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*ADDRESSING NON-COMPLIANCE WITH THE BCEA – HOW THE PROPOSED
AMENDMENTS SEEK TO ADDRESS THE PROBLEM*

Media reports suggest that that the proposed amendments to labour legislation, including the BCEA, have not been received well. Are the concerns justified? We believe that some are, but in the main, we believe that there has also been an emotional over-reaction to some of the proposals, based perhaps on a poor reading of the proposals. The major amendments to both the BCEA and LRA are aimed at combating abuses that have arisen over the years, particularly in connection with the use of temporary labour and labour brokers but also failures to comply with the provisions of the BCEA and sectoral determinations issued in terms of it. The main changes to the BCEA deal with the strengthening of provisions covering child labour (to comply with our international obligations) and strengthening the hand of the Department of Labour when it comes to enforcement of compliance.

Chapter 10 of the BCEA deals with enforcement of the Act by labour inspectors. The latter have wide powers, e.g. powers of entry, to question and inspect, to secure undertakings, issue compliance orders; consider objections and appeals, and applications to the Labour Court. The enforcement provisions have proven to be time consuming and open to technical challenges by recalcitrant employers. This has employees vulnerable and dependent upon the effectiveness of the labour inspectors' ability to address employers' non-compliance with the BCEA.

While the overall framework for enforcement is maintained, the proposed amendments have as their main objective the fast tracking of enforcement. The current law stipulates that the labour inspector, who has reasonable grounds to believe that an employer has not complied with any provision of the BCEA, *must* endeavour to secure a written undertaking by the employer to comply. The written undertaking could be obtained by arranging to meet with the employer or by serving a document on the employer. Only if the employer fails to comply within a given time frame, can a compliance order be issued. The employer still has an opportunity to object and appeal against such an order to the Director-General of the Department of Labour. If the employer's objections are rejected, the D-G can approach the Labour Court for an order compelling compliance.

The existing procedure is very time consuming and the employer can delay the process even more by not cooperating with the labour inspector. If the proposed amendments are enacted, labour inspectors will be able to exercise their discretion to immediately issue a compliance order instead of an undertaking to comply.

If an employer fails to comply with a written undertaking that it has given, the Department of Labour will be able to apply directly to the Labour Court to enforce compliance with the undertaking. The current section 69 of the BCEA will be amended to provide that a compliance order may specify the date by which the employer must make any representations it wishes to make as to why it is not in breach of the BCEA and which the Department of Labour will apply to the Labour Court to have the order made into a court order if the employer does not comply with the order.

The proposed amendments will speed up the process of enforcement to a great extent, strengthening the Department of Labour's powers and removing all accidental opportunities for habitual non-compliance and unnecessary delays in enforcement. This is done whilst allowing the employer with adequate opportunity to state its case in representations to the Labour Court. The further proposed repeals of sections 71 and 72, will remove the employer's current right to make objections to the Director-General concerning a compliance order. Any objections that an employer has to a compliance order, that are contested by the Department of Labour, will now be adjudicated by the Labour Court. This might dissuade employers from objecting to compliance order merely for purposes of delaying its final enforcement.

The proposed changes discussed above will undoubtedly provide more and better protection to the most vulnerable workers. This must be welcomed. However, the proposed compliance mechanisms would require the Department of Labour to be sufficiently and competently staffed to ensure that it issues defensible compliance orders as losses in the Labour Court will merely worsen current levels of non-compliance.

For employers, the amendments mean that they would need to ensure that they adhere to the provisions of the BCEA and that, in the event of alleged non-compliance, they engage with the Department of Labour to establish if and to what extent non-compliance might have taken place. All in all, good relations with the Department will be beneficial.

Authors: Barney Jordaan and Andrea de Jongh

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