



# Update on NEDLAC Negotiations August 2011

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CAPES Chief Operating Officer

## AGENDA

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### **OVERVIEW INTRODUCTION**

- Introduction
- Fixed Term Contracts
- Temporary employment agencies
- Part-time work
- Probation

### **DETAILED DISCUSSIONS**

- Fixed Term Contracts
- Temporary employment agencies
- Part-time employees
- Probation periods
- Organisational Rights
- Annexures



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## PROCESS THUS FAR

- 4 Draft bills published in December 2010
- Agreement between the parties that the proposed amendments, as published 17 December 2010, too badly drafted to negotiate
- Big Task Team (6-a -side) set up to deliberate on issues
- Terms of reference agreed on between the parties for the first time at NEDLAC negotiations on Labour Law amendments
- Task Team (2-a -side) to identify the issues and find effective areas of compromise
- Brief legal team to draft amendments for consideration by parties on the themes

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## TERM OF REFERENCE TASK TEAM

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### Scope

The scope of work for the Labour Market Policy Review Task Team covers the policy considerations of the proposed amendments contained in the Basic Conditions of Employment Amendment Bill, Employment Equity Amendment Bill, Labour Relations Amendment Bill and the Employment Services Bills (LLA Bills) under the following broad themes:

1. A-typical employment relationships
2. Dispute resolution
3. Compliance and enforcement
4. Access to employment
5. Collective bargaining
6. Employment equity

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## OBJECTIVES

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- Reach an agreed outcome through social dialogue that promotes the spirit of tripartism;
- Achieve a settlement that is fair for workers and employers;
- Endeavour to reach an agreement to promote stability and industrial peace and the national objectives of growth, **job creation**, decent work and sustainable business and poverty alleviation;
- Use creative problem-solving mechanisms when challenges arise;
- Give consideration to the regulatory impact assessment (RIA) conducted and the unintended consequences which may arise in an attempt to address such and to; and
- Commit to abide by and implement the agreement reached.

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## INTRODUCTORY COMMENTS AND CONSIDERATIONS

- World Employment Forum (WEF) data reflects that SA labour market competitiveness fell by 8.1% over the past year and we now have the 7<sup>th</sup> most restrictive labour laws and regulations out of 139 countries
- National Planning Commission: While SA's labour regulations had positive effects, they blocked rapid job creation...increase the cost of doing business...discourage businesses from hiring inexperienced workers...relatively high starting salaries...critical shortage of technical skills...
- Hence, as we all agreed at the start of the proceedings this year, the most important question to be asked is: **“Will it drive job creation?”**. In addition: “Are the proposed changes proportionate and rational with least administrative cost and administrative burden.


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## WHERE ARE WE NOW: A-TYPICAL DRAFT

- There is **no consensus** within the drafting team on material aspects of the preliminary draft clauses.
- Business has made it clear that until such time that the preliminary draft clauses are finalised and referred to the plenary and thereafter **ADOPTED**, we view these engagements as good faith initiatives to identify balanced ways to move forwards.



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**OVERVIEW OF  
CURRENT ISSUES  
WITHIN A-TYPICAL  
EMPLOYMENT TOPIC**

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**OVERVIEW: FIXED TERM CONTRACTS**

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- 1 The draft precludes the use of fixed term contracts for this category of workers for longer term contracts unless there is specific justification for setting a fixed or limited period of employment.
- 2 Because protection is specifically aimed at an abuse of fixed term contracts for longer term or indefinite periods of employment, this would not apply during a specified initial period of employment. The draft requires justification for conclusion of fixed term contracts longer than this period, and sets out typical grounds that would be regarded as justifiable for the conclusion of fixed term contracts in these circumstances. **(Comment: This amounts to clarification and codification)**

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## OVERVIEW: FIXED TERM CONTRACTS

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- 3 Where contracts are concluded in breach of these limitations employment will be considered to be indefinite.
- 4 The draft includes a provision for no less favourable treatment for fixed term employees in the protected category, unless different treatment can be justified.  
**(Comment: This is not acceptable to Business and needs to go under Employment Equity theme)**
- 5 In addition, for all categories of employee the draft extends the current definition of dismissal to include a situation where a fixed term employee reasonably expects to be employed on an indefinite basis on expiry of the fixed term, but is not.

