momentum

Legal update

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The impact of Labour Relations Amendment Act 6 of 2014

Summary

The Labour Relations Amendment Act (LRA) No. 6 of 2014 which was published under Notice 629 in Government Gazette 37921 on 18 August 2014 became effective on 1 January 2015. Among other things, this Amendment Act protects three categories of non-standard employees: employees placed by temporary employment services ("TESs"), employees engaged in fixed term contracts and part-time employees. It also regulates the employment of employees who earn below the earnings threshold, currently R205,433.30 per annum, in these categories. This Legal Update deals with the impact of the Act on these categories of employment as far as it relates to employee benefits.

Section 200A of the LRA contains the presumption as to who an employee is. It provides as follows-

"(1) Until the contrary is proved, for the purposes of this Act, any employment law and section 98A of the Insolvency Act, 1936 (Act No. 24 of 1936), a person who works for, or renders services to, any other person is presumed, regardless of the form of the contract, to be an employee, if any one or more of the following factors are present:

(a) the manner in which the person works is subject to the control or direction of another person;

(b) the person's hours of work are subject to the control or direction of another person;

(c) in the case of a person who works for an organisation, the person forms part of that organisation;

(d) the person has worked for that other person for an average of at least 40 hours per month over the last three months;

(e) the person is economically dependent on the other person for whom he or she works or renders services;

(f) the person is provided with tools of trade or work equipment by the other person; or

(g) the person only works for or renders services to one person."

Section 198A – temporary service

Temporary employment services (generally known as labour brokers) are often used by clients with the intention of getting around labour legislation. This section puts an end to this practice. It specifies that a worker will only be seen as the employee of the TES if he is employed to perform genuine temporary work for the client. If that is not the case, he is deemed to be an employee of the client and not the TES.

"Temporary service" is defined as work for a client by an employee:

(a) for a period not exceeding 3 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 Ministerial notice.

The 3 month period referred to in paragraph (a) started on the effective date of the Amendment Act, which was 1 January 2015.

An employee who performs a temporary service as defined above, will be the employee of the TES.

An employee working for the client for longer than 3 months will be deemed to be the employee of the client for purposes of the LRA, employed on an indefinite basis, unless the provisions of paragraphs (b) and (c) above apply. If the client terminates the employee's assignment to avoid the deemed employment provision, it will constitute a dismissal. The employee can then challenge the fairness of the termination under the LRA.

The client may not treat the deemed employee on the whole less favourably than his other employees who perform the same or similar work, unless there is a justifiable reason. For example, such an employee would be entitled to the same remuneration and benefits as the client's other employees who do the same or similar work if he becomes a deemed employee after the expiry of the 3 months, unless the client has a justifiable reason for the differentiation.

The implications of the new section 198A are that only genuine temporary workers will be employees of the labour broker, while other workers that were previously employed by the labour broker and then assigned to a client for longer periods, will now become employees of the client, and will be entitled to enjoy the same benefits as the client's other employees who perform the same or similar work. That being the case, there should be no reason for a client to make use of a labour broker if the intention is for the employee to be in the client's employment for longer than 3 months, unless it is to fill a temporary vacancy, for instance where the client's permanent employee is on maternity leave, or where the worker falls in a category as referred to in paragraph (c) of the definition of "temporary service".

Section 198B – fixed term contract

Section 198B defines a "fixed term contract" as a contract of employment that terminates on:

(a) the occurrence of a specified event;

(b) the completion of a specified task or project, or

(c) a fixed date (not the retirement date).

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. To accommodate new and small businesses, it also does not apply to an employer that employs less than 10 employees or an employer that employs less than 50 employees and who has been in business for less than 2 years. However, it will apply if the employer conducts more than one business or the business was formed by the division or dissolution of an existing business.

An employer can only employ an employee on a fixed term contract for longer than 3 months if the nature of the work is of a limited or definite duration or the employer has a justifiable reason for fixing the term of the contract. The following are examples of justifiable reasons:

(a) replacing of another employee who is temporarily absent from work;

(b) temporary increase in the volume of work which is not expected to last longer than 12 months;

(c) student or recent graduate employed for the purpose of being trained or gaining work experience in order to enter a job or profession;

(d) work exclusively on a specific project that has a limited or defined duration;

(e) non-citizen who has been granted a work permit for a defined period;

(f) seasonal work;

(g) official public works scheme or similar public job creation scheme;

(h) the position is funded by an external source for a limited period, or

(i) reaching the normal or agreed retirement age applicable in the employer's business.

If employment extends beyond the 3 months in contravention of the provisions stated above, the employee will be deemed to be an employee of the employer, for an indefinite period.

