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EMPLOYMENT EQUITY PROPOSED AMENDMENTS planned for 2014

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The Amended Employment Equity Act places an obligation on employers to train all employees on the provisions of the Employment Equity Act. Training on the act, diversity management programs and discrimination awareness programs must be reported in part 10 of the employment equity plan to the Department of Labour.

1. EMPLOYMENT EQUITY HISTORICAL BACKGROUND

Since its inception in 1998 and the end of the first reporting period in the year 2000, the Employment Equity Act 55 of 1998 (the EE Act) saw 14 annual reporting periods before the recent amendments. The amendments are contained in the Employment Equity Amendment Act 47 of 2013 which was published for general information on 16 January 2014 and still waiting to be signed by President Jacob Zuma. (Not approved yet)

Coupled with these enhanced provisions, the EE Act will have far-reaching implications for non-compliant employers. Amendments to the regulations are currently also in the pipeline and are soliciting widespread comment from business.

In terms of section 21 of the EE Act all designated employers are required to submit their annual employment equity (EE) report by a certain date, normally the first working day of October. Electronic filing is also allowed.

2. SUMMARY OF THE AMENDMENTS

The new amendments to the Employment Equity Act 2014 planned will influence:

1. How you recruit new staff...
2. How you training of staff...
3. How you pay your employees...
4. How you do your EE reporting...
5. How you perform your EE plans...

If you don't comply with this the DoL could fine you 10% of your turnover or up to R2.7 million! Now 10% may not seem like a lot, but if your annual turnover is R6 million, you'd be liable to pay the DoL R600,000 for each area of non-compliance! And if you're non-compliant with five of the changes that could cost you R3 million.

If you employ more than 50 people or if your turnover is over the Employment Equity Act threshold for your industry, you need to comply with each and every one of them.

3. CHANGES IN THE DEFINITION OF DESIGNATED EMPLOYERS OF THE ACT

The designated employers referred in the new amendment in section 21 are:

- An employer who employs 50 or more employees
- An employer who employs fewer than 50 employees, but has a total annual turnover that is equal to or above the applicable annual turnover of a small business in terms of Schedule 4 to the EE Act
- A municipality, as referred to in Chapter 7 of the Constitution
- An organ of state as defined in section 239 of the Constitution, but excluding the National Defence Force, the National Intelligence Agency and the South African Secret Service, and
- An employer bound by a collective agreement in terms of sections 23 or 31 of the Labour Relations Act, which appoints it as a designated employer in terms of this Act, to the extent provided for in the agreement

4. CHANGES IN THE AMENDED ACT

4.1 Definition of "designated groups"

"Designated Groups in short mean black people, women and people with disabilities."

The revision of the term "designated groups" ensures that only citizens of the Republic of South Africa, by birth or descent, may benefit from affirmative-action measures.

People who became citizens of the Republic of South Africa by way of naturalisation, after 26 April 1994 are barred from benefits of affirmative action, unless such people were entitled to citizenship but were barred as a result of apartheid policies.

This effectively means that affirmative action measures do not apply to anyone who falls outside this definition. Please bear in mind that this will have an impact on your B-BBEE scorecard as well.

4.2 Unfair discrimination

The grounds for claims of unfair discrimination have been broadened to include discrimination on arbitrary grounds as opposed to previously listed grounds only. The listed grounds include race, gender, sex, pregnancy, marital status, family responsibility, ethnic or social origin, colour, sexual

orientation, age, disability, religion, HIV status, conscience, belief, political opinion, culture, language and birth.

Amendment

Section 6 sees the inclusion of a clause which states that "*a difference in terms and conditions of employment between employees of the same employer performing the same or substantially the same work of equal value* that is directly or indirectly based on the grounds of race, gender, pregnancy, marital status, family responsibility, ethnic or social origin, colour, belief, political opinion, culture language, birth or any other arbitrary ground amounts to unfair discrimination.

