



SABOA

PRESENTATION TO SABOA MEMBERS

**DRAFT EMPLOYMENT EQUITY
REGULATIONS
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EMPLOYMENT EQUITY AMENDMENT ACT

- The Employment Equity Amendment Act, 2022 was assented to by the President on 6 April 2023. The amendments are not yet in force. They will take effect on a date fixed by the President by proclamation in the Government Gazette. In a previous media release by the Department of Employment and Labour it was announced that the amendments would take effect on 1 September 2023 but this still needs to be confirmed.
- One of the main objectives of the amendments introduced is to empower the Minister of Labour and Employment to, among other things, identify and set employment equity numerical targets for each national economic sector.

EMPLOYMENT EQUITY AMENDMENT ACT

- The Employment Equity Act (EEA) applies to all employees and employers who operate in South Africa, except the South African National Defence Force, National Intelligence Agency and South African Secret Services. While the EEA applies to all employers (excluding those listed above), certain sections of the EEA only apply to designated employers.
- The amendments to the EEA will bring about a change to the definition of “designated employer” to restrict the application of these sections to a reduced group of employers and relieve some of the administrative burden on smaller employers

EMPLOYMENT EQUITY AMENDMENT ACT

- Changes include the introduction of an Employer Equity Certificate of Compliance which companies wishing to participate in state contracts are now required to provide. Companies without an Employment Equity Certificate of Compliance will not be able to receive any points under the Management Control pillar of the B-BBEE scorecard and could be subject to fines and penalties for non-compliance with the Employment Equity Act. Management Control has traditionally been the pillar that all sectors struggle the most with.

EMPLOYMENT EQUITY AMENDMENT ACT

- The purpose of the numerical targets is to ensure equitable representation of suitably qualified people from historically disadvantaged groups based on race, gender
- The EEA prohibits discrimination against an employee, directly or indirectly, in any employment policy or practice on the grounds of:
 - race
 - gender
 - pregnancy
 - marital status
 - family responsibility

EMPLOYMENT EQUITY AMENDMENT ACT

- ethnic or social origin
- colour
- sexual orientation
- age
- disability
- religion
- HIV status
- conscience
- belief
- political opinion
- culture
- language and
- birth

EMPLOYMENT EQUITY AMENDMENT ACT

- **How will smaller employers be affected by the amendments?**
- Smaller employers are positively affected by a change in the definition of “designated employer”. The definition is amended to exclude employers who employ fewer than 50 employees, irrespective of their annual turnover.
- **What is the effect of the amendment to the definition of designated employer?**
- As a result of the amendment, smaller employers will not be required to comply with the obligations of a designated employer relating to affirmative action, including the development and implementation of employment equity plans and reporting to and submission of employment equity reports to the Department of Employment and Labour. This will significantly relieve the administrative burden on these employers.

EMPLOYMENT EQUITY AMENDMENT ACT

- **As a result of the amendment, will smaller employers be deprived of the ability to secure a certificate of compliance?**
- No. While smaller employers will not be required to develop and submit employment equity reports, they will nevertheless be entitled to obtain a certificate of compliance under section 53 of the EEA
- **Will there be any changes in relation to and for people with disabilities?**
- Yes. The definition of "people with disabilities" is substituted to align with the definition in the United Nations Convention on the Rights of Persons with Disabilities, 2007. The amended definition includes within the meaning of "people with disabilities", "people who have a long-term or recurring physical, mental, intellectual or sensory impairment which, in interaction with various barriers, may substantially limit their prospects of entry into, or advancement in, employment". This enhanced definition accords with a more expansive international understanding of what constitutes disabilities.

EMPLOYMENT EQUITY AMENDMENT ACT

- **Will there be an ongoing requirement for HPCSA certification in relation to psychological testing?**

No. In 2014, the EEA was amended to make it a requirement that psychological testing and similar assessments be certified by the Health Professionals Council of South Africa (HPCSA). The amendment was aimed at addressing a concern that without the relevant and formal certification, such tests were essentially partial and could result in exclusionary practices, particularly in a country as culturally diverse as South Africa. Subsequent to the amendment, the capacity of the HPCSA to fulfil the requirement was legally challenged. The latest amendment removes the requirement of certification by the HPCSA of psychological testing and similar assessments.

