IMPLICATIONS OF THE NEW LABOUR RELATIONS AMENDMENT ACT: 2014

The State President has signed the Labour Relations Amendment Act on 25th August which will come into force in the new future on a date yet to be announced.

The main implications of the new legislation are as follows:

1. Unions have been given the right to recruit, represent and bargain on behalf of “temporary employment service” employees, whether employed by a labour broker or the client. This will also include recognition of so-called ‘minority’ unions that have ‘significant representation’. It also means that unions will have the right to call a protected strike by their members at the client’s premises.

2. The procedure regarding applications for exemption from a bargaining council agreement which has been extended to non-party members has been speeded up. Applications must now be processed within 30 days by the council, and if not granted the employer may appeal to an independent body which will give a ruling within 30 days. Bargaining councils are also required to prove each year that they are sufficiently representative of the trade unions and employers operating in the industry in order for the extension to non-parties to remain in force. Bargaining council dispute resolution committees may now charge for conciliation and arbitration proceedings at the same rate as CCMA commissioners.

3. The CCMA has been given jurisdiction over the enforcement of non-compliance orders and disputes between employees and employers regarding conditions of employment regulated by the Basic Conditions of Employment Act. The CCMA may issue an award which becomes an immediate writ of execution. Employees may also embark on a protected strike over any issue regulated by the BCEA. Striking employees may also picket at or in the premises of third parties, (e.g. Shopping Malls), where their employer is situated.

4. A new Essential Services Committee is the be established within the CCMA with new powers to make compulsory essential service determinations, minimum service agreements, maintenance service agreements and determinations and to determine on its own initiative whether or not the whole or part of any service is an essential service. This is an attempt to ensure that the CCMA can step in when it considers it necessary to curb prolonged strike action in certain sectors of the economy. Any such determination can be challenged in the Labour Court. The CCMA may now appoint commissioners to conciliate in any dispute if it is considered to be in the public interest to do so. Previously they had to be invited.
5. A new S103A provides that the Labour Court may order a suitable person, who may be a Commissioner, to be appointed as an administrator of a trade union or employer’s organization if requested by the Registrar. Changes to S111 provide that a deregistered trade union or employer’s organization may not continue to operate pending an appeal to the Labour Court.

6. S145 provides that if any party wishes to take a matter on review to the Labour Court it must lodge security equivalent to 24 months or equivalent to the amount the award made by the CCMA, including awards in terms of the BCEA.

7. Trade unions and employers’ organizations representatives may not charge for appearances at the Labour Court.

8. The definition of unfair dismissal has been extended to cover the non-renewal of fixed-term contracts unless the employer can provide a justifiable reason for not doing so. (*See the new extensive provisions relating to the ‘Regulation of Non-Standard Employment’ below)

9. S189 has been strengthened to ensure that there are no ‘quickie’ retrenchments. “A consulting party may not unreasonably refuse to extend the period for consultation if such extension is required to ensure meaningful consultation”. Where one or more employees (<10) are alleging unfair retrenchment they may elect to take the matter to either the CCMA for arbitration or the Labour Court.

10. **Regulation of Non-Standard Employment**

    One of the major changes to the Labour Relations Act relates to the protection of ‘temporary service employees’, i.e. those employees either placed on fixed-term contracts or provided to an employer by a labour broker. (see S198)

    10.1 The client of the temporary employment service (labour broker) will no longer be held jointly and severally liable for any breach of employment legislation, including non-compliance with the BCEA, and the employee or labour inspector may institute action against either the client, or the service provider, or both.
10.2 A temporary service provider must provide an employee whose service is procured for or provided to a client with Written Particulars of Employment that comply with the provisions of the BCEA when employment commences.

10.3 An employee may now be employed by a temporary employment service provider on terms and conditions of employment contrary to the provisions of the LRA or any employment law or collective agreement which may be applicable to the client’s business.

10.4 No person may perform the function of a temporary employment service provider unless it is registered in terms of the LRA.

10.5 An employee of a temporary employment service may not work for a client for longer than 3 months where after they become an indefinite employee of the client, unless they are substituting for an employee of the client who is temporarily absent.

10.6 The termination by the temporary employment service provider of an employee’s services with a client, whether at the instance of the TES provider or the client for the purpose of circumventing the 3 month provision will be deemed to be a (unfair) dismissal.

10.7 An employee of a temporary employment service must be treated on the whole not less favourably than an employee of the client performing the same or similar work, unless there is a justifiable reason for it.

LIMITATIONS ON THE USE OF FIXED-TERM CONTRACTS

10.8 A fixed term contract can only be used and terminated:

10.8.1 on the occurrence of a specified event; (e.g. return of employee)
10.8.2 the completion of a specified task or project;
10.8.3 a fixed date, (other than the employee’s normal or agreed retirement)

NB. This provision does not apply to employers employing less than 10 employees, or employers with less than 50 employees whose business has been in operation for less than 2 years, unless the employer conducts more than one business, or the business has been formed out of an existing business.
10.9 An employer may employ an employee on a fixed-term contract, or successive fixed-term contacts for longer than 3 months only if –

10.9.1 the nature of the work for which the employee is employed is of a limited or definite duration; or
10.9.2 the employer can demonstrate any other justifiable reason for fixing the term of the contract, such as -
10.9.3 the employee is replacing another employee who is temporarily absent from work;
10.9.4 the employee is employed on account of a temporary increase in the volume of work;
10.9.5 is a student or recent graduate employed for the purpose of being trained or gaining experience in order to enter a job or profession;
10.9.6 is employed to work exclusively on a specific project that has a limited or defined duration;
10.9.7 is a non-citizen who has been granted a work permit for a defined period;
10.9.8 is employed to perform seasonal work;
10.9.9 is employed for the purpose of an official public works scheme or similar public job creation scheme;

Any employment on a fixed-term contract basis, or renewed employment, which cannot be justified will be deemed to be of indefinite duration!

10.10 An offer to employ an employee on a fixed-term contract, or to renew or extend a fixed-term contract must be in writing and must state the reasons for it having to be a fixed-term contract. The onus will be on the employer to prove the need for a fixed-term contract. If an employee is employed for longer than 3 months then they must be afforded all the benefits of a full-time employee in a similar position unless the difference can be justified. An employee who has been engaged for a period of longer than 24 months on a fixed-term contract or project is entitled to severance pay of one week for each completed year of service.

NB. There will be a moratorium period of 3 months from the date of promulgation of the Act to enable employers and temporary employment service providers to comply with the provisions of the new legislation.

Should you require any further assistance in this regard you are welcome to contact the COFESA ‘hot-line’ on 011-679-4373.