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BUSA SUBMISSION: LABOUR RELATIONS AMENDMENT BILL, BASIC CONDITIONS OF EMPLOYMENT AMENDMENT BILL, EMPLOYMENT EQUITY AMENDMENT BILL, EMPLOYMENT SERVICES BILL

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I. BACKGROUND

BUSA is a confederation of 58 business organisations, including chambers of commerce and industry, professional associations, corporate associations and unisectoral organisations. BUSA also has a board of Trustees made up of 58 members.

BUSA represents South African business on macroeconomic and high-level issues that affect business at national and international levels. BUSA aims to ensure that organised business plays a constructive role in the country's economic growth, development and transformation, and to create an environment in which businesses of all sizes and in all sectors can thrive, expand and be competitive.

As the principal representative of organised business in South Africa, BUSA represents the views of its members in a number of national structures and bodies, both statutory and non-statutory. BUSA also represents businesses' interests at the National Economic Development and Labour Council (NEDLAC).

Internationally, BUSA is a member of the International Organisation of Employers (IOE), the Pan-African Employers' Confederation (PEC) and the Southern African Development Community (SADC) Employers' Group. BUSA is also the official representative of business at the International Labour Organisation (ILO), African Union (AU) Social Affairs Commission and World Trade Organisation (WTO).

II. INTRODUCTORY COMMENTS

BUSA welcomes the invitation to make written submission on the Labour Law Amendments, but has found it difficult to respond given the contradictory provisions in the Bills and the departure from established principles of the tripartite consensus. The policy considerations driving the amendments are not clear and are at odds with government's commitment to job creation. BUSA reserves the right to make further representations at the appropriate fora.

Our members expressed grave concern that the Bills were published on 17 December 2010, during the festive season, as this has resulted in stakeholders not having adequate time to properly consider and finalise submissions on the four Bills.

It has been noted that the Department of Labour (DOL) has embarked on a country-wide series of public hearings on the Bills. BUSA is unsure regarding the intention behind these public hearings, particularly bearing in mind that the deadline for the submission of public comments is 17 February 2011.

You will be aware that some NEDLAC discussions on possible amendments to labour legislation took place in 2009. However, the content of the recently published Bills is considerably different and beyond the scope of the issues discussed in 2009 and even includes the introduction of an entirely new Bill which was not mooted at the time. This, in our opinion undermines the social dialogue process.

Further, our greatest concern is that the Bills appear not to have been drafted with any regard to the recommendations in the report on the Regulatory Impact Assessment (RIA) that was conducted at the request of Cabinet. A RIA provides an analysis of the likely impacts of government interventions and weighs up the costs, the benefits and risks associated with each option in order to identify the most effective form of government intervention. Business feels strongly that the Bills should be tested against the RIA report and the objectives of growth and employment contained in Government's New Growth Path recently released by Minister Patel.

BUSA also has some issues as there are several discrepancies in the Bills and some of the provisions are not entirely clear. Business is thus somewhat confused by these discrepancies and also overlapping provisions in the different Bills. For example, it is not entirely clear whether it is the Department's intention to abolish Temporary Employment Services (TES) or not. Such uncertainty is not good for the economy or for job creation which President Zuma recently reiterated in the State of the Nation Address is the top priority for government.

Our input and comments are targeted at addressing concerns that fail to adequately address the regulatory intent, or create undue and unnecessary regulatory impact. We have particular concern on the following themes that cut cross across the amendments to the Bills.

Definitions of contract of employment, employer, employee and independent contractor: Amendments to the definitions are made in s 213 of the LRA, s1 of the BCEA, s1 of the EEA and s 1 of the ESB. It is unclear why these definitions are to be introduced or amended. Our law is clear on these definitions, and there is a code of good practice on who is an employee, that codifies the law in this regard. The amendments narrow the definition of employee and erode the current pool of people regarded as employees.

Repeal of provisions regulating Temporary Employment Services: The repeal of s198 of the LRA, s82 of the BCEA, s 55(g) and s57 of the EEA and the applicable provisions in the ESB all result in the deregulation of temporary employment services and job loss. The repeal of these provisions will lead to significant job loss, limitations on employment flexibility and create less certainty for employers and employees of employment services as they will no longer automatically know who the employer is. Instead, employees will first have to

approach the CCMA and determine the employer before being able to proceed any further. This amendment will therefore create less stability and predictability in the labour market which is not desirable. It will be a major deterrent to employment and will have a debilitating impact on business.

Offences, Penalties and Fines: These provisions contained in s93(1A) of the BCEA, schedule 1 of the EEA, and schedule 3 of the ESA of the amendments pose significant concern pertaining to the cost of doing business and the possible negative consequences of running a business. They are also contrary to the tripartite consensus that underpinned the negotiations on the new labour laws post 1994. Substantial fines and periods of imprisonment are contrary to the social partner consensus to de-criminalise labour laws that underpinned the labour law negotiations post-1994. To penalise what could be innocent errors, or those errors created due to vicarious liability on the part of an employer for the actions of an employee with criminal sanctions is undesirable. This will discourage employment, and the consequences of such extensive penalties may well result in retrenchment, lower levels of employment and in some instances closure of businesses. In addition, the capacity of the courts, the time it takes for matters to go via the criminal courts, and the different procedures makes it undesirable to criminalise most aspects of labour law. While it is acknowledged that criminal consequences may be appropriate for certain infringements such as those pertaining to child labour, forced labour, or criminal behaviour such as fraud, they are not appropriate for the vast range of non-compliance matters in the labour arena. Furthermore, should criminal processes be imposed for non-compliance. Criminalisation of labour matters would result in employees facing a higher burden of proof and being deprived of individual relief, in favour of the State being paid a fine or imprisonment. Where possible, the labour law processes should be improved and streamlined through the good enforcement, CCMA and the Labour Courts, rather than creating a multitude of forums and punitive impacts that have limited beneficial impact and will impact negatively on the employment relationship and the national job creation efforts.



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III. LABOUR RELATIONS AMENDMENT BILL, 2010

a) Opening Comments:

The New Growth Path, Human Resource Development Strategy (HRD-SA), National Industrial Policy Framework (NIPF) and National Skills Development Strategy III(NSDS III)all talk to economic growth, employment creation, poverty reduction, skills development and equality. BUSA is committed to the achievement of these objectives and believes that a rigorous social dialogue process and regulatory impact assessment is required to ensure that the regulatory intent is achieved in the legislation.

The New Growth Path places “Decent Work” at the centre of economic policy, Foreign Direct Investment (FDI) and job creation, requiring us to analyse global, regional and national developments.

Economic growth is to be measured by rate, intensity and composition of labour absorption. Five million jobs are proposed in the New Growth Path by 2020 via labour-absorbing activities and one of the major areas of focus is the youth. Some of the proposed amendments will be a blockage to the goal of job creation and economic growth.This flies in the face of global trends where employment growth and competitiveness has been largely dependent on the growth of atypical forms of employment.

In the business environment, the recent economic and employment crisis still lingers as employment recovery is seriously lagging. South Africa, in particular, has lost comparatively more jobs than other developing economies and it has lagged behind the recovery rates of the BRIC countries. Our unemployment levels remain at around 25% and over the past two years, every quarter we have witnessed further job losses. In fact, in certain sectors, such as the financial sector and BPO sector, the only growth in employment was attributable to atypical employment.

Planned demand creation by increased public infrastructure spend and EPWPs alone call for a more flexible approach to employment and entry into employment in a struggling labour market. This illustrates the requirement of different employment relationships, which is an integral part of doing business. The Bills in general go in the opposite direction

The ILO has increasingly recognized the role to be played by atypical employment and private employment agencies by various instruments being passed, realizing that a failure to allow for labour market flexibility will result in unemployment, automation, mechanization, new technologies, off-shoring and an outflow of FDI.

