WHITE PAPER:
A COMPARISON OF LABOUR LAWS WORLDWIDE, THEIR IMPACT ON THE GLOBAL WORKFORCE AND SOUTH AFRICA’S LABOUR LAW DISPOSITION

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Contents
1. Abstract / Executive Summary ............................................................................................................ 3
2. Introduction ........................................................................................................................................ 4
   2.1 Labour law defined ....................................................................................................................... 4
   2.2 Labour and Employment associations ......................................................................................... 5
   2.3 International employment context ............................................................................................... 5
      (2.3.1) UNEMPLOYMENT ................................................................................................................ 5
      (2.3.2) A MISSION TO ELIMINATE FORCED LABOUR AND EXPLOITATION ......................... 5
3. Labour laws across the globe .............................................................................................................. 6
   3.1 First world countries ..................................................................................................................... 6
      (3.1.1) UNITED KINGDOM ............................................................................................................... 6
      (3.1.2) UNITED STATES OF AMERICA .............................................................................................. 7
      (3.1.3) GERMANY ............................................................................................................................ 8
      (3.1.4) FRANCE ............................................................................................................................... 9
   3.2 South Africa’s fellow BRICS nations ............................................................................................ 11
      (3.2.1) BRAZIL ................................................................................................................................ 11
      (3.2.2) RUSSIA ............................................................................................................................... 13
      (3.2.3) INDIA .................................................................................................................................. 14
      (3.2.4) CHINA ................................................................................................................................. 16
4. South Africa ....................................................................................................................................... 18
   4.1 South African working environment ........................................................................................... 18
      (4.1.1) UNEMPLOYMENT .............................................................................................................. 18
      (4.1.2) LABOUR UNREST .............................................................................................................. 19
   4.2 South African labour law ............................................................................................................. 19
      (4.2.1) COMMENCEMENT OF THE LABOUR RELATIONS AMENDMENT ACT, 2014 .......... 22
5. What do labour law discrepancies between countries mean for the global workforce? ................. 24
   5.1 What is the global workforce? .................................................................................................... 24
   5.2 Global workforce considerations ............................................................................................... 24
   5.3 South Africa’s global competitiveness and attracting international investment ......................... 25
6. South Africa’s labour law comparative standing .............................................................................. 26
7. Summary ........................................................................................................................................... 27
8. Conclusion / Call to Action ................................................................................................................ 28
9. About The Federation of African Professional Staffing Organisations (APSO) ................................. 29
1. Abstract / Executive Summary
As South Africa and Africa’s largest professional body representing staffing and workforce solution firms of all sizes and specialties, The Federation of African Professional Staffing Organisations (APSO) has set out to identify the differences in labour and employment laws across the globe. This white paper pays particular attention to South Africa’s labour law disposition, specific temporary labour considerations, and the often unintended consequences of these laws on not only the South African workforce, but also the perception of “red-tape” holding the country back in terms of global competitiveness and foreign investment.

Factors such as contractual agreements, benefits, maximum working hours and the protection of vulnerable groups - such as children - from exploitation, are common labour law considerations of regions across the world. Regulations which are specific to temporary labour, on the other hand, differ in terms of the requirements for organisations to utilise a temporary workforce, the maximum length of temporary contracts and the benefits temporary labourers are entitled to.

In the South African context, one which has consistently high levels of labour unrest and unemployment, a recent amendment to the Labour Relations Act has impacted the perceptions of who - the temporary employment service provider or the client organisation - is responsible for particular temporary workforce employment considerations. This amendment has resulted in large scale confusion in the market, with potentially damning consequences for stakeholders - small to medium sized recruitment companies, client organisations and the temporary workers which the Act ultimately aims to protect.

Considering the above, APSO has noted that interpretations of this amendment is likely to act as a disincentive for employers who have utilised temporary labour to upscale their workforce. APSO has also noted that the Act has already had unintended consequences on the market and resulted in the loss of a number of temporary jobs. This uncertainty has been highlighted as likely to cost the country 254 000 jobs - with an unemployment rate of 26.4% (as of the first quarter of 2015), the potential loss of so many additional jobs is cause for concern.

Although a recent report by law firm, DLA Piper, titled “A Global Employment Guide to Redundancies and Reductions in Force”, found that South Africa's labour laws are on par with many developed - first world – countries, this contradicts numerous other international reports such as the World Economic Forum's (WEF) Global Competitiveness Index, which criticises South Africa's labour law for being rigid and restrictive.
To conclude this white paper, APSO calls on stakeholders – government, the South African staffing and recruitment industry, business and labour - to relook and revise labour and employment regulations perceived as “red tape” or unclear to both the local and international market. The ultimate goal in this regard is to not only secure employment opportunities for South Africa's unemployed but also to reach milestones in terms of global competitiveness, economic growth and creating an environment conducive to growing the global workforce.

2. Introduction

This white paper sets out to uncover the differences in labour and employment laws across the world, with a particular focus on temporary labour, the implications of “red-tape” on global competitiveness and investment, as well as South Africa’s labour law disposition.

2.1 Labour law defined

Labour law (also referred to as employment law) was first established as employment standards in the Industrial Revolution.

Today, labour laws fall into one of two categories, collective or individual.

Collective labour law covers union, employer and employee relationships while individual labour law covers employees’ workplace rights.

Labour laws have a fixed purpose, to protect employees' rights and set obligations and responsibilities for employers. The primary function of labour laws is to provide equal opportunity and pay, employees' physical and mental well-being and safety, and workplace diversity.

Although many employers would still embrace sound business principles without legal mandates, employers use the structure that labour laws provide to ensure that their operations are legally compliant.