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## OVERVIEW: TEMPORARY EMPLOYMENT AGENCIES

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- 1 The draft makes it clear that the client and the TES are the employer of workers who earn below the threshold for the Labour Relation provisions after a period. In this way the draft seeks to extend the protection afforded to vulnerable workers against the abuse of labour broking arrangements.
- 2 The draft attempts to address the abuse of labour broking arrangements that effectively preclude employees from access to meaningful protection against unfair dismissal or unfair labour practices.
- 3 Where labour broking arrangements are permitted beyond a specified period the client or user will be jointly liable for unfair labour practices, as well as other breaches of terms and conditions of employment.

**Comment:** We need to build on this formulation. Retention of Section 198 of the Labour Relations Act.

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## OVERVIEW: PART-TIME WORK

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- 1 The purpose of the draft clause is to protect vulnerable or low paid workers who may be employed on a part-time basis for lengthy periods of time.
- 2 The formulations provide for equal access to training and skills development opportunities.

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## OVERVIEW: PROBATION

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- 1 The purpose of the provision would be to increase opportunities for access to employment for new entrants to the job market, and to encourage employers to take on new employees, by introducing less onerous conditions for assessing the suitability of new employees for the positions into which they are employed.
- 2 The draft provisions still protect employees from discriminatory conduct but provide less onerous dismissal procedures than are required for employees who have successfully completed a probation period.

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## ° DETAILED DISCUSSION ON ISSUES WITHIN THE A-TYPICAL NEDLAC NEGOTIATIONS

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### DETAILED: FIXED TERM CONTRACTS

#### **Insertion of section 200B in Act 66 of 1995**

The principal Act is hereby amended by the insertion after section 200A of the following sections:

#### **200B Fixed term contracts**

1. For the purposes of this section, a “fixed term contract” means a contract of employment that terminates on the occurrence of a fixed event, the completion of a specified task or project or on a fixed date, other than an employee’s normal or agreed retirement date.
2. This section does not apply to-
  - a. a employee who earns more than an earnings threshold (our starting position at R60 000pa, government at R500 000pa) determined by the Minister; after the consultation with NEDLAC;

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## DETAILED: FIXED TERM CONTRACTS

- b. a employer that employs less than 10 employees (50 is our starting position) and whose business has been in operation for less than two years;
  - c. a employee engaged in terms of any statute permitting the conclusion of a fixed term contract.
3. An employer may engage an employee on a fixed-term contract or successive fixed term contracts for a period, longer than X months of employment only if the nature of the work for which the employee is engaged is of a limited or definite duration or the employer can demonstrate any other justifiable reason for fixing the term of the contract (our starting position is 24 months) .

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## DETAILED: FIXED TERM CONTRACTS

4. An offer to renew a fixed term contract must –
- a. be in writing; and
  - b. state the reason required by sub-section (3), if applicable.
5. If the employer employs an employee on a fixed term contract or renews a fixed term contract in contravention of the provisions of sub-section (3), the employee will be;-
- a) deemed to be employed on the basis of indefinite employment; or
  - b) the employer must, if it is relevant in any proceedings, prove that there is a justifiable reason for fixing the term of the contract as contemplated by subsection (3) and that the term was agreed.

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## DETAILED: FIXED TERM CONTRACTS

6. An employee employed on a fixed term contract for a period in excess of the period contemplated in sub-section (3) must be treated on the whole not less favourably than an employee on an indefinite contract performing the same or similar work, unless there is a justifiable reason for different treatment. For the purposes of this section, it is a justifiable reason if the employee's remuneration is determined by reference to a system which takes into account –
- a) seniority, experience or length of service;
  - b) merit;
  - c) the quantity or quality of production
  - d) any other factor that is not prescribed in terms of section 6(1) of the EEA.

