



Smart Business and Employment Equity

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In a recent public document Nicholas Preston, Senior Associate, @ Cliffe Dekker Hofmeyr suggests; Be smart and comply – Employment Equity Plans

But: *Is it smart to comply with the requirement to report on Employment equity and or to expend energy and cost on addressing the elements required to comply with the EE Act ?*

What is the requirement to Designated Employers?

Can one consider taking a calculated risk of non-compliance or not?

Let's explore these questions!

1. The intent of the Employment Equity Act

Create a free and fair workplace unencumbered by prejudice and redress the impacts of past socio political and economic engineering under Apartheid. Most of us would want to employ based on competence. The EE act asks that we address the imbalance by allowing affirmative measures to redress imbalance where it has occurred and or is in evidence by implementing a plan that will allow our workplaces to be reflective of our South African community.

The Commission for Employment Equity (CEE) has reported that despite the noble intent of the legislature to achieve progressive realisation of employment equity in the workplace, persons from designated groups (which is defined to include black people, women, persons with disabilities and any persons who were disadvantaged by Apartheid policies) remain largely under-represented in top management and senior management positions.

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There is a tangible shift in the regulators approach which companies must take note of

We could unpack the reasons for this such as: the fragmented and uncoordinated, silo-based manner in which organs of state work. Our educational woes, created by, amongst other things an ineffective educational supply chain, which pose challenge to the employability of our youth. The state of the economy, etc.

All of this is interesting but the real challenge we must address is what we can do to make it possible for our people to assimilate skills and attitudes that will enable access to the economy through employment. Good for people, the nation and business. A failure to do this is to support the disintegration of our economy and society.

2. Who has to Comply with the provisions of the EE Act?

Designated employers (as defined below) have to comply and report annually

A designated employer means an employer who;

employs 50 or more employees, or

has a total annual turnover as reflected in Schedule 4 of the Act, Municipalities and organs of state.

Employers can also volunteer to become designated employers.

3. What must designated employers do?

Among the objectives of the Employment Equity Amendment Act of 2013 (EEAA) (effective from 1 August 2014) is to remedy this failure and to emphasize the important roles employers have to play in achieving equality in the workplace and the dire consequences of failing to comply with their duties in terms of the EEA.

Section 20 of the EEA (as amended) must be read together with Regulation 9 of the EEA Regulations of 2014 (Regulations) which contain the minimum requirements of a designated employer's Employment Equity Plan (EEP).

4. Requirements of the Employment Equity Plan

A designated employer's EEP must set out the following:

- The duration of the plan - this may not be less than one year and not more than five years.
- Objectives - the EEP must set out the employer's objectives for each year of the plan: These must be:
 - Specific;
 - Measurable;
 - Attainable;
 - Relevant; and
 - Time bound.
- Barriers and Affirmative Action (AA) - the barriers and AA measures identified in the audit analysis must include:
- time frames for tracking and monitoring implementation of AA measures which have a specific start and end date;
- Which dates must be within the duration of the EEP and cannot be stated as 'on-going'; and designations of persons responsible for overseeing implementation.
- Workforce profile, numerical goals and targets:
- A workforce profile snapshot of entire current workforce including disabled persons and a snapshot of current disabled workforce profile. These snapshots will form the basis of numeric goals and targets;
- the numeric goals should be based on the current workforce profile and not the difference projected for the end of the EEP; and
- The numeric targets should similarly be based on the current workforce profile and not the projected difference for the end of each reporting period.
- Processes to monitor and ensure implementation of the plan: should include details of stakeholders, responsibilities and frequency of monitoring (which may be monthly or quarterly as reporting is required annually).
- Internal dispute resolution process for disputes around interpretation or implementation of the plan (which should include a step by step process including the designations and/or names of the persons and/or stakeholders involved in the process).
- Names of the senior managers responsible for monitoring the implementation of the EEP.
- Any other prescribed matter.

Employers will be required to prepare their subsequent EEP six months prior to the expiration of the current EEP and keep the EEP for a minimum of five years after its expiration. A template setting out how the above requirements should be recorded is contained in Form EEA13 of the Regulations.

When preparing the EEP, the Codes of Good Practice on Preparation, Implementation and Monitoring of EE Plans and on The Integration of Employment Equity into Human Resources Policies and Procedures should be considered as guidelines along with the factors set out in s42(1)(a) (Assessment of compliance) which require employers to consider the extent to which suitably qualified people from the different designated groups are equitably represented within each occupational level in the employer's workforce in relation to the demographic profile of the national and regional economically active population when determining numerical targets.

5. Risk Analysis

What are the associated risks to designated employers of non-compliance to the EE Legislation?

Where the designated employer fails to prepare and implement their EEP in accordance with the requirements set out above the Director General of the Department of Labour is granted a discretionary power to approach the Labour Court in order to impose a fine in accordance with the amounts set out in Schedule 1 of the EEA. It is worth noting that the smallest fine which may be imposed for a first contravention by an employer of s20 is the greater of R1.5 million or 2% of the employer's annual turnover.

The legislature's intent stemming from these amendments is clear: comply or pay the price. The Constitutional Court also recently reaffirmed the importance of affirmative action as a form of restorative justice and as a just strategy for achieving equality in South Africa's unique context (*South African Police Service v Solidarity obo Barnard [2014] ZACC 23*).

Based on the above a case can be made to say that it is economically, ethically, socially and financially wise for Employers to ensure that their employment equity plans are in place, thorough and in compliance with the requirements imposed by the EAAA.

Contact MNA Consulting regarding any enquiries or for further information