MAINTAINING STATUS QUO

The Department of Labour has identified three key factors motivating the proposed restructuring of the penalty system:

1. Current fines are too low to serve as an effective deterrent for non-compliance
2. The Schedule, by setting a fixed Rand amount, necessitates regular amendments to keep penalty amounts in line with changing economic conditions. This creates an administrative burden that could be minimised by linking penalty amounts to a percentage figure, which remains relevant to the prevailing economic context
3. A percentage-linked figure ensures that the size of penalty imposed is proportionate to the size (in terms of turnover) of the firm. Large firms would thus be required to pay substantially more than small firms under the new system.

Objectives two and three would not be met by increasing the Rand amounts for each type of contravention but maintaining the current framework for determination of penalties.

⁴⁹ Currently, employers with 150 or more employees are required to submit reports on an annual basis, and employers with less than 150 employees and more than 50 employees must submit reports every two years to the Department of Labour.

OPTION 2: FINES FOR CONTRAVENTION OF THE ACT TO BE EQUIVALENT TO TEN PERCENT OF EMPLOYER'S ANNUAL TURNOVER

The proposed Employment Equity Amendment Bill would repeal Schedule 1 and increase penalties for contravention of the Act, by linking penalties to annual turnover of the employer. The Bill provides that fines will be equivalent to ten percent of employer's turnover.

The proposed approach follows the penalty structure of the Competition Commission, which allows the Commission to impose a *maximum* penalty of ten percent of turnover. It should, however, be noted that the Commission applies a formula to calculate the fine, which takes a number of factors into account, and retains the principle of harsher fines for repeat offenders.

In *The Competition Commission v South African Airways* [2005] 2 CPLR 303 (CT), for example, the following formula was applied:

- Nature, duration, gravity and extent of the contravention – three percent weighting, as it encompasses the widest range of factors
- Loss or damage as a result of the contravention – one percent weighting – relates to the loss or damage suffered by consumers and/or competitors and is curtailed because of the rights of both parties to recoup their damages through civil action
- Behaviour of the respondent – one percent sliding scale weighting – can work as an aggravating or mitigating feature
- Market circumstances in which the contravention took place – one percent weighting – assesses the structure and history of the market and the actual effects the unlawful conduct had on its structure
- Level of profit derived from the contravention – 0,5 percent weighting – low in recognition of difficulty of proof
- Degree to which the respondent has co-operated with the competition authorities – 1,5 percent weighting on sliding scale, as a mitigating or aggravating feature
- Whether the respondent has previously been found in contravention of the Act – 2 percent weighting – designed to act as a deterrent against subsequent offences.⁵⁰

The process of calculating the penalty figure thus takes into account a number of variables, which together *may* amount to a maximum of ten percent of turnover. The Commission has however yet to

⁵⁰ *Competition authorities adopting an increasingly tougher stance*, Nicolette Mudaly, Bowman Gilfillan, April 2009, <http://www.bowman.co.za>

impose the maximum fine. In October 2009 the Competition Commission recommended that Telkom be fined ten percent of its annual turnover for the year ended 31 March 2009 – the first time the Commission had ever recommended the maximum fine. The matter has been subject to protracted litigation over nine years and is yet to be finalised.

RISKS

It is not clear whether the Department of Labour's proposed imposition of a ten percent of turnover penalty replaces the existing gradation of penalties, whereby fines are charged at a higher rate for each successive contravention of the Act. The current system appears designed to encourage compliance, by being more lenient on first time offenders, and more lenient in respect of a first time contravention on each specific provision (this is also the model followed by the Commission, as described above).

Implementation of a standard fine of ten percent of turnover, applicable to all offenders, for all offences, may constitute a disproportionate response particularly in the case of first time offenders. It is likely to be particularly onerous for companies newly classified as designated employers (companies expanding from small to medium businesses, for example).

It is not clear whether the level at which fines will have a significant impact in improving levels of overall compliance. While the imposition of very severe fines on a small proportion of businesses may be effective in demonstrating the seriousness of contraventions and punishing affected offenders, it may not necessarily translate into improved compliance across the economy.

The proposed option carries significant risk of unintended consequences. Ten percent represents a considerable proportion of annual turnover. A fine of this magnitude could pose a significant threat to the continued viability of a company. Consultation with business representatives suggests that net profit generally runs at well below ten percent. The Retail Sector, for example, reports an average net profit of four percent of turnover, while the Food Sector reports net profit at just two percent of turnover. Fuel Retailers have a regulated profit margin, but an extremely high turnover owing to the large volumes of fuel which they buy and sell. In these and many other sectors, imposition of a ten percent of turnover fine could render businesses non-viable.

Possible unintended consequences may include the imposition of penalties contributing to company contraction and retrenchments, and even company closure, resulting in job losses and negative impacts on economic growth. Companies might also choose to split into component parts in order to fall below minimum thresholds. It is not clear that the risk of possible job losses is outweighed by the benefit of a more onerous penalty for non-compliance, nor that such penalties will translate into improved compliance.

The costs of fines may be passed on by companies to consumers. The Competition Commission provides an illustrative example – the prosecution of Tiger Brands for involvement in a bread pricing cartel was followed relatively quickly by the significant increases in bread prices.⁵¹

It should also be noted that the Competition Commission has encountered a number of technical challenges in the calculation of fines based on turnover. Specific cases have required the Commission to decide whether fines should be imposed on the basis of turnover of an entire group of companies, or limited on the basis of turnover of the specific division responsible for transgression, for example.

The Commission has also documented considerable difficulties in prosecuting cases effectively. Commissioner Shan Ramburuth has noted that “Prosecuting cases is costly. Respondents are always better resourced than the Commission and have access to increasingly more sophisticated legal and economic expertise. Respondents also have an incentive to frustrate and delay.”⁵²

OPTION 3: FINES FOR CONTRAVENTION OF THE ACT TO BE LINKED TO PAYROLL

An alternative option could be to link penalties for contravention of the Act to the employer’s payroll. Penalising companies by a percentage of payroll recognises a direct link between the policy objective (diversifying the workforce profile) and company size in terms of number of employees.

Penalty provisions within the BCEA provide a relevant example. Table 2 in Schedule 2 provides for the maximum fine that may be imposed in the event of failure to pay an amount due to an employee. Penalties increase exponentially with each failure to comply – starting at 25 percent of the amount due including any interest owing, for first offenders, and rising to 200 percent of the amount due in the case of four or more previous failures to comply. The penalty is thus directly linked to the compliance failure (that is, under-payment), and provides a remedy proportionate to the contravention, with rapid increases for repeat offenders.

A similar gradation of penalties could be imposed for EEA non-compliance, as per the current system, thereby punishing repeat offenders much more severely than first time offenders.

RISKS

Linking penalties to payroll would meet the Department’s objectives of administrative streamlining, since the Schedule will not require repeated updating of fixed Rand amounts, and proportionality, since penalties based on percentage or payroll will ensure that the size of penalty imposed is proportionate to the size of the company workforce. Firms with many employees would be required to pay substantially more than firms with a smaller workforce.

⁵¹ Trudi Hartzenbergh, *Competition Policy in South Africa: Towards Development?* Presented at DPRU Conference 2008: The Regulatory Environment and its Impact on the Nature and Level of Economic Growth and Development in South Africa

⁵² Presentation to the 11th Nedlac Annual Summit by Competition Commission

However, as per the risks associated with turnover linked penalties, there is a risk that companies might cut their staff numbers, and/or outsource certain functions, in order to minimise the impact of EE requirements.

RECOMMENDATION

The proposed changes to penalty fees associated with EEA non-compliance point to potentially far reaching economic impacts.

An economic risk assessment was outside the scope of the current project. It is strongly recommended that a thorough economic risk assessment should be undertaken before proceeding with amendments to penalty provisions, in light of possible negative impacts on productivity, job creation and economic growth associated with the proposal.

CONSULTATION

Consultation to inform the options analysis was undertaken during August 2010. The following social partners were consulted during the process of identifying and developing options analysis in relation to the selected provisions:

- Department of Labour – Les Kettledas, DDG; Theminkosi Mkalipi, Senior Executive Manager: Collective Bargaining; Ian Macun, Executive Manager: Collective Bargaining
- Representatives of BUSA

Chapter Three

A Legal Assessment of Provisions Dealing with Equality and Discrimination in the Employment Equity Amendment Bill 2010

By Professor Paul Benjamin

Formulation of Problem

Section 6 of the Employment Equity Act prohibits unfair discrimination on a ground list in section 6(1) or on an “analogous ground” that impairs human dignity. This covers claims concerning unfair discrimination in respect of remuneration, employment benefits and terms and conditions of employment if the employee can establish linkage between the differentiation and a ground such as race or gender. In practice, a minimal number of claims of wage discrimination have been brought, despite evidence indicating widespread discrimination on these grounds. In part, this is a result of the significant evidential burden involved in linking a differentiation to a listed or analogous ground.⁵³

PURPOSE OF THE PROPOSED AMENDMENTS

The purpose of the amendments is:

- To clarify that unfair discrimination claims in respect of remuneration and other conditions of employment can be brought into terms of section 6 of the Employment Equity Act, (section 6(4) and (5) of the EEA)
- To allow employees earning below a prescribed earnings threshold to bring discrimination cases in the CCMA: (section 10(6)(b) of the EEA);
- To bring the burden of proof resting on a party bringing an unfair discrimination claim under the Employment Equity Act in line with the equivalent provisions under the Promotion of Equality and Prevention of Unfair Discrimination Act (PEPUDA), (section 11 of the EEA)
- to extend the reporting procedure on wage differentials between occupational groups to cover information that would identify wage discrimination; (section 27(2) of the EEA).

⁵³ Provisions dealing with discrimination between standard and non-standard employees are dealt with in Chapter One.

The following sub-sections are inserted after section 6 (3) of the EE Act:

“6(4) A difference in terms and conditions of employment between employees of the same employer performing the same or substantially the same work or work of equal value that is directly or indirectly based on any one or more of the grounds listed in subsection (1) is unfair discrimination.”

(5) The Minister, after consulting the Commission, may issue a code of good practice setting out the criteria and the method of the Department of Labour for assessing work of equal value in terms of subsection (4).”

STATEMENT OF EXISTING LAW

The current state of the law is well-described in the following passage in a Labour Court judgement by Judge Andre van Niekerk:

“Unlike equality legislation in many other jurisdictions, the EEA does not specifically regulate equal pay claims. Section 6 of the Act prohibits unfair discrimination in any employment policy or practice, on any of the grounds listed in s 6 (1) or on any analogous ground, if an applicant is able to show that the ground is based on attributes or characteristics that have the potential to impair the fundamental human dignity of persons or to affect them in a comparably serious manner. (See *Harksen v Lane NO & others* 1998 (1) SA 300 (CC) at 325A). ‘Employment policy or practice’ is defined by s 1 of the EEA to include remuneration, employment benefits and terms and conditions of employment. To pay an employee less for performing the same or similar work on a listed or an analogous ground clearly constitutes less favourable treatment on a prohibited ground, and any claim for equal pay for work that is the same or similar falls to be determined in terms of the EEA. Similarly, although the EEA makes no specific mention of claims of equal pay for work of equal value, the terms of the prohibition against unfair discrimination established by s 6 are sufficiently broad to incorporate claims of this nature. In relation to claims where the differential that is asserted by the claimant is a difference in sex, the ILO Equal Remuneration Convention 1951 (No. 100) situates the comparison to be made at the level of the value of work, and obliges ratifying member states to give effect to the principle of equal remuneration for men and women workers for work of equal value. To this extent, this court is required to interpret the EEA in compliance with South Africa’s public international law obligations⁵⁴. In the present instance, the differential asserted by the claimant is

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Convention 100 was ratified by the government of South Africa in 2000; Convention 111 in 1997. Section 3 (d) of the EEA requires the Act to be interpreted in compliance with South Africa’s international law obligations.

one of race rather than sex, but I see no reason why the principle of equal pay for work of equal value should not be extended beyond the listed ground of sex to other listed and analogous grounds and why, in principle, an equal value claim based on race should not be admitted. This would be consistent with the substantive conception of equality that the Constitution and the EEA adopt, and in particular, a recognition that since race historically played a role in the value attributed to particular jobs, a systemic approach to the elimination of what might often be structural inequality is necessary. Moreover, the principle that an equal value claim was competent under a general prohibition of unfair discrimination was recognised by this Court some years ago. In *Louw v Golden Arrow Bus Services (Pty) Ltd* (2000) 21 ILJ 188 (LC), Landman J said the following:

“In other words, it is not an unfair labour practice to pay different wages for equal work or for work of equal value. It is however an unfair labour practice to pay different wages for equal work or work of equal value if the reason or motive, being the cause for so doing, is direct or indirect discrimination on arbitrary grounds or the listed grounds, eg race or ethnic origin.” (at 196-F)

Writing in *“Essential Employment Discrimination law”*, Landman suggests that to succeed in an equal pay claim, the claimant must establish that “the unequal pay is caused by the employer discriminating on impermissible grounds” (at 145). This suggests that a claimant in an equal pay claim must identify a comparator, and establish that the work done by the chosen comparator is the same or similar work (this calls for a comparison that is not over-fastidious in the sense that differences that are infrequent or unimportant are ignored) or where the claim is for one of equal pay for work for equal value, the claimant must establish that the jobs of the comparator and claimant, while different, are of equal value having regard to the required degree of skill, physical and mental effort, responsibility and other relevant factors. Assuming that this is done, the claimant is required to establish a link between the differentiation (being the difference in remuneration for the same work or work of equal value) and a listed or analogous ground. If the causal link is established,⁵⁵ section 11 of the EEA requires the employer to show that the discrimination is not unfair, that is, it is for the employer to justify the discrimination that exists.