In 2006, General Secretary of the International Metalworkers Federation (IMF), Marcello Malentacchi said that the fundamental principle of labour legislation is to guarantee the weaker party in the labour market protection and basic rights in order to be in a fair position when negotiating salary and working conditions.
2.2 Labour and Employment associations
The International Labour and Employment Relations Association (ILERA) was established in 1966. The general purpose of the ILERA is to promote the study of labour and employment relations throughout the world, in the relevant academic disciplines.

With 22 member countries, the ILERA encourages the establishment of national associations of industrial relations specialists; facilitates the spread of information about significant developments in research and education in the field of industrial relations; organises worldwide and regional congresses; and promotes internationally planned research.

2.3 International employment context

(2.3.1) UNEMPLOYMENT
According to the International Labour Organisation’s (ILO) facts and figures, released in May 2014, the number of unemployed worldwide rose by 3.9 million in 2013 to almost 200 million - a 6% unemployment rate.

In addition, some 23 million workers have dropped out of the labour market and approximately 73.8 million people in the 15 to 24 age group were unemployed in 2013 (a 13% youth unemployment rate).

The ILO notes that the number of job-seekers is expected to rise by more than 13 million by 2019.

(2.3.2) A MISSION TO ELIMINATE FORCED LABOUR AND EXPLOITATION
In 2014, the ILO estimated that 21 million people worldwide are in “forced labour”.

“Forced labour” is a global practice in which workers live in a form of modern slavery, handled as property and forced to work in industries such as prostitution (run by organised criminal gangs), domestic work and brick making.

In circumstances of forced labour, the ILO notes that none of the - illegal – profits are taxed or go to the workers for their labour.

A growing industry, forced labour draws in a staggering annual revenue of around $150bn - which exceeds the gross domestic product (GDP) of most developing countries.

The ILO’s original Forced Labour Convention was established in 1930, it aimed primarily at preventing governments (many of them then colonial) from abusing their workers. It states that signatories must suppress the use of forced and compulsory labour in all forms.
Many countries have also implemented very specific employment laws which regulate or
forbid child labour and / or the labour conditions of the workforce – often in industrial and
labour intensive industries.

3. Labour laws across the globe

3.1 First world countries

(3.1.1) UNITED KINGDOM
The UK comprises England, Northern Ireland, Wales and Scotland and has a population of
over 62 million people.

Pursuant to the Employment Rights Act of 1996, all employees in the UK are entitled to
receive a written statement from their employer - within two months of hire. This statement
sets the terms and conditions of their employment, is required for both fixed-term and
indefinite contracts and must include a specific list of employee information such as the
employee's date of commencement of employment; the duration of employment; job title;
duties; pay amount; pay intervals; play of employment; sick pay; work hours; holidays and
leave benefits; notice of termination requirements and probationary period; pension details;
and disciplinary procedures.

Recruitment agencies estimated that in 2011, there were around 1.4 million temporary
workers in the UK which made up approximately 4% of the nation's workforce.

Temporary agency workers in the UK are entitled to a number of benefits which are available
to their permanent counterparts after 12 weeks with the same employer. These benefits
include paid holidays (including public holidays); maternity / paternity / adoption pay; sick
pay; rest breaks and limitations set on working times; the national minimum wage; no
unlawful deductions from wages; freedom from discrimination; health and safety protection;
and access to shared facilities and services that are available to comparable employees –
such as vending machines, a workplace crèche, transport or prayer room.

Under UK labour guidelines, temporary agency workers are also entitled to the details of any
job vacancies with their employer organisation.

However, in the UK, temporary agency workers are not entitled to redundancy pay or to
claim unfair dismissal - which are rights available to full-time employees only.
(3.1.2) UNITED STATES OF AMERICA

The US Department of Labor (DOL) administers and enforces more than 180 federal laws which - combined with the regulations that implement them - cover numerous workplace activities for approximately 10 million employers and 125 million workers across the country.

According to the DOL website, the Fair Labor Standards Act (FLSA) sets the standard for wages and overtime pay. The act requires employers to pay covered employees (employees who are paid wages for their services) - who are not otherwise exempt - at least the federal minimum wage and overtime pay of one and a half times their regular rate.

For non-agricultural operations, the act also restricts the hours that children under the age of 16 can work and forbids the employment of children under age 18 for jobs which are deemed to be too dangerous. For agricultural operations, the act prohibits the employment of children under the age of 16 during school hours as well as for jobs deemed to be too dangerous.

The US DOL considers ‘a temporary appointment’ as an appointment lasting one year or less, with a specific expiration date.

Outlined as “appropriate” when an agency expects that there will be no permanent need for the employee, an agency may make use of a temporary employee:

- To fill a short-term position that is not expected to last more than one year;
- To meet an employment need that is scheduled to be terminated within one or more years (completion of a specific project or peak workload); or
- To fill positions that involve intermittent or seasonal work schedules.

In terms of US labour law, a temporary employee does not serve a probationary period and is not eligible for promotion, reassignment or transfer to another job.

However, temporary employees are eligible to earn leave and are covered by Social Security and unemployment compensation. They are not, however, eligible for other fringe benefits provided to career civil service employees – including coverage under the Federal Government Life Insurance program or the Federal Employees Retirement System. Current law allows temporary employees in the US to purchase health insurance after they have one year of temporary service, but the employee must pay the full cost with no contribution from government.

Alongside worker benefits and compensation for permanent employees, US labour law also addresses specific regulations per industry as well as family and medical leave. The Family and Medical Leave Act (FMLA) requires employers of 50 or more employees to give up to 12...
weeks of unpaid, job-protected leave to eligible employees for the birth or adoption of a child
or for the serious illness of the employee or their immediate family (a spouse, child or
parent).

(3.1.3) GERMANY
Relations between German employers and employees are highly regulated under German
labour and employment law which is often perceived as strongly biased in favour of
employees.

According to the ILO, Germany’s Basic Law guarantees freedom of association as well as
free choice of occupation and the prohibition of forced labour. However, because of the
German membership in the European Union (EU), labour law is strongly influenced by EU
legislation and case law.

