

Blurred lines pave the way to placement: are you running an employment agency?

The growing demand for hard to find skill sets, coupled with the looming talent crisis, has been a boon for the Recruitment Process Outsourcing (RPO) industry. RPO is a rapidly growing segment of the Human Resources Outsourcing industry, which in turn is a subset of the Business Process Outsourcing industry. Essentially, RPO is where an employer transfers all, or part, of its recruitment process to the external service provider.



Whilst industry leaders have been able to transition themselves from being transactional, low-cost recruitment service providers into strategic Human Resource and Talent Acquisition partners – the demand for RPO services has also seen other businesses, where RPO is not their core service offering, venturing into the talent acquisition realm.

What these newbies are often not aware of is that where they are providing recruitment services to employers, they might be required to be registered as a Private Employment Services Agency.

What is a Private Employment Services Agency?

Private Employment Services Agencies were, until 9 August 2015, regulated by the Skills Development Act (97 of 1998) (SDA). The Employment Services Act (4 of 2014) (ESA) has since been promulgated, and has repealed the relevant sections, specifically s24, of the SDA.

The ESA provides that a Private Employment Services Agency is "*any person that provides employment services for gain*", with "*employment services*" meaning, *inter alia*, the provision of the service of assisting employers:

- (i) by providing recruitment and placement services; and
- (ii) by advising employers on the availability of work seekers with skills that match their needs.

Types of Employment Services

The phrases "*providing recruitment and placement services*" and "*advising employers on the availability of work seekers with skills that match their needs*" are not further defined in either the ESA or SDA and, as such, are open to interpretation. In

the broadest sense, these two concepts can encompass a myriad services. The definition of employment services is, therefore, sufficiently wide to encompass any number of recruitment and talent placement services provided to an employer, either independently or cumulatively.

These services can include everything from sourcing of internal and external candidates, drafting of job specifications, advertising job profiles on various platforms, candidate sampling, assessment and screening, confirmation of candidates' knowledge, skills and experience, screening applicants against relevant criteria, providing employers with a pool of candidates suitable for interviewing to communicating with interviewees and facilitating on-boarding.

In each case, an assessment needs to be conducted as to whether employment services are being provided. Where the service provider's only offering is, for instance, providing reference checks and/or criminal background checks, this will not, in all likelihood, be considered to be providing employment services for the purposes of the ESA. However, if the service provider is sourcing the candidates and passing on only those who successfully clear the checks and/or fit the criteria, then this is likely to be considered providing employment services.

Where do we sign up?

Registration is peremptory when (i) employment services are provided (ii) for gain. Thus, an entity that provides employment services for gain must register as a Private Employment Services Agency. Applications for registration are processed by the Department of Labour.

That said, presently entities needing to register may have a *slight* problem. Whilst the ESA has come into effect (and repealed the SDA) all but one of the sections of the ESA have been enacted. That section is s13, which deals with the registration of private employment agencies.

In terms of the transitional arrangements contained in Schedule 2 of ESA, private employment agencies already registered in terms of SDA are deemed to be registered in terms of s13. However, that is of no assistance to those entities which were not registered under the SDA.

As it stands, neither s24 of the SDA nor s13 of the ESA are operative for the purposes of registering a new Private Employment Services Agency. That withstanding, the Department of Labour does still seem to be accepting applications for registration in terms of the SDA - who needs empowering legislation anyway?

Well, what should we do now?

Private Employment Services Agencies which are required to register could adopt one of two approaches:

1. Take the stance that they will only register once s13 of the ESA is enacted; or
2. Apply to register under the repealed s24 of the SDA.

On the face of it, option 1 is likely to be the more appealing approach - considering the present *lacuna* in the law. However, adopting this approach is not without risk. The risk associated with option 1, operating without being registered, is contained in s50 of the ESA Section 50, which *is* enacted, makes it an offence to operate a Private Employment Services Agency without being duly registered. A term of imprisonment not exceeding 24 months or a fine as permitted by the Adjustment of Fines Act (101 of 1991), or both a fine and imprisonment, may be imposed for operating *sans* registration. Importantly, it is apposite to mention that s50 makes no reference to registration in terms of either the SDA or the ESA, and thus is not dependent on the enactment of s13 of the ESA.

Option 2 is the more risk averse option. However, registration may be less appealing where the entity is not entirely certain whether the services it provides are, in fact, employment services. Entities in this position should undertake a balancing exercise, weighing up the competing ramifications, financial, reputational and otherwise, of registration and non-registration.

Regardless of the present confusion, businesses venturing into the employment services domain need to be mindful of their compliance with the legislative framework. Entities that provide services which could potentially be considered as employment services should seek advice about which side of the blurred line they are likely to fall.

Salt is an associate with Baker & McKenzie. Johan Botes was the supervising partner.

Article by LAUREN SALT