



# **AMERICAN CHAMBER OF COMMERCE**

## **IN SOUTH AFRICA (NPC)**

27 June 2012

### **AMERICAN CHAMBER OF COMMERCE (AMCHAM) SUBMISSION TO THE PARLIAMENTARY PORTFOLIO COMMITTEE ON LABOUR REGARDING THE LABOUR RELATIONS AMENDMENT BILL AND THE BASIC CONDITIONS OF EMPLOYMENT AMENDMENT BILL**

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#### **1. Background**

The American Chamber of Commerce in South Africa (Amcham) represents 270 American companies in South Africa, 60 of which are Fortune 500 companies. These companies contributed over R9 billion to the South African economy in 2011.

Amcham supports the aims and ambitions of the New Growth Path (NGP) which states that the NGP must provide bold, imaginative and effective strategies to create the millions of new jobs that South Africa needs. Amcham strives to assist to position South Africa as a globally competitive destination for Foreign Direct Investment. The New Growth Path in conjunction with the National Development Plan looks at job creation as a key element in achieving growth of the South African economy. We laud the South African government's

stance that it has a critically important role to play in accelerating social and economic development through the effective regulation of markets and also recognise the role of the private sector in assisting the South African government to reach its goals.

It is with this mindset that Amcham is commenting on the Labour Amendment Bills 2012 and we thank the Department of Labour and the Parliamentary Portfolio Committee on Labour for this opportunity.

## **2. Introduction**

It is the principal mission of the American Chamber of Commerce in South Africa to facilitate trade and investment between the United States and South Africa and to attract American businesses to invest in South Africa. In order to successfully carry out our mandate, South Africa has to be a country that is attractively positioned for Foreign Direct Investment. Many countries are competing for limited Foreign Direct Investment and it is important that South Africa is competitively positioned.

It is when we consider that South Africa ranks 95<sup>th</sup>/142 countries in labour market efficiency, 138<sup>th</sup>/142 in terms of rigid hiring and firing practices, 138<sup>th</sup>/142 in wage determination by companies, and 138<sup>th</sup>/142 in terms of tension in labour-employer relations<sup>1</sup> that it is clear that South Africa does not provide a 'business friendly' environment in terms of labour cost and flexibility. South Africa is amongst the lowest ranked countries in regard to labour market efficiency.

## **3. The Labour Amendment Process**

Intensive negotiating around the proposed amendments took place at NEDLAC during 2011, and this resulted in a report which was not signed off by all the parties, as is required in terms of the NEDLAC guidelines. In addition, it is noted that a Regulatory Impact Assessment has not been carried out in terms of the proposed amendments and this omission is of grave concern. We submit that the following questions should be addressed:

- i) To what extent will the amendments push up the cost of labour?
- ii) Will the amendments increase or decrease employment opportunities?
- iii) Will barriers to employment be increased or decreased?
- iv) Will the reforms create certainty or uncertainty in the labour market?

## **4. What principles should be considered when considering the labour amendments?**

It is questionable whether any serious corporate citizen wants to see a diminution of workers' rights or that South Africa should not be seen as a country where fair labour practices are evident. The dignity and respect of individuals in the workplace is and should be supported through FAIR labour practices.

The principles that are important to employers when considering labour issues include the following :

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<sup>1</sup> World Economic Forum: **The Global Competitiveness Report 2011-2012**; Centre for Global Competitiveness and Performance; World Economic Forum, SRO-Kundig, Switzerland, 2011, pg 322-323

#### **4.1 Whether dismissal routines are made more complex or difficult;**

Current labour legislation allows for an employer to retrench employees who refuse to accept changes to terms and conditions of employment. It is stressed that employers must still satisfy the requirements of Section 189 and that remedies for unfair retrenchment are available to employees.

The labour amendments propose to close this aspect and prohibit retrenchment. In other words, individual employees can resist change, no matter how justified, and insist on the *status quo* retention. The only effective tool that the employer will have is to resort to lockout.

The proposed amendments severely curtail the flexibility of employers to effect workplace changes and removes the only tool currently available with which to do so. This contributes to the rigidity of the labour laws.

#### **4.2 Whether the employer's ability or capacity to employ temporary workers is restricted or eased;**

Amcham submits that the regulation of temporary employment services is welcomed. Temporary work which is offered through temporary employment services is an accepted global practice as companies require flexibility in order to serve their markets at a cost effective price and then to be able to rein in the labour costs when the market in that product is not in demand. Without this flexibility many businesses would have to close.