The employer may not treat an employee on a fixed term contract for longer than 3 months on the whole less favourably than his other employees who perform the same or similar work, unless there is a justifiable reason. This will apply 3 months after 1 January 2015 to a fixed term contract entered into before 1 January 2015.

An employer must give a fixed term contractor the same opportunities to apply for vacancies as it gives its other employees. The employer would therefore not be entitled to restrict applications for vacancies to permanent employees only.

Where the employee has been on a justified fixed term contract for longer than 24 months, the employer must pay the employee 1 week's remuneration for each completed year's service when that contract comes to an end, unless the employer offers the employee employment or procures employment for him with a different employer which starts no later than 30 days after the fixed term contract expires. The employer must do this before the fixed term contract ends. The new employment must be on the same or similar terms.

It is clear from the above that an employer can't convert the employment of an employee whose services were provided through a labour broker into a fixed term contract in an effort to avoid that employee being considered its deemed employee. Once the employment goes over 3 months, the employer has to treat that employee the same as his other permanent employees anyway.

Section 198C – part-time employment

Section 198C specifies that a part-time employee is an employee who is remunerated wholly or partly by reference to the time that the employee works and who works less hours than a comparable full-time employee. A comparable full-time employee is a full-time employee employed by the employer on the same type of employment relationship who performs the same or similar work as the part-time employee.

This section does not apply to employees who ordinarily work less than 24 hours a month, or during the first 3 months of employment. As with the provisions dealing with fixed term contracts, it also does not apply to an employer that employs less than 10 employees or an employer that employees less than 50 employees and who has been in business for less than 2 years, unless the employer conducts more than one business or the business was formed by the division or dissolution of an existing business.

An employer is required to treat part-time employees on the whole not less favourably than a comparable full-time employee doing the same or similar work, unless there is a justifiable reason for the differentiation. Furthermore, the employer must provide the part-time employee with basically the same access to training and skills development as that applying to a comparable full-time employee and also provide them with the same access to opportunities to apply for vacancies as full-time employees.

From the above it seems as if there is no material difference between a part-time employee and a full-time employee.

Justifiable reason for different treatment

For the purposes of the above 3 sections, a justifiable reason for treating employees differently 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 that is not prohibited by the Employment Equity Act.

The impact on the FundsAtWork Umbrella Funds

The Funds are governed by their General Rules, read together with the Special Rules applicable to the participating employer concerned.

The General Rules provide that an Eligible Employee who enters the Participating Employer's employment on or after the date on which the Participating Employer starts participating in the Fund and meets the membership qualifications set out in the Special Rules, must become a Member of the Fund. Eligible Employee is defined as an employee of a Participating Employer who meets the membership criteria as set out in the Special Rules. The standard membership criteria in the FundsAtWork Umbrella Funds' Special Rules provide for eligibility of all employees in employment that are under the normal retirement age. This means that all employees (including employees of a temporary employment service and fixed term and part-time employees) would be obliged to be members of the Fund, unless the Participating Employer requests that their scheme's Special Rules state that a specific class of persons, for instance fixed term employees, be excluded. As far as fund membership is concerned, an employer can therefore decide whether it wants fixed term employees to be members of the Fund or not.

The impact on the FundsAtWork insurance benefits

The FundsAtWork insurance policies referred to Eligible Employees, having to be full-time employees. In line with the changes referred to in this Legal Update, the wording has been changed with effect from 1 November 2014 to remove the reference to "full-time". The same principle as stated with regards to the FundsAtWork Umbrella Funds then applies; all employees will be covered, whether they are fixed term or part-time employees or employed by a temporary employment service or not, unless the employer instructs FundsAtWork to specifically exclude them. Where the employer treats these employees differently from their other employees, they should make sure that the reasons for that can be justified and are in line with the

Amendment Act. This then also leaves it up to the employer to determine which of his employees should be covered for insurance benefits.

Conclusion

From 1 January 2015, an employer will not be able to make use of labour brokers to avoid the consequences of labour legislation, nor will they be able to employ workers on a fixed term contract or on a part-time basis to do so. Once an employee assigned by a labour broker to a client is employed for longer than 3 months (excluding the exceptions), the employee will be deemed to be in the employment of the client and the provisions of the LRA will become applicable to that relationship. Similarly, once an employee on a fixed term contract is employed for longer than 3 months (barring the exceptions), the employee becomes a deemed employee of the employer. Since a part-time employee has to be treated similarly to a full-time employee, that employee is for all intents and purposes the same as a full-time employee. All of these will probably result in employers having to reconsider their current labour practices.

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