Uncertainty and rigidity is the greatest threat posed to labour absorption and many of the proposed amendments to the various laws and the introduction of a new law has the potential of extinguishing business’ openness toward labour intensive production.

The proposed amendments introduce uncertainty, inter alia, in respect of the identification of the employer for almost four million persons employed by sub-contractors, outsourcing entities and labour brokers; whether or not an employee would be a permanent employee/ indefinite employee (presumption until proven to the contrary).In addition the definitions of “employee” and “employer” do not cater for an ever increasing component of the workforce

where supervision and control are no more than archaic, narrow, concepts operating only in certain labour market contexts. The alternative dispute resolution processes also pose problems as they call for significant resource and administrative investment.

CCMA referrals will be characterized by an unprecedented increase with obvious consequences to all stakeholders and a further blow to service delivery in general. A recent NABC survey (across 14 Bargaining Councils) reflects that 92% of labour brokers operating within those industries comply with and are up to date with payments whereas only 30% of other employers were compliant. The question therefore is why labour brokers, who are generally “well controlled” according to the said research, are targeted when a large percentage of their employees are covered by the main agreements of councils and enjoy the same protections as other employees in respect of dismissal, unfair labour practices, fair discrimination and the like.

In the Regulatory Impact Assessment prepared for the DOL the following is stated at pages 5 and 6:

“In Annexure One of the report four negative consequences or costs as a result of the repeal of section 198 of the LRA are highlighted.

Firstly, depending on the extent of the demand for their labour, some of the workers currently employed by TES might lose their jobs if clients (employers) are unwilling to incur the administrative and other costs associated with directly employing these workers. While it is difficult to accurately quantify the Labour Broking Sector using official labour force data, a significant share of these workers are recorded in the official surveys in the sub-sector "Not Elsewhere Classified" within the Financial and Business Services Sector. In 2007, more than 600 000 workers were employed in this sub-sector, with the majority of them semi- or unskilled. While this number included workers not employed by labour brokers, it should also be highlighted that not all workers employed by labour brokers were recorded in this sub-sector, as this sector of employment is self-reported and individuals may report the sector applicable to the client and not the labour broker. Alternative estimates obtained through the Confederation of Associations in the Private Employment Sector (CAPES) suggest that almost 850 000 workers are currently employed by labour brokers. While it is difficult to accurately predict employers' responses to the repeal of section 198, some of these workers may lose their jobs if employers are unwilling to employ them directly. Thus, while permanent employment may increase in response to the repeal of section 198, it is a fair assumption that total employment will decline. This will not only contribute to increased levels of unemployment in the country, but also deprive the households attached to these workers of a valuable source of wage income.

Secondly, if clients would like to continue utilising the labour supplied by workers previously employed by TES, they would have to employ these workers directly and incur the associated time and financial costs, which may ultimately result in a significant increase in the cost of doing business. Specifically, evidence from the 2007 Labour Force survey suggests that the average wage of the TES employee was less than the national mean wage - this means that the fixed cost of hiring a worker will place a relatively higher burden on hiring lower-wage workers. The effect of significantly higher wage and hiring costs may thus also induce, in the aggregate, employers to hire fewer workers.

Thirdly, the proposed repeal of section 198, coupled with the proposed change in the definitions of employee and the new definition of an employer may induce uncertainty in the

labour market and would in all probability increase the number of cases referred to the CCMA, the Labour Courts and civil courts. The potential increase in the case-load of these institutions will have significant budgetary implications. Finally, the proposed amendment means that substitute employees will now be considered employees of the client and each individual client will now have to register the employee under the Compensation for Occupational Injuries and Diseases Act (COIDA) and the Unemployment Insurance Act (UIF), which would impose additional administrative costs on the Unemployment Insurance Fund (UIF) and the Compensation Fund.”

(b) Specific comments:

Substitution of section 43 of Act 66 of 1995, as amended by section 10 of Act 42 of 1996

BUSA does not support this proposed amendment. The amendment will undermine the carefully crafted tripartite consensus contained reflected in the provisions on Statutory Councils which is to promote greater representivity through the attainment of progressively higher collective bargaining rights and powers with higher levels of representation. The amendment will change the concept of “sufficiently representative” as required in section 32(5) for the extension by the Minister of council agreements which will have serious implications and unintended consequences of what constitute “sufficient representation” developed since the inception of the LRA. The unintended consequence will be to weaken Bargaining Councils, collective bargaining and representative bargaining powers.

Secondly, it will allow a statutory council (which represents 30% of the employees in that industry) to extend a collective agreement on wages to the majority of the parties in that industry. This works against the concept of workplace democracy in that centralized bargaining and the setting of minimum terms and conditions will be possible by those who are, at least “sufficiently representative” or ideally representing the “majority” in an industry.

Amendment of section 51 of Act 66 of 1995, as amended by section 11 of Act 42 of 1996 and section 12 of Act 12 of 2002

While the principle of supporting Bargaining Councils to effectively perform dispute resolution services is supported, this amendment is problematic. It will potentially involve a double charging of Bargaining Council members, who already pay a fee to be members of the Bargaining Council.

Amendment of section 65

This amendment is supported as it clarifies the existing principle that limits the right to strike where there is an existing right in law.

Amendment to section 115

The extension in the scope of the CCMA’s operations will involve a significant impact on the fiscus. In the absence of proper provision to resource such operations, such amendments cannot be supported.

We do not support the amendment to permit rules that will ‘prohibit’ legal representation, as this constitutes a deprivation of a person’s right, in the appropriate circumstances to have the support of legal representation.

Further, the amendment that proposes the CCMA to assist in the service of documents and the enforcing of arbitration awards places the CCMA at risk of losing its role as an impartial and independent body. If employers are to lose confidence in the CCMA this could result in the erosion of labour peace.

Amendment of section 143 of Act 66 of 1995, as amended by section 32 of Act 12 of 2002

It would appear that this amendment seeks to remedy the delay in getting writs issued by the Registrar of the Labour Court. BUSA proposes that the focus should be on getting the capacity of the Registrar’s office right in order to alleviate the problem, rather than affording a Tribunal the right to engage in judicial processes.

The Bill proposes that the award would be deemed an order of the court and would have the status of a writ of execution. However, even a Magistrate’s Court or High Court Order does not have a status of a writ of execution.

Amendment of section 147 of Act 66 of 1995, as amended by section 41 of Act 42 of 1996

Paragraph (a) seeks to ensure that employees are not unduly prevented from having their disputes properly heard because of costs, especially if they would otherwise not have been required to pay anything if their matter had been referred to the CCMA. However, it is possible to achieve this objective and still respect the integrity of private dispute resolution arrangements.

Substitution of section 150 of Act 66 of 1995, as amended by section 35 of Act 12 of 2002

Conciliation is and should always be a voluntary process between the disputing parties. While public interest is a consideration, this should not be used as a pretext to compel parties into an involuntary conciliation. Parties may be encouraged to conciliate, but not compelled. Besides, the concept of public interest is not necessarily a clear-cut one. It is subject to interpretation. This amendment could damage the CCMA’s reputation as an independent party, particularly when the State is the employer.

Amendment of section 158 of Act 66 of 1995, as amended by section 44 of Act 42 of 1996 and section 36 of Act 12 of 2002

Section 1B -The Explanatory Memorandum states that the aim with this provision is to prevent the obstructive use of piecemeal reviews to delay dispute resolution in the CCMA.

This amendment will only operate to delay justice and burden institutions unnecessarily. The current provision is satisfactory in that it review is prevented until the logical conclusion of each phase. Spurious reviews can be better discouraged through more rigorous awarding of costs to such parties. To legislate that a matter should go all the way to conclusion, when there is an initial problem is not desirable.

BUSA requests clarity here in regard to a dispute referred to the Labour Court in terms of section 65(1)(c)?