**(Comment: This is very problematic and we need to refer to Employment Equity. Unfair discrimination must be the basis of the claim. This goes across all categories TES, fixed term and part time). Alternative prescribed amounts in terms of agreements, collective and otherwise.**

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## DETAILED: FIXED TERM CONTRACTS

8. Without limiting the generality of sub-section (3), the conclusion of a fixed-term contract will be justified if – (remember this is over the x period)
- a. The employee is replacing another employee who is temporarily absent from work;
  - b. The employee is engaged on account of a temporary increase in the volume of work which is not expected to endure beyond x months;
  - c. The employee is engaged to work on a specific project that has a limited or defined duration;
  - d. The employee has been engaged for a trial period of not longer than x months for the purpose of determining the employee's suitability for employment for an indefinite period.;
  - e. The employee is a non-citizen who has been granted a work permit for a defined period;
  - f. The employee is engaged to perform seasonal work;

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## DETAILED: FIXED TERM CONTRACTS

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- g. The employee is engaged on a public works scheme or similar job public job creation scheme;
- h. The employee is engaged on a position which is funded by an external source for a limited period;
- i. The employee holds a senior executive or managerial position;
- j. The employee has reached the normal or agreed retirement age applicable in the employer's business.
- k. The agreement has been concluded in a manner or for a purpose permitted by collective agreements.

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## DETAILED: TEMPORARY EMPLOYMENT SERVICES

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### **Private employment agency and temporary employment service**

(1) In this section [,]-

- a) **'private employment agency'** means any person who, for reward, provides one or more of the following services –
  - i. services for matching offers of and applications for employment without the private employment agency becoming a party to the employment relationship that may arise from this service;
  - ii. services consisting of procuring for or providing employees to a client, which assigns their tasks and supervises the execution of their task or in any other manner performs the functions of the employer;
  - iii. services relating to jobseekers, determined by the Minister after consulting NEDLAC that do not set out to match specific offers of the applications for employment.

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## DETAILED: TEMPORARY EMPLOYMENT SERVICES

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- b) **'temporary employment service'** means a private employment agency that procures for or provides to a client other persons –
- i. who render services to, or perform work for, the client; and
  - ii. who are remunerated by the temporary employment service
- c) **'temporary services'** means work or services for a client –
- i. for a period not exceeding x months, in the case of employees earning on or below a threshold determined by the Minister;
  - ii. for a period not exceeding x months in the case of employees earning above the threshold referred to in (i)
  - iii. in a category of work and for any period of time which is determined to be temporary services by a collective agreement concluded in a bargaining council, a sectoral determination or a notice published by the Minister after consulting in NEDLAC (**Comment: outside of (i) and (ii) above.**)

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## DETAILED: TEMPORARY EMPLOYMENT SERVICES

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For the purposes of this Act –

- a) subject to sub-paragraph (b) and (c) a person whose services have been procured for or provided to a client by a private employment agency is the employee of the client, and the client is that person's employer;
- b) a person whose services have been procured for or provided to a client by a temporary employment service is the employee of that temporary employment service, and the temporary employment service is that person's employer;
- c) a person whose services have been procured for or provided to a client by a temporary employment service for a period longer than the applicable period in the definition of temporary service is deemed to be the employee of that client, and the client is deemed to be that person's employer. (**Comment: For the purpose of the Labour Relations Act chapter 8 – Dismissals**)

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## DETAILED: TEMPORARY EMPLOYMENT SERVICES

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- If a temporary employment service is the employer of an employee , then the temporary employment service and the client are jointly and severally liable if the temporary employment service, in respect of any of its employees, contravenes –
  - a) A collective agreement concluded in a bargaining council that regulates terms and conditions of employment;
  - b) A binding arbitration award that regulates terms and conditions of employment;
  - c) The Basic Conditions of Employment Act; or
  - d) A sectoral determination made in terms of the Basic conditions of Employment Act.

