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GENERAL NOTICE

NOTICE 1112 OF 2010

DEPARTMENT OF LABOUR

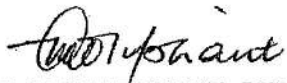
LABOUR RELATIONS AMENDMENT BILL, 2010

BASIC CONDITIONS OF EMPLOYMENT AMENDMENT BILL, 2010

EMPLOYMENT EQUITY AMENDMENT BILL, 2010

EMPLOYMENT SERVICES BILL, 2010

1. I, **NELISIWE MILDRED OLIPHANT**, Minister of Labour, hereby publish proposed amendments to the Labour Relations Act, 1995, the Basic Conditions of Employment Act, 1997, the Employment Equity Act, 1998 and an Employment Services Bill, 2010, for general information and comment.
2. I will also be tabling these bills at NEDLAC for consideration.
3. Submission of representations:
 - a. All interested parties are invited to submit written comments on the draft bills.
 - b. Such comments should be addressed to: **Mr. Thembinkosi Mkalipi**, Department of Labour, Private Bag X117, Pretoria, 0001, or faxed to 012 309 4156 or e-mailed to Thembinkosi.Mkalipi@labour.gov.za or Maria.Briedenhann@labour.gov.za
 - c. Comments should reach the Department of Labour not later than 17 February 2011.


N M OLIPHANT, MP
MINISTER OF LABOUR

08/12/2010

NOTICE 1112 OF 2010**UMNYANGO WAZABASEBENZI****UMTHETHOSIVIVINYWA OCHIBIYELA UMTHETHO WOBUDLELWANO
KWEZABASEBENZI, 2010****UMTHETHOSIVIVINYWA OCHIBIYELA UMTHETHO WEZIMISELO
EZIYISISEKELO EMSEBENZINI, 2010****UMTHETHOSIVIVINYWA OCHIBIYELA UMTHETHO WOKUQASHA
NGOKULINGANA, 2010****UMTHETHOSIVIVINYWA WOSIZO KWEZOKUQASHWA, 2010**

1. Mina, **NELISIWE MILDRED OLIPHANT** Ungqongqoshe wezemiSebenzi lapha ngazisa ngezichibiyelo ezihlongozwayo eMthethweni Wobudlelwano KwezemiSebenzi, 1995, uMthetho Wezimiso Eziyisisekelo Emsebenzini, 1997, uMthetho Wokuqasha Ngokulingana, 1998 kanye noMthethosivivinywa Wosizo Kwezokuqashwa, 2010, ukuze abantu bonke babe nolwazi futhi babeke imiqondo yabo.
2. Futhi ngizokwethula lemithethosivivinywa kwi NEDLAC ukuze iNEDLAC icabange ngayo
3. Ukulethwa kwezikhalo:
 - (a) Bonke labo abathintekayo bamenywa ukuba balethe amazwi okubeka imiqondo abhaliwe ngalemithethosivivinywa ehlongozwayo
 - (b) Lawo mazwi okubeka imiqondo kufanele athunyelwe ngeposi ku Mnumzane Thembinkosi Mkalipi, Umnyango WezabaSebenzi, Isikhwama Seposi X117, Pretoria, noma bathumele ngefekisi ku 012 309 4156 noma bathumele nge e meyili ku Thembinkosi.Mkalipi@labour.gov.za noma Maria.Briedenhann@labour.gov.za
 - (c) Amazwi okubeka imiqondo kufanele afike eMnyangweni WezemiSebenzi ungakadluli umhlaka 17 kuNhlolanja 2011



NM OLIPHANT, MP

UNGQONGQOSHE WEZEMISEBENZI

08/12/2010

REPUBLIC OF SOUTH AFRICA

LABOUR RELATIONS AMENDMENT BILL

*(As introduced in the National Assembly (proposed section 75); explanatory
summary of Bill published in Government Gazette No. 33873 of 17 December 2010)
(The English text is the official text of the Bill)*

(MINISTER OF LABOUR)

GENERAL EXPLANATORY NOTE

[] Words in bold type in square brackets indicate omissions from existing enactments.
_____ Words underlined with a solid line indicate insertions in existing enactments.

BILL

To amend the Labour Relations Act, 1995 so as to substitute or insert certain definitions, to align the employment laws to ensure decent work by regulating sub-contracting, contract work and outsourcing, to amend the jurisdiction of the Labour Courts; to provide for the prohibition of certain abusive practices to workers, and to repeal a section; and to provide for matters connected therewith.

BE IT ENACTED by the Parliament of the Republic of South Africa, as follows:—

Substitution of section 43 of Act 66 of 1995, as amended by section 10 of Act 42 of 1996

1. Section 43 of the Labour Relations Act, 1995 (hereafter referred to as the principal Act), is hereby amended by the substitution for subsection (3) of the following subsection:

"(3) If a statutory council concludes a *collective agreement* in terms of subsection (1)(d) or in respect of any matter referred to by subsection

(2), the provisions of sections 31, 32 and 33 apply, read with the changes required by the context."

Amendment of section 51 of Act 66 of 1995, as amended by section 11 of Act 42 of 1996 and section 12 of Act 12 of 2002

2. Section 51 of the principal Act is hereby amended by the substitution for subsection (9) of the following subsection:

"(9) *A bargaining council may, by collective agreement*[,] —

- (a) establish procedures to resolve any dispute contemplated in this section;
- (b) provide for payment of a dispute resolution levy; and
- (c) provide for the payment of a fee in relation to any conciliation or arbitration proceedings in respect of matters for which the Commission may charge a fee in terms of section 115(2A)(f)."

Amendment of section 65 of Act 66 of 1995

3. Section 65 of the principal Act is hereby amended by the substitution in subsection (1) for paragraph (c) of the following paragraph:

"(c) *the issue in dispute* is one that a party has the right to refer to arbitration or to the Labour Court in terms of *this Act* or any other employment law;"

Amendment of section 115 of Act 66 of 1995, as amended by section 31 of Act 42 of 1996, section 6 of Act 127 of 1998 and section 22 of Act 12 of 2002

4. Section 115 of the principal Act is hereby amended by—

- (a) the deletion of the word “and” at the end of paragraph (c), the insertion of the word “and” at the end of paragraph (d) and the addition of the following paragraph:

“(e) review any rules made in terms of this section at least every second year.”.

- (b) the insertion in subsection (2) of the following paragraph after paragraph (b):

“(bA) if asked, assist a party to serve any notice or document in respect of conciliation or arbitration proceedings in terms of this Act;

“(bB) if asked, assist a party to enforce an arbitration award that has been certified in terms of section 143(3).”.

- (c) the substitution in subsection (2A) for paragraph (k) of the following paragraph:

“(k) [the right of any person or category of persons to represent any party] the representation of parties in any conciliation or arbitration proceedings, including the limitation or prohibition of representation in those proceedings;”.

- (d) the insertion in subsection (2A) of the following paragraph after paragraph (k):

“(kA) the consequences for any party to conciliation or arbitration proceedings for not attending those proceedings;” and

- (e) the substitution in subsection (3) for the words preceding paragraph (a) of the following words:

"[If asked, the] The Commission may provide
employees, employers, registered trade unions, registered employers'
organisations, federations of trade unions, federations of employers'
organisations or councils with advice or training relating to the primary
objects of this Act or any other employment law, including but not
limited to—".

Amendment of section 136 of Act 66 of 1995, as amended by section 9 of Act 127 of 1998

5. Section 136 of the principal Act is amended by the substitution in subsection (1) for paragraphs (a) and (b) of the following paragraphs:

- "(a) a commissioner has issued a certificate stating that the *dispute* remains unresolved or the 30 day period or any further period agreed between the parties has ended and the *dispute* remains unresolved; and
- (b) within 90 days after the date on which that certificate was issued or the end of the 30 day period or any further period agreed between the parties, whichever is the later, any party to the *dispute* has requested that the *dispute* be resolved through arbitration. However, the Commission, on good cause shown, may condone a party's non-observance of that timeframe and

allow a request for arbitration filed by the party after the expiry of the 90-day period."

Amendment of section 143 of Act 66 of 1995, as amended by section 32 of Act 12 of 2002

6. Section 143 of the principal Act is hereby amended by—

(a) the substitution for subsection (1) of the following subsection:

"(1) An arbitration award issued by a commissioner is final and binding and it may be enforced as if it were an order of the Labour Court, High Court or the Magistrate's Court, as the case may be, unless it is an advisory arbitration award."; and

(b) the insertion after subsection (3) of the following subsection:

"(3A) An arbitration award certified in terms of subsection (3) that orders a party to pay a sum of money has the status of a writ of execution of—

(a) the Magistrate's Court, to the extent that the award is in respect of an amount within the jurisdiction of the Magistrates Court;

(b) the High Court, to the extent that the award is in respect of an amount which exceeds the jurisdiction of the Magistrates Court."

Amendment of section 144 of Act 66 of 1995, as substituted by section 33 of Act 12 of 2002

7. Section 144 of the principal Act is hereby amended by—
- (a) the substitution for the heading of the following heading:
- "Variation and rescission of certificates, arbitration awards and rulings";**
- (b) the substitution for the words preceding paragraph (a) of the following words:
- "Any commissioner who has issued a certificate in terms of section 135, an arbitration award or ruling, or any other commissioner appointed by the *director* for that purpose, may on that commissioner's own accord or, on the application of any affected party, vary or rescind an arbitration award or ruling—"; and
- (c) the deletion of the word "or" at the end of paragraph (b), the insertion of the word "or" at the end of paragraph (c) and the addition of the following paragraph:
- "(d) if there is good cause on any other ground for the award or ruling to be varied or rescinded.".

Amendment of section 147 of Act 66 of 1995, as amended by section 41 of Act 42 of 1996

8. Section 147 of the principal Act is hereby amended by insertion after subsection (6) of the following subsection:

"(6A) Despite subsection (6), the Commission must appoint a commissioner to resolve the *dispute* in terms of *this Act* if—

- (a) the *employee* is required to pay any part of the cost of the private *dispute* resolution procedures; or
- (b) the person or body appointed to resolve the *dispute* is not independent of the employer."

Substitution of section 150 of Act 66 of 1995, as amended by section 35 of Act 12 of 2002

9. The following section is hereby substituted for section 150 of the principal Act:

"Commission may appoint commissioner to conciliate in the public interest

150. (1) The Commission may appoint a commissioner who must attempt to resolve the *dispute* through conciliation whether or not that *dispute* has been referred to the Commission or a bargaining council—

- (a) at the request of the parties; or
- (b) if there is no request, if the *director* believes it is in the public interest to do so.

(2) Before appointing a commissioner in terms of this section, the Commission must consult—

- (a) the parties to the *dispute*; and

(b) the secretary of a bargaining council with jurisdiction over the parties to the dispute.

(3) The director may appoint one or more commissioners to conciliate the dispute, who may include a person who has already conciliated in respect of that dispute.

(4) In addition, the director may appoint to assist in conciliating—

(a) one person from a list of at least five names submitted by the representatives of organised labour on the governing body of the Commission; and

(b) one person from a list of at least five names submitted by the representatives of organised business on the governing body of the Commission.

(5) Unless the parties to the dispute agree otherwise, the appointment of a commissioner in terms of this section, suspend the right of an employee to strike or an employer to lock-out, acquired in terms of Chapter IV."

Substitution of section 157 of Act 66 of 1995, as amended by section 14 of Act 127 of 1998

10. The following section is hereby substituted for section 157 of the principal Act:

"Jurisdiction of Labour Court

157. (1) Subject to the Constitution the Labour Court has exclusive jurisdiction in respect of—

- (a) a matter that is required to be determined by the Labour Court in terms of this Act or any other employment law;
- (b) the interpretation or application of any employment law;
- (c) a dispute concerning the termination of a contract of employment;
- (d) a constitutional matter arising from employment or labour relations;
- (e) subject to section 145, review any administrative action taken in terms of this Act or any employment law;
- (f) a dispute between a trade union or an employers organisation and a member or applicant for membership of the union or organisation, as the case may be, about an alleged non-compliance with the constitution of the union or organisation or section 25(5)(b);
- (g) hear and determine any appeal in terms of section 35 of the Occupational Health and Safety Act, 1993 (Act No. 85 of 1993); and
- (h) any other matter arising from employment or labour relations.

(2) If the CCMA or a bargaining council has exclusive jurisdiction in a particular matter, no party may refer such matter to the Labour Court before finalisation by the CCMA or a bargaining council.

(3) If proceedings concerning any matter contemplated in terms of subsection (1) are instituted in a court or tribunal that does not have jurisdiction in respect of that matter, that court or tribunal may at any stage refer those proceedings to the Labour Court for determination."

Amendment of section 158 of Act 66 of 1995, as amended by section 44 of Act 42 of 1996 and section 36 of Act 12 of 2002

11. Section 158 of the principal Act is hereby amended by—

(a) the substitution in subsection (1) for paragraph (b) of the following paragraph:

"(b) order compliance with any provision of *this Act* or any employment law;"

(b) the deletion in subsection (1) of paragraphs (e), (g), (h) and (i); and

(c) the insertion after section (1A) of the following subsection—

"(1B) No decision may be taken on review in respect of conciliation or arbitration proceedings under the auspices of the Commission or any bargaining council with jurisdiction in respect of a matter contemplated in section 65(1)(c) until the dispute has been determined by the Commission or a bargaining council."

Amendment of section 186 of Act 66 of 1995, as amended by section 95 of Act 75 of 1997 and section 41 of Act 12 of 2002

12. (1) Section 186 of the principal Act is amended by—

(a) the substitution in subsection (1) for paragraph (b) of the following paragraph:

"(b) an *employee* engaged under a fixed term contract of employment reasonably expected the employer—

(i) to renew a fixed term contract of employment on the same or similar terms but the employer offered to renew it on less favourable terms, or did not renew it; or

- (ii) to offer the *employee* an indefinite contract of employment on the same or similar terms but the employer offered it on less favourable terms, or did not offer it, where there was reasonable expectation;; and
- (b) the substitution in subsection (2) for the words preceding paragraph (a) of the following words:

“unfair labour practice’ means any unfair act or omission that arises between an employer and client company in sub-contracting cases and an *employee* involving—”.

Insertion of section 187A in Act 66 of 1995

13. The following section is hereby inserted in the principal Act after section 187:

“Limitation on application of Chapter VIII

187A. An *employee* earning in excess of an amount determined by the Minister by notice in the *Gazette*, may not refer labour *disputes* in respect of the provisions of sections 185, 186, 188, 189, 189A and 197 to the CCMA.”