This Court has repeatedly made it clear that it is not sufficient for a claimant to point to a differential in remuneration and claim baldly that the difference may be ascribed to race. In *Louw v Golden Arrow* (supra) Landman J stated:

“Discrimination on a particular ‘ground’ means that the ground is the reason for the disparate treatment complained of. The mere existence of disparate treatment of people of, for example, different races is

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There is a debate on how strong that link should be – see Dupper and Garbers in *“Essential Employment Discrimination Law”* at p.36. I need not decide this issue in these proceedings.

not discrimination on the ground of race unless the difference in race is the reason for the disparate treatment. Put differently, for the applicant to prove that the difference in salaries constitutes direct discrimination, he must prove that his salary is less than Mr. Beneke's salary because of his race (sic)" (at 197-B).

This formulation places a significant burden on an applicant in an equal pay claim. In *Ntai & others v South African Breweries Ltd* (2001) 22 ILJ 214 (LC), the Court acknowledged the difficulties facing a claimant in these circumstances and expressed the view that a claimant was required only to establish a *prima facie* case of discrimination, calling on the alleged perpetrator then to justify its actions. But the Court reaffirmed that a mere allegation of discrimination will not suffice to establish a *prima facie* case (at 218F, referring to *Transport and General Workers Union & another v Bayete Security Holdings* (1999) 20 ILJ 1117 (LC)).⁵⁶

POLICY OBJECTIVE OF PROPOSED AMENDMENTS

Section 6(4) and (5) of the EEA

These amendments seek to clarify the application of the current anti-discrimination provisions to claims concerning unfair discrimination in respect of remuneration and other conditions of employment. This clarifies that cases of discrimination in terms and conditions of employment that can be linked to a proscribed ground such as race or gender can be lodged under section 6 of the EEA. The new section 6(5) allows for the Minister of Labour, on the advice of the Employment Equity Commission, to publish a code of good practice identifying the factors that should be taken into account in assessing whether work performed by employees earning different earnings is of equal value. This proposal coupled with the proposed amendments to section 10(6)(b) and section 11 will significantly reduce the legal and resource burden on employees seeking to bring discrimination cases of this type.

Section 10(6)(b) of the EEA

This clause seeks to facilitate lower-paid employees bring discrimination claims by allowing employees earning below a prescribed earnings threshold to bring discrimination cases in the CCMA rather than the Labour Court which is currently the case. This will enhance access to justice and involve savings in costs and time for employees and employers. It will impose additional costs on the CCMA (including costs of training, extra personnel etc). It is likely to result in a small decrease in the number of cases that are referred to the Labour Court.

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Mangena & Others v Fila South Africa (Pty) Ltd & Others (JS 343/05) [2009] ZALC 81 (28 August 2009) (at paras 5-7).

Section 11 of the EEA

The redrafted section 11 seeks to facilitate this category of unfair discrimination claims by making the burden of proof similar to that applied under PEPUDA.

Section 27 of the EEA

This will enable the Department of Labour to use the system for reporting on a wage differential as a mechanism for uncovering and combating discriminatory practices in respect of wages and remuneration.

Chapter Four

A Legal Assessment of Selected Provisions in the Employment Services Bill

By Professor Paul Benjamin

Introduction

For the purposes of a Regulatory Impact Analysis (RIA), sections 10 and 11 of the proposed Employment Services Bill (ES Bill) are the provisions requiring most thorough analysis.

Provisions dealing with the registration and control of private employment agencies also require detailed impact analysis. These provisions are not directly addressed in the context of the Employment Services Bill. The regulation of Temporary Employment Services (TES) is however examined in terms of options analysis in respect of relevant provisions in proposed amendments to the LRA and other statutes dealing with atypical work.

Within the proposed ES Bill, Section 10, and to an even greater extent section 11, have significant resource and efficiency implications, which will impact on both the Department of Labour and employers. It is not clear whether the Department of Labour has quantified the internal resource requirements imposed on the Department by the proposed amendments. No such assessment has been made available for the purposes of the RIA.

Neither the Bill nor the Explanatory Memorandum provides a clear articulation of the policy objectives underpinning these provisions.

Section 10 raises critical questions in terms of cross-departmental co-ordination. It is not clear how the proposed provisions are to be co-ordinated with the functions of the Department of Home Affairs in respect of the processing work permit applications for foreigner employees.

S(10) Employment of Foreign Workers

I) POLICY OBJECTIVE

Foreign workers are being employed in certain jobs despite the fact that there are South Africans (citizens and permanent residents) available to fill these jobs. The provisions of the Immigration Act have proven inadequate in addressing the problem.

Section 10 of the Employment Services Bill provides that employment of a foreign worker may not compromise South African citizen's opportunity for employment, employment conditions, economic development or social stability. The section outlines procedures that employers must follow if they

have to employ a foreign worker, and consequences for not complying or abusing foreign qualifying workers.

ii) STATUS QUO

The Immigration Act, administered by the Department of Home Affairs, aims to prevent foreign workers being employed in jobs for which South Africans are available. The employment of foreign workers is currently dealt with exclusively in the Immigration Act and its regulations. Foreign workers require a work permit to work in South Africa.

Section 19 of the Immigration Act allows for foreigners to be employed in terms of a quota work permit (section 19(1)); a general work permit (section 19(2)); an exceptional skills work permit (section 19(4)); or an intra-company transfer work permit (section 19(5)). The Minister may regulate the requirements for obtaining the different categories of work permits. In terms of section 7(1) (m), the Minister may make regulations on “the steps to be taken to ensure proper exploitation of the local labour market before a work permit is issued in terms of section 19.”

A quota work permit may be issued to a foreigner by the Director General, as prescribed, if the foreigner falls within a specific professional category or within a specific occupational class determined by the Minister at least annually by notice in the *Gazette* after consultation with the Ministers of Labour and Trade and Industry; and as long as the number of work permits so issued for such category or class does not exceed the quota determined in the notice.

The requirements to obtain a general work permit are set out in Regulation 16(4) of the Immigration Act Regulations. The following requirements in particular seek to protect South African employees. An application for a general work permit must be accompanied by:

- a letter from the employer motivating why a citizen or permanent resident could not fill the position, as well as proof of efforts made to obtain the services of a citizen or resident, together with particulars of the unsuccessful candidates;
- proof of publication of an advertisement in the national printed media;
- a certificate from the Department of Labour or an extract from the database of a salary benchmarking organisation stipulating the average salary earned by employees occupying similar positions in the Republic.

In addition, an application for an exceptional skills work permit must include a letter of motivation indicating that the exceptional skill possessed by the applicant will be to the benefit of the South African environment in which he or she intends to operate.

III) DEPARTMENT OF LABOUR PROPOSALS

The Bill creates authority for the Minister of Labour to implement and enforce regulations in respect of the employment of foreign workers. This includes a provision that the Minister may publish categories of provisional work, within which foreign nationals may be employed, in the Government Gazette every second year.

The Bill requires that employers must exhaust the following steps before resorting to recruiting foreign nationals:

- Make use of the Public Employment Services
- Submit reasons to the Director General why they cannot employ amongst persons with relevant profiles referred to them by the Public Employment Services; and
- Provide proof to the Director General that they have tested the local labour market through recruitment campaigns.

The Bill requires an employer to submit a detailed skills transfer plan when employing a foreign-national in scarce skills categories published by the Minister of Home Affairs.

It prohibits an employer engaging in any of the following:

- Employing in the name of the Employer a Foreign worker, but in reality causing that foreign worker to engage in work for a third party
- Forcing the employed qualifying foreign worker to engage in work that is not within the sphere of the permit
- Dismissing or laying off national worker(s) as a result of having employed foreign worker(s); or
- Exerting coercion, threat, or any other illegal means upon the employed Foreign worker(s) to enforce him/her/them to engage in work contrary to his/her/their free will.

IV) RISKS

These provisions appear to have been drafted in response to administrative failings in Immigration control. It is not clear that more effective controls over the employment of foreign workers will be achieved through the establishment of a parallel regulatory regime administered by Department of Labour.

The proposals will impose considerable administrative burdens on Department of Labour facilities.

The proposals do not address the application of labour law provisions to the employment of foreign workers. Additional provisions that might be included in the ESB for this purpose are:

- A provision stating that an employee who is employed without the necessary work permit is entitled to enforce any claim that the employee has in terms of statute or contract.⁵⁷ While the Labour Court has held this, there has been no equivalent ruling by a higher court.
- A provision allowing a court hearing any matter in which the employee was employed without the relevant work permit to impose an additional penalty upon the employer.

Specific risks associated with specific clauses are outlined below:

Section 10(1): “Employment of a foreign worker may not compromise South African citizen’s opportunity for employment, employment conditions, economic development or social stability” – this clause is extremely broad and its wording is more appropriate to a “purpose” clause rather than a substantive provision in the statute.

Its provisions are similar to clause (i) of the Preamble to the Immigration Act which states that

“The contribution of foreigners in the South African labour market does not adversely impact on existing labour standards and the rights and expectations of South African workers.”

The inclusion of this provision in the ES Bill will cause difficulties of interpretation and uncertainty surrounding the employment of foreigners.

Section 10(3): “The Minister may publish in the Government Gazette every second year categories of provisional work within which foreign nationals may be employed.”

This clause enables the Minister of Labour to identify categories of work in which foreign employees may be employed, in addition to those identified in quotas established by the Minister of Home Affairs under the Immigration Act. “Provisional work” is not defined – it is not clear what might be included under this category. It is also not clear how the Minister will make this decision, whether the Minister will consult with Home Affairs/non-governmental stakeholders, or how this will be co-ordinated with Immigration Act quotas. These uncertainties need to be specified in Act.

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The Labour Court has held that a contract of employment concluded by an employee without a valid work permit was valid and the employee could claim unpaid monies. The Court also pointed out that even if the employment contract was invalid because the employer was not permitted to employ the employee under s 38(1) of the Immigration Act, the employee was nonetheless an ‘employee’ as defined by s 213 of the LRA because that definition is not dependent on a valid and enforceable contract of employment. (*Discovery Health Limited v Commission For Conciliation, Mediation and Arbitration and Others* (JR 2877/06) [2008] ZALC 24; [2008] 7 BLLR 633 (LC); (2008) 29 ILJ 1480 (LC)).

Section 10(4)(a) requires employers who are engaging foreign workers to utilise Public Employment Services. This goes beyond current requirements of employers having to advertise. *This will have significant financial and resources implications for the Department of Labour and significant efficiency implications for employers.*

If the provision is to be included it must be made consistent with section 11 – that is, it could be restricted to categories of employees in respect of which vacancies would be reported to the Department.

Section 10(4)(b) requires reasons to be submitted to DG why South African workers are not hired. This would impose administrative costs on Department of Labour and create possible delays in appointments. It is also likely to lead to litigation. It is not clear whether this is intended to apply to only those categories of work created by section 10(3), or to all categories. There is no such requirement in the Immigration Act. The effect is to create a “parallel” procedure to the Immigration Regulation procedures. It is not evident whether DG’s consent is a requirement for the issue of permits under the Immigration Act.