The major sources of labour law are Federal legislation, collective agreements, works
agreements and case law. Rather than having a single consolidated Labour Code, minimum
labour standards are laid down in separate Acts on various labour related issues, which are
supplemented by the government's ordinances.

German labour law outlines that part-time workers who want to work full-time must be given
preference in case of a vacant full-time post. Employers are also obliged to inform
employees who want to change their working time, as well as the works council, about
vacant full-time or part-time jobs within the company and about opportunities to participate in
training measures.

Part-time employees must also be given treatment equal to that given full-time workers,
provided that there are no legally justified reasons for unequal treatment.

In terms of temporary employment through an employment agency, German labour laws
highlights that if the dispatching of employees is not only occasional, but on a long term
basis (a period longer than 12 months), it is considered commercial.

Commercial dispatching is permitted only under the strict preconditions of the Act on the
Commercial Transfer of Employees. First, the business of the temporary work agency needs
permission by the Federal Institute of Employment. Secondly, the dispatched worker must
be employed on a permanent basis except for under particular circumstances when a non-
renewable fixed-term contract is justified.
These dispatched - temporary - employees are also entitled to:

- Maternity protection;
- Parental leave;
- Continued payment of remuneration in case of sickness;
- 24 days holiday (including Saturdays);
- Social insurance; and
- Statutory redundancy provisions.

German labour laws also address work hours, the protection of children (minimum age for employment), equality, trade unions, remuneration, contract terminations and employee benefits.

(3.1.4) FRANCE

In general, French law does not require employment contracts to be in writing. However, as is the case with Germany, France is a member of the EU which requires employers to inform staff of certain material terms applicable to their contract or their employment relationship within two months of on-boarding – in writing.

These material terms (among others) include:

- The identity of the parties (both employer and employee);
- The work place address;
- The employee’s title or a summary description of the employee’s position;
- The start date of the employment contract;
- The number of paid holidays;
- The mandatory notice period required prior to the early termination of the employment contract;
- Salary information and pay period;
- The end date of work carried out on a daily or weekly basis; and
- If applicable, the name of any agreement or collective bargaining agreement governing working conditions.

As an exception to the general rule, the following (among others) are required to be in writing in order to be valid:

- Definite term employment contracts;
- Part-time employment contracts;
- Temporary employment contracts;
- Apprenticeship contracts; and
• Professionalisation (the social process whereby people come to engage in an activity for pay or as a means of livelihood) contracts.

For a written employment contract to be valid against an employer, different laws apply. The goal of a written employment contract is to permit the employer to limit the rights of the employee and to subject the employee to certain obligations.

In addition, where there is no written employment contract, the employee is considered to be a permanent employee. This is important because there are no at will terminations in France. To dismiss a permanent employee, an employer is required to justify the termination for economic reasons, gross negligence or gross misconduct.

The primary sources of terms implied by French law into the employment contract are collective bargaining agreements. In the event that there is a difference between the terms of the applicable collective bargaining agreement and an individual employment contract, the former will prevail - unless the terms of the individual employment contract are more advantageous.

In terms of temporary employment, French law does not recognise “temporary workers” and employers therefore only utilise such labour under fixed-term employment contracts or through agencies.

In this case, an agency worker is contractually bound to the employment agency and not the employer organisation.

In general, agency workers are entitled to the same rights and benefits as permanent employees of the hiring company. Agency workers must therefore:

• Be paid at least the same salary as a permanent employee (performing the same duties as the agency worker) within the employer company;
• Be paid at least every 16 days;
• Receive the ordinary health care benefits provided under the French social security system;
• Receive accident insurance coverage and retirement benefits under their mission contract;
• Receive all the same paid holidays as the employees of the employer company;
• Acquire paid holiday at the same legal rate as all other employees and are entitled to use them after 10 days or 70 hours of work completed; and
• Be entitled to the same government unemployment benefits as permanent employees, subject to certain special agency workers rules.
Agency workers are also generally entitled (at the end of their employment contract) to receive an end of contract bonus which is usually equal to 10% of the total gross salary and bonuses received by the employee over the course of the mission contract.

French labour law also addresses potentially harmful factors such as harassment and discrimination, prohibiting employers from making decisions regarding an employee / potential employee on the basis of their origin, sex, family situation, nationality, religion, political standing etc.

The law also outlines that the head of the company must take all necessary steps to prevent harassment and sexual harassment. No employee should be subject to repeated moral harassment where the purpose or effect is to degrade works conditions so as to damage his/her rights and dignity, to alter his/her physical or mental health or compromise his/her professional future.

Likewise, no employee may be disciplined, dismissed or discriminated against, directly or indirectly, for having been subject to or refused to be subject to, testifying or reporting such harassment.

Other important employment considerations taken into account by French labour laws include working hours (stating both a maximum number of hours that an individual may work as well as a minimum number of hours that an individual must be given to rest); paid holidays, paid leave and sick leave; and the hourly / monthly minimum wage – with special laws regulating the minimum wage for: apprentices, child care-centre helpers, building superintendents, domestic employees, temporary employees seconded to France, employees younger than 22 years old and employees who work from home.

3.2 South Africa’s fellow BRICS nations

(3.2.1) BRAZIL
Brazil is often referred to as a country with very strict labour laws and numerous benefits for its employees.

The Brazilian constitution considers “an employee” as any person providing services to an employer on a regular basis, depending on this employer and receiving a salary.

Created in 1943 and approved by President Getúlio Vargas, the Brazilian consolidation of labour laws (Consolidação das Leis do Trabalho or simply CLT) is the major legislation regularising labour activities in the country.
Ranked fifth globally (among countries that have a formal system for hiring temporary workers), the Brazilian industry which makes the most use of temporary workers is the retail sector – especially over religious holidays such as Christmas and Easter.

