# AMERICAN CHAMBER OF COMMERCE

IN SOUTH AFRICA *(NPC)*

**27 September 2013**

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

The American Chamber of Commerce (Amcham) consists of 250 American multinationals who are registered to do business in South Africa. An economic survey consisting of a sample of 80 of the biggest American multinationals in South Africa indicated that these multinationals contributed a combined total of R233 billion to the South African economy in 2012 and employ 150 000 employees (directly and indirectly). R445 million was spent on corporate social investment during that year, and R500 million was invested on skills development with an additional R320 million being spent on training. These amounts exclude the 1,5% skills development levy that benefits the South African workforce.

American multinationals in South Africa are collectively working to address unemployment, poverty and inequality by sustainably investing in the economic growth of South Africa.

Amcham is pleased to respond to the invitation by the portfolio Committee to comment on proposed amendments to The LRA and BCEA. We refer collectively to these proposals as The Amendments.

Amcham submitted a position paper on similar amendments in June of 2012. That submission is attached for ease of reference. The submission made then remains applicable today although the details thereof are not repeated at this stage.

The principal mission of the American Chamber of Commerce in South Africa is to facilitate trade and investment between the United States and South Africa and to attract American businesses to invest in South Africa. American business has had a long presence in this country and adopted best practice on issues such as affirmative action and socio-economic development long before these initiatives took on legislative form.

In this submission, Amcham's comments on the Amendments are firstly made from an umbrella perspective and thereafter various specifics are addressed.

The 3 major ills facing our country are unemployment, poverty and inequality. Employment and job creation are the keys to poverty reduction and a more equal society. Reduction in poverty and inequality can only be obtained with sustained increases in employment and human capital investment. In broad terms one third of the economically active population is unemployed, one third under-employed in the informal sector and the balance is in formal employment.

South Africa can be termed as a mid-income economy. It is no longer a low cost-low wage economy which can compete with the high volume-low price producers in Asia and the Far East. Simultaneously, South Africans are not sufficiently skilled or productive to compete with the industrialised countries such as the North Americas and parts of Europe.

South Africa's small to medium size employers are potentially best placed as creators of jobs. Not only are they relatively labour intensive but they are also sensitive to rising labour costs and labour market rigidity.

Recent foreign trade missions from the United States to South Africa see labour laws, labour relations tensions and skills shortages as major obstacles to foreign direct investment and a key influence for them to establish a foothold in Africa elsewhere than in South Africa. The Amendments under discussion will not, we feel, alter this trend.

Against this background, Amcham has the following concerns about the thrust of The Amendments:-

- The direct and indirect cost of employees in the formal sector will rise. In turn this will present a major barrier for those in the informal sector and those who are unemployed to access jobs in the formal sector. Forty two percent of our fellow citizens who have less than 12 years of schooling are unemployed. Increasing the entry wage will make it more difficult for the under-skilled to obtain decent work and development in the formal sector.
- There is little potential in The Amendments to predict a reduction in inter-union rivalry, an improvement in collective bargaining processes and outcomes (The Amendments address aspects of this in the context of bargaining councils only), the promotion of democratic pre-strike procedures and an easing of tension/violence on picket-lines and strikes in general.
- Working with and embracing change in organisations increases competitiveness and therefore job creation. The proposed change to section 187 potentially counters the desirability for collaboration over change and effectively gives unions the tool by which to veto change. The right to strike is already available to unions in cases of disputes of interest.
- The world-wide practice and growth in atypical employment is the result of numerous factors which combine together for flexibility and ease of administration, amongst other factors. India for example has similar legislation on labour broking and subcontracting compared to The Amendments and this is one of the major reasons advanced for the lack of job creation in the formal sector in India since 1994.

In summary and in relation to the points made above, the American business community is concerned The Amendments will:

- increase barriers of entry to the formal sector
- hamper job creation
-increase the direct and indirect costs of employing people
-decrease South Africa's competitiveness and reduce foreign direct investment
-are contrary to the recommendations found in the National Development Plan and
-are dismissive of the social dialogue of the Nedlac process.

The points above overshadow other aspects of proposed changes which can be seen as positive.

Attention is now directed to some of the specific proposals found in The Amendments. Our concerns lie in cost implications, potential uncertainty and perhaps unintended consequences. This input is not made in any specific order.

