



**IMPACT ANALYSIS FOR BUSINESS ON PROPOSED
LABOUR AMENDMENT BILLS 2012**

Economic Analysis of Selected Provisions

Prepared for Business Unity South Africa & Employment Promotion Programme

By

**Chris Darroll
Chief Executive, SBP**

**Professor Neil Rankin
University of the Witwatersrand**

11 July 2012

Impact Analysis for Business on Proposed Labour Amendments 2012: Selected Provisions

Headline Comments

The objective of the amendments was driven by the intention to address abusive practices and vulnerable work. Contrary to the intention, this report shows that, the amendments being contemplated are deeply problematic. They will place a burden on the whole business community for uncertain benefits, and will have a particularly negative impact on small and growing businesses, probably forcing some to close down:

- Our assessment demonstrates that these amendments will cost existing jobs. The exact magnitude is difficult to determine, but it can confidently be expected to amount to several hundred thousand.
- Our calculations suggest that at a minimum, 215 150 jobs will be lost as a direct consequence of the amendment dealing with equalising conditions of service between atypical and permanent, full-time staff.
- We also project job losses of anywhere between 11,684 and 105,155 based on a *limited* sample of sectors in the economy, should amendments prescribing wage increases on actual earnings be introduced – if the projections are valid for the wider economy, we can expect considerably greater job-shedding. This is likely to be a recurrent pattern in future, as future wage determinations would have a similar effect on the workforces to which they were applicable. A subsidiary effect will be to disincentivise further employment, by making it more expensive and risky.
- Proposals to extend collective bargaining agreements will also have a negative impact on employment, on the available evidence, destroying some 38,671 to 80,783 jobs.
- They will have the unintended consequences of reducing the rates of pay offered to employees.
- They will place a significant extra administrative burden on business, which will be expressed both in terms of time and money.
- They will undermine collective bargaining and the industrial relations regime in general.
- The evidentiary basis on which they are based – that is, a consideration of the costs vs benefits or the unintended consequences – are unclear at best. The Regulatory Impact Assessment, done in 2010, did not address these matters, or addressed them in a form incompatible with what is currently being proposed.

Introductory Comments

This report was prepared at the request of Business Unity South Africa (BUSA) and given the limited time available only focuses on three areas of concern.

A raft of amendments to labour legislation – the Basic Conditions of Employment Act (BCEA) and the Labour Relations Act (LRA) – is currently under consideration in Parliament. The changes they intend to introduce range from relatively minor clarifications to some 20 provisions that, according to BUSA, could potentially fundamentally restructure the labour regime in South Africa. In view of South Africa's high unemployment rate, and given the priority which has been accorded to dealing with it, this calls for clear and sober reflection.

The amendments have in various forms been under consideration since 2010. In mid-2010, Cabinet called for a Regulatory Impact Assessment (RIA) of the draft bills as they then existed. Research specialists, SBP, were, in conjunction with Professor Paul Benjamin of the University of Cape Town; Professor Haroon Borat and Ms Carlene van der Westhuizen of the Development Policy Unit at the University of Cape Town, involved in conducting the RIA. It is notable that the RIA cautioned at the time about some of the provisions, stressing their potential to undermine the creation of employment opportunities and to increase the regulatory burdens on business.

During the course of 2011, the Bills were negotiated in NEDLAC under core themes identified by the parties. Business has expressed deep concern at the level of disagreement at the negotiations on issues that will have a significant impact to the labour market and the country. It believes that the Bills will have a severe impact on small and large business, will reduce the number of existing jobs and will retard future job creation. Despite these concerns, the two Bills are now before Parliament during its third session.

In June 2012 BUSA commissioned SBP and Professor Neil Rankin of the School of Economics and Business Science at the University of the Witwatersrand to conduct an independent economic impact analysis on selected areas of the draft Bills. The analysis, constrained by the availability of firm-level data in South Africa, is centred on the following draft provisions:

- The equal treatment provisions for full and part-time, permanent and contract employees;
- Sectoral determination to provide increases on actual rates of pay
- Bargaining council extensions.

