



DLA CLIFFE DEKKER
HOFMEYR

EMPLOYMENT

ALERT

22 SEPTEMBER 2014

IN THIS ISSUE

BE SMART AND
COMPLY –
EMPLOYMENT
EQUITY PLANS

CONCERNS RAISED
ON INTEREST
DEDUCTION
LIMITATION RULES

BE SMART AND COMPLY – EMPLOYMENT EQUITY PLANS

“However good our new laws may be on paper, they must be implemented and enforced before they bring benefits to workers and others. However good the policies of the government are, nothing will come of them without the active participation of each and every one of us.” Nelson Mandela, 1998

One of the primary goals of the Employment Equity Act, No 55 of 1998 (EEA) is to redress the disparities in the workplace resulting from Apartheid policies by achieving equitable representation in all occupational levels in the workforce. 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.

From the CEE’s report for the year 2013/2014, it is apparent that the inception of the EEA over a decade ago has been to a large extent, ineffective. This is evident from the statistics which reflect that most top management and senior management levels in all sectors of the economy are held by white males. The CEE’s report concluded that the under-representation was almost a constant feature among private employers. Among the objectives of the Employment Equity Amendment Act of 2013 (EEAA) (effective from 1 August 2014) is to remedy this failure and to emphasise 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).

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:
 - **S**pecific;
 - **M**easurable;
 - **A**ttainable;
 - **R**elevant; and
 - **T**ime bound.



FOLLOW US ON TWITTER:
[@CDH_LabourLaw](https://twitter.com/CDH_LabourLaw)

- 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.

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*).

Employers are therefore advised to ensure that their employment equity plans are thorough and in compliance with the requirements imposed by the EEAA.

Nicholas Preston and Bilal Bokhari

ASSESSMENT OF COMPLIANCE WITH EMPLOYER'S EMPLOYMENT EQUITY REQUIREMENTS

Section 42 of the amended Employment Equity Act, No 55 of 1998, (EEA), as amended by the Employment Equity Amendment Act, No 47 of 2013, deals with the assessment of compliance with employment equity by a designated employer.

The EEA places a positive duty on a designated employer to take steps to eliminate unfair discrimination in the workplace.

In terms of s42, the Director-General of the Department of Labour is empowered to determine whether a designated employer is implementing employment equity in accordance with the EEA.

The Director-General may take the following factors into account:

- the extent to which suitably qualified people from and among the different designated groups, as defined in the eea, are equitably represented within each occupational level in that designated employer's workforce in relation to the demographic profile of the national and regional economically active population;
- the reasonable steps (no longer 'efforts') taken by a designated employer to train suitably qualified people from the designated groups;
- the reasonable steps taken by the designated employer to implement its employment equity plan;
- the extent to which the designated employer has made progress in eliminating employment barriers that adversely affect people from designated groups; and
- the reasonable steps taken by an employer to appoint and promote suitably qualified people from the designated groups and any factor that may be prescribed.

The Director-General may also take into account s15 of the EEA, which deals with the affirmative action measures to be implemented by a designated employer.

Significantly, the EEA provides that the Director-General may consider the steps taken by the designated employer to comply with the Act and not merely the reasonable efforts to comply with the EEA. The significance of this amendment is that designated employers should show that they are taking positive steps to comply with the EEA.

The Director-General may, in terms of s20(7) apply to the court for a sanction to be imposed on a designated employer who does not comply with its employment equity plan. An employer may, in an assessment or in any court proceedings, raise any reasonable grounds to justify its failure to comply. These grounds may include any labour market related conditions, such as skills-shortage.

Employers are advised to monitor their compliance in order to avoid being heavily fined.

Lauren Salt and Nhlanhla Ncube

CONTACT US

For more information about our Employment practice and services, please contact:



Aadil Patel
National Practice Head
Director
T +27 (0)11 562 1107
E aadil.patel@dclacdh.com



Gillian Lumb
Regional Practice Head
Director
T +27 (0)21 481 6315
E gillian.lumb@dclacdh.com



Johan Botes
Director
T +27 (0)11 562 1124
E johan.botes@dclacdh.com



Mohsina Chenia
Director
T +27 (0)11 562 1299
E mohsina.chenia@dclacdh.com



Fiona Leppan
Director
T +27 (0)11 562 1152
E fiona.leppan@dclacdh.com



Hugo Pienaar
Director
T +27 (0)11 562 1350
E hugo.pienaar@dclacdh.com



Gavin Stansfield
Director
T +27 (0)21 481 6314
E gavin.stansfield@dclacdh.com



Michael Yeates
Director
T +27 (0)11 562 1184
E michael.yeates@dclacdh.com



Faan Coetzee
Executive Consultant
T +27 (0)11 562 1600
E faan.coetzee@dclacdh.com

Kirsten Caddy
Senior Associate
T +27 (0)11 562 1412
E kirsten.caddy@dclacdh.com

Nicholas Preston
Senior Associate
T +27 (0)11 562 1788
E nicholas.preston@dclacdh.com

Ndumiso Zwane
Senior Associate
T +27 (0)11 562 1231
E ndumiso.zwane@dclacdh.com

Anli Bezuidenhout
Associate
T +27 (0) 21 481 6351
E anli.bezuidenhout@dclacdh.com

Shungu Mariti
Associate
T +27 (0)11 562 1475
E shungu.mariti@dclacdh.com

Inez Moosa
Associate
T +27 (0)11 562 1420
E inez.moosa@dclacdh.com

Zinhle Ngwenya
Associate
T +27 (0)11 562 1119
E zinhle.ngwenya@dclacdh.com

Lauren Salt
Associate
T +27 (0)11 562 1378
E lauren.salt@dclacdh.com

This information is published for general information purposes and is not intended to constitute legal advice. Specialist legal advice should always be sought in relation to any particular situation. Cliffe Dekker Hofmeyr will accept no responsibility for any actions taken or not taken on the basis of this publication.

BBBEE STATUS: LEVEL THREE CONTRIBUTOR

JOHANNESBURG

1 Protea Place Sandton Johannesburg 2196, Private Bag X40 Benmore 2010 South Africa
Dx 154 Randburg and Dx 42 Johannesburg
T +27 (0)11 562 1000 F +27 (0)11 562 1111 E jhb@dclacdh.com

CAPE TOWN

11 Buitengracht Street Cape Town 8001, PO Box 695 Cape Town 8000 South Africa
Dx 5 Cape Town
T +27 (0)21 481 6300 F +27 (0)21 481 6388 E ctn@dclacdh.com