



**SUBMISSION ON THE SOCIAL JUSTICE
IMPLICATIONS OF DRAFT NATIONAL LABOUR
MIGRATION POLICY and EMPLOYMENT SERVICES
AMENDMENT BILL 28 MAY 2022**

**Submitted to the Minister of Labour and the Speaker of The National
Assembly**

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TABLE OF CONTENTS

EXECUTIVE SUMMARY	3
(a) Purpose	3
(b) General observations	3
(c) Key guiding principles	4
(d) Key recommendations.....	5
1. INTRODUCTION	7
2. COMMENTARY ON THE DRAFT NATIONAL LABOUR MIGRATION POLICY	8
2.1. Labour migration governance and management	9
2.2. Using accurate and sufficiently disaggregated data for responsive policy design....	10
2.3. Labour migration to and from South Africa.....	11
3. EMPLOYMENT SERVICES AMENDMENT BILL, 2021	13
4. REFERENCES.....	45

EXECUTIVE SUMMARY

(a) Purpose

The purpose of this submission is to provide commentary on the Draft National Labour Migration Policy (Draft Policy) and the Employment Services Amendment Bill (Draft Policy and Bill). The commentary is in response to the invitation by the Minister of Employment and Labour, Hon Thembelani Wálermade Nxesi, for public comments on proposed *Amendments to the Employment Services Act 4 of 2014, Sections 8 and 9 to introduce new provisions on National Labour Migration and related matters* published on 28 February 2022. The submission has been prepared by the Law Trust Chair in Social Justice at Stellenbosch University (CSJ), with input from experts and stakeholders from an Expert Roundtable and a Social Justice Café on social justice and immigration regulation.

(b) General observations

The government deserves to be applauded for the 90 days it allocated for public comment. This is a reasonable amount of time given to the public to engage with these proposed regulatory changes. Also worth applauding is the fact that the relevant government departments and agencies sent representatives to the Expert Roundtable who outlined the context that has necessitated the law and policy reform, the vision behind the proposed changes, and the factors considered in grounding the proposed changes. They also engaged meaningfully with the experts and the stakeholders, which augurs well for the democratic governance goal in the Constitution of the Republic of South Africa, 1996 (Constitution).

The consensus at the Expert Roundtable and Social Justice Café was that law and policy reform was necessary interventions to promote just, equitable and fair participation in employment and informal sector opportunities, while still upholding and advancing relevant human rights. It was agreed that the *status quo* was neither good for social cohesion nor in sync with constitutional and international human rights obligations, particularly regarding social justice in employment and economic inclusion.

However, some of the participants expressed concerns about the risk of the proposed changes and whether they would exacerbate the hardships that refugees, asylum seekers and other foreign nationals are already unfairly experiencing. The concerns included allegations that some of the regulatory standards fell below South Africa's international obligations, under the United Nations (UN) and the International Labour Organisation (ILO) on the protection of

refugees and workers of foreign origins. The participants of the roundtable expressed concern that the incidences of xenophobia in South Africa are skewed towards Africans.

Some expressed the opposite view that the proposed changes did not go far enough to address the unfair employment practices experienced by citizens due to unethical business practices that undercut their decent work demands by drawing their workforce from foreign nationals, particularly undocumented immigrants. Concern was also raised about the unsustainability of allowing the free flow of migrants to start and operate businesses in the informal sector given the existing social justice challenges in the country. Some of these challenges include the highest Gini coefficient in the world at almost 70% with poverty at 64.2% among those classified by law as Africans and at 1% among those classified as white as well as high levels of unemployment, incorporating youth unemployment that Statistics South Africa estimates to be at about 70%.

(c) Key guiding principles

In reviewing the Draft Policy and Bill, the CSJ considered the policy and legal obligations that government has a constitutional duty to comply with whenever developing or reviewing any law or policy. In line with the core mandate of the CSJ, the assessment of the proposed policy and law reform has primarily focused on the social justice implications of the changes. The CSJ's understanding of social justice is rooted in the constitutional provisions dealing with social justice namely, the preamble, the right to equality in section 9, the right to human dignity in section 10 and the human rights advancement duty in section 7(2) as well as case law such as *Minister of Finance v Van Heerden*, *Investigating Directorate: Serious Economic Offences v Hyundai Motor Distributors (Pty) Ltd: In re: Hyundai Motor Distributors (Pty) Ltd v Smit NO* and *Sidumo v Rustenburg Platinum Mines Ltd*. The conception of social justice is further enriched by the work of among others the concept originator, Italian Jesuit priest Luigi Taparelli, John Rawls' Theory of Justice, and the Copenhagen Declaration on Social Justice bearing in mind the elasticity of the concepts of justice, social justice and equality, which has seen them transcend selective recognition of humanity and formal equality, and are currently anchored on substantive equality and justice.

A key consideration underpinning the assessment of the proposed policy and law review is the extent to which its impact will comply with the constitutional social justice commitment and related equality duty. This has been distilled in a prospective assessment instrument called the Social Justice Impact Assessment Matrix (SIAM) designed by the CSJ to help policy and

lawmakers prospectively assess the likely impact of any proposed law, policy or programme on divergent social groups in society and the historical disparities among them primarily as a result of past unjust laws that dispossessed and disadvantaged certain groups on the grounds of race, gender, disability, national and geographic origin, among others.

The key policy questions that need to be asked to ensure a policy advance rather than exacerbating inequality, include the following:

- i. Whether the policy or law will not discriminate unfairly against citizens or foreign nationals.
- ii. Whether the policy or law will have the impact of reducing or exacerbating inherited racial, gender, geographic and other employment and informal business opportunities in the country.
- iii. Whether the policy or law will reduce or enhance the ability of work seekers and employees in the lower economic echelons to bargain for fair treatment regarding representation in economic opportunities, particularly in the informal sector and fair compensation for their services.
- iv. Whether the policy will advance social cohesion, particularly on the grounds of race, class, nationality and the intersection of these and others.

(d) Key recommendations

- i. The proposed policy and law reform should primarily seek to ensure compliance with constitutional governance responsibilities and international obligations primarily relating to the protection of refugees under UN treaties and social justice obligations under ILO Conventions, in addition to and as a superior objective to the stated strategic objectives.
- ii. The proposed policy and law reform should ensure that the implementation will reduce inequalities, especially among those most vulnerable to employment exploitation and economic exclusion.
- iii. The proposed policy and law reform should consciously advance equality as envisaged in section 9 of the Constitution, which includes the duty not to discriminate unfairly, directly and indirectly, while rectifying existing inequalities as part of complying with the duty to advance human rights as envisaged in section 7(2) of the Constitution.