Amendment of section 186 of Act 66 of 1995, as amended by section 95 of Act 75 of 1997 and section 41 of Act 12 of 2002

We refer with approval to the RIA report which deals with this issue as follows on page 24:

“The provision for a presumption that workers should be employed indefinitely, unless the employer can establish a justification for employment on a fixed-term, is very broad and vague as it is currently formulated in the Amendment Bill and therefore is open to misinterpretation.”

It is proper to put measures in place to guard against abuse of temporary contracts. It is fundamentally wrong, however, in a country which has such high levels of unemployment to create employment relationships on the basis of expectation, rather than actual agreement. The rise in expectations, litigation and resultant confusion can only lead to labour unrest and act as a disincentive to temporary employment and job creation in general.

BUSA has significant concern about the extension of labour rights to commercial contracts as this is unworkable and contrary to the established principle that labour law regulates those in employment.

As this stands, there would be a large impact on the cost of doing business, the complexity of legal claims, and broad-based uncertainty in conducting business, FDI outflows which would definitely result in employers pursuing alternative production and service options, technology, off-shoring, automation and mechanization.

The Government RIA makes the following comments in respect of risks associated with the changed legislation at pages 27 and 28:

“Risks

Outsourcing and sub-contracting of services such as security, cleaning and catering is a common business model in South Africa and internationally. There appears to be no international precedent for joint liability to be applied generally in the area of sub-contracting and outsourcing.

This is a critical area of opportunity for small business. Indeed, a number of innovative business linkage programmes, specifically designed to encourage large corporations to expand their value chains to include local and particularly small businesses, strongly advocate outsourcing and subcontracting of this type. Similarly, government tender requirements may stipulate that a portion of the contract value is outsourced to Black Economic Empowerment (BEE) contractors.¹ The model enables small businesses with specialised skills to access the supply chains of big business, and creates employment opportunities in the local area.

A regulatory requirement that the client business should share in the liability of its sub-contractors and outsourced service providers creates a significant disincentive to supply chain diversification, and could have a negative impact on small business and job creation.

The current proposals as set out in the Bill give rise to various legal ambiguities. The term 'subcontracting' is not used elsewhere in South African legislation and various meanings could be ascribed to it. While sub-contracting may involve delegation to a third party of some, or all, of the work that the principal contractor has contracted to do, it may also be

used to describe outsourcing arrangements.

The Amendment Bill contains no definition of the term "sub-contractor." There is no indication as to the context in which it is used. The difficulty in ascertaining the meaning is exacerbated by the use of the term Client Company to describe the party that sub-contracts work. There are several difficulties with this term: firstly the relationship created by sub-contracting is not typically one involving a "client." Secondly, the party to a sub-contracting arrangement may not be a company."

Insertion of section 187A in Act 66 of 1995

BUSA would like to ascertain whether the DOL has information that the number of employees earning above a certain level referring disputes to the CCMA is so high that they prejudice the speedy resolution of disputes of low income earners. Furthermore, if the numbers are so great cognisance must be taken of the capacity in the Labour Court.

BUSA questions the constitutionality around the different treatment of employees based on what they earn and whether or not they are covered by a council. The amendment would anticipate a two tier labour market, which was mooted and found not desirable in the post 1994 negotiations on the LRA.

The impact of excluding higher earning individuals from s188A and discrimination referrals also requires consideration as these have differing considerations.

This proposed amendment has the potential to necessitate amendments to other provisions of the LRA, e.g. the jurisdiction of the Labour Court.

Amendment of section 188A of Act 66 of 1995

Whilst the proposed amendment is welcome in general, the proposed subsection 11 could be of concern.

While the procedure generally expedites dispute resolution, it should not be forced on parties, especially on the mere allegation of impropriety by the employee.

The service has a cost, albeit not excessive. It is conceivable that some small employers may not be in a position or even willing to pay for this service.

Amendment of section 191 of Act 66 of 1995

BUSA is most concerned about the automatic con-arb process as this will not have a considerably positive impact on the CCMA, but will have a significant impact on the parties who would want to object to a con-arb for legitimate practical reasons. The application process, resources and applications for separating the procedures will add complexity for the CCMA. Parties before the CCMA will have to waste time of full preparation for arbitration with all witnesses, despite the fact that the time scheduled will be insufficient to conclude arbitration. Ultimately this will operate against conciliation and dispute resolution, which is a pivotal part of fair labour practices.

BUSA proposes the addition of section 191 (5A) (b)(iv) as “*any other reasonable ground*”, which would allow parties the space to apply for postponement under this subsection.

With regards to the proposed substitution for subsection (12), BUSA can support the clarification of an individual retrenchment as motivated in the Explanatory Memorandum but it is not convinced that the drafting and proposal is sound. It effectively introduces a two tier system of labour justice. Although the motivation for making mass retrenchments by small employers also open to the choice of recourse, the matter has not been thought through properly and requires further consideration by the NEDLAC parties.

Amendment of section 197 of Act 66 of 1995, as amended by section 49 of Act 12 of 2002

BUSA does not support this proposed amendment which is also contrary to recent case law. The amendment would have serious adverse implications to business transactions, which will be a deterrent to doing business and FDI into the country.

Repeal of section 198 of Act 66 of 1995

This repeals the section which currently regulates TES and the issue of joint and several liability between the TES and the client in certain circumstances. This read with the other Bills would be harmful and detrimental to job creation and employment in general. It would also be contrary to constitutionally guaranteed rights.

We are largely in concurrence with the outcome of the Government’s RIA which deals with this as follows at pages 37 to 40.

“Risks associated with an effective ban on TES

I) REDUCED FLEXIBILITY FOR EMPLOYEES

TES provides support for a portion of the employment market that wants "flexibility" and temporary assignments. First-time work seekers, part-time students, women that have particular needs in respect of family obligations, older persons who do not want permanent placements, and groups of people with specific needs or specialist qualifications or experience may benefit from and actively prefer temporary placements. There is also potential for TES to provide workplace skills, vocational skills, learnerships and work experience to these employees. An effective ban on TES would deprive employees genuinely seeking job flexibility and opportunities to gain experience in terms of the possible types of employment opportunities available to them.

II) RIGHT CHOOSE TRADE, OCCUPATION OR PROFESSION FREELY

An effective ban on TES risks violating the constitutionally guaranteed right of TES to conduct their trade - which would result in the relevant provisions being set aside as unconstitutional. The provisions would prevent a person or agency



that places employees to work for its clients from being the employer of those employees. While these provisions do not involve an express prohibition on TES, its effect is the same as a prohibition.

In evaluating whether legislation violates any provision of the Bill of Rights, the Constitutional Court examines the substance of the relevant provisions. The cumulative effect of the relevant provisions could be interpreted as a violation of section 22 of the Constitution which grants every citizen the right to choose their trade, occupation or profession freely. While this section permits the practice of a trade, occupation or profession to be regulated by law, a provision that effectively prohibits the relevant activity does not amount to the regulation of that activity.

Accordingly, these provisions would have to be shown to be "reasonable and justifiable" in terms of section 36 of the Constitution (the "limitations clause"). While the purpose animating these clauses (the prevention of abuses practiced by labour brokers) is an important purpose, this is not sufficient to justify the clause. The central constitutional issue is whether a complete phasing out of TES is proportionate to this purpose or whether there are less restrictive means or more targeted mechanisms to achieve the purpose. To survive an adverse constitutional finding, the State would have to make out a case that these abuses could not have been eliminated by way of regulation.

In evaluating whether a prohibition is reasonable and justifiable as contemplated by section 36 of the Constitution, the court would have regard to the international law,² specifically the International Labour Organisation Convention 181 dealing with Private Employment Agencies, 1998, which covers the practice of labour hire. The ILO accepts the operation of temporary employment agencies in a regulated environment provided that this does not result in a diminution of the rights of employees. Accordingly, international law will not provide support for an argument in favour of a prohibition on labour broking. The Department will therefore have to argue that despite the relevant ILO instruments, the abuses of labour broking in the South African context are such that they cannot be guarded against by regulation.