Amendment of section 188A of Act 66 of 1995

14. Section 188A of the principal Act is hereby amended by—
- (a) the substitution for the heading of the following heading:
- “[Agreement for pre-dismissal arbitration] Inquiry by arbitrator”;**

- (b) the substitution for subsection (1) of the following subsection:

“(1) An employer may, with the consent of the *employee* or in accordance with a *collective agreement*, request a council, an accredited agency or the Commission to appoint an arbitrator to conduct an [arbitration] inquiry into allegations about the conduct or capacity of that *employee*.”;

- (c) the substitution for subsection (4) of the following subsection:

(4) (a) An *employee* may only consent to **[a pre-dismissal arbitration]** an inquiry in terms of this section after the *employee* has been advised of the allegation referred to in subsection (1) **[and in respect of a specific arbitration]**.

(b) Despite any other provision in this Act **[subparagraph (a),]**—

- (i) an *employee* earning more than the amount determined by the Minister in terms of section 6(3) of the *Basic Conditions of Employment Act* at the time, may **[consent]** agree in a contract of employment to the holding of [a pre-dismissal arbitration in a contract of employment] an inquiry in terms of this section;
- (ii) a collective agreement may provide for an inquiry to be held in terms of this section.”;

- (d) the substitution in subsection (5) for the words preceding paragraph (a) of the following words:

“In any **[arbitration] inquiry** in terms of this section a party to the *dispute* may appear in person or be represented only by—”;

- (e) the substitution for subsection (8) of the following subsection:

“(8) The ruling of the arbitrator in an inquiry has the same status as an arbitration award and the provisions of sections 143 to 146 apply with the changes required by the context to any ruling made by an arbitrator in terms of this section.”;

- (f) the substitution for subsection (9) of the following subsection:

“(9) An arbitrator conducting an **[arbitration]** inquiry in terms of this section must, in the light of the evidence presented and by reference to the criteria of fairness in the Act, **[direct]** rule as to what action, if any, **[should]** may be taken against the *employee*.”;

- (g) the substitution for subsection (10) of the following subsection:

“(10) (a) A private agency may only appoint an arbitrator to conduct an **[arbitration]** inquiry in terms of this section if it is accredited for **[this purpose]** arbitration by the Commission.

(b) A council may only appoint an arbitrator to conduct an **[arbitration]** inquiry in terms of this section in respect of which the employer or the *employee* is not a party to the council, if the council has been accredited for **[this purpose]** arbitration by the Commission.”; and

- (h) the addition of the following subsections:

“(11) Despite subsection (1), if an *employee* alleges that the holding of an inquiry contravenes the Protected Disclosures Act, 2000 (Act No. 26 of 2000), or that the employer has contravened section 5 of *this Act*, that *employee* or the employer may require that an inquiry be conducted by arbitration under this section—

- (a) into allegations by the employer into the conduct or capacity of that *employee*; or
- (b) in respect of any contemplated dismissal for operational requirements.

(12) The holding of an inquiry by a arbitrator in terms of this section and the suspension of an *employee* on full pay pending the outcome of such an inquiry do not constitute an occupational detriment, as contemplated in the Protected Disclosures Act, 2000 (Act No. 26 of 2000).".

Amendment of section 191 of Act 66 of 1995

15. Section 191 of the principal Act is hereby amended by—

- (a) the substitution for subsection (5A) of the following subsection:

"(5A) Despite any other provision in the Act, the council or Commission must commence the arbitration immediately after certifying that the *dispute* remains unresolved unless—

- (a) the commissioner and the parties agree otherwise;
- (b) the commissioner concludes that it is unreasonable for the arbitration to commence immediately, after considering—
 - (i) the nature of the questions of law raised by the *dispute*;
 - (ii) the complexity of the *dispute*; and
 - (iii) the public interest."; and

- (b) the substitution for subsection (12) of the following subsection:

"(12) An employee dismissed by reason of the employer's operational requirements may elect to refer the dispute either to arbitration or to the Labour Court if—

- (a) the employer followed a consultation procedure that applied to that employee only, irrespective of whether that procedure complied with section 189;
- (b) the employer's operational requirements for the dismissal relate to that employee only; or
- (c) the employer employs less than 10 employees."

Amendment of section 197 of Act 66 of 1995, as amended by section 49 of Act 12 of 2002

16. Section 197 of the principal Act is hereby amended by the substitution in subsection (1) for paragraph (b) of the following paragraph:

- "(b) **'transfer'** means the transfer of a business **[by]** from one employer ("the old employer") to another employer ("the new employer") as a going concern."

Repeal of section 198 of Act 66 of 1995

17. Section 198 of the principal Act is hereby repealed.

Amendment of section 200A of Act 66 of 1995

18. Section 200A of the principal Act is hereby amended by the substitution for subsection (1) of the following subsection:

"(1) Until the contrary is proved, for the purposes of *this Act* and any employment law, a person, who works for or renders services to, any other person, is presumed, regardless of the form of the contract, to be an *employee*, if any one or more of the following factors are present:".

Insertion of section 200B in Act 66 of 1995

19. The following sections are hereby inserted in the principal Act after section 200A:

"Declaring Temporary Employment to be permanent

200B. An *employee* must be employed permanently, unless the employer can establish a justification for employment on a fixed term.

Liability of client company in sub-contracting

200C. An *employee* must have recourse against the employer and its client company where there is unfair labour practice."

Amendment of section 201 of Act 66 of 1995, as amended by section 49 of Act 42 of 1996

20. Section 201 of the principal Act is hereby amended by the deletion of subsection (3).

Amendment of section 203 of Act 66 of 1995, as amended by section 52 of Act 12 of 2002

21. Section 203 of the principal Act is hereby amended by the addition of the following subsections:

"(5) The Minister may table proposals in NEDLAC—

(a) for a code of good practice; or

(b) to amend or replace any code of good practice.

(6) If NEDLAC fails to reach consensus on any proposal to change, replace or issue a code of good practice within six months of the commencement of consultations, the Minister may publish in the Government Gazette the relevant change, replacement or code of good practice in accordance with the provisions of this section.

(7) A code of good practice issued by the Minister in terms of subsection (6) has the same status as a code of good practice issued by NEDLAC in terms of this section."

Insertion of section 209A in Act 66 of 1995

22. The following section is hereby inserted in the principal Act after section 209:

"Offences and penalties

209A. Any person who contravenes or fail to comply with section 201 and 205 is guilty of an offence and is liable to a fine or imprisonment or both such fine and imprisonment as listed in the table below."

<u>It is a criminal offence to contravene the following provisions</u>	<u>Minimum applicable fines</u>	<u>Minimum term of imprisonment</u>
Section 201	R10 000.00	12 months
Section 205	R10 000.00	12 months

Amendment of section 213 of Act 66 of 1995, as amended by section 52 of Act 42 of 1996, section 54 of Act 12 of 2002 and section 43 of Act 30 of 2007

23. Section 213 of the principal Act is hereby amended by—
(a) the insertion after the definition of "**collective agreement**" of the following definition:

" 'contract of employment' means—

(a) a common law contract of employment; or

(b) any other agreement or arrangement under which a person agrees to work for an employer but excluding a contract for work as an independent contractor;";

(b) the substitution for the definition of an **"employee"** of the following definition:

"'employee' means any person employed by or working for an employer, who receives or is entitled to receive any remuneration, reward or benefit and works under the direction or supervision of an employer;";

(c) the insertion after the definition of **"employer"** of the following definition:

"'employer' means any person, institution, organisation, or organ of state who employs or provides work to an employee or any other person and directly supervises, remunerates or tacitly or expressly undertakes to remunerate or reward such employee for services rendered;";

(d) the substitution the definition of **"employment law"** of the following definition:

"'employment law' includes *this Act*, any other Act the administration of which has been assigned to the *Minister*, and any of the following Acts:

(a) the Unemployment Insurance Act, **[1966 (Act No. 30 of 1966)]**
2001 (Act No. 63 of 2001);

(b) **[the Skills Development Act, 1998 (Act No. 97 of 1998);**

(c) the Employment Equity Act, 1998 (Act No. 55 of 1998);

(d) the Occupational Health and Safety Act, 1993 (Act No. 85 of 1993); **[and]**

- (e) the Compensation for Occupational Injuries and Diseases Act, 1993 (Act No. 130 of 1993); and
 - (f) the Basic Condition of Employment Act, 1997 (Act No. 75 of 1997);";
- (e) the insertion after the definition of "**essential service**" of the following definition:
- "**independent contractor**" means a person who works for or supplies services to a client or customer as part of the person's business, undertaking or professional practice; and
- (f) the substitution for the definition of "**serve**" of the following definition:
- "**serve**" means to send by registered post, telegram, telex, telefax or to deliver by hand and:
- (a) in respect of the Labour Courts, any other method of service specified in the Rules of the Labour Court;
 - (b) in respect of the Commission, any other method of service specified in the Rules of the Commission;".

Transitional provisions

24. (1) Notwithstanding the provisions of this Act, any proceedings instituted in any court or tribunal before the commencement of *this Act* must be dealt with as if the principal Act had not been amended.

(2) Nothing in this section precludes a court or tribunal from referring any such proceedings to the Labour Court for determination in terms of section 157(4) of the principal Act as amended by *this Act*.

(3) Until the Rules Board for Labour Courts contemplated in section 159 of the principal Act makes rules concerning the referral of matters from other courts in terms of section 157(4) of the principal Act as amended by *this Act*, the registrar of the Labour Court must submit a referred matter in chambers to a judge of the Labour Court give a directive as to how the proceedings should be conducted in the Labour Court.

(4) The *Minister* must publish a notice in the *Gazette* notifying the public when section 198 will cease to operate.

Short title

25. This Act is called the Labour Relations Amendment Act, 2010, and comes into operation on a date fixed by the President by proclamation in the *Gazette*.

EXPLANATORY MEMORANDUM

LABOUR RELATIONS AMENDMENT BILL, 2010

The Department of Labour is submitting the Labour Relations Amendment Bills for approval. This is a fifth amendment since the promulgation of the Labour Relations Act in 1995.

This Bill seeks to address the concerns raised in the ruling party's election manifesto which has committed the government to the following: "In order to avoid exploitation of workers and ensure decent work for all workers as well as to protect the employment relationship, introduce laws to regulate contract work, subcontracting and out-sourcing, address the problem of labour broking and prohibit certain abusive practices."

In preparation for the publication of this Bill the Department of Labour and the representatives of organised business and labour undertook a labour law review. The proposed amendments to the Act can be grouped under the following themes –

- (a) responses to the increased informalisation of labour to ensure that vulnerable categories of workers receive adequate protection and are employed in conditions of decent work;
- (b) adjustments to the law to ensure compliance with South Africa's obligations in terms of international labour standards;

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- (c) ensuring that labour legislation gives effect to fundamental Constitutional rights including the right to fair labour practices, to engage in collective bargaining and right to equality and protection from discrimination;
- (d) enhancing the effectiveness of the primary labour market institutions such as the Labour Court, the CCMA and the Department's inspectorates;
- (e) rectifying anomalies and clarifying uncertainties that have arisen from the interpretation and application of the three statutes.

COLLECTIVE BARGAINING

1 Statutory councils (section 43)

The Act provides for statutory councils to be established in sectors in which employers' organisations and trade unions are unable to agree on the establishment of a bargaining council. Presently, statutory councils can ask the Minister to extend collective agreements concerning certain specified topics to all parties within their sector. It is proposed to amend section 43(1) to allow a statutory council to make such a request in respect of any collective agreement that it has concluded.

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2 Bargaining councils (section 51)

The amendment of section 51(9) allows a bargaining council to establish dispute resolution procedures for its sector by collective agreement. Section 51(9) is amended to clarify that such a collective agreement may provide for a dispute resolution levy as well as for the council to charge a fee for dispute resolution services. A fee may only be charged if the CCMA charges a fee for that service and may not exceed the fee charged by the CCMA.

3 Limitation on rights to strike and lock-out.

Section 65(1)(c) is amended to align the use of employment laws instead of labour Relations Act to broaden the scope of this provision. The insertion addresses the issue of referring the matters to the Labour Court only in matters referring to Labour Relations as the case now in the LRA and we want to include all employment laws.

THE CCMA

A range of amendments are made to the provisions dealing with the operation of the CCMA to facilitate the resolution of disputes and enhance the efficiency of the CCMA's operation.

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4 CCMA rules (section 115 (2) and (2A))

A number of amendments are proposed to the provisions empowering the Governing Body of the CCMA to make rules - the Governing Body is required to consider the adequacy of its rules at least every two years;

- 4.1 It is proposed that the CCMA should, on request, be able to assist a party to proceedings to serve documents on other parties and to enforce an arbitration award, if requested by a party to assist. These proposed functions will facilitate the operation of the CCMA. Presently, parties are obliged to serve documents themselves. There is evidence that employees are unable to serve documents or, where they have done so, they are unable to prove that there has been service. In these circumstances, it is appropriate that the CCMA should be able to utilise its resources to ensure that proper notification is given to parties so that they have the opportunity to decide whether to participate in proceedings and to prevent claims of non-service being used to frustrate dispute resolution. Secondly, many employees are unable to enforce awards in their favour because the practice of the Deputy Sheriffs is to require the payment of deposits before executing awards

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- 4.2 The amendment of subsection “2A (k)” seeks to empower the CCMA to make rules regarding representation, whether to allow or prohibit representation in any Conciliation or Arbitration proceedings. By doing that we want to give the CCMA discretion whether to allow or prohibit representation looking at the complexity of the matter.
- 4.3 The CCMA’s function of providing training and assistance to stakeholders is extended to all employment legislation. (s115(3)) CMA did not have these powers).

5. Appointment of Commissioner to resolve dispute through Arbitration (section 136)

The Commission is given the authority to appoint a Commissioner to arbitrate over matters that remain unresolved between the parties for 30 days or any further agreed period in order to facilitate speedy resolution of matters. As the case is now in the Principal Act the provision is open and we now want to put the time frames for a speedy resolution.

6. Effect of arbitration awards (section 143)

Proposed changes to section 143 would change the status of CCMA arbitration awards. The purpose of this is to facilitate the enforcement of awards by removing the need for a writ to be issued by the Labour Court before an award can be executed. In

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addition, if an award is executed for an amount of compensation that is within the Magistrate's Court jurisdiction, the fees for execution will be at the Magistrate's Court tariff rather than the High Court tariff. This will assist in the speedy resolution without taking the route of lengthy litigation. If you have an award you can have the writ issued immediately without making an application to the Labour Court if the employer fails to comply with the order.

