REPUBLIC OF SOUTH AFRICA

EMPLOYMENT EQUITY AMENDMENT BILL

(As introduced in the National Assembly (proposed section 75); explanatory summary of Bill and prior notice of its introduction published in Government Gazette No. 43535 of 20 July 2020)
(The English text is the official text of the Bill)

(MINISTER OF EMPLOYMENT AND LABOUR)

[B 14—2020]

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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, 1998, so as to amend a definition; to insert certain definitions, to substitute a definition and to delete a definition; to provide for the Minister to identify sectoral numerical targets in order to ensure the equitable representation of suitably qualified people from designated groups; and to provide for matters connected therewith.

PARLIAMENT of the Republic of South Africa enacts, as follows:—

Amendment of section 1 of Act 55 of 1998, as amended by section 40 of Act 65 of 2002, section 26 of Act 68 of 2002, sections 23 and 25 of Act 52 of 2003, section 51 of Act 11 of 2013 and sections 1 and 2 of Act 47 of 2013

1. Section 1 of the Employment Equity Act, 1998 (Act No. 55 of 1998) (hereinafter referred to as the principal Act), is hereby amended—

(a) by the deletion of paragraph *(b)* of the definition of ''designated employer'';

(b) by the insertion, after the definition of ''Minister'', of the following definition:

" **'National Minimum Wage Commission'** means the Commission established in terms of section 8 of the National Minimum Wage Act, 2018 (Act No. 9 of 2018);'';

(c) by the substitution for the definition of ''people with disabilities'' of the following definition:

" **'people with disabilities' [means]** includes people who have a long-term or recurring physical **[or]**, mental, intellectual or sensory impairment which, in interaction with various barriers, may substantially **[limits]** limit their prospects of entry into, or advancement in, employment, and 'persons with disabilities' has a corresponding meaning;'';

(d) by the insertion, after the definition of ''Republic'', of the following definition:

" **'sector'** means an industry or service or part of any industry or service;''; and

(e) by the deletion of the definition of ''serve'' or ''submit''.

Amendment of section 8 of Act 55 of 1998, as amended by section 4 of Act 47 of 2013

2. Section 8 of the principal Act is hereby amended by the insertion of the word ''and'' at the end of paragraph *(b)*, the substitution for the expression ''; and'' at the end of paragraph *(c)* of a full stop and the deletion of paragraph *(d)*.

Repeal of section 14 of Act 55 of 1998

3. Section 14 of the principal Act is hereby repealed.

Insertion of section 15A in Act 55 of 1998

4. The following section is hereby inserted after section 15 of the principal Act:

''**Determination of sectoral numerical targets**

15A. (1) The Minister may, by notice in the *Gazette*, identify national economic sectors for the purposes of this Act, having regard to any relevant code contained in the Standard Industrial Classification of all Economic Activities published by Statistics South Africa.

(2) The Minister may prescribe criteria that must be taken into account in identifying sectors and sub-sectors for the purposes of this section.

(3) The Minister may, after consulting the National Minimum Wage Commission, for the purpose of ensuring the equitable representation of suitably qualified people from designated groups at all occupational levels in the workforce, by notice in the *Gazette* set numerical targets for any national economic sector identified in terms of subsection (1).

(4) A notice issued in terms of subsection (3) may set different numerical targets for different occupational levels, sub-sectors or regions within a sector or on the basis of any other relevant factor.

(5) A draft of any notice that the Minister proposes to issue in terms of subsection (1) or subsection (3) must be published in the *Gazette*, allowing interested parties at least 30 days to comment thereon.''.

Amendment of section 16 of Act 55 of 1998, as amended by section 8 of Act 47 of 2013

5. Section 16 of the principal Act is hereby amended by the substitution in subsection (1) for paragraph *(a)* of the following paragraph:

''*(a)* with a representative trade union representing members at the workplace **[and its employees or representatives nominated by them]**; or''.

Amendment of section 20 of Act 55 of 1998, as amended by section 10 of Act 47 of 2013

6. Section 20 of the principal Act is hereby amended by the insertion after subsection (2) of the following subsection:

''(2A) The numerical goals set by an employer in terms of subsection (2) must comply with any sectoral target in terms of section 15A that applies to that employer.''.

