EMPLOYMENT LAW
ALERT

19 SEPTEMBER 2022

CDH
CLIFFE DEKKER HOFMEYR

INCORPORATING
KIETI LAW LLP, KENYA

IN THIS ISSUE

FOR MORE INSIGHT INTO OUR EXPERTISE AND SERVICES

What is the Employment Equity Act and what is its purpose?

South Africa's history of structural and political exclusion on the basis of race and its negative consequences are well known. Four years into the new constitutional dispensation, the Employment Equity Act 55, 1998 (EEA) was passed.

The primary purpose of the EEA is to promote the right to equality, to ensure that all employees receive equal opportunities and that employees are treated fairly by their employers. A core focus of the EEA is the implementation of employment equity and affirmative action to redress the effects of historical discrimination.

The EEA applies to all employees and employers who operate in South Africa, except the South African National Defence Force, National Intelligence Agency and South African Secret Services.

While the EEA applies to all employers (excluding those listed above), sections of the EEA, particularly, sections 12 – 27 only apply to designated employers. The amendments to the EEA will bring about a change to the definition of "*designated employer*" to restrict the application of these sections to a reduced group of employers and relieve some of the administrative burden on smaller employers.

The EEA prohibits discrimination against an employee, directly or indirectly, in any employment policy or practice on the grounds of:

- race
- gender
- pregnancy
- marital status
- family responsibility
- ethnic or social origin
- colour
- sexual orientation
- age
- disability
- religion
- HIV status

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- conscience
- belief
- political opinion
- culture
- language and
- birth

HOW WILL SMALLER EMPLOYERS BE AFFECTED BY THE AMENDMENTS?

Smaller employers will be positively affected by a change in the definition of "*designated employer*". The definition will be amended to exclude employers who employ fewer than 50 employees, irrespective of their annual turnover.

WHAT IS THE EFFECT OF THE AMENDMENT TO THE DEFINITION OF DESIGNATED EMPLOYER?

As a result of the amendment, smaller employers will not be required to comply with the obligations of a designated employer relating to affirmative action, including the development and implementation of employment equity plans and reporting to and submission of employment equity reports to the Department of Employment and Labour. This will significantly relieve the administrative burden on these employers.

AS A RESULT OF THE AMENDMENT, WILL SMALLER EMPLOYERS BE DEPRIVED OF THE ABILITY TO SECURE A CERTIFICATE OF COMPLIANCE?

No. While smaller employers will not be required to develop and submit employment equity reports, they will nevertheless be entitled to obtain a certificate of compliance under section 53 of the EEA.

WILL THERE BE ANY CHANGES IN RELATION TO AND FOR PEOPLE WITH DISABILITIES?

Yes. The definition of "*people with disabilities*" will be substituted to align with the definition in the United Nations Convention on the Rights of Persons with Disabilities, 2007.

The amended definition includes within the meaning of "*people with disabilities*", "*people who have a long-term or recurring physical, mental, intellectual or sensory impairment which, in interaction with various barriers, may substantially limit their prospects of entry into, or advancement in, employment*". This enhanced definition accords with a more expansive international understanding of what constitutes disabilities.

WILL THERE BE AN ONGOING REQUIREMENT FOR HPCSA CERTIFICATION IN RELATION TO PSYCHOLOGICAL TESTING?

No. In 2014 the EEA was amended to make it a requirement that psychological testing and similar assessments be certified by the Health Professionals Council of South Africa (HPCSA). The amendment was aimed at addressing a concern that without the relevant and formal certification, such tests were essentially partial

