

REPUBLIC OF SOUTH AFRICA

EMPLOYMENT EQUITY AMENDMENT BILL

(As introduced by the Minister of Labour (National Assembly))

(The English text is the official text of the Bill)

GENERAL EXPLANATORY NOTE:

[] Words in bold type in square brackets indicate omissions from existing enactments.

_____ Words underlined with a solid line indicate insertions in existing enactments.

BILL

To amend the Employment Equity Act, No. 55 of 1998 (the Act) in order to...

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, 1998 (hereinafter referred to as the principal Act) is hereby amended by:

(a) the substitution for paragraph (d) of the definition of “**designated employer**” of 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”;

(b) 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;”;

- (c) 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;”;

- (d) the substitution for the definition of '**serve**' or '**submit**', of the following definition –

“**serve**' or '**submit**', in relation to any communication, means either

–

- (a) to send it in writing delivered by hand or registered post; **[or]**
- (b) to transmit it using any electronic mechanism as a result of which the recipient is capable of printing the communication; or
- (c) to send or transmit it in any other prescribed manner;”.

Amendment of section 6 of Act 55 of 1998

2. Section 6 of the principal Act is hereby amended by:

- (a) the substitution for sub-section (1) of the following sub-section –

“(1) 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, **[and]** birth or on any other arbitrary ground.”

(b) the insertion after subsection (3) of the following sub-sections –

“(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) or on any other arbitrary ground is unfair discrimination.

(5) The Minister, after consulting the Commission, may issue a regulation setting out the criteria and the methodology for assessing work of equal value in terms of subsection (4).”

Substitution of section 8 of Act 55 of 1995

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

“8 Psychometric testing [Psychological testing and other similar assessments]

Psychometric [Psychological] 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]**
- (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 or any other body which may be authorised by law to certify such tests or assessments.”

Amendment of section 10 of Act 55 of 1995

4. Section 10 of the Principal Act is hereby amended by:

- (a) 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 may refer it to the CCMA for arbitration if –

- (i) the employee alleges sexual harassment;

- (ii) in any other case, the employee earns less than the amount prescribed by the Minister in terms of section 6(3) of the Basic Conditions of Employment Act; or

- (c) any party may refer the dispute to the CCMA for arbitration if all the parties to the dispute **[may]** consent to arbitration of the dispute.”;

- (b) the insertion after subsection (7) of the following subsection –

“(8) A person affected by an award of a CCMA commissioner made pursuant to a dispute referred in terms of paragraph (b) of

subsection (6) may appeal to the Labour Court within 14 days of the date of the award; provided that the Labour Court, on good cause shown, may extend the period in which a person may appeal.”

Substitution of section 11 of Act 55 of 1998

5. Section 11 of the Principal Act is hereby substituted with the following section:

“11 Burden of proof

[Whenever unfair discrimination is alleged in terms of this Act, the employer against whom the allegation is made must establish that it is fair.]

(1) If unfair discrimination is alleged on a ground listed in section 6(1), the employer against whom the allegation is made must prove, on a balance of probabilities, that –

(a) such discrimination did not take place as alleged; or

(b) such discrimination is rational and is not unfair or is otherwise justifiable.

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

(a) the conduct complained about is not rational;

(b) the conduct complained about amounts to discrimination; and

(c) the discrimination is unfair.”

Amendment of section 15 of Act 55 of 1998

6. Section 15 is hereby amended by the deletion of the word 'categories' in the following sub-sections:

“(1) Affirmative action measures are measures designed to ensure that suitably qualified people from the designated groups have equal employment opportunities and are equitably represented in all occupational **[categories and]** levels in the workforce of a designated employer.

(2)(d)(i) ensure the equitable representation of suitably qualified people from designated groups in all occupational **[categories and]** levels in the workforce; and”

Amendment of section 16 of Act 55 of 1998

7. Section 16 is hereby amended by the deletion of the word 'categories' in the following sub-section:

“(2) (a) employees from across all occupational **[categories and]** levels of the employer's workforce;”

Amendment of section 19 of Act 55 of 1998

8. Section 19 is hereby amended by the deletion of the word 'category' and 'categories' in the following sub-section:

“(2) An analysis conducted in terms of subsection (1) must include a profile, as prescribed, of the designated employer's workforce within each occupational **[category and]** level in order to determine the degree of underrepresentation of people from designated groups in various occupational **[categories and]** levels in that employer's workforce.”

