

March 19, 2025

AFFIRMATIVE ACTION REQUIREMENTS SET BY THE EMPLOYMENT EQUITY ACT (EEA)



This is Part Three of our four-part blog series on the application of the amended Employment Equity Act of 1988 (Act No. 55 of 1998) which came into effect on 1 January 2025.

If you have missed the two previously published articles, kindly follow the links below:

- In Part One we discussed *the compliance requirements for designated and non-designated employers in the context of the amended EEA*.
- In Part Two we discussed *employer duties imposed by the EEA and sanctions for non compliance*.

We have also published a useful guide outlining the provisions of the EEA that prescribe sanctions for non-compliance. For ease of reference, you can download a copy of the *Employer Duties and Sanctions for Non-Compliance with the Amended EEA and Numerical Sector Targets*.

In this part, the focus is on the implementation of lawful affirmative action measures.

As discussed in the previous parts of this series of blogs, the EEA places significant emphasis on the implementation and enforcement of administrative procedures in an attempt to ensure that the objectives of the Act are achieved.

These processes can briefly be described as follows:

- Steps to be taken by all employers in the form of audits and analysis to identify and eliminate all forms of discrimination in workplace and working environment policies and practices – an anti-discrimination assessment of workplace and working environment policies and practices is required (section 5);
- For designated employers, a process of consultation with employees in conducting a workforce profile to determine the level of representation of designated groups at all occupational levels and whether such groups are under-represented (sections 16 to 19)--
 - compile a plan with objective measures, timetables and strategies to achieve equitable goals (section 20); and
 - introduce measures to monitor implementation and appoint a senior manager to take responsibility for monitoring and implementation of an employment equity plan;
- Report annually to the Department of Employment and Labour on progress in achieving the intended goals / targets to achieve equitable representation of all designated groups at all occupational levels;
- In respect of all employers, display in the workplace the provisions of the Act (section 25); and
- All employers to keep records of their compliance with the Act for a period of at least five years.

Besides the processes prescribed and enforced by the EEA, it also makes provision for measures, so-called “affirmative measures” or “affirmative action”, in an attempt to ensure achievement of the Act’s ultimate goal of equal representivity of all designated groups at all occupational levels.

These measures are often contained in an enterprise’s Employment Equity Plan / Employment Equity Strategy / Employment Equity Policy / Transformation Policy / Recruitment Policy. It is important to ensure that such plans, strategies and policies comply with the EEA.

In this Part, the focus is purely on the minimum affirmative action measures and the requirements set for affirmative action measures by the EEA. The requirements that these measures must meet within the broader legal framework apart from the EEA, will be the subject matter of a later series of blogs.

The ensuing blog, will deal in more detail with one of the more onerous and contentious *requirements of National Economic Active Population (EAP) targets versus Provincial EAP targets.*

Minimum affirmative action measures (duties) that the EEA sets for designated employers

The EEA describes affirmative action measures as “measures designed to ensure that suitably qualified people from designated groups have equal employment opportunities and are equitably represented in all occupational levels in the workforce of a designated employer” (section 15(1)).

The EEA allows designated employers to use their own initiative and discretion to design affirmative action measures (section 20(6)). However, the Act requires that certain minimum measures must be introduced by all designated employers. Moreover, the Act sets boundaries for all affirmative action measures – those set by the employer at its own discretion and those set as a minimum requirement by the Act.

The Act requires the following minimum affirmative measures to be implemented by all designated employers (section 15(1) and (2)):

- Measures to identify and eliminate employment barriers, including unfair discrimination which prevents people from designated groups from progressing in the workplace;
- Measures designed to further diversify the workplace and are based on equal dignity and respect for all people;
- Making reasonable accommodation for people from designated groups to ensure that they enjoy equal opportunities and are equitably represented in the workforce;
- Measures to ensure the equitable representation of suitably qualified people from designated groups at all occupational levels; and
- Retention and development of people from designated groups, including appropriate training measures.

From the minimum affirmative action provisions enunciated above, two important terms emanate and are further explained by the Act. These terms are “reasonable accommodation” and “suitably qualified”.

Reasonable accommodation

The term “reasonable accommodation” is defined in section 1 of the Act as “any modification or adjustment to a job or to the working environment that will enable a person from a designated group to have access to or participate in or advance in employment”.

One of the more common practices as an example of accommodation in respect of working environment is to allow a disabled person to work from home where the working environment is more suitable or conducive. These are instances where a disabled person in a wheelchair for example cannot access a workplace with stairs without the facility of an elevator.

