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Government Notice

OFFICE OF THE PRIME MINISTER

No. 98

2012

PROMULGATION OF ACT OF PARLIAMENT

The following Act which has been passed by the Parliament and signed by the President in terms of the Namibian Constitution is hereby published in terms of Article 56 of that Constitution.

No. 2 of 2012: Labour Amendment Act, 2012.

Act No. 2, 2012

LABOUR AMENDMENT ACT, 2012

EXPLANATORY NOTE:

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

ACT

To **amend the Labour Act, 2007 so as to substitute and insert certain definitions; to regulate the employment status of individuals placed by private employment agencies to work for user enterprises; to provide protection for individuals placed by private employment agencies; to prohibit the hiring of individuals placed by private employment agencies in contemplation of a strike or lockout or following collective termination; to introduce a presumption as to employee status based on enumerated criteria; to confer on the Minister the power to deem persons to be employees; to introduce a presumption of indefinite employment; to amend the Employment Services Act, 2011 so as to insert and substitute certain definitions; to substitute certain provisions in order to align them with the definition of private employment agency; and to provide for incidental matters.**

(Signed by the President on 24 March 2012)

BE IT ENACTED by the Parliament of the Republic of Namibia, as follows:

Amendment of section 1 of Act No. 11 of 2007

1. Section 1 of the Labour Act, 2007 (Act No. 11 of 2007) (hereafter referred to as the principal Act) is amended by -

- (a) by the substitution of the following definition for the definition of “employer”:

“ ‘employer’ means any person, including the State and a user enterprise referred to in section 128(1) who -

- (a) employs or provides work for, an individual and who remunerates or expressly or tacitly undertakes to remunerate that individual; or
- (b) permits an individual to assist that person in any manner in **[the]**carrying on or **[,]**conducting that person’s business;”;
- (b) the insertion of the following definition after the definition of “exclusive bargaining agent”:

“independent contractor” means a self-employed individual who works for or renders services to a user enterprise or customer as part of that individual’s business, undertaking or professional practice;” and

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- (c) by the substitution of the following definition for the definition of “Labour Commissioner”:

“‘Labour Commissioner’ means the individual appointed as Labour Commissioner in terms of [in] section 120;”.

Amendment of section 5 of Act No. 11 of 2007

2. Section 5 of the principal Act is amended in subsection (1) by the substitution of the following subparagraph for subparagraph (i) of paragraph (g):

- “(i) is of the same or compared with any other work is broadly similar in nature, having due regard to the frequency with which any differences in relation to the first-mentioned work and such other work occur, and the natural extent of such differences does not justify the determination of conditions of employment which differ[s] from the conditions of employment prevailing in respect of any employee of the opposite sex performing such work [and nature of the differences; and]; or”.

Amendment of section 82 of Act No. 11 of 2007

3. Section 82 of the principal Act is amended by the substitution of the following subsection for subsection (16):

“(16) When issuing a certificate under subsection [(14)] 15 the conciliator must, if the parties have agreed, refer the unresolved dispute for arbitration in terms of Part C of this Chapter.”.

Amendment of section 83 of Act No. 11 of 2007

4. Section 83 of the principal Act is amended –

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

“(1) If a dispute is referred in terms of section 74(1)(a), [than] then subsection (3) of that section applies to any failure to attend a conciliation meeting.”; and

- (b) by the substitution of the following subsection for subsection (2):

“(2) In respect of any other dispute referred in terms of this Act, the conciliator of the dispute may dismiss the matter if the party who referred the dispute fails to attend a conciliation meeting.”.

Amendment of section 89 of Act No. 11 of 2007

5. Section 89 of the principal Act is amended by the substitution of the following sentence for the opening sentence of subsection (1):

“(1) A party to a dispute may appeal to the Labour Court against an arbitrator’s award made in terms of Section 86, except an award concerning a dispute of interest in essential services as contemplated in section 78 -”.

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Substitution of section 128 of Act No. 11 of 2007

6. The following section is substituted for section 128 of the principal Act:

“Persons placed by private employment agencies

128. (1) In this section –

“place” and “private employment agency” bear the meanings assigned to them in section 1 of the Employment Services Act, 2011 (Act No. 8 of 2011); and

“user enterprise” means a legal or natural person with whom a private employment agency places individuals.

(2) For the purposes of this Act and any other law, an individual, except an independent contractor, whom a private employment agency places with a user enterprise, is an employee of the user enterprise, and the user enterprise is the employer of that employee.

(3) An individual placed by a private employment agency with a user enterprise has the same rights as any other employee in terms of this Act, including the right to join a trade union and to be represented by a trade union in collective bargaining with his or her employer.

(4) A user enterprise must not-

(a) employ an individual placed by a private employment agency on terms and conditions of employment that are less favourable than those that are applicable to its incumbent employees who perform the same or similar work or work of equal value;

(b) differentiate in its employment policies and practices between employees placed by a private employment agency and its incumbent employees who perform the same or similar work or work of equal value.

(5) A user enterprise must not employ an employee placed by a private employment agency -

(a) during or in contemplation of a strike or lockout; or

(b) within six months after the user enterprise has, in terms of section 34, dismissed employees performing the same or similar work or work of equal value.

(6) Any person aggrieved by a contravention of subsection (3), (4) or (5) may refer a dispute to the Labour Commissioner in terms of section 86 to seek a remedy, including -

(a) reinstatement;

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- (b) back pay or other monetary relief;
- (c) an order to take action or refrain from certain action; and
- (d) any other remedy that the arbitrator considers to be appropriate.