- iv. Women who constitute a sizable percentage of immigrants should be protected along with the gender policy imperatives of the country.
- v. South Africa's Constitution upholds the rights of the LGBTQ+ community while these rights are outlawed in other countries. Therefore, in dealing with asylum seekers, the rights of everyone including the LGBTQ+ community to work in South Africa should be safeguarded.
- vi. Policy and law reform should avoid unintended consequences where the rights and dignity of immigrants and South Africans, especially the unskilled, are eroded when employers exploit foreign workers and use them to undercut local workers in competition for employment. Locals are concerned that immigrant labour is used to undercut their fair employment demand, as employers hire foreign workers to pay them much lower wages.
- vii. Ensure that the implementation of the policy is supported by disaggregated data to ensure that it is fair and equitable to everyone. This could include province-, region- and ward-specific data on the state of economic inclusion and local-foreign national ratio in employment trends.
- viii. The quota system should include legally recognised refugees in the same category as South Africans. This appears to be so given their exclusion in the definition of non-national employee
- ix. Consideration should be given to ensure that there is always meaningful engagement with all sectors of society on planned regulations and that they are not used to disadvantage or exacerbate the socio-economic disadvantage of any group

1. INTRODUCTION

The Law Trust Chair in Social Justice at Stellenbosch University (CSJ) presents this submission to the Minister of Employment and Labour, Hon Thembelani Wálermade Nxesi, in response to his solicitation of public comments on proposed *Amendments to the Employment Services Act 4 of 2014, Sections 8 and 9 to introduce new provisions on National Labour Migration and related matters*, published on 28 February 2022. The submission for the Employment Services Amendment Bill is presented as a short commentary and elaborated on in a tabular format. The assessment of the bill is grounded in South Africa's constitutional obligations regarding social justice as clarified in labour and constitutional jurisprudence and the country's international obligations on social justice as articulated in International Labour Organisation (ILO) conventions.

The CSJ acknowledges the need for policy reform to protect all workers, promote fair employment practices and improve the treatment of refugees and asylum seekers while fostering social cohesion. The popularity of Operation Dudula among citizens should not be minimised or simply condemned without looking at the reason people feel aggrieved. There is a perception that immigration is not regulated, and illegal immigrants can enter the country to work and run businesses without following the country's immigration laws. This raise concerns about the fairness in accessing employment and business opportunities, especially for unskilled citizens. This has resulted in people resorting to self-help or more crudely put, vigilantism, regarding law enforcement. It has also led to demagogues seeking to exploit this issue for political point-scoring. Therefore, the proposed policy and law reform is a welcome development, for which government deserves to be applauded.

However, the CSJ, like many social watchdogs, has grave concerns over the potential unintended social impact of the Draft Policy and Bill. Key concerns relate to the social justice implications of most of the content and the impact of immigrants, especially those from the African continent. The concerns stem from our understanding of government's duty to act in fidelity to the constitutional commitment to social justice and related equality duty. Our understanding of social justice is that it is about the equal enjoyment of all rights and freedoms reflected in a just equitable and fair distribution of all opportunities, resources, benefits, privileges and burdens in a society and between societies. We further understand advancing social justice to be a constitutional duty requiring that all laws, including regulations, policies and public services be tailored for all and by all and must, where necessary, have a restitutive impact on equality rather than a corrosive impact.

The concerns driving the advice contained herein are informed by ongoing social justice research conducted by the CSJ, which includes conversations with experts and civil society members during social justice, cafes, roundtables, conferences and summits in the last four years.

It is our considered view that injustice and peace cannot coexist and that much injustice is not an outcome of intentional malice but the unintended impact of indifference to difference and disadvantage in tailoring regulatory instruments such as laws, including regulations, policies, and services. We believe that conscious constitutional fidelity, particularly on the three preambular goals of democratic values, social justice, and fundamental human rights, could foster more just governance. In this context, one of the key requirements of social justice is that immigration be regulated in a manner that assures fairness to all as a basis for peace, concerning employment and other economic opportunities, regardless of national origin. To achieve this, the ILO provides extensive guidance on regulating labour and employment opportunity to foster fairness to all and peace. South Africa is further required to regulate immigration in a manner that complies with human rights obligations in the treatment of refugees and workers of foreign origin.

With regard to the Constitution, this submission primarily draws from the constitutional obligations contained in Chapter 2 of the Constitution. Key among these obligations are the right to equality in section 9, the government's duty to advance human rights in section 7(2), the limitation of human rights in section 36, employment labour rights in sections 22 and 23, government's duty to put the Constitution first as enshrined in section 237 and the responsibility to integrate international human rights obligation as envisaged in section 39(1)(b).

2. COMMENTARY ON THE DRAFT NATIONAL LABOUR MIGRATION POLICY

At the CSJ, we have developed a tool that calls for leveraging sufficiently disaggregated data for social conscious impact policymaking. It is a research output seeking to facilitate social impact conscious policy and legislation design: the Social Justice Impact Assessment Matrix (SIAM). SIAM is an instrument designed to leverage data analytics to predict the likely poverty and equality impact of any planned law, policy, programme, service or decision on any group identified by one or more of the grounds in section 9 of the Constitution. It aims to eschew laws, regulations, policies, and service delivery plans that may exacerbate social and economic

inequality, including poverty. Where inevitable, the idea is to implement such policies and decisions, with a compensation strategy that will mitigate the unfair impact. The SIAM, which seeks to close the gaps in government's Social and Economic Impact Assessment Systems (SEIAS), differs from SEIAS in that SIAM has an overt grounding in the constitutional social justice commitment and related equality duty. SIA also emphasises using sufficiently disaggregated data to predict the future as it relates to narrowing or widening the substantive equality and poverty gaps.

All policies should pass the equality duty as set out in the nine dimensions of SIAM. The role of the CSJ is to ensure that the implementation of this labour policy does not increase the already high unequal levels in South African society. SIAM provides a guiding framework to ensure that this policy will advance equality.

