DLA CLIFFE DEKKER HOFMEYR

EMPLOYMENT ALERT

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IN THIS ISSUE

ALTERNATIVES TO LABOUR BROKING

Temporary Employment Services (TES), or labour brokers as they are commonly known, have been under scrutiny by the government and unions for some time.

The motivation for this is a perception that TES employees have much lower job security and that there is a violation of these employees' rights.

There was a major drive on the part of COSATU, and even from various members within Government, to have Labour Broking totally banned, whilst the amendments to the Labour Relations Act, No. 66 of 1995 (LRA) were being discussed and debated.

The Portfolio Committee on Labour has now determined that labour broking will not be banned, but employment of labour broking employees will be subject to a maximum period of three months after which those employees will be deemed to be permanent employees of the labour broker's client. This limitation only applies to employees earning below the threshold of R193,805.00 per annum.

BACKGROUND

During 2010, the Department of Labour and the Presidency prepared a Regulatory Impact Assessment (RIA) on the selected provisions of the Labour Relations Amendment Bill and other Labour Bills at the time.

The RIA indicated that among others, unemployment was disproportionally high among young people at approximately 47%. The report indicated further that the majority of employed young people are employed by labour brokers.

The report warned that a limitation on or a banning of labour brokers would make it more difficult for first time job seekers to enter into the labour market and therefore cause further unemployment.

Despite the warnings announced in the RIA, government has now persisted in limiting the scope of labour brokers.

NEW PROVISIONS

The LRA Amendment Bill was recently recirculated as a 'B' draft. This draft will most likely be put to a vote during the next session of the National Assembly for legislative matters, which will commence on 1 August 2013.

The essence of the most recent provisions in terms of s198(A) and (B) of the LRA are that:

- Employees earning less than the threshold are not to be employed by labour brokers for a period exceeding three months.
- Employees who perform such services in excess of three months will be deemed to be permanent employees of the client.
- The employee who is deemed to be an employee of the client, must be treated on the whole not less favourable than other employees of the client performing similar work.

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These clauses, as well as others, will create various limitations for labour brokers.

One of the reasons a client appoints labour brokers is to obtain manual or temporary labour without the administrative burden associated with employing permanent employees. In particular, a client could obtain labour on an ad hoc basis for individual projects or undertakings, without having to commit to employing workers on a full time basis. A further reason is that, as the 'deemed employer', the labour broker was burdened with unfair dismissal disputes, compliance orders and the like.

In the past, it was common practice for labour brokers to indemnify their clients against any litigation flowing from any termination of employment of a labour broker employee. However, in the event of an unfair dismissal leading to reinstatement of an employee, it will now be impossible for a labour broker to indemnify a client after the three month period because it will be the client who will have to reinstate the employee and not the labour broker.

Furthermore, the new provisions allow for an employee to choose to institute action against the labour broker, the client, or both. The provisions therefore almost do away with the benefits associated with labour broking and as such, the industry is at risk.

Alternatives to labour brokering

It is envisaged that in a true labour broker scenario, where services are only to be rendered for a short duration of time of less than three months, labour brokers will continue to operate and will be unaffected by the proposed amendments.

However, the labour brokers who render services for longer periods of time as a result of seasonal work, the need for mass manual labour and/or other considerations will be most affected by these new provisions.

It is suggested that the only reasonable alternative to traditional labour broking would be to revise the whole concept and to move into the sphere of genuine subcontracting.

The answer lies in the wording of s198 (3) of the LRA, which states that a person who is an independent contractor is not an employee of the labour broker.

This alternative concept would mean that labour brokers will have to establish a new legal entity, which will render a sub contractual service to the client.

The labour broker will then have to tender, or propose to take over, the whole of the contract or service previously provided. For example, where the labour broker provides 80% of the general workers of a particular client, the labour broker will have to take over all the general workers of the client and then subcontract the work to the client. The pricing will not be linked to the number of employees performing the work but the true value of the subcontract.

