

GOVERNMENT NOTICES • GOEWERMENTSKENNISGEWINGS

DEPARTMENT OF LABOUR

NO. 992

21 SEPTEMBER 2018

PUBLICATION OF THE EMPLOYMENT EQUITY AMENDMENT BILL, 2018

(herein referred as EE Amendment Bill, 2018)

FOR PUBLIC COMMENT

I, **Mildred Nelisiwe Oliphant**, Minister of Labour, hereby publish the proposed amendments in the Employment Equity Amendment Bill, 2018 for public comment.

Interested and affected parties are hereby invited to submit written representations on the proposed amendments in the Employment Equity Amendment Bill, 2018. The aforesaid representations must be marked for the attention of **Mr Niresh Singh or Mr Innocent Makwarela** and hand delivered, sent by registered post or emailed, within 60 days of publication of this notice to the following addresses:

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A copy of the Employment Equity Amendment Bill, 2018 is attached hereto.



MILDRED OLIPHANT, MP
MINISTER OF LABOUR

DATE: 12/09/2018

Executive Summary of the 20-year review of the implementation of the Employment Equity Act, 1998

The Employment Equity Act 55 of 1998 (the Act) was enacted to give effect to equality in terms of Section 9(2) of the Bill of Rights in the Constitution of the Republic of South Africa Act 108 of 1996. The purpose of this Act is to achieve equity in the workplace by-

- Promoting equal opportunity and fair treatment in employment through the elimination of unfair discrimination; and
- Implementing affirmative action measures to redress the disadvantages in employment experienced by designated groups, in order to ensure their equitable representation in all occupational levels in the workplace.

It has been 20 years since the inception of the Employment Equity Act, however the pace of transformation has been very slow. Relative to the demographics of the Economically Active Population (EAP) as released quarterly by Statistics South Africa, marginal progress in relation to the equitable representation of the designated groups, in particular Africans, Coloureds and persons with disabilities have been made in the middle-to-upper occupational levels, which is repeatedly visible in the statistics contained in all the Commission for Employment Equity (CEE) annual reports.

The CEE Annual reports submitted from the years 2001 to 2017 reflected that the Public Sector showed significant progress of transformation as compared to the Private Sector, even though women in the Public Sector are underrepresented when taking into account their 45.3% of the EAP. For example, in Top and Senior Management levels, women only account for 32.6% and 39.0% respectively in all positions at these key decision-making levels in the Public Service. Whereas, in the Private Sector, women only account for 21.6% in Top management and 32.3% in Senior management levels.

In terms of the representation of Persons with disabilities across all sectors of the economy, they only account for 1% of the total workforce reported in 2017. In the Public Sector, their representation is at 1% and in the Private Sector is only 0.9%.

Employers tend to only use EAP distribution as a long term benchmark for the setting of self-imposed targets, there is no short-to-medium term benchmarks for the setting of numerical targets and goals. During the Director General Reviews conducted to assess substantive compliance with the Act, it became evident that most of the employers used the self-regulated targets as a shield to circumvent the law by setting low targets as there are no visible incentives or sanctions for not complying with the intentions of the law.

Therefore, it also became evident that a number of employers that are non-compliant or in breach of the Act, continue to unfairly financially benefit from the State by accessing State Contracts, despite their lack of commitment and willingness to transform and create equal opportunities and inclusion of the designated groups in their organisations.

In light of this, it became prudent to promulgate Section 53 of the Act, which was never promulgated since the inception of the Act in 1998. This provision states that:

“Every employer that makes an offer to conclude an agreement with any organ of state for the furnishing of supplies or services to that organ of state or for the hiring or letting of anything.

a) must-

- (i) If it is a designated employer, comply with Chapter II and III of this Act, or
- (ii) If it is not a designated employer, comply with Chapter II of this Act; and

b) attach to that offer either-

- (i) a certificate in terms of subsection (2) which is conclusive evidence that the employer complies with the relevant Chapters of this Act; or
- (ii) a declaration by the employer that it complies with the relevant Chapters of this Act, which when verified by the Director-General, is conclusive evidence of compliance.”

It is worth noting that this Section was not initially promulgated with the whole Act because the assumption then was that the Act was fairly new and no employer or organisation will be able to obtain the EE Certificate of compliance and as a result, employers needed to be given time to put in place processes and systems to comply with the requirements of the law.

However, 20 years later, it became clear that the assumption that all employers would embrace the objectives and spirit of the Act to transform their workplaces, did not materialise given the slow pace of transformation, especially for the previously disadvantaged groups such as black women and persons with disabilities.

Furthermore, it became evident that penalties for non-compliance that were increased through the 2013 amendments to this Act did not yield positive results because most of the non-compliant employers still budget for these penalties and are prepared to settle outside the Court of law.