Brazilian law only permits the rendering of services by a temporary worker under certain circumstances and only if all of the requirements are met.

These requirements include:

- A written contract between the employment agency and the company requesting the services;
- The need for a temporary workforce to be justified;
- The salary which the worker will be paid must be stated in advance; and
- The contract must clearly specify the term of the work such as the period of time that the temporary worker will provide services to the company – which cannot exceed three months. If the company wishes to extend the contract, the company must - in advance - make a formal request to the Ministry of Labour - if granted, this extension can then not exceed six months.

In addition to these requirements, under Brazilian law, a contract for temporary work can only be used for specific types of work. Such identified circumstances include:

- To meet a specific demand for a specified period of time – Eg. for shopping malls during Christmas season;
- Transitory (short-term) company activities; and
- A probation period of three months during which the employer can evaluate the employee and, if necessary, dismiss him or her without having to pay the rights granted to CLT workers by law, such as notice and maternity leave.

Some stakeholders in Brazil oppose a temporary work system claiming that employers can take unfair advantage of the system - by creating a cheap workforce and exempting themselves from paying applicable fees and benefits that are granted - by law - to regular employees.

Despite laws that forbid this practice, some companies operate with only a temporary workforce which reduces and often even eliminates the costs of employee benefits and rights for the employer. For this reason, it is not unusual to hear of temporary workers who successfully sued the company they worked for and were granted by law the right to be hired as regular employees.
According to the Assesttem (Associação Brasileira das Empresas de Serviços Terceirizáveis e de Trabalho Temporário), which is the association responsible for temporary work in Brazil, only 15% of those temporary workers hired in December 2012 (to meet the demands of the Christmas season) were hired as regular employees in 2013.

The Associação Comercial de São Paulo (ACSP), the São Paulo Commercial Association, further notes that out of the 150 000 temporary workers that were utilised in 2012, 70% were in the retail sector, while the remaining 30% were divided among other sectors.

In terms of trade union guidelines, Brazilian labour legislation determines that, for the purposes of union membership, a worker is defined by his or her specific professional category, and not by the line of business of the employing company. For example, a journalist employed full-time by an engineering company to produce an in-house bulletin would be represented by the Journalists’ Union and not by the Engineering Workers’ Union.

Other Brazilian labour laws include provision for additional payment for weekend work; and outsourced services, for example.

According to a 2011 article in The Economist (Employer, beware), Gustavo Gonzaga, an economist at Rio de Janeiro's Catholic University noted that one-third of Brazilian workers are made redundant each year, a fact he attributes in part to the labour laws themselves. These are extraordinarily rigid: they prevent bosses and workers from negotiating changes in terms and conditions, even if they are mutually agreeable. They also give workers powerful incentives to be fired rather than resign. Generous and poorly designed severance payments cause conflict, Gonzaga said, and encourage workers to move frequently.

(3.2.2) RUSSIA

The Russian Labour Code No. 197-FZ (as amended) dated 30 December 2001 (Labour Code) is the main document regulating and addressing employment legislation in Russia.

The employment of temporary agency workers is not clearly defined in Russian labour law, causing uncertainty for both employers and lawyers. In response, the Russian parliament has passed new legislation to protect employees in temporary work arrangements that will come into effect on 1 January 2016. The new law amends the Labour Code, Tax Code and existing employment law to prohibit temporary agency work (more commonly known in Russia as ‘outstaffing’) in all but a few circumstances.

This amendment will see a specific definition for ‘secondment’ or ‘loaned labour’ to be introduced for the first time. Significant limits will be set on the activities of private employment agencies, including the introduction of substantial accreditation requirements.
The use of temporary workers will only be permitted in the following circumstances:

- To substitute for employees who are temporarily absent from the workplace;
- To assist in the temporary expansion of production or services (for up to a maximum of nine months);
- To provide temporary employment to certain approved categories of workers (e.g., full-time students, single parents, parents of multiple children and former convicts);

Only two categories of employers will be permitted to supply temporary workers – specifically accredited private employment agencies and legal entities.

Agencies will also not be able to provide temporary workers to perform particular types of work such as those considered to be harmful or hazardous, and employers will be prohibited from using temporary workers to replace employees who are on strike or during downturns in business.

In addition, agencies will be required to amend the employment contracts of their employees to stipulate the type of work they will be expected to do for the employer, while the employer must ensure that temporary workers are paid the same as ordinary employees performing the same job or with similar qualifications.

Other factors addressed under Russian labour law include labour and employee benefits; discrimination and harassment; foreign citizen occupation exclusions; compensation and the minimum wage; working hour restrictions and the requirement of a written employment contract.

(3.2.3) INDIA

India provides for core labour standards of ILO for the welfare of workers and to protect their interests.

With a number of labour laws addressing various issues such as resolution of industrial disputes, working conditions, labour compensation, insurance, child labour and equal remuneration, labour is a subject in the concurrent list of the Indian Constitution and is therefore in the jurisdiction of both central and state governments. Both central and state governments have enacted laws on labour issues.

Indian legislation recognises two categories of employee, workmen and non-workmen.

A workman is defined as any person employed in any industry to perform manual, unskilled, skilled, technical, operational, clerical or supervisory work for hire or reward, whether the terms of employment are expressed or implied.
Although all sales promotion employees are excluded from the definition of workmen, certain sales employees are protected under the Industrial Disputes Act 1947 (ID Act) as a result of the Sales Promotion Employees (Condition of Service) Act 1976.

In addition, the model standing orders under the Industrial Employment (Standing Orders) Central Rules 1946, classify workmen as permanent workmen, probationers, ‘Badli’ workmen (workers who are appointed in the place of a permanent worker who is temporarily absent) and temporary workmen based on the nature of their employment.