Amendment of section 20 of Act 55 of 1998

9. Section 20 of the Principal Act is amended by the deletion of the word 'category' and the insertion after subsection (6) of the following sub-section:

(2) (c) where underrepresentation of people from designated groups has been identified by the analysis, the numerical goals to achieve the equitable representation of suitably qualified people from designated groups within each occupational **[category and]** level in the workforce, the timetable within which this is to be achieved, and the strategies intended to achieve those goals;"

"(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 –

- (a) prepare an employment equity plan in accordance with the provisions of this Act; or
- (b) implement an employment equity plan in accordance with the provisions of this Act."

Substitution of section 21 of Act 55 of 1998

10. Section 21 of the Principal Act is hereby substituted with the following section:

"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 or on such other date as the Minister may prescribe.

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

(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)]**, an employer that becomes a designated employer [submits its first report in the 12-month period preceding] after the first working day of **[October] April**, **[should] must** only submit its **[second] first** report on the first working day of October in the following year or on such other date as may be prescribed by the Minister in terms of sub-section (1).

(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] is** a designated employer in terms of this 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 therefor].

(5) An employer that is not able to submit a report to the Director-General in terms of sub-section 1(a) or (b) must notify the Director-General in writing at least one month before the first working day of October giving reasons for its inability to do so.

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

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

(b) if the Court finds that the employer did not have good cause for not submitting its report.

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

Amendment of section 27 of the Act 55 of 1998

11. Section 27 of the principal Act is hereby amended by-

(a) the substitution for the heading of the following heading:

“Income differentials and discrimination”; and

(b) the substitution for subsections (1) and (2) of the following subsections:

“(1) Every designated employer, when reporting in terms 21(1), must submit a statement, as prescribed, to the Employment Conditions 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).”

Substitution of section 36 of Act 55 of 1998

12. Section 36 of the Principal Act is hereby substituted with the following section:

“36. Undertaking to comply

- (1) A labour inspector [**must**] may request and obtain a written undertaking from a designated employer to comply with paragraphs (a) to (f) [**(j)**] within a specified period, if the inspector has reasonable grounds to believe that the employer has failed to –
- (a) consult with 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;**
 - (d) **implement its employment equity plan;**
 - (e) **submit an annual report as required by section 21;]**

- (c) publish its report as required by section 22; [
 - (g) prepare a successive employment equity plan as required by section 23;]**
 - (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.
- (2) If a designated employer does not comply with a written undertaking within the period stated in it, the Labour Court may, on application by the Director-General, make the undertaking, or any part of the undertaking, an order of the Labour Court.”

Amendment of section 37 of Act 55 of 1998

13. Section 37 of the Principal Act is hereby amended by:

- (a) the substitution for sub-section (1) of the following subsection –

“(1) A labour inspector may issue a compliance order to a designated employer if that employer has failed to comply with sections 16, 17, 19, 22, 24, 25 or 26 of this Act. [–

- (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]”;**

(b) the substitution for sub-section (3) of the following subsection –

“(3) A **[labour inspector who issues a compliance order must serve a]** copy of **[that]** the compliance order must be served on the employer named in it.”;

(c) the substitution for sub-section (5) of the following subsection –

“(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].**”;

(d) the substitution for sub-section (6) of the following subsection –

“(6) 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 apply to the Labour Court to make the compliance order an order of the Labour.”

Repeal of sections 39 and 40 of Act 55 of 1998

14. Sections 39 and 40 of the principal Act are hereby repealed.

Substitution of section 42 of Act 55 of 1998

15. Section 42 of the Principal Act is hereby substituted with the following section:

“42 Assessment of compliance

(1) 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 **[must]** 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 demographic profile of the national and regional economically active population. [-

(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;**

(iv) **present and anticipated economic and financial circumstances of the employer; and**

(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 a designated 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) **[any other prescribed factor]** reasonable steps taken by an employer to appoint and promote suitably qualified people from the designated groups; and
- (f) any other prescribed factor.

