EXPLANATION: SECTION 198 AMENDMENTS

Clause 37

Clause 37 of the Bill seeks to amend section 198 of the Act in order to effectively address certain problems and abusive practices associated with temporary employment services or commonly referred to as "labour brokers". The main thrust of the amendments is to restrict the employment of more vulnerable, lower-paid workers by a temporary employment service to situations of genuine and relevant "temporary work", and to introduce other measures to protect workers employed by temporary employment services.
Section 198 of the Act continues to apply to all employees. It retains the general provisions that a temporary employment service is the employer of persons whom it employs and pays to work for a client, and that a temporary employment service and its client are jointly and severally liable for specified contraventions of employment laws.

The proposed amendment seeks to clarify provisions relating to temporary employment services by providing for the following:

(a) An employee bringing a claim for which a temporary employment services and client are jointly and severally liable may institute proceedings against either the temporary employment services or the client or both and may enforce any order or award made against the temporary employment services or client against either of them.

(b) A labour inspector acting in terms of the Basic Conditions of Employment Act may secure and enforce compliance against the temporary employment services or the client, as if it were the employer, or both.

(c) A temporary employment services may not employ an employee on terms and conditions of employment not permitted by the Act, a sectoral determination or a collective agreement concluded at a bargaining council that is applicable to a client for whom the employee works.

(d) The Labour Court or an arbitrator may now rule on whether a contract between a temporary employment service and a client complies with the Act, and make an appropriate award.

(e) A temporary employment service must be registered to conduct business, but the fact that it is not registered is no defence to any claim instituted in terms of the section 198A.

(f) A temporary employment service must provide an employee it assigns to a client with written particulars of employment that comply with section 29 of the Basic Conditions of Employment Act, when the employee commences employment.

Clause 38

Clause 38 of the Bill seeks to insert sections 198A to 198D. The proposed section 198A seeks to introduce additional protection for employees who earn on or below the threshold prescribed in terms of section 6(3) of the Basic Conditions of Employment Act. For the purposes of the Act, employees are treated as the employees of the client if they work for a period in excess of three months. The only exception to this is employees who work as a substitute for an employee of the client who is temporarily absent. Temporary services may also be regulated by a collective agreement concluded in a bargaining council, a sectoral determination, or a Ministerial notice.
To prevent abuse of the three-month period that constitutes temporary work, the section provides that a termination by temporary employment services of an employee's assignment with a client for the purpose of avoiding deemed employment by the client constitutes a dismissal. This means that the fairness of the termination of an assignment may be challenged in terms of the Act. Employees deemed under this provision to be employees of the client must be treated on the whole not less favourably than employees of the client who perform the same or similar work, unless there is a justifiable reason for different treatment. This means, for example, that if an employee's procured by a temporary employment service for a client for three months, but is kept on after the expiry of the three-month period, then that employee must, unless there is a justifiable reason for different treatment, be paid the same wages and benefits as the client's other employees who are performing the same or similar work.
Like section 198A, the proposed section 198B introduces additional protection for Employees who earn on or below the threshold prescribed in terms of section 6(3) of the Basic Conditions of Employment Act. This section does not apply to employees who are employed in terms of a statute, sectoral determination or collective agreement that permits the conclusion of a fixed term contract. In addition, and in order to accommodate new and small businesses, the section does not apply to:

(a) an employer that employs less than 10 employees; or

(b) an employer that employs less than 50 employees and whose business has been in operation for less than two years.

These exclusions do not apply if the employer conducts more than one business or the business was formed by the division or dissolution for any reason of an existing business.

An employer is permitted to employ an employee to whom this proposed amendment applies on a fixed term contract or successive fixed term contracts for up to three months. An employee may be employed on a fixed term contract for a longer period if the nature of the work for which the employee is engaged is of a limited or definite duration or the employer can demonstrate any other justifiable reason for fixing the term of the contract. The period of three months may be varied by a sectoral determination or a collective agreement concluded at a bargaining council.
The proposed amendment provides a non-exhaustive list of justifiable reasons for fixing the term of a contract, which include the following:

(a) An employee to whom the section applies who is employed for a period longer than three months is deemed to be employed for an indefinite period unless the nature of the work is of a limited or definite duration or the employer can demonstrate any other justifiable reason for fixing the term of the contract.

(b) An employer who employs an employee to whom the section applies on a fixed term contract or who renews or extends a fixed term contract, must do so in writing and must state the reason that justifies the fixed term nature of the employment contract.

(c) An employer bears an onus to prove in any relevant proceedings that there is a justifiable reason for fixing the term of the contract and that the term was agreed.

(d) The proposed amendments provide the following additional protection for certain specified employees:

I. An employee employed on a fixed term contract for more than three months (or any other period determined by a sectoral determination or collective agreement concluded at a bargaining council) must be treated on the whole not less favourably than an employee on an indefinite contract performing the same or similar work, unless there is a justifiable reason for treating the employee differently. What may constitute a justifiable reason for this purpose is dealt with in section 198D.

II. An employer must provide an employee employed on a fixed term contract with the same access to opportunities to apply for vacancies as it provides to an employee employed on an indefinite contract of employment.

III. If a fixed term of longer than 24 months can be justified under the section, the employer must, on expiry of the contract and subject to the terms of any collective agreement regulating the issue, pay the employee one week's remuneration for each completed year of the contract. An employee is not entitled to payment in terms of subsection (10) if, prior to the expiry of the fixed-term contract, the employer offers the employee employment or procures employment for the employee with a different employer which commences no later than 30 days after expiry of the contract and on the same or similar terms.

The proposed section 198C seeks to regulate the work of vulnerable part-time employees by reflecting the provisions regulating part-time employees in the European Union, and the ILO Convention on Part-time Work (Convention 175, 1994).
Similar to the proposed sections 198A and 198B, section 198C applies only to employees who earn on or below the threshold prescribed in terms of section 6(3) of the Basic Conditions of Employment Act. This provision does not apply to employees who ordinarily work less than 24 hours a month, or during the first three months of employment. In order to accommodate new and small businesses this section does not apply to:

(a) an employer that employs less than 10 employees; and

(b) an employer that employs less than 50 employees and whose business has been in operation for less than two years, unless the employer conducts more than one business or the business was formed by the division or dissolution for any reason of an existing business.

The proposed amendment seeks to define part-time and comparable full-time employees, and requires employers to:

(a) Treat part-time employees on the whole not less favourably than comparable full-time employees doing the same or similar work, unless there is a justifiable reason for different treatment. What constitutes a justifiable reason for differentiation is dealt with in section 198D.

(b) Provide part-time employees with access to training and skills development that is on the whole not less favourable than the access applicable to comparable full-time employees.

(c) Provide part-time employees with the same access to opportunities to apply for vacancies as full-time employees.

The proposed section 198D provides that disputes about the interpretation or application of sections 198A to 198C may be referred to the CCMA or a bargaining council with jurisdiction for conciliation and, if not resolved, to arbitration. A justifiable reason for different treatment (referred to in the proposed sections 198A, 198B and 198C) includes different treatment which 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; and