Section 10(5) states that an employer must submit a detailed skills transfer plan when employing a foreign national in scarce skills categories published by the Minister of Home Affairs. The language of this provision is not consistent with the Immigration Act. This appears to be a reference to quota work permits in terms of section 19(1) as well as exceptional skills work permits in terms of section 19(4). The requirement for a skills transfer plan goes beyond the current Immigration Act requirements. It is unclear who will adjudicate on the skills transfer plan.

10(6)(a) and (b) identifies specific offences. These are already offences under section 49(3) of the Immigration Act. Argument can be made that a separate offence could be created regarding fraudulent conduct in respect of work permits. The language is problematic – for example, if the provisions are retained, “force” in section 10(6)(b) should be replaced with “require or permit”.

10(6)(c) prohibits employers from dismissing employees in order to hire foreign workers. While this is a legitimate provision, it is unclear how this provision will be implemented as it is not expressly criminalised.⁵⁸

10(6)(d) prohibits forced labour. This is already an offence under the BCEA.

⁵⁸ Violations of section 10(6) are not made criminal offences. It is further pointed out that the criminal provisions in the Act contain numerous anomalies (including the imposition of minimum penalties) and require extensive reworking.

S(11) Reporting of Vacancies and Filling of Positions

I) POLICY OBJECTIVE

The Explanatory Memorandum describes the objectives of section 11 of the ES Bill as providing for: “the reporting and registration of existing or new vacancies by employers with the Public Employment Services (and) the employment of people referred by the Public Employment Services.”

II) STATUS QUO

Employers are currently under no obligation to report vacancies to the Department of Labour. The Unemployment Insurance Act requires an employee who is applying for unemployment benefits to register as a work-seeker with a labour centre established in terms of the Skills Development Act.

This results in a situation in which the number of vacancies reported to the Department of Labour amount to a fraction of the number of work-seekers who are registered through the UIF. As a result, only a small proportion of work-seekers are placed in employment.

III) DEPARTMENT OF LABOUR PROPOSALS

S11(1): The Bill requires employers to notify the Public Employment Service of any vacancy or new position in their establishment within 14 working days after the position became vacant or was created.

S11(2): The Minister may prescribe how employers must notify the Public Employment Services of vacancies or new positions in their establishment including:

- Categories of employment in respect of which vacancies and new positions must be reported
- The job description
- Qualifications
- Remuneration levels
- The format and manner in which vacancies and filling of positions must be reported

S11(3) An employer must provide written reasons within 14 days to the Director General as to why any of the referred candidates with the required profiles could not be appointed.

S11(4) An employer must notify the Director General of the filling of vacancy within 14 days of such an appointment.

IV) RISKS

Lack of Clarity

Provisions under *section 11(1) and (2)* are inconsistent and it is unclear what the purposes of the provisions are. Section 11(1) appears to indicate that there is a general obligation on employers to notify the Employment Services of all vacancies. On the other hand, section 11(2) enables the Minister to regulate “how” employers must notify the PES of vacancies.

The factors listed in section 11(2) restrict the categories of workers in respect of which employers are obliged to notify the DEPARTMENT OF LABOUR of vacancies. This makes 11(2) internally inconsistent as these categories go beyond regulating “how” the PES must be notified of vacancies and indicate in respect of which employees mandatory reporting of vacancies is required.

If the intention is to only require employers in certain categories to notify the PES of vacancies, 11(1) and (2) need to be reworked to reflect that.

An alternative approach is to have an enabling provision (voluntary notification of vacancies) but allow the Minister in due course to extend mandatory reporting of vacancies as and when adequate resources exist. This would allow for a focus on identified categories of vulnerable workers.

To the extent that notification is voluntary, employers will be induced to use the service (provided it operates efficiently) in preference to Private Employment Services because there is no charge for its services. It should, however, be noted that the Department of Labour’s existing database has been largely ineffective. In a recent reply to a parliamentary question, the Minister of Labour revealed that the Employment Services South Africa project (ESSA), a database system designed to link unemployed work-seekers to prospective employers, had only managed to place three percent of the over one million work-seekers that registered with the project since its inception four years ago.⁵⁹

Administrative Burden on the Department of Labour and Employers

A mandatory obligation to report vacancies will impose major resource constraints on the Department of Labour. The extent to which additional resources will be required will depend upon the full extent of categories of employees in respect of which mandatory reporting of vacancies is required. If mandatory reporting for employers is introduced, under-resourcing will have significant inefficiencies for both employers and employees as there will be longer periods to fill vacancies. The Department has already commissioned a report which has concluded that the PESs are currently severely under-

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Parliamentary question by MP Louw to the Minister of Labour, August 2010: In 2007-08 ESSA registered 169,059 work-seekers and placed three percent of them (5578), in 2008-09 ESSA registered 421,686 people and placed 3.5 percent, in 2009-10 ESSA registered 636,140 and placed one percent. In the current 2010-11 year, ESSA has registered 97,596 people and placed 2.8 percent.

resourced in terms of funding, personnel and the number of offices at which Public Employment Services are provided.⁶⁰

Staffing: The International benchmarks suggest that for every 150-250 unemployed there should be at least one staff member to assist Job-seekers within a PES office. This is aside from those resources required to assist employers. The South African PES currently has 559 staff members deployed across its centres. This is compared to countries such as Hungary (3 759), Germany (90 000) and UK (between 60 000 and 80 000) and probably more than one million in the case of China. Thus, whilst Germany has approximately 42 unemployed individual per PES staff member, and Hungary has 150, the estimates for South Africa is 483 unemployed individuals (narrowly defined) per PES staff member. Given South Africa's much higher proportion of rural unemployed where access to a PES is extremely difficult, this number is likely to underestimate the true 'access rate' to a PES staff member amongst the unemployed. This suggests that South African PES staff may not be able to offer a level of service comparable with those countries where there are significantly higher staffing levels per numbers of unemployed in the country.

Section 11(3), which requires an employer to provide written reasons within 14 days to the Director General as to why any of the referred candidates with the required profiles could not be appointed, imposes a significant administrative burden on employers. The purpose of the provision appears to be to deal with a situation where the PES sends a number of candidates to an individual employer and all of them are rejected. This is a narrower meaning than the section as currently drafted appears to indicate.

Even with this narrower meaning, it is not evident what purpose the written reasons will serve. If the purpose of the clause is to prevent employers from employing foreign workers in preference to South African workers, this is already dealt with in section 10(4)(b). A requirement of written reasons for rejection of candidates is unlikely to achieve the above policy goal. The employer will merely state that it does not consider any of the employees sent to it to be satisfactory.

Section 11(4) requires an employer to notify the Director General of the filing of vacancy within 14 days of such an appointment. This imposes significant administrative costs on the employer, and it is not clear what the Department of Labour will do with this information.

It appears that the objective of ensuring that South African workers are employed in categories for which they are available would be more effectively supported by amending the Immigration Act. The amendment would be to impose more strenuous criteria on the steps that must be taken before permits are granted to employ foreign workers, and to ensure that permits are not issued if the relevant official is not satisfied that the requisite steps have been taken.

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See Singizi Consulting "Developing an appropriate Public Employment Service model for South Africa" (February 2010).

Basic calculations on the possible increased expenditure associated with expanding the current system of PES within the Department of Labour's ambit can be undertaken, on the basis of the change in expenditure associated with increasing the staff complement across all the offices nationally. This provides an estimate of the immediate resource implications of expanding the PES to become more comparable to other countries.

Table 7: Potential Costs to Department of Labour for Expansion of current PES System

Total Staff	5806
Total Expenditure	R 1,017,497,217.82
Expenditure per staff	175,249.26
so....to increase staff by	Total Cost would be
10 %	1,017,503,604.42
25 %	1,271,871,522.27
50 %	2,543,743,044.54
75 %	2,798,117,349.00
100 %	3,052,491,653.45

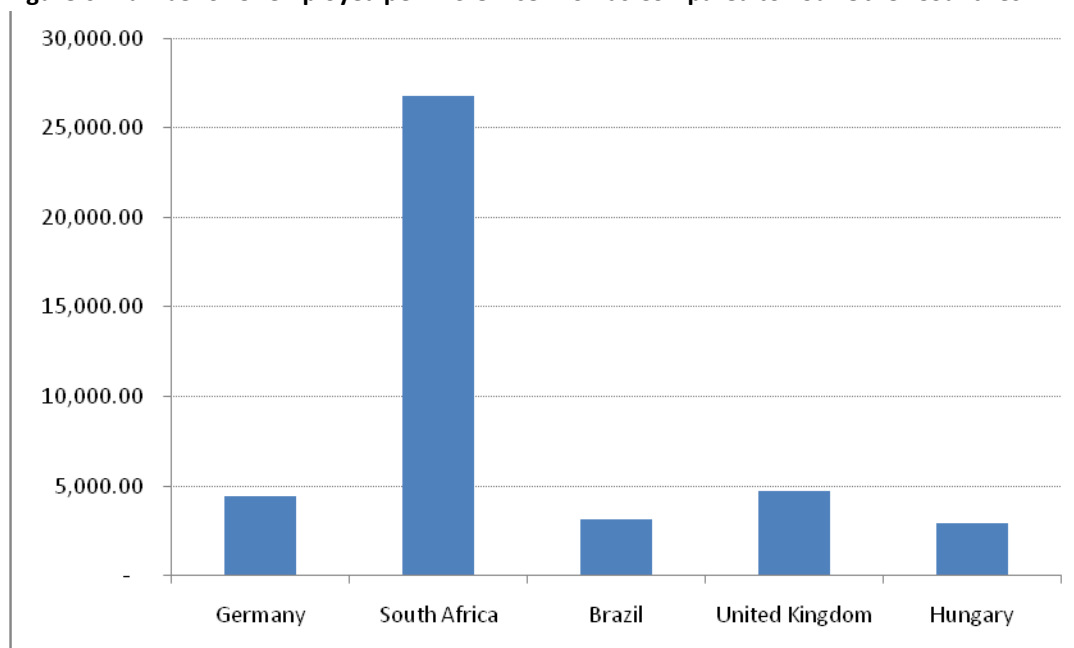
Current data indicates that the Department of Labour employs some 5 806 staff within the PES system. This, given a total expenditure of about R1 billion (including the UIF), translates into a per capita expenditure of about R175 000 per staff member. Based on this, a Singizi Consulting report (commissioned by the Department of Labour) projected the new total expenditure which would arise from increasing the number of staff by 10, 25, 75 and 100 percent respectively. These simple calculations show that total expenditure on PES would rise by anything ranging from R1.2 billion to R3.1 billion.

Facilities

South Africa currently has 125 labour centres, nine provincial offices and 19 mobile centres. This is compared to Brazil (1 268 offices), Germany (178 Local Employment Agencies with 660 branches plus ten regional directorates), Hungary (170 local centres 20 regional centres) the UK (741 job centres, 81 BDC and 31 contact centres) and China has over 24 000 PES agencies around the country.

These figures suggest that South African PES has too few offices: to locate this within a context, these figures are considered in terms of the numbers of unemployed that the centres are intended to service.

Figure 6: Number of Unemployed per PES Office in SA as Compared to Four Other Countries



Source: Data obtained from the PES' of the respective countries

Notes:

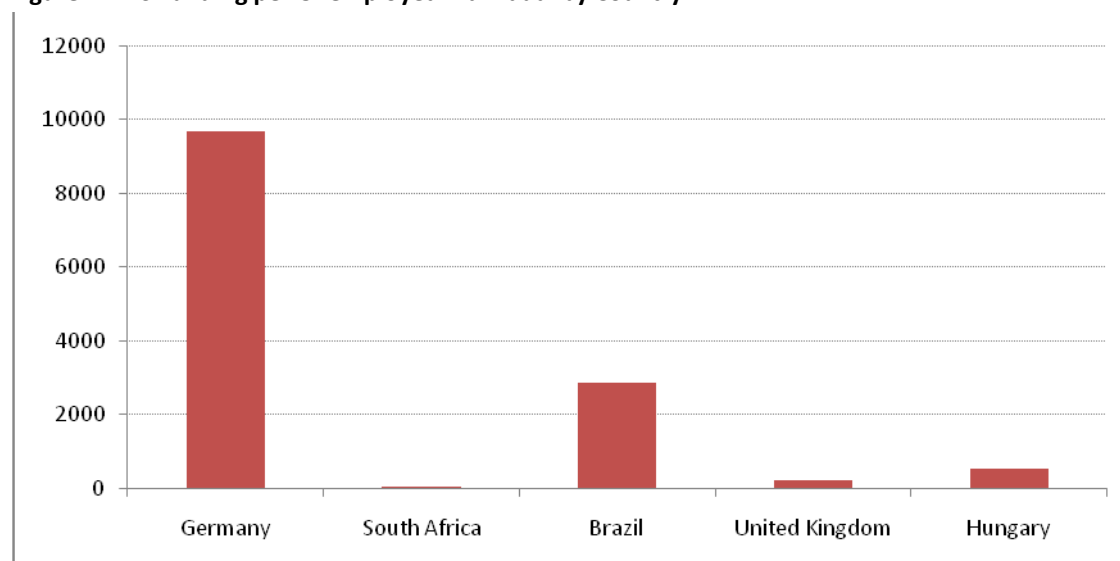
1. Data based on the ILO definition of unemployment for each country
2. Expenditure Estimates on PES are in nominal values of home currency.

