

Summary of the Employment Equity Act

(Act 55 of 1998, as amended issued in terms of Section 25(1))

Chapter I: Definition, purpose, interpretation and application

Definitions: Section 1

a. **Designated employer** means a person who employs 50 or more employees; a municipality; an organ of state as defined; and an employer bound by collective agreement which appoints it as a designated employer in terms of this Act, to the extent provided for in the agreement.

b. **Designated groups** means black (African, Indian and Coloured) people, women and people with disabilities who are citizens of the Republic of South Africa by birth or descent; or became citizens of the Republic of South Africa by naturalisation before 27 April 1994; or after 26 April 1994 and who would have been entitled to acquire citizenship by naturalisation prior to that date but who were precluded by apartheid policies;

c. **People with Disabilities** include 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.

d. **Temporary employees** are employees who are employed for less than three months

Purpose of the Act: Section 2

The purpose of this Act is to achieve equity in the workplace by

a. **promoting equal opportunity and fair treatment** in employment through the elimination of unfair discrimination; and

b. **implementing affirmative action measures** to redress the disadvantages in employment experienced by designated groups, in order to ensure their equitable representation in all occupational levels in the workforce.

Application of the Act: Section 4:

Chapter II of this Act applies to all employees and employers and Chapter III applies only to designated employers and people from designated groups. National Defence Force, the National Intelligence Agency, the South African Secret Service or the South African National Academy of Intelligence are excluded from this Act.

Chapter II: Prohibition of Unfair Discrimination

Prohibition of Unfair Discrimination: Section 6

No person may unfairly discriminate, directly or indirectly, against an employee, in any employment policy or practice, on one or more grounds, including 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, birth or on any other arbitrary ground.

It is not unfair discrimination to promote affirmative action measures consistent with the Act; or prefer or exclude any person on the basis of an inherent job requirement.

Harassment of an employee is a form of unfair discrimination and is prohibited on any one, or a combination of grounds of unfair discrimination.

Employers may not unfairly discriminate against employees by providing different 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 or on any arbitrary ground.

Medical Testing: Section 7

Medical testing of an employee is prohibited, unless legislation permits or requires the testing; or it is justifiable in the light of medical facts, employment conditions, social policy, the fair distribution of employee benefits or the inherent requirements of a job.

HIV testing is prohibited unless such testing is determined justifiable by the Labour Court.

Psychometric Testing: Section 8

Psychometric testing and other 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 employees; and is not biased against any employee or group

Disputes concerning Chapter 2: Section 10

An employee, or applicant for employment, may refer a dispute concerning alleged unfair discrimination to the CCMA for conciliation within 6 months of the alleged unfair discrimination taken place. The employee or applicant who refers the dispute to the CCMA must prove that a copy of the referral has been served on every other party to the dispute and that the employee or applicant made a reasonable attempt to resolve the dispute.

If a dispute is not resolved after conciliation, any party to the dispute may refer it to the Labour Court for adjudication. The parties to a dispute may also agree to refer the dispute for arbitration at the CCMA if

a. the employee alleged sexual harassment or

b. where the employee earns less than the amount prescribed by the Minister in terms of section 6(3) of the Basic Conditions of Employment Act.

c. both parties agree to refer the dispute to the CCMA for arbitration

Chapter III: Affirmative Action

Duties of a Designated Employer: Section 13

Every designated employer must implement affirmative action measures for designated groups to achieve employment equity.

A designated employer therefore must:

a. consult with its employees as required by section 16;

b. conduct an analysis as required by section 19;

c. prepare an employment equity plan as required by section 20; and

d. report to the Director-General on progress made in implementing its employment equity plan, as required by section 21.

Affirmative Action Measures: Section 15

Affirmative action measures are measures intended to ensure that suitably qualified people from designated groups have equal employment opportunities and are equitably represented in all occupational levels in the workforce.

Affirmative action measures include:

a. identifying and eliminating employment barriers, including unfair discrimination, which adversely affect people from designated groups;

b. measures designed to further diversity

c. making reasonable accommodation for people from designated groups

d. retaining and developing people from designated groups and to implement appropriate training measures to ensure designated groups are suitably qualified

e. preferential treatment and numerical goals to ensure equitable representation of designated groups on all occupational levels, which exclude quotas.

Designated employers are not required to take any decision concerning an employment policy or practice that would establish an absolute barrier to the prospective or continued employment or advancement of people not from designated groups.

Consultation: Section 16 & 17

A designated employer must take reasonable steps to consult on employment equity matters with:

a. trade union representatives at the workplace; or

b. if no representative trade union representatives in the workplace, with its employees or representatives nominated by them.

