

EMPLOYMENT EQUITY AMENDMENT BILL, 2010

[Words in bold type indicate omissions from existing enactments]

Words underlined indicate insertions in existing enactments

To amend the Employment Equity Act, (55 of 1998) by amending definitions so as to align with other employment laws. To provide for the protection of employees performing same work to be remunerated equally; to provide for the certification of psychometric testing; to provide for employees earning less than the amount prescribed in terms of section 6(3), a right to refer unresolved dispute to the CCMA and to empower the Director General to impose fines.

BE IT ENACTED by the Parliament of the Republic of South Africa, as follows:

Amendment of section 1 of Act 55 of 1998

1 Section 1 of the Employment Equity Act (hereafter referred to as the principal Act) is amended by:

- (a) the substitution for the definition of “designated groups” of the following definition:

“designated groups” means black people, women and people with disabilities who –

(a) are citizens of the Republic of South Africa by birth or descent; or

(b) became citizens of the Republic of South Africa by naturalisation –

(i) before 27 April 1994; or

(ii) after 26 April 1994 who would have been entitled to acquire citizenship by naturalisation prior to that date but were precluded by Apartheid policies;”

- (b) Substitution of the definition of “ employee” for the following definition-

EMPLOYMENT EQUITY AMENDMENT BILL, 2010

“Employee” means any person who is employed by or who works for an employer and who receives or is entitled to receive any remuneration and who works under the direction and supervision of an employer.

- (c) Insertion after the definition of employee for the definition of an “employer”-

“ Employer” means any person, institution or organisation, including government who employs and provides work to an employee, directly supervises, remunerates or tacitly or expressly undertakes to remunerate such employee for services rendered by such employee.

- (d) the substitution for paragraph (d) of the definition of “designated employer” by the following paragraph:

“(d) an organ of state as defined in section 239 of the Constitution, but excluding [local spheres of government], the National Defence Force, the National Intelligence Agency and the South African Secret Service; and”

- (e) insertion after the definition of “HIV” of the following definition –

“‘independent contractor’ means a person who works for or supplies services to a client or customer as part of the person’s business, undertaking or professional practice;”

- (f) the substitution for the definition of 'labour inspector' of the following definition:

“‘labour inspector’ means a person appointed in terms of section 6[5].3 of the Basic Conditions of Employment Act;”

- (g) the substitution for the definition of "serve" of the following definition:

“‘serve’ means to send by registered post, telegram, telex, telefax or to deliver by hand and –

EMPLOYMENT EQUITY AMENDMENT BILL, 2010

- (a) in respect of the Labour Courts, any other method of service specified in the Rules of the Labour Courts;
- (b) in respect of the Commission, any other method of service specified in the Rules of the Commission;”
”
- (h) the insertion after the definition of "trade union representative" of the following definition –
- “‘turnover’ means the total annual turnover of an employer for the preceding year calculated in accordance with the provisions of the Competition Act, 1998 (Act No 89 of 1998);”

Amendment of section 6 of Act 55 of 1998

- 2 The following sub-sections are inserted after sub-section (3) of section 6 of the principal Act:

- (4) A difference in terms and conditions of employment between employees of the same employer performing the same or substantially the same work or work of equal value that is directly or indirectly based on any one or more of the grounds listed in subsection (1) is unfair discrimination.”
- (5) The Minister, after consulting the Commission, may issue a code of good practice setting out the criteria and the methodology for assessing work of equal value in terms of subsection (4).”

Amendment of section 8 of Act 55 of 1998

- 3 The following section is substituted for section 8 of the principal Act:

8. Psychometric testing –

Psychometric 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 employees; **[and]**

EMPLOYMENT EQUITY AMENDMENT BILL, 2010

- (c) is not biased against any employee or group; and
- (d) has been certified by the Health Professions Council of South Africa established under the Health Professions Act, 56 of 1974.”

Amendment of section 10 of Act 55 of 1998

4 Section 10 is amended by the substitution for subsection (6) of the following subsection:

- “(6) If the dispute remains unresolved after conciliation –
- (a) any party to the dispute may refer it to the Labour Court for adjudication; **[or]**
 - (b) an employee earning less than the amount prescribed by the Minister in terms of section 6(3) of the Basic Conditions of Employment Act may refer it to the CCMA for arbitration; or
 - (c) all the parties to the dispute may consent to arbitration of the dispute.”

Amendment of section 11 of Act 55 of 1998

5 The following section is substituted for section 11 of the principal Act:

“11 Burden of Proof

- (1) If the employee makes out a reasonable case to answer based on discrimination, the respondent must prove that –
 - (a) the discrimination did not take place as alleged; or
 - (b) the conduct is not based on one or more of the prohibited grounds.
- (2) Unless the respondent proves otherwise, discrimination proved in terms of subsection (1) is unfair discrimination if it is based on –
 - (a) a ground listed in section 6(1);
 - (b) a ground not listed in section 6(1) but which –
 - (i) causes or perpetuates systematic disadvantage in the workplace;

EMPLOYMENT EQUITY AMENDMENT BILL, 2010

(ii) undermines human dignity; or
adversely affects the equal enjoyment of a person's rights and freedoms in a
manner that is comparable to discrimination on a ground listed in
section 6(1).