The court will also have regard to the approach to TES in other countries. As noted above, the overwhelming trend in other countries is to permit the operation of temporary employment agencies who are the employers of employees they place with clients while seeking to give these employees the same protection as other employees.

Recent case-law in Namibia is pertinent. In December 2009, Namibia's highest court, the Supreme Court, held that the blanket prohibition of labour hire (agency work) was a disproportionate and unconstitutional response to the abuses associated with labour hire.³ The Court found that the prohibition violated the right of labour hire firms to conduct their businesses, even though Namibian law had not previously recognised and regulated labour hire. In effect, the Namibian Supreme Court held that the abuses associated with labour hire could be dealt by regulation and therefore a prohibition was a disproportionate response. The following statement reflects its approach:

"If properly regulated within the ambit of the Constitution and Convention No. 181, agency work would typically be temporary of nature; pose no real threat to standard employment relationships or unionisation and greatly



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contributes to flexibility in the labour market. It will enhance opportunities for the transition from education to work by workers entering the market for the first time and facilitate the shift from agency work to full-time employment."

III) RISK OF JOB LOSSES AND INCREASED UNEMPLOYMENT

The banning of TES, and the removal of flexibility that this implies, could create disincentives to labour-intensive economic growth. The government has made a strong commitment to labour intensive economic growth, as evidenced in policies such as ASGISA. However, a decline in labour market flexibility could see employers moving toward increased mechanisation and capital intensive production methods, at the expense of job creation.

Similarly, companies with short-term placement needs, to cover workers on maternity leave, sick leave or study leave for example, rely heavily on the ability of TES agencies to quickly identify and place an appropriate person in the role for as long as needed. If the TES facilitation role is removed, and temporary placement becomes a more onerous or lengthy process, many companies may choose to manage in the absence of the relevant employee, by allocating his work among colleagues or putting tasks on hold, for example - with negative impacts for job creation and productivity.

Banning of TES may also make it more difficult for lower skilled workers to access potential work opportunities, in circumstances in which it is more difficult to approach individual clients directly for job opportunities. In this regard, it is worth noting that a 2008 Report commissioned by the Department of labour recommended that:

"The Department of labour should facilitate the introduction of labour market intermediaries (LMIs) who do not replace employers through a commercial contract but, instead, recruit among the unemployed, especially the youth, train them and then place them in decent jobs. This involves the creation of labourmarket institutions that are more active and aggressive in their relations to both sides of the labour market."⁴

IV) INCREASED ADMINISTRATIVE BURDEN FOR EMPLOYER AND EMPLOYEES

The proposed provision requires that persons who are placed as temporary employees and are supervised by the client will be employees of the client, no matter how short-term their relationship with the client. Thus a substitute employee who comes in for a period as short as a single day, to work subject to the "direction and supervision" of a client, will be the employee of that client for the purposes of all labour legislation. An employee who makes a career of being a replacement (or any other form of temporary work) will have many employers. There are a large number of employees who fall into this category. As the ILO



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has pointed out, this group includes a large number of women who use this form of work as a mechanism for balancing work and family responsibilities and young workers who use these forms of work as mechanisms for gaining experience and gaining exposure to employers who may consider employing them permanently. Trade unions however point out that the dominant reality in South Africa is that the largest numbers of female workers performing agency work are in long-term insecure and low-paid work.

This has significant disadvantages for employers. As the same definitions are to be included in both COIDA and UIF, each individual client will have to register the employee under these two Acts, and will be responsible for contributions for every employee even if the employment relationship was for just a few days.

If the employee is not paid correctly, he or she will have to sue each individual employer. The employee will also be responsible for ensuring that their tax affairs are in order - they will need to collect IRPSs from each client that has employed them over each twelve month period.

The provision will also impose significant additional administrative costs on public institutions, in particular the Unemployment Insurance Fund and the Compensation Fund. Statutory collections may be significantly undermined, since the relevant authorities will need to collect UIF, Workman's Compensation, and skills development levies from a wide array of clients - including individuals and families who have engaged temporary workers for any length of time.

One proposal made in the RIA consultation process was that administrative obligations such as compliance with UIF, COIDA, payment of skills levies and deduction of PAVE could be placed on the agency while the core labour law responsibilities relating to dismissal and collective bargaining should be placed on the client. It is possible for many of the administrative aspects associated with employment to be transferred to specialist agencies that are not the employer of the employees concerned."

Amendment of section 200A of Act 66 of 1995

Section 83A in the BCEA is identical and should therefore be scrapped as the scenario will be captured by the amended section 200A (1).

Insertion of section 200B in Act 66 of 1995

Although the legal implication is that the onus is on the employer/ client company to justify the fixed-term employment, the manifested impact will be that employers will be reluctant to sub-contract or engage in labour-intensive practices as fixed term contracts will be deemed indefinite until the contrary is proved, regardless of the circumstances.

It is unreasonable and unfair to allow an employer to engage an employee on a fixed-term basis assuming that all accept that arrangement only to, at the end of the contract face an allegation that the employer must prove the need for a fixed-term contract.

This amendment will result in considerable uncertainty, increased litigation and expectations which will create an undue burden on the employer.

According to the 2007 September Labour Force Survey, approximately 2.13 million workers or 16 percent of the total workforce were classified as fixed-term, temporary or seasonal workers. These workers will potentially be affected by the proposed amendment declaring temporary employment to be permanent. If the proposed amendment is implemented, a share of these more than two million workers will have to be employed permanently if the employer cannot show justification for continued temporary employment. Employers will incur time and financial costs associated with responding to increased claims of permanent employment at the CCMA and if unsuccessful, converting temporary/fixed-term contracts to permanent employment contracts (including extending benefits such as membership of a medical-aid and pension fund). This suggests an increase in the cost of doing business for employers and the higher this share is in relative and absolute terms, the greater the impact of this proposed amendment on the cost of doing business in the domestic economy. While permanent employment is expected to increase as a result of the amendment, it is likely that a proportion of contract workers will not be offered permanent positions, with a resulting decline in total employment (and therefore an increase in unemployment).

Insertion of section 200C in Act 66 of 1995

Reference to the word “*must*” leads to potential absurdities. As the clause reads at present, an employee will be legally compelled to have recourse against his employer and client. BUSA cannot support this.

The proposal of joint and several liability here is at odds with the scrapping of TES in s198 and clarification is sought.

It is unclear why the registrar’s duty of confidentiality is removed.

Amendment of section 201 of Act 66 of 1995, as amended by section 49 of Act 42 of 1996

The deletion of the subsection is noted, and BUSA’s comments will be inserted under the proposed new s209A.

Amendment of section 203 of Act 66 of 1995, as amended by section 52 of Act 12 of 2002

This proposal is not supported. As with all labour legislation, changes must go through Nedlac in the ordinary course. This is especially the case with labour regulation which relies on a delicate tripartite consensus and social dialogue that is designed to promote better outcomes and buy-in. More so with codes, these are practical codifications of existing practices and promote standards which must have the benefit of social dialogue.

Insertion of section 209A in Act 66 of 1995

We refer to the general comments above.

The Explanatory Memorandum states that the proposed amendment is intended to strengthen compliance with the LRA and enforcement by labour inspectors. However, the proposals appear to be draconian in nature. There is little correlation between the punishment and the offence. For example, a minimum fine of R10 000 or a prison term of 12 months for failure to keep certain records for the prescribed period seems excessive. There is no justification for the amendment. There is no evidence that employers regularly breach the two sections and that the existing penalties are insufficient. Instead, it seems the amendment is intended to punish rather than improve compliance.

It is also not clear why the maximum fines are suddenly becoming minimum fines. BUSA accordingly questions the motivation for and opposes this proposed amendment.

