

14 SEPTEMBER 2020

EMPLOYMENT ALERT

IN THIS ISSUE

POPI and the Employment Life Cycle

POPI hails a new dispensation for employers and employees. It introduces obligations on employers and grants rights to employees in an attempt to balance the right of employers to conduct a business with the right to the privacy of its employees. POPI is not limited to the parties to an employment relationship, but there is no doubt that they are subject to its protections. Employers must apply themselves to the application of POPI in all aspects of the employment life cycle. The CDH employment Team have created the following infographic to assist you in doing so.

Employment Equity Amendment Bill – decisive measures to transform South African workplaces

On 21 July 2020, the Employment Equity Amendment Bill was tabled in Parliament. The Bill includes a number of significant proposed amendments to the Employment Equity Act.

NOTES FOR THE ENGAGEMENT PROCESS

- The personal information (PI) of applicants' must be obtained directly from them, unless derived from a public platform.
- Where an employer makes use of a recruitment agency, the applicant must consent to his/her PI being obtained from the recruitment agency.
- The PI of unsuccessful applicant(s) must be destroyed once a decision has been taken not to employ the applicant(s).

EXAMPLES OF PI IN THE ENGAGEMENT PROCESS

Curriculum vitae; identity document; educational qualifications and transcripts; interview forms; psychometric test results; email addresses; cell phone number; criminal and background checks.

ENGAGEMENT

(advertising, recruitment and selection)

01

EMPLOYEE ONBOARDING, INDUCTION & TRAINING

02

NOTES FOR THE ONBOARDING PROCESS

- The nature of the information required pertaining to a next of kin constitutes PI in terms of POPI, as it is information related to an identifiable, living, natural person.
- Accordingly, an employer must
 - (i) notify the next of kin that their PI is being processed and (ii) only process PI pertaining to a next of kin with their consent.
- The onus of proof rests with the employer to prove that consent was received from a next of kin.

EXAMPLES OF PI THE TERMINATION PROCESS

The following should be retained on termination for the applicable periods as per legislation:
Contract of employment (3 years); Arbitration Awards (3 years); SARS employee records (5 years); OHS Incident records (3 years); Employee disciplinary records (indefinite)

04

TERMINATION OF EMPLOYMENT

03

DAY TO DAY EMPLOYEE MANAGEMENT AND ENGAGEMENT WITH UNIONS

EXAMPLES OF PI IN DAY TO DAY MANAGEMENT

Screening records in the context of COVID-19; Employee personnel file; disciplinary records; leave applications; Doctors notes; Drug & Alcohol test results; performance reviews and the processing of information related to Trade Union membership.

EXAMPLES OF PI IN THE ONBOARDING PROCESS

Contract of employment; residential address; next of kin contact details; medical aid details; biometrics; email address; cell phone number; bank account details; payslips; and SARS tax records.

NOTES FOR DAY TO DAY MANAGEMENT

Recommended action to be taken by employers:

- Ongoing analysis of PI to verify the quality, accuracy and completeness of the PI;
- Conduct risk assessments to determine loopholes in the protection of PI;
- Revise HR policies and contractual arrangements; and
- Revise and update contractual arrangements.

NOTES FOR TERMINATION OF EMPLOYMENT

- Save for the information that must be retained in terms of applicable legislation, an employer must dispose of information where an employment relationship is terminated.
- PI retained for further processing in terms of section 15(e) of POPI must be processed solely for that purpose and should not be published in an identifiable form.

POPI AND THE EMPLOYMENT LIFE CYCLE

Employment Equity Amendment Bill – decisive measures to transform South African workplaces

This proposed amendment will be welcomed by smaller employers and seeks to eliminate the regulatory burden on these employers.

On 21 July 2020, the Employment Equity Amendment Bill was tabled in Parliament. The Bill includes a number of significant proposed amendments to the Employment Equity Act.