With regard to working environment accommodation – a job in itself – the way in which the work is done or the job description can also be adjusted to accommodate people from designated groups. This, for instance, includes translation of manuals, working procedures and operations to make them more understandable for people from designated groups to perform the tasks associated with the job.

Suitably qualified

Section 20(3) of the EEA determines that a person may be suitably qualified for a job as a result of any one or a combination of the following factors:

- Formal qualifications;
- Prior learning;
- Relevant experience; or
- Capacity to acquire, within a reasonable time, the ability to do the job.

The Act then requires an employer to consider all the factors and determine whether that person has the ability to do the job based on any one or a combination of these factors.

Requirements which all affirmative action measures must meet

The EEA sets certain pertinent requirements with which all affirmative action measures must comply.

Five main requirements are set, namely:

1. All persons, including those from designated groups, must be suitably qualified;
2. Measures may include preferential treatment (section 15(3));
3. Measures may include numerical goals but exclude quotas (section 15(3));
4. Employers may not adopt employment policies and practices that would establish absolute barriers to the prospective or continued employment or advancement of people who are not from designated groups (section 15(4)); and
5. Affirmative action must be applied in a nuanced way, and economically active population statistics are but one of many factors to consider (regulation 4.2 of Draft Employment Equity Regulations, 2024).

These requirements will now be considered separately.

o All persons, including those from both designated and non-designated groups, must be suitably qualified

As discussed above, the Act defines suitably qualified in such a way as to assist those from designated groups with the necessary potential but without formal qualifications, prior learning and experience. The concept of suitably qualified sets an important norm. It requires all persons, those from designated and non-designated groups, to have the ability to do the work.

Appointing a non-suitably qualified person from a designated group may constitute unfair discrimination if such an appointment results in the non-appointment of a suitable person from a non-designated group. Likewise, the appointment of a non-suitable person from a non-designated group may also constitute unfair discrimination or an unfair labour practice if it results in the non-appointment of a suitable person from a designated group. Even if a person has formal qualifications, prior learning and relevant experience, the person must still be capable of doing the work, and a person without a formal qualification, prior learning or relevant experience but with the potential to learn to do the work is regarded as suitably qualified and can be considered. The Act goes further and prohibits discrimination against a person based solely on a lack of experience. The ability or potential to learn to do the work, without formal qualifications, prior learning or relevant experience, is a measure to assist persons from designated groups to be preferred for positions.

However, regulation 4.5.6 states that insufficient qualifications, skills and experience of persons from designated groups are deemed to be reasonable grounds for not complying with the numerical targets set by the Minister. Therefore, relevant experience or the lack of experience cannot be ignored and must be applied as one of the factors.

The “suitably qualified” requirement essentially means that the appointment of a non-suitably qualified person at the expense of a suitably qualified person will constitute unfair discrimination and/or unfair labour practice depending on the circumstances of each case.

o **Measures may include preferential treatment**

The requirement of preferential treatment constitutes the essence of affirmative action. Affirmative action is not a process of excluding non-designated groups, but rather to give preference to designated groups.

Therefore, policies or practices that exclude non-designated groups will be tantamount to unfair discrimination. Appointment procedures need to be developed and implemented in such a way that preference is given to designated groups without disqualifying persons from non-designated groups. Thus, an evaluation system based on a points system where candidates from designated groups score more points on certain elements, such as relevant experience to correct past barriers, will be justified.

The only instance recognised by the Act for the disqualification of an applicant is if it is based as an inherent requirement of a job. Such inherent qualities must be absolutely necessary to perform the relevant job, for instance excluding male applicants for a position as a model to advertise a range of women’s clothing, or excluding persons of a certain age from advertising a range of children or teenager clothing.

o **Measures may include numerical goals but exclude quotas**

The aspect of goals versus quotas was explained by two prominent Constitutional Court cases.

In ***South African Police Service v Solidarity obo Barnard* [2014] ZACC 23** (referred to as *Barnard*) and in ***Solidarity and Others v Department of Correctional Services and Others* [2015] ZACC 16** (referred to as *Correctional Services*) the Constitutional Court explained that targets and goals are flexible while quotas are rigid.

- In *Correctional Services*, the Constitutional Court held that the provision for factors such as the operational needs of an employer in its EE Plan to deviate from the numerical goals is evidence that the targets are flexible and lawful.
- The Court held that targets are by their very nature something that needs to be pursued and do not constitute a rigid quota or something that cannot be deviated from.
- In *Barnard, Van der Westhuizen J*, the Court in a minority judgement found that by focusing on numerical targets alone, affirmative action may thwart other equality concerns.
- He explained that in the case of minority disadvantaged groups, such as Coloureds and Indians, who comprise a small percentage of the population, the numerical target for the group would be very small or even non-existent.
- If a candidate of a minority disadvantaged group cannot be appointed, it would in effect disadvantage previously disadvantaged groups.