Another category of employee recognised under Indian law are contract workers who are employed through an intermediate contractor.

The entitlement to statutory employment rights depends on the category in which the employee falls as well as other factors such as remuneration, location of employee and type of industry. However, an employee who does not qualify as a workman will not receive any protection or benefit under the ID Act.

Certain statutory benefits are only available to persons in continuous employment for a particular period of time. While gratuity amounts are payable if an employee has worked for a company for at least four years and 240 days, leave entitlement depends on the employee's length of service for the respective year.

The definition of "workman" under the ID Act does not exclude temporary workers who are therefore entitled to the same benefits as continuous employees (subject to the provisions of the ID Act in relation to termination provisions).

The employment of agency workers through third party contractors is governed by the Contract Labour (Regulation and Abolition) Act 1970 and is applicable to:

- Every establishment which is not seasonal in character and that employs 20 or more workmen as contract labour in the preceding 12 months; and
- Every agency employing 20 or more workmen in the preceding 12 months.

Agency workers are not treated as the employees of the company unless the contract between the establishment and the agency is shown to be a sham. In this case, all the statutory benefits received by the organisation’s employees will be extended to the agency workers.

The duration for which the agency workers have been employed at the company is one of the factors that the court considers when determining whether or not an agency contract is a sham, though there is no prescribed length of service that determines that an agency worker is in fact an employee.
In an instance where a regular employee is misclassified as an agency worker or temporary worker and is not given the statutory or contractual benefits he is entitled to, an industrial dispute can be raised.

In terms of employment relationship regulation in India, it is not mandatory to enter into a written employment contract. However, certain industrial establishments employing the prescribed number of workmen must adhere to the model standing orders under the Industrial Employment (Standing Orders) Act 1946, which lays down certain conditions of service which must be uniformly implemented across the workforce who qualify as workmen.

Some statutes which regulate local businesses require prescribed particulars to be disclosed in writing to the employee.

Where an employment contract is written it usually includes:

- The employee's position and duties;
- Remuneration including other benefits such as bonus, provident fund contributions etc. ;
- Working hours, holidays and leave provisions;
- Term of employment (where applicable) and termination provisions; and
- Provisions for dispute resolution in relation to key employees.

Certain terms are implied into the employment relationship, such as:

- Fidelity;
- Confidentiality; and
- Protecting the employer's property.

Other factors impacting employment which are covered in Indian labour law include: minimum wages (varies from region to region); worker compensation; payment of wages; industrial disputes; working time restrictions; protection from discrimination and harassment; employee benefits; holiday entitlement; and leave.

(3.2.4) CHINA

The labour laws of the People’s Republic of China are formulated in accordance with the Constitution in order to protect the legitimate rights and interests of labourers, readjust labour relationships, establish and safeguard the labour system (in line with the socialist market economy), and promote economic development and social progress.

Chinese labourers have the right to be employed on an equal basis, choose occupations, obtain remunerations for labour, take rests, have holidays and leave, receive labour safety
and sanitation protection as well as training in professional skills, receive social insurance and welfare treatment, and submit applications for settlement of labour disputes, among other labour rights stipulated by law.

To be recognised as valid, labour contracts need to be in writing and contain the following:

- Timeframe / limit of the labour contract;
- Content of work;
- Labour protection and labour conditions;
- Labour remunerations;
- Labour disciplines;
- Conditions for the termination of the labour contract; and
- Liabilities for violations of the labour contract.

Apart from the above, the parties involved (both employer and employee) can include other agreed upon contents in their respective labour contracts.

In 2012, China amended its labour law to ensure that workers hired through contracting agents are offered the same conditions as full time employees, the aim of the move was to tighten a loophole used by some employers to maintain flexible staffing.

Contracted labourers make up approximately a third of the workforce at many Chinese and multinational factories, in some cases accounting for well over half.

Under the amendment, "temporary" refers to durations of under six months, while supplementary workers would replace staff who are on maternity or annual leave.

Although contracted or dispatch workers are meant to be paid the same as full time workers, with benefits supplied by the agencies who are legally their direct employers, in practice many contracted workers (especially in manufacturing industries and state-owned enterprises) do not receive benefits and are in fact paid less than their full time counterparts.

Chinese labour laws also address: discrimination; protection of women and children; probation periods; work hours; leave; remuneration; minimum wages; labour safety and sanitation; and labour disputes.
4. South Africa

South Africa's Labour Relations Act applies to all workers and employers and aims to advance economic development, social justice, labour peace and democracy of the workplace.

According to a 2014 report by global law firm, DLA Piper, titled “A Global Employment Guide to Redundancies and Reductions in Force”, South Africa's labour laws are on par with many developed - first world - countries.

With a chapter on South Africa - contributed by local law firm Cliffe Dekker Hofmeyr - the report contradicts a number of international reports, including the World Economic Forum's (WEF) Global Competitiveness Index, which criticises South Africa's labour law for being rigid and restrictive.

South Africa received an “A-rating” for its redundancy and restructuring legislation in the DLA Piper report. An “A-rating” indicates that the country's legislation is balanced - providing protection and legal recourse for both employers and employees.

Essentially, the “A-rating” means that South Africa's employment legislation compares favourably to other first world countries and offers a similar legal employment framework for multinationals operating in Europe, Asia and the Middle East.

South Africa shares its rating with first world countries including Australia, Austria, Belgium, France and the United Kingdom - among others.

4.1 South African working environment

(4.1.1) UNEMPLOYMENT

South Africa’s unemployment rate increased to 26.40% in the first quarter of 2015 from 24.30% in the fourth quarter of 2014.
As depicted in the above Trading Economics graph, the unemployment rate in South Africa, as reported by Statistics South Africa (Stats SA), has averaged 25.27% from 2000 until 2015, reaching an all-time high of 31.20% in the first quarter of 2003 and a record low of 21.50% in the fourth quarter of 2008.