Hence, it is critically important to strengthen the enforcement mechanisms by introducing the stick and carrot approach through the promulgation of Section 53. This will ensure that those that are prepared to implement the law and comply with the requirements of the Act should reap the benefits of access to State Contracts.

REPUBLIC OF SOUTH AFRICA

EMPLOYMENT EQUITY AMENDMENT BILL, 2018

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MINISTER OF LABOUR

GENERAL EXPLANATORY NOTE

- [] Words in [bold and in brackets] are proposed deletions.
_____ Words underlined are proposed insertions

BILL

To amend the Employment Equity Act, 1998 so as to insert new provisions to allow the Minister of Labour to establish sectoral numerical targets for the purpose of ensuring the equitable representation of suitably qualified people from designated groups (blacks, women and persons with a disability) at all occupational levels in the workforce; and enhance the administration of the Act, including the implementation of section 53 concerning state contracts.

BE IT ENACTED by the Parliament of the Republic of South Africa. As follows: -

Amendment of section 1 of Act 55 of 1998

1. The following definitions are amended in section 1 as follows:

- (a) the definition of “designated employer” is amended by the deletion of paragraph (b);
- (b) the following definition is inserted after the definition of ‘Minister’:

“**National Minimum Wage Commission**” means the Commission established in terms of the National Minimum Wage Act, 2017 (Act No. of 2017);”

- (c) the following definition is inserted after the definition of “Republic”-

“sector” means an industry or service or part of any industry or service;

- (d) the definition of ‘**serve or submit**’ is deleted.

- (e) the following definition is inserted after the definition of 'suitably qualified person';

"the state" means-

- (a) a national or provincial department as defined in the Public Finance Management Act, 1999 (Act 1 of 1999);
- (b) a municipality or municipal entity as defined in the Local Government Municipal Systems Act of 2000 (Act 32 of 2000);
- (c) a constitutional institution as defined in the Public Finance Management 1999 (Act, 1999 (Act 1 of 1999);
- (d) Parliament;
- (e) a provincial legislature;
- (f) any entity listed in Schedule 2 and 3 of the Public Finance Management Act of 1999 (Act 1 of 1999).

Amendment of section 8 of Act 55 of 1998

2. The following section is substituted in the principal Act for section 8:

"8 Psychological testing and other similar assessments

Psychological testing and other similar assessments of an employee are prohibited unless the test or assessment being used –

- (a) has been scientifically shown to be valid and reliable;
- (b) can be applied fairly to all employees; and
- (c) is not biased against any employer or group[;
- (d) **has been certified by the Health Professions Council of South Africa established by section 2 of the Health Professions Act, 1974 (Act 56 of 1974), or any other body which may be authorised by law to certify those tests or assessments]."**

3. **Deletion of section 14 of Act 55 of 1998**

Section 14 of the principal Act is hereby deleted.

Insertion of section 15A in Act 55 of 1998

4. The following section is inserted in the principal Act after section 15:

“15A Establishment of sectoral targets

- (1) The Minister may publish a notice in the Gazette identifying national economic sectors for the purposes of this Act, having regard to any relevant code contained in the Standard Industrial Classification of all Economic Activities published by Statistics South Africa.
- (2) The Minister may, after consulting the relevant sectors and with the advice of the Commission, for the purpose of ensuring the equitable representation of suitably qualified people from designated groups at all occupational levels in the workforce, by notice in the Gazette set numerical targets for any sector or part of a sector identified in terms of subsection (1).
- (3) A notice issued in terms of subsection (2) may set different numerical targets for different occupational levels, or regions within a sector or on the basis of any other relevant factor.
- (4) A draft of any notice that the Minister proposes to issue in terms of subsection (3) must be published in the Gazette and interested parties must be permitted at least 30 days to comment on the draft notice.”
- (5) The Minister may issue regulations prescribing the criteria to be taken into account in determining a numerical target in terms of subsection (2).

Amendment of section 20 of Act 55 of 1998

5. Section 20 is amended by the insertion of the following after subsection (2) –

“(2A) The numerical goals set by an employer in terms of subsection (2) must comply with any sectoral target in terms of section 15A that applies it. “

Amendment of section 21 of Act 55 of 1998

6. Section 21 is amended by –

- (a) the substitution for subsection (1) of the following subsection:

“(1) A designated employer must submit a report to the Director-General once a year **[on the first working day of October or]** on such **[other]** date and in such manner as may be prescribed.”

- (b) the deletion of subsections (3) and (4);

- (c) the substitution for subsection (4A) of the following subsection –

“(4A) An employer that is not able to submit a report to the Director-General **[by the first working day of October]** within the period prescribed in terms of subsection (1) must notify the Director-General in the prescribed time and manner **[in writing before the last working day of August in the same year]** giving reasons for its inability to do so.”