Notable amongst the proposed amendments are the following:

1. The deletion from the definition of "designated employer" of paragraph (b) which provides for an employer who employs fewer than 50 employees; but has a total annual turnover that is equal to or above the turnover of a small business as set out in schedule 4 to the Act. If this amendment is effected employers who employ fewer than 50 employees, (regardless of their turnover) will no longer fall within the definition of "designated employer" and will not be required to comply with Chapter III of the Act relating to affirmative action. This proposed amendment will be welcomed by smaller employers and seeks to eliminate the regulatory burden on these employers.
2. The definition of "people with disabilities" is to be amended in line with the definition in the UN Convention on the Rights of Persons with Disabilities, 2007 which reads, "includes people who have a long-term or recurring physical, mental, intellectual or sensory impairment which, in the interaction with various barriers, may substantially limit their prospects of entry into, or advancement in, employment and 'persons with disabilities' has a corresponding meaning".
3. The removal of the requirement for certification of psychological testing and other similar assessments of an employee by the Health Professions Council of South Africa or any other body authorised by law. This proposed amendment relieves the Council of its certification obligation in recognition of its lack of capacity and procedures to discharge this obligation.

RETRENCHMENT GUIDELINE



CLICK HERE for the latest thought leadership and explanation of the legal position in relation to retrenchments, temporary layoffs, short time and retrenchments in the context of business rescue.

Employment Equity Amendment Bill – decisive measures to transform South African workplaces...continued

The Bill indicates a robust attempt on the part of Government to address the slow pace of transformation within many South African workplaces.

4. The most notable amongst the proposed amendments is the introduction of a provision which empowers the Minister of Employment and Labour to determine sectoral numerical targets. In terms of the proposal the Minister may identify national economic sectors and, after consulting the National Minimum Wage Commission for the purposes of ensuring the equitable representation of suitably qualified people from the designated groups at all occupational levels, set numerical targets for any national economic sector. The targets may differ across occupational levels, sub-sectors, regions or based on other relevant factors. If this provision comes into force this will give rise to a significant change. To date designated employers when determining numerical goals frequently have regard to the demographic profile of the economically active population. The amendment if effected will require that an employer, in setting its numerical goals, comply with any sector target which the Minister may have determined and which applies to the employer.
5. Where a workplace has a representative trade union representing its employees, the employer must consult with the trade union only and not its employees or their nominated representatives, in relation to *inter alia* the preparation and implementation of its employment equity report.
6. The scope of a labour inspector's power has been extended to request and obtain a written undertaking from a designated employer requiring it to prepare an employment equity plan.
7. Where an employer makes an offer to conclude an agreement with any organ of state to provide services or supplies i.e. state contracts and requests a certificate from the Minister that it has complied with its obligations under the Act, the Minister, in terms of the proposed amendment, may only issue such certificate if *inter alia* the Minister is satisfied that the employer has complied with any numerical targets applicable to the employer, or if it has failed to do so, the employer has a reasonable ground to justify such non-compliance; and within the previous three years there has been no finding by the CCMA or a court that the employer breached the prohibition on unfair discrimination in terms of the Act or failed to pay the minimum wage.

The Bill indicates a robust attempt on the part of Government to address the slow pace of transformation within many South African workplaces.

Gillian Lumb and Dylan Bouchier



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EMPLOYMENT

CASE LAW UPDATE 2019



CLICK HERE
to access CDH's Employment Law booklet to assist you in navigating the employment relationship during the current economic uncertainty.

CHAMBERS GLOBAL 2014 - 2020 ranked our Employment practice in Band 2: Employment.

Aadil Patel ranked by CHAMBERS GLOBAL 2015 - 2020 in Band 2: Employment.

Fiona Leppan ranked by CHAMBERS GLOBAL 2018 - 2020 in Band 2: Employment.

Gillian Lumb ranked by CHAMBERS GLOBAL 2020 in Band 3: Employment.

Hugo Pienaar ranked by CHAMBERS GLOBAL 2014 - 2020 in Band 2: Employment.

Michael Yeates ranked by CHAMBERS GLOBAL 2020 as an up and coming employment lawyer.



Our Employment practice is ranked as a Top-Tier firm in THE LEGAL 500 EMEA 2020.

Fiona Leppan is ranked as a Leading Individual in Employment in THE LEGAL 500 EMEA 2020.

Aadil Patel is recommended in Employment in THE LEGAL 500 EMEA 2020.

Gillian Lumb is recommended in Employment in THE LEGAL 500 EMEA 2020.

Hugo Pienaar is recommended in Employment in THE LEGAL 500 EMEA 2020.

Michael Yeates is recommended in Employment in THE LEGAL 500 EMEA 2020.

Jose Jorge is recommended in Employment in THE LEGAL 500 EMEA 2020.



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BBBEE STATUS: LEVEL TWO CONTRIBUTOR

Our BBBEE verification is one of several components of our transformation strategy and we continue to seek ways of improving it in a meaningful manner.

PLEASE NOTE

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.

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