The following report is the outcome of that analysis. It demonstrates the impact of these provisions on the economy, with a particular focus on the consequences they are likely to have in terms of employment. It shows how these amendments stand to alter the cost of employment; how these changes in cost impact on the number of people in employment; the nature of firms most likely to be affected; as well as the broad profiles of workers who will carry the greatest impact of these measures.

Equal treatment provisions

The amendments (Labour Relations Act s198A(5), S198B(8), s198C(3) and S198D) aim to secure for atypical employees, who have been engaged for longer than 6 months and who earn less than R183 000pa, the same pay, benefits and general treatment as permanent workers. Although atypical employment in relation to labour brokers was addressed to some degree in the 2010 Bills and the Regulatory Impact Assessment (RIA) – which cautioned about the impact the then proposed amendments would have on employment – the substance of the amendments were substantially different. Equal treatment for atypical employees, and provisions pertaining to part time workers are new provisions.

In much of the commentary around these measures, the issue of labour broking has featured prominently. These provisions, though, are far broader. They are equally applicable to part-time workers, and workers employed on fixed time contracts. They make no distinction between workers employed in different types of atypical work. Such atypical work has a legitimate place in the labour market, for example, in raising a firm's productive capacity during the busier times of its business cycle. It is also true that most work created in South Africa over the past decade has been of this nature. Atypical positions are, moreover, important gateways to full-time or permanent employment. And according to SBP's research for the SME Growth Index, part-time and limited-term contract employment was widespread among small firms.

There are real grounds for concern. The 2010 RIA cautions that an "equal pay" clause should not be seen as mandating identical packages of benefits to all who are performing the same work, but rather that employers should determine remuneration through a fair and rational process, which may involve taking into account such matters as skill and experience. (This is already regulated in terms of the Employment Equity Act, with further proposals under consideration.) The danger exists that these amendments will set off extensive litigation, as individual workers, or groups of workers, demand a very broad range of rights and treatment referenced to others. Much of this will inevitably have to be resolved before the Commission for Conciliation Mediation and Arbitration (CCMA) and then by the Labour Court. At the time of negotiations concluding in Nedlac, no assessment had been done on the impact of these measures on these institutions, particularly with reference to the extent of potential cases that may be referred.

It will furthermore demand more new and complex administrative systems for firms' human resources. This will likely prove most onerous on small, new and growing businesses: these being, for the most part, those that the economy relies on to produce jobs.

These provisions will increase the costs of employment. This danger was identified in the 2010 RIA. The RIA noted that South Africa's wage-employment elasticity is estimated at 0.7 (there is reason to believe that it may now be closer to 0.8 given the prevailing economic conditions). An increase in the cost of hiring workers (the cost of wages and benefits) of 1% is likely to imply a decrease in employment of 0.7%.

Given the relationship between wage costs and jobs, it is to be expected that these measures will lead to job losses. The magnitude of this, and the burden of job losses, can be predicted through a look at the employment statistics. (The data used is from StatsSA's *Quarterly Labour Force Survey*, 2nd Quarter, 2011, analysed by Dr Neil Rankin of the University of the Witwatersrand).

Some 13m people are employed in South Africa. Their employment status with respect to the size of the employing firm and the division between part-time and full-time employees is shown in the table below.

How many people work part-time and in what sized firms?										
Firm size									Total	
	0	1	2-4	5-9	10-19	20-49	50+	Do not know	All	Excluding firms with 0 employees
	1,281,241	1,239,359	1,367,433	1,250,234	1,725,488	1,905,573	4,011,305	471,640	13,252,273	11,971,032
Part-time work										
32 hours or less										
N	307,769	375,250	177,799	90,831	105,958	76,076	138,502	36,556	1,308,741	1,000,972
%	24	30	13	7	6	4	3	8	10	8
28 hours or less										
N	216,052	314,034	129,449	65,224	75,440	51,511	103,154	25,612	980,476	764,423
%	17	25	9	5	4	3	3	5	7	6

Sources: Stats SA; Prof Neil Rankin

Depending on the definition of part-time employed, between 6% and 10% of workers in South Africa are employed on a part-time basis. It is also notable that part-time employment is heavily biased towards smaller firms, both in the numbers involved and the proportions of workers employed by these firms.

