SABPP
SA BOARD FOR PEOPLE PRACTICES
Setting HR standards

FEBRUARY 2015 · NUMBER 2015/01

FACT SHEET

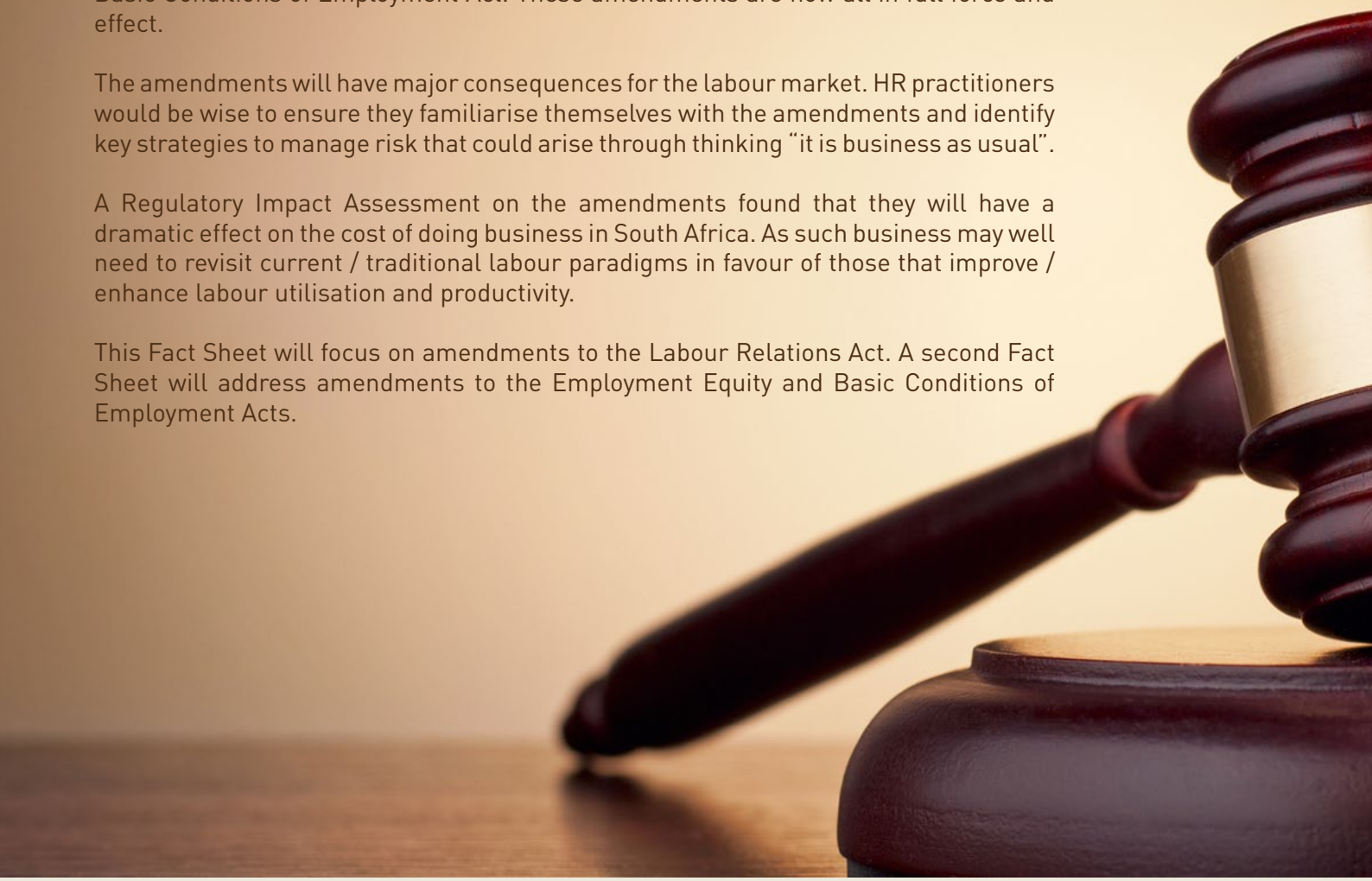
AMENDMENTS TO LABOUR LEGISLATION 2014

Following lengthy negotiations through NEDLAC, representatives of state, business and labour a new raft of legislation has been promulgated. These involved fundamental amendments to the Labour Relations Act (LRA), the Employment Equity Act and the Basic Conditions of Employment Act. These amendments are now all in full force and effect.

The amendments will have major consequences for the labour market. HR practitioners would be wise to ensure they familiarise themselves with the amendments and identify key strategies to manage risk that could arise through thinking "it is business as usual".

A Regulatory Impact Assessment on the amendments found that they will have a dramatic effect on the cost of doing business in South Africa. As such business may well need to revisit current / traditional labour paradigms in favour of those that improve / enhance labour utilisation and productivity.