EMPLOYMENT EQUITY AMENDMENT ACT

- **What is the purpose of the introduction of sectoral numerical targets?**
- The new section 15A introduces sectoral numerical targets. The purpose of this addition is to ensure the equitable representation of people from designated groups (historically disadvantaged groups of people based on race, gender, and disability) at all occupational levels in the workforce. The amendment empowers the Minister of Employment and Labour (Minister) to identify national economic sectors for purposes of the administration of the EEA and set numerical targets for each such sector.
- **How will the sectoral numerical targets be determined?**
- The sectoral numerical targets will be determined by the Minister in consultation with the Employment Equity Commission. All proposals in relation to identifying sectors (an industry or service or part of any industry or service) and setting numerical targets for sectors will have to be published in order to afford interested parties a period of at least 30 days to comment on the proposal.

EMPLOYMENT EQUITY AMENDMENT ACT

- **How will the sectoral numerical targets impact a designated employer's employment equity plan?**
- An amendment to section 20 of the EEA (which deals with employment equity plans) links the sectoral numerical targets to the numerical targets set by a designated employer in its employment equity plan. A designated employer will be required to set numerical targets in line with the applicable sectoral targets set by the Minister.
- An amendment to section 42 aligns the assessment of compliance with employment equity with the new requirements relating to sectoral numerical targets.
- **Could the sectoral numerical targets impact an employer's eligibility for the awarding of state contracts?**
- Yes. An amendment to section 53 of the EEA dealing with state contracts provides that the Minister may only issue a compliance certificate if the employer has complied with the sectoral numerical targets set by the Minister for the relevant sector, or has demonstrated a reasonable ground for non-compliance.

EMPLOYMENT EQUITY AMENDMENT ACT

- **Do the amendments offer any clarity relating to a designated employer's obligation to consult with a trade union?**

Yes. An amendment to section 16 of the EEA clarifies the consultation process between a designated employer and its employees. Where there is a representative trade union the designated employer must only consult with that trade union, and not with its employees. The consultations relate to the implementation of an employment equity plan, the analysis conducted by a designated employer to identify employment barriers which adversely affect people from the designated groups, and the content and submission of the employment equity report.

DRAFT EE REGULATIONS FOR PUBLIC COMMENTS

- On the 12th of May 2023 The Minister of Labour & Employment published the regulations on the Government Gazette for comments
- Only 30 days have been set aside for public comments
- The regulations propose sector economic targets in terms of Section 15A of the EE Amendment Act 04 of 2022
- 18 economic sectors are listed
- SABOA members fall under Transport and Storage

DRAFT EE REGULATIONS FOR PUBLIC COMMENTS

- Numerical targets may be different for different occupational levels, or regions within a sector
- The proposed targets for the various economic sectors prescribed in the EEA17 form in terms of population groups and gender for the occupational levels (i.e. Top Management, Senior Management, Professionally Qualified and Skilled Levels) and for employees with disabilities
- The proposed sector EE numerical targets for the various population groups (i.e. African, Coloured, Indian and White) and gender must, where applicable, be proportional to the demographics of the Economically Active Population, whether national or provincial

DRAFT EE REGULATIONS FOR PUBLIC COMMENTS

- The national EAP shall apply to designated employers conducting the business/operations nationally, and the respective provincial EAP shall apply to designated employers conducting their business/operations in a particular province
- Designated employers must choose only one demographics (i.e. either national or provincial) and utilise the chosen demographics for the entire duration of the EE Plan that is in line with the 5 year sector targets.
- However, there are no defined sectoral targets for semi-skilled or unskilled employees with the amended regulations requiring companies to apply economically active population (EAP) figures to determine employment equity plan numerical goals for semi-skilled or unskilled employees. Of concern, however, is the fact that some sector targets are now higher than the EAP for middle and junior management in those sectors making it highly unlikely that those targets will be met.

DRAFT EE REGULATIONS FOR PUBLIC COMMENTS

- Designated employers are still required to implement the 5 year numerical goals and annual targets set in terms of section 20(2)(c) for the semi-skilled and unskilled levels in their EE Plans, which are not covered by the sector targets, by utilising the same demographics of the EAP that they have chosen, whether national or provincial.
- Employers who fail to comply with the amended regulations may be subject to fines of up to R1.5 million or 2% of turnover for first time offenders. Repeat offenders can face fines up to a maximum of R2.7 million or 10% of turnover.
- According to the Department of Labour, reasonable grounds for non-compliance with regards to meeting targets includes insufficient recruitment or promotion opportunities and a lack of suitably qualified candidates from the targeted designated groups. To prove their case, companies will need to substantiate their claims with detailed documentation showing how they recruit, promote and terminate employees.

DRAFT EE REGULATIONS FOR PUBLIC COMMENTS

The various sectoral numerical targets are displayed on the accompanying Government Gazette. Of importance are the number 6 tables under Transportation and Storage

DRAFT EE REGULATIONS FOR PUBLIC COMMENTS

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