The equal treatment provisions relate to another important division in the labour force, that is, those employed permanently by their employers, and those on limited duration contracts.

How is employment divided between limited-duration contracts and permanent employment, and across what sized firms? ¹								
Firm size								
	1	2-4	5-9	10-19	20-49	50+	Do not know	Total
Number of employees by mode of employment								
Limited duration	20,881	79,826	130,678	208,521	238,061	471,873	79,586	1,229,427
Permanent	199,478	332,197	606,055	1,061,866	1,314,846	3,053,109	261,918	6,829,469
Unspecified	40,922	80,288	98,444	109,786	150,247	249,824	50,649	780,159
% on limited duration ²	9	19	18	16	15	13	23	15

Sources: StatsSA; Prof Neil Rankin

1. This table reflects those employees who have a written contract.
2. The proportions cited here have been calculated by excluding the "unspecified".

Over 1.2m people – at a minimum – are on some sort of limited duration contracts. Proportionately, the available information suggests that some 15% of the workforce is employed in this way. Once again, the use of such employment is biased towards smaller firms.

The information presented on the relationship between atypical work and firm size in the above tables is significant for two interconnected reasons. Firstly, it demonstrates that part-time work is a substantial part of the contribution to employment that smaller firms are making. Secondly, it shows that part-time employment is part of small firms’ business models. It is widely recognised internationally and in South Africa that smaller businesses are the key creators of jobs – but it must be understood that does not necessarily imply full-time employment for all workers engaged.

Differences in terms of service between part-time employees and their full-time colleagues on the one hand, and between contract and permanent employees on the other, are clearly borne out by an examination of pension and medical aid benefits provided. (It is to be noted that data on these benefits exists and can be measured, but, in practice, permanent and full-time employees enjoy many other benefits that atypical employees do not – a consideration which would further escalate personnel costs.) There is a direct correlation between the likelihood of receiving such benefits and an employee’s permanent and/or full-time status. Equally stark is the relationship between these benefits and the size of firms: full-time and permanent employees in large firms are best served by benefits overall, in relation to part-time and contract employees in similar firms and in relation to those in smaller firms. This speaks, once again, to the economics of small business: smaller firms do not have the resources to provide benefits on the scale of larger ones, and need to be particular careful about managing their personnel costs. For many, additional costs can mean the difference between viability and closure. It should be noted that the relationship between size and benefits raises the interesting subsidiary question of whether the policy framework is conducive to the growth of firms. Successful small businesses tend to grow, and in so doing, generate employment – and tend also to be in a position to offer better terms of service.

What does this imply for the overall labour market, should the amendments be passed?

We assume that benefits account for around 25% of the cost-to-company of the personnel expenses, and a wage elasticity of 0.7 is constant across all types of workers. Raising the costs of contract and part-time work can be expected to cause a noticeable shedding of jobs among workers so employed. The table below shows the job losses that can be expected, based on the data presented above:

Projected job losses by firm size								
Job losses	1	2-4	5-9	10-19	20-49	50+	Do not know	Total
Part-time ¹	54,956	22,654	11,414	13,202	9,014	18,052	4,482	133,774
Limited duration	3,654	13,970	22,869	36,491	41,661	82,578	13,928	215,150

Note: Figures should add up horizontally, but may not, as each represents a calculation done from the original figures.

