



## Proposed changes to labour laws won't fly

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IT'S ALMOST a year exactly since Minister of Labour Nelisiwe Oliphant published four controversial labour law amendment bills which, if made law, would have a profound effect on how the labour market in the country is regulated.

On December 17 last year the Labour Relations Amendment Bill, the Basic Conditions of Employment Amendment Bill, the Employment Equity Amendment Bill; and a proposed new Employment Services Bill were released, leaving the public one month – over the Christmas break – to comment on them.

It soon became apparent that the bills were so poorly drafted – they were riddled with errors and inconsistencies, and in some cases clearly unconstitutional and contrary to government's own Regulatory Impact Assessment study. The process suggested by the minister at the time was halted and they were referred to the National Economic Development and Labour Council (Nedlac) for negotiations before they were to be taken back to Parliament. The parties agreed to negotiate on six themes and put the bills aside.

These six themes were: atypical employment relationships; dispute resolution; compliance and enforcement; collective bargaining; access to employment and equity. The Nedlac process applies to all labour legislation and it sees bills negotiated by the social partners: organised labour, organised business and government, before they are finalised for consideration at Parliament.

Last week the minister announced that Nedlac had reached agreement on some of the major proposals and that accord on the rest of them was imminent. Speaking at the launch of a pilot project that will see surplus funds in the Unemployment Insurance Fund deployed to skills development projects, she apparently said Nedlac had agreed on amendments regarding overtime pay and on justifying the need for employing temporary workers. She had earlier instructed Nedlac to finalise its deliberations by November – which didn't happen – and told them that two of the four amendment bills, the Employment Equity Amendment Bill; and Employment Services Bill, could be held over till next year.

According to numerous sources, it's simply not true to speak of any significant approval of the proposed amendments. **Elias Monage, president of the Confederation of Associations in the Private Employment Sector** – the body representing the organised temporary employment services in negotiation with the Department of Labour, and at Nedlac – says very little substantive progress has been made in the year since discussions began on the principles that underlay the proposed changes.

“The two examples reported on in the press – the justification at court of the need for temporary workers, and the criminalisation of non-payment for overtime work – have, in fact never been discussed,” he says. By putting the negotiators at Nedlac under the pressure of a deadline, Monage believes, they have been reduced to making line by line amendments to the proposals, without looking at the overall effects of the legislation, which is Nedlac’s real purpose.

“It’s been a frustrating year,” Monage says. “Cosatu has been consistent in its call for an outright ban on temporary work, and for labour brokers to be banned, despite the representatives of labour agreeing in the discussion chamber that regulation, rather than prohibition, is the way to go.” Monage cites examples during the year when the same Cosatu officials who have been discussing the details of regulation in Nedlac have called for banning, from the platform at industrial action gatherings.

A government-commissioned regulatory impact assessment (RIA) undertaken by UCT law professor Paul Benjamin in September last year, before the bills were published, predicts that the new laws will have a profound effect on flexibility in the labour market and will hamper the ability of companies to compete in the global market. The report says: “Fixed-term contracts are widely used at the global level as a legitimate mechanism to provide flexibility and responsiveness to changing labour force requirements, particularly on project work, and in sectors that are highly impacted by seasonality or cyclical activity”.

The practical implications of this will be to affect the ability of organisations to act quickly and, therefore, to reduce competitiveness. Monage points out that the bills, if they become law, will result in widespread job losses. “Companies are likely to share out the existing work among employees, or invest in capital intensive solutions, rather than employing more workers,” he says. “It’s simply not logical to assume that banning temporary work will result in all temporary jobs becoming permanent ones.”

The recommendations of the RIA have, in any event, been ignored in the Nedlac process during the course of the year. Labour lawyer Jonathan Goldberg believes rushing the legislation through could result in Constitutional Court challenges which will see the process tied up for years, as happened with other ill-conceived pieces of legislation in the past.

“We have been litigating on some aspects of the LRA for over 15 years now,” he points out, “without sight of finalisation on some interpretive sections. To make changes in the LRA and Basic Conditions of Employment Acts without, as the minister suggests, carrying these through to the Employment Equity and the proposed Employment Services Acts is short-sighted. That will, without any doubt, lead to serious shortcomings in consistency and interpretation of the law.”

It was the failure to consistently apply certain principles throughout the four Amendment Bills that made them unworkable in the first place. They speak, for example, of banning temporary work outright in the LRA and then go on to propose the regulation of temporary workers and their employers in the other bills.

The minister’s insinuation in the article that the government will be going ahead with its intention to ban temporary work and outlaw labour brokers is, according to Goldberg, even more puzzling in light of the National Development Plan that was released last month.

The plan says, under section six: “TESs (temporary employment services) have made a significant contribution to labour market matching. TESs are essential given the fragmented labour market, where low-income households are generally far from economic opportunities with weak labour market networks. They raise the chance of achieving more regularised employment, as well as access to skills training.”

Goldberg points out that the National Development plan goes on to recommend that TESs need to be effectively regulated to ensure that there is no abuse. “Remembering that the plan was a thoroughly-researched document, based on international best practice, one has to wonder which branch of government will prevail here, and to ask whether the branches ever speak to each other,” he says.