Should this be the case, the employer is bound by an amendment to **Section 27** to take measures to progressively reduce the income differentials.

4.3 Burden of proof

If unfair discrimination on a listed ground is claimed, the employer must prove that such discrimination did not take place, is rational and not unfair, or is otherwise justifiable.

If unfair discrimination on arbitrary grounds is claimed, the complainant must prove on a balance of probabilities that the conduct is not rational, the conduct complained of amounts to unfair discrimination and the discrimination is unfair.

Amendment

Section 11 has been expanded upon to give clear guidelines regarding the "burden of proof" in discrimination cases.

If unfair discrimination is alleged on a ground of race, gender, pregnancy, marital status, family responsibility, ethnic or social origin, colour, belief, political opinion, culture, language and birth, the employer against whom the allegation is made, must prove, on a balance of probabilities that:

- The discrimination did not take place as alleged; or
- Is rational and not unfair, or is otherwise justifiable

If unfair discrimination is alleged on an arbitrary ground, the complainant must prove, on the balance of probabilities, that:

- The conduct complained of is not rational;
- The conduct complained of amounts to discrimination; and

- The discrimination is unfair

This amendment places a burden of proof on the complainant, which was not explicitly stated in the original Act. With these guidelines, we should see a reduction in discrimination cases as an employee or job applicant would now need to prove that the conduct complained about is not rational, is in fact discrimination and that it is unfair. This should bring an end to every second employee claiming "Discrimination" when they don't get their way in the workplace.

4.4 Psychometric tests

Psychometric testing and similar assessments of an employee are prohibited unless the test or assessment being used has been scientifically shown to be valid and reliable, can be applied fairly to all employees and is not biased against any employee.

The new amendments require that any such test must be certified by the Health Professions Council of South Africa (HPCSA) established under the Health Professions Act, 56 of 1974, or any other body that may be authorised by law to certify such tests or assessments.

Amendment

Section 8, which deals with psychometric assessments, has an additional paragraph inserted, which will compel an employer who conducts psychometric assessments on employees or job applicants to ensure that the test has been certified by the Health Professions Council of South Africa or any other body which is authorised by law to certify psychometric test or assessments.

4.5 Equal pay for work of equal value

This new provision is included to ensure that employees receive equal pay for work of equal value unless the employer is able to show that valid and fair grounds exist for discrimination.

The minister of labour will be entitled to publish codes to provide guidelines on work of equal value.

4.6 Discrimination: jurisdiction of the CCMA

Employees who claim unfair discrimination on the grounds of sexual harassment may refer the matter to the CCMA for arbitration.

In any other case pertaining to disputes regarding unfair discrimination, an employee who earns below the threshold in terms of the Basic Conditions of Employment Act may refer the matter to arbitration to the CCMA. Employees who earn above the threshold may refer the matter to the CCMA for arbitration only in the event that all parties have consented to the arbitration of the dispute.

Parties affected by an award of the CCMA under this section may appeal to the Labour Court.

Amendment

Section 10 sets out clearly defined dispute resolution procedures for alleged unfair discrimination, which sees the inclusion of the following:
In addition to the existing clause 1, which stipulates that the first port of call for alleged unfair discrimination is a referral to the CCMA for conciliation, the following clauses are included

"An employee may refer the dispute to the CCMA for arbitration if:

- The employee alleges unfair discrimination on the grounds of sexual harassment; or
- In any other case, that employee earns less than the amount stated in the determination made by the Minister in terms of section 6(3) of the Basic Conditions of Employment Act; or
- Any party to the dispute may refer it to the CCMA for arbitration if all the parties to the dispute consent to arbitration.

Furthermore the amendments will allow a party affected by an arbitration award, to lodge an appeal against such arbitration award by the CCMA, concerning this section, to the Labour Court. The party appealing has 14 days from the date of the award to lodge an appeal with the Labour Court.