2.1. Labour migration governance and management

A good policy needs to be based on a realistic assessment of what the state can do. South Africa has a wonderful transformative Constitution. This policy should be about foregrounding the welfare of poor South Africans. It should not be about security and sovereignty for its own sake. It should be about what can be done to address the inequality, the poverty, and the unemployment rate that are the acute issues facing the country.

The policy must intersect with urban planning, trade, and labour while intersecting with the factors that will make South Africans' lives better. The role of government also needs to be clarified. The Department of Labour and all other relevant state agencies must be the ones doing business visits for audits and not citizens (eg. Operation Dudula/EFF). This will ensure that the rule of law is upheld and that immigrant rights, whether they are in this country legally or illegally, are protected.

Following global trends, more African women are migrating to South Africa, and more are migrating independently from their partners or spouses in search of a better economic life and better opportunities. This is primarily owing to the changes in the labour market and the shrinking pathways of male migration.

However, as it stands, South Africa's migration system does not consider the gendered aspects of migration and fails to consider gender-specific migration drivers, trends and vulnerabilities. A lack of gender-specific data makes it difficult to determine the specificities of migrant women's engagement within the informal labour market.

Although as a country we have an in-depth women's rights and gender equality agenda that is well integrated into the national development agenda of the country concerning socio-economic challenges, migration policies have failed to catch up with those trends to reflect the women's rights agenda of migrant women. Recent global migration trends have shifted, and the number of women migrants have significantly increased.

The intersectionality between gender and migration must therefore ensure that the policy is not neglecting the vulnerabilities and experiences confronted by migrant women in the country. The policy urgently needs to update and upgrade its current migration framework to align with existing gender frameworks and gender equality commitments. The migration framework as it stands ignores the unskilled workers and the impact that those have particularly on women, exposing them to additional risks. Also, this inhibits South Africa from maximising the development benefits of migration.

For this to improve, women need to be recognised as migration drivers and the workforce that needs to be integrated is key to developing a holistic plan to address irregular migration in South Africa. There needs to be a drive into new visa regulations that should capitalise on the high number of women that are already in the country, particularly those that make up a significant number of the informal economy.

2.2. Using accurate and sufficiently disaggregated data for responsive policy design

The CSJ firmly believes that policy design should include an element of mainstreaming social justice by leveraging sufficiently disaggregated data to predict the likelihood of an unintended disparate impact of a policy or law that exacerbates inequality or disadvantage for a historically disadvantaged group. The CSJ recommends the SIAM as an instrument that provides a framework for the Department of Labour to ensure the proposed policy and law are assessed for prospective equality and poverty impact before approval and implementation. This would not only ensure fair play in the labour market and informal sector opportunities. It would also ensure fidelity to constitutional governance and international law obligations, including ILO social justice obligations and UN obligations regarding the protection of refugees. Part of the prospective assessment exercise may be facilitated through the nine questions that are asked by SIAM (these are provided as **ANNEXURE A**). The idea is that should the policy pose the risk of undermining the advancement of equality and ending poverty or compliance with the Constitution, including international obligations, it should be changed. If there is no better

alternative, the approach should be to implement the regressive policy and law reform dimensions with a compensation strategy.

Regarding other uses of data, the submission has benefited immensely from a survey conducted by the Human Sciences Research Council (HSRC), titled *South African Social Attitudes Survey*. The survey is a nationally representative public opinion survey fielded in all nine provinces in South Africa with people 16 years and older.

The HSRC data not only shows what the migrant sentiment in the country is, but it also outlines several important areas that seem to drive anti-immigrant sentiment within the country, that is, zero-sum myths and social welfare chauvinism. The zero-sum myth is the idea that for South Africans to gain, foreigners must lose. This comes from the idea that foreigners take jobs and wealth from South Africans. Welfare chauvinism is the desire to restrict access to social welfare for immigrants. These two concepts have been shown to drive the anti-immigrant sentiment worldwide. However, the survey revealed that public discourse on xenophobia had a positive impact on it. This means the policy should include requirements for anti-xenophobia awareness.

2.3. Labour migration to and from South Africa

Migrations to and from South Africa have been taking place since the era of Mfecane (the Crushing), driven by Nguni wars and drought (Britannica, 2022). Since then, people have been migrating to and from South Africa in search of wealth and jobs. The panellists at the roundtable noted how South Africa's economy, especially in mining, was built through the exploitation of cheap migrant labour.

The employers employing unskilled labours will need to be stringently regulated to ensure that they are not pitting foreign workers against locals by exploiting the foreign workers and thus undercutting local workers' rights. Labour inspectors must be properly trained to audit that the employers are following all labour and immigration laws.

The refugees that have been granted refugee status by the Department of Home Affairs, should be classified as South Africans, especially when granting quotas.

The policy needs to link development and migration. Migrants contribute to social assistance and support the needy. We cannot continue to criminalise migrants and see them as a security threat when they are contributors to the development of South Africa at the community level and nationally as well. This should be part of a social cohesion awareness campaign against xenophobia.

Immigrants who own and run businesses are investing in the country. They have skills that they bring to host communities and to the economy. They provide a safety net and employment opportunities within their communities. There needs to be a shift towards harnessing these developmental benefits for migrants. They pay licensing fees to municipalities and VAT on purchased goods. And so, there are many avenues through which migrants are contributing to economic development and this needs to be reflected in this policy.

3. EMPLOYMENT SERVICES AMENDMENT BILL, 2021

GENERAL EXPLANATORY NOTE:

To amend the Employment Services Act, 2014, so as to extend the scope of the Act to cover private employment agencies not operating for gain; to regulate the employment of foreign nationals in South Africa in a manner consistent with the objects of the Act, the Immigration Act, 2002 and the Refugees Act, 1998; to expand the scope of the Act to cover employees and workers; to expand the functions of the Employment Services Board and the powers of the Minister to make regulations in respect of matters related to labour migration; to provide for the governance of Supported Employment Enterprises; to provide for the improved enforcement of the Act and other laws regulating work by foreign nationals; and to provide for matters connected therewith.

Addition

Substitution

Repeal

Employment Services Act, 2014	Employment Services Amendment Bill, 2021	Commentary
Section 1 Definitions		
	“ asylum-seeker ” means a person who is seeking recognition as a refugee in the Republic in accordance with the provisions of the Refugees Act;	Addition to Bill accepted.
	“ bargaining council ” means a bargaining council referred to in section 27 of the Labour Relations Act”;	Addition to Bill accepted.

