

Flexible employment relations remain possible

It is often alleged that South African labour legislation poses a stumbling-block to investment, entrepreneurship and greater productivity. From this perspective, more flexible labour standards are viewed as the solution to these problems. One has to admit that compliance with all the legislation places a huge administrative burden on smaller employers in particular, but it would be incorrect to blame labour legislation for all the shortcomings in the labour market.

Employers themselves are often the cause of their own inflexible practices and employment conditions because they do not avail themselves of the room for creativity that exists in the legislation. The best and most flexible employment conditions alone will however not result in better labour relations or greater productivity if employers do not pay attention to the purposeful development and proper management of their people. What is required is a combination of greater flexibility and a commitment to sound management practices.

Three key questions need to be asked before somebody's services are contracted, namely: how would the functions performed by the person link up and contribute to the achievement of the business objectives; how can those objectives best be achieved in terms of the type of employment relationship required; and, if an employment contract is decided upon, what would be an ideal set of employment conditions to suit the post and the person? If the answers to these questions have been established, an advisor can be approached to test the ideal against the requirements of legislation and to finalise it in a written agreement. The answer to the first question depends on the unique circumstances of each employer's business. In this article, two of the three options in respect of the type of employment relationship that may be established, namely independent contractors and labour brokers are discussed. In the next two articles, employment contracts and how to gain maximum flexibility from them will be discussed. From the outset, it needs to be mentioned that a combination of all the options is often the best.

A typical independent contractor would be the person who operates his or her own business, who performs functions for various businesses and who delivers a specific result at an agreed fee. One would for example contract a plumber to repair leaking taps in one's home, and a lawyer to draw up one's will. Such persons are not one's employees and consequently labour legislation does not apply to them. The content, conditions and duration of the relationship are established exclusively by the provisions of the contract. The flexibility and benefits offered by such a relationship are obvious. This form of service delivery is however prone to abuse, as regards both labour legislation and income tax.

To protect the lower income groups from being deprived of their basic rights, labour legislation since last year stipulates that the status of persons who earn less than a total of R89 455 per annum, is not determined by their contract only,

but also by the presence or absence of one or more of a number of factors aimed at determining the degree of dependence on a single job supplier. For example, if a person earns less than the stated amount, and the person works mainly for one institution, or is under the control and supervision of that institution, it is presumed that the person is an employee, regardless of what his or her contract stipulates, unless the institution who utilises the services can prove that the person indeed has his or her own business and operates independently. If a person earns more than the stated amount, his or her status is determined by the stipulations of the contract. If the contract thus states that the person is an independent contractor, then that is the person's status, unless he or she can show that the factual situation is different and the contract is in fact a misrepresentation to evade labour legislation or tax. The lesson to be learnt there is that the independent contractor relationship is a convenient way of achieving flexibility, but then it must be ensured that the person concerned is indeed independent and not merely called that to evade legislation.

Labour brokers also offer a very flexible form of service provision, provided that the few warnings below are taken into consideration. According to labour legislation, someone is a broker if the person makes the labour of other people available to a client and the latter pays those people's remuneration to the broker and not to the people directly. The broker is regarded as the employer of the people who deliver the services and is responsible for payment to them, as well as the compliance with all labour legislation that apply to them. The client never becomes the employer of the people concerned and in principle the client may, subject to the stipulations of the contract with the broker, therefore decide how many persons are required, when they are required and may insist on replacement of those who do not perform as desired. The client however needs to fulfil a policing function and ensure that the broker meets the minimum conditions of employment contained in the Basic Conditions of Employment Act and Sectoral Determinations or Bargaining Council agreements that may be applicable to the broker's employees. Failing this, the client is held co-responsible. For this reason, it is recommended that only brokers with a proven good reputation are used, that guarantees be required of them that they comply with labour legislation and other measures mentioned above; and that they are in possession of liability insurance in case the client ever wants to exercise a right of recovery for any amounts that have to be paid due to the broker's failure.

It is also advisable to ensure that the broker exercises sound labour practices and people management seeing that the dissatisfaction of the broker's employees may affect the client. Broker relations also offer a convenient empowerment tool to existing employees when restructuring of business takes place, but then the client needs to ensure that the necessary financial, administrative and people management support services are in place to ensure the success of the new business.

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