The number of staff and centres in South Africa as compared to the number of individuals that the service may need to accommodate is considerably lower than many countries internationally.

Funding

The current budget for Department of Labour for employment services alone (without UIF and Workmen's Compensation) is in the region of R154m. This is compared to the budget for the UK (£3,555m for cost and administration costs and an additional £845m for outsourced services for job-seekers) and Hungary (300m euro). In the case of Germany and Brazil, it is a difficult to estimate the actual operational costs of the PES as the global figures include the disbursement of UI and other benefits and other labour market interventions such as training. Last year Germany spent over 36bn euro on all its services which is expected to rise to 56bn during this financial year while Brazil spends between \$11-12bn on employment services and UI. These figures are illustrated below:

Figure 7: PES Funding per Unemployed Individual by Country



Source: Funding details from the PES' of the respective countries

Notes:

1. Data based on the ILO definition of unemployment for each country
2. Expenditure Estimates on PES are in nominal values of home currency.

COST IMPLICATIONS FOR DEPARTMENT OF LABOUR

If the PES in South Africa is to provide the level of services offered elsewhere at a similar standard of effectiveness and efficiency there will be a need for a radical step up in funding. This would need to cover additional staff numbers (and possible reorganisation of existing staff), new facilities as well as the introduction of improved technology. Existing figures for the average cost of running a labour centre in South Africa can range from anything between R1m to R15m. Depending on the size, additional staffing and improved technology could increase this amount. Additional facilities may also be required. Massive recruitment of staff and investment in additional facilities would also be needed. The feasibility of this will need to be carefully considered particularly given issues such as the demand that this will place on the Department of Labour to find sufficient numbers of appropriately skilled personnel as well as challenges related to the costs of new facilities (even if other spaces are utilised).⁶¹

Recommendation

It is recommended that the provisions discussed above, together with many other provisions in the Bill, are not at an appropriate stage for presentation to Parliament, both from a policy and a drafting perspective.

The Regulatory Impact Assessment conducted on the ES Bill has been necessarily limited owing to time constraints imposed by the project. The Bill has not been subjected to consultation or options

⁶¹ Developing an appropriate Public Employment Service Model for South Africa, Singizi Consulting, February 2010

analysis as would be required under a full RIA process. We understand that the Department has engaged in further discussions with the Department of Home Affairs but we have not been briefed on these issues.

As noted, the Bill imposes significant administrative costs on the Department of Labour. It is recommended that the Department undertake a detailed costing exercise to assess the resource implications created by the proposals, and to assess its capacity to process and respond to the mandatory reporting requirements imposed on employers. Further clarity is needed about the extent to which mandatory reporting will be required (S11(2)), in order to enable an assessment of compliance costs and likely reporting volumes.

The Bill creates significant compliance costs and efficiency risks for employers, particularly in terms of mandatory reporting of vacancies, mandatory use of Public Employment Services, reporting on why candidates proposed by the Department have been rejected, and reporting on vacancies filled

It is important that the Department of Labour should be able to use the information generated by reporting requirements in a meaningful way, in order to ensure that the costs imposed on government and business are justified in terms of the realisation of policy objectives. In the absence of appropriate departmental capacity, there is a risk of administrative inefficiency resulting in delays to placements, and negative impacts on productivity and employment creation.

In conclusion, it is important to note that the draft Employment Services deals with both the provision of Public Employment Services through the Department of Labour and the regulation of Private Employment Service agencies. As we have noted, the proposed revision of Public Employment Services has considerable resource implications which require detailed costing and policy development.

On the other hand, the regulation of temporary employment services is an integral aspect of the regulation of the labour market and the implementation of requirements such as registration is needed to address the abuses associated with labour broking. For this reason, it would be an expeditious way forward for legislation dealing with the regulation of Private Employment Services to be enacted separately from the legislative proposals to reconstitute the Public Employment Services so it can come into force simultaneously with any changes to the Labour Relations Act and other laws dealing with atypical employment.

Chapter Five

Amendments in the LRA Related to the CCMA: A Cost- Benefit Analysis

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Introduction

The objective of this section of the report is to explain certain key amendments in the Labour Relations Amendment Bill 2010 related to the Commission for Conciliation, Mediation and Arbitration (CCMA) in a way that can be understood by a non-legal audience and to ascertain and estimate the economic impact (both potential costs and benefits) associated with the amendments. Each of the amendments is discussed in the following manner: Firstly, the actual amendment is shown as it appears in the Amendment Bill, with underlined words/sections indicating insertions in existing enactments Secondly, a brief explanation or interpretation of the amendment is given; and finally the associated costs and benefits are discussed.

LRA: Substitution of Section 65 of Act 66 of 1995

Section 65 of the principal Act is amended by the substitution for paragraph (c) of subsection (1) of the following paragraph:

“(c) the issue in dispute is one that a party has the right to refer to arbitration or to the Labour Court in terms of this Act or any other employment law;

I) EXPLANATION/INTERPRETATION

The amendment is designed to align the use of all employment laws and to broaden the scope of this provision, which is currently limited to the Labour Relations Act (LRA). It specifically means that the limits on the right to strike will be extended to include matters in other employment laws, such as overtime, shift allowance, skills development, and Sunday work regulations.

Strike action is considered the appropriate method of last resort if a dispute is one of mutual interest where conciliation was not successful and the employees are not providing an essential service. Data for the year 2009 indicates that about 80 percent of strikes in South Africa were triggered by wage disputes (Tokiso Dispute Settlement, 2009), although it may be ultimately difficult to isolate all those factors influencing strike activity. Discussions with the CCMA officials also confirmed that the key reason for strikes is a dispute about wages.

II) COSTS/ NEGATIVE CONSEQUENCES

While it was confirmed that the majority of strikes are triggered by a wage dispute, the CCMA indicated that there were often additional underlying demands that may contribute to the incidence, length and severity of a strike. It is the opinion of the CCMA officials that this amendment will not result in a significant decline in strike incidence as workers, they argue, may identify an additional legitimate reason to embark on a strike. For example, it has been reasoned that if a dispute about overtime arises, workers may embark on strike action and cite a wage dispute as the reason for the strike given that the amendment in its current form would prevent a strike based on overtime provisions.

This amendment may result in an increase in the operating budget of the CCMA, as the Commission may have to arbitrate cases that previously would have resulted in strike action if conciliation was unsuccessful. On the other hand, the view of the CCMA is that such a decline in strike activity (and hence an increase in their case-load) would not actually materialise. Ultimately then, the negative consequence is that of an increase in the financial and human resource commitments required of the CCMA as strike activity under this new proposed amendment could potentially increase. To reiterate though, the probability the CCMA attaches to strike action falling as a result of this change is low and the potential impact on the CCMA's operating budget would therefore also be minimal.

III) BENEFITS

In theory, the main benefit associated with this amendment will be a reduction in strike days lost and other negative consequences associated with industrial action.

According to the Department of Labour's Industrial Action 2008 Annual Report, 63 strikes occurred in 2008 and 497 436 working days were lost due to strike action (Department of Labour 2009). This means that an average of 7 896 working days were lost per strike. In 2008, disputes about wages, bonus and other compensation only accounted for 44 percent of strike action, as a Cosatu protest against increases in price levels and load shedding contributed to a relatively high number of working days lost due to broader socio-economic related strike action (Department of Labour 2009).

In 2007, 100 strikes occurred, but approximately 9,6 million working days were lost. The large number of working days lost was mainly driven by the Public Service strike in June 2007 which accounted for 8,2 million working days lost (Department of Labour 2009). As a result of the high number of working days lost, the average number of working days lost per strike was 95 289. Disputes about wages, bonus and other compensation accounted for 90 percent of the strike days lost in 2007.

In theory then, the possible benefit of this amendment would be to reduce the economic cost associated with strike action. Should strike action indeed decline following the proposed amendments, the benefit to the economy would relate to a drop in disruptions to output; possible higher levels of productivity; increase firm-level efficiency and ultimately fewer workdays lost to strike action. For example, if we use the average number of working days lost per strike in 2008 as a proxy, one less

strike as a result of the amendment will mean that the loss of 7 896 working days would have been averted.

As discussed above, however, this amendment is not expected to result in a significant decline in strike action. Experts have suggested that workers will identify a legitimate reason (such as a wage dispute for example) for their strike action if strike action concerning the main dispute/cause is no longer permitted.

LRA: Amendment of Section 115 of Act 66 of 1995

Section 115 of the principal Act is hereby amended by:

the insertion in subsection (1) of the following paragraph:

“(e) review any rules made in terms of this section at least every second year,...”

i) EXPLANATION/INTERPRETATION

This amendment places an obligation on the Governing Body of the CCMA to review its rules at least every two years.

ii) COSTS/NEGATIVE CONSEQUENCES

While it is not possible to accurately estimate the costs or negative consequences associated with this amendment in the absence of an actual rule change, the potential costs for all parties involved may be reflected on.

There are no significant costs associated with the actual process of reviewing the rules by the CCMA Governing Body. However, the internal processes of the CCMA may have to be adapted in response to the change in the rules of the Commission. For example, if the rule change requires the CCMA to perform an additional function or provide an additional service, additional human and financial resources will have to be allocated to this function/service, with an associated increase in the operating budget of the CCMA. A new rule could also impose additional costs on either the party referring a matter to the CCMA or on the respondent, or on both parties.

iii) BENEFITS

In the absence of any clear example of a possible rule change, the benefits associated with such a change cannot be calculated. In principle, however, the benefit of a rule change would operate at two levels – at the level of the CCMA itself, and secondly in terms of a national labour market impact. Hence, the benefit of the rule could be to improve the efficiency and effectiveness of the CCMA whilst also improving both equity and efficiency outcomes in the labour market. Ultimately though, a key generic benefit of such an amendment is that it enforces a more regular updating and assessment of

the CCMA's rules in relation to the changing dynamics of the labour market in particular and the economy in general.

LRA: Amendment of Section 115 of Act 66 of 1995

the insertion in subsection (2) of the following paragraph:

“(d) if asked, assist a party to serve any notice or document in respect of conciliation or arbitration proceedings in terms of this Act;

I) EXPLANATION/INTERPRETATION

At present, a party which refers a matter to the CCMA has to provide evidence that the referral form was served to the other party before the CCMA schedules a hearing (conciliation or con/arb). A referral form can be faxed or posted (using registered mail) to the respondent. The applicant has to attach proof of this (either a fax report-sheet or the receipt from the postal service) to the referral form. If an applicant (and in most cases the applicant is the employee) cannot provide evidence that the referral form has been served, the case is dismissed. This amendment proposes that the CCMA, on request, should assist a party to serve the referral form on the other party.

II) COSTS/ NEGATIVE CONSEQUENCES

The amendment implies that the CCMA can be asked to assist applicants to serve notice of referral on the respondents, (for example fax or post the referral form). In the 2009/2010 financial year, 5 397 cases (or 3.5 percent of total referrals) were rejected because no proof of service was submitted. The costs associated with the proposed amendment would be, in the first instance, the costs associated with faxing or posting the referral form, as well as the human resource costs associated with administrative or front-line staff providing the actual service at the offices of the CCMA. Given the relatively small number of cases, these costs are not expected to be significant, although it would necessitate an increase in the annual budget allocation made to the CCMA.