Amendment of section 21 of Act 55 of 1998, as substituted by section 11 of Act 47 of 2013

7. Section 21 of the principal Act is hereby amended—

(a) by the substitution for subsection (1) of the following subsection:

''(1) A designated employer must submit a report to the Director-General once every year **[on the first working day of October or]** on such **[other]** date and in such manner as may be prescribed.'';

(b) by the deletion of subsections (3) and (4); and

(c) by the substitution for subsection (4A) of the following subsection:

''(4A) An employer that is not able to submit a report to the Director-General **[by the first working day of October]** within the

period prescribed in terms of subsection (1) must notify the Director-General **[in writing before the last working day of August in the same year]** in the prescribed manner and period giving reasons for its inability to do so.''.

Amendment of section 27 of Act 55 of 1998, as amended by section 12 of Act 47 of 2013

8. (1) Section 27 of the principal Act is hereby amended—

(a) by the substitution for subsection (1) of the following subsection:

''(1) Every designated employer, when reporting in terms of section 21(1), must submit a statement, as prescribed, to the **[Employment Conditions]** National Minimum Wage Commission **[established by section 59 of the Basic Conditions of Employment Act,]** on the remuneration and benefits received in each occupational level of that employer's workforce.''; and

(b) by the substitution for subsections (3), (4) and (5) of the following subsections, respectively:

''(3) The measures referred to in subsection (2) may include—

(a) collective bargaining;

(b) compliance with sectoral determinations made by the Minister in terms of section 51 of the Basic Conditions of Employment Act and the national minimum wage set in terms of the National Minimum Wage Act, 2018 (Act No. 9 of 2018);

(c) applying the norms and benchmarks set by the **[Employment Conditions]** National Minimum Wage Commission;

(d) relevant measures contained in skills development legislation; or

(e) other measures that are appropriate in the circumstances.

(4) The **[Employment Conditions]** National Minimum Wage Commission must research and investigate norms and benchmarks for proportionate income differentials and advise the Minister on appropriate measures for reducing disproportional differentials.

(5) The **[Employment Conditions]** National Minimum Wage Commission may not disclose any information pertaining to individual employees or employers.''.

Amendment of section 36 of Act 55 of 1998, as substituted by section 13 of Act 47 of 2013

9. Section 36 of the principal Act is hereby amended—

(a) by the substitution in subsection (1) for the words preceding paragraph *(a)* of the following words:

''A labour inspector may request and obtain a written undertaking from a designated employer to comply with paragraph *(a)*, *(b)*, *(c)*, *(f)*, *(h)*, *(i)* or *(j)* within a specified period, if the inspector has reasonable grounds to believe that the employer has failed to—''; and

(b) by the insertion in subsection (1) after paragraph *(b)* of the following paragraph:

''*(c)* prepare an employment equity plan as required by section 20;''.

Amendment of section 37 of Act 55 of 1998, as amended by section 14 of Act 47 of 2013

10. Section 37 of the principal Act is hereby amended—

(a) by the substitution for subsection 1 of the following subsection:

''(1) A labour inspector, or any person acting on behalf of a labour inspector, may **[issue]** serve a compliance order **[to]** on a designated employer in the prescribed manner if that employer has failed to comply with section 16, 17, 19, 22, 24, 25 or 26 of this Act.''; and

(b) by the substitution in subsection (2) for the words preceding paragraph *(a)* of the following words:

''A compliance order **[issued]** contemplated in **[terms of]** subsection (1) must be issued by a labour inspector and must set out—''.

Amendment of section 42 of Act 55 of 1998, as substituted by section 16 of Act 47 of 2013

11. Section 42 of the principal Act is hereby amended by the insertion in subsection (1) after paragraph *(a)* of the following paragraph:

"*(a*A*)* whether or not the employer has complied with any sectoral target set in terms of section 15A applicable to that employer;".

