LABOUR LAW AMENDMENT UPDATE

Issued: 22 August 2013

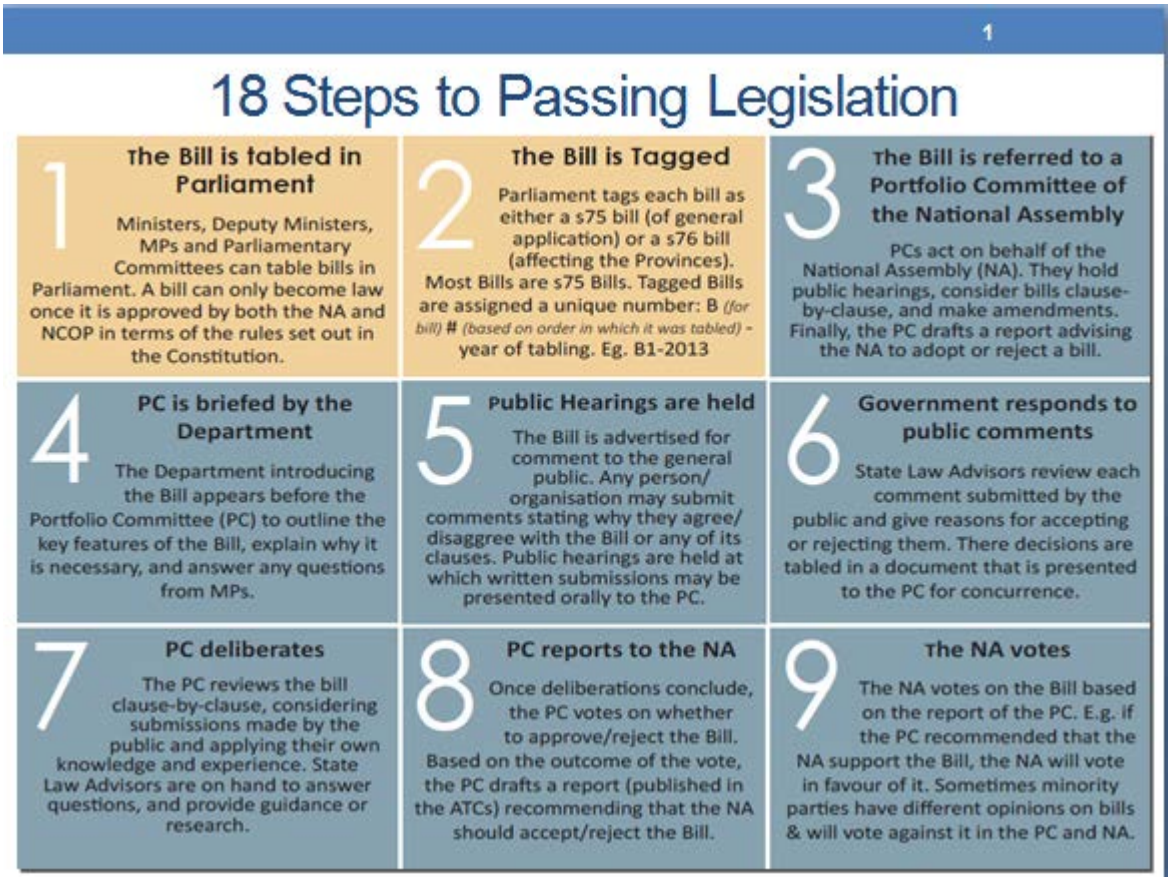
Background

The process of revising the labour legislation goes back several years with the first drafts of the Labour Relations Amendment Bill, Basic Conditions of Employment Amendment Bill, Employment Equity Amendment Bill and the Employment Services Bill published in December 2010 together with the Regulatory Impact Assessment (RIA) commissioned by the Department of Labour.