	<p>“critical skills’ means skills determined to be critical for the Republic in accordance with the provisions of section 19(4) of the Immigration Act”;</p>	Addition to Bill accepted.
	<p>“digital labour platform’ means an electronic entity that enables the provision of work or services by a person to any other person in the Republic”;</p>	Addition to Bill accepted.
	<p>“employer’ means any person who remunerates, or is liable to remunerate, an employee or a worker;</p>	<p>Addition not accepted.</p> <p>Suggestion to reconcile addition with the definition of “employer” in accordance with the Labour Relation Act 66 of 1995. Furthermore, clarification should be provided as to who is considered a worker.</p>
	<p>‘employment’ means employment as an employee or as a worker”;</p>	<p>Addition not accepted.</p> <p>Suggestion to reconcile addition with the definition of “employer” in accordance with the Labour Relation Act 66 of 1995. Furthermore, clarification should be provided as to who is considered a worker.</p>
<p>“foreign national’ means an individual who is not a South African citizen or does not have</p>	<p>“foreign national’ means an individual who—</p>	Substitution to Bill accepted.

<p>a permanent residence permit issued in terms of the Immigration Act;</p>	<p>(a) is not a South African citizen or does not have a permanent residence permit issued in terms of the Immigration Act; <u>or</u> (b) <u>has not been granted recognition as a refugee in terms of the Refugees Act</u>”;</p>	
	<p>“labour inspector’ means a labour inspector appointed in terms of section 63 of the Basic Conditions of Employment Act”;</p>	<p>Addition to Bill accepted.</p>
	<p>“permanent resident’ means a person who has been issued with a permanent residence permit in terms of sections 25 to 27 of the Immigration Act”;</p>	<p>Addition to Bill accepted.</p>
<p>“private employment agency” means any person who provides employment services for gain;</p>	<p>“private employment agency’ means any person who provides employment services [for gain]”.</p>	<p>Substitution to Bill accepted.</p>
	<p>“refugee’ means an individual who has been granted asylum in terms of section 24 of the Refugees Act; ‘Refugees Act’ means the Refugees Act, 1998 (Act No. 130 of 1998)”;</p>	<p>Addition to Bill accepted.</p>

	<p>“sector” means an industry or service or part of an industry or service;</p> <p>‘sectoral determination’ means a sectoral determination made under Chapter Eight of the Basic Conditions of Employment Act”;</p>	<p>Addition to Bill not accepted.</p> <p>We suggest reconciling the definition of “sector” with Chapter 1 of the Basic Conditions of Employment Act 75 of 1977 (BCEA) or provide clarity that amendments to the definition in the BCEA will or will not have any impact on the definition provided in this Bill and for purposes of judicial interpretation.</p>
<p>“Supported Employment Enterprises” means the national government component established in terms of section 42;</p>	<p>“Supported Employment Enterprises” means [the national government component] <u>Supported Employment Enterprises</u> established [in terms of] by section 42;</p>	<p>Amendment to Bill not accepted.</p> <p>The Bill does not provide clarity as to the definition of “Supported Employment Enterprises” and what a supported employment enterprise would comprise. Section 42 also does not provide such clarity.</p>
	<p>‘worker’ means any person who works for another and who receives, or is entitled to receive, any payment for that work, whether in money or in kind;</p>	<p>Addition to Bill not accepted.</p> <p>The definition provides for “worker” is vague and ambiguous; in effect, it will lead to much confusion about the legal consequences of being a “worker”. Furthermore, does the definition of a “worker” include an independent contractor and/or an employee?</p>

		<p>It is unclear whether a “worker” would enjoy the same benefits or be subjected to the same regulations as an employee.</p> <p>The definition of “worker” does not have any legislative yardstick.</p>
<p>Amendment of section 2 of Act 4 of 2014</p>		
<p>(h) facilitate the employment of foreign nationals in the South African economy, where their contribution is needed in a manner—</p> <p>(i) that gives effect to the right to fair labour practices contemplated in section 23 of the Constitution;</p> <p>(ii) that does not impact adversely on existing labour standards or the rights and expectations of South African workers; and</p> <p>(iii) that promotes the training of South African citizens and permanent residents.</p>	<p>“(h) facilitate <u>and regulate</u> the employment of foreign nationals in the South African economy, where their contribution is needed in a manner—</p> <p>(i) that gives effect to the <u>fundamental rights contained in the Constitution, including the right to fair labour practices</u> contemplated in section 23 of the Constitution;</p> <p>(ii) that does not impact adversely on existing labour standards or the rights and expectations of South African workers; and</p> <p>(iii) that <u>does not impact adversely on the availability of critical skills in the South African labour market and promotes work opportunities for and</u> the training of South</p>	<p>Substitution to Bill accepted.</p> <p>Suggestion: Provide clarity on whether “employee” is synonymous with “worker”.</p>

	African [citizens and permanent residents] employees and workers”; and	
<p>(2) The purpose is to be achieved by—</p> <p>(a) providing comprehensive and integrated free public employment services;</p> <p>(b) coordinating the activities of public sector agencies whose activities impact on the provision of employment services;</p> <p>(c) encouraging partnerships, including in the provision of employment services, to promote employment;</p> <p>(d) establishing schemes and other measures to promote employment; and</p> <p>(e) providing a regulatory framework for the operation of private employment agencies.</p>	<p>“(f) providing a framework to facilitate and regulate—</p> <p>(i) the employment of foreign nationals in South Africa;’</p> <p>(ii) the employment of South Africans abroad; and</p> <p>(iii) the reintegration and employment of South Africans residing or working abroad into the South African economy”.</p>	Addition to Bill accepted.
	<p>“Application of Act to digital labour platforms</p> <p><u>50A.</u> For the purposes of this Act, a digital labour platform is an employer and any person</p>	<p>Addition to Bill accepted.</p> <p>While we accept that this area of the law needs clarity, the use of the words “employer” and “worker” do not facilitate clarity as to the legal</p>

	<p><u>who provides work or services in the Republic to another person by means of a digital labour platform is a worker if—</u></p> <p><u>(a) the payment for, or terms and conditions of, such work or services are determined by digital labour platform; and</u></p> <p><u>(b) the digital labour platform remunerates the worker.”.</u></p>	<p>relationships that will be established in digital labour platforms. Thus, the legal consequences and recourse are also not clear.</p>
<p>Repeal of sections 8 and 9 of Act 4 of 2014</p>		
<p>Employment of foreign nationals</p> <p>8. (1) An employer may not employ a foreign national within the territory of the Republic of South Africa prior to such foreign national producing an applicable and valid work permit, issued in terms of the Immigration Act.</p> <p>(2) The Minister may, after consulting the Board, make regulations to facilitate the employment of foreign nationals, which regulations may include the following measures:</p>		<p>For Prof TM to advise on repeal.</p>

(a) The employers must satisfy themselves that there are no other persons in the Republic with suitable skills to fill a vacancy, before recruiting a foreign national;

(b) the employers may make use of public employment services or private employment agencies to assist the employers to recruit a suitable employee who is a South African citizen or permanent resident; and

(c) preparation of a skills transfer plan by employers in respect of any position in which a foreign national is employed.