The amendment, however, also has additional implications in terms of the costs associated with resolving a matter. If a referred case proceeds to a conciliation or con/arb, and possibly then further to arbitration, this would have additional cost implications for the CCMA. The CCMA has estimated that, for the 2008/2009 financial year, it incurred an average cost of R2 334 per case referred, while the average cost incurred per case settled was R5 738 (CCMA 2009). This implies that, on average, the cost per case increases by R3 404 when a case proceeds beyond the referral stage. Average costs per case referred and settled are not available for the 2009/2010 financial year. The difference between the average costs of cases referred and settled, however, remains between R3 400 and R3 600 for the 2007 to 2009 period (CCMA 2009). If we assume a difference of R3 400, the CCMA's operating expenditure would have increased by R18,4 million if the 5 397 cases noted above proceeded pass the referral stage. This amount corresponds to 6.3 percent of the CCMA's 2009/2010 budget allocation.

The vast majority of applicants are employees and the CCMA has suggested that one of the unintended negative consequences of this amendment may be that the Commission is perceived to be biased in favour of employees.

III) BENEFIT

As noted above, in the 2009/2010 financial year, 5 397 or 3.5 percent of all referrals were rejected because there was no proof of service attached to the referral form. This means that these cases were not heard by the CCMA and the employees involved were effectively prevented from gaining access to social justice. The benefit associated with the proposed amendment is that these cases will be heard by the CCMA and the matter will hopefully be resolved by the Commission either at conciliation or arbitration. The amendment also potentially creates a more equitable and stable industrial relations system, in an economy where access to certain forms of communication may indeed be costly for low-earning workers.

LRA: Amendment of Section 115 of Act 66 of 1995

the insertion in subsection (2) of the following paragraph:

(e) if asked, assist a party to enforce an arbitration award that has been certified in terms of section 143(3);"

I) EXPLANATION/INTERPRETATION

If an employer fails to voluntarily comply with an arbitration award for compensation, the employee can approach the CCMA to certify the award. The applicant has to take the certified award to the Registrar of the Labour Court to issue a writ. It then becomes an order of the Labour Court and the employee has to ask the Sheriff of the Court to execute (serve on the employer). The Sheriff, however, requires a deposit to be paid before executing the award. This amendment proposes that the CCMA, if asked, has to assist an employee through paying the deposit required by the Sheriff.

II) COST/NEGATIVE CONSEQUENCES

In the 2009/2010 financial year, 6 989 awards were certified by the CCMA. No data exists on the share of these awards *not* enforced for those employees who could not afford to pay the deposit to the Sheriff of the Court.

This amendment will have significant cost implications for the CCMA as the Commission, if requested, will have to pay the deposit on behalf of the employee. It has been suggested, however, that the CCMA may be able to negotiate a reduction in the deposit with the Sheriff's Association. The CCMA has indicated that a figure of R85 per case was previously mentioned in discussions with the Sheriff's Association (as per e-mail communication with Eugene van Zuydam). If we assume, for example, that ten percent of certified awards were not enforced in 2009/2010 because the employee could not

afford the deposit, this means that the CCMA would have had to pay the deposit for 699 cases, resulting in a total cost of R59 415.

In addition, the CCMA has indicated that if it is asked to perform this function, a new department (with administrative staff, paralegals and other staff) will have to be established for this purpose. Overhead costs associated with operating this department will also have to be covered by the CCMA. The CCMA's Case Management System (CMS) will also have to be enhanced to capture the relevant information for each case where the CCMA is asked to assist the applicant.⁶² Overall, if the CCMA is required by law to perform this function, its budget (in other words the funds allocated to the Commission through the national budget) will have to increase significantly. It should be noted here that the CCMA may be able to recoup most of the costs associated with this amendment by adding the unit cost of assisting an employee in this way to the award amount that has to be paid by the employer.

Perhaps the biggest unintended cost and consequence of such a proposed amendment is that the CCMA may not be able to optimally means-test applicants requesting a reprieve from the deposit payment. This is a standard moral hazard problem, which may result in the CCMA underwriting the deposits of more individuals than only those who truly cannot afford to pay.

Finally, an unintended negative consequence highlighted by the CCMA is that the Commission may be perceived as being prejudiced in favour of employees if it assists workers in the manner proposed. However, there is precedent for claimants being assisted with enforcement. Section 27(2)(b) of the Maintenance Act, 1998 allows a maintenance officer or investigator to take the prescribed steps to facilitate a claimant for maintenance executing a warrant for unpaid maintenance amounts.

III) BENEFITS

In 2009/2010, 6 989 awards were certified by the CCMA. While no data is available on the proportion of the 6 989 awards that were not enforced because the employee was unable to pay the deposit to the Sheriff of the Court, the proposed amendment means that employees will no longer be prevented from receiving compensation due to them if they cannot afford to pay the Sheriff's deposit. It can be argued that if an employee does not receive the award compensation it undermines their right to social justice. This amendment therefore promotes workers' access to social justice, particularly for the most vulnerable workers.

In addition though, the benefit of this amendment can be illustrated, again assuming that ten percent of certified awards (thus, 699 awards) were not enforced due to the fact that the employee could not afford the Sheriff's deposit. In 2009/2010, the average arbitration compensation amount was R49 168.79 (figures supplied by the CCMA). If we assume the enforcement of 699 awards as a

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The CCMA operates an electronic Case Management System (CMS) which captures details for each case referred to the CCMA. As jurisdictional cases progress through the dispute resolution processes at the CCMA, a range of information is captured for each case during each stage of the process.

consequence of the proposed amendment, the total welfare gain associated would have been R34.4 million. While the 699 individuals would have received an average amount of R49 168.79 each, this increase in income as a consequence of the amendment is a clear, positive welfare benefit to both those individuals and the households they reside in.

LRA: Amendment of Section 115 of Act 66 of 1995

the insertion in sub-section (2A) of the following paragraph:

“(m) the consequences for any party to conciliation or arbitration proceedings for not attending those proceedings; and”

I) EXPLANATION/INTERPRETATION

The insertion of the above means that the CCMA may make rules to address the non-attendance of any party to conciliations and arbitrations conducted by the CCMA. This implies that if either party (employee or employer) is not present at a conciliation or an arbitration hearing, the CCMA may impose the consequences as prescribed in the rules. The exact nature of these consequences is not prescribed in the amendment. This amendment therefore aims to enable the Governing Body of the CCMA to make rules dealing with non-attendance by both employees and employers at conciliation and arbitration hearings. The need for this amendment arose from a ruling by the Labour Appeal Court that a rule that a dispute referred by an employee was struck from the roll if the employee did not attend the conciliation was invalid, because the CCMA did not have the power to make such a rule. The implication of this ruling is that an employee may disregard conciliation proceedings and then refer the matter to arbitration.

In 2009/2010, non-attendance by the applicant, respondent or both parties occurred at 15 738 scheduled conciliation hearings. In 20 percent of the events, both parties did not attend the conciliation, while non-attendance by the applicant only accounted for 26 percent of the events, and non-attendance by the respondent accounted for more than 54 percent of the events. If either the applicant or both parties do not attend the conciliation hearing, the case is dismissed. If the respondent does not attend the hearing, the conciliation is completed and the outcome is recorded as “not settled”. This means that the applicant can refer the matter for arbitration.

In the same financial year, non-attendance occurred at 9 840 scheduled arbitration hearings. Again, in 20 percent of the cases, both parties did not attend the arbitration hearing, while in 38 percent of the cases non-attendance was by the applicant and in 42 percent of the events, the respondent did not attend. If either the applicant or both parties do not attend the hearing, the arbitration case is dismissed. If the respondent does not attend, a default award is issued in favour of the applicant.

The data therefore suggests that while non-attendance at arbitrations is relatively equally distributed between the applicants and the respondents, at conciliation hearings non-attendance by respondents

only is more than double that of applicants only. It has been suggested that respondents (mostly employers) often do not attend conciliations when a matter has been scheduled for con-arb as they do not want to incur all the costs associated (including preparation for a matter and bringing witnesses to the hearing) if they are unsure whether the matter will be settled at conciliation or will proceed to arbitration. (Witnesses are only allowed to be called at arbitrations.)

ii) **COST/NEGATIVE CONSEQUENCES**

At this stage the actual costs associated with the rule cannot be estimated as it will depend on the nature of the rule set by the CCMA and how it is going to be enforced. The potential sources of costs for the different parties, however, can be identified here.

As discussed earlier, the costs associated with the actual process of reviewing and creating rules by the CCMA Governing Body is not significant. However, the internal processes of the CCMA may have to be adapted in response to the change in the rules of the Commission. The CCMA may therefore have to, for example, appoint additional staff to implement the rule or consequence associated with a rule. This will again have an impact on the operating budget of the CCMA and could mean an increase in the budget allocation to the Commission.

The rule would also impose costs on the parties who do not attend the hearing, and again this will depend on the nature of the consequence for the parties. In addition, employers/respondents may incur additional costs if they have to prepare for a con-arb (including preparing and bringing witnesses) even though the matter may be settled at conciliation.

iii) **BENEFIT**

As indicated above, if the applicant or both parties do not attend a hearing, the case is dismissed. This means that in 2009/2010, 7 219 cases were dismissed as a result of non-attendance at conciliation and 5 673 cases were dismissed as a result of non-attendance at an arbitration hearing (CCMA, 2010). This implies that for a total number of 12 892 cases which did not actually take place, a venue was reserved and a Commissioner was allocated to hear the case. If the rule proposed by the amendment decreases the non-attendance by the applicant or both parties, the CCMA would benefit from the decrease in the number of cases dismissed due to non-attendance as the financial and human resource wastage associated with the dismissal of these cases will be avoided.

It is undesirable that employees who refer disputes to the CCMA are able to ignore conciliation proceedings. It has been shown that respondents/employers are more likely not to attend conciliations, thereby depriving vulnerable workers access to swift social justice. In 2009/2010, the respondent did not attend the conciliation hearing in 8 519 instances. In these cases, a conciliation certificate is issued and the outcome is indicated as “not settled”. The applicant can then refer the matter to arbitration, but this means that a second event has to be scheduled at a later date, thereby postponing the employee’s opportunity to have his/her case heard. This amendment will therefore promote access to speedier dispute resolution, particularly for vulnerable workers. Overall the

benefit of the proposed amendment will be improved efficiency of dispute resolution in the South African labour market.

LRA: Amendment of Section 115 of Act

Section 115 of the principal Act is hereby amended by –

(f) *the substitution for sub-section (3) of the following sub-section:*

*“(3) **[If asked,] [t]**The Commission may provide employees, employers, registered trade unions, registered employers’ organisations, federations of trade unions, federations of employers’ organisations or councils with advice or training relating to the primary objects of this Act or any other employment law, including but not limited to –”.*

I) EXPLANATION/INTERPRETATION

Currently, the CCMA can be asked to provide training or assistance to stakeholders on the provisions of the LRA. This amendment extends the CCMA's function of providing training and assistance to include provisions of all employment laws. The CCMA can now, for example be asked to provide training or assistance on laws such as the Basic Conditions of Employment Act (BCEA), the Skills Development Act (SDA), Employment Equity Act (EEA), and the Occupational Health and Safety Act.

The manager of the CCMA’s Dispute Management and Prevention Unit has indicated that the Unit currently provides training to the users of the CCMA on issues within their current jurisdiction, namely the LRA. They do, however, receive regular requests for training on unfair discrimination, particularly on sexual harassment. For this, they utilise slide presentations which provide a very basic overview of the provisions in Chapter Two of the EEA and the Code on Sexual Harassment.

II) COSTS/NEGATIVE CONSEQUENCES

The amendment means that the CCMA may provide training outside their current jurisdiction and capacity. The costs associated with the amendment relates to additional training of commissioners (who will provide the training and assistance to CCMA users) as well as increases in the number of administrative staff in the CCMA's Dispute Management and Preventions (DM&P) Unit which carry out the administrative tasks associated with the provision of training and assistance. Awareness campaigns will also have to be designed and implemented to inform the users of the CCMA that the Commission can now provide training or facilitate training on additional issues if asked. Expanding the CCMA's capacity to train will thus have a significant impact on the budget of the DM&P Unit. It has been estimated that the Unit's current budget of R2 million may have to increase by as much as 40 percent (or R800 000).