7. Rescission and variation of certificates, arbitration awards and rulings (section 144)

8. The power of Commissioners to rescind or vary erroneous or improperly obtained rulings and awards is extended to cover the issue of certificates at the conclusion of conciliation and not only the arbitration awards. The grounds on which certificates, rulings and arbitration awards can be varied or rescinded are extended to include "good cause". (s144(d)) This is consistent with the jurisprudence of the Labour Court on this issue.

9. Agreements in respect of private arbitration (s 147 (6))

The CCMA provides employees with access to expedite dispute resolution without any charge. However, there has been a practice by certain employers to seek to avoid these provisions

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by, for instance, requiring employees in their contracts of employment to agree to share the costs of arbitrations. While these clauses are not enforceable and the CCMA is entitled to hear these disputes, a new sub section (6A) is inserted to clarify that the CCMA must deal with such a dispute if a private dispute resolution procedure either requires the employee to pay the costs of the arbitration or the arbitrator is not independent of the employer.

10. Intervention in disputes in the public interest (section 150)

Amendments are proposed to extend the power of the CCMA to intervene to resolve disputes in the public interest. Presently, this can only be done with the consent of both parties and it is proposed that this could be done in other disputes after the Director of the CCMA has consulted with the parties. This power has been used to provide conciliation in high profile disputes which have given rise to industrial action or the threat of industrial action.

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LABOUR COURT

11. Jurisdiction and powers of the Labour Court (sections 157 and 158)

(a) The jurisdiction of the Labour Court is clarified and expanded. The Labour Court's exclusive jurisdiction is extended to the interpretation of all employment laws, all matters concerning the termination of contracts, constitutional matters arising from employment or labour relations and reviews of administrative actions in terms of any employment law. It is also clarified that, in line with the jurisprudence of the Constitutional Court, the Labour Court will have exclusive jurisdiction for issues of labour law in the public service. These changes will prevent "forum shopping" by parties as well as prevent the emergence of conflicting jurisprudence in the specialist Labour Court and the High Court. (s. 157(1))

(b) Provisions dealing with the jurisdiction of the Labour Court which were initially included in section 158 (which deals with the court's powers) are to be moved to section 157. In addition, the review powers of the Labour Court are adjusted to be consistent with PAJA. (s 158(1) (g)) This applies to reviews other than those dealing with

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arbitration awards. Similar amendments are made to other labour legislation.

(c) Decisions made during conciliation and arbitration hearings may only be reviewed after the conclusion of the arbitration. (s 158(1)(b)) This provision is introduced to prevent the obstructive use of piece-meal reviews to delay dispute resolution in the CCMA(s 158 (1B)). This amendment is justified by the need to ensure that the CCMA is able to resolve disputes in an expeditious manner.

(d) The Labour Court Rules Board is required to review the Labour Court rules at least once every two years.

DISMISSAL

9. Changes in dismissal law (sections 186)

Amendments are proposed to clarify aspects of the law on unfair dismissal. These are –

Basis on which an employee engaged on a fixed term contract can allege unfair dismissal is extended to cover cases in which the employee alleges a reasonable expectation that the employer would offer him or her indefinite employment; (s

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186(b)(ii) This is in line with the Manifesto to regulate the contract work.

Section 186 (2) is a consequential to the new section 200C introduced to address the issue of liability of client company to the actual employer in cases of unfair labour practice. The reason for this amendment is that as it stands in the Principal Act unfair labour practice refers to the employer only.

11. Limitation on application of Chapter VIII (section 187 A)

The amendment seeks to exclude employees earning more than the prescribed threshold from referring their labour disputes to the CCMA. This will ensure that vulnerable employees are not prejudiced because of the delays caused by the volume of complaints from employees who can afford to approach the courts.

12. Enquiry by arbitrator (section 188A)

- (a) The concept of the “pre-dismissal arbitration” introduced in 2002 is renamed as an enquiry by an arbitrator. While this procedure in terms of which an arbitrator chairs an internal enquiry into allegations about an employee’s conduct or capacity offers considerable potential savings to employers and employees by avoiding a duplication of

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internal enquiries and arbitration hearings, little use has been made of it. In order to facilitate more extensive use, it is proposed that collective agreements should be able to provide for inquiries by an arbitrator. This will allow employers and trade unions to agree on using this form of enquiry in disciplinary codes that are established by collective agreement.

- (b) In addition, an enquiry of this type is made mandatory on the request of either the employer or the employee in two cases. The first is if the employee alleges that the dismissal would be automatically unfair because the employee is seeking to dismiss the employee for exercising a protected right under section 5 of the LRA. The second is “whistle-blower” cases in which the employee alleges that an employer is seeking dismissal in response to a protected disclosure under the Protected Disclosures Act. The latter type of case can give rise to protracted litigation over whether the employer is entitled to conduct an enquiry. This can be abused by persons other than genuine “whistle-blowers” to delay legitimate disciplinary processes. An enquiry by an arbitrator will ensure that there is an immediate investigation into the substance of the allegations and will lead to a very much quicker resolution of these disputes.

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13. Conciliation through arbitration (Con-arb) proceedings (section 191 (5))

The “con-arb” process allows arbitration proceedings to commence immediately after the end of conciliation phase. This change, which was introduced in 2002, has contributed to a significant reduction of the period taken to resolve disputes. However, in terms of section 191(5), either party may object to a dispute being dealt with in terms of the “con-arb” process. CCMA statistics show that objections to “con-arb” are lodged in roughly 30% of cases significantly delaying the resolution of disputes. It is proposed that all disputes should be dealt with by “con-arb” unless the commissioner and all the parties agree that “con-arb” is not appropriate or the commissioner concludes that it is unreasonable. This will ensure that an increasing proportion of cases are dealt with through “con-arb” while more complex cases can be postponed to allow the parties to prepare.

14. Individual dismissals for operational requirements (section 191(12))

The right of dismissed employees to refer an “individual” operational requirements dismissal to arbitration is clarified. This is necessitated by conflicting Labour Court decisions on

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the matter. In addition, employees of employers with less than 10 employees will be able to refer retrenchments to the CCMA for arbitration.

15. Transfers of businesses as a going concern (section 197)

The application of section 197 to “second generation” transfers in which work that has been previously outsourced is transferred from one service provider to another is clarified. This change is consistent with a purposive construction of the provision by the Labour Appeal Court

16. Temporary Employment Services (repeal of section 198)

The repeal seeks to address the unintended consequences of s 198 which brought about the confusion in its application. The labour brokers manipulated this section and operated under the auspices of this section and therefore by repealing this section we want to address the Manifesto which states that we must address the problem of Labour broking. The challenge with this section is that CCMA and the Labour Courts have difficulties in identifying who is the employer.

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PROVISIONS PROTECTING VULNERABLE EMPLOYEES –

17. Presumption of who is an employee (section 200A)

This is an amendment to the principal act where the presumption of who is an employee was only referred to the Labour Relations Act and now we want to extend it to include any other employment law. This is to align all labour laws.

18. Declaring Temporary Employment to be permanent (section 200B)

The Bill proposes a declaration of indefinite employment. In other words, an employer that engages employees on a fixed-term basis will have to demonstrate a justification for doing so. Such a justification will be present if the employee was engaged to work on a specific task (eg: the building of a particular building, replacing a person who is on maternity, ect.) or on a task that lasts for a specific period. The purpose of this clause is to prevent the use of “fixed term” contract as a basis for depriving employees who are engaged for work of indefinite duration of security of employment. It is proposed that the clause should only apply to employees who are earning below a threshold set by the Minister of Labour (section 200B). As a result, the presumption will not

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impact on the use of fixed term contracts in respect of managerial and other senior employees.

19. SECTION 200 (C) LIABILITY OF CLIENT COMPANY IN SUB-CONTRACTING

Proposed section 200C addresses the issue of employees to have recourse against client companies in cases of unfair labour practices in sub-contracting.

20. Confidentiality (section 201)

The deletion seeks to align with the table provided in the new section 209 which deals with offences and penalties. There is no need for these provisions as they are addressed in the table.

21. NEDLAC and Codes of Good Practice (section 203)

The Minister may place proposals before NEDLAC for new codes of good practice or to revise existing codes. If the NEDLAC stakeholders are unable to reach consensus on a code of good practice after six months of consultations, the Minister will be empowered to issue a code of good practice. This provision seeks to ensure that codes of good practice are

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updated and balances the importance of stakeholder consultation with the requirements of good governance.

22. Offences and Penalties (section 209A)

The amendment seeks to strengthen compliance of Labour Relations Act and enforcement by Labour inspectors. The new provision will also empower inspectors to issue fines and lay criminal charges to that employer who contravenes section 201 and 205 of this Act. It also gives time frames in order to expedite the process.

23. New definitions (section 213)

A new definition of the term “contract of employment” clarifies that any contract or arrangement in terms of which an employee, as defined in the LRA, is a contract of employment. This clarifies an uncertainty that has arisen from the fact that the statutory definition of an employee is broader than the equivalent common law concept. The need for this has been identified in several Labour Court decisions as well as by the SA Law Commission. At the same time, a new definition of an “independent contractor” is inserted to ensure that the fraudulent “independent contracting” is not used to disguise employment relationships.

In addition, the definitions of an “employment law” addresses the reference to the old Labour Relations Act, and adding the Basic

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Conditions of Employment as one of the legislations administered by the Minister of Labour and to remove the Skills Development Act as it is no longer assigned to the Minister of Labour.

the term “serve” (serving of documents and notices) to be consistent with other employment laws.

Other definitions that were amended are:-

Employee, employer, and the workplace are defined for alignment with other employment laws as defined in Occupational Health and Safety Act, to extend the definition to address the new developments in the labour market.

24. Transitional provisions

A transitional provision to require the Minister to invite representations three months before the repealed section 198 comes into effect on categories of “temporary work” in which placement by temporary employment services to address those temporary placements that are already in place should be permitted is proposed. In addition, provisions to phase in the revised jurisdiction of the Labour Court are included.

REPUBLIC OF SOUTH AFRICA

BASIC CONDITIONS OF EMPLOYMENT AMENDMENT BILL

*(As introduced in the National Assembly (proposed section 75); explanatory
summary of Bill published in Government Gazette No. 33873 of 17 December 2010)
(The English text is the official text of the Bill)*

(MINISTER OF LABOUR)

GENERAL EXPLANATORY NOTE

[] **Words in bold type in square brackets indicate omissions from existing enactments.**
_____ **Words underlined with a solid line indicate insertions in existing enactments.**

BILL

To amend the Basic Conditions of Employment Act, 1997 so as to substitute or insert certain definitions; to provide benefits for contract workers; to prohibit certain conduct of employees; to provide for the prohibition of work by children as employees or independent contractors; to further provide for the adjustment of remuneration; to provide for the Minister to publish a sectoral determination for employees and employers who are not covered by any other sectoral determination; to delete or repeal certain obsolete provisions; to provide for a convicted employer to repay an employee amounts which are due to the employee; to provide for the prohibition of certain exploitative practices by employers; and to provide for certain offences and penalties; to increase the penalties for certain offences; and to provide for matters connected therewith.

BE IT ENACTED by the Parliament of the Republic of South Africa, as follows:—

Amendment of section 1 of Act 75 of 1997, as amended by section 40 of Act 65 of 2001, section 26 of Act 68 of 2002 and section 25 of Act 52 of 2003

1. Section 1 of the Basic Conditions of Employment Act, 1997 (hereafter referred to as the principal Act) is amended by—

(a) the insertion after the definition of "Constitution" of the following definition—

" 'contract of employment' means—

(a) a common law contract of employment; or

(b) any other agreement or arrangement under which a person agrees to work for an employer but excluding a contract for work as an independent contractor;"

(b) the insertion after the definition of "farmworker" of the following definition:

" 'independent contractor' means a person who works for or supplies services to a client or customer as part of the person's business, undertaking or professional practice;"

(c) **"forced labour"** means all work or service which is exacted from any person under the menace of any penalty and for which the said person has not offered himself voluntarily

(d) the substitution for the definition of "sector" of the following definition:

"sector' means an industry or a service or part of an industry or service and in respect of a sectoral determination made in terms of section 55(8), means the employers and employees covered by that determination;" and

(e) the substitution for the definition of 'serve' of the following definition:

"serve' means to send by registered post, telegram, telex, telefax or to deliver by hand and—

(a) in respect of the Labour Courts, any other method of service specified in the Rules of that Court;

(b) in respect of the Commission, any other method of service specified in the Rules of the Commission;".

Amendment of section 32 of Act 75 of 1997

2. Section 32 of the principal Act is hereby amended by the addition of the following subsection:

"(5) Employers must contribute benefits of similar or equal value to employees employed on a fixed term contract as the benefits afforded to permanent employees."

Insertion of section 33A in Act 75 of 1997

3. The following section is hereby inserted in the principal Act after section 33:

33A. "Prohibited conduct

An employer must not—

(a) require or accept any payment by or on behalf of an employee or prospective employee;

- (b) require an employee or prospective employee to purchase any goods from the employer, any business or person nominated by the employer;
or
- (c) accept or seek benefit of any kind;
in respect of the employment of, or the allocation of work to, an employee or prospective employee."

Substitution of section 35 of Act 75 of 1997

- (4) If an employee's remuneration or wage is calculated, either wholly or in part, on a basis other than time or if an employee's remuneration or wage fluctuates **[significantly]**."

Substitution of section 43 of Act 75 of 1997

- 4. The following section is hereby substituted for section 43 of the principal Act:

43. "Prohibition of [employment of] work by children

- (1) No person may **[employ]** require or permit a child to work as an employee or independent contractor if the child—
 - (a) **[who]** is under 15 years of age; or
 - (b) **[who]** is under the minimum school-leaving age in terms of any law[, if this is 15 or older].

(2) No person may **[employ]** require or permit a child **[in employment]** to perform any work or provide services—

- (a) that **[is]** are inappropriate for a person of that age;
- (b) that place**[s]** at risk the child's well-being, education, physical or mental health, or spiritual, moral or social development.

(3) A person who **[employs]** requires or permits a child to work in contravention of subsection (1) or (2) commits an offence.”.

Substitution of section 44 of Act 75 of 1997

5. The following section is hereby substituted for section 44 of the principal Act:

44. “Regulations of work by children [of 15 years or older]

(1) Subject to section 43(2), the Minister may, on the advice of the Commission, make regulations to prohibit or place conditions of **[on the employment of]** work by children who are at least 15 years of age and no longer subject to compulsory schooling in terms of any law.

(2) A person who [employs] requires or permits a child to work in contravention of **[subsection (1) or (2)]** any regulation made in terms of this section commits an offence.”.