Amendment of section 53 of Act 55 of 1998, as amended by section 20 of Act 47 of 2013

12. Section 53 of the principal Act is hereby amended by the addition of the following subsection:

"(6) The Minister may only issue a certificate in terms of subsection (2) if the Minister is satisfied that—

(a) the employer has complied with a numerical target set in terms of section 15A that applies to that employer;

(b) in respect of any target with which the employer has not complied, the employer has raised a reasonable ground to justify its failure to comply, as contemplated by section 42(4);

(c) the employer has submitted a report in terms of section 21;

(d) there has been no finding by the CCMA or a court within the previous three years that the employer breached the prohibition on unfair discrimination in Chapter 2; and

(e) the CCMA has not issued an award against the employer in the previous three years for failing to pay the minimum wage in terms of the National Minimum Wage Act, 2018 (Act No. 9 of 2018).".

Repeal section 64A of Act 55 of 1998

13. Section 64A of the principal Act is hereby repealed.

Repeal of Schedule 4 to Act 55 of 1998

14. Schedule 4 to the principal Act is hereby repealed.

Deletion of footnotes to Act 55 of 1998

15. Footnotes 4 and 7 to the principal Act are hereby deleted.

Short title and commencement

16. This Act is called the Employment Equity Amendment Act, 2020, and takes effect on a date fixed by the President by proclamation in the *Gazette*.

MEMORANDUM ON THE OBJECTS OF THE EMPLOYMENT EQUITY AMENDMENT BILL, 2020

1. PURPOSE

The Employment Equity Amendment Bill, 2020 (''the Bill''), seeks to amend the Employment Equity Act, 1998 (Act No. 55 of 1998) (''the Act''). The amendments have the purpose of—

(a) empowering the Minister of Labour (''the Minister'') to determine sectoral numerical targets for the purpose of ensuring the equitable representation of suitably qualified people from designated groups (blacks, women and persons with disabilities) at all occupational levels in the workforce;

(b) enhancing the administration of the Act, including the implementation of section 53 thereof, which provides for the issuing of a certificate by the Minister confirming an employer's compliance with Chapter II, or Chapters II and III, of the Act, as the case may be, in relation to the conclusion of State contracts;

(c) removing the requirement for psychological testing and similar assessments of employees to be certified by the Health Professions Council of South Africa (''the Council''); and

(d) removing a provision empowering non-designated employers to notify the Director-General of the Department of Labour (''the Director-General'') that they intend to voluntarily comply with Chapter III of the Act as if they were a designated employer.

2. CLAUSE BY CLAUSE ANALYSIS

2.1 Clause 1

Clause 1 seeks to amend section 1 of the Act in order to—

(a) amend the definition of a ''designated employer'' by deleting paragraph *(b)*, which classified employers with fewer than 50 employees who meet a turnover threshold determined in Schedule 4 to the Act as designated employers. This is intended at reducing the regulatory burden on small employers in relation to regulatory provisions dealing with the implementation of Chapter III of the Act;

(b) introduce a definition of the ''National Minimum Wage Commission'' in order to align with the National Minimum Wage Act, 2018 (Act No. 9 of 2018);

(c) substitute the definition of ''people with disabilities'' in order to align with the definition in the UN Convention on the Rights of Persons with Disabilities, 2007;

(d) insert a definition of ''sector'' in order to ensure certainty concerning the application of section 15A dealing with sector numerical EE targets; and

(e) delete the definition of ''serve or submit'' since the intention is to allow the Minister to prescribe the methods of service and submission of documents by regulation.

2.2 Clause 2

Clause 2 seeks to amend section 8 of the Act in order to exclude the requirement that psychological testing and similar assessments of employees must be certified by the Council. The Council does not have the capacity or procedures to undertake this certification. The validity of these tests will continue to be subject to evaluation by the Labour Court, in the event of a dispute.

2.3 Clause 3

Clause 3 seeks to repeal section 14 of the Act, which allowed non-designated employers to notify the Director-General of their intention to comply voluntarily with Chapter III of the Act. This is intended to reduce

regulatory burden on small employers in implementing Chapter III of the Act because all employers will obtain a Certificate of Compliance under section 53 of the Act without having to submit an EE Report.

2.4. Clause 4

2.4.1 Clause 4 of the Bill seeks to insert section 15A in the Act to empower the Minister to—

(a) identify national economic sectors for the purposes of the administration of the Act; and

(b) determine numerical targets for these sectors.