4.7 Requirement for representation at all occupational levels

The new amendments have deleted the reporting of and requirements for representation in occupational categories, with emphasis on the requirement for representation in the various occupational levels.

Amendment

Section 15, 16, 19, 20 and 21 which deal with the designated employer's duty to consul; conduct an analysis of its workforce profile, policies practices

and procedures; prepare and implement an employment equity plan; and report to the Director General have been changed in terms of reference to "occupational categories and levels." The amendments take into account only "occupational levels."
The reason for this is that when consulting, analysing, planning and reporting across "occupational categories", we see sufficient representation of designated groups; however, the real disparity with regards to equitable representation lies in the "occupational levels". This change will force employers to focus on the real burning platform which affects transformation, i.e. underrepresentation of designated groups within "occupational levels" in their workplaces.

4.8 Reporting

All designated employers are required to report annually in October each year, or on a date specified in the regulations if such reporting submitted via e-filing. In the past, designated employers who employed less than 150 employees were only required to file a return once every two years.

Section 21 which deals with the designated employer's duty to submit an EEA2 report to the Director General has changed significantly. In the past, there was a distinction made between reporting periods of Large employers (150+ employees) and Small employers (0 – 149 employees).

With the amendments, all employers must now submit an EEA2 and EEA4 report every year, by the first working day of October or on such other date which may be prescribed.

Also, an employer who becomes designated on or after the first working day of April, but before the first working day of October, must submit its first report by the first working day of October the following year, or on such other date that may be prescribed. Please see a worked example of how this will affect your company below:

For example:

- If you become designated on 18 June 2014, you must submit your report by the first working day of October 2015, or on such other date that may be prescribed

- If you become designated on 15 March 2014, you must submit your report by the first working day of October 2014, or on such other date that may be prescribed
- Furthermore, the amendments to this section stipulate that should you not be able to report by the first working day of October, you are obliged to notify the Director General in writing by the last working day of August in the same year and give reasons for your failure to report by the deadline
- Another significant amendment to this section is that the Director General may apply to the Labour Court to impose a fine in accordance with Schedule 1 (see table above) if the employer:
- Fails to submit a report in terms of this section;
- Fails to notify and give reasons to the Director General for failing to report by the deadline;
- Has notified the Director General of failure to submit, but the reasons are false or invalid.
- Thus, to avoid unnecessary complications, reporting by the deadline is paramount.

Section 27 amendments were mentioned in the beginning, where we saw that "a difference in terms and conditions of employment between employees of the same employer performing the same or substantially the same work of equal value that is directly or indirectly based on the grounds of race, gender, pregnancy, marital status, family responsibility, ethnic or social origin, colour, belief, political opinion, culture language, birth or any other arbitrary ground amounts to unfair discrimination.

An employer is bound to progressively reduce these disparities.

4.9 Monitoring and compliance

Obligations of labour inspectors to request letters of undertaking from employers under certain circumstances have been removed. This means that an employer could be faced with a compliance order in the event that the designated employer has failed to prepare or implement an employment equity plan, and submit an annual report or prepare a successive employment equity plan.

Certain obligatory considerations by the director general during a DG review process have also been removed from the Act. Thus, the main consideration during the DG review process would be national and regional demographics and steps taken by an employer to train people from designated groups in order to achieve targets.

Maximum permissible fines which may be imposed for contravention of certain provisions of the Employment Equity Act

Enforcement measures and penalties:

- The Director-General of the Department of Labour is now empowered to apply to the Labour Court to impose a fine on an employer who fails to prepare or implement an employment equity plan or who fails to file the required return.
- Amendments to sections 36, 37, 39, 40, 42 and 45 seek to promote enhanced enforcement measures and prevent the use of reviews as a mechanism to delay the enforcement process.
- The powers of a labour inspector to issue a compliance order was clarified and applies to specific provisions. By the same token the provisions for objections and appeals against compliance orders are repealed.
- The Minister of Labour is empowered to make regulations for circumstances under which an employer's compliance should be assessed with reference to the demographic profile or the national or regional economically active population.
- Amendment to sections 59 and 61 increase the maximum fines for criminal offences from R10 000 to R30 000.
- The maximum fines that may be imposed in terms of the Act for the contravention of certain provisions indicated are set out in Schedule 1 (see table 1). An employer's turnover may be taken into account in determining the maximum fine that may be imposed for substantive failure to comply with the Act.