(2) The Minister, after consulting NEDLAC, may issue a regulation in terms of section 55 which must be taken into account by any person who is required to determine whether a designated employer is implementing employment equity in compliance with this Act.

(3) Without limiting subsection (1)(a), the regulations made in terms of subsection (2) may specify the circumstances under which an employer's compliance should be determined with reference to the demographic profile of either the national economically active population or the regional economically active population.

(4) In any assessment of its compliance with this Act or in any court proceedings, a designated employer may raise any reasonable ground

to justify its failure to comply.”

Substitution of section 45 of Act 55 of 1998

16. Section 45 of the Principal Act is hereby substituted with the following section:

“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.

(2) If an employer notifies the Director-General in writing within the period specified in a request or recommendation that it does not accept the request or recommendation, the Director-General must institute proceedings in terms of sub-section (1) within –

(a) 90 days of receiving the employer's notification, in the case of a request;

- (b) 180 days of receiving the employer's notification, in the case of a recommendation.
- (3) If the Director- General does not institute proceedings within the relevant period contemplated in sub-section (2), the request or recommendation, as the case may be, lapses.
- (4) 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 48 of Act 55 of 1998

17. Section 48 of the Principal Act is hereby amended by renumbering the existing provision as subsection (1) and by the insertion of the following subsection –

"(2) An award made by an arbitrator hearing a matter in terms of section 10(6)(b) and (c) may include any order contemplated by section 50(2)(a) to (c), read with the changes required by the context, provided that an award of damages in terms of section 50(2)(b) may not exceed the annual earnings threshold set by the Minister in terms of section 6(2) of the Basic Conditions of Employment Act."

Amendment of section 50 of Act 55 of 1998

18. Section 50 of the principal Act is hereby amended by:

- (a) the substitution for paragraph (h) of sub-section (1) of the following paragraph –

“(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;”;

- (b) the insertion after subsection (4) of the following subsections –

“(5) When determining an appropriate fine to be imposed in terms of section 50(1)(g), the Labour Court must consider all relevant factors and any reasonable ground brought to the Court’s attention.

“(6) A fine payable in terms of this Act must be paid into the National Revenue Fund referred to in section 213 of the Constitution.”

Amendment of section 53 of Act 55 of 1998

19. Section 53 of the Principal Act is hereby amended by the insertion after subsection (4) of the following subsection:

“(5) The Minister may issue a code of good practice in terms of section 54 which must be taken into account by any person who is required to assess whether an employer complies with either Chapter II or Chapter III of this Act.”

Amendment of section 55 of Act 55 of 1998

20. Section 55 of the Principal Act is hereby amended by the substitution for sub-section (2) of the following sub-section:

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

Amendment of section 56 of Act 55 of 1998

21. Section 56 of the Principal Act is hereby amended by the substitution for sub-section (1) of the following subsection:

“(1) The Minister may delegate any power conferred, or assign any duty imposed, upon the Minister in terms of this Act, except the powers and duties contemplated in sections 29(1), (5) and (7), **[53 (2),]** 54, 55, 59(4) and 61(4).”

Amendment of section 57 of Act 55 of 1998

22. Section 57 of the Principal Act is hereby amended by the substitution for subsection (1) of the following subsection:

“(1) For purposes of Chapter III of this Act, a person whose services have been procured for, or provided to, a client by a temporary employment service is deemed to be the employee of that client, where that

person's employment with the client is of indefinite duration or for a period of **[three]** six months or longer.¹

Amendment of section 59 of Act 55 of 1998

23. Section 59 of the Principal Act is hereby amended by:

(a) the substitution for subsection (3) of the following subsection –

“(3) A person convicted of an offence in terms of this section may be sentenced to a fine not exceeding **[R10 000,00]** R30 000,00.”

(b) the substitution for subsection (4) of the following subsection –

“(4) The Minister may, **[with the concurrence of the Minister of Justice and]** by notice in the Gazette, amend the maximum amount of the fine referred to in subsection (3) in order to counter the effect of inflation.”