If the CCMA is asked to provide training outside their current jurisdiction and capacity, the Commission also envisages that it may have to form partnerships with external organisations to provide the requested training or advice on specific issues. These organisations can range from civil society organisations (for example, to provide training on issues pertaining to occupational health and safety) to the Department of Labour (for example, to provide training on the provisions of Sectoral Determinations). This will have cost implications for these organisations in terms of their human resources that will have to be allocated to assisting the CCMA for this purpose. In addition, particularly if non-governmental organisations are involved, the CCMA will have to compensate these organisations for their assistance, constituting another potential cost for the CCMA.

The potential increase in the case-load of the CCMA – as workers become more aware and knowledgeable about their rights in the workplace as a result of the expansion in the provision of training and advice – will have significant cost implications for the Commission. It has been suggested that the CCMA could expect an increase in the number of referrals of up to ten percent in response to the implementation of the provision of this amendment. Using data from 2009/2010, we attempt to illustrate the budgetary implications of such an increase in case-load. In 2009/2010 153,657 cases were referred to the CCMA – a ten percent increase thus implies that more than 15 000 additional cases would have been referred to the CCMA. The CCMA estimates that in the 2008/2009 financial year the average cost per case referred was R2 334. Using this cost as a proxy for the 2009/2010 financial year, it means that if 15 000 additional cases were referred to the CCMA, the Commission's total expenditure on cases referred would have increased by more than R35 million. As discussed previously, the average cost per case increases by approximately R3 400 when a case proceeds beyond the referral stage. If we assume that approximately 20 percent of the referred cases would have been outside the jurisdiction of the CCMA (based on the 2009/2010 estimates), the CCMA would have had to hear 12 000 additional cases, which implies a further increase of R40.8 million in the CCMA's expenditure. Overall then, as a result of this amendment, the CCMA would have required an additional budget allocation of approximately R75 million, which corresponds to 26 percent of the Commission's 2009/2010 budget allocation.

III) BENEFITS

The proposed amendment will contribute significantly to realising access to social justice as well as access to the relevant dispute resolution institutions. Workers will become more aware and knowledgeable about their rights in the workplace and how to pursue these rights. In the medium to longer term, this should ultimately result in improved industrial relations in the workplace, and improved efficiency and equity in the labour market.

In addition, it has been suggested that the CCMA could expect an increase of up to ten percent in the number of referrals as a result of workers' increased knowledge and awareness of their rights. As shown above, this implies an increase of 12 000 additional cases heard by the CCMA. Put differently, this means that 12 000 additional vulnerable workers will be afforded the opportunity to have their disputes heard by the CCMA – a clear welfare benefit associated with this amendment.

LRA: Amendment of Section 143 of Act 66 of 195

the insertion after subsection (3) of the following subsection:

“(3A) An arbitration award certified in terms of subsection (3) that orders a party to pay a sum of money has the status of a writ of execution of –

(a) the Magistrate’s Court, to the extent that the award is in respect of an amount within the jurisdiction of the Magistrates Court;

(b) the High Court, to the extent that the award is in respect of a greater amount.”

I) EXPLANATION/INTERPRETATION

This objective of this amendment is to facilitate the enforcement of CCMA arbitration awards by changing the status of these awards and removing the need for a writ to be issued by the Labour Court. This means that an individual will no longer have to make an application to the Labour Court to issue an order if the employer fails to pay the compensation stipulated in an arbitration award. A further implication of the amendment is that the fees for the execution of the award will be set at the Magistrate Courts' tariff rather than the High Court tariff if the amount of compensation is within the former's jurisdiction. Currently, claims of up to R100 000 may be brought to the Magistrate's Court.

II) COSTS/ NEGATIVE CONSEQUENCES

Removing the need for an order to be issued by the Labour Court before an award can be executed does not have any cost implications. It will, in fact, lead to a saving of costs for the Labour Court.

Data obtained from the CCMA shows that the average arbitration award compensation amount was R49 168.79 in the 2009/2010 financial year and R50 587.97 for the first few months of the current financial year. It is very difficult to obtain detailed information on awards that had to be enforced and the average compensation amounts of these awards can therefore not be estimated. The data on average award compensation amounts, however, does suggest that the average award compensation amount falls well below the maximum amount set for claims that can be brought to the Magistrate's Court. The assumption can therefore be made that if this amendment is implemented, the majority of awards would have the status of a writ of execution of the Magistrate's Court and not the High Court.

III) BENEFIT

Removing the need for the employee to approach the Labour Court to issue a writ will be a considerable saving to both the employee and the Labour Court in terms of the time and costs associated with the process. After an award has been certified by the CCMA, the employee will be able to approach the Sheriff of the Court directly to execute the order.

As indicated above, the average arbitration award amount falls far below the ceiling amount set for claims that can be brought in the Magistrate's Court. There are significant savings associated with the fact that the majority of awards will have the status of a Magistrate's Court order. Currently all arbitration awards which have to be enforced have the status of an order of the Labour Court, which means that the Sheriff's tariff applicable to the High Court applies. According to this amendment the Sheriff's fees in respect of claims for less than R 100 000 will be set at the level of the Magistrate's Court, which constitutes a cost saving for the employee.⁶³

In 2009/2010 a total of 24 850 arbitration awards were rendered and 28 percent or 6 989 of these awards were certified by the CCMA. While no data exists on whether these awards were eventually enforced, some experts have suggested that approaching the Labour Court can be very intimidating to particularly vulnerable workers and some of these workers may refrain from taking their certified awards to the Labour Court. In addition, vulnerable workers may not be able to afford the Sheriff of the High Court's deposit. To illustrate the potential financial benefit associated with this amendment we again assume that ten percent of certified awards (thus, 699 awards) were not enforced due to the fact that the employee was unable to approach the Labour Court or could not afford the Sheriff of the Labour Court's deposit. In 2009/2010, as noted above, the average arbitration compensation amount was R49 168.79 (figures supplied by the CCMA). If we assume the enforcement of 699 awards and replicating the results above, the total welfare gain associated with the amendment would have been R34.4 million. While the 699 individuals would have received an average amount of R49 168.79 each, the households attached to these individuals would also have benefited from the increase in their household income.

The amendment will again improve access to social justice for vulnerable workers by facilitating quicker and easier enforcement of arbitration awards.

⁶³

We have been unable to verify the exact amounts of the deposits involved. In addition, we have also been given conflicting evidence about whether the deposit is a fixed amount or a percentage of the award compensation amount. Utilising the tariffs published in the Magistrates Court Rules and the Uniform Rules of Court, we attempt to illustrate the potential impact of the proposed amendment using a hypothetical case where an applicant has to utilise the services of the Sheriff to serve a summons for payment of an arbitration award to an employer who lives 6 km from the Court. The applicable fees for an order of the Magistrates Court and for an order of the High/Labour Court are shown below. If the award amount is less than R100 000 the amendment proposes that the tariffs of the Magistrate Court apply. This means that the tariff to serve the summons will be R25 instead of R40. In addition, if summons is served within a 6 km radius the cost related to that is free, while the Labour/High Court tariff is set at R3 per kilometre. For our hypothetical case, the saving associated with the Magistrate Court tariffs being applicable is more than 50 percent.

	Magistrate Court	Labour/High Court
Registration of Document	R 5	R 5
Serving of summons	R 25	R 40
Travel fee	Free within 6km radius	R3 a kilometre
Total	R 30	R45 + (R3*6km) = R63
Saving	R 33	

LRA: Substitution of Section 144 of Act 66 of 1995

The following section is substituted for section 144 of the principal Act:

“144 Variation and rescission of certificates, arbitration awards and rulings

Any commissioner who has issued a certificate in terms of section 135, an arbitration award or ruling or any other commissioner appointed by the director for that purpose, may on that commissioner's own accord or, on the application of any affected party, vary or rescind an arbitration award or ruling –

- (a) erroneously sought or erroneously made in the absence of any party affected by that award;*
- (b) in which there is an ambiguity, or an obvious error or omission, but only to the extent of that ambiguity, error or omission; **[or]***
- (c) granted as a result of a mistake common to the parties to the proceedings; or*
- (d) if there is good cause on any other ground for the award or ruling to be varied or rescinded.”*

I) EXPLANATION/INTERPRETATION

Currently, a party has to approach the Labour Court for a variation or rescission if there is a mistake on the certificate issued at the end of a conciliation hearing. This amendment extends the power of CCMA Commissioners to rescind or change conciliation certificates, and not only arbitration awards as is currently the case. The grounds on which certificates, rulings and arbitration awards can be varied or rescinded are also extended to include “good cause”.

II) COSTS

The most common mistake on conciliation certificates involves the incorrect spelling of one of the party's names. In terms of the proposed amendment, this mistake can now be rectified by the CCMA and the party (or parties) will no longer have to apply for a rescission or a variation of the certificate by the Labour Court.

In theory, this amendment will result in costs for the CCMA, as there will be a small increase in the number of rescissions that the CCMA will have to perform. While it is very difficult to obtain accurate statistics from the Labour Court, the CCMA has provided data which suggests that only 38 conciliation cases have been taken on review at the Labour Court between 1 April 2009 and the end of July 2010. Of the total, 15 cases were out of the jurisdiction of the CCMA, implying that not more than 23 of the cases related to mistakes on the conciliation certificate. Due to the small number of cases the staff requirements will be very small and the potential impact on the CCMA's operating budget will therefore be inconsequential.

III) BENEFITS

The proposed amendment will improve the efficiency of the dispute resolution process. Approaching the Labour Court to vary or rescind a certificate is a costly and time consuming process, which can also be very intimidating to vulnerable workers. While no exact data is available on the average length of the current process, the amendment will mean that an applicant can approach the CCMA to rescind the certificate which will be a much less time-consuming process. Ultimately, whilst the absolute number of effected cases is insignificant, the benefit offered to each individual case, through this amendment, is substantial. Indeed, the welfare and efficiency gains associated with this amendment to the individual employer and worker should not be underestimated.

LRA: Amendment of Section 147 of Act 66 of 195

Section 147 of the principal Act is amended by insertion after subsection (6) of the following subsection:

“(6A) Despite sub-section (6), the Commission must appoint a commissioner to resolve the dispute in terms of this Act if

(a) the employee is required to pay any part of the cost of the private dispute resolution procedures; or

(b) the person or body appointed to resolve the dispute is not independent of the employer.”

I) EXPLANATION/INTERPRETATION

Certain employers have required their employees in their contracts of employment, to agree to share the costs of a private arbitration in the case of a dispute. While these clauses are not enforceable and the CCMA is entitled to hear these disputes, the insertion above clarifies 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 if the arbitrator is not independent of the employer.

II) COSTS

The costs associated with the amendment relate to the CCMA's additional case-load as a result of more cases being referred to the Commission. Evidence suggests that private dispute resolution currently accounts for less than one percent of statutory disputes each year (Tokiso Dispute Resolution, 2009:20), whilst the absolute number of cases referred to private dispute resolution is not available. In 2008/09, a total of 173 866 cases were referred to the CCMA and Bargaining Councils combined (Tokiso Dispute Resolution, 2009:21). If we assume one percent of these disputes as a proxy for cases referred to private dispute resolution, it means that an estimated 17 387 cases were referred to private dispute resolution in 2008/09. If we assume that approximately 50 percent of these cases would be referred to the CCMA in terms of the amendment, the Commission would receive 8 693 additional referrals. Assuming that 80 percent of these cases had been correctly referred and were within the jurisdiction of the CCMA, the Commission would have had to resolve 6 955 additional

disputes. At an estimated average cost of R5 738 per case (see CCMA, 2009), this means that the operating budget of the CCMA would have had to increase by almost R40 million to handle the estimated number of additional cases. This constitutes 13.67 percent of the CCMA's current budget allocation and a substantial increase on the amount allocated to the CCMA through the national budget.

III) BENEFITS

No data exists on the number of disputes that are not heard because workers cannot afford to pay the costs of private arbitration. However, if workers are required to pay a fee that they cannot afford, they are being denied their right to have their dispute heard. This amendment will therefore benefit vulnerable workers who generally cannot afford private dispute resolution fees.

Again, the potential benefit associated with the amendment can be illustrated by utilising the same data and argument presented above. If we assume that one percent of statutory disputes are referred to private dispute resolution agencies, and that 50 percent of these disputes would be referred to the CCMA in terms of this amendment, the CCMA would have had to hear 6 955 additional cases in 2008/2009. This means that 6 955 workers would have benefited from the free and efficient access to dispute resolution provided by the CCMA.