With such a large portion of the population struggling to secure employment, many may be exposed to risk of exploitation related to working hours and pay while taking on numerous “piece jobs” to get by. These “employers” may not see themselves as being held by the same labour laws as formal employers.

(4.1.2) LABOUR UNREST
Labour unrest affects numerous large corporations in South Africa, especially in the mining, manufacturing and construction industries.

In 2013, The World Bank and the International Monetary Fund (IMF) pinned the blame for South Africa’s slow economic growth on the labour relations environment, noting the paralysing strikes that have hurt the mining, automotive and transport sectors, among others.

According to a Business Report article on 13 October 2013, titled ‘Unrest imperils SA’s growth, status’, the World Bank’s lead economist for Africa, Punam Chuhan-Pole, said South Africa needs “less rigidity in the labour market” if it wants to attract foreign investors.

4.2 South African labour law
South Africa’s labour laws are outlined in the below listed labour legislation, some of which apply to all workers and employers while others only apply to workers who are effected by specific events such as injury or who are currently unemployment.
• Labour Relations Act;
• Basic Conditions of Employment Act;
• Compensation for Occupational Injuries and Disease;
• Employment Equity Act;
• Occupational Health and Safety;
• Skills Development;
• Skills Development Levies Act;
• Unemployment Insurance Fund (UIF) and Unemployment Insurance Contributions Act;
• Unemployment Insurance Act; and
• Manpower Training Act.

The purpose of the Basic Conditions of Employment Act is to advance economic development and social justice by fulfilling the primary objects of this Act which is to give effect to and regulate the right to fair labour practices conferred by section 23(1) of the South African Constitution:

• By establishing and enforcing basic conditions of employment;
• By regulating the variation of basic conditions of employment; and
• To give effect to obligations incurred by the Republic as a member state of the International Labour Organisation.

This Act regulates basic employment considerations such as: working hours; leave; particulars of employment; remuneration; termination of employment; the prohibition of child labour; sectoral determinations; protection against discrimination; as well as general factors such as confidentiality, codes of good practice and penalties.

The Basic Conditions of Employment Act also outlines the written particulars of employment which the employer is required to supply the successful candidate when commencing with their employment requirements. The following particulars are required to be in writing for staff who work 24 hours - or more - for an employer each month:

• The full name and address of the employer;
• The name and occupation of the employee, or a brief description of the work required of the employee;
• Various places of work;
• The date of employment;
• Ordinary hours of work and days of work;
• Wage or the rate and method of calculating;
• The rate for overtime work;
• Any other cash payments;
• Any payment in kind and the value thereof;
• The frequency of remuneration;
• Any deductions;
• Leave entitlement;
• Period of notice or period of contract;
• Description of any council or sectoral determination which covers the employer’s business;
• The period of employment with a previous employer that counts towards the period of employment; and
• A list of any other documents that form part of the contract, indicating the place where a copy of each may be obtained.

These particulars must be revised if the terms of any employment change.

The Act also notes that statement of employees’ rights must be displayed at the workplace in official languages used at the workplace.

The purpose of the Labour Relations Act is to advance economic development, social justice, labour peace and the democratisation of the workplace by fulfilling the primary objects of the Act, which are:

• To give effect to and regulate the fundamental rights conferred by section 27 of the Constitution; and
• To give effect to obligations incurred by the Republic as a member state of the International Labour Organisation.

As well as:

• To provide a framework within which employees and their trade unions, employers and employers' organisations can:
  o collectively bargain to determine wages, terms and conditions of employment and other matters of mutual interest;
  o formulate industrial policy; and
  o to promote orderly collective bargaining; collective bargaining at sectoral level; employee participation in decision-making in the workplace; and the effective resolution of labour disputes.
In addition to the above, the Labour Relations Act also addresses matters relating to trade unions; collective agreements; bargaining councils; dismissals; confidentiality; and unfair treatment in the workplace, among other factors.

The Labour Relations Act does NOT apply to ONLY members of the National Defence Force; the National Intelligence Agency; and the South African Secret Service.

Additional vital laws and regulations relating to South Africa’s employment sector are that of Broad-Based Black Economic Empowerment (B-BBEE) as a form of economic empowerment initiated by the South African government. This set of policies intended to bring about the involvement or participation of previously disadvantaged communities (PDCs) into the mainstream economy. In this instance, PDCs include: people of colour, women of all races, and the disabled.

Government seeks to achieve B-BBEE by:

- Increasing the number of PDCs who manage, own and control businesses;
- Facilitating the ownership and management of such businesses by communities, workers and other collective enterprises;
- Boosting human resource and skills development;
- Achieving equitable representation in all categories and levels of the workforce;
- Promoting preferential procurement which would involve the purchase of goods and services with a strong B-BBEE score; and
- Encouraging investment in enterprises that are PDC-owned or managed.

(4.2.1) COMMENCEMENT OF THE LABOUR RELATIONS AMENDMENT ACT, 2014

In terms of temporary employment services (TES), the Labour Relations Act defines TES as any person who, for reward, procures for or provides to a client other persons; who renders services to, or performs work for, the client; and who is remunerated by the TES.

Initially, the Act noted the below outline relating to who the true employer of a TES worker is:

“For the purposes of this Act, a person whose services have been procured for or provided to a client by a temporary employment service is the employee of that temporary employment service, and the temporary employment service is that person's employer.”
For the purposes of independent contractors, the Act further noted that a person who is an independent contractor is not an employee of a temporary employment service, nor is the temporary employment service the employer of that person.

However, a recent amendment to the Act (effective 1 January 2015) has impacted the perceptions of who – the temporary employment service provider or the client – is responsible for particular employment considerations. This amendment (below) has therefore resulted in large scale confusion in the industry, with potentially damning consequences for numerous stakeholders such as small to medium sized recruitment companies, client organisations and the temporary workers themselves which the Act aims to protect.

