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AMENDED EMPLOYMENT EQUITY ACT: COMPLIANCE REQUIREMENTS FOR DESIGNATED AND NON-DESIGNATED EMPLOYERS (BY GIDEON GERBER)



*In the first of a four-part blog series, we deal with specific aspects of the Employment Equity Act.

Although each part can, on its own, serve as an independent blog, they are also tied together to be mutually inclusive.

As introduction, the Employment Equity Act (EEA) of 1998 (Act No. 55 of 1998) was amended by the Employment Equity Amendment Act 4 of 2022 and became effective on 1 January 2025.

Impact of the amended EEA on employers

Below is some of the most notable *amendments to the Employment Equity Act*:

- The definition of “designated employers” now only includes employers who employ 50 or more employees, and municipalities, organs of state and employers bound by a collective agreement which binds an employer to be a designated employer. The previous criteria for employers who employed fewer than 50 employees but whose annual turnovers exceeded the thresholds per industry enumerated in Schedule 4 of the Act, have now fallen away;
- The Act enjoins the Minister of Employment and Labour (Minister) to identify national economic sectors and to set numerical targets for any national economic sector identified by the Minister; and
- The issuing of certificates by the Minister to employers who make offers to conclude agreements with any organ of state for the supply of goods and services, confirming such an employer’s compliance with chapter II (in respect of all employers), or chapters II and III of the Act (in respect of only designated employers), including compliance with numerical targets set by the Minister for the relevant economic sector in which a designated employer operates.

The fact that many smaller employers now fall outside the scope of the definition of designated employer, means that they are no longer burdened with the requirement in terms of the *EEA to implement affirmative action in the workplace*, to develop and implement Employment Equity (EE) plans, and to submit these plans and annual reports to the Department of Employment and Labour (Department).

The amendments to the EEA have received wide media coverage and legal commentary.

Unfortunately, some of the media reports and commentary suggest, and in other cases it is misconstrued, that non-designated employers (those employing fewer than 50 employees), who are not required to implement affirmative actions and to submit EE plans and reports to the Department, do not have any further duties in terms of the EEA.

This is far from the truth.

The EEA still imposes compliance duties on both designated and non-designated employers. In order to understand the duties imposed by the EEA on the different categories of employers, an elucidation of the purpose and operation of the Act is required.

The purpose and objectives of the Employment Equity Act (EEA)

The purpose of the *EEA*, as set out in section 2 of the Act, is to "achieve equity in the workplace".

To achieve this objective, the Act requires a dual approach.

- **The first angle of approach is to promote equal opportunities and fair treatment in employment through the elimination of unfair discrimination in the workplace, which can be described as "levelling of the playing field".**
- The provisions dealing with this first approach are set out in chapter II of the Act and involve all employers (designated and non-designated) in respect of of all employees – those from designated as well as non-designated groups.
- The Act requires steps to be taken by all employers to promote equal opportunity in the workplace by eliminating unfair discrimination in any of their employment and working environment policies and practices (section 5) in respect of all employees.

- **Only once the playing field is level for everyone, does the second angle of approach come into play.** It involves the implementation of affirmative action measures as positive steps to achieve employment equity.
- The provisions of this second leg of the approach are delineated in chapter III of the EEA and are only applicable to designated employers and only involve designated employers and employees from designated groups, namely black people, females (all races) and people with disabilities (all race and gender groups).
- To implement affirmative action measures, designated employers must develop and implement EE plans for a period of not less than one year and not exceeding five years.
- They must submit their Employment Equity (EE) plans to the Department and report annually on progress made in achieving the goals set out in their plans.
- The Act sets various requirements for an EE plan (sections 16 to 19).

The requirements applicable to *designated employers* are discussed in the follow-up blogs as part of this series of blogs.

The purpose of the discussion in Part One is firstly, to focus on the compliance applicable to all employers, not only designated employers.

The sanctions for non-compliance by non-designated and designated employers are then discussed in Part Two of this 4 part blog series.

Important steps to be taken by all employers

The Act requires all employers to take steps to eliminate all forms of discrimination in the workplace. The “steps” to be taken in terms of section 5, chapter II of the EEA by all employers are contained in two important adjunct documents relevant to the interpretation and implementation of the Act.