(3) A regulation made in terms of this section may—

(a) include any other requirement necessary to implement the provisions of this section which are consistent with the Immigration Act; and

(b) differentiate between different categories of visas issued in terms of the Immigration Act and different categories of work.

<p>(4) An employee who is employed without a valid work permit is entitled to enforce any claim that the employee may have in terms of any statute or employment relationship against his or her employer or any person who is liable in terms of the law.</p>		
<p>Prohibited acts in respect of foreign nationals</p> <p>9. An employer may not require or permit a foreign national—</p> <p>(a) to perform any work which such foreign national is not authorised to perform in terms of his or her work permit; or</p> <p>(b) to engage in work contrary to the terms of their work permit.</p>		
	<p><u>“CHAPTER 3A</u></p> <p><u>EMPLOYMENT OF FOREIGN NATIONALS</u></p>	

	<p>Employment of foreign nationals</p> <p>12A.</p> <p>(1) No person may employ a foreign national to work within the territory of the Republic of South Africa, unless that foreign national—</p> <p>(a) has the right to be so employed in terms of a visa issued under the Immigration Act;</p> <p>(b) has been issued with an asylum seeker visa, in terms of section 22 of the Refugees Act, which is endorsed, with the right to work; or</p> <p>(c) is permitted to work within the territory of South Africa in terms of any other legislation or international agreement binding upon the Republic in terms of section 231 of the Constitution.</p> <p>(2) Any person who employs a foreign national to work within the territory of the Republic of South Africa must—</p> <p>(a) ascertain that the foreign national is entitled to work in the Republic and is entitled</p>	<p>Addition to Bill accepted.</p> <p>12A.(b) Suggestion to provide clarity on the standards (time spent in searching for persons in the Republic with the requisite skills and other relevant factors) to be met for an employer to be satisfied that there is no one with requisite skills to fill the vacancy. We acknowledge that these will be in line with the regulations to be promulgated by the Minister.</p> <p>(c) we suggest a clarification of the conditions that must not be inferior to those provided to South African citizens, permanent residents or refugees. [That is, do these terms and conditions include issues such as working hours, leave, and minimum wage.]</p>
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	<p>to perform the work in which they are employed;</p> <p>(b) satisfy themselves that there are no persons in the Republic, other than foreign nationals, with the requisite skills to fill the vacancy, before recruiting a foreign national to occupy such vacancy;</p> <p>(c) prepare a skills transfer plan in respect of any position in which a foreign national is employed;</p> <p>(d) employ such foreign national on terms and conditions of employment that are not inferior to those which would be provided to a South African citizen, permanent resident or refugee; and</p> <p>(e) retain copies of all documents reflecting that the foreign national is lawfully entitled to be employed in the Republic.</p> <p>(3) The Minister may, if it is consistent with the purpose of this Act, make a determination to exclude the requirement to prepare a skills transfer plan in terms of subsection 2(c) in</p>	
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	<p>respect of any category of employers or any category of employees or workers.</p> <p>(4) A determination in terms of subsection (3) must—</p> <p>(a) be made on the advice of the Board: and</p> <p>(b) be issued by a notice in the Gazette.</p>	
	<p>Quotas for employment of foreign nationals</p> <p>12B.</p> <p>(1) The Minister, after consulting the Board, may, by notice in the Gazette, specify a maximum quota for the employment of foreign nationals by employers in any sector.</p> <p>(2) A quota specified in any notice that is issued in terms of this section may apply to the employment of of employees or workers—</p> <p>(a) in one or more sectors specified in the notice;</p> <p>(b) in one or more occupational categories specified in the notice;</p>	<p>Addition to Bill accepted.</p> <p>However, we suggest the clarification of the word “worker”.</p> <p>The implementation of quotas based on nationality or region can result in unfair discrimination based on the grounds of social origin in terms of section 9(3) of the Constitution.</p> <p>We suggest the deletion of the second “of” in subsection (2).</p> <p>We further suggest that the Minister’s quota determinations should be approved by Parliament before implementation to encourage checks and balances.</p>

	<p>(c) nationally; or</p> <p>(d) to one or more regions specified in the sector.</p> <p>(3) A notice issued in terms of this section must—</p> <p>(a) specify the period within which existing employers must comply with the quotas in the notice;</p> <p>(b) specify the period within which newly established employers must comply with the quotas within a notice; and</p> <p>(c) exclude small employers, as defined in that notice, from complying with the quotas specified in the notice.</p> <p>(4) A draft of any notice that the Minister proposes to issue in terms of this section must be published in the Gazette and interested parties must be permitted at least 30 days to comment on the draft notice.</p> <p>(5) For the purpose of determining a quota under this section, the Minister may take into</p>	<p>Concerning subsection (6), when an employer is allowed to employ a greater percentage of foreign nationals: we suggest there should also be a review of the availability of South African citizens, permanent residents or refugees who possess the required skills in accordance with the updates of the National Critical Skills list regularly to diversify and balance the workforce.</p>
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	<p>account any relevant factor and must take into account—</p> <p>(a) the purpose of the Act, as set out in section 2(1)(h);</p> <p>(b) the availability of the requisite skills, including critical skills, among South African citizens, permanent residents or refugees who are available to work in the sector; or</p> <p>(c) the Republic’s obligations to permit foreign nationals to work in terms of any international agreement, which is binding upon the Republic in terms of section 231 of the Constitution.</p> <p>(6) An employer may only employ a greater percentage of foreign nationals as employees or workers in its workforce or in any occupational category than are permitted in terms of a quota that is applicable to it in terms of this section if—</p> <p>(a) a foreign national is employed to fill a position in respect of which critical skills are required; or</p>	
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	<p>(b) in respect of any other position, the employer has applied, in the prescribed manner, for an exemption from the applicable quota or prohibition and such exemption has been granted by the Minister.</p>	
	<p>Regulations on employment of foreign nationals</p> <p>12C</p> <p>(1) The Minister may, after consulting the Board, make regulations concerning the employment of foreign nationals, which regulations may include the following:</p> <p>(a) The measures that employers must take to satisfy themselves that there are no other persons in the Republic with suitable skills to fill a vacancy, before recruiting a foreign national;</p> <p>(b) requirements for employers to make use of public employment services or private employment agencies to assist employers to recruit suitable employees or workers who are South African citizens, permanent residents or refugees;</p>	<p>Addition to Bill accepted.</p>