The changing world of work is increasingly requiring the use of flexibility in the global market. In order to remain competitive companies bring in specific skills, for specific jobs, in "just in time". The nature of these employment relationships varies, but most are referred to as "a-typical". Business has turned to Temporary Employment Services to manage the sourcing, recruiting, assessing and administering of flexible labour. South Africa is no different to the rest of the world.

This more flexible labour model can be balanced to secure the needs of both the employer and employee through effective regulation and the availability of suitable social protection schemes.

Typical cases where business has to employ temporary workers are cyclical industries such as holiday retail sales, hospitality services, agriculture and horticulture.

We recommend that a task team should be constituted to draw up regulations to administer the temporary employment services industry. Regulation should look at the following:

- i) Providing tariffs to guide the maximum percentage that temporary employment services can charge when hiring out employees; and

- ii) Be controlled by an official Regulatory Body which will allow for temporary employment services to be registered and monitored.

**4.3 Whether there is an increase in centralization or decentralization of union power;**

The existing Act seeks to promote strong trade unions and majoritarianism. The proposed amendment allows for a decrease in thresholds for the purposes of recognition of unions and extends bargaining units to cover wider nets of employees. It is suggested that the former will encourage the multiplicity of unions and this in turn might undermine the principle of majoritarianism.

The amendments could lead to situations similar to that of the turbulence created by the clash between the Association of Mineworkers and the Construction Union recently that resulted in a six week strike that halved the income of the employer, Impala Platinum, in the first quarter of 2012. The clash resulted in job losses and the deaths of four workers.

**4.4 The possible impact on labour relations, and in particular, whether this terrain has become more hostile or more productive;**

Current legislation requires that the Unions are obliged to conduct pre-strike ballots. Despite this, only one in eight major strikes in 2011 respected this principle. The failure to hold such ballots can be seen as a major source of strike related violence and the incidence of industrial action.

The proposal to entrench the practice of pre-strike ballots is welcomed.

For the same reason, the proposal to link the right to picket with orderly conduct is welcomed and necessary.

**4.5 Labour productivity – will this increase or decrease;**

It is felt that the proposed amendments will push up the cost of the least skilled labour without any reference to productivity and experience. This will result in a higher cost of doing business in South Africa.

**4.6 Industrial Action - will this reduce or increase in intensity**

The amendments propose that Employers can be held jointly and severally liable along with temporary labour employers for unfair labour practices. This process will unnecessarily expose employers, for reasons that could be entirely out of their control, to labour disputes. There will be both direct and indirect costs associated with this step. This should be carefully investigated to ensure that the law does not have unforeseen consequences.


#### 4.7 Dispute resolution – will this become more expeditious and less costly?

Employers will be able to dismiss high earners earning above R1 million per annum more easily with a three month pay settlement being the only requirement. Although business does call for more flexibility in hiring and firing of workers, it is questioned why this principle only applies to very high earning workers and not across the board. It is inconceivable that the law provides for workers to be treated differently.

#### 5. Conclusion

We are of the opinion that the proposed Labour Law Amendments move in the opposite direction to that which is required to grow jobs. The proposed amendments will destroy jobs, and exacerbate the current jobs crisis. They will impact on South Africa's competitiveness and the fight to attract scarce foreign direct investment will be lost.

We call on government to implement a Regulatory Impact Assessment prior to these amendments being gazetted, so that we are sure that they will not put South Africa at the very bottom of the WEF rankings in terms of labour rigidity. It is time that we turn our focus away from protecting the 2.72 million unionized workers<sup>2\*</sup> who are the key beneficiaries of the proposed amendments to the 4.244 million people who are unemployed.<sup>3</sup> This should be our focus.

  
PP Donna Oosthuysen  
President

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<sup>2</sup> South Africa.info: [Trade Unions in South Africa](http://www.southafrica.info/business/economy/policies/tradeunions.htm),  
<http://www.southafrica.info/business/economy/policies/tradeunions.htm>

\*Congress of South Africa Trade Unions (COSATU) and affiliates: 1.8million worker, Federation of Unions of South Africa and affiliates: 520 000 workers, National Council of Trade Unions and affiliates: 400 000 workers

<sup>3</sup> Statistics South Africa: [Quarterly Labour Force Survey: Quarter1, 2012](#); Statistics South Africa, 2012