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Basic Conditions of Employment Act (BCEA)

Submission by the Free Market Foundation
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This submission is in two sections, the first of which deals with general principles of law and economics and the second of which deals with specific proposals.

1. General Principles

The discourse on labour law and policy tends to focus on details at the expense of basic truths. Arguably, the only "law" of economics that is incontestable is that "there ain't no such thing as a free lunch" (TANSTAAFL). The implication of this law is of critical importance in South Africa since it is seldom acknowledged, especially in the context of labour. An inescapable fact is that all benefits have costs and that the benefit of improved working conditions, wages and job security is achieved by having fewer jobs, less investment, lower growth, substitution of technology for labour, and worse conditions for all non-formal employment. President Zuma has declared job creation as the leading national priority. Economic theory and the world's experience suggest that all the jobs he envisages can be created with relative ease and certainty. The challenge is not how to increase employment, but whether the government is willing politically to implement measures that will do so.

The measures necessary to increase employment are mercifully straightforward yet lamentably difficult to achieve politically. Laws and policies that increase the cost, risk and difficulty of employing people, as the proposed measures do, necessarily have benefits for a privileged few at the expense of the unemployed and prosperity in general.

Given the priority of job creation, our proposal is that the existing measures should not be considered for implementation in isolation, but that the government should undertake a comprehensive review of laws and policies, and retain only those that will reduce unemployment immediately and improve working conditions, incomes and job security by virtue of increased demand for labour rather than draconian legislation.

Increased demand for labour, namely conditions that promote capital formation, skills, and the desire for hiring more employees, is the only sustainable means of achieving two otherwise irreconcilable objectives: more jobs and improved working conditions. In a static or low growth economy, one of these can be achieved only at the expense of the other and both can be achieved only under conditions of economic prosperity.

It is therefore recommended that the envisaged measures not be proceeded with. Instead they should be included in a comprehensive response to the President's call for "jobs, jobs, jobs". It is recommended that the government include in such a comprehensive policy review, not only all existing and proposed labour law and policy, but all other measures that are of direct relevance. Such other measures include the proposal repeated by the President in his two State of the Nation addresses, by Minister Ebrahim Patel and others, that there should be a review of laws and policies impacting small business so that it is easier for small business to operate and prosper in general and so that small businesses create more jobs in particular. Comprehensive review of measures to increase employment should consider all disincentives to savings and investment, both by local and foreign investors.

There are two broad categories of policy available to government if it wants to create jobs. The first is to discontinue measures that discourage and penalise employment, and the second is to implement new measures that encourage and reward employment, including self-employment.

There are various provisions in this Bill on which no comment is made because they are regarded as positive or of no significant consequence. Comment has been confined to issues of concern.

2. Basic Conditions of Employment Act (BCEA)

Clause 2 will have the unintended consequence of discriminating against temporary employees because it will become more costly to employ them. In other words, it will benefit people who already have jobs by victimising people who don't. For reasons presented below, its impact on employers will be negligible.

Clauses 2 & 3 (32 & 33a in the Act) are an example of a provision where the good intentions of the legislature are apparent and appreciated, but where the cost to intended beneficiaries may be underestimated. An inescapable fact is that anything that reduces incentives to employ, reduces the likelihood of employment, and anything that raises the effective cost of employment, is offset by employees being paid less or being replaced by technology. It also drives job-creating forms of enterprise out of existence or abroad.

Unfortunately causality is seldom that straightforward in economics. The problem is that there is no way of knowing at whose expense increased costs mandated by legislation occur. Contrary to popular assumption, the least likely person to bear regulatory costs is the one presumed to do so, in this case an employer. Employers are concerned with "rates of return" on their investment or enterprise. No matter what legal burdens are imposed, rates of return soon adjust to be relatively constant over time. This is a simple business principle, which everyone in business economics understands. If you raise or lower the cost of any input, rates of return adjust back to "market-related rates" almost immediately (in competitive markets). We see this happening around us every day. As the rand strengthened, we saw the price of computers, for instance, tumble. If the cost of raw materials goes up, the price of beneficiated products soon follows. There are no mysteries involved and rare exceptions that arise are of no greater significance than that they prove the general rule. This is as true of labour as it is of everything else.

Since rates of return to employers stay the same regardless of the impact on them of cost-raising labour law, you can safely conclude that it is not employers who bear the costs (except to the limited extent that

higher costs result in slightly smaller markets for their goods and services compared to other sectors). Such relative shifts in the size of market sectors occur only if costs imposed on one are not imposed on others. If the minimum wage is multiplied tenfold in the leisure industry and scrapped in the clothing industry, there will still be a relative contraction in the former and growth in the latter, but rates of return will stay the same.