(3) For the purposes of this section, 'respondent' includes the employer of
the employee and any other person contemplated by the prohibition in
section 6(1).'"

Amendment of section 20 of Act 55 of 1998

6 Section 20 of the principal Act is amended by the insertion of the following subsection:

(7) The Director-General may apply to the Labour Court to impose a
fine contemplated in schedule 1 of the Act, if a designated employer fails
to prepare and implement an employment equity plan in accordance with
the provisions of this Act

Amendment of section 21 of Act 55 of 1998

7 The following section is substituted for section 21 of the principal Act:

"21. Report –

- (1) A designated employer **[that employs fewer than 150 employees]** must –
- (a) submit its first report to the Director-General within **[12 months after the commencement of this Act or, if later, within]** 12 months after the date on which that employer became a designated employer; and
 - (b) thereafter, submit a report to the Director-General once every **[two] year[s]**, on the first working day of October.

[(2) A designated employer that employs 150 or more employees must--

EMPLOYMENT EQUITY AMENDMENT BILL, 2010

(a) submit its first report to the Director-General within six months after the commencement of this Act or, if later, within six months after the date on which that employer became a designated employer; and

(b) thereafter, submit a report to the Director-General once every year on the first working day of October.]

(2) Despite subsection[s] (1) **[and (2)]**, a designated employer that submits its first report in the 12-month period preceding the first working day of October, should only submit its second report on the first working day of October in the following year.

(3) The reports referred to in subsection[s] (1) **[and (2)]** must contain the prescribed information and must be signed by the chief executive officer of the designated employer.

(4) An employer who becomes a designated employer in terms of the Act must--

(a) report as contemplated in this section for the duration of its current employment equity plan; and

(b) notify the Director-General in writing if it is unable to report as contemplated in this section, and give reasons therefore.

(5) An employer that is not able to submit a report to the Director-General by the first working day of October in terms of subsection 1(b) must notify the Director-General in writing before the last working day of August in the same year giving reasons for its inability to do so.

(6) The Director-General may apply to the Labour Court to impose a fine contemplated in schedule 1 of the Act, if an employer fails to report in terms of subsection (1)(b) –

(a) did not submit reasons in terms of subsection (5) for not reporting; or

(b) the reasons submitted in terms of subsection (5) are found to be invalid.

[6] (7) Every report prepared in terms of this section is a public document.”

EMPLOYMENT EQUITY AMENDMENT BILL, 2010

Amendment of section 27 of Act 55 of 1998

8 The following section is substituted for section 27 of the principal Act:

27 Income differentials and discrimination . –

- (1) Every designated employer, when reporting in terms of section 21 (1) and (2), must submit a statement, as prescribed, to the Employment Conditions of Commission established by section 59 of the Basic Conditions of Employment Act, on the remuneration and benefits received in each occupational [**category and**] level of that employer's workforce.
- (2) Where disproportionate income differentials or unfair discrimination in terms and conditions of employment as contemplated by 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 guidance as may be given by the Minister as contemplated in subsection (4).

Repeal of section 36 of Act 55 of 1998

9 Section 36 of the principal Act is hereby repealed.

Amendment of section 37 of Act 55 of 1998

10 The following section is substituted for section 37 of the principal Act:

“37 Compliance order

- (1) A labour inspector may issue a compliance order to a designated employer if that employer has failed or refused to –
 - [(a) refused to give a written undertaking in terms of section 36, when requested to do so; or**
 - (b) failed to comply with a written undertaking given in terms of section 36]**
 - (a) consult with employees as required by section 16;
 - (b) conduct an analysis as required by section 19;
 - (c) publish its report as required by section 22;

EMPLOYMENT EQUITY AMENDMENT BILL, 2010

- (d) assign responsibility to one or more senior managers as required by section 24;
 - (e) inform its employees as required by section 25; or
 - (f) keep records as required by section 26.”
 - (g) prepare and implement an employment equity plan in accordance with section 20
- (2) A compliance order issued in terms of subsection (1) must set out-
- (a) the name of the employer, and the workplaces to which the order applies;
 - (b) those provisions of Chapter III of this Act which the employer has not complied with and details of the conduct constituting non-compliance;
 - [(c) any written undertaking given by the employer in terms of section 36 and any failure by the employer to comply with the written undertaking;]
 - (d) any steps that the employer must take and the period within which those steps must be taken;
 - (e) the maximum fine, if any, that may be imposed on the employer in terms of Schedule 1 for failing to comply with the order; and
 - (f) any other prescribed information.
- (3) A labour inspector who issues a compliance order must serve a copy of that order on the employer named in it.
- (4) A designated employer who receives a compliance order served in terms of subsection (3) or (5(a)) must –
- (a) display a copy of that order prominently at a place accessible to the affected employees at each workplace named in it;
 - (b) comply with the order within the time period stated in it ; and
- (c) inform the inspector in the prescribed form within 30 days of the expiry of the time period of either its compliance with the order or, if it has not complied, the reasons for not doing so.