In summary, the amendment of section 198A - Labour Relations Amendment Act No 6 of 2014 (LRAA) - or the “deeming clause” states:

*Employees Employed By A Temporary Employment Service (TES): Employees who earn below the Basic Conditions of Employment Act 75 of 1997 (BCEA) threshold (presently an amount of R205 433.30) and who are not performing temporary services will be deemed to be the employees of the client and not the TES, will be deemed to be indefinite employees and may not be treated less favourably than employees of the client. Effective from 1 April 2015, this section (sec 198) will apply to employees procured for or provided to a client by a TES before the commencement of the amendment act (1 January 2015).*

The amendment aims to streamline the country’s labour environment and protect vulnerable workers. With this backdrop, South African businesses are required to adjust the way in which they have traditionally employed and managed staff in their organisations.

Some institutions and legal entities have interpreted the amendment to mean that assignees, or temporary workers, transfer permanently to the client after a three month period.

However, APSO, has noted that this interpretation is likely to act as a disincentive for employers who have utilised TES to upscale their workforce if and when needed. APSO has noted that the Act has already had unintended consequences on the market and the “deemed provision” has resulted in the loss of a number of temporary jobs.

In addition, uncertainty resulting from the amendment has been highlighted as likely to cost the country 254 000 jobs – according to an article published by Business Day on Monday, 30 March 2015.

In contrast with the interpretation outlined above, APSO interprets the amendment as meaning that while the client of the TES is “deemed” to be the employer for purposes of the
Relations Act, this does not mean that the employee transfers into the permanent books of the client.

5. What do labour law discrepancies between countries mean for the global workforce?

5.1 What is the global workforce?
The 'global workforce' refers to the international labour pool which includes those employed by multinational companies and connected through a global system of networking and production as well as immigrant workers, temporary migrant workers, telecommuting workers, those in export-oriented employment, contingent work or other precarious employment.

As labour laws differ in various regions around the globe, the question which arises is: What does this mean for the global workforce which is set to fast track in the near future. According to the latest EY global job creation and youth entrepreneurship survey 2015 (a study into the impact entrepreneurship has on the global jobs market), 47% (of 2 345 entrepreneurs surveyed) expect to increase their worldwide workforce in 2015, compared to 29% of senior executives at large corporations.

5.2 Global workforce considerations
The priority should be for employment law to give businesses the confidence to take on new staff while also ensuring that employee rights are protected at all times, avoiding any loop hole for potential exploitation.

What is required to facilitate this process is laws applicable to nationals working abroad. For instance, Russian nationals in other states may work on the basis of applicable law determined on the basis of bilateral treaties in the given sphere and, in their absence, in accordance with the legislation of the host state.

All labour laws regulating employment relationships in India also apply to foreign nationals working in India. These include benefits such as the Employees' Provident Fund and Miscellaneous Provisions Act 1952 (EPF Act), Employees' State Insurance Act 1948 (ESI Act), Industrial Disputes Act 1947 (ID Act), Maternity Benefit Act 1961 (MBA) and the Payment of Bonus Act 1965 (PBA).

However, Indian labour law does not apply to Indian nationals who are employed by foreign entities abroad.
The red tape, statutory inflexibility and overregulation in labour legislation can not only hinder that expansion of multinationals in foreign countries - which often requires the on-boarding of local candidates - but also the global competitiveness of the potential host country as large businesses relocate elsewhere.

The worldwide trend of the past decade is to relax restrictive laws with the Organisation for Economic Co-operation and Development (OECD) highlighting that flexible labour markets are an essential requirement for any country that wants to enjoy long-term economic success. The OECD argues that strict employment legislation will “hamper labour mobility, reduce the dynamic efficiency of the economy and restrain job creation.”

An international example of how less restrictive labour laws can assist a country in reaching overarching objectives is in China which succeeded in attracting foreign direct investment (FDI) to export-oriented labour-intensive manufacturing, in part because of flexible labour laws such as the contract labour system implemented in 1995.

In a South African context, minimising red tape relating to international business expansion into the country should also be considered as a means to create employment for local job-seekers. With a second quarter 2015 unemployment rate of 25%, any means by which more unemployed citizens can secure work that is legal and non-exploitive, should be considered seriously.

5.3 South Africa’s global competitiveness and attracting international investment


South Africa is now ranked as the 56th most competitive country out of the 144 assessed, behind China (28) and Russia (53) but ahead of India (71) and Brazil (57) among the Brics nations.

The WEF Global Competitiveness Report, which assesses the competitiveness landscape of 144 economies, is the most comprehensive assessment of national competitiveness worldwide, providing a platform for dialogue between government, business and civil society about the actions required to improve economic prosperity.

The WEF’s Global Competitiveness Ranking is based on multiple factors including financial market development (an area where South Africa fares well); market size; market efficiency; technological readiness; business sophistication; institutions; education and labour (areas where South Africa fares badly).
With the need to increase the nation’s global competitiveness and investment in the country, it is important to note that sovereign rating agencies which evaluate South Africa’s creditworthiness - notably Standard & Poor’s and Moody’s and Fitch - have pointed to labour laws in the past as one of the biggest obstacles for investing in South Africa because of their effect on unemployment.

6. South Africa’s labour law comparative standing

The 2014 report, "A Global Employment Guide to Redundancies and Reductions in Force", compiled by global law firm DLA Piper (as sited in section 4. South Africa) - with a chapter on South Africa contributed by local law firm Cliffe Dekker Hofmeyr, found that South Africa's labour law is on par with many developed countries.

