DLA CLIFFE DEKKER HOFMEYR

EMPLOYMENT ALERT

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AMENDMENTS TO THE PROVISIONS DEALING WITH LABOUR BROKERS

Temporary Employment Services (TES), or as they are more commonly referred to, labour brokers, have been accused, particularly by trade unions, of increasing the casualisation of labour and exploiting employees.

On the other hand, members of the TES industry defend their existence by arguing that they create employment in a country where unemployment is rife and where employers cannot always commit to full-time employees.

The Labour Relations Amendment Bill, 2012 (LRAB) aims to protect vulnerable individuals who are employees of TESs and who often lack the protection normally afforded to full-time employees by virtue of the Labour Relations Act, No 66 of 1995 (LRA). The LRAB seeks to regulate TESs by providing for their regulation, registration and licensing. The Department of Labour (DOL) will now also be able to access information about the number of individuals employed by TESs and where these individuals are being placed among the TESs client base.

The LRAB introduces a new definition of 'temporary services' in the proposed new s189A of the LRA. Temporary services will now mean work done by an employee of a TES for a client:

- for a period not exceeding six months,
- as a substitute for an employee of the client who is temporarily absent, and/or
- in the category of work for any period of time which is determined to be a temporary service by a collective Agreement Concluded in a Bargaining Council, or a sectoral determination.

The proposed new s198A(3)(b) of the LRA will provide that an employee who does not meet the definition of performing temporary work for a client will be deemed to be an employee of the client. The proposed s198A(4) provides further that the termination by a labour broker of an employees' assignment with a client for the purposes of avoiding s198(3)(b) will constitute a dismissal.

Temporary employment is therefore limited to genuine temporary work that does not exceed six months, unless there is a justifiable reason for the differentiation. The employee should further be employed on terms which are no less favourable than the terms applicable to the client's other employees performing the same or similar work. The LRAB has not defined "justifiable reason" and this will be the subject of extensive litigation in the Labour Court.

The LRAB proposes that at least three months before the amendments come into effect, the Minister of Labour (Minister) is required to issue a notice inviting persons to consult on what is deemed to be temporary services. The Minister will be required to issue a sectoral notice in this respect and the recognised categories of work will be deemed to be temporary work.

The sectoral notice issued by the Minister does not take precedence over any collective agreement that is concluded in a bargaining council, the notice does however take precedence over any sectoral determinations. The increased power the Minister acquires in this respect appears to be a move to regulating the industry more strictly.

Zinhle Ngwenya

It is with sadness that we heard of the passing of Dr Charl Mischke, a well-known author and scholar of employment law and employee relations. He wrote the weekly comment on the IR Network and was a key member of SASLAW. May he rest in peace.

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