Previous Contravention	Contravention of:S16 – Consultation with employees S19 – Analysis S 43(2) – Failure to provide information to DG as requested during DG review process	Contravention of any provisions ofS 20 – Employment Equity Plan S21 – Report S23 – Successive Employment Equity Plans S44(b) – Recommendations of DG
No previous contravention	R1 500 000	The greater of R1 500 000 or 2% of the employer's turnover
A previous contravention in respect of the same provision	R1 800 000	The greater of R1 800 000 or 4% of the employer's turnover

A previous contravention within the previous 12 months or two previous contraventions in respect of the same provision within three years	R2 100 000	The greater of R2 100 000 or 6% of the employers' turnover
Three previous contraventions in respect of the same provision within three years	R2 400 000	The greater of R2 400 000 or 8% of the employer's turnover
Four previous contraventions in respect of the same provisions within three years	R2 700 000	The greater of R2 700 000 or 10% of the employer's turnover

Turnover threshold for compliance as designated employer

The turnover for compliance purposes as a designated employer, other than the number of employees is R45 000 000 per annum in the retail motor industry.

Amendment

Section 36 dealing with a "written undertaking to comply" has been amended to state that a labour inspector may obtain a written undertaking to comply from the designated employer who has failed to:

- Consult as per Section 16
- Conduct an analysis as per section 19
- Publish a report as per section 22
- Assign responsibility as required by section 24
- Inform employees of the Act as per section 25 or
- Keep records as per section 26

From the list above, and as mentioned earlier, we can see that the duty to prepare and implement an employment equity plan as well as report are excluded. Failure to observe these two duties will allow for procession straight to the Labour Court upon application by the Director General.

Other changes state that if an employer fails to comply with a written undertaking within the time period stipulated in it, the Director General may apply to the Labour Court to make the undertaking or part thereof an order of the court.

Section 37 which deals a "compliance order" has been amended to state that a labour inspector may issue a compliance order to a designated employer

who has failed to:

- Consult as per Section 16 on the topics dealt with in S17
- Conduct an analysis as per section 19
- Publish a report as per section 22
- Assign responsibility as required by section 24
- Inform employees of the Act as per section 25 or
- Keep records as per section 26

The previous provisions which state that the inspector can issue the compliance order if the employer refuses to sign a written undertaking to comply or has failed to adhere to the written undertaking by the deadline, have been taken out

With this change, we can see that inspectors will be faced with a choice of either securing a written undertaking or issuing a compliance order. I believe they will default straight to the compliance order.

Once again, we can see that the duty to prepare and implement an employment equity plan as well as report, are excluded. As before, failure to observe these two duties will allow for procession straight to the Labour Court upon application by the Director General.

Other changes state that if an employer fails to comply with a compliance order within the time period stipulated in it, the Director General may apply to the Labour Court to make the undertaking or part thereof an order of the court.

Section 39 and Section 40 which deal with and objection and appeal against a compliance order are repealed. Thus, the designated employer is left no recourse other than to wait for his day in Labour Court should he believe he has complied with the provisions of the compliance order and the Director General submits an application to Labour Court to impose fines in accordance with Schedule 1.

