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# EMPLOYMENT ALERT

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### Affirmative Action: Ten lessons learnt from recent case law

The Employment Equity Act 55 of 1998 (EEA) was established to achieve equity in the workplace through the elimination of unfair discrimination and the implementation of affirmative action measures.

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# Affirmative Action: Ten lessons learnt from recent case law

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**The Employment Equity Act 55 of 1998 (EEA) was established to achieve equity in the workplace through the elimination of unfair discrimination and the implementation of affirmative action measures.**

A plethora of case law has come and gone before the courts where the application of the EEA has been analysed. We recently analysed some of the leading case law on point and have carved out ten prominent principles for employers to bear in mind when marketing new opportunities.

1. An employer is legitimately entitled to place reliance on the race, gender and/or disability of an applicant during the recruitment process in deciding whether or not to appoint the applicant. This does not amount to racial discrimination and is consistent with section 6(2) of the EEA, which permits employers to take affirmative action measures consistent with the purpose of the EEA.
2. Employers are required to prepare and submit employment equity plans which must, amongst other things, detail recruitment targets and the strategies intended to achieve those targets. The employer must stick to the plan as far as reasonably possible during the recruitment process. The plan cannot be applied haphazardly or inconsistently.
3. When advertising positions, an employer is at liberty to indicate that preference will be given to affirmative action candidates or designated groups. The advertisement should not, however, outright exclude non-designated groups from applying for the position. For example, if an employer advertises a position by stating "only affirmative action candidates will be considered for the position", this may constitute unfair discrimination as it constitutes an absolute barrier to non-affirmative action candidates.
4. Once equity targets have been recorded, further appointments should be strictly assessed on merit.
5. Where a court is tasked with determining the employment equity status of a designated employee versus a non-designated employee, the court will consider the dynamics of the relevant group as a whole and not the individual circumstances of the employee in question. In other words, the court will look past comparative inequalities within a particular group.
6. Whether or not discrimination has taken place is an objective test. Accordingly, the court will not have regard to any defence based on an employer's subjective intention not to discriminate.

# Affirmative Action: Ten lessons learnt from recent case law...*continued*

There are many important principles which employers must bear in mind when implementing their obligations under the EEA.

7. An applicant for employment may not rely on unfair discrimination where such an applicant is not, first and foremost, suitably qualified for the position in question.
8. Employers may not hide behind the defence of having a collective agreement in place, where those provisions are discriminatory in nature. The mere fact that a discriminatory practice is codified in a collective agreement will not serve as a defence to an unfair discrimination claim.
9. Employers should constantly guard against potential equal pay claims, but may pay a premium to attract scarce skills.
10. Diversity of interview panels is essential when making new appointments.

There are many more important principles which employers must bear in mind when implementing their obligations under the EEA. Employers are advised to consistently be on the lookout for possible discriminatory practices and barriers to affirmative action in the workplace. Where employers identify such practices, they must take active steps to eliminate or rectify these practices.

*Hugo Pienaar and Sean Jamieson*





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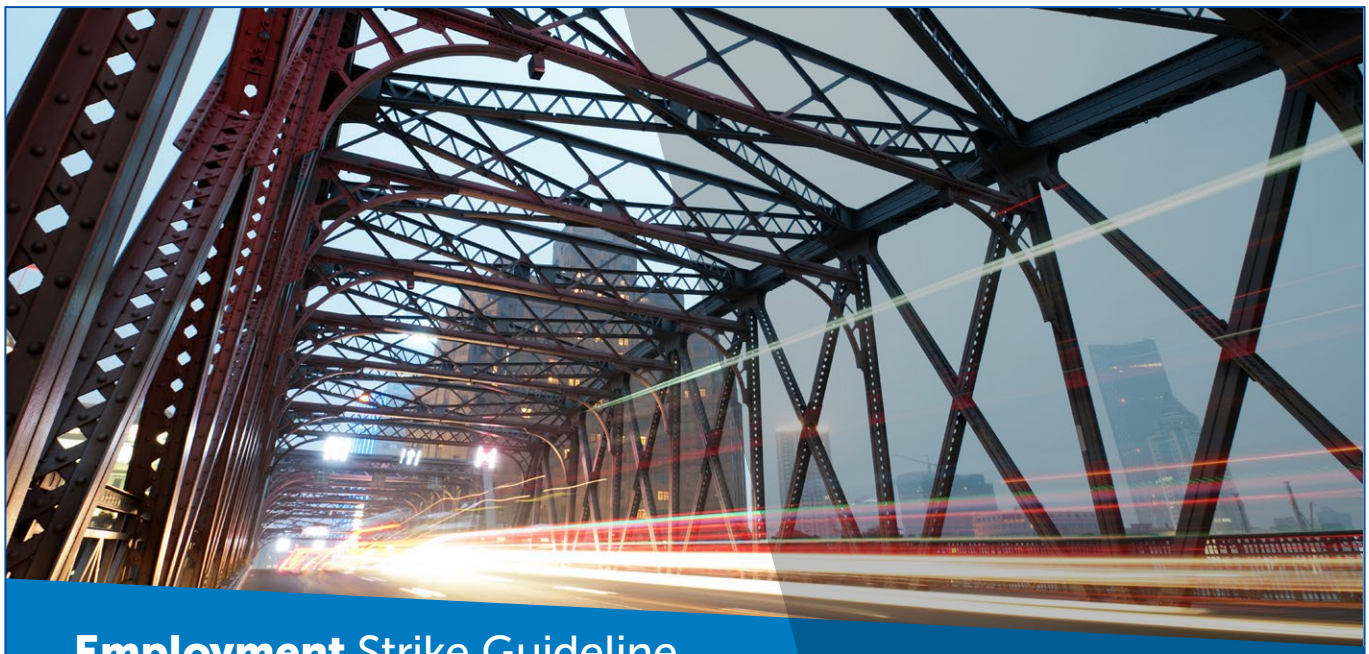

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Hugo Pienaar ranked by CHAMBERS GLOBAL 2014 - 2019 in Band 2: Employment.

Fiona Leppan ranked by CHAMBERS GLOBAL 2018 - 2019 in Band 2: Employment.

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**BBBEE STATUS:** LEVEL ONE CONTRIBUTOR

Cliffe Dekker Hofmeyr is very pleased to have achieved a Level 1 BBBEE verification under the new BBBEE Codes of Good Practice. 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.




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