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LRA AMENDMENTS - YET MORE DELAYS AND UNCERTAINTY

Contrary to recent reports, the amendments to the LRA, although passed by parliament, still have some way to go before becoming law. After being debated in parliament, the amendments were sent to the state law advisors to tidy up some of the amendments proposed during the parliamentary process and in the normal course of events would then have gone to the National Council of Provinces for approval before being signed off by the president.

However, a notice appeared in the Government Gazette a week ago in which the Select Committee on Labour and Public Enterprises asks for public comment on the BCEA and LRA Amendment Bills. This is a most unusual step seeing that parliament has already debated the Bills. The reasons for the move are not stated in the notice. It is also not clear what will be done with comments received, i.e. whether the Bills will be re-submitted to parliament for re-consideration.

Depending on the comments received, we might see yet further amendments being made to the Bills, causing yet more uncertainty.

As they stand now, and subject to what happens as a result of the public participation process, the following are some of the key amendments that are likely to impact on our clients:

1. Temporary employees

A fixed-term contract is one entered into for a definite period, for completion of a specific project, or until a specified event occurs, e.g. where someone fills the position of another person who is temporarily absent.

The provisions below only apply to employees on a fixed-term contract earning less than the BCEA threshold:

a. you cannot employ someone for longer than 3 months on a fixed-term contract unless there is a good business reason for it (s 198B(3)(b), e.g., seasonal employment; employment on a specified project; employment for a season; or appointment in place of someone who is absent for a temporary period, etc) or 'the nature of the work for which the employee is employed is of a limited or definite duration' (s198B(3)(a));
b. if there isn't a justifiable reason present, the employee is deemed to be permanent (indefinite') and must be treated as such. However, even if the fixed-term appointment is justifiable, after 3 months the pay and benefits of a temporary employee must be adjusted to be on the whole not less favourable than those of a comparable permanent person doing the same or similar job. E.g., someone employed on a seasonal contract of 5 months must receive equivalent benefits for the last 2 months;
c. if you do not have a good justification for the temporary appointment the employee is deemed to be permanent and must be treated accordingly. You will be permitted to differentiate i.t.o. pay and benefits if this is based on, e.g., experience, length of service, seniority of the

appointment, merit or performance. This creates an opportunity for employers to creatively link pay to performance for all employees, the basic principle being 'performance before pay';

d. ending the contract at the end of the fixed-term can now lead to two claims, i.e., a claim for permanent appointment (i.e., where a reasonable expectation of permanent employment can be proved by the employee); alternatively, a reasonable expectation of renewal (as is the case at present). It is likely that temporary employees will claim both, in the alternative. Note, however, that in both cases compensation in the event of a successful claim, the level of compensation is likely to be based on the a scale 'on the whole not less favourably' than that of a comparable permanent employee employed by the company;
e. the contract of a temporary employee must be in writing, must specify if the reason why the appointment is only temporary and must contain the employee's agreement to the temporary appointment. Clients would have to adapt their temporary contracts accordingly;
f. temporary employees who have been employed for more than 24 months must receive severance pay equal to 1 weeks' pay per year of completed service unless alternative employment has been provided to them;
g. in any dispute about the employee's status, i.e., whether she is temporary or permanent, the employer who insists that the appointment is temporary must prove that a good justification exists for it; and
h. temporary employees must be given equal access to opportunities to apply for vacancies, training and development.

All in all, the rule of thumb will be that employees earning less than the threshold will be regarded as permanent employees after 3 months unless the employer can prove a good (business-related) reason for the temporary nature of the appointment. After 3 months, whether they are truly temporary or have become permanent, their pay and benefits would need to be adjusted.

In respect of temporary employees already in employment, there is a 3-month period of grace.

2. Part-time employees

Part-time employees (those working fewer hours than a comparable full-time employee doing the same or similar work) earning less than the threshold and working for longer than 3 months must, like temporary employees, be given pay and benefits on par with a comparable full-time person doing the same or similar job; and must be given equal opportunity to training opportunities and to apply for vacancies, as their full-time counterparts. You will be permitted to differentiate i.t.o. pay and benefits if this is based on, e.g., experience, length of service, seniority (of the appointment), merit or performance None of this applies if the employee works less than 24 hours per month. It also only applies to people being paid for hours worked. It is not clear how many hours someone must work less than a comparable full-time employee before the personal qualifies as a part-time employee.

