MEDIA BRIEFING

BY

THE MINISTER OF LABOUR AND SOCIAL WELFARE IMMANUEL NGATJIZEKO


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Media Practitioners,
Ladies and gentlemen

I thank you for attending today’s briefing on two related laws that our Ministry is about to put into effect. The Labour Amendment Act, 2012 (Act No. 2 of 2012), regulating the employment relationship in the context of labour hire, will come into operation on 1 August 2012 and Part 4 of the Employment Services Act (Act No. 8 of 2011), regulating private employment agencies, and related sections will come into operation on 1 September 2012. Both measures will regulate, among other things, interrelated aspects of the system of labour hire, a form of private employment agency. The Labour Amendment Act will also introduce measures to ensure that the protections of the Labour Act, 2007 (Act No. 11 of the 2007) are available to vulnerable employees in ambiguous or disguised employment relationships.

The new legislation must be understood against the historical background of extreme exploitation of black workers and the current day exploitation and marginalisation of a sector of the Namibian workforce. Before Independence, the regulation of black labour was inseparable from the objectives and modalities of colonialism and apartheid with its system of influx control, passes, native reserves and job reservation. Blacks served as a cheap labour pool for white farmers, mining companies and other white employers. The greatest supply of black labour came through the notorious contract labour system, in which all workers were temporary employees on fixed-term contracts, to be relegated to unemployment on native reserves at the end of the contract. Their status as workers was akin to chattel. Breaking a contract was a crime. Those workers who were not on contract were subject to the common law employment at will, where they could be fired with impunity for any reason or no reason. Black workers did not enjoy the right to form trade unions and to bargain collectively with their employers.

Namibia’s Independence laid the basis to reverse the chattel-like status of black workers and held out the prospect of equality and a better life. Chapter 3 of the Namibian Constitution entrenches freedom of association, including the right to form a trade union, and protects the rights of workers to withhold their labour without
criminal penalties. Article 95, “Principles of State Policy,” enjoins the Government to promote and maintain the welfare of the people by adopting polices that promote sound labour relations, fair employment practices and adherence to international Conventions and Recommendations of the International Labour Organization (ILO). The State is also mandated by the same Article to take action to ensure that workers are paid a living wage adequate for the maintenance of a decent standard of living. Modern labour and employment legislation has been enacted to effectuate the constitutional mandate, in line with international labour standards. This legislation has introduced, among other thing, basic minimum conditions of employment, protection of health and safety at the workplace, and the requirement of fair dismissal. In addition to legislation, the Ministry of Labour and Social Welfare has set as its objective the achievement of Decent Work for all, in line with the Decent Work Agenda of the International Labour Organization.

However, vestiges of the old system are present today, in the form of both attitudes and practices on the part of some Namibian employers, which are not in line with the Namibian Constitution or the labour laws and which hinder the achievement of Decent Work. Taking advantage of high unemployment, labour hire agencies have emerged as a new means of ensuring a cheap pool of black labour. While nominally employed by labour hire agencies, unemployed persons are sent to work for user companies, who pay the equivalent of a rental fee to the labour hire agencies, who in turn pay the workers a portion of the rental (or labour hire) fee. The referred employees are invariably paid less than the regular employees of the user enterprise.

The appeal of labour hire for many “user” enterprises is that, in addition to procuring cheap labour on terms of “no work, no pay”, they are able to contract with the agency to avoid all obligations that the law imposes on employers. Under standard labour hire contracts, the user has no obligation to provide a safe working environment for these employees, to ensure that they enjoy the basic conditions of employment guaranteed by law to other employees or to adhere to the protections against child labour, discrimination or sexual harassment at work. The user can terminate these employees at will with impunity by simply asking the agency to withdraw or replace employees that it does not want, pursuant to their agreement, regardless of the reason. The agency in turn also avoids responsibility for unfair dismissal or benefits
payable upon termination under the “no work, no pay” policy by claiming that the withdrawn employees remain in the “employment” of the labour hire agency, although without jobs and without pay. In the same manner, the user can refuse to bargain with the labour employees simply by disavowing that it is their employer. **The net effect of the afore-mentioned features of the labour hire system is that it maintains a large force of marginalised workers in precarious employment who are trapped in perpetual poverty.** It is no wonder that labour hire is viewed by many as the contract labour system in a new suit of clothes.