○ **Employers may not adopt employment policies and practices that would establish absolute barriers to the prospective or continued employment or advancement of people who are not from designated groups**

Although the Act refers to absolute barriers to non-designated groups, this prohibition was extended in regulation 4.3 of the Draft EE Regulations, 2024 to include “any persons from any group”. Therefore, the implementation of affirmative action may not create absolute barriers to being appointed or to progress for persons of any group.

The numerical targets may also not make it impossible for any employee to participate or to make progress in employment.

An example of a prohibited policy or practice would be the retrenchment of persons from non-designated groups to make space for persons from designated groups.

This was more specifically and clearly formulated in regulation 4.7 of the Draft EE Regulations, 2024 which stipulates that no employment termination of any kind may be effected as a consequence of affirmative action.

In the much-criticised judgement of *Barnard*, the Constitutional Court held that the South African Police Service's EE Plan, in terms of which the employee (*Barnard*) was overlooked for promotion as a result of the overrepresentation of the employee's race and gender group (white women) at that occupational level, was not unlawful or unfair as the employee had progressed to her current level (rank) of Lieutenant-Colonel in the South African Police Service which, according to the Constitutional Court, indicates that there was no absolute barrier for the employee to progress.

However, the South African Human Rights Commission (SAHRC) in its *Equality Report 2017/18* pointed out that the representivity principle which was applied in *Barnard* to a white woman, and which was affirmed for all race groups in *Correctional Services*, created imbalances.

According to the SAHRC, a white male from a non-designated group may be preferred over an African female from a designated group if the population target for African females is filled and that of white males not.

This, according to the SAHRC, will prevent and create absolute barriers for suitable candidates from previously disadvantaged groups to being appointed.

Therefore, numerical targets cannot be pursued in such a way that any race or gender group is excluded or barred from participating or progressing in employment.

o Affirmative action must be applied in a nuanced way, and economic active population (EAP) statistics are but one of many factors to consider

There are many factors that need to be built into an Employment Equity Plan / Policy / Strategy for consideration to ensure fairness and dignity for all. Many of these factors were laid down by the Constitutional Court and are discussed in the next blog, namely Part Four of this series, and blogs to follow.

Of importance at this point is the question of national versus regional targets.

These targets differ substantially as the overall demographic spread of South Africa differs vastly from region to region.

Regulation 3.4.8 of the Draft Regulations, 2024, determines that the National EAP shall apply to designated employers conducting their business / operations nationally and that the relevant Provincial EAP shall apply to designated employers conducting their business / operations in a particular province.

This requirement can provide national employers with significant challenges. In *Correctional Services*, the Court found that the Department of Correctional Service's EE Plan was not compliant with the EEA as the Act at that point provided for both the National EAP and Provincial EAP to be considered.

As the Department of Correctional Services only considered the National EAP, the Constitutional Court held that the Department's EE Plan was contrary to the EEA and therefore unlawful, and that the non-appointment of Coloured people as a result of the incorrect application of the EAP targets constituted unfair discrimination and an unfair labour practice.

The provisions of the Act have been amended since the *Correctional Service* judgement and the Act and Regulations now provide for only one of the two EAP targets to be applied. This provision of the Act is inconsistent with its own provisions and objectives.

Thus, both National and Provincial EAP will have to be considered to meet the requirement that affirmative action must be applied in a nuanced way and that EAP statistics will only be one of many factors.

The matter of National EAP *versus* Regional / Provincial EAP requires a more comprehensive assessment and is discussed in more detail in the next blog, Part Four.

Conclusion

For affirmative action to be implemented in compliance with the Act and thus lawfully, certain minimum or basic affirmative action measures must be implemented. Over and above these minimum measures, designated employers are also at liberty to implement additional affirmative measures and preferences on condition that they promote the objective of equal representation. The minimum measures prescribed by the Act as well as those discretionary measures introduced by designated employers must also meet certain norms and standards. They can be said to be EEA standards.

However, affirmative action measures must also comply with Constitutional norms. The Constitutional norms will be discussed in a later blog. Part Four will deal with one of the main inconsistencies of the EEA, namely the question of National EAP *versus* Regional / Provincial EAP.

If a designated employer fails to apply its Employment Equity Plan (or similar policy and strategy) to strike a balance between the National EAP and Provincial EAP, it cannot be said to be a nuanced plan and will fall short of the EEA requirements and the Constitutional norms of fairness and substantive equality.

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