1. These refer to employees working 28 hours or less, in other words, more conservative figures.

The job losses projected in the table above are not necessarily cumulative, as there is likely to be some overlap between part-time and contract workers. However, this suggests that, at the very minimum, 215 150 jobs will be lost as a direct consequence of this amendment. The actual figure is likely to be in the region of a quarter of a million upwards.

The 2010 RIA noted that the increase in labour costs would likely result in some portion of the atypical workforce gaining improved and more secure employment – some contract and part-time staff could expect their positions to be converted into full-time, indefinite jobs. However, this would be at the cost of significant numbers of other workers who would lose their jobs altogether. Those affected will, in the main, be the most vulnerable and insecure in the labour market: in particular, they are African women, particularly those with fewer skills (not educated to matric), at the beginning and end of their working lives.

These are existing jobs that will probably be abolished or converted into far fewer full time indefinite jobs, denying an income and position in the labour market to very substantial number of people. There will also be considerable knock-on effects, since many – if not most – of these newly redundant workers have dependents, whose livelihoods will be threatened. This is especially so given the profile of those in atypical employment, many of whom are single parents or sole-breadwinners from our poorest communities.

An attempt to enforce equal benefits will likely further aggravate the problem of youth unemployment. Many atypical employees (particularly those employed on a temporary basis) are young, and at the start of their careers. The potential consequences – a further bar on entry to the workforce – were pointed out in the 2010 RIA:

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 the account the difference in skills and experience between these employees and others 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.

Increases on actual rates of pay

The amendment (Basic Conditions of Employment Act s55(1)(4)(b)) proposes that the Minister be given the power to provide in Sectoral Determinations for increases on actual rates of pay. At present, the Minister is empowered to prescribe increases on minimum rates of pay. This is typically set at the Consumer Price Index (CPI) or CPI + a percent, which is important as it provides a crucial protection to the lowest paid workers in the country. It serves as a floor of earnings, allowing further increases to be negotiated.

This amendment was not subject to investigation in the 2010 RIA. Potentially, the impacts of this amendment are considerable and disruptive to employment. Possibly most importantly, the amendment stands to undermine collective bargaining. Deciding on actual rates of pay is a matter best resolved through negotiations between employers and employees, who are familiar with the circumstances of the industry and the firm, and who will ultimately bear the consequences of the decision. The potential for greater ministerial intervention in this area could further complicate workplace relationships.

Our research has indicated that a failure to distinguish between small and large firms in sectoral determinations place a burden small business at present. Making heightened demands on them – implicit in this amendment – will certainly increase this, and may very well undermine the viability of some small businesses.

The amendment does not specify any top thresholds to be governed by the minister's determination. This is likely to have unintended consequences of benefitting better paid workers disproportionately, and thereby to increase wage gaps. It will furthermore raise personnel costs, possibly to the extent of forcing job losses.

It also creates incentives for businesses to keep pay offers to a minimum, as the risk exists that they will in future be obliged to raise pay regardless of employee performance or economic circumstances. Employers would be likely to respond by attempting to keep pay offers low. This will have the unintended consequence of depressing employees' earnings.

The risks inherent in going ahead with this amendment can be illustrated with reference to the country's employment elasticity of 0.7. Although data on wages is somewhat scanty, we believe this to be illustrative.

We begin by identifying the number of people employed in the various selected sectors, as per the *Quarterly Labour Force Survey*. Next, we attempt to determine what proportion of these would be affected by these changes (this information is in the row entitled “Distribution”). This is important: CPI is assumed to be a natural increase, and a corresponding rise in wages will have no impact on employment. Since it is not entirely clear what proportion of workers would be affected, we offer three sets of assumptions: that 25% of employees earn above the minimum, that 50% of employees earn above the minimum, and that 75% of employees earn above the minimum. We then calculate job losses based on a mandatory increase of CPI+1%, CPI+2% and CPI+3%.