(3) The Minister may, on the advice of the Commission, make regulations to give effect to South Africa's international law obligations in terms of the International Labour Organisation Convention (No.182) on the Worst Forms of Child Labour and any other international instrument dealing with work by children.

Substitution of section 45 of Act 75 of 1997

6. The following section is hereby substituted for section 45 of the principal Act:

45. "Medical examinations

The Minister may, after consulting the Commission, make regulations relating to the conduct of medical examinations of children **[in employment]** who perform work.".

Amendment of section 46 of Act 75 of 1997

7. Section 46 of the principal Act is hereby amended by—
- (a) the substitution for paragraph (a) of the following paragraph:

"(a) assist **[an employer to employ]** any person to require or permit a child to work in contravention of this Act; or"; and
 - (b) the substitution for paragraph (b) of the following paragraph:

“(b) discriminate against a person who refuses to permit a child to **[be employed]** work in contravention of this Act.”.

Substitution of section 47 of Act 75 of 1997

8. The following section is hereby substituted for section 47 of the principal Act:

47. "Evidence of age

In any proceedings in terms of this Act, if the age of **[an employee]** any person is a relevant factor for which insufficient evidence is available, it is for the party who alleges that the **[employment]** work by that person complied with the provisions of this Chapter to prove that it was reasonable for that party to believe, after investigation, that the person was not below the permitted age in terms of section 43 or 44.”.

Amendment of section 55 of Act 75 of 1997, as amended by section 11 of Act 11 of 2002

9. Section 55 of the principal Act is hereby amended by—

(a) the substitution for subsection (1) of the following subsection:

“(1) After considering the report and recommendations of the Commission contemplated in section 54 (4), the Minister may

make a sectoral determination for one or more sector and area or as contemplated by subsection (8)."

(b) the substitution in subsection (4) for paragraph (b) of of the following paragraph:

"(b) provide for the adjustment of remuneration by way of—
(i) minimum rates; or
(ii) minimum increases of remuneration;"

(c) the substitution for paragraph (g) of subsection (4) of the following paragraph:

"(g) prohibit or regulate task-based work, piecework, homework, the placement of employees by temporary employment services, sub-contracting and contract work;"

(d) the deletion of the word "and" at the end of paragraph (m), the insertion of the word "and" at the end of paragraph (o) and the addition of the following paragraphs:

"(o) subject to the provisions of the Labour Relations Act, set a threshold of representativeness for a registered trade union to have the organisational rights contemplated in sections 12 and 13 of the Labour Relations Act in respect of all workplaces covered by the sectoral determination; and
(p) any matter necessary to determine the conditions of a labour tenant as contemplated in section 4 of the Land Reform (Labour Tenants) Act No. 3 of 1996;"

(e) the substitution in subsection (7) for paragraph (a) of the following paragraph:

"(a) covering employees and employers who are bound by a collective agreement concluded at a bargaining council in

respect of any matter dealt with in that collective agreement;"

and

(f) the addition of the following subsection:

"(8) Subject to the provisions of subsection (7), the Minister may publish a sectoral determination that applies to employers and employees who are not covered by any other sectoral determination."

Amendment of section 64 of Act 75 of 1997

10. Section 64 of the principal Act is hereby amended by the deletion in subsection (1) of paragraph (d).

Amendment of section 65 of Act 75 of 1997, as amended by section 17 of Act 37 of 2008

11. Section 65 of the principal Act is hereby amended by—

- (a) the deletion in subsection (1) of paragraphs (b) and (c); and
- (b) the addition of the following subsection:

"(5) An interpreter, a member of the South African Police Service or any other assistant may, when required by a labour inspector, accompany the labour inspector when he or she performs his or her functions under this Act or any employment law."

Repeal of sections 68, 69, 70, 71, 72 and 73 of Act 75 of 1997

13. Sections 68, 69, 70, 71, 72 and 73 of the principal Act are hereby repealed.

Amendment of section 74 of Act 75 of 1997, as amended by section 17 of Act 11 of 2002

14. Section 74 of the principal Act is hereby amended by—
(a) the substitution in subsection (2) of the words preceding paragraph (a) of the following words:

"If an employee institutes proceedings for unfair dismissal, the Labour Court or the arbitrator hearing the matter may also determine any claim for an amount that is owing to that employee in terms of this Act if ~~[—]~~ the claim has not prescribed."; and

(b) the deletion in subsection (2) of paragraphs (a), (b) and (c).

Amendment of section 77 of Act 75 of 1997

15. Section 77 of the principal Act is hereby amended by—
(a) the substitution for subsection (1) of the following subsection:

"(1) Subject to the Constitution, the Labour Court has exclusive jurisdiction in respect of all matters in terms of this Act."; and

(b) the substitution of subsection (3) of the following subsection:

"(3) The Labour Court has **[concurrent]** exclusive jurisdiction **[with the civil courts]** to hear and determine any matter

concerning a contract of employment, irrespective of whether any basic condition of employment constitutes a term of that contract.”.

Amendment of section 77A of Act 75 of 1997

16. Section 77A of the principal Act is hereby amended by—

(a) the deletion of paragraphs (a) and (c); and

(b) the substitution for paragraph (d) of the following paragraph:

“(d) reviewing **[the performance or purported performance of]** any **[function provided for]** administrative action in terms of this Act **[or omission by any person or body in terms of this Act, on any grounds permissible in law]** or any employment law;”.

Repeal of section 82 of Act 75 of 1997

17. Section 82 of the principal Act is hereby repealed.

Amendment of section 93 of Act 75 of 1997

18. Section 93 of the principal Act is hereby amended by—

(a) the insertion after subsection (1) for the following subsection:

“(1A) If an employer is convicted of any offence under this act, the court that imposes the sentence must consider any amounts due to the employee as a result of non payment or illegal

deductions and must make an appropriate order for the payment of amounts due to the employee.”;

- (b) the substitution for the table of the following table:

"OFFENCES AND PENALTIES

<i>It is a criminal offence to contravene the following provisions</i>	<i>Minimum Applicable fines</i>	<i>Minimum term of imprisonment</i>
<u>Section 9, 10, 14, 15, 16, 17, 18, 19, 20, 21, 22, 25, 26, 27, 32, 33, 34 and 34A</u>	<u>R10 000.00</u>	<u>12 months imprisonment</u>
<u>Section 33A</u>	<u>R10 000.00</u>	<u>12 months</u>
<u>Section 39, 40 and 41</u>	<u>R10 000.00</u>	<u>12 months imprisonment</u>
Section 43		[3] <u>6 years</u>
Section 44		[3] <u>6 years</u>
Section 46		[3] <u>6 years</u>
Section 48		[3] <u>6 years</u>
<u>Sections 65 and 66</u>	<u>R10 000.00</u>	<u>12 months imprisonment</u>
Section 90(1), (3) and 92(a), (d), (e), (f)		<u>1 year</u>
Section 92(b)		<u>Applicable legislation must be used to determine imprisonment”.</u>

- (c) the addition of the following subsection:

"(3) The Minister may by notice in the Gazette review the applicable penalties."

Repeal of section 95 of Act 75 of 1997

- 19.** Section 95 of the principal Act is hereby repealed.

Short Title

- 20.** This Act is called the Basic Conditions of Employment Amendment Act, 2010.

nb070610

**EXPLANATORY MEMORANDUM ON THE BASIC CONDITIONS OF
EMPLOYMENT AMENDMENT BILL, 2010****1. BACKGROUND**

This Bill is the second amendment since the promulgation of the Basic Conditions of Employment Act, 1997 (Act No. 75 of 1997), (Act).

2. OBJECTS OF BILL**2.1 The Bill seeks to—**

- (a) address government's commitment to avoid exploitation of workers;
- (b) ensure decent work for all workers;
- (c) protect the employment relationship;
- (d) introduce laws to regulate contract work, sub-contracting and out-sourcing;
- (e) address the problem of labour broking;
- (f) prohibit certain abusive practices; and
- (g) effect certain consequential amendments as a result of the insertion of new definitions and to effect certain textual corrections.

2.2 Definitions

Clause 1 of the Bill seeks to substitute or insert certain definitions to align the Act with other legislation.

2.3 Payment of remuneration

Clause 2 of the Bill provides that employers must contribute benefits of equal or similar value to fixed term contract workers as the benefits afforded to its permanent employees.

2.4 Prohibited conduct

2.4.1 Clause 3 of the Bill seeks to prohibit employers from seeking, requiring or accepting any benefit or payment from an employee or a prospective employee in respect of their employment or the allocation of work to the employee. There are recent reports that employees working for a company operating parking meters for the Cape Town City Council were required to make a payment to the employer in order to secure employment for the day.

2.4.2 Employers are also prevented from requiring an employee or a prospective employee to purchase any goods from a business that the employer operates or from any other business or person nominated by the employer. Clauses preventing this potentially exploitative practice are found in many bargaining council collective agreements.

2.5 Prohibition of work by children

2.5.1 Clause 4 of the Bill seeks to prohibit and regulate the exploitation of children. Clause 4 prohibits work by children as an employee or independent contractor if the child is under the minimum school leaving age or the age of 15 years. This amendment is required to achieve full compliance with South Africa's obligations under the relevant International Labour Standards as well as to create consistency

with the Constitution and other legislation protecting the rights of children. In addition, the maximum prison term for breach of child labour provision is increased from three to six years.

2.5.2 Breach of this proposed provision is a criminal offence.

2.6. Sectoral determinations

The powers of the Minister and the Employment Conditions Commission in respect of sectoral determinations are clarified and adjusted. **Clause 9** proposed the following changes—

- (a) the Minister may issue an “umbrella” sectoral determination covering employees not covered by any other sectoral determination or by a bargaining council collective agreement;
- (b) a sectoral determination may apply to bargaining councils in respect of matters not dealt with by collective agreements concluded by the bargaining council;
- (c) a sectoral determination may prescribe minimum increases in remuneration; and
- (d) a sectoral determination may prescribe a threshold of representativeness for a registered trade union to have the organisational rights of access to employer premises and deduction of trade union subscriptions in respect of workplaces covered by the sectoral determination. Currently only a bargaining council agreement can include such a provision.

2.7 Functions of Labour Inspectors

Clause 10 of the Bill amend the functions of the labour inspector by deleting the provision that provides for a labour inspector to secure undertakings and issue compliance orders when endeavoring to ensure compliance with an employment law. This is aligned with other employment laws.

2.8 Powers of Entry

Clause 11 of the Bill seeks to provide for an interpreter, a member of the South African Police or any other assistant to accompany the labour inspector when performing his or her functions under this Act. The need for labour inspectors to be accompanied by members of the Police stems from certain incidents that the inspectors are threatened and physically assaulted and refused entry to premises to execute their mandate. In ensuring good communication between labour inspectors and employers during inspections, there is a need for interpreters to accompany the inspectors to overcome language barriers.

2.9 Repeal of sections 68; 69; 70; 71; 72 and 73

Clause 12 of the Bill seeks repeal certain sections of the Act to address the delay caused by issuing of undertakings and compliance orders by inspectors. It has been identified that the employers are abusing these provisions and use them as delaying tactics.

2.10 Joinder of BCEA claims with unfair dismissal cases

The jurisdiction of the Labour Court and the CCMA to adjudicate on matter arising from the provisions of the Act in the course of hearing an unfair dismissal case is

extended to cover a claim for an amount owing to the employee under the Act if that claim has not prescribed. Once the Court or arbitrator has determined the matter, no compliance order or other proceedings can be continued or brought in respect of the claim. This will avoid the need to “split” claims and prevent the unnecessary duplication of proceedings and will also ensure the effective use of the resources of the Labour Court, CCMA and the Department.

2.11 Jurisdiction of Labour Court

Clause 14 of the Bill seeks to amend sections 77(1) and 77(3) of the Act. Certain aspects of the jurisdiction of the Labour Court are repealed as the provisions relating to the Court’s jurisdiction are to be consolidated in amendments to section 157 of the Labour Relations Act. The jurisdiction of the Labour Court to review administrative actions in terms of the Act is aligned with the Promotion of Administrative Justice Act, 2000 (Act No. 3 of 2000).

2.12 Penalties

Clause 17 seeks to impose heavy penalties for offences and contravention of the provisions of this Act.

2.13 Repeal of section 95

Clause 18 seeks to repeal the transitional provisions in the Act which are no longer relevant.

3. CONSULTATION

None.

4. FINANCIAL IMPLICATIONS

None.

5. PARLIAMENTARY PROCEDURE

5.1 The Department of Labour and the State Law Advisers are of the opinion that this Bill must be dealt with in accordance with the procedure established by section 75 of the Constitution since it contains no provision to which the procedure set out in section 74 or 76 of the Constitution applies.

5.2 The State Law Advisers are of the opinion that it is not necessary to refer this Bill to the National House of Traditional Leaders in terms of section 18(1) (a) of the Traditional Leadership and Governance Framework Act, 2003 (Act No. 41 of 2003), since it does not contain provisions pertaining to customary law or customs of traditional communities.

REPUBLIC OF SOUTH AFRICA

EMPLOYMENT EQUITY AMENDMENT BILL

*(As introduced in the National Assembly (proposed section 75); explanatory
summary of Bill published in Government Gazette No. 33873 of 17 December 2010)
(The English text is the official text of the Bill)*

(MINISTER OF LABOUR)

[B — 2010]

070610nb

GENERAL EXPLANATORY NOTE

[] **Words in bold type in square brackets indicate omissions from existing enactments.**
_____ **Words underlined with a solid line indicate insertions in existing enactments.**

BILL

To amend the Employment Equity Act, 1998, so as to substitute or insert certain definitions; to prohibit a difference in the terms and conditions between employees from the same employer performing substantially the same work or work of equal value; to provide for the certification of psychometric testing used to assess employees; to provide for certain employees to refer unresolved disputes to the CCMA; and to empower the Director General to impose fines; and to provide for matters connected therewith.

