

EMPLOYMENT SERVICES BILL ('ESB')

1. Introduction

The first draft of the ESB was published for comment in 2010. Many employers greeted the first draft with great apprehension, criticising it for being unworkable and placing too much of a burden on employers. A second draft was published in the Government Gazette in November 2012. The Bill, in its current form, aims to regulate 'employment services'; the registration of private employment agencies; to ensure job retention by enabling the Minister of Labour to establish schemes to minimize retrenchment of employees who are employed by employers in Protected Employment Enterprises that are in economic distress; provide 'comprehensive and integrated free public employment services'; and to 'establish schemes to promote the employment of young job seekers and other vulnerable persons'. The ESB seeks to contribute to the government's objectives of 'more jobs, decent work and sustainable livelihoods'.

2. Regulation of Private Employment Agencies ('PEA')

The ESB comes at a time when the debate over 'labour broking', is slowly subsiding and a more pragmatic approach appears to be the route rather than outright banning of short term work opportunities through agencies or 'brokers'. In keeping with the proposed amendments pertaining to temporary employment services ('TES') in terms of the Labour Relations Amendment Bill (canvassed in detail in our previous article *Highlights of the LRA Amendment Bill, March 2012*), labour broking activities are further regulated by the ESB. The net effect of the proposed amendments to both the LRA and ESB, is to bring the mechanism of a TES back to its original purpose, which has always been to provide a means through which employers could satisfy genuine *short-term* employment needs.

The first draft of the ESB introduced the concept of a PEA. The second draft of the ESB defines a PEA as any person who provides employment services for gain. This definition is quite similar to that of a TES as defined in s198 of the LRA. The ESB empowers the Minister to prescribe criteria for registering a PEA after consulting with the Employment Services Board established in terms of the ESB (which only has an advisory function).

Any person who wishes to offer employment services – including labour broking services – must apply to register an agency. The registration certificate must specify if the agency is entitled to perform the functions of labour broker, or other recruitment services. If the PEA does not have the required registration certificate, it will not be allowed to operate. The registration of a PEA may be cancelled if the agency fails to comply with the following:

- the ESB's requirements;
- any regulation issued under the ESB; or
- any procedure prescribed by the ESB.

The ESB also regulates the processing of work seekers' personal information, which is in line with the soon-to-be promulgated Protection of Personal Information Bill ('POPI'). All information pertaining to work seekers, placements and particulars of the employer must be retained in an electronic manual for a minimum period of three years. (POPI does not provide for a minimum period pertaining to the retention of personal information.)

The ESB states that a PEA will be prohibited from 'charging work seekers any fees for services rendered, unless the Minister permits such fees for specific categories or specialized services' and they will be prohibited from 'making deductions from employees' remuneration'. The provision also prevents practices by which employers or a PEA may seek to circumvent these prohibitions or make deductions from employees' remuneration.

A PEA must keep and safeguard the confidentiality of information relating to work seekers, the ESB warns, and 'the labour court will be empowered to impose fines for breaches of the Act'.

The provisions of the ESB (read with changes to the LRA and the BCEA dealing with the presumption of permanent employment and equalisation of benefits for temporary employees) will undoubtedly contribute to organisations revisiting their reliance on labour brokers.

3. Establishment of a Public Employment Service ('PES')

The strategic objectives of the ESB will be achieved through institutional arrangements the Department of Labour is required to establish to provide free employment-related services to citizens. These services will include the registration of job seekers, registering of placement opportunities, matching services, referral to training and careers information. While these services will be performed free of charge for employees, the PES will be entitled to charge employers for providing similar services to them. The PES will be financed in part by statutory contributions to funds established in terms of the Unemployment Insurance Act.

The Minister may issue regulations requiring employers to register vacancies in specified categories of work. Such a regulation may differentiate between different categories of work and different categories of employers.

The establishment of the PES is intended to facilitate the exchange of information among labour market participants including employers and work seekers; careers counselling assessment of work seekers to determine suitability for positions; and provision of other related life skills necessary to secure employment. To this end, the Department may develop and operate an employment information system for monitoring, evaluating, researching and analysing trends. The practical difficulties employers were faced with under the first draft of the ESB, remain substantially the same under the second draft of the ESB. For example, there is still uncertainty as to whether 'vacancies' refer to all positions, i.e. permanent as well as temporary. It also remains unclear what the consequences would be if an employer fails to appoint an individual referred to them by the Department.

4. Employment of foreign nationals

Upon a first read, the second draft of the ESB appears to soften the stance taken towards the employment of foreign nationals in the first draft. In describing the ESB's purpose, the Bill has been designed to regulate and facilitate the employment of foreign nationals into areas 'where they are needed ... [provided it] does not impact adversely on existing labour standards or the rights and expectations of South African workers'.

Unlike the first draft, the second no longer makes provision for:

- the Minister to publish work categories within which foreign employees may be employed;
- requiring employers to use public employment services; or
- employers needing to follow additional time-consuming processes before employing a foreign national.

However, the ESB does empower the Minister, after consulting with the Employment Services Board, to make regulations regarding the procedures that employers must undertake before employing foreign nationals and in appropriate cases, requiring the preparation of skills transfer plans for positions in which foreign nationals are engaged. In particular:

- employers must satisfy themselves that there are no other persons in the country with suitable skills to fill the vacancy;
- local citizens must be up-skilled if there is a shortage of that particular skill in SA through a skills transfer plan; and
- an employer may use private or public employment services to recruit SA citizens or a permanent resident.

Employers will be prohibited from requiring or permitting a foreign national to perform any work for which such foreign national is not authorised to perform in terms of his or her work permit; or to engage in work contrary to the terms of their work permit.

It should be noted that, as the law stands at the moment, an employee who is employed without a valid work permit is entitled to enforce any claim that the employee may have in terms of statute against his or her employer. Employers have long abused illegal foreign nationals, e.g. not paying them or dismissing them without complying with unfair dismissal law, basing their actions on the assumption that their so called 'illegal employees' are unable to use the statutory employment law framework to take the employer to task. See, e.g., *Discovery Health Ltd v CCMA & others (CLL Vol 17, April 2008, Labour Court)* where it was held that s23 of the Constitution provides that 'everyone has the right to fair labour practice', including illegally employed foreign nationals. This approach is now confirmed in s 8(4) of the ESB.

5. General

The Labour Court, unless otherwise provided for in the ESB, will have exclusive jurisdiction to hear all matters arising from it. Only criminal offences will not be dealt with by the Labour Court.

The ESB also re-establishes Productivity South Africa, a body which was previously established under the Skills Development Act. The functions of Productivity South Africa are, amongst others, to:

- promote a culture of productivity in the workplace;
- develop relevant productivity competencies;
- facilitate and evaluate productivity improvement and competitiveness in workplaces; and
- to implement and oversee related strategies and regulatory matters.

Finally, Chapter 6 provides for the promotion of employment for persons with disabilities through the establishment of so-called 'Protected Employment Services'. Their mandate is to facilitate on-the-job training for people with disabilities to promote their access to formal and self-employment.

6. Conclusion

No specific sanctions are provided for in the ESB for non-compliance. However, fines may be imposed by the Labour Court for certain offences provided for in the ESB, listed in Schedule 3.

While the objects of the ESB may be commendable and hopefully provide better protection for the most vulnerable workers, the ESB will further limit employers' ability to utilise temporary employment services (labour brokers) and in all likelihood increase bureaucratic compliance requirements. However, whether the PES will have the necessary capacity to be able to carry out its mandate – which includes promoting access to employment – also remains to be seen.

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Jan 2013

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