Firstly, paragraph 5.2.4 of the *Code of Good Practice on the Integration of Employment Equity into Human Resource Policies and Procedures* (the Codes) issued in terms of section 54 of the EEA explains that this process provided for in section 5 of the EEA requires an “audit and analysis” of all “employment policies, as well as the working environment and facilities” of an employer.

Secondly, the guidelines issued by the International Labour Organization (ILO) to countries such as South Africa which are bound by the conventions of the ILO (section 3(d) of the EEA), suggest that such “steps” should involve the following:

- Conducting an assessment (anti-discrimination audit, analysis and assessment) to determine whether discrimination is taking place within the enterprise, for example using a self-assessment questionnaire;
- Drafting an enterprise policy establishing clear procedures on non-discrimination and equal opportunities;
- Providing training at all levels of the organisation to raise awareness and encourage people to take action against discrimination;
- Setting measurable goals and specific time frames to achieve objectives; and
- Monitoring and quantifying progress to identify exactly which improvements had been made.

The audit and analysis imposed by section 5 of the EEA should not be confused with the audit required by section 19 of the Act to identify employment barriers for designated groups.

Section 5 applies to all employers (designated and non-designated) in respect of all employees (designated groups and non-designated groups) in respect of all employment and working environment policies and practices to create equal opportunities. Section 19, on the other hand, is a narrower audit. It requires the identification of barriers that prevent persons from specifically designated groups from making progress. The section 19 audit (chapter III) is required to identify barriers other than those already identified as discriminatory in terms of section 5 (chapter II) as the first step towards achieving the objective of the EEA with regard to equal opportunities.

Importance of compliance by all Employers

Compliance with chapter II by all employers is important for two reasons:

- Firstly, compliance can be enforced in respect of all employers by labour inspectors in terms of section 64 of the *Basic Conditions of Employment Act (BCEA)*. Labour inspectors are entrusted with the power to enforce “employment law” which includes compliance with the EEA (section 63 of the BCEA) and can obtain written undertakings from, and issue compliance orders to employers. The Director-General of the Department can also make recommendations to employers who are not in compliance with the EEA. Such undertakings, compliance orders and recommendations can be made an order of court by the Labour Court. Non-adherence to an order of court constitutes a criminal offence of contempt of court which is punishable by a fine and/or imprisonment.
- Secondly, all employers offering to do business with the state must comply with chapter II, and furthermore, designated employers are required to comply with chapter III. Proof of compliance with chapter II by all employers and also with chapter III by designated employers, must be provided by means of a declaration or a certificate issued by the Department (Minister).

Conclusion

Although non-designated employers are not required to implement affirmative action or to develop, *implement and submit EE plans and EE reports*, the EEA not only regulates affirmative action, but also equal opportunities.

Equal opportunities refer to leveling of the playing field for all employees by removing all forms of discrimination from the workplace as a basic requirement and starting point. This duty applies to all employers. Once the playing field is level, designated employers are expected to embark on further processes of affirmative action to pursue equal representation. Steps required to be taken by all employers to identify and eliminate discrimination in all workplace policies and practices are contained in chapter II, section 5 of the EEA. Such anti-discrimination assessments, with questionnaires, plans and timelines, will serve as proof and will need to be available on inspection by labour inspectors, or on request by the Director-General of the Department or the Minister, should a certificate be required to conduct business with the state.

In the ensuing blog, Part Two, *the specific duties imposed by the Act on designated and non-designated employers and the sanctions for non-compliance are dissected in more detail.*

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Our Employment Equity Specialists and *Skills Development Facilitators (SDFs)* offer professional guidance to ensure compliance with the amended Employment Equity Act. Contact us for expert advice on how Employment Equity may impact your business, including its role in *BEE compliance*. Our legal consulting services also include assisting businesses in the following areas: *Labour Relations*, *Occupational Health and Safety*, *BEE compliance*, Information Law (*POPIA and PAIA*), Employment *Training* and *Corporate Law*.

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https://www.gov.za/sites/default/files/gcis_document/202304/48418employment-equity-amendment-act42022.pdf

https://www.gov.za/documents/acts/employment-equity-amendment-act-4-2022-english-xitsonga-14-apr-2023

https://www.gov.za/documents/notices/employment-equity-amendment-act-commencement-english-afrikaans-28-nov-2024

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