2.4.2 The sectoral targets set may differentiate between occupational levels, sub-sectors, regions or other relevant factors.

2.4.3 The Minister is required to consult with the Employment Equity Commission on the proposed sectors and sectoral targets and publish any proposals for public comment.

2.5 Clause 5

Clause 5 seeks to amend section 16 of the Act in order to clarify the consultation process between the designated employer and its employees on matters of consultation contained in section 17 of the Act. This amendment is intended to provide certainty and minimise confusion in relation to which parties the designated employer must consult with in matters for consultation as outlined in section 17 of the Act. Where there is a representative trade union, the designated employer must only consult with that trade union.

2.6 Clause 6

Clause 6 seeks to amend section 20 of the Act in order to link the sectoral employment equity targets to the numerical targets set by designated employers in the employment equity plans of their workplaces.

2.7 Clause 7

Clause 7 seeks to amend section 21 of the Act in order to empower the Minister to make regulations with regard to the manner in which employers are required to submit employment equity reports.

2.8 Clause 8

Clause 8 seeks to amend section 27 of the Act in order to transfer the functions of the Employment Conditions Commission in respect of reporting and monitoring of disproportionate income differentials to the National Minimum Wage Commission.

2.9 Clause 9

Clause 9 seeks to amend section 36 of the Act in order to allow a labour inspector to secure a written undertaking from a designated employer on the preparation of an employment equity plan in terms of section 20 of the Act.

2.10 Clause 10

Clause 10 seeks to amend section 37 of the Act in order to empower the Minister to make regulations with regard to the manner of service of compliance orders on employers.

2.11 Clause 11

Clause 11 seeks to amend section 42 of the Act in order to clarify that a designated employer's compliance with its obligations to implement employment equity may, in addition to being measured against the demographic profile of either the national or the regional economically active population, be measured against an employer's compliance with the sectoral numerical targets set by the Minister in terms of the proposed section 15A.

2.12 Clause 12

2.12.1 Section 53 of the Act, which has not yet been operationalised, provides that State contracts may only be issued to employers that have been certified as being in compliance with their obligations under the Act.

2.12.2 Clause 12 seeks to amend section 53 of the Act by adding a new subsection (6) in order to clarify that the Minister may only issue a compliance certificate to an employer if—

(a) the employer has complied with any applicable sectoral targets or has raised a reasonable ground for non-compliance;

(b) the employer has submitted its most recent employment equity report; or

(c) within the previous three years, the employer has not been found to have breached the prohibition on unfair discrimination or paid wages below the level of the minimum wage.

2.13 Clause 13

Clause 13 seeks to repeal section 64A of the Act, which empowered the Minister to amend, by notice in the *Gazette*, the total annual turnover thresholds in Schedule 4 to the Act in order to counter the effect of inflation.

2.14 Clause 14

Clause 14 seeks to repeal Schedule 4 to the Act, which contains the total annual turnover thresholds contemplated in paragraph *(b)* of the definition of ''designated employer'' as contained in section 1 of the Act and referred to in section 64A of the Act.

2.15 Clause 15

Clause 15 seeks to delete footnotes 4 and 7 to the Act, respectively, as they are no longer necessary.

2.16 Clause 16

Clause 16 provides for the short title and commencement of the Act.

3. CONSULTATION

3.1 The proposed amendments to the Act and regulations relating thereto were tabled at NEDLAC. The Employment Equity Task Team commenced with the negotiations in October 2017 and concluded its work in April 2018.

3.2 The Bill was published for public comment and public hearings in all nine provinces were conducted during October 2018. The Bill, therefore, has taken into account the public comments submitted through written and oral submissions made by interested parties.

3.3 The promulgation of section 53 of the Act dealing with State contracts and the issuing of the Certificate of Compliance as a prerequisite for access to State contracts necessitated inter-departmental consultations with the National Treasury (Chief Procurement Office), the Department of Trade and Industry

(BBBEE Policy Unit), the Department of Mineral Resources and Energy and the Commission for Conciliation, Mediation and Arbitration (CCMA).

