DLA CLIFFE DEKKER HOFMEYR

EMPLOYMENT ALERT

8 July 2013

OVERVIEW OF THE AMENDMENTS TO THE EMPLOYMENT EQUITY ACT, NO 55 OF 1998

The Employment Equity Amendment Bill, published on 19 October 2012, signifies the first proposed amendments to the Employment Equity Act, No 55 of 1998 (EEA) since its enactment in 1998.

The Bill proposes numerous amendments to the Act. However, the following are particularly noteworthy:

- **Amendment of the definition of 'designated groups'**

  A revision of the definition of 'designated groups' is proposed to ensure that beneficiaries of affirmative action in terms of Chapter III of the EEA are limited to persons who were citizens of South Africa before the democratic era, or would have been entitled to citizenship but for the policies of apartheid, and their descendants.

  This proposal will have the result that employment of persons who are foreign nationals or who have become citizens after April 1994 cannot assist employers to meet their affirmative action targets. This change is consistent with changes that are to be made to the Broad-based Black Economic Empowerment Act, No 53 of 2003.

- **Amendment of s6 – expansion of discriminatory grounds**

  The amendment proposed to s6(1) seeks to clarify that discrimination is not only permitted on a ground listed in that section but also on any other arbitrary ground. This change would create consistency with the terminology used in s187(1)(f) of the Labour Relations Act, No 66 of 1995 (LRA), that prohibits discriminatory dismissals.

- **Insertion of new s6(4) and s6(5) – work of equal value**

  A new s6(4) is proposed to deal explicitly with unfair discrimination by an employer in respect of the terms and conditions of employment of employees doing the same or similar work or work of equal value. A differentiation based on a proscribed ground listed in s6(1) or any other arbitrary ground will amount to unfair discrimination unless the employer can show that differences in wages or other conditions of employment are based on fair criteria such as experience, skill and responsibility.

  In terms of s6(5), the Minister of Labour will be empowered to publish a code of good practice dealing with criteria and methodologies for assessing work of equal value.

- **Amendment of s10 - jurisdiction of the Commission for Conciliation, Mediation and Arbitration (CCMA)**

  At present, all unfair discrimination claims fall within the exclusive jurisdiction of the Labour Court. It is proposed that s10(6) should be amended to allow parties to the dispute the option of referring the dispute for arbitration in the CCMA under the following circumstances:

  (a) An employee may refer the dispute to the CCMA for arbitration if the employee's cause of action arises from an allegation of unfair discrimination on the grounds of sexual harassment;

  (b) Employees earning less than the earnings threshold will be entitled to refer any discrimination claim to the CCMA for arbitration; and

  (c) Any party to the dispute may refer the dispute to the CCMA for arbitration if all the parties to the dispute consent thereto.

  However, the maximum award that the CCMA can make in respect of damages will be an amount equal to the earnings threshold referred to above. A person affected by an arbitrator's award in a discrimination case will be entitled to appeal to the Labour Court.

IN THIS ISSUE

DLA CLIFFE DEKKER HOFMEYR

- **Amendment of s57 – labour brokers**

  The Bill seeks to amend s57(1), which deals with the application of affirmative action provisions to employees placed to work by temporary employment services, to make it consistent with the new approach to temporary employment services contained in amendments proposed to the LRA. Employees who are placed with a client by a temporary employment service for longer than six months will be deemed to be employees of the client for the purposes of affirmative action.

- **Amendment of s59 and s61 and schedule 1 - penalties**

  The Bill seeks to increase the maximum fines that can be imposed for criminal offences contemplated in s59 and s61 from R10,000 to R30,000. In addition, it is proposed that the Minister should be empowered to adjust those fines to counter inflation without the concurrence of the Minister of Justice and Constitutional Development.

  An employer's turnover may be taken into account in determining the maximum fine that may be imposed for substantive failures to comply with the EEA.

- **Amendment of schedule 4 – total annual turnover threshold**

  Schedule 4 of the Bill proposes an increase of 200% to the total annual turnover threshold that an employer must exceed to be classified as a designated employer. This means that some employers that were obliged to comply by virtue of their turnover will no longer have to do so. Employers that employ 50 or more employees will still be regarded as 'designated employers' irrespective of their turnover.

It is uncertain when exactly these proposed amendments will be passed. However, at the Employment Equity and Transformation Indaba held earlier this year, the Minister of Labour appealed to the Legislature to assist in making sure that the proposed amendments to the labour legislation are passed without delay.

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