BE IT ENACTED by the Parliament of the Republic of South Africa, as follows:—

Amendment of section 1 of Act 55 of 1998

1. Section 1 of the Employment Equity Act, 1998 (hereafter referred to as the principal Act), is hereby amended by—

(a) the substitution in paragraph (d) of the definition of "designated employer" of the following paragraph:

"(d) an organ of state as defined in section 239 of the Constitution,

but excluding **[local spheres of government,]** the National Defence Force, the National Intelligence Agency and the South African Secret Service; and";

- (b) the substitution for the definition of "designated groups" of the following definition:

" 'designated groups' means black people, women and people with disabilities who—

(a) are citizens of the Republic of South Africa by birth or descent;

or

(b) became citizens of the Republic of South Africa by naturalisation—

(i) before 27 April 1994; or

(ii) after 26 April 1994 who would have been entitled to acquire citizenship by naturalisation prior to that date but were precluded by Apartheid policies based on race;"

- (c) the insertion after the definition of "HIV" of the following definition:

(" 'independent contractor' means a person who works for or supplies services to a client or customer as part of the person's business, undertaking or professional practice;")

- (d) the substitution for the definition of "labour inspector" of the following definition:

"labour inspector' means a person appointed in terms of section [65] 63 of the Basic Conditions of Employment Act;"

- (e) the substitution for the definition of "serve" of the following definition:

" 'serve' means to send by registered post, telegram, telex, telefax or to deliver by hand and:

(a) in respect of the Labour Courts, any other method of service specified in the Rules of the Labour Courts;

(b) in respect of the Commission, any other method of service specified in the Rules of the Commission;"; and

(f) the insertion after the definition of "trade union representative" of the following definition:

" 'turnover' means the total annual turnover of an employer for the preceding year calculated in accordance with the provisions of the Competition Act, 1998 (Act No. 89 of 1998);".

Amendment of section 6 of Act 55 of 1998

2. Section 6 of the principal Act is hereby amended by the addition of the following subsections:

"(4) A difference in terms and conditions of employment between employees of the same employer performing the same or substantially the same work or work of equal value is a form of unfair discrimination and is prohibited on any one, or more grounds of unfair discrimination listed in subsection (1).

(5) The Minister may, after consultation with the Commission, issue a code of good practice setting out the criteria and the methodology for assessing work of equal value in terms of subsection (4)."

Amendment of section 8 of Act 55 of 1998

3. Section 8 of the principal Act is hereby amended by the deletion of the word "and" at the end of paragraph (b), the insertion of the word "and" at the end of paragraph (c) and the addition of the following paragraph:

"(d) has been certified by the Health Professions Council of South Africa established in terms of the Health Professions Act, 1974 (Act No. 56 of 1974)."

Amendment of section 10 of Act 55 of 1998

4. Section 10 of the principal Act is hereby amended by the substitution in subsection (6) for paragraphs (a) and (b) of the following paragraphs:

- "(a) any party to the dispute may refer **[it]** the dispute to the Labour Court for adjudication; or
- (b) an employee earning less than the amount prescribed by the Minister in terms of section 6(3) of the Basic Conditions of Employment Act may refer the dispute to the CCMA for arbitration."

Substitution of section 11 of Act 55 of 1998

5. The following section is hereby substituted for section 11 of the principal Act:

11. "Burden of proof"

(1) If the employee makes out a *prima facie* case of unfair discrimination, the respondent must prove that—

- (a) the discrimination did not take place as alleged; or
- (b) the conduct is not based on one or more of the prohibited grounds listed in section 6(1).

(2) Discrimination is unfair, unless the respondent proves that the discrimination is fair, if the discrimination did take place—

- (a) on a prohibited ground listed in section 6(1);
- (b) on a ground not listed in section 6(1), and the discrimination—
 - (i) causes or perpetuates systematic disadvantage in the workplace;
 - (ii) undermines human dignity; or
 - (iii) adversely affects the equal enjoyment of a person's right and freedom in a manner that is comparable to discrimination on a ground listed in section 6(1).

(3) For the purposes of this section, a respondent includes an employer of the employee or any other person contemplated in section 6(1)."

Amendment of section 20 of Act 55 of 1998

6. Section 20 of the principal Act is hereby amended by the addition of the following subsection:

"(7) The Director-General may apply to the Labour Court to impose a fine contemplated in Schedule 1 of the Act, if a designated employer fails to prepare and implement an employment equity plan in accordance with the provisions of this Act."

Amendment of section 21 of Act 55 of 1998

7. Section 21 of the principal Act is hereby amended by—

(a) the substitution for subsection (1) of the following subsection:

"(1) A designated employer [that employs fewer than 150 employees] must—

(a) submit its first report to the Director-General within [12 months after the commencement of this Act or, if later, within] 12 months after the date on which that employer became a designated employer; and

(b) thereafter, submit a report to the Director-General once every [two years] year, on the first working day of October."

(b) the deletion of subsection (2);

(c) the substitution for subsections (3) and (4) of the following subsections:

"(3) Despite [subsections (1) and (2)] subsection (1) , a designated employer that submits its first report in the 12-month period preceding the first working day of October, should only submit its second report on the first working day of October in the following year.

(4) The reports referred to in [subsections (1) and

(2)] subsection (1) must contain the prescribed information and must be signed by the chief executive officer of the designated employer."; and

(d) the insertion after subsection (5) of the following subsections:

"(5A) An employer that is not able to submit a report to the Director-General by the first working day of October in terms of subsection (1)(b) must notify the Director-General in writing before the last working day of August in the same year giving reasons for its inability to do so.

(5B) The Director-General may apply to the Labour Court to impose a fine contemplated in Schedule 1 of the Act, if an employer who fails to report in terms of subsection (1)(b)—

(a) did not submit valid reasons in terms of subsection (5) for not reporting;
or

(b) the reasons submitted in terms of subsection (5) are found to be false or invalid."

Amendment of section 27 of Act 55 of 1998

8. Section 27 of the principal Act is hereby amended by—

(a) the substitution for the heading of the following heading:

"Income differentials and discrimination"; and

(b) the substitution for subsections (1) and (2) of the following subsections:

"(1) Every designated employer, when reporting in

terms of section 21(1) and (2), must submit a statement, as prescribed, to the Employment Conditions Commission established by section 59 of the Basic Conditions of Employment Act, on the remuneration and benefits received in each occupational **[category and]** level of that employer's workforce.

(2) Where disproportionate income differentials or unfair discrimination in terms and conditions of employment as contemplated by section 6(4) are reflected in the statement contemplated in subsection (1), a designated employer must take measures to progressively reduce such differentials subject to guidance as may be given by the Minister as contemplated in subsection (4)."

Repeal of section 36 of Act 55 of 1998

9. Section 36 of the principal Act is hereby repealed.

Amendment of section 37 of Act 55 of 1998

10. Section 37 of the principal Act is hereby amended by—

(a) the substitution of subsection (1) of the following subsection:

"(1) A labour inspector may issue a compliance order to a designated employer if that employer has failed or refused to—
[(a) refused to give a written undertaking in terms of section 36, when requested to do so; or

(b) failed to comply with a written undertaking given in terms of section 36]

(a) consult with employees as required by section 16;

(b) conduct an analysis as required by section 19;

(c) publish a summary of its report as required by section 22;

(d) assign responsibility to one or more senior managers as required by section 24;

(e) inform its employees of the provisions of this Act as required by section 25; or

(f) maintain records as required by section 26;

(g) prepare and implement an employment equity plan in accordance with section 20.";

(b) the deletion in subsection (2) of paragraph (c);

(c) the substitution of subsection (4) of the following subsection:

"(4) A designated employer who receives a compliance order served in terms of subsection (3) must—

(a) display a copy of that order prominently at a place accessible to the affected employees at each workplace named in it;

(b) comply with the compliance order within the time period stated in it ; and

(c) inform the inspector in the prescribed form within 30 days of the expiry of the time period of either its compliance with the order or, if it has not complied, the reasons for not doing so.";

(d) the deletion of subsection (5); and

(e) the substitution of subsection (6) of the following subsection:

"(6) If a designated employer does not comply with an order within the period stated in it, **[or does not object to that order in terms of section 39,]** the Director-General may—

- (a) amend the order and serve it to the employer; or
- (b) apply to the Labour Court to make the compliance order or any part of such order an order of the Labour Court."

Repeal of sections 39 and 40 of Act 55 of 1998

11. Sections 39 and 40 of the principal Act are hereby repealed.

Substitution of section 42 of Act 55 of 1998

12. The following section is hereby substituted for section 42 of the principal Act:

42. "Assessment of compliance

In determining whether a designated employer is implementing employment equity in compliance with this Act, the Director-General or any person or body applying this Act **[must]** may, in addition to the factors stated in section 15, take **[into account all of]** the following into account—

- (a) The extent to which suitably qualified people from and amongst the different designated groups are equitably represented within each occupational **[category and]** level in that employer's workforce in

relation to the[—

- (i)] demographic profile of the **[national and regional]** economically active population;
- [(ii) pool of suitably qualified people from designated groups from which the employer may reasonably be expected to promote or appoint employees;**
- (iii) economic and financial factors relevant to the sector in which the employer operates;**
- (iv) present and anticipated economic and financial circumstances of the employer;]** and
- (v) the number of present and planned vacancies that exist in the various [categories and] occupational levels, and the employer's labour turnover;**
- [(b) progress made in implementing employment equity by other designated employers operating under comparable circumstances and within the same sector;]**
- (b) reasonable steps taken by an employer to train suitably qualified people from the designated groups;**
- (c) reasonable [efforts made] steps taken by a designated employer to implement its employment equity plan;**
- (d) the extent to which the designated employer has made progress in eliminating employment barriers that adversely affect people from designated groups; and**

- (e) **[any other prescribed factor]** reasonable steps taken by an employer to appoint and promote suitably qualified people from the designated groups.".

Substitution of section 45 of Act 55 of 1998

13. The following section is hereby substituted for section 45 of the principal Act:

45. "Failure to comply with Director-General's recommendation or request

(1) If an employer fails to comply with a request made by the Director-General in terms of section 43 (2) or a recommendation made by the Director-General in terms of section 44 (b), the Director-General may **[refer the employer's non-compliance]** apply to the Labour Court—

(a) for an order directing the employer to comply with the request or recommendation;

(b) if the employer fails to justify the failure to comply with the request or recommendation, to impose a fine in terms of Schedule 1 on the employer.

(2) Any challenge to the validity of the Director General's request or recommendation may only be made in the proceedings contemplated in sub-section (1)."

Amendment of section 50 of Act 55 of 1998

14. Section 50 of the principal Act is hereby amended by the substitution in subsection (1) for paragraph (h) of the following paragraph:

"(h) reviewing **[the performance or purported performance of any function provided for in this Act or any act or omission of any person or body]** an administrative action in terms of this Act **[on any grounds that are permissible in law];"**.

Amendment of section 55 of Act 55 of 1998

15. Section 55 of the principal Act is hereby amended by the substitution of subsection (2) of the following subsection:

"(2) The Minister **[must]** may, by notice in the *Gazette* make **[a regulation]** regulations providing for separate and simplified forms and procedures when making regulations in respect of the obligations created by sections 19, 20, 21, 25 and 26 for employers that employ 150 or fewer employees."

Amendment of section 56 of Act 55 of 1998

16. Section 56 of the principal Act is hereby amended by the substitution of subsection (1) of the following subsection:

"(1) The Minister may delegate any power conferred, or assign any duty imposed, upon the Minister in terms of this Act[, **except the**

powers and duties contemplated in sections 29(1), (5) and (7), 53(2), 54, 55, 59(4) and 61(4)].".

Repeal of section 57 of Act 55 of 1998

17. Section 57 of the principal Act is hereby repealed.

Substitution of Schedule 1 of Act 55 of 1998

18. The following Schedule is hereby substituted for Schedule 1 of the Principal Act:

<i>Previous Contravention</i>	<i>Contravention of any Provision of Sections 16, 19, 20, 21, 22, 23 and <u>27</u></i>
No previous contravention	<u>2% of turnover</u>
A previous contravention in respect of the same provision	<u>4% of turnover</u>
A previous contravention within the previous 12 months or two previous contraventions in respect of the same provision within three years	<u>6% of turnover</u>
Three previous contraventions in respect of the same provision within three years	<u>8% of turnover</u>
Four previous contraventions in respect of the same provisions within three years	<u>10% of turnover</u>

Substitution of Schedule 4 of Act 55 of 1998

19. The following Schedule is hereby substituted for Schedule 4 of the principal Act:

"Schedule 4**Turnover threshold applicable to designated employers**

Sector or subsectors in accordance with the Standard Industrial Classification	Total annual turnover
Agriculture	[R2,00m] R5,00m
Mining and Quarring	R7,50m
Manufacturing	R10,00m
Electricity, Gas and Water	R10,00m
Construction	R5,00m
Retail and Motor Trade and Repair Services	R15,00m
Wholesale Trade, Commercial Agents and Allied Services	R25,00m
Catering, Accommodation and other Trade	R5,00m
Transport, Storage and Communications	R10,00m
Finance and Business Services	R10,00m
Community, Social and Personal Services	R5,00m

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EXPLANATORY MEMORANDUM ON THE EMPLOYMENT EQUITY AMENDMENT BILL, 2010

1. PURPOSE OF BILL

1.1 The Bill seeks to—

- (a) effect amendments to the Employment Equity Act, 1998 (Act No. 55 of 1998) (hereinafter referred to as the “Act”), to ensure compliance with South Africa’s obligations in terms of international labour standards;
- (b) promote the prevention of unfair discrimination in the workplace;
- (c) ensure that the Act gives effect to fundamental Constitutional rights including the right to equality, the right to fair labour practices and protection from unfair discrimination;
- (d) increase fines for non-compliance with the Act;
- (e) align the provisions of this Act with the Promotion of Administrative Justice Act, 2000 (Act No. 3 of 2000), and the Promotion of Equality and Prevention of Unfair Discrimination Act, 2000 (Act No. 4 of 2000); and
- (f) effect certain consequential amendments and textual corrections.

2. DISCUSSION OF BILL

2.1 Clause 1: Definitions

2.1.1 Clause 1 seeks to amend the definition of “designated group” to ensure that the beneficiaries of affirmative action in terms of Chapter III of the Employment Equity Act are limited to persons who were citizens of the Republic of South Africa before the democratic era, or would have been entitled to citizenship but because of

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policies of Apartheid those people and their descendants were not allowed citizenship. The proposed definition seeks to provide that the employment of persons from the “designated groups” who are foreign nationals or became citizens subsequent to April 1994 will assist employers to meet their affirmative action targets.

2.1.2 Clause 1 also seeks to amend the definition of “labour inspector” to correct the cross reference to section 65 instead of section 63 of the Act.

2.1.3 Clause 1 seeks to insert new definitions and amend of certain definitions to provide clarity and to align the Act with other legislation.

2.2 Clause 2: Equal pay for work of equal value

2.2.1 Clause 2 seeks to amend section 6 of the Act by the addition of subsection (4) which deals explicitly with unfair discrimination by an employer in respect of the terms and conditions of employment of employees doing the same work, similar work or work of equal value. A differentiation based on a prohibited ground listed in subsection (1) amounts to unfair discrimination unless the employer can show that difference in wages or conditions of employment is in fact based on fair criteria such as experience, skill, responsibility and qualifications.