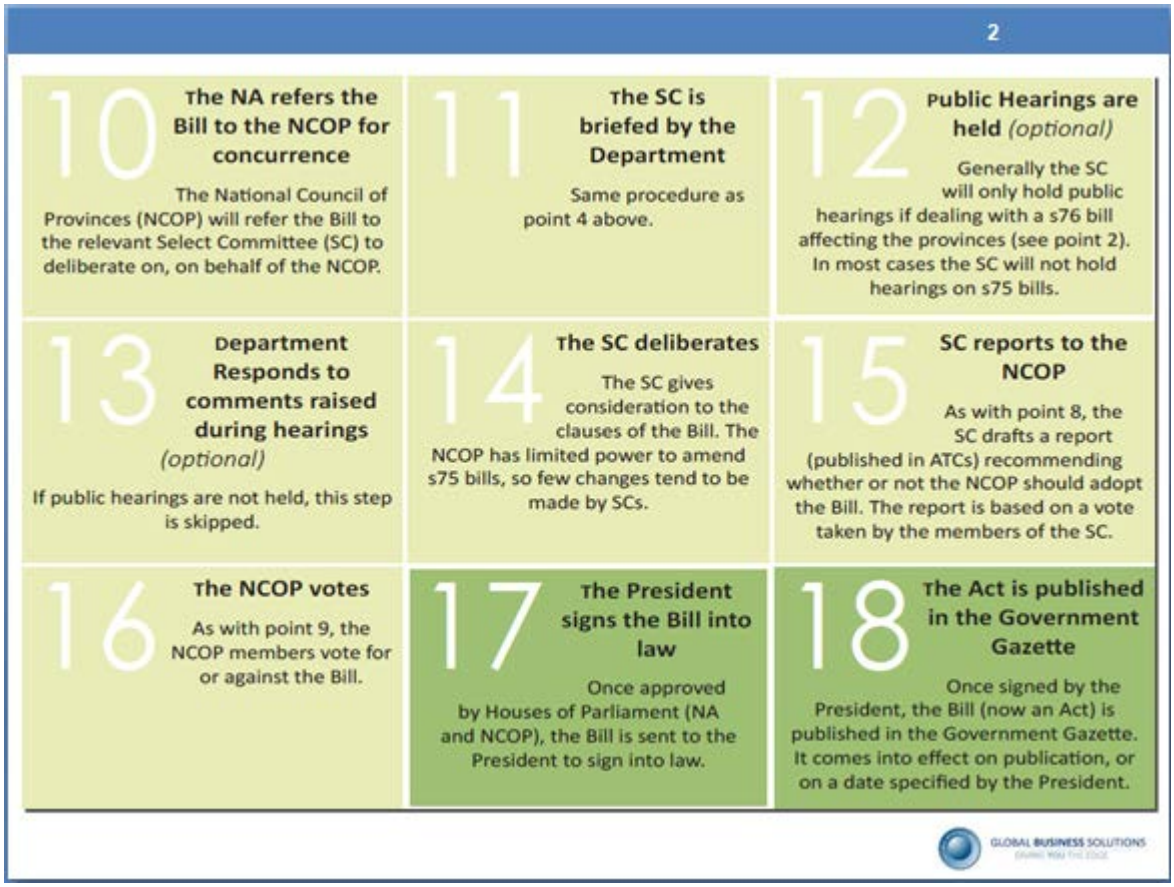
Since then, rigorous debate has taken place within the NEDLAC forum and alterations made to the Bills for consideration by the Parliamentary Portfolio Committee: Labour. Regional public hearings and parliamentary hearings have taken place and the issue of "labour brokers" has invoked high emotion and divided opinion on how this sector of the labour economy should be regulated. An emotive topic, the banning of labour brokers has been a regular call from trade unions and continues to be a politicking tool, likely to continue in the lead up to national elections in April 2014.

Understanding the process of passing legislation

There is a very strict process that must be followed before any new, or amended, legislation can be passed and effected into law. To illustrate this point, see the 18 steps below:



Steps 1 – 9 have thus been completed for both the Basic Conditions of Employment Amendment Bill and the Labour Relations Amendment Bill. As one can see, steps 10 – 18 are still to be completed and these processes can take time.



Acceptance of the LRA in the National Assembly – 20 August 2013

When the Labour Relations Amendment Bill was first put forward in the National Assembly (back in June), there was insufficient quorum to take a vote. As a result, this was deferred to the meeting that took place earlier this week. Feedback on the meeting, from our CAPES colleague, confirmed:

The matter was dealt with first on the agenda instead of third as we anticipated. Having rewound the footage of the National Assembly we wish to advise what was decided in parliament today:

- The DA, Freedom Front & Cope objected to the bill being read out in parliament for a second time.
- The DA then called for a division which led to a voting session on the question of whether the bill would be read for a second time.
- The voting session concluded with 248 votes in favour of the bill being read for a second time vs. 81 votes against this.
- The result was that the Secretary read the bill for a second time and same was sent to the National Council of provinces for concurrence.

It is critical for members to understand that this legislation still has to go to the National Council of Provinces. Our information is that they are likely to hold public hearings on these bills. It is critical that our industry is well represented at these public hearings to influence the outcome. APSO and CAPES will send formal representatives but we will also advise members of the details of the hearings, once we have this confirmed, so that as many members as possible can also participate to show support for the industry. We are aware that there is serious consideration to moving back to six months (before additional protections come into effect) and this would be our ideal goal at these hearings.

Most importantly, it is critical to remember that the National Assembly has passed the Bill through a process (as outlined above) and that these new amendments are not law. The status quo remains and you and your clients should continue to operate compliantly with current legislation.

What do the changes mean for TES/labour brokers?

The following opinion was provided by CAPES and is available for circulation to your networks and is designed to address some of the common misperceptions of the impact of the "deemed" provision in particular.

If it is a legitimate replacement employee, it is not subject to 3 months limitation.