Amendment of section 27 of Act 55 of 1998

7. Section 27 is amended by the substitution with the following section:

“(1) Every designated employer, when reporting in terms of section 21(1), must submit a statement, as prescribed, to the **[Employment Conditions]** National Minimum Wage Commission **[established by section 59 of the Basic Conditions of Employment Act,]** on the remuneration and benefits received in each occupational level of that employer's workforce.

(2) Where disproportionate income differentials, or unfair discrimination by virtue of a difference in terms and conditions of employment contemplated in section 6(4), are reflected in the statement contemplated in subsection (1), a designated employer must take measures to progressively reduce such differentials subject to such guidance as may be given by the Minister as contemplated in subsection (4).

(3) The measures referred to in subsection (2) may include –

(a) collective bargaining;

(b) compliance with **[sectoral determinations made by the Minister in terms of section 51 of the Basic Conditions of Employment Act]** the national

minimum wage set in terms of the National Minimum Wage Act, 2017 (Act of 2017);

- (c) applying the norms and benchmarks set by the **[Employment Conditions] National Minimum Wage Commission;**
- (d) relevant measures contained in skills development legislation;
- (e) other measures that are appropriate in the circumstances.

(4) The **[Employment Conditions] National Minimum Wage Commission** must research and investigate norms and benchmarks for proportionate income differentials and advise the Minister on appropriate measures for reducing disproportional differentials.

(5) The **[Employment Conditions] National Minimum Wage Commission** may not disclose any information pertaining to individual employees or employers.

Amendment of section 36 of the Act 55 of 1998

8. Section 36 is amended by –

(a) the substitution for subsection 1 of the following subsection:

“(1) A labour inspector may request and obtain a written undertaking from a designated employer to comply with paragraph (a), (b), (c), (f), (h), (i) or (j) within a specified period, if the inspector has reasonable grounds to believe that the employer has failed to –

- (a) consult with employees as required by section 16;
- (b) conduct an analysis as required by section 19;
- (c) prepare an employment equity plan as required by section 20;
- [(c)] (d) to (e) inclusive...**”

Amendment of section 37 of the Act 55 of 1998

(a) the substitution for subsection 1 of the following subsection:

“(1) A labour inspector, or any person acting on behalf of a labour inspector, may **[issue]** serve a compliance order **[to]** on a designated employer in the prescribed manner if that employer has failed to comply with section 16, 17, 19, 22, 24, 25 or 26 of this Act.”

(b) the substitution in subsection (2) of the words preceding paragraph (a) of the following words –

“(2) A compliance order **[issued]** served in terms of subsection (1) must set out –

Substitution of subsection (1) in section 42 of Act 55 of 1998

9. The following subsection is substituted for subsection (1) of section 42 in the principal Act:

“42 Assessment of compliance

(1) In determining whether a designated employer is implementing employment equity in compliance with this Act, the Director-General or any person or body applying this Act may, in addition to the factors stated in section 15, take the following into account:

(a) The extent to which suitably qualified people from and amongst the different designated groups are equitably represented within each occupational level in that employer's workforce in relation to the demographic profile of the national **[and]** or regional economically active population;

(aA) whether or not the employer has achieved any sectoral target set in terms of section 15A applicable to that employer;

(b) reasonable steps taken by a designated employer to train suitably qualified people from the designated groups;

(c) reasonable steps taken by a designated employer to implement its employment equity plan;

(d) the extent to which the designated employer has made progress in eliminating employment barriers that adversely affect people from designated groups;

(dA) reasonable steps taken by an employer to appoint and promote suitably qualified people from the designated groups; and

(e) any other prescribed factor.”

Amendment of section 53 of Act 55 of 1998

10. Section 53 is hereby amended by –

(a) the substitution for paragraph (b) of the following -

“(b) attach to that offer **[either –**

(i)] a certificate in terms of subsection (2) which is conclusive evidence that the employer complies with the relevant Chapters of this Act[; **or**

(ii) a declaration by the employer that it complies with the relevant Chapters of this Act, which, when verified by the Director-General, is conclusive evidence of compliance].

(b) the insertion of the following subsection

“(6) The Minister may only issue a certificate in terms of subsection (2) if the Minister is satisfied that the employer –

(a) has met any sectoral targets in terms of section 15A that applies to it or has provided reasonable grounds, as contemplated by section 42(4), justifying its failure to comply;

(b) has submitted a report in terms of section 21;

(c) has not been found by the CCMA or a court within the previous twelve months to have –

(i) breached the prohibition on unfair discrimination in Chapter 2; or

(ii) failed to pay the national minimum wage in terms of the National Minimum Wage Act, 2017 (Act of 2017).”