EMPLOYMENT EQUITY AMENDMENT BILL, 2010

- [(5) A designated employer must comply with the compliance order within the time period stated in it, unless the employer objects to that order in terms of section 39.**
- (6)] (5) If a designated employer does not comply with an order within the period stated in it [or does not object to that order in terms of section 39,] the Director-General may –**
- (a) amend the order and serve it to the employer; or**
 - (b) apply to the Labour Court to make the compliance order or any part of such order an order of the Labour Court.”**

Repeal of sections 39 and 40 of Act 55 of 1998

11 Sections 39 and 40 of the principal Act are hereby repealed:

Amendment of section 42 of Act 55 of 1998

12 The following section is substituted for section 42 of the principal Act:

“42 Assessment of compliance

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 **[into account all of]** 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 **[category and]** level in that employer's workforce in relation to the[–**

 - (i) demographic profile of the **[national and regional]** economically active population;**
 - [(ii) pool of suitably qualified people from designated groups from which the employer may reasonably be expected to promote or appoint employees;**
 - (iii) economic and financial factors relevant to the sector in which the employer operates;**

EMPLOYMENT EQUITY AMENDMENT BILL, 2010

- (iv) **present and anticipated economic and financial circumstances of the employer; or**
- (v) **the number of present and planned vacancies that exist in the various categories and levels, and the employer's labour turnover;**
- (b) **progress made in implementing employment equity by other designated employers operating under comparable circumstances and within the same sector;]**

- (b) reasonable steps taken by an employer to train suitably qualified people from the designated groups;
- (c) reasonable **[efforts]** steps [made] 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; **[and]**
- (e) reasonable steps taken by an employer to appoint and promote suitably qualified people from the designated groups.

Amendment of section 45 of Act 55 of 1998

13 The following section is substituted for section 45 of the principal Act:

“45 Failure to comply with Director-General's request or recommendation

- (1) If an employer fails to comply with a request made by the Director-General in terms of section 43 (2) or a recommendation made by the Director-General in terms of section 44 (b), the Director-General may **[refer the employer's non-compliance]** apply to the Labour Court –
 - (a) for an order directing the employer to comply with the request or recommendation;
 - (b) if the employer fails to justify the failure to comply with the request or recommendation, to impose a fine in terms of Schedule 1 on the employer.

EMPLOYMENT EQUITY AMENDMENT BILL, 2010

(2) Any challenge to the validity of the Director General’s request or recommendation may only be made in the proceedings contemplated in sub-section (1).”

Amendment of section 50(h) of Act 55 of 1998

14 The following subsection is substituted for paragraph (h) of section 50 of the principal Act:

“(h) reviewing **[the performance or purported performance of any function provided for in this Act or any act or omission of any person or body]** an administrative action in terms of this Act **[on any grounds that are permissible in law];”**

Amendment of section 55 of Act 55 of 1998

15 The following subsection is substituted for subsection (2) section 55 of the principal Act:

“(2) The Minister **[must]** may, by notice in the Gazette make **[a]regulations** providing for separate and simplified forms and procedures when making regulations in respect of the obligations created by sections 19, 20, 21, 25 and 26 for employers that employ 150 or fewer employees.”

Amendment of section 56 of Act 55 of 1998

16 The following subsection is substituted for subsection (1) of section 56 of the principal Act:

“(1) The Minister may delegate any power conferred, or assign any duty imposed, upon the Minister in terms of this Act.”

Repeal of section 57 of Act 55 of 1998

EMPLOYMENT EQUITY AMENDMENT BILL, 2010

Section 57 of the Principal Act is hereby repealed.

Amendment of section 60 of the Act 55 of 1998

Addition after subsection (4) of the following subsection-

(5) Employers in contravention of this Act will be liable to pay a fine equivalent to 10 (ten) percent of the employer's business turnover.

Amendment of schedule 1 of Act 55 of 1998

Schedule 1 of the Principal Act is hereby repealed.

Amendment of schedule 4 of Act 55 of 1998

17 The following schedule is substituted for schedule 4 of the principal Act:

“Schedule 4

Sector or subsectors in accordance with the Standard Industrial Classification	Total annual turnover
Agriculture	[R 2,00 m] <u>R 5,00 m</u>
Mining and Quarrying	R 7,50 m
Manufacturing	R10,00 m
Electricity, Gas and Water	R10,00 m
Construction	R 5,00 m
Retail and Motor Trade and Repair Services	R15,00 m
Wholesale Trade, Commercial Agents and Allied Services	R25,00 m
Catering, Accommodation and other Trade	R 5,00 m
Transport, Storage and Communications	R10,00 m
Finance and Business Services	R10,00 m
Community, Social and Personal Services	R 5,00 m