The Committee is invited to consider the following:-

1. What are the estimated cost implications of The Amendments for Temporary Employment Services and their clients? What impact is this expected to have on employment levels? Has consideration been given to the phasing in of financial implications over time?
2. Provision is made for organizational rights for minority unions in certain instances. See section 21 (8). Will these rights overturn an agency shop in favour of the majority union? Will minority union members remain bound to the extension of collective agreements made with the majority union, say, on wages or will the minority union be able to embark on a protected strike over wages in these circumstances?
3. Amendments to Section 22 offer the prospect of union representation of employees assigned to clients. What will be the status of collective agreements concluded with such a union? Will these agreements trump or be trumped by the proposals in section 198?
4. The Labour Court can intervene in the power play of industrial action under section 69(12). What are the implications for the status and reputation of the courts when this occurs? What are the implications should a party side-step such a court order as has happened with interdicts in respect of unprotected strikes? What happens to the underlying dispute when the court orders the suspension of industrial action? Has consideration been given to interest based arbitrations in these instances?
5. The basis for the court's intervention in industrial action is 'just and equitable'. In the power play of industrial action the intent is to apply economic pressure. When and in what circumstances does the tipping point occur? This is potentially an area of uncertainty and could lead to more difficulties than are solved. Will the failure for example to conduct a pre-strike ballot as is required in terms of all unions' constitutions satisfy this just and equitable standard? Incidentally, the omission of pre-strike ballots is seen as a major contributor to strike related violence.
6. The expeditious and cost effective resolution of labour and employment disputes is to be encouraged. The existence of institutions and processes to achieve these goals influence foreign investment. The proposed change to section 145(8) could undermine the record and reputation of South Africa's legal system. The provision for security as a pre-condition to reviews is one-sided as it applies to employers, presupposes that all employers are intent on delaying or frustrating the implementation of awards and could be contrary to the Constitutional right of access to courts. There are other ways in which to address the abuse of court processes such as cost awards.
7. The protection of whistle blowers is necessary and desirable. Truncating the disciplinary/dispute processes into an arbitrated inquiry under section 188A is to be welcomed. We do not see the inability to challenge a related suspension in the same light and recommend that suspensions should be subject to a separate test as an unfair labour practice given the impact that a suspension has on the employment relationship and reputation of the individual.
8. The extension of time for consultations under section 189 is one-sided and appears to be predicated on the view that employers alone act unreasonably in retrenchment consultations. The proposals are silent on the procedure to challenge the decision of an employer to grant an extension in this regard and the impact that this could have on retrenchment processes. Again the proposal opens the door to uncertainty. A trade union that effectively avoids joint-consensus seeking consultations could trigger a call to extend

the consultation time-frame and be rewarded with an extension whilst the employer's refusal to grant an extension is adjudicated.

9. We are of the view that section 189A(19) should be retained. The deletion thereof will rekindle the debate over the courts' role in assessing the substantive fairness of retrenchments. This in turn will lead to further uncertainty and add to the cost of retrenchments at the expense of, say social plans to ameliorate the consequences of dismissals.
10. Attention is made to the proposed changes to section 198, including the new sections of 198A-D. Mention has been made earlier in this submission of the desirability to assess the impact of the sections on employment levels given the higher payroll costs and the potential barriers that the provisions may create to employment. Mention was also made of the phasing-in of increased costs. It is suggested that consideration be given to using the exceptions found in section 198B (4) to all the sub-sections under section 198. There are a number of practical concerns which deserve further attention so as create certainty and ease of application/interpretation. What will happen where an individual's remuneration fluctuates below and above the threshold? What if there are no other persons who perform the same or similar work? How will the standard of 'no less favourable' apply where employees doing the same or similar work are remunerated differently? Will the benchmark salary be the minimum or average remuneration of the comparators? The cost of benefits is often shared between the parties and participation in a benefit scheme could thereby reduce take-home pay because of deductions for the individual's contributions therefor? What will happen where an individual say, on a fixed term contract, was paid a premium relative to permanent staff to allow the former to acquire benefits privately? How will these sections apply where there is a collective agreement on wages etc. for employees covered by the various sections?
11. Laws and regulations, which impact on the workplace, differently define small and medium size employers, for example in the The Amendments, in the Employment Equity Act (EEA) and in Codes of Practice under the BBBEE Act. Consistency of these definitions is both useful and desirable. It is recommended that the definition in the EEA of a large employer as one with 150 employees be adopted.

The questions raised in our submission will hopefully find favour with the Committee and help with the accurate design and implementation of changes to the LRA. Amcham members, whilst cognisant of the desire to promote decent work, are also mindful of the urgent need to grow jobs in the formal sector, reduce the administrative and indirect costs associated with employing persons and to decrease or remove uncertainties in labour/employment laws. Employers create jobs and there is a balance to be had in combining the needs of employers and employees. The labour relations terrain has changed dramatically since the publication of the initial amendments to the LRA and other labour laws. These are mentioned above and in our view do not receive attention in the latest draft changes; reducing the tensions and rigidity in labour and employee relations is an imperative to attract investment and generate real jobs.

The Chamber is available to meet with the Committee to clarify any of the issues raised herein. The Amcham submissions that were submitted of a year ago are attached.

**Jeff Nemeth**
**AmCham President**
**27/09/2013**