

The Employment Equity Act, 1998: How it affects employers



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THE PURPOSE OF THE ACT

The purpose of the Employment Equity Act is to achieve equality in the workplace by :

- creating equal opportunity and fair treatment in employment through the elimination of unfair discrimination;
- implementing affirmative action measures to redress the disadvantages in employment experienced by designated groups, to ensure their equitable representation in all occupational categories and

The main obligations upon employers are the elimination of unfair discrimination and the implementation of affirmative action measures.

levels in the workforce.

The main obligation upon employers is thus two-fold :

- The elimination of unfair discrimination; and
- The implementation of affirmative action measures.

Unfair Discrimination

Chapter II of the Act specifically deals with the prohibition of unfair discrimination. This chapter replaces the unfair discrimination provisions previously contained in Schedule 7, item 2(1)(a) of the Labour Relations Act 1995. The obligation not to unfairly discriminate includes both direct and indirect discrimination against employees in any employment policy or practice, on one or more grounds including race, gender, 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.

Conceptual Framework

Only unfair discrimination is prohibited. It is thus necessary to consider what constitutes unfair discrimination. Discrimination is not necessarily unfair.

Discrimination after all means differentiation.

It is unfair differentiation

that is prohibited. An employer does not commit unfair discrimination against an employee if the employer takes affirmative action measures consistent with the purpose of the Act or distinguishes, excludes or prefers any persons on the basis of an inherent requirement of the job.

Discrimination may consist of either direct discrimination or indirect discrimination. Direct discrimination occurs when an employer singles out an employee, or group of employees, for less favourable treatment on one or more of the grounds listed above.

Indirect discrimination is a wider concept which is concerned with the effect of apparently neutral provisions that have a disproportionate impact on a group of employees. For example, recruitment or selection criteria based on characteristics such as height, physical strength or educational qualifications, which are not essential

Discrimination is not necessarily unfair. It is unfair differentiation that is prohibited.

for the job, may constitute indirect unfair discrimination.

Testing of Employees

Medical testing of employees 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 the job. The testing of an employee to determine the employee's HIV status is, however, specifically prohibited unless an order to the contrary is obtained from the Labour Court. Psychological testing and other similar assessments of employees are prohibited unless the test being used has been scientifically shown to be valid and reliable, can be applied to all employees and is not biased against any employee or group.

Recourse

Should an employee experience unfair discrimination in the workplace, he/she may refer the matter to the

Should an employee experience unfair discrimination in the workplace, he/she may refer the matter to the CCMA.

CCMA, in writing, within 6 months after the act or omission that allegedly constituted the unfair discrimination.

Should an Applicant refer the matter to the CCMA outside the 6 months period, the CCMA may condone the late referral if the Applicant shows good cause.

The CCMA must attempt to resolve the matter through conciliation. If the dispute remains unresolved the employee may refer the dispute to the Labour Court for adjudication or the parties to the dispute may consent to arbitration.

Unlike unfair dismissal claims, the Act does not provide for the capping of any compensation award the CCMA or Labour Court may order.

AFFIRMATIVE ACTION

The obligation to introduce affirmative action measures applies to designated employers in respect of designated groups or employees.

Designated Employer

A designated employer is defined as :
"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 Act; a Municipality, an organ of State as defined in s239 of the Constitution, but excluding local spheres of Government, the National Defence Force, the National Intelligence Agency and the South African Secret Service; and an employer appointed as a designated employer in terms of a collective agreement under the Labour Relations Act."

Note: Employers who are not defined

Employers who are not defined as designated employers may voluntarily comply with the affirmative action measures.

as designated employers may voluntarily comply with the affirmative action measures contained in the Act.

Designated Group

A designated group is defined as :
"Black people, women and people with disabilities."
'Black people', in turn, is defined as : "Africans, coloureds and Indians" and people with disabilities are defined as : "People who have a long term or recurring physical or mental impairment which substantially limits their prospects of entry into, or advancement in, employment."

Obligations of Designated Employers

A main obligation of a designated employer is to implement affirmative action measures in the workplace so as to achieve employment equality for employees from the designated groups.

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In order to implement affirmative action measures, a designated employer must :

- consult with employees and Unions (if applicable) to ensure the acceptance of the Employment Equity Plan;
- conduct an analysis of all employment policies, practices and procedures and prepare a profile of the workplace;
- prepare and implement an Employment Equity Plan setting out the affirmative action measures it intends taking to achieve the employment equity goals;
- report to the Director General (Labour) on the progress made in the implementation of the plan in order for the Department of Labour to monitor compliance;
- and display a summary of the provisions of the Act in the "official" language used in the workplace.

A summary in poster-form can be obtained from the Department of Labour.

Preparation of Employment Equity Plan

Designated employers must file a report dealing with the initial development and subsequent implementation of its Employment Equity Plan by 1 June 2000 if it has more than 150 employees

or by 1 December 2000 if it has fewer than 150 employees.