Repeal section 64A of Act 55 of 1998

11. Section 64A of the principal Act is hereby repealed.

Repeal of Schedule 4 of Act 55 of 1998

12. Schedule 4 of the principal Act is hereby repealed.

Deletion of footnotes to Act 55 of 1998

13. Footnotes 4 and 5 are hereby deleted.

EXPLANATORY MEMORANDUM

THE EMPLOYMENT EQUITY BILL

1 Background

1.1 The Employment Equity Amendment Bill, 2018 is to be introduced to amend the Employment Equity Act, 1998. The amendments have the purpose of –

1.1.1 allowing the Minister of Labour to establish sectoral numerical targets for the purpose of ensuring the equitable representation of suitably qualified people from designated groups (blacks, women and persons with a disability) at all occupational levels in the workforce; and

1.1.2 enhancing the administration of the Act, including the implementation of section 53 concerning state contracts.

2 Amendment of section 2 of Act 55 of 1998

The following changes are made to the definitions –

2.1 The definition of a designated employer is amended by repealing paragraph (b) which classified employers with fewer than 50 employees who meet a turnover threshold as designated employers.

2.2 A definition of the National Minimum Wage Commission is introduced;

2.3 A definition of sector is included;

2.4 The definition of "serve or submit" is deleted to allow the Minister to prescribe by regulation the methods of service and submission of documents by regulation.

2.5 A definition of "the state" is included to ensure certainty concerning the application of section 53 dealing with state contracts.

3 Amendment of section 8 of Act 55 of 1998

Section 8 is amended by excluding the requirement that psychological testing and other assessments of employees must be certified by the Health Professions Council of South Africa. The Council does not have the capacity or procedures to undertake this certification. In the event of a dispute, the validity of these tests will continue subject to evaluation by the Labour Court.

4 Deletion of section 14

Section 14 which allowed non-designated employers to notify the Director General of voluntary compliance with Chapter 3 is repealed.

5 Insertion of section 15A of Act 55 of 1998

5.1 A new section, 15A, is inserted which will allow the Minister to –

5.1.1 identify national economic sectors for the purposes of the administration of the Employment Equity Act;

5.1.2 establish numerical targets for these sectors.

5.2 The sectoral targets set may differentiate between occupational levels, sub-sectors, regions or other relevant factors.

5.3 The Minister may publish regulations listing the criteria to be applied in setting sectoral targets.

6 Section 20 is amended to insert a new

Amendment of section 20 of Act 55 of 1998 provision to link the sectoral EE targets to the numerical targets set by designated employers in the EE Plan of their workplaces.

7 Amendment of section 21 of Act 55 of 1998

Section 21 is amended to permit the Minister to prescribe by regulation the manner in which employers are required to submit employment equity reports.

8 Amendment of section 27 of Act 55 of 1998

Section 27 is amended to transfer the functions of the Employment Conditions Commission in respect of reporting and monitoring of disproportionate income differentials to the National Minimum Wage Commission.

9 Amendment of section 37 of Act 55 of 1998

Section 37 is amended to permit the Minister to prescribe by regulation the manner of service of compliance orders on employers.

10 Amendment of section 42 of Act 55 of 1998

Section 42 is amended to clarify that a designated employer's compliance with its obligations to implement affirmative action may be measured against the demographic profile of either the national or the regional economically active population. In addition, compliance may be measured against an employer's compliance with the sectoral targets set by the Minister terms of section 15A.

11 Amendment of section 53 of Act 55 of 1998

11.1 Section 53 provides that state contracts may only be issued to employers that have been certified as being in compliance with their obligations under the Employment Equity Act.

11.2 Subsection (1) is amended to require that an employer attaches a certificate when concluding a contract with the State in terms of Subsection (2) as conclusive evidence that the employer complies with the relevant Chapters of the Act.

11.3 A new section 53(6) is inserted to clarify that the Minister of Labour may only issue a certificate to an employer if the employer –

11.3.1 has achieved any applicable sectoral targets or has raised a reasonable ground for non-compliance;

11.3.2 has submitted its most recent employment equity report; and

11.3.3 has not been found within the previous twelve months to have breached the prohibition on unfair discrimination or to have paid wages below the level of the national minimum wage.

12 Amendment of section 64A of Act 55 of 1998

Section 64A which allowed for the setting of annual turnover thresholds applicable to defining employers with less than 50 employees as designated employers is repealed.

13 Repeal of Schedule 4

Schedule 4 containing the turnover thresholds referred to in Section 64A is repealed.

14 Deletion of footnotes 4 and 5

Footnotes 4 and 5 which are outdated are deleted.