DLA CLIFFE DEKKER HOFMEYR

EMPLOYMENT

ALERT

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2014, THE YEAR OF ALL THINGS NEW...

"We cannot become what we need to be by remaining what we are." - Max de Pree, American Executive and leadership guru.

The year ahead holds the promise (or threat) of a changing employment landscape.

The President assented to a suite of employment law amendments over the December-January period. Employers and employees alike are waiting with keen anticipation on the effective date for the implementation of the amendments to the Labour Relations Act, No 66 of 1995, Basic Conditions of Employment Act, No 75 of 1997 and Employment Equity Act, No 55 of 1998. We should also see the implementation of the new Employment Services Act. The changes to current legislation and the introduction of the new law will have a drastic impact on various aspects of the employment relationship.

Prudent employers are preparing for the changes to the statutory structure by conducting audits of employment contracts, policies and practices. This may be just the opportunity needed to reconsider outdated contractual provisions or workplace practices (whilst avoiding costly litigation or disputes caused by non-compliance).

The Protection of Personal Information Act, No 4 of 2013 (POPI) should also be promulgated soon. This Act creates significant employee rights and employer obligations in respect of the gathering, processing, distributing and safekeeping of personal information. We will provide advice and guidance on various aspects relating to POPI in subsequent editions of our Employment Alerts.

Aadil Patel

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PRESIDENT ASSENTS TO THE AMENDMENTS TO THE EMPLOYMENT EQUITY ACT, 1998

On 14 January 2014, the President assented to the Employment Equity Amendment Act, No 47 of 2013, which was subsequently published in Notice R16 in Government Gazette No. 37238 on 16 January 2014. While the Act has been assented to and published, it has not yet come into operation as the President is still required to determine a date on which this will occur.

The Employment Equity Amendment Act (EEA) marks the first amendments to the Employment Equity Act, No 55 of 1998 since it became effective in 1998. The Amendment Act amends various sections of the principal act. However, the following amendments are most 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 amendment will have the result that the employment of persons who are foreign nationals or who have become citizens after April 1994 will not 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 section 6 – Expansion of discriminatory grounds

The amendment 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, however, creates consistency with the terminology used in section 187(1)(f) of the Labour Relations Act, No 66 of 1995, that prohibits discriminatory dismissals.

Insertion of new sections 6(4) and 6(5) – Work of equal value

A new s6(4) has been introduced 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 in fact based on fair criteria such as experience, skill, responsibility and the like.

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)

Under the Principal Act, all unfair discrimination claims fall within the exclusive jurisdiction of the Labour Court. However, the Amendment Act amends s10(6) 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) lower-paid employees (those earning less than the earnings threshold prescribed under s6(3) of the Basic Conditions of Employment Act, No 75 of 1997, will be entitled to refer any discrimination claim to the CCMA for arbitration;

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

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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.

Amendment of s59 and 61 and Schedule 1 - Penalties

The Amendment Act increases the maximum fines that can be imposed for criminal offences contemplated in s59 and 61 from R 10 000 to R 30 000. In addition, it is proposed that the Minister should be empowered to adjust those fines in order 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

The EEAA increases the total annual turnover threshold that an employer must exceed in order 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.

Employers are encouraged to familiarise themselves with the changes to the Employment Equity Act. In addition, employers should ensure compliance with the amendments to avoid the hefty penalties in place. The Department of Labour has indicated that they are going to clamp down on enforcement of the provisions of the Act, which should be incentive enough for employers to start getting their proverbial ducks in a row, while the President determines the date on which the amendments will come into effect.

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