Amendment of section 213 of Act 66 of 1995, as amended by section 52 of Act 42 of 1996, section 54 of Act 12 of 2002 and section 43 of Act 30 of 2007

"employee"

The Explanatory Memorandum appears to state that the definition of “employee” is aligned to the definition in the Occupational Health and Safety Act 85 of 1993 (OHSA) . However, the definition in the Labour Relations Amendment Act, 2010 is not completely in line with the definition in OHSA.

The potential problems associated with this new definition are endless and are referred to in the general comments above

The Government RIA correctly deals with them as follows at pages 34 and 35:

“RISKS ASSOCIATED WITH NEW DEFINITIONS OF EMPLOYER AND EMPLOYEEE

I) RISK TO EXISTING EMPLOYEE RIGHTS

The Bill's conceptualisation of employee requires that a person who works for another is only an employee if he or she is employed by or works for an employer; and is remunerated by the employer⁵; and works under the direction and supervision of an employer. (In the definition of "employer" these concepts are merged as "direct supervision"). These requirements are cumulative.

Under existing law, the employer's right of control is not a definitive requirement to be an employee. The proposed definition elevates "direction and supervision" by an employer to be a mandatory requirement to be a statutory employee. If this definition comes into effect, many workers who are currently classified as "employees" but who are not directed or supervised in the way they work will cease to be employees for the purposes of all labour legislation and will therefore be excluded from all statutory labour rights.

This is particularly true of employees who work away from the office. For example, workers such as taxi-drivers, truck-drivers and commercial travellers are not



considered to be under the "direction and supervision" of their employers. This amounts to an unjustifiable limitation of the rights of excluded workers (that is, employees who are not directly supervised by their employers) to receive those protections guaranteed to "workers" in terms of the Labour Relations clause of the Bill of Rights (section 23).⁶ There are thus severe unintended consequences to this approach in terms of the impact on direct employment. The provisions could be interpreted as violating the constitutionally protected labour rights of employees, and could be set aside as unconstitutional. The extent of the unintended consequences is revealed by the fact that those trade unions who favour a ban on labour broking do not support the approach of the Bill on this issue because of the negative consequences it will have for their members.

II) EMPLOYER WILL HAVE TO BE DETERMINED ON A CASE-BY-CASE BASIS

International experience shows that the definition of "employee" is not a satisfactory basis for regulating triangular employment. The prime example of this is the UK, where the contractual test remains the basis for determining who the employer of an "agency" employee is. The case-law is uncertain with the courts having found on different occasions that the employee is employed by the agency, by the client, by both and by neither. The reason for this is that the definition has evolved for the purpose of distinguishing employees from independent contractors; it is not designed to serve the purpose of distinguishing [sic] whether the agency supplying workers or the client for whom they work is the employer, particularly where both exercise some measure of supervision of the employee.

In practice, many employees are supervised in their work by both the agency and the client for whom the employee works. For instance, the agency may supervise general aspects of the employee's duties while the client will supervise the day-to-day performance of tasks in the client's workplace. It is not clear how the Bills' proposals will deal with this situation. This could lead to the conclusion that neither party is the employer because supervision is shared and neither the "agent" nor the "client" exercises the full responsibilities of an employer.⁷ However, it is more likely that the employer who controls the workplace in which the employee is working will be classified as the employer because that employer more directly supervises the employee. There are many situations in which this will produce an anomalous result. One example is businesses that hire out expensive equipment such as earth-moving equipment or cranes. These businesses supply an employee to operate the equipment who is fully trained to perform that task. However, it is the client who will instruct the employee as to what tasks he or she should undertake. The proposed "direct supervision" test will have the anomalous result that it is the "client" who is the employer.

"The effect of repealing section 198 will be that the question of who the employer is will have to be dealt with on a case-by-case basis. This will cause uncertainty and increase the scope for avoidance, as well as increasing litigation to the detriment of employees. The major beneficiaries will be unscrupulous employers who have an interest in disguising the employment relationship."

BUSA submits that section 200A along with the current definition of employee should remain.

"employer"

The Explanatory Memorandum appears to state that the definition of “employer” is aligned to the definition in the Occupational Health and Safety Act 85 of 1993 (OHSA) , however, the proposed definition in the Labour Relations Amendment Bill, 2010 differs significantly from this definition.

BUSA submits that the status quo should remain and thus that the concept should remain undefined in the LRA, BCEA and the EEA.

“independent contractor”

It is unclear why this definition is required, as labour law seeks to define those that are captured within the net of employers and employees, and not those that are not. The Code of Good Practice on Who is an Employee provides clear guidance on who is an employee and needs to be relied on.

This definition is technically unsound in respect of, inter alia, “works for” as well as in regard to an Independent Contractor being an “extension” of the person’s business. Both of these need not necessarily be present to be an Independent Contractor.

Reference to “*as part of the person’s business, undertaking or professional practice*” is vague and will lead to confusion.

IV. EMPLOYMENT EQUITY AMENDMENT BILL, 2010

a) Opening Comments:

BUSA maintains the view that workplace employment equity must be regulated in the context of the skills base, history and available workforce. Small businesses cannot unduly shoulder administrative reporting and litigation burdens if they are to grow and create jobs. The same argument applies to larger business that should be focused on doing work.

Employment equity needs to be promoted in substance through education and capacity building, skills development and a generally enabling environment, rather than through enhanced administrative obligations, punitive court proceedings and fines.

It is critical that social dialogue and tripartite consensus be achieved on matters of employment equity as the need to gain buy-in and substantive improvement in employment equity is critical to labour market sustainably.

Although BUSA, as a co-signatory to the Employment Equity Act, remains firmly committed to the eradication of unfair discrimination and the promotion of affirmative action in the workplace and is in support of a number of proposed amendments in the Bill, it cannot support a significant number of the amendments in the Bill as they are either badly drafted and unclear as to intent or that they will have unintended consequences or actually undermine employment equity and fairness. The introduction of section 6(4) and (5), the amendments to sections 11 and 42 as well to Schedule 1 (which deals with fines for contravention of the Act) are particularly worrying for BUSA.

b) Specific Comments:

DEFINITIONS

"designated groups"

BUSA supports the intention of the proposed amendment subject to improved drafting.

"independent contractor"

There is no need to define an Independent Contractor as the EEA does not deal with them but is focused on promoting fairness and eradicating unfair discrimination in relation to "employees" in the workplace. This definition is also technically unsound in respect of inter alia, "works for" as well as in regard to an Independent Contractor being an "extension" of the person's business. An Independent Contractor does not "work for" a client but rather contracts to provide the end result of his/her efforts as a completed project to the client.

"serve"

BUSA supports this proposed amendment except that the reference to Commission in paragraph (b) should be changed to "CCMA" as section 1 of the Employment Equity Act defines "Commission" as the Commission for Employment Equity and the acronym "CCMA" is used to refer to the Commission for Conciliation, Mediation and Arbitration.

"annual turnover"

BUSA does not support the usage of this concept in Schedule 1 and thus also does not support the introduction of this concept in section 1 of the Act.

Amendment of section 6 of Act 55 of 1998

BUSA remains of the view that the insertion of subsection (4) is unnecessary as subsection (1) is broad enough to cover the situation which subsection (4) now attempts to cover. Support for this view is to be found in the recent decision of Judge Andre van Niekerk in *Mangena & Others v Fila SA (Pty) & Others* (2010) 31 ILJ 662 (LC) at 669D-E where he stated "... although the EEA makes no specific mention of claims of equal pay for work of equal value, the terms of the prohibition against unfair discrimination established by s6 are sufficiently broad to incorporate claims of this nature." It is interesting to note that the Government's RIA report (at page 84) also refers to the *Mangena* case and quotes from it quite extensively.