Who then does pay the substantial cost imposed by labour policy, including the proposed amendments? The reason such legislation is popular and seductive is that nobody knows. There is an unpredictable and unknown impact on everyone. Government gets less revenue, consumers pay higher prices, employees get lower pay and fewer benefits, bankers have less profitable financial transactions, managers earn less, less is spent on skills development, there is less philanthropy, exports are less competitive, and so on. The economy in general suffers and individual groups are impacted differentially. The connection between such negative impacts and the law concerned is seldom recognised simply because there is no obvious causal link.

A wise government understands such realities and avoids superficially seductive measures. Instead it looks at the "big picture" and does what is truly in the national interest. It is concerned about and protects the interests of victims even though they do not see themselves as victims, such as, in this case, workers.

This analysis cannot be disputed. It may give the mistaken impression that the "baddie" in the equation is the employer who appears to be the only role player exempt from the unavoidable cost of the proposed law. It appears as if employers simply "pass-on" costs to everyone else in society. The only employers for whom the "rate of return" declines are "marginal" employers who go out of business when uncompetitive markets contract. Most marginal businesses are the self-employed and small businesses that in South Africa are typically black people whom the government wants to advance.

This could lead to the flawed assumption that "something must be done" about less vulnerable businesses which survive unscathed. There is an obvious temptation to find ways of forcing them to bear the costs of well-intentioned measures. Unfortunately, reality does not allow for a solution. The laws of economics mean that investment in business occurs according to anticipated rates of return. There is nothing that can or should be done about this. On the contrary, if government wants more jobs, the laws of economics require it to do precisely the reverse, which is to find ways of increasing the rate of return on employment.

However, it will find that the reverse also does not happen: rates of return do not rise for the same reason that they do not fall. What government policies do is decrease or increase market size. If it lowers costs by reducing rather than increasing cost-raising measures, the market sectors concerned will grow locally and internationally, and if it does so throughout the economy, the country as a whole will prosper.

Clause 4 (34 in the Act) is a relatively minor amendment to the existing prohibition on child labour. The degree to which child labour is an emotive issue, unfortunately makes it difficult to consider the implications rationally. There are many contexts in which children under the age of 15 are legitimately employed, such as child models and actors, and children in family employment. If the law is being amended at all, it should be subjected to a more sophisticated and critical examination, not on whether children may work, but under what conditions they may do so.

Provisions governing child labour are perhaps inappropriately considered to be part of labour policy. It is not at all clear that the BCEA should govern child labour. These provisions are or should be about the protection of children and should therefore be left to the child welfare authorities and legislation.

This is not merely a matter of what is administratively appropriate. Throughout history, laws restricting and prohibiting child labour have been lobbied for by adults not wanting competition in the labour market and child labour laws have had more to do with protecting adults than children. Placing the protection of children in the correct department means that the matter will be approached in the true interests of children and not subverted by the crude self-interest of adults.

As a matter of simple social dynamics it should be appreciated that adults rule the world: they lobby for, formulate and enforce laws. Children on the other hand, are not politically organised, have no voice, and are powerless against supposedly well-intentioned legislation that harms them.

Clause 9 (55 in the Act) sub-clause (g) should have the word "prohibited" scrapped (or suspended pending the comprehensive review suggested above). It is probably unconstitutional since Section 32 of the Constitution secures the right for people to practise their trade subject to regulation, not prohibition. It is in any event inappropriate to prohibit piecework, etc, especially when the top national priority according to the State President is to promote employment.

The literal meaning of the provision is probably not its intention. It provides, for instance, that sub-contracting can be prohibited. Apart from the fact that there should be no prohibition in the context of this clause at all, there should certainly be no possibility of sub-contracting being prohibited.

In the unlikely event that what the clause says is intended, we point out that sub-contractors are also subject to all labour law. There is no ability to escape labour law by sub-contracting. The building in which this submission is being written, probably has many functions sub-contracted or outsourced such as building maintenance, security, catering, cleaning, courier services, and so on. Such sub-contracting is economically efficient, partly because it enables people who sub-contract, and the sub-contractors to whom they sub-contract, to concentrate on their "core functions". It promotes essential specialisation and the division of labour. It would be manifestly absurd for police stations to be forced to employ rather than outsource vehicle maintenance, for instance.

If there are specific contexts in which the government wants to prohibit sub-contracting or temporary employment, it should never be by way of open-ended administrative discretion and always, in accordance with the Constitution and rule of law, by way of unambiguous legislation by the legislature.

The envisaged ability of the Minister to set organisational thresholds is unnecessary in law when the Minister has the right to make minimum wage and related determinations. The Minister is free in good faith and in accordance with administrative law to take all appropriate representations and information into account. It is inappropriate and undesirable to allow for non-representative unions to be elevated by arbitrary law and administrative discretion to the status of representative organisations.

More seriously, to allow for different thresholds for different sectors would clearly not be a law of general application (equally applicable to all) as required by the Constitution and the rule of law. This provision violates basic principles of good law, natural justice and the Constitution.

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