3. Temporary employment services

The provisions regarding temporary employees apply equally to the TES, who is the 'real' employer of the employees whose services are sold to the client. For e.g., if an employee of a TES earns less than the threshold, he/she must be appointed on a permanent basis by the TES after 3 months, unless the broker has a justification for continued temporary appointment of the employee. After 3 months, the employee must be treated on the whole not less favourably to a

comparable permanent employee of **the client,** unless there is a justification for the difference in treatment (i.e., merit, length of service, etc.) It is presumably the responsibility of the TES to ensure such similar treatment. (The phrase 'must be treated .... not less favourably' is broader than merely requiring similar pay and benefits. Exactly what it encompasses is not clear, however.)

If the employee works for a client for longer than 3 months, he/she is 'deemed to be' the employee of the client. This part of the Bill is confusing as it suggests that the client now becomes the employer for all purposes. This begs the question what happens to the broker. However, we believe that the intention is that the client is deemed to be the employer for purposes of joint and several liability only, not any other purposes. This will then mean that the client, or the TES, or both (jointly and severally) may be held liable for unfair dismissal and unfair labour practice claims brought by an employee of the TES. Clients will therefore have to ensure that they protect themselves against unfair conduct by the broker by requiring certain guarantees of fair treatment; an indemnity; and also, e.g., that no disciplinary decisions can be taken without the client's oversight. Similarly, it might be useful to require the broker to copy the client on any grievances received, or to require of TES employees that any grievances must be dealt with i.t.o. the client's grievance procedure.

The amendments prohibit any scheme in terms of which employees' are terminated and replaced in order to escape the provisions of the law. If, e.g., an employee of the TES working for a client is replaced by a new employee before the expiry of 3 months, the employee may now have 3 claims, i.e. on the basis that he/she reasonably expected permanent appointment; alternatively, renewal of the fixed-term contract; or a claim that his/her replacement constitutes a dismissal in the usual sense. Presumably, the employer and/or TES will bear the onus of proving that the purpose of the replacement was not to circumvent the provisions of the Act.

Also bear in mind that for purposes of determining sufficient representivity, the CCMA will in future have to take into consideration the union's support among **all** employees working at or for the client when deciding whether or not to award organisational rights.

Note further that the TES must comply with any bargaining council agreement or Sectoral Determination applicable to the client, *irrespective* of the earnings level of the TES's employees.

4. No dismissal protection for high income earners

It was previously mooted in an earlier draft of the amendment Bill that high income earners will be excluded from unfair dismissal protection. This would have meant that they could be dismissed without substantive or procedural fairness requirements being adhered to as long as their employer gave them 3 month's written notice.

High income earners will be glad to hear that this provision has bitten the dust, most probably because it would have been unconstitutional. However, the Bill does provide for an upgraded version of the pre-dismissal arbitration option which can be built into the contracts of people earning above the threshold. This involves a once-off in-house hearing by an accredited arbitrator without the need for an internal hearing, appeal and conciliation followed by arbitration at the CCMA or Bargaining Council.

Clients might want to consider incorporating a provision to this effect in the contracts of senior employees: evidence suggests that disputes involving these employees are often drawn out and

expensive affairs. Using this mechanism will save costs, time and create certainty sooner than would be the case otherwise.

5. Changes to organisational rights system

The amendments provide that:

a. if there is no majority union in a workplace;
b. but there is a union that is the 'most representative' and
c. that qualifies for rights of access and deductions (because it is 'sufficiently representative'),

it may apply for and be awarded full organisational rights, including the right to elect shop stewards. Note that there still is no statutory duty to bargain with that or any other union.

6. Industrial action

The mooted requirement that unions should conduct a ballot before striking has not materialised and therefore the status quo remains: unions are only required to follow the LRA procedures and adhere to their own constitutions when calling a strike. However, a new provision provides for the Labour Court to 'suspend' industrial action, including pickets, if, e.g. the conduct of the picketers or strikers is no longer peaceful.

A new provision also provides for the right to picket against an employer on the premises of someone that is not the employer, e.g. in a mall. However, the owner of the property, the landlord, has a right to be heard before picketing rules are determined by the CCMA.

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