3.4 These consultation processes are continuous to ensure alignment in relation to procurement and BBBEE policies, including other legislation and regulatory mechanisms such as sector charters. The following, for instance, remain crucial:
(a) The mining sector EE targets should be aligned to the Mining Charter regulated by the Department of Mineral Resources and Energy; and
(b) systems alignment is critical between the EE System, the CCMA Case Management System and the National Minimum Wage System for exemptions and for verification purposes, before the issuing of a Certificate of Compliance.

4. IMPLICATIONS FOR PROVINCES

None

5. FINANCIAL IMPLICATIONS FOR STATE

Estimated costs associated with implementation of the Act are in the region of R1 200 000.00 for the Department of Employment and Labour. This is inclusive of the implementation plan after the Bill has been adopted by Parliament. Provision has been made for the budget of the implementation of the proposed amendments to the Act and associated regulations within the Medium Term Expenditure Framework (MTEF). No additional funds are required.

6. PARLIAMENTARY PROCEDURE

6.1 The State Law Advisers and the Department of Employment and Labour are of the opinion that the Bill should be dealt with in accordance with procedure set out in section 75 of the Constitution, since it contains no provisions to which the procedure set out in section 74 or 76 of the Constitution applies.

6.2 The Constitution distinguishes between four categories of bills as follows: Bills amending the Constitution (section 74); Ordinary Bills not affecting provinces (section 75); Ordinary Bills affecting provinces (section 76); and Money Bills (section 77). A Bill must be correctly classified or tagged, otherwise it would be constitutionally invalid.

6.3 The Bill has been considered against the provisions of the Constitution relating to the tagging of Bills, and against the functional areas listed in Schedule 4[1] to the Constitution.

6.4 The crux of tagging has been explained by the courts especially the Constitutional Court in the case of *Tongoane and Others v Minister of Agriculture and Land Affairs and Others 2010 (8) BCLR 741 (CC)*. The Court in its judgment stated as follows:

> ''**[58]** What matters for the purpose of tagging is not the substance or the true purpose and effect of the Bill, rather, what matters is whether the provisions of the Bill ''in substantial measure fall within a functional area listed in schedule 4''. This statement refers to the test to be adopted when tagging Bills. This test for classification or tagging is different from that used by this court to characterise a Bill in order to determine legislative competence. This ''involves the determination of the subject matter or the substance of the legislation, its essence, or true

[1] Functional areas of concurrent national and provincial legislative competence.

purpose and effect, that is, what the [legislation] is about''. (footnote omitted)

[60] The test for tagging must be informed by its purpose. Tagging is not concerned with determining the sphere of government that has the competence to legislate on a matter. Nor is the process concerned with preventing interference in the legislative competence of another sphere of government. The process is concerned with the question of how the Bill should be considered by the provinces and in the NCOP, and how a Bill must be considered by the provincial legislatures depends on whether it affects the provinces. The more it affects the interests, concerns and capacities of the provinces, the more say the provinces should have on its content.''.

6.5 In light of what the Constitutional Court stated in the abovementioned case, the test essentially entails that ''any Bill whose provisions in substantial measure'' affect the provinces must be classified to follow the section 76 procedure.

6.6 The Bill seeks to amend the principal Act and is intended to provide for the role of the National Minimum Wage Commission with regard to the reporting and monitoring of disproportionate income differentials. It further seeks to empower the Minister to identify national economic sectors for the purposes of the administration of the principal Act and to determine numerical targets for these sectors in order to ensure the equitable representation of suitably qualified people from designated groups. In the final analysis, it is our view that the subject matter of the Bill does not fall within any of the functional areas listed in Schedule 4 to the Constitution. Consequently, we are of the opinion that this Bill is an ordinary Bill not affecting provinces and that it must be dealt with in accordance with the procedure set out in section 75 of the Constitution.

7. REFERRAL TO NATIONAL HOUSE OF TRADITIONAL LEADERS

The opinion is held that it is not necessary to refer this Bill to the National House of Traditional Leaders in terms of section 18(1)*(a)* of the Traditional Leadership and Governance Framework Act, 2003 (Act No. 41 of 2003), since it does not contain provisions pertaining to customary law or customs of traditional communities.

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