Magnitude of employment losses as a result of mandatory increases on actual pay										
Assumption of increase		CPI+1			CPI+2			CPI+3		
Distribution		75	50	25	75	50	25	75	50	25
Sector	N									
Farm workers	548,410	2,879	1,919	960	5,758	3,839	1,919	8,637	5,758	2,879
Domestic servants	1,130,668	5,936	3,957	1,979	11,872	7,915	3,957	17,808	11,872	5,936
Civil engineering	695,676	3,652	2,435	1,217	7,305	4,870	2,435	10,957	7,305	3,652
Wholesale and retail	2,967,150	15,578	10,385	5,193	31,155	20,770	10,385	46,733	31,155	15,578
Forestry	46,355	243	162	81	487	324	162	730	487	243
Private security	801,510	4,208	2,805	1,403	8,416	5,611	2,805	12,624	8,416	4,208
Taxi industry	486,732	2,555	1,704	852	5,111	3,407	1,704	7,666	5,111	2,555
Total		35,052	23,368	11,684	70,103	46,736	23,368	105,155	70,103	35,052

Sources: Stats SA; Prof Neil Rankin

The implications of the above are that, within these sectors, we can expect a cumulative loss of between 11,684 and 105,155 jobs. It is important to note that these figures do not measure all work in the economy: such an analysis would definitely increase the totals. Moreover, this would not be a once-off loss of jobs; it would repeat (at some rate) every time such a determination was made. In other words, this intervention stands to introduce a recurring mechanism, each time the provision is applied in the sectoral determination, within the economy that will have the unintended consequence of regularly destroying jobs.

Representation Thresholds for Minority Trade Unions and Representative Parties

The amendments (Labour Relations Act, s21 (18)(5), s21, s32(5A), s43(3); Basic Conditions of Employment Act S55(1)(o), S55(1)(p)) propose extending the rights of minority unions. Certain elements – s43(3), S55(o), S55(p) – were included in the 2010 Bill, but none of these was subjected to an RIA.

South Africa's system of labour relations was instituted to engender industrial peace and cooperation through negotiations and a social partnership. To this end, strong parties, able to carry a mandate, are necessary and promoted through a general recognition of the "majority rules" provision.

There is heated debate as to whether the system has been successful in achieving this, but within its own logic, the amendments are counterproductive. By lowering the thresholds for representation, smaller and poorly organised unions are able to participate in bargaining at a level at which they are at present not entitled. It lowers the incentives for responsible, professional and orderly unionism, and increases the incentives for brinkmanship, opportunism and industrial conflict. Indeed, it holds potential not only to generate conflict between business and labour, but between different unions. As a consequence of this, there is a probability of increased pressure being put on an already overburdened conciliation and labour court systems, both in the number of cases and in the complexity of cases submitted.

Bargaining Council Extensions

Two amendments (Labour Relations Act, s32 (5A), s43 (3)) significantly affect the manner in which wages and terms of service are likely to be determined. In broad terms they empower the minister and statutory councils to extend coverage of bargaining council agreements – for example, by possibly bringing atypical employees into the net – and their net import is likely to be an expansion of the coverage of the workforce by bargaining council agreements.

The impact of centralised bargaining on employment is the subject of a forthcoming paper by Prof Jeremy Magruder at Berkeley University. His research found that centralised bargaining agreements reached through Bargaining Councils are likely to reduce employment in small firms (those with between 1 and 9 employees) by between 7% and 16%, and also that it reduces self-employment by between 7% and 15%. They have no effect on larger firms.

It is estimated that around 22% of the workforce is covered by bargaining councils. With this as a basis, it is possible to make two comparisons: one depicting employment without bargaining council agreements, and one in which coverage is increased to 33%. Using the figures that show the hypothetical situation in which no centralised bargaining agreements exist, it is possible to determine the likely situation after an extension of such agreements. This is represented in the table below, with figures as per the *Quarterly Labour Force Survey*.