2.2.2 The lack of a provision dealing expressly with wage discrimination on the basis of race and gender has been criticised by the International Labour Organisation. The failure to apply the principle of equal pay for equal work is classified as an unfair labour practice in the Promotion of Equality and Prevention of

Unfair Discrimination Act, which infringes the right to equality as provided for in section 9 of the Constitution and the right to fair labour practices as provided for in section 23 of the Constitution. The proposed amendment seeks to provide a basis for equal pay claims for same or similar work. Clause 2 also seeks to provide for the Minister of Labour, after consultation with the Commission, to issue a code of good practice setting out the criteria and the methodology for assessing work of equal value.

2.3 Clause 3: Psychometric testing

Clause 3 seeks to amend section 8 of the Act to provide that only psychometric tests that have been certified by the Health Professions Council of South Africa may be used in tests and assessments of an employee. This will ensure that the testing used is scientifically valid, reliable, and objective and cannot be used to unfairly discriminate and unfairly disadvantage a certain employee or a certain group of employees.

2.4 Clause 4: Disputes concerning discrimination

Clause 4 seeks to amend section 10 of the Act to provide for lower paid employees (those earning less than the earnings threshold prescribed under section 6(3) of the Basic Conditions of Employment Act, 1997 (Act No. 75 of 1997)) to refer a dispute based on discrimination (including equal pay claims) to the CCMA for arbitration. This will assist lower income employees in having their disputes adjudicated in a cost effective manner which will promote protection for vulnerable, powerless and exploited employees.

2.5 Clause 5: Burden of proof

Clause 5 seeks to substitute section 11 of the Act to align the burden of proof in respect of a claim of unfair discrimination in the workplace with the Promotion of Equality and Prevention of Unfair Discrimination Act.

2.6 Clause 6: Employment equity plan

Clause 6 seeks to amend section 20 of the Act to empower the Director-General to apply to the Labour Court to impose a fine when an employer fails to prepare or implement an employment equity plan in accordance with the provisions of this Act.

2.7 Clause 7: Report

2.7.1 Clause 7 seeks to amend section 21 of the Act to provide for all designated employers to submit annual reports on the implementation of their Affirmative Action Plans. Presently, employers with between 50 and 150 employees are required to report every second year. Reporting can be done online and will not impose undue obligations on designated employers.

2.7.2 The proposed amendment seeks to empower the Director-General of Labour to apply to the Labour Court to impose a fine on an employer, who without a valid reason, fails to file its annual report. This seeks to ensure that designated employees adhere to the provisions of the Act.

2.8 Clause 8: Income differentials and discrimination

Clause 8 amends section 27 of the Act and seeks to provide that a designated employer must take measures to reduce disproportionate income differentials or unfair discrimination in terms of the conditions of employment. This is aimed at preventing and eliminating unfair discrimination in the workplace.

2.9 Clause 9: Undertaking to comply

Clause 9 repeals section 36 of the Act because the process of obtaining a written undertaking from a designated employer to comply with section 36 delays the employer to comply with the provisions of the Act.

2.10 Clauses 10-13: Enforcement provisions

Clauses 10-13 seek to amend sections 37, 39, 40, 42 and 45 of the Act to eliminate certain mandatory steps and criteria that must be taken into account in determining whether a designated employer is implementing employment equity in compliance with the Act. These proposed amendments seek to promote effective enforcement and prevent the use of reviews as a mechanism to delay the enforcement process. The proposed amendments do not prevent employers who are aggrieved by decisions from challenging these decisions at an appropriate juncture. The Director-General may apply to the Labour Court to impose a fine on an employer that does not comply with a request made during a review of the employer's compliance with the Act or a recommendation made as a result of such a review.

2.11 Clause 14: Powers of Labour Court

Clause 14 seeks to amend section 50(1)(h) of the Act to empower the Labour Court to review administration actions in terms of the Employment Equity Act. This amendment aligns this Act with the Promotion of Administrative Justice Act.

2.12 Clause 15: Regulations

Clause 15 seeks to effect a grammatical correction to section 55 of the Act by empowering the Minister to make “regulations” instead of “a regulation”.

2.13 Clause 16: Delegations

Clause 16 seeks to abolish the limitation imposed on the power of the Minister to delegate in terms of this Act. This clause seeks to empower the Minister to delegate the power to issue certificates of compliance with the Act.

2.14 Clause 17: Temporary employment service

Clause 17 repeals section 57 of the Act to align the Act with the Labour Relations Act, 1995 (Act No. 66 of 1995).

2.15 Clauses 18: Schedule 1: Maximum permissible fines that may be imposed for contravening this act

Clause 18 seeks to repeal the Schedule 1 of the Act, which aims to increase the penalties for contravention of the provisions of this Act by imposing penalties that are linked to the annual turnover of the employer.

2.16 Clause 19: Turnover threshold applicable to business employers

Clause 19 seeks to amend Schedule 4 to the Act by increasing the total annual turnover that an employer in agriculture must exceed to be classified as a designated employer from R 2 million to R 5 million.

3. PERSONS CONSULTED

None

4. FINANCIAL IMPLICATIONS FOR STATE

None

5. PARLIAMENTARY PROCEDURE

5.1 The Department of Labour and the State Law Advisers are of the opinion that this Bill must be dealt with in accordance with the procedure established by section 75 of the Constitution of the Republic of South Africa, 1996, since it contains no provision to which the procedure set out in section 74, 76 and 77 of the Constitution applies.

5.2 The State Law Advisers are of the opinion that it is not necessary to refer this Bill to the National House of Traditional Leaders in terms of section 1(1)(a) of the Traditional Leadership and Government Framework Act, 2003 (Act. No. 41 of 2003), since it does not contain provisions pertaining to customary law or customs of traditional communities.

REPUBLIC OF SOUTH AFRICA

EMPLOYMENT SERVICES BILL

*(As introduced in the National Assembly (proposed section 75); explanatory
summary of Bill published in Government Gazette No. 33873 of 17 December 2010)
(The English text is the official text of the Bill)*

(MINISTER OF LABOUR)

[B - 2010]

040610se

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To provide for public employment services; to provide for the registration of private employment agencies; to provide for the establishment of the Employment Services Board; to provide for the establishment of Productivity South Africa; and to provide for transitional provisions; and to provide for matters connected therewith.

BE IT ENACTED by the Parliament of the Republic of South Africa, as follows:—

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CHAPTER 1

INTERPRETATION, PURPOSES AND ADMINISTRATION

Definitions

1. In this Act, unless the context otherwise indicates—

"Basic Conditions of Employment Act" means the Basic Conditions of Employment Act, 1997 (Act No. 75 of 1997);

"Commission" bears the same meaning ascribed to it in section 1 of the Basic Conditions of Employment Act;

"Department" means the Department of Labour;

"Director-General" means the Director-General of the Department of Labour;

"Employment Services Board" means the Employment Services Board established by section 22.

"Employee" means any person who is employed by or works for an employer and who receives or is entitled to receive a remuneration and who works under the direction or supervision of an employer;

"Employer" means any person who, or any institution, organisation or organ of state, which, employs or provides work to an employee, directs or supervises the employee, remunerates or tacitly or expressly undertakes to remunerate such employee for services rendered;

"independent contractor" means a person who works for or supplies services to a client or customer as part of that person's business, undertaking or professional practice;

"Labour Relations Act" means the Labour Relations Act, 1995 (Act No. 66 of 1995);

"Minister" means the Minister of Labour;

"NEDLAC" means the National Economic, Development and Labour Council established by section 2 of the National Economic Development and Labour Council Act, 1994 (Act No.35 of 1994);

"NEDLAC social partners" means the members of NEDLAC contemplated in section 3 of the National Economic, Development and Labour Council Act;

"placement" means to place, recruit, or otherwise contract persons to work for another person, but does not include work as an independent contractor;

"Placement opportunity" means any opportunity for work or learning that could be offered to an individual and includes vacancies for employment, an opportunity for self-employment, a learning programme or community service;

"Private Employment Agency" means any natural or juristic person who procures for or provides to an employer, other persons who render service or perform work for the employer;

"public employment services" means the public employment services contemplated in section 5;

"Public Finance Management Act" means the Public Finance Management Act, 1999 (Act No. 1 of 1999);

"registrar" means the registrar contemplated in section 19 of this Act;

"Sheltered Employment Factories" means sheltered employment factories established by section 8(1);

"Skills Development Act" means the Skills Development Act, 1998 (Act No. 97 of 1998);

"this Act" includes regulations;

"work seeker" means any person, and includes a legal foreign worker, who is unemployed and is looking for work;

"youth" means any person who is between the ages of 15 and 35 years.

Purpose of Act

2. (1) The purpose of this Act is to—

- (a) promote employment of citizens;
- (b) improve access to the labour market for work seekers;
- (c) provide opportunities for new entrants to the labour market to gain work experience;
- (d) improve employment prospects of persons with disabilities;
- (e) improve employment prospects of work-seekers and employees facing retrenchments;
- (f) facilitate access by work seekers to training and;
- (g) promote employment growth and workplace productivity.

(2) The purpose is to be achieved by—

- (a) providing comprehensive and integrated free public employment services;
- (b) coordinating the activities of public sector agencies whose activities impact on the provision of employment services;
- (c) encouraging partnerships between the public and private employment agencies in the provision of employment services;
- (d) establishment of schemes, measures and subsidies to promote employment;
- (e) providing a regulatory framework for the operation of private employment agencies, registration of vacancies, employment of qualifying foreign workers and other related prescribed matters.

Interpretation

3. Any person applying this Act must interpret its provisions to give effect to—
- (a) its purpose; and
 - (b) South Africa's obligations in terms of any relevant international labour standard.

Administration of Act

4. Subject to the laws governing the public service, the Director-General must ensure that the Department—
- (a) including its provincial offices and labour centres, has the personnel and financial resources necessary for performing its functions in terms of this Act;
 - (b) maintains labour centres at which members of the public are able to access the public employment services provided for in terms of this Act.

CHAPTER 2**PUBLIC EMPLOYMENT SERVICES****Public employment services**

5. (1) The Department must provide the following public employment services free of charge in a manner that is open and accessible to members of the public:
- (a) match work seekers with available work opportunities;
 - (b) register work seekers;
 - (c) register job vacancies and other placement opportunities;

- (d) facilitate the placement of work seekers with employers or in other placement opportunities;
- (e) advise workers on access to social security benefits;
- (f) provide specialised services to assist specific categories of work seekers including the youth, new entrants into the labour market, disabled persons and members of rural communities;
- (g) facilitate the exchange of information among labour market participants including employers, workers and work seekers, private employment agencies, Sector Education and Training Authorities and training providers; and
- (h) generally, perform any other function in terms of an employment law or prescribed in terms of this Act.

(2) The Department may also provide the following services to facilitate the matching of work seekers to employment opportunities:

- (a) Vocational and career counselling;
- (b) assessment of work-seekers to determine suitability; and
- (c) other related life skills to secure employment.

Promotion of employment of youth

6. (1) The Minister may establish work schemes for the employment of youth who are unemployed.

(2) The employment of youth in terms of a scheme established under this section is subject to any terms and conditions that the Minister may determine on the recommendation of the Commission.

(3) Chapters eight and nine of the Basic Conditions of Employment Act apply, with the changes required by the context, to a determination made in terms of subsection (2): Provided that—

- (a) for the purposes of section 54(3) of that Act, the Commission must also consider the likely impact that any proposed condition of employment may have on the employment of youth and the achievement of the purposes of this Act; and
- (b) section 55(7) of that Act does not apply.

(4) The Minister may prescribe—

- (a) any incentive, including a subsidy, that may be provided to employers in terms of the scheme contemplated in subsection (1); and
- (b) the period for which a youth may be employed in terms of such scheme.

(5) A regulation made in terms of subsection (4) must be made in consultation with the Minister of Finance.

(6) The employment of youth in terms of the scheme terminates at the expiry of the period contemplated in subsection (4)(b).

Promotion of employment of persons with disabilities

7. (1) The Sheltered Employment Factories are hereby established to promote the employment of persons with disabilities.

(2) The Sheltered Employment Factories must—

- (a) provide work opportunities for disabled people;
- (b) facilitate on-the-job training for disabled people, leading to qualifications and competencies that enable access to jobs and income generation capability in the

labour market in accordance with the Skills Development Act, 1998 (Act No.97 of 1998);

- (c) provide training and assist in placing people with disabilities in employment;
- (d) provide technical assistance to emerging and existing enterprises that promote the employment of people with disabilities;
- (e) remain flexible and adaptable to meet the changing needs of people with disabilities in a changing economy.

(3) The Director-General is the accounting authority of the Sheltered Employment Factories and must ensure that they are managed—

- (a) in a viable and sustainable manner; and
- (b) in accordance with the Public Finance Management Act.

(4) The Minister may, on the recommendation of the Employment Commission, determine the terms and conditions of persons with disabilities employed in Sheltered Employment Factories.

(5) Chapters eight and nine of the Basic Conditions of Employment Act apply, with the changes required by the context, to a determination made in terms of subsection (4): Provided that—

- (a) for the purposes of section 54(3) of that Act, the Commission must also consider the likely impact that any proposed condition of employment may have on the employment of persons with disabilities and the achievement of the purposes of this Act; and
- (b) section 55(7) of that Act does not apply.

(6) The Minister may fund bodies or organisations that have similar objectives as Sheltered Employment Factories.

Economic recession and company closures

8. The Minister may—

- (a) after consultation with the NEDLAC social partners establish schemes to respond to economic recession;
- (b) after consultation with the NEDLAC social partners develop regulations regarding turn around strategies; lay-offs and alternative employment opportunities;
- (c) may subsidise worker allowances and or employer costs in respect of paragraphs (a) and (b).

Employment of foreign workers

9. (1) Employment of a foreign worker may not compromise the South African citizen's opportunity for employment, employment conditions, economic development or social stability.

(2) An employer must not employ a foreign national within the territory of the Republic of South Africa prior to such foreigner producing the applicable and valid work permit, issued in terms of the Immigration Act, 2002 (Act No.13 of 2002).

(3) The Minister may publish in the Gazette every second year categories of work within which foreign nationals may be employed.

(4) Employers must exhaust the following steps before resorting to recruiting foreign nationals:

- (a) Make use of the public employment services;

- (b) submit reasons to the Director-General, within 14 days of appointment of a foreign national, as to why the employer cannot employ amongst the persons with relevant profiles referred to them by the Department; and
- (c) provide proof to the Director-General that they have tested the local labour market through recruitment campaigns.