(7) A user enterprise that contravenes subsection (4) or (5) commits an offence and is liable to a fine not exceeding N\$80,000 or to be imprisoned for a period not exceeding two years or to both fine and such imprisonment.

(8) Where the Minister is satisfied that the rights of any employee in terms of this Act or any other employment law will be satisfactorily protected without the operation of subsection (2), he or she may, on application made by a user enterprise and supported by both the private employment agency and the affected employee, exempt a user enterprise, in whole or in part, from the provisions of subsection (2), subject to subsection (9) and to any conditions that the Minister may impose.

(9) If the Minister grants an application of a user enterprise for exemption in terms of subsection (8) -

- (a) the private employment agency and the user enterprise are each deemed to be the employer of the individual placed with the user enterprise and are jointly and severally liable for contraventions of this Act;
- (b) in case of a contravention of this section, the employee has the option to seek relief provided herein against either the private employment agency or the user enterprise or both.

(10) The Minister may prescribe regulations concerning the implementation or enforcement of any part of this section and without derogating from the generality of this subsection the regulations may provide for -

- (a) the allocation of responsibilities under this Act between a private employment agency and a user enterprise; or
- (b) categories of employment relationships that may be exempted from this section.

Insertion of sections in Act No. 11 of 2007

7. The principal Act is amended by the insertion of the following sections after section 128:

“Presumption as to who is employee

128A. For the purposes of this Act or any other employment law, until the contrary is proved, an individual who works for or renders services to any other person, is presumed to be an employee of that other person, regardless of the form of the contract or the designation of the individual, if any one or more of the following factors is present:

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- (a) the manner in which the individual works is subject to the control or direction of that other person;
- (b) the individual's hours of work are subject to the control or direction of that other person;
- (c) in the case of an individual who works for an organisation, the individual's work forms an integral part of the organisation;
- (d) the individual has worked for that other person for an average of at least 20 hours per month over the past three months;
- (e) the individual is economically dependent on that person for whom he or she works or renders services;
- (f) the individual is provided with tools of trade or work equipment by that other person;
- (g) the individual only works for or renders services to that other person; or
- (h) any other prescribed factor.

Deeming individuals as employees

128B. (1) The Minister may, after consulting the Labour Advisory Council and by notice in the *Gazette*, deem any individual specified in the notice to be an employee for the purposes of the whole or any part of this Act.

(2) Before the Minister issues a notice under subsection (1), the Minister must -

- (a) publish a draft of the proposed notice in the *Gazette*; and
- (b) invite interested persons to submit written representations on the proposed notice within a reasonable period.

Presumption of indefinite employment

128C. (1) An employee is presumed to be employed indefinitely, unless the employer can establish a justification for employment on a fixed term.

(2) Subsection (1) does not apply to managerial employees.

Amendment of section 1 of Act No. 8 of 2011

8. Section 1 of the Employment Services Act, 2011 (Act No. 8 of 2011) (hereafter referred to as the Employment Services Act) is amended by -

- (a) the insertion of the following definition after the definition of "Permanent Secretary":

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“place” means to place, engage, refer, recruit, procure or supply an individual, to work for an employer or a prospective employer; and

- (b) the substitution of the following definition for the definition of “private employment agency”:

“private employment agency” means any natural or juristic person, except the State, which provides one or more of the following labour market services -

- (a) services for matching offers of and applications for employment, without the private employment agency becoming a party to the employment relationship which may arise therefrom;
- (b) services consisting of engaging individuals with a view to placing them to work for an employer, which assigns their tasks and supervises the execution of those tasks; or
- (c) other services relating to job-seeking that do not set out to match specific offers of and applications for employment, such as providing of information;”.

Amendment of section 24 of Act No. 8 of 2011

9. Section 24 of the Employment Services Act is amended by the substitution of the following subsections for subsection (1):

“(1) A private employment agency may not charge a fee directly or indirectly to any individual using its services to be placed with an employer or a prospective employer or whom it has so placed.

(1A) A user enterprise may not deduct or withhold from the remuneration of an individual placed with it by a private employment agency an amount equivalent to the fee paid by the user enterprise to the private employment agency for the placement of the employee or any portion thereof.”.

Amendment of section 26 of Act No. 8 of 2011

10. Section 26 of the Employment Services Act is amended by the substitution of the following subsection for subsection (2):

“(2) A private employment agency may not place an individual with an employer or a prospective employer -

- (a) unless the employer or prospective employer undertakes to ensure that every individual is employed on terms and conditions not less favourable than –
- (i) those that are applicable to its incumbent employees who perform the same or similar work or work of equal value;

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- (ii) those provided for in a collective agreement in that industry or those prevailing for similar work in the industry and region in which the employees are employed; or
 - (iii) those prevailing in the nearest appropriate region, if similar work is not performed in the region;
- (b) during or in contemplation of a strike or lockout at the facilities of the employer or prospective employer; or
- (c) within six months after the employer or prospective employer has dismissed employees in terms of section 34 of the Labour Act, 2007.”.

Short title and commencement

11. (1) This Act is called the Labour Amendment Act, 2012 and comes into operation on a date determined by the Minister by notice in the *Gazette*.

(2) Different dates may be determined under subsection (1) in respect of the different provisions of this Act.
