

Employment & Labour - South Africa

Changing approach to use of labour brokers

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Introduction

Many foreign companies doing business in South Africa look at the option of using labour brokers (or 'temporary employment agencies', as referred to by the Labour Relations Act). The use of labour brokers by employers has come under the spotlight in the past few months. Diverse views have been expressed by stakeholders, including the government. Foreign employers considering investing in South Africa should follow the debate and subsequent proposed changes to the law.

Certain government ministers have called for labour brokers to be banned, stating that they are "modern-day slave owners". Several large trade unions have called for an outright ban on the use of labour brokers. However, certain employer bodies have argued that:

- a total ban on labour brokers is unrealistic;
- adequate legislation is already in place; and
- the government must merely enforce these regulations properly, which has not previously been the case.

Legal standpoint

Labour broking is recognized by the Labour Relations Act, which provides that a person whose services are hired out by a labour broker to a client is the employee of the labour broker, not the client.

Labour broking involves a triangular employment structure with three distinct relationships: between employee and broker, employee and client, and broker and client. The relationship between broker and client is commercial and generally falls outside the remit of labour law. The labour broker is regarded as the employer of persons that it places with clients and as such, the labour broker must comply with labour laws.

The client is jointly and severally liable for contraventions by the labour broker of the Basic Conditions of Employment Act, sectoral determinations, collective agreements and arbitration awards. A consequence of joint and several liability is that if the labour broker fails to pay the employee, the client can be held liable to make the payments.

One of the main criticisms of the existing legal position on labour brokers is that employees engaged in this way have no employment security as regards their relationship with the client. This is the case even where employees work on an ongoing basis for the client, as if it were their employer. If the client requests the labour broker to withdraw an employee, this is usually done under the terms of the commercial arrangement between the client and the labour broker and thus falls outside the remit of labour law. Employees often earn less than colleagues employed directly by the client.

The existing legal position has also been criticized as although the Labour Relations Act recognizes labour brokers, it does not regulate them. This has resulted in the use of labour brokers to deprive temporary and permanent employees of labour law protection.

Possible alternatives

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Based on practices in other countries, two approaches to the regulation of labour brokers could be adopted. The first is to limit the categories of work into which employees can be placed by labour brokers. The second is to limit the categories of work and to ensure that employees supplied to clients by labour brokers are afforded the same protection as other employees.

Labour broking is limited to certain categories of work into which employees can be placed, usually for temporary work or work of limited duration. Countries that adopt this approach usually permit agencies to supply workers from highly skilled categories only, on the assumption that such workers are less vulnerable to abuse.

The second approach on equality of employee protection is being sought through increased regulation.

Proposed regulatory framework

The government has produced a discussion paper entitled "Decent Work and Non-standard Employees: Options for Legislative Reform in South Africa". It does not advocate a total ban on labour brokers, as argued for by certain politicians and unions. Rather, it considers an appropriate regulatory framework that could be introduced to prevent abuse resulting from the exploitative use of labour brokers. The paper recommends that the minister of labour be given the power to ban labour broking, but that this power be limited to specific sectors of the economy (presumably those sectors where employees are more vulnerable to unscrupulous labour brokers and clients).

The paper also recommends that all labour brokers be required to register themselves, subject to certain minimum requirements. The suggested minimum requirements include registration as a legal entity in terms of the Companies Act, providing all employees with written contracts and disclosure of fees. Where a client uses an unregistered labour broker, the client will be treated as the employer of the labour broker's employees.

The paper also recommends that the joint and several liability of labour broker and client be extended to include client liability for contraventions of the Labour Relations Act by the broker. Currently, joint and several liability is limited to contraventions of the Basic Conditions of Employment Act and related wage-regulating measures.

Another recommendation is that employees be able to argue for the client's joint and several liability for compliance with labour laws where it exercises a significant degree of control over the labour broker. This recommendation is not limited to labour broking arrangements, but applies to other arrangements, such as subcontracting and outsourcing, where an entity other than the direct employer exercises a significant degree of control over the employee's employer.

It is further recommended that employees who are placed by labour brokers for an indefinite period receive the same protection against unfair dismissal as employees that are directly engaged by an employer. This would enable employees to challenge the client's decision to terminate their employment as if it were a decision of the employer. Standard practice is for the client simply to inform the labour broker that it no longer requires the services of the employee, which results in the employee's removal from the client's premises.

The paper also includes recommendations on fixed-term contracts, the aim of which is to improve conditions for employees with limited duration contracts. The paper suggests that fixed-term contracts for employees be permitted only where it is unfeasible to employ them on an indefinite basis, and that the presumption should be that an employee is employed indefinitely, unless the employer can prove that a fixed-term contract is operationally justified. This is qualified by the suggestion that the presumption apply only to employees whose earnings fall below the wage threshold provided for in employment legislation.

To address concerns that labour broker employees are paid less than employees performing the same work for the same employer, it is proposed that the anti-discrimination provisions in the Employment Equity Act be amended to allow for an effective unfair discrimination remedy, whereby wages and working conditions differ on the basis of the contractual arrangement under which employees are engaged. It is suggested that where a labour broker's employee is paid less than a counterpart employed directly by the client and performs the same work, this should also constitute unfair discrimination.

Outlook

The paper clarifies that these are short-term measures. Those calling for a total ban on labour broking may prevail in the long term. If and when this happens, labour brokers may ask the courts to determine whether a total ban amounts to an impermissible infringement of the constitutional right freely to choose one's trade, occupation or profession.

For further information on this topic please contact [Stuart Harrison](#) at [Edward Nathan Sonnenbergs](#) by telephone (+27 21 410 2500), fax (+27 21 410 2555) or email (sharrison@problemsolved.co.za).

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