The employees will then become permanent employees of the new legal entity and may be appointed on a fixed term basis, depending on the entity's relationship with the client. It is interesting to note that such fixed term arrangements would be permissible in terms of the proposed amendment to the LRA.

Should the sub-contractor route be adopted, it is important that the sub contractual relationship must be a genuine one, and not constitute a scheme to circumvent the provisions of the LRA.

The above suggestion creates an opportunity for labour brokers to render an extended service, where they can also offer to take over payrolls and other relevant services to a client. In some cases, labour brokers have already taken over the provisions of, for example, protective clothing, client's Employment Equity plans, Skills Development, and so on.

Although fixed term employment has remained a possibility, it will also subject to strict requirements that an employee may not be employed for a fixed term period in excess of three months, unless it is for a justifiable reason. A justifiable reason may include replacing an employee who is temporarily absent, employing an employee due to a temporary increase in work volume (not expected to endure beyond 12 months), trainee work, employing an employee for a specified project for a limited duration and seasonal work.

Another alternative may be that the client absorbs all TES employees into its organisation. This may or may not be subject to the provisions of s197 of the LRA and all employees may have to be transferred on terms and conditions, on the whole, not less favourable than what the employees currently enjoy. This would seriously impact the labour broking industry as a whole. With companies taking over an entire temporary workforce, labour brokers could become obsolete entirely.

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Companies may also rely on the exemption that employees working less than 24 hours a month are excluded. In this regard, employees would work on a rotational basis. Such scenarios may be useful when skilled labour is not required.

Companies may also avoid the limitations in terms of the proposed amendments by merely not having a 'comparator' in permanent employment.

It is likely that the new amendments may be subject to constitutional challenge by the labour brokers as an industry.

International law

Within the United Kingdom (UK), the Agency Workers Regulation (2010) protect agency workers in a similar manner to which the proposed amendments to the LRA do. Two main principles apply:

- Day One rights are granted to agency workers. This includes access to facilities and amenities. These must be provided by the hirer (client in SA) on the first day the agency worker (employee in SA) commences his/her duties. In addition, should any vacancies arise in the hirer's company, the hirer is to open such vacancies to agency workers.
- Twelve Week Rights are introduced when an agency worker has been employed by a hirer for 12 weeks or longer. Such employee is entitled to conditions of employment no less favourable and treatment as comparable employees, as if they had been recruited directly by the hirer. These conditions include pay, duration of holiday time, night work, rest periods, rest breaks and holidays. The regulations accordingly are only established if there is a 'comparator'.

The reason the Agency Workers Regulations were introduced, was to ensure that agency workers were treated consistently with a comparable employee of the hirer doing the same or broadly similar work.

In the UK the regulations do not confer employee status on agency workers and they do not have the right to claim unfair dismissal, minimum notice or redundancy pay from hirers.

In a 2012 CBI study of the impact of the regulations, more than 50% of companies reduced their agency worker usage and 1 in 12 stopped agency workers altogether. The same study indicated that companies increased their use of fixed term contracts, existing employees' overtime and permanent hirers.

A better alternative has been the use of 'zero-hour' contracts, which allowed employees to be paid only for hours worked. This is done directly between employees and hirers with no 'labour broker' involved.

The imposition of time limitations similar to that in the UK was introduced in Hungary with 183 days and in the Netherlands with 26 weeks.

The European Union has initiated various directives protecting 'irregular' workers. However, all member states are granted discretion in respect of the implementation thereof.

In Germany, the equal treatment principle does not apply if a collective agreement governs the employment relationship between the agency and its agency workers.

In Indonesia, the outsourcing of labour is highly regulated. The types of activities that outsourced workers can attend to are highly specific. For example, a core activity of the labour use cannot be outsourced.

Similar principles apply in Argentina and Colombia, where outsourced employees can only be used to fill a vacancy, in the case of temporary increase in activity or for other extraordinary or temporary needs.

Conclusion

Once the proposed labour broking amendments come into law it is envisaged that trade unions will do their utmost to make sure that South African companies comply with these new obligations. However, if labour brokers and their clients are inventive and open to change, the amendments may not result in a loss of the industry as a whole.

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