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## DETAILED: TEMPORARY EMPLOYMENT SERVICES

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If a client is jointly and severally liable or is deemed to be the employer then -

- The employee of the temporary employment service may institute proceedings against either the temporary employment service or the client or both the temporary employment service and the client.  
**(Comment: Legitimate TES will indemnify you from this)**
- No person may perform the functions of a private employment agency unless it is registered in terms of the applicable legislation. The fact that a private employment agency is not registered will not constitute a defence to any claim instituted in terms of this section. **(Comment: This will take out the unregulated sector)**

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## PART TIME EMPLOYEES

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### No less favourable treatment of part-time employees

(1) For the purpose of this section-

- a) A part-time employee is an employee who is remunerated wholly or partly by reference to the time that the employee works and who works less hours than a comparable full-time employee;
- b) A comparable full-time employee is an employee who is remunerated wholly or partly by reference to the time that the employee works and who is identifiable as a full time employee in terms of the custom and practice of the employer of that employee.

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## PART TIME EMPLOYEES

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(2) Taking into account the working hours of a part-time employee, an employer must-

- a) Treat a part-time employee on the whole not less favourably than a comparable full-time employee, unless there is a justifiable and objective reason for not doing so; and
- b) Provide a part-time employee with access to opportunities for training and skills development that is on the whole not less favourable to the employee than the access applicable to a comparable full-time employee.

**(Comment: We do not like any of these issues around comparable conditions and pay. They cut across all categories.)**

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## PROBATION PERIOD

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Amendment to section 188 of Act 66 of 1995

41. Section 188 of the principal Act is hereby amended –

- a) The substitution of subsection (2) for the following- “(2) (a) Despite subsection (1) and provided that the date of dismissal occurs within the first 6 months of employment or any lesser period agreed between the employer and the employee, if the reason for dismissal is misconduct or incapacity in the form either of the employee’s incompatibility or a failure to meet required performance standards, the employer needs to prove only that the dismissal was effected in accordance with a fair procedure.

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## PROBATION PERIOD

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- b) In the case of a dismissal related to the employee’s conduct or capacity, fair procedure means that an employee should not be dismissed before that employee is provided an opportunity to state a case in response to any allegations made by the employer with the assistance if required of a trade union representative or co-employee, unless the employer cannot reasonably be expected to provide this opportunity. The opportunity to state a case need not be a formal hearing.
- c) In the case of a dismissal based on the employers operational requirements, fair procedure is regulated by section 189.”

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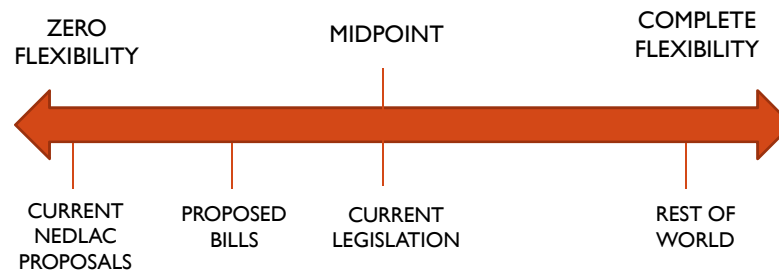
## ORGANISATIONAL RIGHTS

- We believe this should be deferred to collective bargaining



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## FLEXIBILITY GRAPH OF LABOUR LEGISLATION



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## Annexure – policy themes

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The following themes are listed in order of priority, with related sub-themes, for discussion by the Task Team:

### **Atypical employment relationships**

Scope of atypical employment relationships as per Government's Base Document of 2009  
Addressing problem areas in atypical employment in a way that is conducive to job creation and decent work

### **Dispute resolution**

Effectiveness of the CCMA  
Effectiveness and jurisdiction and power of Labour Court  
Disputes in the public interest  
Essential services  
Capacity of bargaining councils iro dispute resolution  
Accreditation of private dispute resolution agencies  
Operational requirement dismissals

### **Compliance and enforcement**

Strengthening the power of the inspectorate  
Streamlining enforcement, strengthening compliance  
Administrative and criminal sanctions  
Capacity building of the inspectorate  
Public Private Partnerships  
Addressing child labour

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## Annexure – policy themes

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### **Access to employment**

The role and function of public employment services  
Private employment services  
Labour market information & reporting  
Creating decent work  
Public Private Partnerships: Employment Services and PPE  
Promotion of Youth Employment  
Probation  
Cost of doing business/compliance costs

### **Equity**


Equal pay for work of equal value  
Reporting  
Enforcement and compliance issues  
Compliance costs  
Discrimination disputes