(5) An employer must submit a detailed skills transfer plan when employing a foreign national in scarce skills categories published by the Minister of Home Affairs in terms of the Immigration Act.

(6) An employer must not engage in any of the following:

- (a) Employ in the name of the employer a foreign worker, but in reality causing that foreign worker to engage in work for a third party;
- (b) force the employed qualifying foreign worker to engage in work that is not within the sphere of the permit;
- (c) dismiss or lay off a South African citizen as a result of having employed a foreign worker; or
- (d) exert coercion, threat, or any other illegal means upon the employed foreign worker to enforce him or her to engage in work contrary to his or her free will.

Reporting on vacancies and filling of positions

10. (1) Employers must notify the Department of any vacancy or new position in their establishment within 14 working days after the position became vacant or was created.

(2) The Minister may prescribe how employers must notify the Department of vacancies or new positions in their establishment.

(3) An employer must notify the Director-General of the filling of any vacancy within 14 days of such an appointment.

Employment information

11. (1) The Department may develop and operate an up-to-date employment information system on which it records—

- (a) the names, qualifications and previous occupations of work seekers;
- (b) vacancies in the labour market;
- (c) training opportunities that are available;
- (d) specialised skills and qualifications possessed by work seekers registered on the public employment services system;
- (e) employers details; and
- (f) employment trends in the country.

(2) The Department may co-operate with other state institutions to link their information-bases.

Information from education and training institutions

12. The Department may require education and training institutions to submit information in respect of—

- (a) persons who completed accredited educational programmes;
- (b) persons who are currently in such programmes; and
- (c) courses offered by them.

Financing of public employment services

13. (1) The provision of public employment services in terms of this Act must be financed from the money voted by Parliament for this purpose and may in addition, be financed from—

- (a) money allocated from the Unemployed Insurance Fund;
- (b) money allocated from the Compensation Fund;
- (c) money generated from the registration and licensing of private employment agencies; and
- (d) grants and donations made for this purpose to the Department.

(2) The monies received by the Department for public employment services may be used only in the prescribed manner and to fund—

- (a) the administration and performance of its functions in terms of this Act;
- (b) schemes for retrenched workers and work seekers;
- (c) rehabilitation and promotion of re-entry into employment for people injured on duty;
- (d) subsidies to organisations providing work place opportunities for people with disabilities;
- (e) private employment agencies for specific and or specialised projects; or
- (f) any other project that the Minister may decide upon, that is promoting public employment services or is consistent with the objects of this Act.

CHAPTER 3

PRIVATE EMPLOYMENT AGENCIES

Registration and licensing of private employment agency

14. (1) The Minister may prescribe the criteria for the registration and licensing of private employment agencies.

(2) The Minister must designate an official of the Department as the registrar of private employment agencies.

(3) A person may not operate a private employment agency, except in terms of a licence issued by the registrar in terms of this Act.

(4) A person may apply to the registrar in the prescribed form and manner for registration of a private employment agency.

(5) The registrar must, within 60 days of the application, issue a private employment agency with a licence if the application is successful.

(6) The registrar must maintain in electronic form a register of private employment agencies that have been registered in terms of this Act.

(7) The private employment agency must display the licence in a conspicuous place on its premises.

Functions of private employment agencies

15. (1) The functions of private employment agencies are only limited to providing services related to—

(a) matching work seekers;

- (b) referring workers to employers;
- (c) career information including—
 - (i) vocational counselling;
 - (ii) assessment of work seekers to determine suitability; and
 - (iii) offering other related life skills to secure employment.
- (2) A private employment agency may not—
 - (a) provide false employment services information;
 - (b) offer job intermediary services to any employer without a lawful licence;
 - (c) counterfeit, alter or transfer the licence of the private employment agency; or
 - (d) retain the identity documents or qualification certificates of work seekers.

Charging of fees by private employment agencies

16. (1) A private employment agency must not charge a fee to any work seeker for providing employment services to that work seeker.
- (2) A private employment agency may not charge a fee to any worker using its services for matching offers of and applications for employment.
- (3) A private employment agency may only charge a fee to an employer.
- (4) An employer must not deduct any amount from the remuneration of an employee or require or permit an employee to pay any amount in respect of the placement of that employee with the employer.
- (5) Any agreement concluded with an employee that is in breach of this section is invalid and of no force and effect.
- (6) The Commission for Conciliation, Mediation and Arbitration established in terms of section 112 of the Labour Relations Act, 1995 (Act No. 66 of 1995)

or a bargaining council having jurisdiction may conciliate and arbitrate any dispute concerning the application of this section.

Retention of information by private employment agencies

17. (1) A private employment services agency must keep an up-to-date electronic and manual register reflecting—

- (a) the work seekers registered with them;
- (b) work seekers that have been placed in employment; and
- (c) particulars of the employer where the work seeker was placed.

(2) The records contemplated in subsection (1) must be retained for a minimum period of five years.

Confidentiality of information collected

18. (1) The processing of personal information of work seekers by a private employment agency must—

- (a) be done in a manner that protects this information and ensures respect for the person's privacy; and
- (b) be limited to matters related to the qualifications and professional experience of the worker concerned and any other relevant information.

(2) A private employment agency—

- (a) may provide information to a prospective employer concerning a work seeker, in accordance with subsection (1); and

- (b) must provide information to the Department as requested by it, with due regard to the confidential nature of such information.

Withdrawal of licence to operate as private employment agency

19. (1) The registrar may withdraw a licence issued to a private employment agency for failure to comply with prescribed procedures or contravention of any provision of this Act.

(2) The registrar must before withdrawing the licence—

- (a) notify the private employment agency in writing of his or her intention to cancel its registration and the reasons for such cancellation;
- (b) give the private employment agency 30 days written notice, calculated from the date the notice was given, to make representations on why its licence should not be cancelled;
- (c) consider any representations received; and
- (d) notify the employment agency of the decision.

(3) If the licence is withdrawn, the registrar must remove the name of such private employment agency from the register of private employment agencies.

Review of decision of registrar

20. (1) Any person aggrieved by the decision of the registrar to refuse to issue, or to withdraw a licence, may apply for a review to the Labour Court against that decision within 30 days of the date of the registrar's decision.

(2) The Labour Court may, on good cause shown, extend the period within which a person may lodge the application for review.

CHAPTER 4

EMPLOYMENT SERVICES BOARD

Establishment of the Employment Services Board

21. (1) The Employment Services Board is hereby established.
- (2) For the purpose of this chapter "Board" means the Employment Services Board.

Composition of Board

22. (1) The Board consists of the following individuals, appointed by the Minister as follows:
- (a) the chairperson;
 - (b) two persons to represent the interest of the State;
 - (c) two persons nominated by NEDLAC to represent organised labour;
 - (d) two persons nominated by NEDLAC to represent organised business;
 - (e) two persons nominated by NEDLAC to represent organisation of community and developmental interests; and
 - (f) two persons with employment services expertise;

(2) The Minister may in the same manner as a member of the Board was appointed in terms of subsection (1), appoint an alternate member for each member of the Board.

(3) An alternate member may in the absence of a member of the Board from a meeting of the Board, attend such meeting on behalf of such member and the alternate member is deemed to be a member of that meeting.

(4) A member of the Board may be appointed—

- (a) for a term of up to four years; and
- (b) may be reappointed only for a maximum of two terms.

(5) The Director-General must designate a person in the employ of the Department to be an *ex-officio* member of the Board.

Functions of Board

23. (1) The Board must advise the Minister on—

- (a) the employment services strategy;
- (b) employment trends and statistics;
- (c) employment schemes and opportunities;
- (d) regulations to be made; or
- (e) any matter related to employment services, on request of the minister;

(2) The Board must liaise with the Department and other relevant bodies as regards the employment services.

Constitution of Board

24. (1) The Board must, as soon as possible after the appointment of its members and subject to the approval of the Minister, adopt a constitution.

(2) Subject to this Act, the constitution of the Board must provide for—

- (a) the circumstances under which the Minister may remove a member from the Board and the procedure for doing so;
- (b) the procedure for the election of a deputy-chairperson to act on behalf of the chairperson, in the absence of the chairperson;
- (c) the establishment and functioning of the committee of the Board, including an executive committee;
- (d) the rules for convening and conducting of meetings of the Board and its committees, including the quorum required for and the minutes to be kept of those meetings;
- (e) the voting rights of the different members and the manner in which decisions are to be taken by the Board and its committees;
- (f) a code of conduct for the members of the Board;
- (g) the determination through arbitration of any dispute concerning the interpretation or application of the constitution;
- (h) subject to subsections (4) and (5), a procedure for amending the constitution; and
- (i) any other matter necessary for the performance of the functions of the Board.

(3) At least 30 days notice must be given for a meeting of the Board at which an amendment of the constitution or a regulation to be made is to be considered.

(4) A supporting vote of at least two thirds of the members of the Board and the approval of the Minister is required for an amendment to its constitution.

Secretariat of Board

25. The Director-General must provide the necessary resources and secretariat to enable the Board to fulfil its functions.

Remuneration and expenditure

26. (1) A member of the Board who is not in full-time employment of the State may be paid such an allowance for travel and subsistence as may be determined by the Minister after consultation with the Minister of Finance.

(2) The allowance determined under subsection (1) may differ according to the office held, or the functions performed, by a member.

CHAPTER 5**EMPLOYMENT GROWTH AND PRODUCTIVITY****Establishment of Productivity South Africa**

27. (1) Productivity South Africa is hereby established as a juristic person to promote employment growth and productivity.

(2) Productivity South Africa must be managed in accordance with the Public Finance Management Act.

(3) Productivity South Africa acts through its Board.

(4) For the purpose of this chapter, Board means Productivity South Africa Board established by section 29.

Functions of Productivity South Africa

28. The functions of Productivity South Africa are—

- (a) to promote a culture of productivity in workplaces;
- (b) to develop relevant productivity competencies;
- (c) to facilitate and evaluate productivity improvement and competitiveness in workplaces;
- (d) to measure and evaluate productivity in the workplace;
- (e) to maintain a data-base of productivity and competitiveness systems and publicising these systems;
- (f) to undertake productivity-related research;
- (g) to support initiatives aimed at preventing job losses; and
- (h) to perform any other prescribed function.

Establishment and composition of Productivity South Africa Board

29. (1) Productivity South Africa Board is hereby established.

(2) The Board consists of seven members appointed by the Minister, as follows:

- (a) a chairperson;
- (b) two members nominated by NEDLAC to represent organised labour;
- (c) two members nominated by NEDLAC to represent organised business; and

(d) two members to represent the government.

(3) The Board is responsible for the management and control of the affairs of Productivity South Africa.

(4) The members of the Board hold office for a period of five years and are eligible for reappointment upon expiry of their terms of office, but may not serve for more than two consecutive terms of office.

Constitution of Productivity South Africa Board

30. (1) The Board must, as soon as possible after the appointment of its members, prepare and adopt a constitution, subject to the approval of the Minister.

(2) The constitution contemplated in subsection (1) must, subject to this Act, provide for—

- (a) the establishment and functioning of committees of the Board, including an executive committee;
- (b) rules for convening and conducting of meetings of the Board of and its committees, including the quorum required for and the minutes to be kept of those meetings;
- (c) the voting rights of the different members of the Board and the manner in which decisions are to be taken by the Board and its committees;
- (d) the circumstances and manner in which a member of the Board may be removed from office;
- (e) the procedure for the filling of vacancies of the Board;
- (f) a code of conduct for the members of the Board;
- (g) the circumstances and manner in which the Minister may dissolve the Board and appoint an administrator on a temporary basis to perform its functions;

- (h) the determination through arbitration of any dispute concerning the interpretation or application of the constitution;
- (i) the procedure for amending the constitution;
- (j) financial arrangements, including bank accounts, investment of surplus money, annual budgets, annual reports, financial statements and annual audits;
- (k) the appointment of an executive officer and such other employees necessary for the effective performance of the functions of Productivity South Africa by the Board, including the determination of their terms and conditions of employment; and
- (l) any other matter necessary for the effective performance of the functions of Productivity South Africa.

Remuneration of members of Productivity South Africa Board

31. Members of the Board must receive such remuneration and allowances as the Minister may determine in consultation with the Minister of Finance.

Finances of Productivity South Africa

- 32.** Productivity South Africa is financed from—
- (a) money appropriated by Parliament for this purpose;
 - (b) income earned from services rendered by it;
 - (c) grants or donations made to it; and
 - (d) money received from any other source.

CHAPTER 6

GENERAL PROVISIONS

Jurisdiction of Labour Court

33. (1) Subject to the jurisdiction of the Labour Appeal Court, the Labour Court has exclusive jurisdiction in respect of all matters arising from this Act.

(2) The Labour Court may review any act or omission of any person in connection with this Act on any grounds permissible in law.

(3) If proceedings concerning any matter arising from this Act are instituted in a court that does not have jurisdiction in respect of that matter, that court may at any stage during proceedings refer the matter to the Labour Court.

Monitoring and enforcement

34. Chapter 10 and Schedule II of the Basic Conditions of Employment Act apply with changes required by the context to—

- (a) the monitoring and enforcement of this Act; and
- (b) any legal proceedings concerning a contravention of this Act.

Offences

35. (1) It is an offence to—

- (a) obtain or attempt to obtain any prescribed document by means of fraud, false pretences or submitting a false or forged prescribed document;

- (b) furnish false information in any prescribed document knowing that the information is false;
- (c) engage a foreign worker within the territory of the Republic of South Africa without a valid work permit;
- (d) recruit foreign workers in violation of section 10(4);
- (e) operate a private employment agency without a licence issued in terms of section 15(3);
- (f) obstruct or attempt to influence improperly a person who is performing a function in terms of this Act.
- (g) fail to notify the Department of any vacancy or new position created in terms of section 11;
- (h) fail to display a licence in a conspicuous place on the premises as contemplated in section 15(7);
- (i) detain the work seeker's identity cards or qualifications as contemplated in subsection 16(2)(d).
- (j) charge a fee to any individual work seeker for employment services as contemplated in section 17(1) and (2);
- (k) deduct from any worker's remunerations or permit an employee to pay any amount for placement services as contemplated in section 17(4);
- (l) fail to keep up to date records as contemplated in section 18;
- (m) compromise the confidentiality of information as contemplated in section 8;

Penalties

36. (1) Penalties in respect of the offences contemplated in section 35 are contained in Schedule 3.

(2) The Minister must review fines contemplated in Schedule 3 every second year and publish a notice to this effect in the *Gazette*.

Delegations

37. (1) The Minister may delegate to the Director-General any power or duty conferred or imposed on the Minister in terms of this Act, except a power to make regulations.