	<p>(c) requirements for the preparation of a skills transfer plan by employers in respect of a position in which a foreign national is employed;</p> <p>(d) the criteria and procedure for applying for an exemption by the Minister in respect of any provision of this Chapter; and</p> <p>(e) the records that employers are required to keep in respect of foreign nationals in their employment.</p> <p>(2) A regulation made in terms of this section may—</p> <p>(a) include any other requirement, which is consistent with the Immigration Act or the Refugees Act, and is necessary to implement the provisions of this Chapter; and</p> <p>(b) differentiate between different categories of visas or permits issued in terms of the Immigration Act or the Refugee Act, different sectors or areas, different categories of employees and different occupational categories.</p>	
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	<p>Employees employed in contravention of Chapter 12D.</p> <p>(1) An employee or worker who is employed in contravention of this Chapter is entitled to enforce any claim that they may have in terms of any statute, collective agreement or contract against his or her employer or any person who is liable in terms of the law.</p> <p>(2) A claim contemplated by subsection (1) may be enforced on behalf of an employee or worker by a labour inspector or a bargaining council agent.</p>	<p>Addition to Bill accepted.</p> <p>Suggestion to clarify the word “worker” as commented in Chapter 1 commentary.</p>
	<p>Prohibited acts in respect of foreign nationals</p> <p>12E.</p> <p>(1) An employer may not require or permit a foreign national—</p> <p>(a) to perform any work that such foreign national is not authorised to perform in terms of his or her visa or permit; or</p>	<p>Addition to Bill accepted.</p>

	(b) to engage in work contrary to the terms and conditions of such foreign national’s visa or permit, or any statute.”	
<p>section 22</p> <p>Functions of Board</p> <p>22. The Board must advise the Minister on—</p> <p>(a) work opportunities;</p> <p>(b) the criteria for the registration and de-registration of private employment agencies and the implementation and enforcement of the provisions of this Act applicable to private employment agencies;</p> <p>(c) the development of criteria and guidelines for the implementation of this Act and the exercise of any function in terms of this Act;</p> <p>(d) the promotion of supported work for persons with disabilities as contemplated by Chapter 6;</p> <p>(e) any regulations that the Minister may, or must, make in terms of this Act;</p>	<p>“(dA) any matter concerning—</p> <p>(i) the recruitment and employment of foreign nationals to work in South Africa;</p> <p>(ii) the recruitment and employment of South Africans residing or working abroad to work in South Africa, and their integration into the labour market;</p> <p>(iii) the recruitment of South Africans to work in other countries; or</p> <p>(iv) the collation and collection of data in respect of the facilitation and regulation of work by foreign nationals in South Africa;”</p>	
	“(f) the publication of an annual employment services report, which must include a section on the facilitation and regulation of the employment of foreign nationals;”	Substitution to Bill accepted.

<p>(f) the publication of an annual employment services report; and</p> <p>(g) any other matter related to employment services, on request of the Minister or NEDLAC.</p>		
<p>Constitution of Board</p> <p>23. (1) The Board must, as soon as possible after the appointment of its members and subject to the approval of the Minister, adopt a constitution.</p> <p>(2) Subject to this Act, the constitution of the Board must provide for—</p> <p>(a) the procedure for the election of a deputy chairperson to act on behalf of the chairperson, in the absence of the chairperson;</p> <p>(b) the establishment and functioning of a committee of the Board, including an executive committee;</p> <p>(c) the rules for convening and conducting of meetings of the Board and its committees,</p>	<p>“(b) the establishment and functioning of [a] committees of the Board, including an executive committee, and committees to deal with—</p> <p>(i) the provision of public employment services and the regulation of private employment services; and</p> <p>(ii) the facilitation and regulation of work by foreign nationals and any other matter contemplated by section 22(dA)”.</p>	

including the quorum required for and the minutes to be kept of those meetings;

(d) the voting rights of the different members and the manner in which decisions are to be taken by the Board and its committees;

(e) a code of conduct for the members of the Board;

(f) the determination through arbitration of any dispute concerning the interpretation or application of the constitution;

(g) subject to subsections (3) and (4), a procedure for amending the constitution; and

(h) any other matter necessary for the performance of the functions of the Board.

(3) At least 30 days' notice must be given for a meeting of the Board at which an amendment to the constitution is to be considered.

(4) A supporting vote of at least two thirds of the members of the Board and the approval of the Minister is required for an amendment to its constitution.

<p>Establishment of Supported Employment Enterprises</p> <p>42. (1) Supported Employment Enterprises is hereby established as a national government component contemplated in section 7A of the Public Service Act, 1994 (Proclamation No. 103 of 1994), to promote work and employment opportunities for persons with disabilities.</p> <p>(2) Supported Employment Enterprises must be managed in accordance with the Public Finance Management Act.</p>	<p>“(1) Supported Employment Enterprises is hereby established [as a national government component contemplated in section 7A of the Public Service Act, 1994 (Proclamation No. 103 of 1994),] as an entity within the Department to promote work and employment opportunities for persons with disabilities.”.</p>	<p>Substitution to Bill accepted.</p> <p>Refer to commentary in Chapter 1, relating to defining “Supported Employment Enterprises”. The provision of a definition will ensure that section 42 is achieved within its parameters.</p>
<p>Functions of Supported Employment Enterprises</p> <p>43. The functions of Supported Employment Enterprises are to—</p> <p>(a) facilitate supported employment;</p> <p>(b) provide work opportunities for persons with disabilities;</p>	<p>“Functions of Supported Employment Enterprises</p> <p>43. (1) The functions of Supported Employment Enterprises are to—</p> <p>(a) facilitate supported employment;</p> <p>(b) provide work opportunities for persons with disabilities;</p>	<p>Substitution to Bill accepted.</p>