This Fact Sheet will focus on amendments to the Labour Relations Act. A second Fact Sheet will address amendments to the Employment Equity and Basic Conditions of Employment Acts.



INTRODUCTION

"In full force & effect" - Labour Relations Amendment Act, 2014 (LRA)

The amendments to the Labour Relations Act are considered far-reaching, particularly as they affect the status of "non-standard employees", namely those employed via labour brokers, fixed termers and part-timers. These changes and their likely impact will be explored in detail. The amendments came into operation on 4 January 2015.

The changes are specifically designed to improve job security of lower paid and more vulnerable workers – and to eliminate abusive practices by less respectable employment service providers. The changes shift the onus onto employers to account for their employment practices.

Other changes to the LRA related to collective bargaining rights, extension of collective agreements, picketing, enforcement of arbitration awards, streamlining reviews and automatically unfair dismissals will be briefly described.

Further changes related to the administrative functioning of the CCMA, essential services and administrative procedures affecting trade unions and employer associations are not included in this Fact Sheet.

1. NON-STANDARD EMPLOYEES

The most significant changes to the LRA, 2014, relate to the status of employees in various forms of "non-standard" employment relationships, namely those working for labour brokers (or Temporary Employment Services (TES) as defined in the LRA), fixed term (FTC's) and part-time contracted employees who earn less than the Basic Conditions of Employment Act (BCEA) threshold, currently R 205 433 per annum.

Although unions demanded a ban on labour broking this has not transpired. The changes do, however, curtail and regulate employment practices for TES, FTC and Part-time employees.

A. Exclusion of small business

It is important to note that these amendments do not apply to "small employers" who have either less than 10 employees, or less than 50 if the employer has been in business for less than 2 years.

B. Definition of TES employees (S 198 & 198A)

The LRA amended defines 'temporary services' to mean:

- a period of 3 months or less,
- a substitute for a temporarily absent employee, or
- a category of work as determined by the Minister, a Sectoral Determination or a Bargaining Council agreement.

Whilst a contract with a TES employee can continue beyond the 3 month period, the TES and its client are jointly and severally liable for the obligations of the employment contract with the TES employees thereafter.

C. Deeming employment

The amendment provides that after 3 months service, TES employees (earning below the threshold) are deemed to be the client's employees. Should a contract with a TES be terminated to avoid "deemed employment" – the amendment, places the onus on the TES's client to prove that the reason for dismissal was fair.

Furthermore, once the 3 month period concludes, the client must treat TES employees "on the whole not less favorably" unless "justifiable reasons" exist. This means that all policies, procedures and Company benefits should be fairly applied. It does not mean that precisely the same benefits and conditions must apply but substantially the similar, and deviations from conditions that apply to other employees would need to be justifiable.

In terms of S 198D (2) broad criteria are identified that an employer can put forward to prove 'justifiable reasons' including:

- seniority,
- experience or length of service,
- merit,
- quality or quantity or work performed, and / or
- any other justifiable reason.

It should be noted that whilst these criteria can be widely interpreted – they may need to stand the test of objective scrutiny, in the face of litigation.

D. Fixed term contract employees (S198B)

An FTC (for employees earning below the threshold) can be for longer than 3 months - only if the work is of limited or definite duration, or if there is a 'justifiable reason'. If there is no justifiable reason, the FTC's employment with the client is deemed to be indefinite after three months. The employer must then treat such employees "on the whole not less favorably' unless 'justifiable reasons' exist. The employer must prove a 'justifiable reason'.

It should be noted that smaller employers (as described in paragraph 1 a. above) are exempt from these provisions.

If the FTC is to extend beyond 6 months it must state the reason why the contract is longer. If an FTC is longer than 24 months on a specific contract, the employee is entitled to severance pay at the rate of 1 week for each completed year of the contract.

E. Part timers (S 198C)

Part-time employees are those who typically work less hours or days of the week than other employees. As a result such employees may have different terms and conditions of employment to permanent employees. Similar provisions apply to part-timers as those described for FTC employees (i.e. that they are deemed to be indefinitely contracted employees). It should be noted that casual employees (working less than 24hrs per month) and those who work for a small employer (as described in paragraph 1 a.) are not considered part-time employees.

After a period of 3 months the part-time employee is therefore entitled to be treated "on the whole no less favourably" than a comparable permanent employee. This would not necessarily alter the hours / days of work of a part-time employee. Other provisions described in respect of FTC employees above are applicable.

2. COLLECTIVE LABOUR LAW

A. Organisational rights (S 21)

The amendment to Organisational rights allows a Commissioner of the CCMA the discretion to make a ruling at Arbitration to grant a minority union organizational rights in terms of S 14, shop steward representation and S 16, disclosure of information rights. Such union is, however, required to be sufficiently representative of the workplace. The amendment further implies that the union would need to be the most representative union in the workplace and it would lose the rights when it is not the most representative union. Previously these rights were reserved for the majority union only.