### **Collective bargaining**

Protecting vulnerable workers  
Bargaining councils and statutory councils  
Sectoral determinations  
Violence in strikes  
Protest action  
Organisational rights

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# THE BIGGER PICTURE

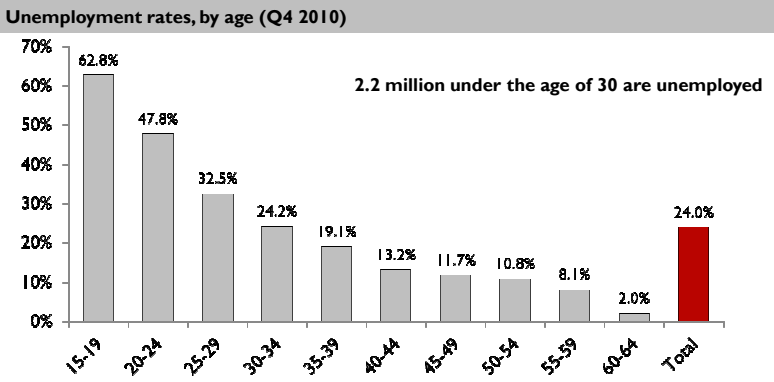


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## HALF OF ALL YOUNG PEOPLE ARE UNEMPLOYED

- Youth unemployment is extremely high
  - Narrow unemployment = 50% for 15 to 24 year olds
  - Broad unemployment (including discouraged) = 60% for 15 to 24 year olds

**Unemployment rates, by age (Q4 2010)**



Age Group	Unemployment Rate
15-19	62.8%
20-24	47.8%
25-29	32.5%
30-34	24.2%
35-39	19.1%
40-44	13.2%
45-49	11.7%
50-54	10.8%
55-59	8.1%
60-64	2.0%
Total	24.0%

2.2 million under the age of 30 are unemployed

Source: Statistics SA, Quarterly Labour Force Survey (QLFS, December 2010)

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## GOVERNMENT RESPONSE: THE NEW GROWTH PATH

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- Job creation – “Number 1 priority”
- The goal is to create 5 million jobs in 10 years
- Focus totally on the supply of jobs through economic growth
- Identifies certain sectors that will be focused on
- Nothing with regard to making labour more attractive to employers (demand side measures)
- Budget proposals
  - Significant expenditure to promote job creation
  - Youth wage subsidy – rejected by Cosatu

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## GORDHAN CALLS FOR RELAXED LAWS TO CREATE JOBS

Finance Minister Pravin Gordhan at the Internal Auditor's Conference, 15 Aug 2011.

“South Africa may only create four million jobs by 2025 on its current growth trajectory, and this is not enough to make a significant dent in unemployment”

“We may have to change the way we see the labour dispensation in South Africa”

“We will have to take risks...try out new ideas... follow best practice elsewhere,” and invent our own ways of doing things.

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## WAY FORWARD

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- Best legal team available.
- Regulatory Impact Assessment study does not support the proposals.
- Government in the final analysis cannot support these proposals with its job creation objectives.
- NEDLAC negotiations continue.
- **Attack is on all employers.** (Examples are):
  - Fixed term
  - Equity fines ranging from 2% to 10% of turnover
  - 14 day registration
  - Equal pay for equal work in the Employment Equity Act
  - Extension of unfair labour practice
  - Fixed term from day one equal pay
  - Wide ranging discretion for inspectors

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## CONCLUSION

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- In principle agreement in respect of certain issues
- Referred to a “drafting” team one per side (Prof. Paul Benjamin (Government) Chris Todd (BUSA), Anton Rosecham (Labour))
- Gets a “brief” from NEDLAC and commence drafting text
- Drafts presented to the Task Teams to consider
- Better wording for proposed amendments
- More intense deliberations on specific amendments
- Dual process of negotiations and drafting
- Timeframe of November 2011 set to finalise negotiations
- Legislative process of Public comment, Standing Committee public hearings and Parliamentary process planned for 2012.

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## OPPORTUNITIES

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**Employers have to **fight** to  
retain flexibility!**

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THE END  
THANK YOU



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