Designated Employers must consult with employees from both designated and non-designated groups and employees representing the interests of individuals from all occupational levels.

Matters for Consultation include conducting the analysis, preparing and implementing the Employment Equity Plan and submitting the employment equity reports.

Disclosure of information: Section 18

To ensure meaningful consultation, the employer must disclose relevant information to the committee subject to Section 16 of the Labour Relations Act 66 of 1995.

Analysis: Section 19

A designated employer must conduct an analysis of employment policies, practices, procedures and the work environment to identify employment barriers that adversely affect members of the designated groups. The analysis must also include the development of a workforce profile to determine the extent designated groups are under-represented in the workplace compared to the Economically Active Population and the Sector Targets determined by the Minister.

Employment Equity Plan: Section 20

Designated employers must prepare and implement an Employment Equity Plan, which should include a timetable for the achievement of goals and objectives for each year of the plan. The numerical goals set by designated employers must comply with any sector target set by the Minister.

The Director-General may apply to the Labour Court to impose a fine in terms of Schedule 1 for failure to prepare and implement an Employment Equity Plan.

Reporting: Section 21

A designated employer must submit a report to the Director-General annually on such date and in such manner as may be prescribed.

The Director-General may apply to the Labour Court to impose a fine in terms of Schedule 1 for failure to report.

Designated employer must assign a manager: Section 24

Designated employers must assign one or more senior managers to ensure the implementation and monitoring of the Employment Equity Plan and must make available the necessary resources for this purpose.

Income Differentials: Section 27

A statement of remuneration and benefits received in each occupational level of that employer's workforce must be submitted by designated employers to the National Minimum Wage Commission.

Where disproportionate income differentials or unfair discrimination in terms and conditions of employment are reflected a designated employer must take measures to progressively reduce such differentials subject to guidance as may be given by the minister as contemplated in the regulations.

Chapter V: Monitoring, Enforcement and Legal Proceedings

Monitoring by employees and trade union representatives: Section 34

Any employee or trade union representative may bring an alleged contravention of this act to the attention of another employee, an employer, a trade union, workplace forum, labour inspector, Director-General or the Commission.

Powers of a Labour Inspector: Section 35

Labour Inspectors are authorised to enter questions and inspect a workplace as provided for in section 65 and 66 of the Basic Conditions of Employment Act.

Undertaking to Comply: Section 36

If the inspector has reasonable grounds to believe a designated employer has failed to comply with its obligations in terms of the Act, the inspector may request and obtain a written undertaking to comply within a specified period.

If an employer fails to comply with an undertaking, the Director-General may apply to the Labour Court to make such an undertaking an order of the Labour Court.

Compliance Order: Section 37

A labour inspector may issue a compliance order to a designated employer if that employer has failed to comply with section 17, 17, 19, 20, 24, 25, or 26 of this Act.

If an employer fails to comply with an undertaking, the Director General may apply to the Labour Court to make such an undertaking an order of the Labour Court.

Review by Director-General: Section 43, 44, 45

The Director-General may conduct a review to determine whether an employer is complying with the Act.

The outcome of the review may result in the Director-General approving the designated employers Employment Equity Plan or may make recommendations to fulfil the requirements of the Act.

If an employer fails to comply with a request or a recommendation made, the Director-General may apply to the Labour Court for an order directing the employer to comply with the request of recommendation or to impose a fine in terms of Schedule 1 of this Act.

Powers of the Labour Court: Section 50

The Labour Court has the power to make any appropriate orders, award compensation or impose fines.

Protection of Employee Rights: Section 51

The Act protects employees who exercise their rights and obligations under the act against victimisation, obstruction and undue influence.

Chapter VI: General Provisions

State Contracts: Section 53

Designated and non-designated employers who seek to do business with any organ of state, will have to apply for a certificate of compliance

The Minister may only issue a certificate of compliance if the employer:

a. complied with the numerical targets set out in Section 15

b. provided reasonable grounds to justify failure to comply where targets were not met

c. has submitted their Employment Equity report

d. has no unfair discrimination findings by the CCMA within the previous 12 months

e. has not received an award from the CCMA in the previous 12 months for failing to pay their employees in line with the National Minimum Wage Act.

Temporary Employment Services: Section 57

If a temporary worker is hired by a client through a temporary employment service provider, for an indefinite period or for three months or longer, they are considered the client's employee.

Where a temporary employment service provider commits an act of unfair discrimination on the express or implied instruction of their client, both the temporary service provider and the client is jointly liable.

Liability of Employer: Section 60

Should employees contravene any provision of this Act while performing their duties, the employer will be liable, unless the employer can prove that it did everything in its power to prevent to avoid the undesired act.