(2) The Director-General may delegate to an officer of the Department any power or duty conferred to the Director General in terms of this Act.

(3) Any person to whom any power or duty has been delegated in terms of subsection (1) and (2) must exercise that power or perform that duty subject to the conditions that the person who made the delegations considers necessary.

(4) Any delegations in terms of subsection (1) and (2)—

- (a) must be in writing;
- (b) does not prevent the person who made the delegations from exercising the power or performing the duty so delegated; and
- (c) may at any time be withdrawn in writing by that person.

Regulations

38. (1) The Minister may, after consultation with the Employment Services Board, make regulations relating to—

- (a) the categories of employment in respect of which vacancies and new positions must be reported, including—
 - (i) job description;
 - (ii) qualifications;
 - (iii) remuneration levels
 - (iv) the format and manner in which vacancies and filling of positions must be reported,
- (b) the procedure and forms in terms of which private employment agencies may apply for licensing;
- (c) a procedure for lodging and considering grievances concerning the operation of private employment agencies;
- (d) the procedure for considering the withdrawal of the licence of a private employment agency; and
- (e) any other matter relating to employment services.

(2) The Minister may, after consulting Productivity South Africa Board, make regulations regarding any improvements in workplace productivity and competitiveness which is necessary or expedient to enable the Board to perform its functions under this Act.

Repeal of laws and transitional provisions

39. (1) The laws specified in Schedule 1 is repealed to the extent specified in that Schedule.

(2) The repeal of those sections is subject to the transitional provisions in Schedule 2.

Short title and commencement

40. This Act is called the Employment Services Act, 2010 and comes into operation on a date determined by the President by proclamation in the *Gazette*.

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**SCHEDULE 1
LAW REPEALED
(section 39)**

No. and Year of Law	Short title	Extent of repeal
Act No.66 of 1995	Labour Relations Act, 1995	Section 198
Act No. 97 of 1998	Skills Development Act, 1998	<p>1. The deletion of the definition of "employment services".</p> <p>2. Sections 2(1)(g) and (h), 2(2)(a)(v), (vi) and (xii), 5(4) in so far as it relates to Productivity South Africa, 22(1), 23(1)(a) and (d), (2) and (3), 24, 25, 26, 26K, 26L, 26M, 26N, 32(1) and (2), 33, 36(a), (o), (p) and (q).</p> <p>3. Item 7 of Schedule 2A and Schedule 4.</p> <p>4. Any other provisions in so far as it relates to "employment services" or Productivity South Africa, as established by section 26K.□</p>

Schedule 2

TRANSITIONAL PROVISIONS

Definitions

1. In this chapter —

"Skills Development Act" means the Skills Development Act, 1998, (Act No.97 of 1998), as amended;

"Productivity South Africa" means the Productivity South Africa established in terms of section 26K of the Skills Development Act;

"Service Product Factories" means 12 Service Product Factories established in 1948 employing people with disabilities and have for years continued to receive subsidies from the Department of Labour.

Productivity South Africa

2. (1) Productivity South Africa established in terms of the Skills Development Act remains in force until repealed by this Act.

(2) Anything done under the repealed provisions of the Skills Development Act relating to Productivity South Africa is deemed to have been done in terms of this Act.

Service Product Factories

3. All assets, rights, liabilities and obligations of the Service Product Factories established by Cabinet in 1948 are transferred to Sheltered Employment Factories established in terms of section 8 of this Act, with effect from the date determined by the Minister by notice in the *Gazette*.

Temporary Employment Services

4. All the existing temporary employment services contemplated in section 198 of the Labour Relations Act—

- (a) continue to exist for a period of three years from the date of commencement of this Act; and
- (b) must register in terms of this Act.

SCHEDULE 3
PENALTIES FOR OFFENCES COMMITTED UNDER THIS ACT

<u>NATURE OF AN OFFENCE</u>	<u>APPLICABLE FINE</u>	<u>PRISON TERM</u>
(1) Obstructing or attempt to influence improperly a person who is performing a function in terms of this Act;	Minimum of R15 000.00	12 months
(2) Obtaining or attempt to obtain any prescribed document by means of fraud, false pretences or submitting a false or forged prescribed document.	To be determined by the court	To be determined by the court
(3) furnishing false information in any prescribed document knowing that information is false;	To be determined by the court	To be determined by the court
(4) engaging a foreign worker within the territory of the Republic of South Africa without the necessary permit in terms of section 10(2) and or to engage in any aspects in terms of section 10(6);	Minimum of R15000.00	Double the salary paid to an illegally employed foreign worker since appointment and or a Minimum of two years imprisonment
(5) failing to notify the public employment services of any vacancy or new position created in terms of section 11;	Minimum of R10000.00	
(6) operating a private employment agency without a licence issued in terms of section 15(3);	Minimum of R15 000.00	Minimum of 12 months imprisonment
(7) failing to display a licence issued by the Registrar in a position that can be readily seen by persons visiting that premises	R5 000.00	

<u>NATURE OF AN OFFENCE</u>	<u>APPLICABLE FINE</u>	<u>PRISON TERM</u>
in terms of section 15(7);		
(8) retaining the identity documents or qualifications certificates of work seekers in terms of section 16(2)(d).	R5 000.00	
(9) charge a fee to any individual work seeker for employment services provided in terms of section 17(1) and (2);	Minimum of R15 000.00 for each individual	Minimum of 12 months imprisonment
(10) deducting from any worker's remunerations or permit an employee to pay any amount for placement services in terms of section 17(4);	Minimum of R15 000.00 for each employee	Minimum of 12 months imprisonment
(11) failing to keep up to date records in terms of section 18;	R5 000.00	
(12) compromising the confidentiality of information in terms of section 19.	R5 000.00	

MEMORANDUM ON THE OBJECTS OF THE EMPLOYMENT SERVICES BILL, 2010**1. BACKGROUND**

1.1 The Employment Services Bill (the Bill seeks to repeal all the employment services provisions and Productivity South Africa, currently contained in the Skills Development Act, 1998 (Act No.97 of 1998), and the Labour Relations Act, 1995 (Act No.66 of 1995), and to incorporate them in the Bill. The Bill furthermore aims to strengthen these provisions in the Bill.

1.2 The Bill will further assist and strengthen the Department's re-organisation and public employment services. The Department of Labour conducted a review of its programmes to determine its effectiveness and to make appropriate adjustments with the assistance of the International Labour Organisation (ILO). A comparative study was also conducted across Ministries of Labour / Labour and Social Affairs / Labour and Employment with similar characteristics and or countries having similar economic conditions with South Africa. The outcome of these discussions resulted in the Department prioritising the following three areas namely: Inspection and Enforcement Services, Labour Policy and Industrial Relations and Public Employment Services inclusive of Unemployment Insurance Fund and Compensation Fund. All these programmes are supported by the programme administration.

1.3 The Bill will contribute to the government's objectives for "More jobs, decent work and sustainable livelihoods". The Bill repositions public employment services to play a

major role in employment promotion and employment preservation and will also assist employers and workers to adjust to changing labour market conditions.

1.4 The Bill will amongst others contribute towards—

- * reduction of unemployment, inequalities and poverty eradication;
- * promotion and preservation or retention of employment;
- * reducing work seeker reliance on the Unemployment Insurance Fund or Social Security grants, and reliance of rehabilitated workers injured on duty on the Compensation Fund;
- * acceleration of employment creation; and
- * employment growth and productivity promotion.

1.5 The strategic objectives will be achieved through institutional arrangements that the Department will further establish to provide free services to citizens such as registration of job seekers, registering of placement opportunities, matching services, referral to training, careers information. The private employment agencies could charge employers for providing similar services in accordance with regulations and ILO Conventions.

1.6 In addition, the Bill requires employers to register vacancies, requires the Minister to introduce schemes to promote employment or preserve employment for the unemployed; youth; people with disabilities; rehabilitation of workers injured on duty, retrenched and seasonal workers, work seekers and employees facing retrenchments.

1.7 The Minister can also introduce measures and subsidies to respond to work place closures and or economic recession, regulations to protect citizen's conditions of

employment in case of employment of foreign workers. The Department will collaborate with a number of players and bodies already functioning within employment services to achieve its objectives.

2. CLAUSE BY CLAUSE ANALYSIS

CHAPTER 1: DEFINITIONS, PURPOSE, INTERPRETATION AND ADMINISTRATION OF THE ACT

2.1 Clause 1: Provides for definitions.

2.2 Clause 2: Outlines the key intentions of the Act and the kind of measures or institutional frameworks that will be used to achieve its purpose.

2.3 Clause 3: Provides for the interpretation of the Act to give effect to its purpose including other applicable international conventions on employment services.

2.4 Clause 4: Provides for the administration of the Act by the Director-General and offices under his/her accountability including agencies that could be licensed or receive transfers.

CHAPTER 2: PUBLIC EMPLOYMENT SERVICES

2.5 Clause 5: Provides for functions that the public employment services must provide to South African citizens free of charge. These functions include matching work-seekers

with available work opportunities; registering work-seekers; registering job vacancies and other placement opportunities; facilitating the placement of work seekers with employers or in other placement opportunities; advising workers on access to social security benefits; providing specialized services to assist specific categories of work-seekers including youth, new entrants into the labour market, disabled persons and members of rural communities; facilitating the exchange of information among labour market participants including employers, work-seekers; careers counseling; assessment of work-seekers to determine suitability and other related life skills necessary to secure employment.

2.6 Clause 6: Gives powers to the Minister to establish decent work schemes to promote youth employment. There is an obligation to consult with the Minister of Finance when related subsidy regulations are made.

2.7 Clause 7: Provides for the promotion of employment of persons with disabilities. Service Product Factories established in 1948, are given legal status and established anew as Sheltered Employment Factories under the Act. The factories mandate is also being expanded to facilitate on-the-job training for people with disabilities, to promote their access to formal and self employment. The factories are to be managed as viable and sustainable enterprises that must adapt to changing needs of people with disabilities.

The Minister is also given powers to allocate subsidies to bodies or organisations that have similar objectives as sheltered employment factories.

2.8 Clause 8: Gives the Minister, powers to establish employment promotion schemes to respond to economic recession, company closures and pending retrenchments or lay-offs.

2.9 Clause 9: Protects South African citizen employment conditions and opportunities, economic development and social stability from being affected as result of employment of foreign workers. Procedures that employers must follow if they have to employ a foreign worker are also outlined including the consequences for not complying or abusing foreign qualifying workers.

2.10 Clause 10: Provides for the reporting and registration of existing or new vacancies by employers with the Public Employment Services, the employment of people referred by the Public Employment Services.

2.11 Clause 11: Provides for the type of statistical information that the Department may collect to inform policy makers regarding developments in the Labour Market.

2.12 Clause 12: Provides for the kind of information that the Public Employment Services may collect from skills development and education and training institutions in order to assist in the referral of work seekers for further learning.

2.13 Clause 13: Provides for sources of funding that could be utilised to mobilise resources to create employment; to promote re-integration of retrenched or workers who lost their employment as a result of injuries or illness; and to preserve employment.

CHAPTER 3: PRIVATE EMPLOYMENT AGENCIES

2.14 Clause 14: Provides for the registration and licensing of any person or body who wants to operate as a private employment agency and the consequences for operating a business in this area without a license.

2.15 Clause 15: Provides functions that Private Employment agencies are to be licensed for.

2.16 Clause 16: Prohibits Private Employment Agencies from charging work seekers any fees for services rendered.

2.17 Clauses 17 & 18: Provides for safeguarding of work seekers information and prohibits the abuse of such information.

2.18 Clauses 19 & 20: Provides powers and conditions under which the Registrar of Public Employment Services can withdraw Private Employment Agent license and the appeal process in case of dissatisfaction with the Registrar's decision.

CHAPTER 4: EMPLOYMENT SERVICES BOARD

2.19 Clauses 21 & 22: Provides for the establishment of the Employment Services Board, the advisory functions to the Minister that they must render and bodies that they can liaise in order to fulfill their functions.

2.20 Clauses 23 & 24: Provides for the composition of the Board, the nomination process of Board members and the constitution of the Board to govern its business.

2.21 Clauses 25 & 26; Provides for the administrative support to be provided by the Department to assist the Board to fulfill its functions and the remuneration of Board members.

CHAPTER 5: EMPLOYMENT GROWTH AND PRODUCTIVITY

2.22 Clause 27: Provides for the establishment anew of Productivity South Africa, established under the Skills Development Act of 1998 as Amended to promote growth and productivity.

2.23 Clauses: 28 & 29: Provides the functions and composition of Productivity South Africa Board.

2.24 Clause 30: Provides areas that the constitution of the Board Productivity South Africa must address to govern its procedures and business.

2.25 Clause 31: Provides for remuneration of members of Productivity South Africa Board.

2.26 Clause 32: Provides for the financing of Productivity South Africa through state grants, self funding and donations.

CHAPTER 6: GENERAL PROVISIONS

2.27 Clause 33: Provides for the Labour Court to have overall jurisdiction in so far as settling disputes that may arise in the implementation of this Act.

2.28 Clause 34: Provides for the monitoring and enforcement of the provisions of the Act in accordance with Schedule two of the Basic Conditions of Employment Act.

2.29 Clauses 35 & 36: Provides for contraventions of the Act and applicable penalties.

2.30 Clause 37: Provides procedures that the Minister and the Director General must follow when delegating officials in the Department to perform functions outlined in the Act on their behalf.

2.31 Clause 38: Provides areas in which the Minister may make regulations to achieve the purpose of the Act.

3. SCHEDULES

3.1 SCHEDULE 1

The Schedule provides for repeal of certain sections in the Skills Development Act and the repeal of section 198 of the Labour Relations Act.

3.2 SCHEDULE 2

The schedule provides transitional provisions.

3.3 SCHEDULE 3

The schedule provides penalties in the form of fines that the Minister must review every second year and the applicable minimum prison terms that the courts may impose on offenders.

4. DEPARTMENTS/ BODIES/ PERSONS CONSULTED

5. FINANCIAL IMPLICATIONS FOR STATE

6. PARLIAMENTARY PROCEDURE

6.1 The State Law Advisers and the Department of Labour are of the opinion that this Bill must be dealt with in accordance with the procedure established by section 75 of the Constitution since it contains no provision to which the procedure set out in section 74 or 76 of the Constitution applies.

6.2 The State Law Advisers are of the opinion that it is not necessary to refer this Bill to the National House of Traditional Leaders in terms of section 18(1)(a) of the Traditional Leadership and Governance Framework Act, 2003 (Act No. 41 of 2003), since it does not contain provisions pertaining to customary law or customs of traditional communities.