In order to develop an Employment Equity Plan the employer must assign responsibility for the development, implementation and monitoring to one or more senior managers. These managers should be permanent employees with a direct reporting line to the CEO or MD of the employer. They must be afforded the necessary time and means (monetary as well as other resources) to fulfil their function.

To facilitate consultation with employees on the Employment Equity Plan a consultative forum should be established which will include Trade Union Representatives (if applicable), employee representatives from designated groups and non-designated groups and must include employees from all occupational categories and levels.

In order to determine the issues to be

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addressed, an analysis of all employment policies, practices and procedures should be conducted to identify employment

barriers which adversely affect people from designated groups. An analysis must also be conducted of the workforce profile. The purpose of this analysis is to determine the degree of under-representation of people from designated groups in various occupational categories and levels in the employers workforce.

Consultation

Consultation with the consultative forum should be engaged in by the employer to ensure that

there is general acceptance of the employer's Employment Equity Plan ("EEP").

Consultation includes the following :-

- ❑ The opportunity to meet and report back to employees and management;
- ❑ Reasonable opportunity for employee representatives to meet with the employer;
- ❑ The request, receipt and consideration of relevant information; and
- ❑ Adequate time allowed for each of these steps.

Structured and regular meetings of the consultative forum or forums should be held to ensure an informed and constructive consultation process. Where a representative body or Trade Union refuses to take part in the consultation process, the employer should record the circumstances in writing, including those steps that the employer has taken to communicate and initiate the consultation process. A copy of this document should be provided to the representative body or Trade Union concerned. Relevant information will be exchanged at the consultation meetings by all parties concerned in order to prepare an EEP. During the consultation process it will be necessary to conduct an analysis of employment policies, practices and procedures; prepare a formulation of corrective measures, establish time frames, and the drawing up of an EEP. The EEP must set realistic and objective goals to be achieved annually.

Guidelines regarding the factors to be taken into account in determining

Guidelines regarding the factors to be taken into account in determining numerical goals is included in the Code of Good Practice.

numerical goals is included in the Code of Good Practice issued by the Department of Labour. The EEP must state the affirmative action measures which will be implemented to achieve the goals and objectives. Examples of such measures are contained in the Code of Good Practice and include :- appointment of members from designated groups; increasing the pool of available candidates; training and development of people from designated groups; promotion of people from designated groups; retention of people from designated groups; reasonable accommodation for people from designated groups; steps to ensure that members of designated groups are appointed in such positions that they are able to participate meaningfully in corporate decision making processes; steps to ensure that the corporate culture of the past is transformed in a way that affirms diversity in the workplace and harnesses the potential of all employees; any other measures arising out of the consultative process.

When developing an EEP, regard must be had to:

- ❑ Duration of the Plan - The duration of the EEP should be for a period that will allow the employer to make reasonable progress towards achieving employment equity. This period should be no shorter than 1 year and no longer than 5 years.

The EEP should be for a period that will allow the employer to make reasonable progress towards achieving employment equity.

- ❑ The broad objectives of the EEP which should be specified and a time table developed for the fulfilment of each objective. These objectives should take into account the output of the planning phase, the particular circumstances of the

employer, and be aligned with and included in the broader business strategy of the employer.

- ❑ Corrective measures to eliminate any barriers identified during the analysis.
- ❑ The development of numerical goals, allocation of resources, including budgets, in order to implement the agreed components of the plan.
- ❑ The creation of an internal dispute resolution procedure to resolve any disputes about the interpretation and implementation of the plan.
- ❑ The use of existing dispute resolutions procedures should be encouraged provided that they are appropriate and in line with the needs of employment equity.
- ❑ The communication of the plan to employees.

Every designated employer that is a public company must publish a summary

of their employment equity report in that employer's annual financial report. A designated employer must place in common places that are accessible to all employees the most recent report submitted to the Department of Labour, any compliance order, arbitration award or order of the Labour Court concerning the provisions of this Act in relation to that employer. The EEP must be made available to employees at their request.

Successive Employment Equity Plan

In terms of the Act all designated employers are obliged to prepare a subsequent EEP before the end of the term of its current EEP.

The Act reaffirms the employer's obligation not to unfairly discriminate against its employees. This concept is not

There is an obligation on all designated employers to prepare a subsequent Employment Equity Plan.

foreign to employers as employers faced significant risks under the old Unfair Labour Practice jurisdiction and lately under the residual Unfair Labour Practice definition should they have unfairly discriminated against employees.

Whilst the concept of affirmative action is not new the statutory imposition of the obligation to implement affirmative action measures coupled with significant penalties in respect of non-compliance is new. Employers are obliged to file their EEP during the course of this year. Considering the consultative nature of the process employers should make haste to engage in a consultative process with employees to develop and finalise such a plan.

Deneys Reitz provides legal services in all areas of law discussed in these Updates. Should you require any advice on labour law, please contact one of the following directors:

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