LRA: Substitution of Section 150 of Act 66 of 1995

The following section is substituted for section 150 of the principal Act:

- “150. Commission may appoint commissioner to conciliate in the public interest**
- (1) The Commission may appoint a commissioner to attempt to resolve a dispute by conciliation whether or not that dispute has been referred to the Commission or a bargaining council –
(a) at the request of the parties; or
(b) if there is no request, if the Director believes it is in the public interest to do so.
 - (2) Before appointing a conciliator in terms of this section, the Commission must consult with –
(a) the parties to the dispute; and
(b) the secretary of a bargaining council with jurisdiction over the parties to the dispute.
 - (3) The Director may appoint one or more Commissioners to conciliate the dispute, who may include a person who has already conciliated in respect of that dispute.
 - (4) In addition, the Director may appoint to assist in conciliating –
(a) one person drawn from a list of at least five names submitted by the representatives of organized labour on the governing body of the Commission; and

(b)one person drawn from a list of at least five names submitted by the representatives of organised business on the governing body of the Commission.

- (5) Unless the parties agree otherwise, the appointment of a conciliator in terms of subsection (4) does not provide any entitlement to strike or lock-out that any party to the dispute may have acquired in terms of Chapter IV.”

I) EXPLANATION

The aim of these amendments is to extend the power of the CCMA to intervene to resolve disputes in the public interest. Currently, the CCMA can only intervene if both parties consent or if the Commission is requested to intervene. These amendments propose that the CCMA can intervene in disputes of public interest without being asked and after the Director of the CCMA has consulted with the parties involved.

Disputes in the public interest are generally classified as “red line matters” and include disputes which in the event of industrial action could affect an entire province; the whole country; or is a dispute in a strategic sector; a dispute relating to the dismissal or unfair labour practice involving a high profile individual.

II) COSTS/NEGATIVE CONSEQUENCES

The CCMA has confirmed that, while the Commission can currently only intervene in cases of public interest as described above when both parties consent, the CCMA's offer of assistance is usually accepted by both parties. This suggests that the amendment will not result in any significant increase in the number of cases in which the CCMA can/will intervene. The amendment simply codifies what has already been general practice within the CCMA.

Whilst difficult to quantify, the proposal that the Director may appoint additional persons to assist may result in higher costs to the CCMA if these persons have to be compensated. It has been highlighted that due to the nature of the mediation process in red line matters, a larger mediation team can prolong the process if the different mediators have different approaches to mediation.

It has also been noted that it may become difficult at a regional level to identify exactly when a dispute is a red line matter. This may result in the CCMA becoming involved in more cases at regional level, with the associate cost implications for the Commission.

III) BENEFIT

It is very difficult to quantify the monetary benefits associated with the CCMA's intervention in “red line matters.” Due to the nature of these matters, the CCMA's intervention and resultant contribution to the resolution of these matters have a very large public good benefit to the economy and the country.

For example, if all Eskom staff embarked on strike action for only one hour during the Soccer World Cup in June/July 2010, apart from the obvious impact in terms of the event, it would have taken two weeks to restore power to the country completely, as the process had to be very carefully synchronised. Large industrial firms would have suffered damages to plants and equipment during the period of interrupted electricity supply. In addition, in 2009 the CCMA's intervention in the strikes at the 2010 Soccer World Cup construction sites limited the number of workdays lost and thus prevented serious delays in the completion of these projects.

LRA: Amendment of Section 158 of Act 66 of 195

(f) the insertion after section (1A) of the following subsection:

“(1B) No decision may be taken on review in respect of conciliation or arbitration proceedings under the auspices of the Commission or any bargaining council with jurisdiction in respect of a matter contemplated in section 65(1)(c) until the dispute has been determined by the Commission or a bargaining council.”

I) EXPLANATION/INTERPRETATION

Currently, decisions made during conciliation and arbitration hearings can be taken on review to the Labour Court during the arbitration process. The amendment proposes that these decisions can only be reviewed after the conclusion of the arbitration. The objective of the amendment is to prevent the obstructive use of piece-meal reviews to delay dispute resolution processes. In addition, it has been claimed that the current legislation engenders an incentive to delay proceedings by taking a decision on review during the arbitration process, with the aim of increasing number of billable hours. The amendment therefore also aims to address this practice.

II) COSTS/ NEGATIVE CONSEQUENCES

While no data is available on reviews taken during arbitration processes, the CCMA has indicated that the proposed amendment will only affect a small number of cases. The amendment does not impose any significant costs on the CCMA.

There may, however, be additional costs for the party (either employee or employer) that now has to wait until the end of the arbitration process to refer a decision for review to the Labour Court. If allowed by the Commissioner, a party can be represented by a legal practitioner at the arbitration process. In addition, a party has to be represented by a legal practitioner in the Labour Court. A delay in taking a decision on review to the Labour Court might therefore result in either or both parties having to employ a legal practitioner for a longer period and therefore being liable for higher legal fees with this proposed amendment. Apart from the fees associated with the preparation of documents and so on, the actual fee for representation at the Court can be between R12 000 and R26 000 per day.⁶⁴ Ultimately then, the key negative consequence of this proposed amendment would

⁶⁴ Fee estimates obtained from a legal expert.

be the additional costs associated with the time of a legal practitioners and this cost would only occur in cases in which a review would dispose of the matter in its entirety which is a relatively rare phenomenon.

III) BENEFIT

As noted above, the aim of the proposed amendment is to prevent the delay of dispute resolution processes at the CCMA. Overall, this amendment will benefit the CCMA, applicants and respondents as it will promote the ability of the CCMA to provide cost-effective and speedy dispute resolution services.

No data exists on reviews taken during arbitrations and the CCMA has indicated that this amendment will apply to an insignificant number of cases, implying that the benefit associated with this amendment will be limited. However, if we assume that this amendment will apply to ten cases annually, the benefit to the parties can be illustrated as follows. The benefit to the CCMA relates to the fact that these ten cases may proceed without delay and may be concluded in a single hearing, even if the matter is subsequently taken on review. The CCMA estimates that the average cost per event (*not case*) is R1 500. If we assume that these ten matters will each be dealt with in a single event rather than two events, the CCMA will save the costs related to ten events, namely R15 000. Hence, whilst the benefit is trivial, it is non-zero.

The benefit to both the employee and employer parties relate to the fact that they may only have to attend a single event, which implies saving in terms of time and direct as well as opportunity costs related to possibly having to take time off work and having to travel the CCMA offices.

LRA: Insertion of Section 187A in Act 66 of 1995

“187A Limitation on application of Chapter VIII”

- (1) Except in so far as an automatically unfair dismissal is concerned, the provisions of Chapter VIII listed in subsection (2) do not apply to an employee earning in excess of an amount determined from time to time by the Minister by notice in the Gazette.
- (2) The provisions of Chapter VIII that do not apply to employees contemplated in subsection (1) are: sections 185, 186, 188 and 189, 189A, and 197.

I) EXPLANATION/INTERPRETATION

This amendment seeks to exclude high-earning employees from the right to refer their labour disputes (except automatically unfair dismissals) to the CCMA. It also proposes that the Minister of Labour can prescribe an earnings threshold to be used to exclude employees. According to the explanatory memorandum, this amendment will ensure improved access by vulnerable workers to the CCMA through excluding employees who can afford to approach the court. Specifically, the amendment seeks to address the delays caused by cases brought to the CCMA by high-earning employees.

ii) COSTS/ NEGATIVE CONSEQUENCES

In order to estimate both the potential costs (and benefits) associated with this amendment, some estimate of the earnings threshold has to be utilised. The Basic Conditions of Employment Act, 1997 (BCEA), prescribes an earnings threshold of R149 736 a year or R12 478 a month as the level above which overtime provisions do not apply. This threshold can therefore be utilised as a potential estimate of a threshold that could be feasibly applied by the CCMA. Utilising the earnings data in the 2007 September Labour Force Survey, the number of workers with earnings above the threshold can be estimated. It should be noted here that only about 70 percent of the workforce falls within the CCMA's jurisdiction, with the rest subject to dispute resolution by bargaining councils (Bhorat & Van Der Westhuizen 2009). It is a very cumbersome and time-consuming exercise to identify the workers in the LFS who are possibly covered by Bargaining Council agreements and those who fall within the jurisdiction of the CCMA. The total number of employed (13 million workers) is therefore used as an estimate for the potential "CCMA client base".

If the earnings level is set at R12 478 a month, two million workers will potentially be excluded from referring cases to the CCMA. However, this population of two million high-earning individuals without potential access to the CCMA is, as we show below, a significant over-statement of the population of affected high-wage employees. This is evident in that CCMA data suggests that high wage employees are heavily under-represented in the cases presented before the CCMA.

Specifically, Macun et al (2008) analysed a sample of CCMA arbitration awards from unfair dismissal and unfair labour practice cases and found that the mean wages of applicants in their limited sample was R2 709.42. This is considerably lower than the earning threshold prescribed in the BCEA. Table 8 provides the breakdown of the number of applicants by wage bands. It is clear that the majority (90 percent) of applicants earned less than R5 000 a month, with only 3.6 percent of applicants earning more than R10 000 a month. It can therefore be assumed that less than 3.6 percent of the full sample of CCMA applicants earned more than the BCEA threshold amount.

Table 8: Number of Applicants by Income Category

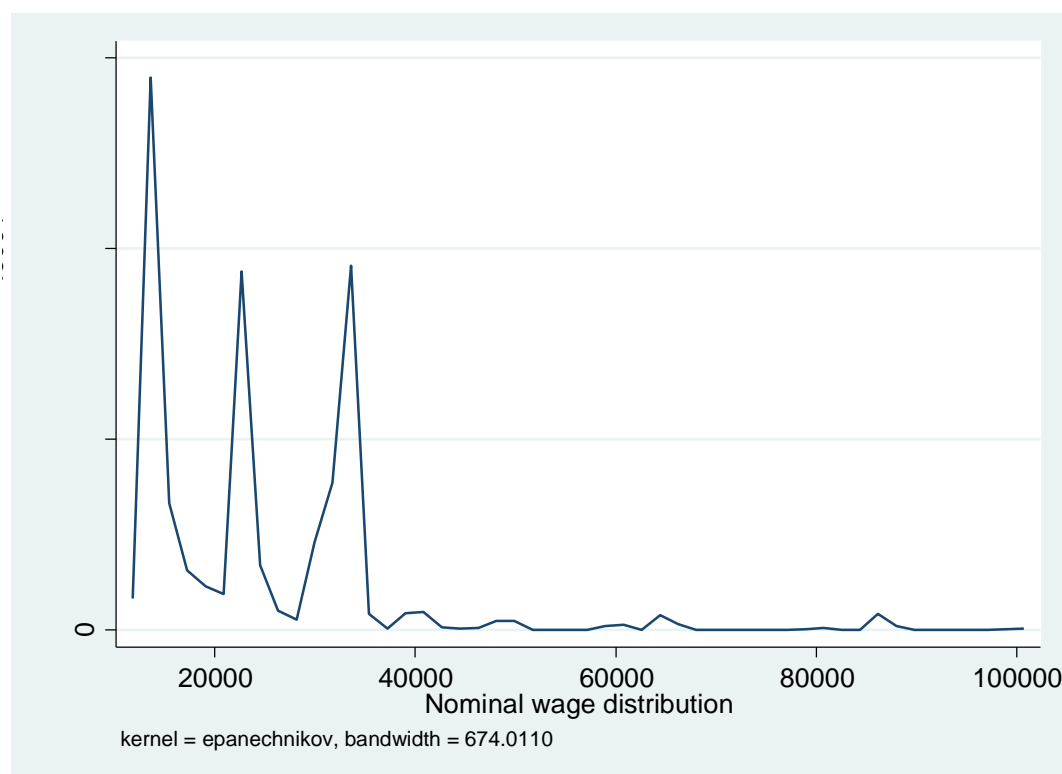
Monthly Income	No	Percent
R0-R1 000	198	31.2
R1 001-R5 000	373	58.7
R5 001-R10 000	41	6.5
R10 001-R20 000	14	2.2
R20 001-R30 000	7	1.1
R30 000 and higher	2	0.3
Total	635	100.0

Source: Macun et al (2008)

Ultimately then, whilst a large population (at two million) of high wage workers will be in principle deleteriously affected by the proposed amendment – through forced exclusion – the data suggests that only a minority of these workers do in fact utilise the free services of the CCMA.