The new legislation also addresses the phenomenon in the labour market by which some employers designate ordinary employees as “casual” or “temporary” or as “independent contractors” in order to avoid coverage of the Labour Act, to exclude them from collective bargaining and/or to pay them less than their “permanent” counterparts. Instances have been reported where workers have been employed continuously for 5 or 7 years but are treated as temporaries. Similarly, some employers use renewable short-term contracts as a modern form of employment at will, because the employee need not be terminated. At the end of the contract, the employment is automatically terminated unless the employer decides to renew the contract. Some employees have worked continuously for years on short-term fixed renewable contracts, without recourse to protections against unfair dismissal. protection against unfair dismissal is avoided. **Like labour hire, these practices produce a force of low-paid vulnerable workers without legal protection enjoyed by other workers, who are trapped in poverty.** Such practices also contribute to the extreme income inequality that plagues our nation.

I will summarize now the main features of the legislation adopted unanimously by both houses of Parliament to address the problems that I have just described. As mandated by Namibian Constitution, these statutes are based upon international labour standards established by ILO Private Employment Agency Convention 181 of 1997 and ILO Recommendation 198 of 2006 on the Employment Relationship.

**The Labour Amendment Act 2012 (Act No. 2 of 2012),** which will come into effect on 1 August 2012, replaces in full, the original Section 128 of the Labour Act, 2007 (Act No. 11 of 2007). The original provision made the practice of labour hire a crime.
The Supreme Court declared this provision to be unconstitutional in the case of Africa Personnel Services (Pty) Ltd v Government of the Republic of Namibia and others. The court accepted the position advanced by APS and the Namibian Employers Federation that the proper way to address the problems of labour hire would be through appropriate labour market regulation, rather than by outlawing the business of labour hire agencies. The new Section 128 regulates the employment relationship in the context of labour hire.

**Under the new Section 128:**

- Every enterprise (“user enterprise”) that utilizes the labour of employees placed by a private employment agency, including a labour hire agency, assumes all obligations of an employer in terms of the law with respect to these employees;

- Every employee placed by a private employment agency with a user enterprise has the same rights and duties in relation to the user enterprise as any other employee in relation to his or her employer, including the guarantee of basic conditions of employment, of safety and health at the workplace and protection against unfair dismissal.

- Employees placed with a user enterprise shall have the right to join trade unions and to bargain collectively with the user enterprise;

- Employees placed by a private employment agency with a user enterprise shall enjoy terms and conditions of employment that are not less favorable than those enjoyed by current employees of the user enterprise who perform the same or similar work or work of equal value;

- A user enterprise may not differentiate in employment policies or practices between current employees and placed employees;
A user enterprise may not hire persons through a private employment agency during or in contemplation of a strike or lockout or within six months after a retrenchment to perform the same or similar work or work of equal value of current or retrenched employees;

Remedies for violations are available through arbitration before the Labour Commissioner;

Criminal penalties of a maximum fine of $80,000 or maximum imprisonment of two years or both have been introduced for violations relating to differentiations in wages and employment policies and hiring of such employees during or in contemplation of a strike or lockout or within six months after a retrenchment.

Employers may apply to the Minister for exemption from part of Section 128.

I emphasis here that the Labour Amendment Act 2012 does not prohibit, but rather regulates the practice of labour hire. A private employment agency and a user enterprise are free to enter into a lawful commercial agreement that is consistent with the new regulatory scheme.