The report compares labour legislation governing redundancies and restructuring in 23 countries around the world. South Africa received an A-rating for its redundancy and restructuring legislation - an A-rating indicates that legislation is balanced, providing protection and legal recourse for both employers and employees. South Africa shares this status with countries such as Australia, France, Russia and the United Kingdom.

Its findings are in contrast to that of a number of international reports, including the WEF Global Competitiveness Index which criticises South Africa's labour law for being rigid and restrictive and The International Monetary Fund which has noted that some aspects of South Africa’s labour laws need to be relaxed.

According South African labour economist, Loane Sharp in an opinion article in The New Age, South Africa’s labour laws seem to be governed by the universal law of unintended consequences.

He notes that, however well-intentioned they may be, labour laws tend to have substantial negative effects that were not foreseen at the time the laws were first contemplated.

An example of such an unintended consequence is that South Africa’s labour relations system is based on the apparently reasonable “representative principle”, whereby trade unions represent workers. However, since only 24% of the national workforce – and only 15% of the private sector workforce – is unionised, South Africa’s labour relations system has the primary characteristic of being unrepresentative. This creates conflict, since the vast majority of workers possess no mode of expressing or resolving their grievances except directly in the workplace.

The same theory, referenced by Sharp in the above, can be applied to the Labour Relations Act Amendment, or the “deeming” provision, which took effect on 1 January 2015.
With the intention of protecting temporary workers though permanent employment, the outcome - due to a lack of clarity - has been to the contrary and has seen companies reassessing their workforce altogether and downscaling activities, placing an additional burden on temporary workers to secure new job opportunities.

An additional factor to consider in this regard is the significant TES economic contribution as the temporary employment industry generates more than R40 billion each year - resulting in additional revenue for government in the form of taxes and VAT.

In addition, the industry also directly employs approximately 20 000 people and - on average - one million temporary workers each day and although it is perceived that temporary employees struggle to find permanent work, approximately 30% of these workers secure permanent employment within 12 months of ‘temping’, increasing to 40% after three years of contract or temporary work.

With the above in mind, clarity is required when Acts and Amendments are passed in South Africa. This is evidenced by the above confusion and uncertainty currently faced by the market which can also impact “red tape” perceptions of international investors as well as interest from large multinational corporations in establishing South African divisions if they may require a temporary workforce for a particular period.

7. Summary
Labour laws are vital in ensuring good-practice in business and ensuring that workers are not exploited by employers. As such, many regions across the world have implemented laws relating but not limited to benefits, contract terms, trade union representation and temporary labour.

However, rigid or unclear legislation can result in a number of negative consequences which may never have been intended when such laws were passed. A recent South African example of which is the Labour Law Amendment Act or the “deeming clause” which, due to increasing confusion and lack of transparency, is likely to cause not only job losses but the closure of a number of local temporary employment businesses and the shutting down of projects which require periodic or seasonal labour on a purely temporary basis.

The global trend over the past decade is to relax restrictive labour and employment laws. With this said, South African labour laws tend to favour older, skilled, unionised workers do so at the expense of young and inexperienced job-seekers who are arguably the worst effected by unemployment in South Africa.
Rigid labour laws, such as that of South Africa (as described by the WEF), also make it difficult for global multinational companies to do business in a region, with excessive red tape resulting in the expansion, investment and job opportunities settling elsewhere.

8. Conclusion / Call to Action
South African labour and employment laws address vital factors to protect the workforce, and rightly so. However, government needs to relook the clarity of certain laws such as that of the Labour Relations Amendment Act which, if continued to be interpreted in the current manner, will have a devastating impact on the country’s temporary workforce, TES industry, FDI, economy and unemployment rate.

Keeping the above in mind, it may also be beneficial for the South African government to revise factors perceived as “red tape” for multinational organisations and investors looking to South Africa for growth and expansion. With the global trend of a flexible labour market, this discussion needs to be opened within the local context. Many opportunities lie in cooperating in this regard, including potentially assisting the country in reaching milestones in terms of global competitiveness, embracing a global workforce and economic growth.

It is also vital for the South African staffing and recruitment industry to be involved in discussions and decision-making related to labour and employment issues. Reputable organisations and industry bodies such as APSO have been involved in advocacy in this regard since its establishment. Looking to the future, presenting a united front as those closest to vital stakeholders (the South African workforce and employers) will be crucial in tackling the difficult questions and driving South Africa forward.
The Federation of African Professional Staffing Organisations (APSO), previously known as the Association of Personnel Services Organisations, is South Africa and Africa's largest professional body representing staffing and workforce solution firms of all sizes and specialties. Established in 1977, APSO has 38 years’ experience in the space and has continually proven its commitment to the professionalisation of the industry, raising standards and highlighting excellence. Granted ‘professional body’ status by SAQA, APSO represents recruitment and staffing organisations, recruitment and staffing individuals and also represents corporate members who have a vested interest in the industry. In addition to ongoing efforts in advocacy, research, education and the promotion of high legal, ethical and professional practice standards, APSO provides guidance to member agencies as well as client companies and job seekers and has, in turn, advanced the interests of the industry. APSO ensures that members remain informed and up-to-date on the laws and regulations that impact the staffing industry. While the professional body does not impose restrictions on the services that member agencies provide, nor the fees and guarantees they offer their clients, members are bound by a Code of Ethics and Codes of Professional Practice which seek to ensure professionalism amongst all members. These efforts assist employment organisations by navigating the legal and legislative landscape; promote the industry’s interests to lawmakers, regulators, media and the business community. In addition to being a proud member of the International Confederation of Employment Associations (CIETT), and a founding member of - and the largest association within - the South African Confederation of Associations in the Private Employment Sector (CAPES), APSO is dedicated to supporting the best interests of members through representation in key industry bodies such as BUSA and NEDLAC. APSO also belongs to the South African Chamber of Commerce & Industry (SACCI) as well as the Ethics Institute of SA. For more information, visit: www.apso.co.za.

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