<p>(c) develop and implement programmes that promote the employability of persons with disabilities, including persons with permanent disablement as defined in the Compensation for Occupational Injuries and Diseases Act, 1993 (Act No. 130 of 1993), in the light of their evolving needs in a changing economy; and</p> <p>(d) perform any other function as may be prescribed by the Minister.</p>	<p>(c) develop and implement programmes that promote the employability of persons with disabilities, including persons with permanent Disablement as defined in the Compensation for Occupational Injuries and Diseases Act, 1993 (Act 130 of 1993), in the light of their evolving needs in a changing economy; and</p> <p>(d) perform any other function as may be prescribed by the Minister.</p> <p><u>(2) Subject to the approval by the National Treasury, Supported Employment Enterprises may perform any of the functions of a trading entity, as contemplated by the Public Finance Management Act.”</u></p>	
<p>Repeal of sections 44 and 45 of Act 4 of 2014</p>		
<p>Appointment of head of Supported Employment Enterprises</p> <p>44. The Minister must, in accordance with the Public Service Act, 1994 (Proclamation No. 103 of 1994), appoint a head of Supported Employment Enterprises, who is also the</p>		<p>Repeal to Bill is accepted.</p>

Chief Executive Officer and accounting officer of Supported Employment Enterprises.		
<p>Powers and functions of head of Supported Employment Enterprises</p> <p>45. (1) The head of Supported Employment Enterprises is responsible for—</p> <p>(a) the administration and management of Supported Employment Enterprises, subject to the direction of the Minister;</p> <p>(b) the compilation of a business and financial plan and reports in terms of the Public Finance Management Act, 1999 (Act No 1 of 1999), for approval by the Minister;</p> <p>(c) the appointment of members of staff of Supported Employment Enterprises; and</p> <p>(d) control of, and maintenance of discipline over, members of staff of Supported Employment Enterprises.</p> <p>(2) The head of Supported Employment Enterprises is accountable to the Minister and</p>		Repeal to Bill is accepted.

must, when requested to do so, report to the Minister on the activities of Supported Employment Enterprises.

(3) If the Chief Executive Officer of Supported Employment Enterprises is for any reason unable to perform any of his or her functions, or if the post of the Chief Executive Officer is vacant, the Minister must, in writing, appoint another person as acting Chief Executive Officer until the Chief Executive Officer is able to resume those functions, or until the Minister appoints a new Chief Executive Officer.

(4) (a) The head of Supported Employment Enterprises may, in writing and on such conditions as he or she may determine, delegate any power or duty of the head of Supported Employment Enterprises to a senior member of Supported Employment Enterprises, unless the Minister prohibits a specific delegation.

(b) The power of the head of Supported Employment Enterprises to delegate includes the power to sub-delegate.

<p>(5) A delegation made under subsection (4) does not—</p> <p>(a) divest the Chief Executive Officer of the responsibility or accountability concerning the performance of the function in question; or</p> <p>(b) prohibit the performance of the function in question by the Chief Executive Officer.</p> <p>(6) A delegation made under subsection (4) may be repealed, withdrawn or amended, but the repeal, withdrawal or amendment does not affect any right which may have accrued to a person as a result of the function performed before the delegation was repealed, withdrawn or amended.</p> <p>(7) The Minister may override any decision taken by the head of Supported Employment Enterprises, subject to any rights that may have vested as a consequence of the delegation.</p>		
<p>Staff of Supported Employment Enterprises</p>	<p>“Staff of Supported Employment Enterprises</p>	<p>Substitution to Bill is accepted. The solution is expedient.</p>

<p>46. The Minister may create the post structures necessary for the functioning of Supported Employment Enterprises, after consultation with the Minister of Finance.</p>	<p>46. The Minister may create the post structures necessary for the functioning of Supported Employment Enterprises [after consultation with the Minister of Finance] <u>in accordance with the Public Service Act, 1994 (Proclamation No. 103 of 1994).’.</u></p>	
<p>Finances of Supported Employment Enterprises</p> <p>47. Supported Employment Enterprises are financed from—</p> <p>(a) money appropriated by Parliament for this purpose;</p> <p>(b) income earned from services rendered by it;</p> <p>(c) grants or donations made to it; and</p> <p>(d) money received from any other source.</p>	<p>“Finances of Supported Employment Enterprises</p> <p>47. (1) Supported Employment Enterprises are financed from—</p> <p>(a) money appropriated by Parliament for this purpose;</p> <p>(b) income earned from services rendered by it;</p> <p>(c) grants or donations made to it; and</p> <p>(d) money received from any other source.</p> <p><u>(2) The Director-General must ensure that the Supported Employment Enterprises is administered in accordance with the requirements prescribed in terms of the Public</u></p>	<p>Substitution to Bill is accepted.</p> <p>It is a good checks and Balances exercise.</p>

	<u>Finance Management Act, 1999 (Act No 1 of 1999).”.</u>	
<p>Monitoring and enforcement</p> <p>49. (1) Chapter 10 of and Schedule II to the Basic Conditions of Employment Act apply with the necessary changes required by the context to—</p> <p>(a) the monitoring and enforcement of this Act; and</p> <p>(b) any legal proceedings concerning a contravention of this Act.</p> <p>(2) The Labour Court may, on application by the Director-General, impose a fine not exceeding R50 000 on an employer that contravenes any of the provisions listed in Schedule 3.</p> <p>(3) The Minister may, by notice in the Gazette, amend the maximum amount of the fine referred to in subsection (2) in order to counter the effect of inflation.</p>	<p>“(2) The Labour Court may, on application by the Director-General, impose a fine not exceeding [R50 000] R 100,000 on a person [an employer] that contravenes any of the provisions listed in Schedule 3.”;</p>	Substitution to Bill is accepted.
	<p>“(4) The Minister may authorise a labour inspector in accordance with the provisions of section 63 of the Basic Conditions of Employment Act to monitor and enforce the provisions of this Act.</p> <p>(5) The Minister and the Minister of Home Affairs may conclude an agreement in terms of which labour inspectors, who are designated in terms of section 63 of the Basic Conditions of Employment Act to enforce Chapter 3A of this Act, may enforce the provisions of section 38 of the Immigration Act and, for that purpose, exercise such powers in terms of the Immigration Act as are identified in that agreement.”.</p>	Addition to Bill accepted.