Employment impact of extended Centralised Bargaining Agreements		
Actual employment		
Self employment		1,281,241
Employment in firms with 1-9 employees		3,857,026
Modelled employment		
Employment without Bargaining Council agreements	7% impact	15% impact
Self employment	1,300,972	1,323,522
Employment in firms with 1-9 employees	3,916,424	3,984,308
Employment with extension to 33% coverage	7% impact	15% impact
Self employment	1,271,598	1,261,098
Employment in firms with 1-9 employees	3,827,997	3,796,387
Difference between current situation and after extension to 33%	7% impact	15% impact
Self employment	-9,643	-20,143
Employment in firms with 1-9 employees	-29,029	-60,639
Total	-38,671	-80,783

Sources: Stats SA; Prof Neil Rankin

Thus, in the absence of centralised bargaining agreements, it is possible that self employment would stand at over 1.3m, while small firms would employ a further 60 000 to 120 000 people (over 3.9m). By extending bargaining council agreements from the current estimated coverage of 22% to cover 33% of the workforce, however, employment can be expected to fall quite sharply, by between 38,671 and 80,783 positions.

Consistent with the previous trio of provisions, the evidence suggests that the proposed amendment will cost jobs and the brunt of the impact will fall on small businesses.

Concluding Remarks

If South Africa is to deal effectively with its universally acknowledged problems of unemployment and socio-economic marginalisation, the health and competitiveness of its economy – and the ability of its economy to generate jobs – will be of cardinal importance. A key factor in this will be the encouragement that its regulatory environment provides. This is, in turn, largely a function of policy and legislation.

Internationally and domestically, it is recognised that small enterprises are the most reliable creators of employment. The policy debate as to how best small business might be assisted has been inconclusive, but it is recognised that policy could be more effective in doing so. The logical goal to be aspired to is an *optimal* outcome: care should be taken that the regulatory burdens placed on business do not generate negative consequences for the economy as a whole. Indeed, it is noteworthy that, in the prevailing difficult economic conditions, the international trend has been to increase regulatory flexibility with a view to preserving jobs. A healthy regulatory environment is one that encourages business in its productive activities, while at the same time promoting its various social goals, and limiting possible abuses.

A considerable body of research supports the view that its regulatory environment is currently overly burdensome to business, and to small business in particular. In 2004, for example, SBP's report *Cutting the Cost of Red Tape for Business in South Africa* estimated the cost of regulatory compliance in that year at some R79bn or around 6.5% of GDP – by a considerable margin higher than many other countries for which information is available. It is unlikely that this burden has been significantly ameliorated. In 2011, the first instalment of SBP's *SME Growth Index* found likewise that significant proportions of small business owners believed that the regulatory environment was a brake on their ability to expand their operations or their workforces.

The amendments under consideration represent imprudent policy choices. They do not appear to have been subjected to the sort of rigorous examination that South Africa's circumstances and aspirations demand. Most are materially different from those provisions first proposed in 2010. They will fail – if indeed this is their intention – to move South Africa closer to the path of job creating growth. On the contrary, the inevitable result of the measures analysed will be a significant loss of jobs and a constriction of the business environment in South Africa. Our analysis suggests that a "least-worse-case" scenario would be a loss of some 285 000 jobs.

The amendments proposed will moreover make their impacts most notably in two areas where South Africa can least afford it. Firstly, they will damage the prospects of small businesses. These are the enterprises most likely to generate jobs, and at present a insufficiently developed part of the economy. Secondly, they will take a heavy toll of those most vulnerable and marginalised in the labour market – young people and recent entrants to the labour market, women, Africans, and those with lower levels of education. The potential social consequences of such exclusion, with scant hope of any future inclusion, are dire and concerning.

The impact of these changes will be ongoing, limiting job creation at present and in the future. They will also create a dynamic that will not easily be undone, even after its consequences become apparent. They will create a new level of regulation which will be difficult to change in the future. Any future reform to increase flexibility in the labour market and make job creation easier and less costly will have an additional set of regulations to overcome.