In addition, the new section 6(4) is not in line with the ILO Equal Remuneration Convention on which the Explanatory Memorandum says it is based. The ILO Equal Remuneration Convention and similar law abroad is meant to address unfair discrimination with regard to race, gender and the like and NOT permanent versus temporary employment.

BUSA submits that there should be proper interpretation and alignment of the ILO Convention within SA context regarding intent, unemployment, skills development needs and transformation and empowerment in general.

Amendment of section 10 of Act 55 of 1998

BUSA does not regard it as appropriate that matters of discrimination and constitutionally protected rights are relegated to a Tribunal rather than a Court. Discrimination matters are highly technical and are best dealt with through a Court. It is not clear that the CCMA will have the requisite capacity and resources to adjudicate such matters.

Substitution of section 11 of Act 55 of 1998

Government's Explanatory Memorandum states that the aim with this amendment is to bring the burden of proof in line with the burden of proof in the Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000 (PEPUDA). But it does not state why this alignment is necessary or preferable.

The amendment is also not absolutely in line with section 13 of PEPUDA which sets out the burden of proof. It deviates in a number of instances. A troubling aspect is that it introduces the second category of "prohibited grounds" of PEPUDA in this section which deals with burden of proof.

It is submitted that this second category of prohibited grounds is largely what the Constitution Court has referred to the "analogous grounds" which have the potential to impair the

fundamental human dignity of persons or to affect them in a comparably serious manner (see *Harsen v Lane NO & Others* 1998 (1) SA 300 (CC) as well as *Mangena & Others v Fila SA (Pty) Ltd & Others* (2010) 31 ILJ 662 (LC) at 668).

BUSA does not support the departure from the current law and requests that this amendment and its legal implications should be explained. Included is the need for the DOL to qualify the concept “systematic disadvantage” in cases of skills development where lesser benefits are paid, also to drive unemployment and poverty levels downwards.

Amendment of section 20 of Act 55 of 1998

The purpose of subsection (7) is unclear and the Explanatory Memorandum does not provide any clarity. There are a number of provisions in the current EEA dealing with the Employment Equity Plan and failure to prepare and implement such a plan. In terms of these provisions, a process must be followed by the DOL.

BUSA does not support the inclusion of this subsection if the intention is to circumvent the compliance process.

Amendment of section 21 of Act 55 of 1998

BUSA does not support the amendment in terms of which smaller designated employers must in future also report annually. It will be onerous, time-consuming and labour intensive for these smaller employers.

In addition, it will completely skew the DOL’s data and will mean that data of previous years cannot be compared with data of subsequent years as the reporting requirements have been changed.

BUSA does not support the newly proposed subsection 5B, which circumvents the whole process of compliance.

Amendment of section 27 of Act 55 of 1998

BUSA does not believe this amendment is workable and it is unclear how such unfair discrimination will be reflected in the statement.

Amendment of section 36 and 37 of Act 55 of 1998

BUSA does not support the erosion of undertakings and compliance orders which are directed and promoting compliance.

BUSA does not support the scrapping of subsection (5) which amounts to the scrapping of an employer’s right to object to a compliance order.

BUSA supports the amendments in respect of subsection (6) except for the scrapping of the words relating to the employer’s right to object.

Repeal of sections 39 and 40 of Act 55 of 1998

BUSA does not support the scrapping of an employer's right to object against a compliance order of an inspector as well as the scrapping of the employer's right to appeal against the Director-General's order to the Labour Court.

Substitution of section 42 of Act 55 of 1998

BUSA does not support the amendment and requests the DOL to motivate all the changes to section 42.

Rather than scrapping some of the factors because, in practice, they have proved to be difficult for the Director-General to determine (consider the *Comair*-case) BUSA proposes that it should remain obligatory for the Director-General to consider all the factors currently listed in section 42 but that he/she should expressly state in his/her report where it was not possible to consider a factor and to state reasons for this impossibility such as that no information or statistics were available.

In addition, the proposed scrapping of subparagraphs (ii)-(iv) and subparagraph (b) will be extremely prejudicial to the employer as it will not be able to share the realities and obstacles faced by it when trying to implement affirmative action with the DOL

The factors that the amendment proposes to delete are important in that they guide any party considering the plan as to which factors are relevant. The amendment even goes as far as seeking to remove the reference in plans to the economically active population. It would be highly irresponsible to suggest that plans should be made in the absence of the current status. These factors guide not only the Court, the Department, but also employers as to what are legitimate considerations in developing a plan. It would be irrational to remove a factor which allows, for example, the employer to take into account the economic crisis, or the availability of skills in a particular sector.

Substitution of section 45 of Act 55 of 1998

The amended section 45 is not clear. Does it provide for the Director-General to get two orders namely an order by the Labour Court that the employer must comply with the request or the recommendation as well as an order imposing a fine?

Amendment of section 55 of Act 55 of 1998

BUSA requires clarity from the DOL as to why the word "must" has been replaced with the word "may" as the Explanatory Memorandum makes no reference to this proposed amendment.

Amendment of section 56 of Act 55 of 1998

This amendment is not supported. The downward delegation of powers on matters of significant importance to social partners and matters of criminal consequence fundamentally undermines social dialogue and should not be entertained.

In the Explanatory Memorandum reference is only made to section 53(2) which provides that the Minister may be requested by an employer that wants to conclude a state contract to confirm the employer's compliance with Chapter II, or Chapters II and III, as the case may be. It is submitted that if that was the sole aim of the proposed amendment, then the other sections referred to in section 56(1) should not be deleted.

Repeal of section 57 of Act 55 of 1998

The Explanatory Memorandum states that this section, which deals with TES is repealed "to align the Act with the Labour Relations Act". Reference is probably to the proposed scrapping of section 198 of the LRA. BUSA opposes the section's repeal.

Substitution of Schedule 1 of Act 55 of 1998

BUSA does not support the use of turnover as a mechanism to set fines. A set financial amount should be established.

Further, BUSA submits that it is wrong to rely on Competition Act contravention fines, which are economic in nature, in order to address matters of employment equity.

Every care must be taken that fines do not have the unintended consequence that the continued existence and viability of the particular company is threatened.

BUSA is of the view that annual turnover as measurement for a fine could pose a real threat to the viability of companies; much more than in the case of a fine based on a fixed Rand amount.

The aim of the fine should be to punish and to "convince" a company to comply, not to push a company into financial distress with a real threat to job security of the company's employees.

For these reasons, BUSA remains of the view that the penalty should be a Rand amount.

BUSA also supports the recommendation in the Regulatory Impact Assessment report that "a thorough economic risk assessment should be undertaken before proceeding with amendments to penalty provisions." (Page 80)

V. BASIC CONDITIONS OF EMPLOYMENT AMENDMENT BILL, 2010

a) Opening Comments:

BUSA submits that any amendments to the Basic Conditions of Employment Act (BCEA) need to be made with due consideration of possible Constitutional infringements, an opportunity to drive labour-intensive economic growth, and to generally support various socio-economic objectives. There are a number of areas where clarity needs to be provided including inter alia; in respect of the provisions dealing with benefits, Independent Contractor, and the categorization and classification of Temporary Employment Services (TES). There also needs to be proper alignment of amendments with other relevant instruments, for example ILO Conventions.

b) Specific Comments:

Amendment of section 1 of Act 75 of 1997, as amended by section 40 of Act 65 of 2001, section 26 of Act 68 of 2002 and section 25 of Act 52 of 2003

“Independent contractor”

See BUSA’s comments above in respect of this concept.

Amendment of section 32 of Act 75 of 1997

While BUSA supports the principle that there should be no unfair discrimination on any of the grounds listed in section 6(1) of the Employment Equity Act, between employees of an employer as regards pay, it cannot support the proposed amendment to section 32 of the BCEA. The amendment to section 32 seeks to provide fixed-term employees with the same benefits as permanent employees, totally disregarding the different nature and duration of the contracts and factors such as years of service, loyalty, long-standing association. Some benefits are provided to permanent employees purely as recognition for their loyalty and long-standing association. Some benefits are given as incentives to gain loyalty. Share option schemes are an example. Such benefits would not be appropriate for fixed term contract (FTC) employees.