While the evidence presented above suggests that a small number of cases will be affected by the amendment, the cost implications for the employees involved would be potentially significant. Figure 8 presents the wage distribution for the workers who would potentially be excluded from referring cases to the CCMA if the earnings threshold prescribed in the BCEA is applied. The data suggests that the majority of these employees earn less than R40 000 a month, with a mean wage of R24 315 and median wage of R23 000 a month.

Figure 8: Kernel Density Distribution of Nominal Wages of “Excluded” Employees, South African 2007



Source: Own Calculations from LFS 2007 September

If these employees are denied access to the CCMA, they will have to refer their cases to the Labour Court. While it is difficult to accurately estimate the average cost associated with referring a labour dispute to the Labour Court, estimates obtained from a legal expert indicate that the fee for drafting an application to the Court is approximately R7 000, while the fee for actual representation in the Court will be R26 000 for the first day and R12 000 per day for any subsequent days. A single day in the Labour Court will therefore be more than the mean wage of the average worker who will no longer be able to refer a matter to the CCMA if the BCEA earnings threshold is applied.

It has been suggested by the CCMA that this earnings threshold should preferably be set at a very high level, at between R600 000 and R1 million a year (or between R50 000 and R83 333 a month). The evidence from the sample of CCMA awards shows that only 0.3 percent of applicants in the limited sample had an earnings level of R30 000 a month or higher. Again, as illustrated above, the amendment will have significant cost implications for these employees.

The Constitution of South Africa, however, affords every person the right to fair labour practices. It has been suggested that to prohibit certain employees from referring cases to the CCMA based on their level of earnings, is a violation of this right. The amendment is based on the premise that excluding high-earning employees can be justified as reasonable limitation on the right to fair labour practices because these employees are generally highly employable and are in a position to negotiate arbitration clauses into their contracts of employment. Alternative options to the amendment have been recommended, which entail charging the higher-earning employees a fee when they refer a case to the CCMA. This fee can be calculated purely on a cost-recovery basis to enable the CCMA to recoup the expenses associated with the case, or alternatively, can be set at a fixed percentage of the referring employee's monthly salary. The challenge, however, of identifying an appropriate earnings level to be used as a threshold remains.

III) **BENEFIT**

Cases referred to the CCMA by higher-paid employees are usually more complex and as a result take longer to resolve than an average case referred to the CCMA. When these cases proceed to arbitration and legal representation is allowed, it has also been claimed that lawyers attempt to delay cases unnecessarily in order to inflate their billable hours. Informed evidence also suggests that these cases can take between five and twenty days to resolve, while the average case takes about half-a-day to finalise. If higher-earning employees are no longer permitted to refer cases to the CCMA, the CCMA will be able to redirect their resources (both human and financial) to cases involving vulnerable workers, constituting a clear benefit to the CCMA and the more vulnerable workers.

Evidence from an actual sample of CCMA awards suggest that, depending on the level of the earnings threshold, between 0.3 to 3.6 percent of cases will no longer be referred to the CCMA. In terms of the total case-load for 2009/2010, this will result in a decline of between 358 and 4 300 cases heard by the CCMA. The CCMA, however, has suggested that in reality this amendment will only apply to a maximum of ten cases a year. Based on these three estimates (and the average cost per case in 2009/2010) the potential savings to the CCMA may be as little as R57 380 and as much as R25 million. This, in turn constitutes between 0.02 and 8.45 percent of the CCMA's budget allocation for 2009/2010. The CCMA will be able to redirect these financial resources to cases involving vulnerable workers.

LRA: Substitution of Section 188A of Act 66 of 1995

The following section is substituted for section 188A of the principal Act:

188A. [Agreement for pre-dismissal arbitration] Enquiry by arbitrator

(1)An employer may, with the consent of the employee or in accordance with a collective agreement, request a council, an accredited agency or the Commission to appoint an arbitrator to conduct an [arbitration] enquiry into allegations about the conduct or capacity of that employee.

i) INTERPRETATION

This amendment renames the process of “pre-dismissal arbitration” as an “enquiry by an arbitrator.” This is a process where a CCMA Commissioner is asked to chair an internal enquiry into allegations about an employee's capacity or conduct. The aim is to conclude the matter internally and avoid the case being referred to the CCMA. In 2009/2010 only 105 pre-dismissal arbitration cases were heard, implying that currently little use is made of the process. The aim of amendment is the promotion of pre-dismissal arbitration by providing for it to be included in collective agreements between unions and employers.

ii) COST/NEGATIVE CONSEQUENCES

This amendment should not result in any significant costs for the CCMA, as the Commission charges for this service (R3 000 a day according to the CCMA's website). The CCMA is therefore compensated for the costs associated with a pre-dismissal arbitration. The amendment will also not impose any costs on the employee.

The employer is responsible for the payment of the CCMA's fee and the amendment may therefore imply additional costs for the employer. Disputes about unfair dismissals generally account for about 70 percent of referrals to the CCMA (see Bhorat et al 2009). This implies that in 2009/2010, approximately 107 632 referrals were related to unfair dismissals (CCMA, 2010). If we assume that ten percent of these cases could have been resolved at pre-dismissal arbitration, this means that 10 736 cases could have been resolved through this process.

iii) BENEFITS

This amendment will promote more efficient and effective dispute resolution in the South African labour market, to the benefit of all parties involved.

The CCMA will benefit from the lower number of cases referred to the Commission. If we assume, as above, that ten percent of referrals related to unfair dismissals could have been solved through pre-dismissal arbitration in 2009/2010, this would have resulted in a decline of 10 736 cases referred to

the CCMA. Based on the average cost per referred case, this amounts to a total saving of R25 million or 8.58 percent of the Commission's budget allocation in 2009/2010.

Both the employers and employee parties in these 10 736 cases would have several benefits. Firstly, they will benefit from the fact that holding an enquiry in terms of section 188A avoids the need to have both an internal inquiry and, if this leads to the dismissal of the employee, conciliation and arbitration proceedings at the CCMA. These savings include the time of the individuals who would be involved in the proceedings as well as factors such as a reduction in travel. In addition, from an industrial relations perspective, it is beneficial to employers and employees that this procedure produces a significantly faster resolution of the dispute.

LRA: Substitution of Section 191 of Act 66 of 1995

Section 191 of the principal Act is hereby amended by:

- (a) *the substitution for subsection (5A) of the following subsection:*
“(5A) Despite any other provision in the Act, the council or Commission must commence the arbitration immediately after certifying that the dispute remains unresolved unless – [if the dispute concerns –
 - (a) the dismissal of an employee for any reason relating to probation;*
 - (b) any unfair labour practice relating to probation;*
 - (c) any other dispute contemplated in subsection (5)(a) in respect of which no party has objected to the matter being dealt with in terms of this subsection]**(a) the commissioner and the parties agree otherwise;*
(b) the commissioner concludes that it is unreasonable for the arbitration to commence immediately, after considering
 - (i) the nature of the questions of law raised by the dispute;*
 - (ii) the complexity of the dispute; and*
 - (iii) the public interest.”*

I) EXPLANATION/INTERPRETATION

The “con/arb” process, which allows for arbitration to start immediately after an unsuccessful conciliation process, was introduced in 2002 through amendments to the LRA. This amendment effectively merged the two processes into one with the purpose of avoiding the delay between the two separate processes and therefore reducing the cost (both financially and in terms of time) of the dispute resolution process (Bhorat & Van der Westhuizen, 2009). While this change has contributed to a significant reduction in the time it takes to resolve disputes, currently either party may object to a dispute being dealt with in terms of the con/arb process. In 2009/2010, 72 091 con-arbs were originally scheduled and 24 716 objections to the con/arb process were received. This means that objections were received to approximately a third of the con/arbs scheduled, with the employer party accounting for 97 percent (24 090) of these objections.

This amendment proposes that all relevant disputes should be dealt with by a con/arb unless the commissioner and both the applicant and responder agree that con/arb is not appropriate or the commissioner concludes that it is unreasonable. The aim of the amendment is to ensure that more cases are dealt with through the con/arb process, while more complex cases can be postponed to allow parties to adequately prepare for these cases.

II) COSTS/ NEGATIVE CONSEQUENCES

The proposed amendment will not have any significant costs for the CCMA. The employee and employer parties may have to incur additional costs associated with the preparation for the arbitration phase of a con/arb (including preparing and bringing witnesses). This may not happen though if the case is settled at conciliation or if the Commissioner accepts that it is not appropriate for the arbitration phase to commence immediately.

III) BENEFIT

This amendment will constitute a significant saving both in terms of cost and time for the CCMA. In practical terms this means that a significantly greater number of matters may be resolved in one day and by one process, not by two processes scheduled on two separate days. In 2009/2010, 24 716 objections to the con/arb process were received and this means that these disputes had to be scheduled for conciliation only, with the implication that if the conciliation was unsuccessful, the matter can be referred to arbitration – a second process scheduled on a separate day. The CCMA has indicated that the average cost per hearing/event is R1 500. We do not have information on whether the cases were objections to con/arb were raised, were settled at conciliation or proceeded to a separate arbitration hearing. If we, however, assume that 50 percent of those cases were referred to arbitration, this means that a second event had to be scheduled for 12 358 cases. If these cases were concluded in a single con/arb hearing it would have constituted a saving of R18.537 million for the CCMA, or 6.35 percent of their allocated budget for 2009/2010.

The employee and employer parties will also benefit from the matter being resolved in a single hearing rather than two separate hearings, specifically in terms of the time and costs savings associated with less time taken off work and the reduction in the cost of travelling to the CCMA office.

Overall, this will expedite the CCMA's case load and improve the efficiency of dispute resolution in the economy. Both the employer and employee parties will benefit from the speedier resolution of matters.

LRA: Substitution of Section 191 of Act 66 of 1995

the substitution for subsection (12) of the following subsection:

*“(12) **[If a] An employee [is] dismissed by reason of the employer's operational requirements [following a consultation procedure in terms of section 189 that applied to that employee only, the employee]** may elect to refer the dispute either to arbitration or to the Labour Court if—
(c) the employer employs less than ten employees.”*

I) EXPLANATION/INTERPRETATION

Section 189 and section 189A of the LRA prescribe the processes which have to be followed when an employer contemplates dismissing workers due to operational requirements (retrenchments). If an employer employs more than 50 workers, large scale retrenchments have to be referred to the CCMA for facilitation in term of section 189A. Currently, firms with less than ten employees have to refer disputes over retrenchments to the Labour Court. In terms of the proposed amendment, businesses with less than ten employees will be able to refer retrenchments to the CCMA for arbitration.

II) COSTS/NEGATIVE CONSEQUENCES

This amendment will impose additional costs on the CCMA. No data exists on the number of disputes over retrenchments by small businesses that are currently heard by the Labour Court, but these cases can now potentially be arbitrated by the CCMA. In 2009/2010, the CCMA facilitated almost 900 retrenchment cases in terms of Section 189 (CCMA, 2010). This is more than double the number cases facilitated in previous financial years (Bhorat et al 2010: 39), indicating the impact of the financial crisis on firm layoffs. The average number of cases is therefore closer to 400 a year, with CCMA expected to experience some increase in the average number of retrenchment facilitations as a result of the proposed amendment. This will again have an impact on the CCMA's operational budget, with the magnitude depending on the number of additional retrenchments arbitrated by the CCMA. (It should also be noted that the amendment does not *require* firms with less than ten employees to refer retrenchments to the CCMA, but gives them the option.)

III) BENEFITS

The proposed amendment will constitute significant savings in terms of cost and time for the employers and employees involved. While no accurate data is available on the number of small business retrenchments currently arbitrated by the Labour Court and the average length of these cases, arbitration of these cases by the CCMA will be much faster and less costly.

In addition, facilitation by the CCMA may ensure that some of the proposed retrenchments are avoided, thereby saving the jobs of some of the workers involved. This will again not only benefit the individual worker, but also those households attached to the worker.

Concluding Remarks

The above represents an initial attempt at outlining the possible economic (in terms principally of welfare and efficiency) costs and benefits associated with the proposed amendments to the LRA – in relation to the functioning of the CCMA. Whilst data constraints abound, the initial analysis suggest that in most cases the predicted financial costs to the CCMA are not unmanageable fiscally. Some possible unintended consequences do remain – most notable the moral hazard problem around the Sheriff's deposit amendment. In the main, however, these amendments would appear to be an attempt at simultaneously reinforcing the rights of vulnerable works, whilst also increasing the efficiency and effectiveness of the dispute resolution system in particular and the industrial relations system in general.

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