Section 42, governing the Director General's "Assessment of Compliance" has seen the existing clauses being substituted with the following clauses:

In determining whether a designated employer in implementing employment equity in compliance with this Act, the Director general or any person or body applying this Act, may, in addition to factors listed in Section 15, take the following into account:

- The extent to which suitably qualified people from designated groups

are equitably represented within each occupational level of the employer's workforce in relation to the demographic profile of the national and regional economically active population;

- Reasonable steps taken by the designated employer to train suitably qualified people from the designated groups
- Reasonable steps taken by the designated employer to implement its employment equity plan
- The extent to which the designated employer has made progress in eliminating employment barriers that adversely affect people from designated groups
- reasonable steps taken by the employer to appoint and promote suitably qualified people from designated groups
- Any other prescribed factor.

Further to these changes, the Minister may, after consultation with NEDLAC, issue a regulation which must be taken into account when determining whether a designated employer is implementing employment equity in compliance with the Act

This regulation may also specify the employer's compliance with reference to either the national or regional economically active profile.

In any assessment of its compliance with this Act or in any court, a designated employer may raise any reasonable ground to justify its failure to comply.

Section 45 which describes the consequences in "failing to comply with Director General's request or recommendation" has changed significantly. The amendment now stipulates that if an employer fails to comply with a request made by the Director General for the employer to:

- submit copies of its analysis or Employment Equity Plan;
- submit any record, book correspondence or information which could be relevant to this Act;
- honour a request for a meeting with the employer to discuss its employment equity plan and implementation thereof;
- allow a meeting with an employee or union, workplace forum or other relevant person;
- The Director General may then apply to the Labour Court
- for an order directing the employer to comply with the request or recommendation; or

- If the employer fails to justify the failure to comply with the request or recommendation, to impose a fine in accordance with Schedule 1.

Further to this, if an employer notifies the Director General in Writing within the period specified in the request or recommendation that it does not accept the request or recommendation, the Director General must institute an application to the Labour Court in accordance with (a) and (b) above within:

- 90 days of receiving the employers notification, in the case of a request; or
- 180 days of receiving the employer's notification, in the case of a recommendation.

Should the Director General not institute proceedings in the timeframe stipulated above, the request or recommendation lapses.

Should an employer challenge the validity of the Director General's request or recommendation, the challenge can only be made in Labour court proceedings as described above.

The introduction of these timeline will give more clarity to employers regarding how to deal with a request or recommendation but will place a large amount of pressure on the employer to firstly, adhere to both a request and recommendation and secondly, on the Director General to enforce compliance.

Section 48 which deals with the "powers of a commissioner in arbitration proceedings", has been amended to state that an award made by the commissioner of the CCMA hearing a matter in terms of Section 10 may include any order which can include payment of compensation by the employer to that employee, payment of damages by the employer to that employee and / or an order directing the employer to take steps to prevent the same discrimination or a similar practice from occurring, but, an award of damages mat not exceed the amount stated in terms of section 6(3) of the Basic Conditions of Employment Act.
This clause was amended to ensure congruence between the EE Act and the BCEA.

Section 50 which stipulates the "powers of the Labour Court" has introduced an additional clause which states that fines payable in terms of the Act must be paid into the National Revenue fund. In the original Act, there was no mention of where fines were to be paid into.

This section has also indicated that the Labour Court has the power to review an administrative action I terms of the Act on any grounds that may be permissible by law.

Conclusion

With all the amendments mentioned above, we can clearly see that the Department of Labour is taking its role very seriously with regards to employment equity.

Not only has dealing with the adverse effects of past discrimination become a social imperative, but compliance with Employment Equity Legislation has now, more than ever, become a business imperative.

Employers who fail to comply with the provisions of the Employment Equity Act No 55 of 1998 and the Employment Equity Amendment Act, 2013 not only face large financial penalties in the form of fines from an Employment Equity legislative perspective and adverse consequences on their B-BBEE scorecards by failing to transform, but they may tarnish their corporate reputation and lose their competitive advantage when recruiting and retaining high performing staff as well as tendering for business.