<p>Offences and penalties</p> <p>50. (1) It is an offence to—</p> <p>(a) obtain or attempt to obtain any prescribed document by means of fraud, false pretences or submitting a false or forged prescribed document;</p> <p>(b) furnish false information in any prescribed document knowing that the information is false;</p> <p>(c) obstruct or attempt to influence improperly a person who is performing a function in terms of this Act; and</p> <p>(d) operate a private employment agency without being duly registered or in violation of its registration.</p> <p>(2)A court that convicts a person of an offence contemplated in subsection (1)(a), (b) or (c) may impose a term of imprisonment not exceeding 12 months or such fine as is permitted by the Adjustment of Fines Act, 1991 (Act No. 101 of 1991), or both such fine</p>	<p>Offences and penalties</p> <p>50. (1) It is an offence to—</p> <p>(a) obtain or attempt to obtain any prescribed document by means of fraud, false pretences or submitting a false or forged prescribed document;</p> <p>(b) furnish false information in any prescribed document knowing that the information is false;</p> <p>(c) obstruct or attempt to influence improperly a person who is performing a function in terms of this Act; and</p> <p>(d) operate a private employment agency without being duly registered or in violation of its registration.</p> <p>(2)A court that convicts a person of an offence contemplated in subsection (1)(a), (b) or (c) may impose a term of imprisonment not exceeding 12 months or such fine as is permitted by the Adjustment of Fines Act, 1991 (Act No. 101 of 1991), or both such fine and imprisonment.</p>	<p>Substitution to Bill is accepted.</p>
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<p>and imprisonment.</p> <p>(3) A court that convicts a person of an offence contemplated in subsection (1)(d) may impose a term of imprisonment not exceeding 24 months or such fine as is permitted by the Adjustment of Fines Act, 1991 (Act No. 101 of 1991), or both such fine and imprisonment.</p> <p>(4) Any employer who contravenes section 8(1) shall be guilty of an offence and liable on conviction to a fine or imprisonment as contemplated in section 49(3) of the Immigration Act.</p> <p>(5) Any employer who contravenes section 9 shall be guilty of an offence and liable on conviction to a fine or imprisonment as contemplated in section 49(6) of the Immigration Act.</p>	<p>(3) A court that convicts a person of an offence contemplated in subsection (1)(d) may impose a term of imprisonment not exceeding 24 months or such fine as is permitted by the Adjustment of Fines Act, 1991 (Act No. 101 of 1991), or both such fine and imprisonment.</p>	
<p>Regulations</p> <p>52. (1) The Minister may, after consultation with the Board, make regulations relating to—</p>	<p>“(fA) the criteria and procedure for applying for an exemption from any provision of this Act or the regulations made under this Act;</p> <p>(fB) the recruitment and placement of persons residing outside of South Africa to work within the territory of South Africa;</p>	<p>For Prof TM and the team to advise.</p> <p>Note: When we looked at the provisions, we accept them, however, in accepting them we are accepting the possibility of these respective regulations being used to created anti-immigration sentiments or if we are to</p>

<p>(a) the categories of employment in respect of which vacancies and new positions must be reported, including—</p> <p>(i) job descriptions;</p> <p>(ii) qualifications;</p> <p>(iii) remuneration levels; and</p> <p>(iv) the format and manner in which vacancies and filling of positions must be reported;</p> <p>(b) the recording of the names and prescribed details of work seekers on a register and their removal from the register;</p> <p>(c) a procedure and forms in terms of which private employment agencies may apply for registration;</p> <p>(d) a procedure for lodging and considering complaints concerning the operation of private employment agencies;</p> <p>(e) a procedure for considering the cancellation of the registration of a private employment agency;</p>	<p>(fC) the recruitment and placement of persons residing in South Africa to work in other countries;</p> <p>(fD) measures to promote and regulate the recruitment and reintegration of South Africans residing or working in other countries into the South African labour market;</p> <p>(fE) a procedure for work seekers and employers to lodge complaints about the operation of public employment services;</p> <p>(fF) any matter necessary for the administration and functioning of Supported Employment Enterprises, including any requirement necessary for its approval and operation as a trading entity in terms of the Public Finance Management Act; or”</p>	<p>advise and suggest that they be debated and approved by parliament or they are open for public commentary for a reasonable amount of time before enforcement, however, it can lead to the issue of encouraging bureaucracy.</p>
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<p>(f) regulating the provision of employment services by persons outside of the public administration; or</p> <p>(g) any other matter relating to the provision of public employment services or the regulation of private employment agencies.</p> <p>(2) The Minister may, after consulting the Board of Productivity South Africa, make regulations regarding any improvements in workplace productivity and competitiveness which are necessary or expedient to enable the Board to perform its functions under this Act.</p>		
<p>OFFENCES FOR WHICH A FINE CAN BE IMPOSED BY LABOUR COURT IN TERMS OF SECTION 49(2)</p> <p>Failing to display a certificate of registration in a conspicuous place on the premises (section 13(8))</p> <p>Contravening section 14(a) to (d). Charging a fee to any individual work seeker for</p>	<p>Amendment of Schedule 3 of Act 4 of 2014 16.</p> <p>Schedule 3 to the principal Act is hereby amended by the insertion before the first item of the following item:</p> <p>“Any contravention of a provision of section 12A, section 12B(8) or section 12E.”.</p>	<p>Addition to Bill not accepted.</p> <p>There is no section 12B(8). Kindly refer to the commentary for section 12A. The addition to section 12E of the Bill is accepted.</p>

<p>employment services (section 15(1)), except in accordance with section 15(2).</p> <p>Deducting any amount from an employee's remuneration in respect of the placing of that employee in employment (section 15(4)).</p> <p>Requiring or permitting an employee to pay any amount in respect of the placement of that employee (section 15(4)).</p> <p>Failing to keep up to date records (section 16).</p> <p>Compromising the confidentiality of information (section 17).</p>		
	<p>Short title and commencement</p> <p>17. This Act is called the Employment Services Amendment Act, 2021, and comes into operation on a date fixed by the President by proclamation in the Gazette</p>	

4. REFERENCES

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