**Part 4 of the Employment Services Act, 2011 (Act No. 8 of 2011)** and several related sections of the Act, will come into effect on 1 September 2012. Part 4 requires that all private employment agencies, including labour hire agencies and employment agencies that match jobseekers and employment vacancies, must obtain a license from the Employment Services Bureau of the Ministry of Labour and Social Welfare in order to operate. Private employment agencies must file applications for such licenses no later than 28 February 2013. Additional key features of the new law are:

A private employment agency may not charge fees to employees whom it places, nor may a user enterprise deduct money from the remuneration of placed employees to recoup placement fees that it has paid;
Several obligations are imposed upon private employment agencies in referring employees, including:

- The duty not to discriminate in advertising of positions for employment placement and in recruitment and referral;

- A prohibition against referring employees to a user enterprise that has not complied with a compliance order issued by a labour inspector in terms of the Labour Act, 2007 or is not in good standing with respect to Social Security contributions or is a designated employer, but is not in possession of a certificate of compliance issued by the Social Security Commission;

- An obligation not to place individuals with a user enterprise unless the user enterprise promises to ensure that placed employees shall have terms and conditions of employment that are not less favourable than those applicable to the user’s incumbent employees performing the same or similar work or work of equal value.

- A prohibition against placing employees with a user company during or in contemplation of a strike or lockout or within 6 months after the retrenchment of employees.

- Criminal penalties to a maximum fine of $20,000 or two years imprisonment or both will be imposed for violations of the above requirements.

Amendments addressed to the status of an individual as employer, employee or independent contractor

The issue of whether or not an individual fits within the definition of “employee” contained in the Labour Act, 2007 determines whether he or she is covered by the
Act and is entitled to the rights and protections that it confers. The determination of whether or not an individual is an employee is based upon the particular facts in a given situation.

The Labour Amendment Act, 2012, also contains several new sections that provide guidance as to how to determine, in doubtful cases, whether an employment relationship exists. This is to afford protection to employees in disguised or ambiguous employment relationships, and to strengthen protection of employees subjected to fixed-term contracts.

Section 128 A sets forth a list of specific indicators that can establish that an individual working for another person is an employee protected by the Labour Act of 2007, regardless of his or her job title or designation:

- the manner in which the individual works is subject to the control or direction of that other person;

- the individual’s hours of work are subject to the control or direction of that other person;

- in the case of an individual who works for an organisation, the individual’s work forms an integral part of the organisation;

- the individual has worked for that other person for an average of at least 20 hours per month over the past three months;

- the individual is economically dependent on that person for whom he or she works or renders services;

- the individual is provided with tools of trade or work equipment by that other person;

- the individual only works for or renders services to that other person;
- **Section 128 B** confers powers on the Minister of Labour and Social Welfare, after consulting with the Labour Advisory Council, to deem any individual to be an employee for the purpose of affording protection of the whole or part of the Labour Act, 2007;

- **Section 128 C** establishes a legal presumption that any employee, including an employee on a fixed-term contract, is hired for an indefinite period of time in the absence of the employer’s good faith business justification for fixed-term employment. This will afford added protection to employees hired on fixed-term contracts in the event of a dispute. However, employers who hire short-term employees on fixed-term contracts for legitimate reasons, such as the need to hire employees for a specific project, or to increase the workforce during a peak period or reduce it during a slow period, need not be concerned. **They can continue to conduct their business as usual, consistent with the other provisions of the Labour Act.**

I note that Sections 128A, B, and C not only conform to ILO Labour International Standards, but are virtually identical to long-standing provisions contained in South African labour laws. As confirmed by the ILO, such provisions are also found in the laws of various other countries.

It is my considered opinion that the implementation of the new laws will enhance fairness at the workplace and social justice, will contribute to the goal of Decent Work and the objectives of NDP4 of creating sustainable employment and reduce income inequality.

**Media Practitioners**

**Ladies and Gentlemen**

In the past two weeks, Namibian Employers and Workers have been expressing their views on the new legislation.
I wish to remind you that these new laws have been on the drawing boards for many years and in the past have been subjected to extensive consultation with our social partners. After the Supreme Court judgment in the APS case, the provisions embodied in the Labour Amendment Act have been under discussion since early 2010.

The National Union of Namibian Workers (NUNW) and the Trade Union Congress of Namibia (TUCNA) have demanded that the Ministry implement the laws as planned. This is consistent with their respective positions of support since the Bill was sent to the Labour Advisory Council.