> **198A.** (1) In this section, a ''temporary service'' means work for a client by an *employee*—
>
> *(a)* for a period not exceeding three months;
>
> *(b)* as a substitute for an *employee* of the client who is temporarily absent; or
>
> *(c)* in a category of work and for any period of time which is determined to be a temporary service by a *collective agreement* concluded in a *bargaining council*, a sectoral determination or a notice published by the Minister, in accordance with the provisions of subsections (6) to (8).

Further after the 3 months a deemed permanent employment relationship with the client is introduced unless there is a justification under section 198(B), the fixed term contract provision.

> *(b)* not performing such temporary service for the client is—
>
> (i) deemed to be the *employee* of that client and the client is deemed to be the employer; and
>
> (ii) subject to the provisions of section 198B, employed on an indefinite basis by the client.

It is our opinion that if an employee earning less than the threshold were not employed by labour brokers for a period exceeding three months, this would be a ban and be contrary to the Constitution. Further if this was so there would be no need for a deeming provision.

It is trite that in South African law an employee can have more than one employer. It must be assumed that the drafters were aware of this principle. See for example: Board of Executors Ltd v McCafferty [1997] 7 BLLR 835(LAC).

If the drafters/Parliament had intended the employee to cease being an employee of the TES and become an employee of the client only, the clause could easily have said so in simple and plain language. For example, if the intention was to automatically substitute the TES for the client, words similar to those used in section 197(2)(a) of the Act could have been used.

If employees who perform such services in excess of three months would be deemed to be permanent employees of the client, in CAPES' opinion, is an incorrect interpretation being given by some advisors.

(4A) If the client of a temporary employment service is jointly and severally liable in terms of section 198(4) or is deemed to be the employer of an employee in terms of section 198A(3)*(b)*—

(a) the *employee* may institute proceedings against either the temporary employment service or the client

This is the artificial deeming provision and how you give effect to it by creating joint and several liability in (a) above.

Further the employee, who is deemed to be an employee of the client, must be treated on the whole not less favourable than other employees of the client performing similar work. It is CAPES' opinion that there are plenty of options for differentiating temporary employment service employees to other employees. In the section below some of those areas are listed and are not limited so long as they are not discriminatory in terms of section 6 of the Employment Equity Act.

198D. (1) Any *dispute arising* from the interpretation or application of sections 198A, 198B and 198C may be referred to the Commission or a *bargaining council* with jurisdiction for conciliation and, if not resolved, to arbitration.

(2) For the purposes of sections 198A (5), 198B (3) and 198C (3) *(a)*, a justifiable reason includes that the different treatment is a result of the application of a system that takes into account—

(a) seniority, experience or length of service;
(b) merit;
(c) the quality or quantity of work performed; or
(d) any other criteria of a similar nature, and such reason is not prohibited by section 6(1) of the Employment Equity Act, 1998 (Act No. 55 of 1998).

(3) A party to a dispute contemplated in subsection (1) may refer the dispute, in writing, to the Commission or to the bargaining council, within six months after the act or omission concerned.

(4) The party that refers a dispute must satisfy the Commission or the bargaining council that a copy of the referral has been served on every party to the dispute.

(5) If the dispute remains unresolved after conciliation, a party to the dispute may refer it to the Commission or to the bargaining council for arbitration within 90 days.

(6) The Commission or the bargaining council may at any time, permit a party that shows good cause to, refer a dispute after the relevant time limit set out in subsection (3) or (5).

Currently the TES is the employer. Deemed is the new proposal and creates an artificial relationship to provide additional protection which is as put out in the sections above specifically:

(4A) If the client of a temporary employment service is jointly and severally liable in terms of section 198(4) or is deemed to be the employer of an employee in terms of section 198A(3)*(b)*—

(a) the *employee* may institute proceedings against either the temporary employment service or the client

This creates a dual liability and employment relationship.

As mentioned above "deeming" creates an artificial relationship to provide "extra" protection to this class of employee (under the LRA only). The employee is still paid by the TES and in effect there is a dual employment relationship.

CAPES is of the opinion that a retrospective reinstatement is accommodated so long as the employee is placed in a similar position with similar remuneration then the award is given effect to. The TES can do this in CAPES' opinion.

The Economic Importance of retaining flexibility

In a document, The Economic Importance of Retaining Flexibility, created by APSO on behalf of CAPES, the economic importance for employers to retain their flexibility is highlighted. In addition, some of the myths about "labour brokers" are addressed and busted. We highly encourage members to read this document, share it with their consultants and circulate it to your clients.

CAPES Business Breakfasts

APSO, in conjunction with CAPES, will be inviting members and their clients to a series of business breakfasts at which the issue of the South African economy, job creation and the impact of the new amendments will be addressed. More specific detail will be circulated in the coming days, but please diarise these dates:

13 September 2013	***Cape Town***
18 September 2013	***Johannesburg***
20 September 2013	***Durban***
26 September 2013	***Port Elizabeth***

Contact Us

Should you have any questions in this regard, or if you have any clients who require specific intervention, please do not hesitate to contact us and we will try to assist you.

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