Amendment of section 61 of Act 55 of 1998

¹ In terms of section 198A (4)(b) of the Labour Relations Act, 1995, employees who are procured for or provided to a client by a temporary employment service to perform work, other than work defined as “temporary services”, and who earn less than the threshold determined by the Minister of Labour in terms of section 6(2) of the Basic Conditions of Employment Act, 1997 are deemed to be employees of the client for the purposes of the Employment Equity Act.

24. Section 61 of the Principal Act is hereby amended by:

(a) the substitution for subsection (3) of the following subsection –

“(3) A person who contravenes a provision of this section commits an offence and may be sentenced to a fine not exceeding **[R10 000,00]** R30 000,00.”

(b) the substitution for subsection (4) of the following subsection:

“(4) The Minister may, **[with the concurrence of the Minister of Justice and]** by notice in the Gazette, amend the maximum amount of the fine referred to in subsection (3) in order to counter the effect of inflation.”

Insertion of section 64A into Act 55 of 1998

25. The Principal Act is hereby amended by the insertion after section 64 of the following section:

“64A Amendment of annual turnover thresholds in Schedule 4

The Minister may, after consulting the Commission, by notice in the Gazette amend the total annual turnover thresholds in Schedule 4 in order to counter the effect of inflation.”

Substitution of schedule 1 of Act 55 of 1998

26. Schedule 1 of the Principal Act is hereby substituted for the following schedule:

“Schedule 1

This Schedule sets out the maximum fine that may be imposed in terms of this Act for the contravention of certain provisions of this Act.

PREVIOUS CONTRAVENTION	CONTRAVENTION OF ANY PROVISION OF SECTIONS 16 <u>(read with 17), 19, [20, 21,] 22, 24, 25, 26, 27 and [23] 43(2)</u>	<u>CONTRAVENTION OF ANY PROVISION OF SECTION 20, 21, 23 and 44(b)</u>
No previous contravention	[R500 000] <u>R 1 500 000</u>	<u>The greater of R1 500 000 or 2 % of the employer’s turnover</u>
A previous contravention in respect of the same provision	[R600 000] <u>R 1 800 000</u>	<u>The greater of R 1 800 000 or 4 % of the employer’s turnover</u>
A previous contravention within the previous 12 months or two previous contraventions in respect of the same provision within three years	[R700 000] <u>R 2 100 000</u>	<u>The greater of R 2 100 000 or 6% of the employer’s turnover</u>
Three previous contraventions in respect of the same provision within three years	[R800 000] <u>R 2 400 000</u>	<u>The greater of R 2 400 000 or 8% of the employer’s turnover</u>
Four previous contraventions in respect of the same provision within three years	[R900 000] <u>R 2 700 000</u>	<u>The greater of R 2 700 000 or 10 % of the employer’s turnover</u>

Substitution of schedule 4 of Act 55 of 1998

27. Schedule 4 of the Principal Act is hereby substituted for the following schedule:

“Schedule 4**TURNOVER THRESHOLD APPLICABLE TO DESIGNATED EMPLOYERS**

<i>Sector or subsectors in accordance with the Standard Industrial Classification</i>	<i>Total annual turnover</i>
Agriculture	[R2,00 m] <u>R6.0m</u>
Mining and Quarrying	[R7,50 m] <u>R22,50m</u>
Manufacturing	[R10,00 m] <u>R30,00m</u>
Electricity, Gas and Water	[R10,00 m] <u>R30,00m</u>
Construction	[R5,00 m] <u>R15,00m</u>
Retail and Motor Trade and Repair Services	[R15,00 m] <u>R45,00m</u>
Wholesale Trade, Commercial Agents and Allied Services	[R25,00 m] <u>R75,00m</u>
Catering, Accommodation and other Trade	[R5,00 m] <u>R15,00m</u>
Transport, Storage and Communications	[R10,00 m] <u>R30,00m</u>
Finance and Business Services	[R10,00 m] <u>R30,00m</u>
Community, Special and Personal Services	[R5,00 m] <u>R15,00m</u>

Short title and commencement

28. This Act is called the Employment Equity Amendment Act, 2012 and comes into operation on a date determined by the President by proclamation in the *Gazette*.