A union may also exercise organizational rights in respect of a temporary employment service or one or more of its clients.

B. Extension of a Bargaining Council Agreement (S 32)

This amendment requires the Minister of Labour, when requested to extend a Bargaining Council Agreement to non-parties within the scope of the Council, to publish a notice in the Government Gazette within 60 days of such request calling for comments within 21 days. Thereafter the Minister may declare such an agreement binding on non-parties. Provisions related to an independent exemption body and appeals, for certain classes of employers, have been tightened up.

C. Amendments to Picketing (S 69)

Previously employees had the right to picket on the employers' premises or in a public place, with the permission of the employer, which rights continue. The amendment to S 69 (2) allows the right to picket to be extended to a place controlled by someone other than an employer (for example, a shop that is on strike in a shopping centre), provided that the person (i.e. the shopping centre owner) has a say in the establishment of the picketing rules. The employer may not unreasonably refuse to grant such picketing rights. The employer may make representations to the CCMA prior to picketing rights being granted.

3. DISPUTE SETTLEMENT PROCEDURES
(S 143 & S 145)

The amendments seek to streamline enforcement of arbitration awards and review procedures. The objective of streamlining the enforcement of arbitration awards (S143) is to make these dispute mechanisms more cost effective and accessible to low earning employees. The changes to review procedures (S 145) aim to reduce the number of review applications that are brought to frustrate or delay compliance with arbitration awards and to speed up the finalization of review applications to the Labour Court.

4. AUTOMATICALLY UNFAIR DISMISSALS
(S 187 (1) (C)

This amendment is significant and widens the scope for employees to challenge automatically unfair dismissals. It does so by altering the wording of sub-clause c as follows:
"a dismissal is automatically unfair if the reason for the dismissal is .....

(c) a refusal by employees to accept a demand in respect of any matter of mutual interest between them and their employer."

The major difference with the previous Act is that it is no longer a requirement that the reason for dismissal is the employer's intention to compel the acceptance of a demand.

This clause is expected to be used in retrenchment consultations, where employers provide employees with an alternative to dismissal, but the employees refuse to accept it. Employees will have the right in terms of this clause to refuse such an option, where previously this was not the case. If they are subsequently dismissed, the dismissal would be unfair. Employers will also not be able to amend terms and conditions of employment following a restructuring, without agreement of employees.

5. IMPLICATIONS FOR HR PRACTITIONERS

Human Resource practitioners would be wise to consider the implications of the amendments as they affect their environment. The following are a few thoughts for consideration:

- Develop a clear understanding of the legislative requirements.
- Obtain the views of specialists who can assist to interpret the legal implications accurately.
- Arrange a labour legislation briefing for executives and managers to further understanding and consideration of implications of the amendments.
- Compare current remuneration, benefits and employment conditions of full time to those of "non-standard" employees.
- Assess whether there are "justifiable reasons" why non-standard employees have less favourable conditions than permanent employees.
- Develop a clear strategy related to the amendments and how these should be managed.
- Identify any additional employment costs and a budget for the process, including opportunities to improve resource utilisation of permanent employees.
- Develop clear policies and procedures to cover areas including Remuneration, Performance Management, Employment Equity and Benefit structuring.

Conclusion

There is no doubt that for many employers these amendments will increase costs and require HR practitioners to focus more strongly on equivalence in contracting, benefit structuring and remuneration. There are options to employers should they develop a clear structure and rationale for their conditions of employment but these need to be clearly stated and understood. Furthermore employers would be wise to explore options with labour specialists who would assist them defend their practices should these be questioned.

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DATE	NUMBER	SUBJECT
2013		
February	1	**GAINING HR QUALIFICATIONS**
March	2	**ETHICS, FRAUD AND CORRUPTION**
April	3	**NATIONAL DEVELOPMENT PLAN**
May	4	**BARGAINING COUNCILS**
June	5	**EMPLOYMENT EQUITY**
July	6	**HR COMPETENCIES**
August	7	**HR MANAGEMENT STANDARDS**
September	8	**PAY EQUITY**
October	9	**COACHING AND MENTORING**
November	10	**HIV/AIDS IN THE WORKPLACE**
2014		
February	1	**EMPLOYING FIRST-TIME JOB MARKET ENTRANTS**
March	2	**PROTECTION OF PERSONAL INFORMATION ACT**
April	3	**QUALITY COUNCIL FOR TRADES AND OCCUPATIONS**
May	4	**WORK-INTEGRATED LEARNING**
June	5	**RECRUITMENT – SCREENING OF CANDIDATES**
July	6	**HR RISK MANAGEMENT**
August	7	**BASIC HR REPORTING (1)**
September	8	**BASIC HR REPORTING (2)**
October	9	**EMPLOYEE ENGAGEMENT**
November	10	**SEXUAL HARASSMENT**

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