The Bill does not define “benefits” and thus creates uncertainty and confusion. The requirement to contribute benefits similar to or of equal value to employees employed on a fixed term contract as the benefits afforded to permanent employees, is problematic. Benefits such as pension contributions cannot be done on a on/off basis. If seasonal workers are employed for a period of say three months in the year, it will be very difficult to administer the partial payment of benefits.

BUSA refers to the observations made in Government’s RIA report which remain relevant:

“The current phrasing of the provision, that is, an obligation to “contribute the same benefits and afford the contract workers the same rights as enjoyed by permanent employees” is extremely broad. It is unclear what is included in “benefits”. Benefits packages tend to be discretionary at firm level, or are determined through collective bargaining processes. Variations in benefits packages, across firms and within firms, make it very difficult to compare wages on an objective basis.

The provision may create a disincentive to employment. Industry statistics show that a large proportion of atypical employees, particularly temporary and TES employees are young people and a significant number are new entrants to the labour market. A provision that these employees should receive equal pay and equal benefits from the start of their employment fails to take into account the difference in skills and experience between these employees and other who have accumulated greater experience and expertise. There is a significant risk that such a provision will make it more difficult for first-time Job-seekers to enter the labour market.”

In conclusion, BUSA does not support the proposed amendment.

Insertion of section 33A in Act 75 of 1997

The above provision in (b) is unclear as to the nature, extent and scope of what is covered under “goods”. Many employers may be offering “goods” as benefits to their employees either as part of contractually agreed remuneration or as an additional service.

It is proposed that this amendment probably slots in better after section 34, which deals with prohibited conduct relating to deductions and repayments and could be reflected as section 34A.

Amendment 43, 44,45,46,47

BUSA supports the intention of these amendments.

Amendment of section 55 of Act 75 of 1997, as amended by section 11 of Act 11 of 2002

BUSA supports the proposed amendment in section 55 (4) (b) , subject to the revision of paragraph (ii) to read “increases to minimum rates of remuneration”.

Sectoral determinations have always been confined to minimum standards pertaining to conditions of employment for sectors regarded as having large numbers of vulnerable employees, and less ability to collectively bargain. These amendments will undermine existing collective bargaining arrangements which many of our members are party to at company level. Amendments to regulate actual wages will have a negative impact of employers who are paying above the minimum being penalised for this through higher increases being imposed. Furthermore, employers will exercise more wage restraint in good years if they know they may be compelled to provide higher actual increases in coming years. If actual wage increases are to be set through the Sectoral Determination, the need for company level bargaining and union membership will fall away. Furthermore, if the company cannot in severe economic conditions, afford the increase on actual wages, this could lead to

redundancy rather than a negotiated wage solution. Care should be taken to avoid creating a situation such as what is happening in Newcastle, where employers are facing closure as the wages are unaffordable.

The proposed section 55 (4) (g) is not supported as it amounts to an unfair limitation of certain workers and forms of business. This would have a negative impact on employment.

BUSA does not support the proposed amendment to section 55 (o) .Organizational rights should be left to the LRA processes.

In relation to thresholds of representivity being established, the amendment proposes to replace the bargaining power of parties and the complex industrial relations considerations applied under the CCMA, with the discretion of the ECC. With due respect, the Commissioners of the ECC are not industrial relations experts, and they should not be engaged in matters best left to the relationship between unions and employers. Such an amendment would serve to undermine in the long run the bargaining power of parties, and increase the proliferation of unions and the administrative burdens pertaining thereto.

Amendment of section 64 of Act 75 of 1997

The purpose of undertakings and compliance orders is to ensure resolution of workplace issues without the need to resort to the courts. These tools of enforcement also serve to educate parties of their rights and obligations. If they are removed, the DOL would have to rely on enforcement only through the courts, an option which would unduly burden the court roll and delay processing of labour matters. Therefore BUSA does not support the proposed amendment.

Amendment of section 65 of Act 75 of 1997, as amended by section 17 of Act 37 of 2008

BUSA requires clarity is given on the does not support entry by a wide range of parties onto workplace unless very clear controls are in place to protect the employer. For example, the impact to domestic employers in this regard would need to be understood and appropriate measures be put in place to protect the employer's privacy and safety.

Repeal of sections 68, 69, 70, 71, 72 and 73 of Act 75 of 1997

BUSA does not support these proposed amendments as they are all targeted at reducing the monitoring, enabling and educating role of the inspectorate which is targeted at improving and encouraging compliance.

Amendment of section 74 of Act 75 of 1997, as amended by section 17 of Act 11 of 2002

BUSA supports this proposed amendment, except insofar as it refers to a compliance order.

Amendment of section 77A of Act 75 of 1997

BUSA does not support this proposed amendment insofar as it seeks to delete paragraphs (a) and (c) of s77A, would like to understand the rationale pertaining to the rest.

Repeal of section 82 of Act 75 of 1997

BUSA opposes the proposed amendment and requests clarity as to whether TES now falls under the “sub-contracting, outsourcing” category.

Amendment of section 93 of Act 75 of 1997

In terms of the newly proposed section 93 (1A), BUSA supports the proposed amendment, but suggests that the text be reworked.

BUSA opposes the entire amendment on offences and penalties. The DOL should be enforcing most of the sections of the Act through its labour inspectors. Instead, the DOL seeks to shift this obligation to the criminal courts. This will not only have the undesirable effect of criminalizing even the pettiest of contraventions, thus unravelling the whole philosophy of the labour laws which is to build industrial peace through dispute resolution, bargaining where possible, but it will completely drown an already struggling criminal justice system. The social and economic impact of this amendment would indeed be considerable.

The amendment imposing new fines is not supported. There is also no apparent rational connection between the contravention and the penalty. For example, failure to pay overtime of, say, R20 could result in a minimum fine of R10,000 or a minimum prison term of 12 months. Apart from being immoral, such a penalty would, in most cases, lead to the collapse of the employer’s business, especially the SMEs. The inevitable job losses would merely compound an already grave social problem. It is further unlikely that the employee would benefit due to the delays in the criminal justice system, and the fact that the fine would not be paid to the employee.

The proposed increase in prison terms for some of the offences from three to six years is also excessive. There is no evidence that contravention of these sections occurs regularly or is on the increase, so that the aggressive increases in the minimum sentences would be considered necessary as a deterrent.

BUSA does not support the insertion of section 93 (3) to review the applicable penalties by notice in the *Gazette*. This is contrary to the tripartite consensus underpinning labour laws and would fundamentally undermine social dialogue and perceptions of a stable labour market.

VI. EMPLOYMENT SERVICES BILL, 2010

a) Opening comments:

The fact that Temporary Employment Services (TES) are not recognized under this section is tantamount to a ban if they are not classified under the “sub-contracting and outsourcing” category.

The ironic reality is that the exclusion of TES undermines most of the purpose statements in Section 2 of this Bill.

This is also of grave concern as ILO has repeatedly confirmed that that TES actually improve labour market efficiencies. The international trends to recognize and regulate TES and the recent Namibian case law, has been ignored. ILO Convention 181, a convention of tripartite consensus, has not been complied with and once again the concept of Decent Work is stretched beyond recognition.

It will increase business uncertainty and operating costs, undermine economic growth, employment growth, poverty reduction and skills development.

The notion that Public Employment Services will provide a service at “no cost” is not only highly debatable but is unlikely to make any significant impact on the intermediation of skills/ labour between sectors of supply and demand, employment facilitation and the like.

Reducing Employment Services effectively to facilitating permanent placements denies economic and business realities.