It is noteworthy that the Namibian Employers Federation never in the past expressed opposition to Sections 128A, B and C. Its sole opposition to the new Section 128 was an assertion that the new provision banned labour hire. Anyone who reads the provision will find that this is not the case. It is equally noteworthy that the Namibian Employers Federation: remained silent when the Labour Amendment Bill was debated in Parliament last year and early this year; remained silent when the Bill was adopted unanimously by Parliament in February; remained silent after the Act was signed into law by His Excellency President Pohamba on 12 April; remained silent after His Excellency the President announced on the first of May that the Act would soon be put into operation; remained silent after notice appeared in the Gazette almost three months ago announcing the 1 August implementation date. All of the Government’s actions were in the public domain. But the NEF remained silent until only two weeks ago.

Shortly before the announced implementation of the new law, the NEF unleashed what can unfortunately only be described as a disinformation campaign intended to frighten employers and to hold the Namibian nation hostage. It has distorted the provisions of the law to scare employers into believing they may no longer hire temporary employees, that all current temporaries must be converted to permanent, and that contractors will become the employers of the employees of their subcontractors on 1 August. Because such assertions are obvious distortions of the
law, the NEF has adopted as a broad fallback position that the language of the Act is “too vague.”

Despite the lateness of its campaign, I invited the NEF to voice its objections to the Act in detail, so that we could address them concretely. Initially, the NEF sent the Ministry an extremely vague and purely ideological letter, which concluded by asking the Ministry to scrap the current Act adopted by Parliament. The NEF included a letter from one of its affiliates, the Agricultural Employers Association, which both insulted agricultural workers and intimated that time was needed to hire advisors to find ways to transform all farm workers into independent contractors. The NEF claimed, as it often does when Government attempts to strengthen protections of workers, that the new law was certain to cause unemployment, would scare off investors and would result in social instability. We then forwarded to the NEF a list of questions in a second attempt to focus on the concrete perceived problems, in preparation for an urgent meeting between the Ministry and the NEF. After receiving their second communication, we also reviewed the Act in detail with Government legal drafters, who reaffirmed the propriety of the language employed in the Act.

At the urgent meeting with the NEF last Friday, whose delegation consisted of three employer representatives and the NEF Secretary General, the Ministry’s top management discussed all expressed concerns in detail and attempted to allay their fears by presenting a straightforward explanation on the key provisions in order to eliminate the distortions. Based on the comments expressed by two of the employers, we were under the impression that their misconceptions had been eliminated and that they were prepared to work with the Ministry to implement the Act. No mention was made at the meeting of either delaying implementation or scrapping the Act. It was our impression that meeting was very useful to both parties. We informed the NEF delegation that we were prepared to meet with any of the individual employers who needed further information or clarification. Several such meetings are now scheduled as from tomorrow. It is therefore quite surprising to read in one of the local newspapers that the NEF Secretary General stated that “nothing came out of the meeting.”
During this two-week period, we have asked ourselves whether the Namibian employers have any idea of the conditions under which their lowly-paid and marginalised “casuals”, “temporaries” and “independent contractors” must live. Have they been to Babylon, Okahandja Park or Ombili. Have they every considered how the meagre wages that they pay these employees, without pension, medical benefits, transport and housing allowance is stretched to provide food, shelter, clothing and other basic needs for a family? Have they questioned whether they are contributing to the high rate of malnutrition among young children or to the high income inequality between rich and poor. Do they seriously contend that implementing a law to afford a greater degree of justice and equal to these workers will threaten the social stability of Namibia? Do they seriously contend that investors coming to Namibia to exploit its uranium, copper, oil and diamonds or other natural resources will stay away because of Namibia’s commitment to Decent Work? I am of the opinion that these modest measures to advance Decent Work and eliminate abuse and exploitation of workers will ensure greater social stability and greater productivity in the interest of the entire nation.

Our Ministry stands ready to provide further information or explanation concerning the new laws.

I encourage all stakeholders to accept and comply with these laws in the interest of fairness, harmonious labour relations and national economic and social development.

I thank you.