There exists a real opportunity to co-regulate TES along with permanent agencies and to partner with the Department of Labour (DOL) and Bargaining Councils in order to ensure that industries are practicing appropriately.

Using tax payer funds to compete with the very businesses that paid the tax amounts is unacceptable – TES industry contributes around R3bn per annum in VAT alone and this would be potentially lost.

b) Specific Comments:

CHAPTER 1: Definitions

“employee” & “employer”

It is submitted that S 200A of the Labour Relations Act (LRA) along with the current definition of “employee” should remain.

The definitions in this Bill are also slightly different from those proposed in the LRA and needs to similar to those in the LRA.

See BUSA’s comments on this proposed definition earlier in this document.

“placement”

This definition is unsound and clarity is required on the intention.

“Placement opportunity”

This definition is unclear and too broad. “Any opportunity for learning” could include promotions, training programmes, and sections 18.1 and 18.2 learnerships. In addition, there is no clarity on how this will interact with internal company policies and procedures around recruitment and selection, and centralised versus decentralised recruitment.

“Private Employment Agency”

The definition is not acceptable as the employer may be a TES under the “sub-contractor or outsourcing” category and this would essentially BAN them as they could also be an employer in their own right.

Again, clarity is required with regard to the intention to ban TES or not. In this regard, the definition appears to include a TES as per section 198 of the current LRA. However, if regard is had to section 15 of this Bill, the function of a private employment agency excludes a TES as currently defined.

“work seeker”

There is no reason why unemployment is a pre-requisite to be a work seeker.

Purpose of Act

TES research, both internationally and domestically, proves that TES are significant contributors to most of these purposes and are best positioned to partner with Public Employment Services. TES have more than 7000 branches; focused systems and processes; credibility with business and candidates; 20 000 plus learnerships of which 95% were unemployed; intermediation of 950 000 plus assignees per day; 30% movement of temporary employees to permanent employees per annum; Foreign Direct Investment(FDI) via, for example, Business Processing Outsourcing (BPO) and automotive sector

Administration of Act

DOL has approximately 170 Labour Centres and consideration must be given as to how public access is going to be achieved and how the service will be delivered, given the financial requirements for successful labour centres. The RIA demonstrates the extent of the of costs to finance functional labour centres in other developing countries. It is submitted that the likelihood of funding and establishing efficiencies appear unrealistic aspirations in South Africa given the base services, the fiscal resources and the levels of unemployment.

CHAPTER 2: Public Employment Services (PES)

Public Employment Services

The Private Employment Sector (Perm and TES) already perform most of these services and functions in a proficient manner and facilitate the payment of taxes and other statutory payments.

There is an opportunity for both private and public services to exist alongside each other, or for a formalized Public Private Partnership (PPP) arrangement under the governance of a Private Employment Agency Board. These options must be considered if the countries growth and employment targets are to be met.

Promotion of employment of youth

The focus on youth employment is supportable, but needs to be done through both private and public employment services.

Employment of foreign workers

BUSA does not support increasing regulatory burden in this regard, nor does it support the principle of discouraging importation of skills particularly where there is a skills deficit in South Africa.

These provisions appear to overlap with similar provisions in the Immigration Act which falls under the Department of Home Affairs. Perhaps a cross-reference in this Bill to the similar provisions in the Immigration Act would suffice. Having two government departments dealing with the same issue is unsound and counter-productive and will lead to confusion and ineffective legislation.

Reporting on vacancies and filling of positions

BUSA does not support these provisions. The amendment creates huge administrative burden which is not justified given the limited benefit and capacity of the DOL.

These provision create much uncertainty and confusion given the use of numerous and different terms e.g. “placement opportunity” vs “vacancy” vs “new position” etc. This needs to be addressed and the necessary latitude given to employers to implement their internal processes first before reporting is required.

Clarity is required regarding the need for the proposal of reporting within 14 days, and what is the impact of the amendment in relation to recruitment from within.

The administrative impact on employers could be huge and around 3 million opportunities may be reported on in a year!

Employment information

The role of business needs to be considered as in its current form the obligations are exceptionally onerous with limited benefit.

Information from education

DOL needs to obtain this information from Department of Higher Education and Training/ NLRD/ SAQA and other relevant institutions. The complexity of obtaining such information and availability of such information requires consideration, as it appears impractical.

Financing of Public Employment Service (PES)

BUSA cannot support this proposal. These funds have a specific purpose and are NOT to be used to fund PES. This is tantamount to an additional form of tax, and it would thus be prudent to rather decrease these taxes and let Private Employment Services and TES get on with their jobs! There is an existing institutional framework and DOL should enforce this properly with a Board structure.

CHAPTER 3: Private Employment Agencies (PEA)

Registration and licensing of PEA

It is easy to audit and monitor TES compliance with statute via audits etc.
BUSA cannot support section 14 (1) and (2) and is of the view that it should include TES and on advice from a Co-operative Stakeholder Board.

Functions of PEA

BUSA proposes that this section needs to be reworked. It must at least contain all the functions assigned to PES under section 5 as well as include TES and their specific functions. Also, there are additional functions offered by current Private Employment Agencies that are not contained in this list.

It is proposed that job intermediary services should include TES in section 15 (2) (b).

Charging of fees by PEA

Section 16 (1) cannot be supported. Often the workseeker opts voluntarily to access specific non standard employment services (e.g. psychometric assessments etc.)

Confidentiality of information collected

It is submitted that this provision must apply equally to PES.

Withdrawal of licence to operate as PEA

BUSA cannot support this provision and suggests that this is to be done on the advice of the Board comprising social partners.

CHAPTER 4: Employment Services Board

BUSA is of the view that TES ought to be included as Employment Services in all respects and amendments ought to be made throughout this Bill in accordance herewith, where necessary. As currently structured, the functions are not Board functions, but those of a Commission. Broader Board powers would be necessary to perform meaningful functions.

CHAPTER 6: General Provisions

Monitoring and enforcement

The role of the Employment Services Board should be included.

Regulations

BUSA proposes that TES to be included as Employment Services in all respects and amendments ought to be made throughout this Bill in accordance herewith, where necessary.

Schedule 2: TRANSITIONAL PROVISIONS

Temporary Employment Services (TES)

BUSA submits that TES must remain in place.

VII. CONCLUDING REMARKS

The comments made above in respect of some of the amendments proposed in the Bills are by no means complete and all-encompassing given the contradictory and unclear provisions in the Bills, the very tight timelines under which BUSA had to disseminate the four Bills, develop positions and attempt to obtain the requisite mandates from its extensive membership. BUSA will provide its comprehensive and motivated views and proposals on the Bills at the relevant fora.

BUSA looks forward to engaging the other social partners in robust social dialogue to determine what the real shortcomings of the current labour legislation are and how best to address these. This engagement must start with an overarching policy considerations sought to be achieved. This must be done with due consideration to all relevant factors that relate to or are important for the South African labour market particularly critical issues such as job retention and job creation. In this regard, the social partners will also have to take cognizance of the RIA report on the proposed amendments as well as government's New Growth Path. The views of those entities that will be affected by the proposed amendments such as the Labour Court and the CCMA should be ascertained. There should be liaison with other government departments such as the Department of Home Affairs in respect of foreign workers and the Department of Justice and Constitutional Development in regard to the future of the Labour Courts as provided for in the Superior Courts Bill. It will also be critical to determine the affordability of proposed amendments.

Should it become evident that some of the proposed amendments do not address the real shortcomings of the current labour laws, the social partners should have the courage and maturity to reconsider the appropriateness of the relevant provisions of the Bills, and, where necessary, be prepared to address the issues *de novo* with an open mind and focus on developing amendments that are in line with the stated purposes of chapter 2 of the Constitution as well as the current labour statutes, particularly to advance economic development, social justice, labour peace, fair labour practices and the democratization of the workplace.