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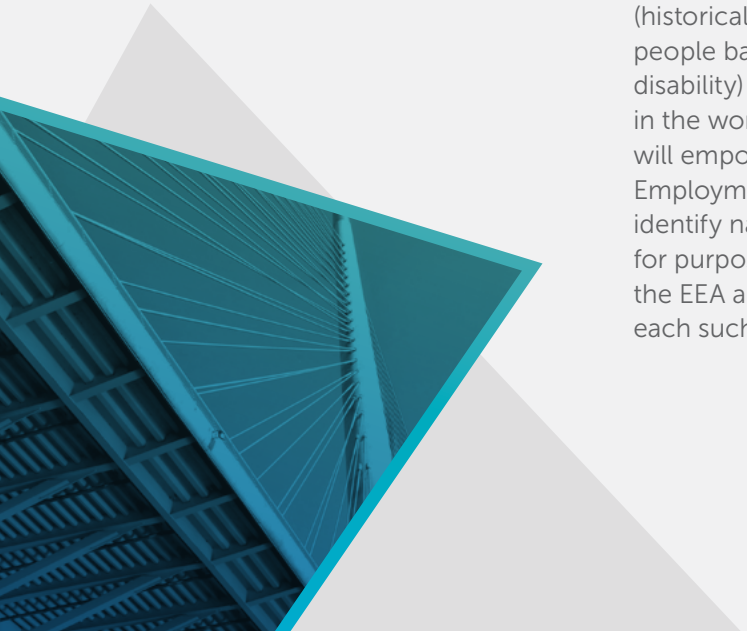

and could result in exclusionary practices, particularly in a country as culturally diverse as South Africa. Subsequent to the amendment, the capacity of the HPCSA to fulfil the requirement was legally challenged. The latest amendment will remove the requirement for certification by the HPCSA of psychological testing and similar assessments.

WHAT IS THE PURPOSE OF THE INTRODUCTION OF SECTORAL NUMERICAL TARGETS?

The new section 15A will introduce sectoral numerical targets. The purpose of this addition is to ensure the equitable representation of people from designated groups (historically disadvantaged groups of people based on race, gender, and disability) at all occupational levels in the workforce. The amendment will empower the Minister of Employment and Labour (Minister) to identify national economic sectors for purposes of the administration of the EEA and set numerical targets for each such sector.

HOW WILL THE SECTORAL NUMERICAL TARGETS BE DETERMINED?

The sectoral numerical targets will be determined by the Minister in consultation with the Employment Equity Commission. All proposals in relation to identifying sectors (an industry or service or part of any industry or service) and setting numerical targets for sectors will have to be published in order to afford interested parties a period of at least 30 days to comment on the proposals.

HOW WILL THE SECTORAL NUMERICAL TARGETS IMPACT A DESIGNATED EMPLOYER'S EMPLOYMENT EQUITY PLAN?

An amendment to section 20 of the EEA (which deals with employment equity plans) will link the sectoral numerical targets to the numerical targets set by a designated employer in its employment equity plan. A designated employer will be required to set numerical targets in line with the applicable sectoral targets set by the Minister. An amendment to section 42 will align the assessment of compliance with employment equity with the new requirements relating to sectoral numerical targets.

COULD THE SECTORAL NUMERICAL TARGETS IMPACT ON AN EMPLOYER'S ELIGIBILITY FOR THE AWARDING OF STATE CONTRACTS?

Yes. An amendment to section 53 of the EEA dealing with state contracts provides that the Minister may only issue a compliance certificate if the employer has complied with the sectoral numerical targets set by the Minister for the relevant sector, or has demonstrated a reasonable ground for non-compliance.

ARE THE SECTORAL NUMERICAL TARGETS EQUIVALENT TO A QUOTA?

The law distinguishes between a quota and a numerical target or goal. A quota is rigid, or applied rigidly, and amounts to job reservation. On the other hand, a target is a flexible

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employment guideline. Quotas are prohibited because it constitutes an absolute barrier to the future or continued employment or promotion of people who are not from designated groups.

The new section 15A of the EEA allows the Minister to identify national economic sectors, and then set *"numerical targets for any national economic sector identified in terms of subsection (1)."* Importantly, this is a discretionary power and requires consultation with the relevant sectors and advice of the Employment Equity Commission. Furthermore, the target must be set to help achieve the purpose of ensuring the equitable representation of suitably qualified people from designated groups at all occupational levels in the workforce. The outcome of this exercise should ideally result in the Minister setting numerical targets based on the reality of the sector, the composition of the workforces within the sector, and the shifting needs for certain skills or proficiencies. This means that the target should neither be arbitrary nor rigid.

ARE THERE ANY CHANGES IN RELATION TO THE SUBMISSION OF EMPLOYMENT EQUITY REPORTS AND THE TIMING OF THE SUBMISSION?

Yes. An amendment to section 21 of the EEA dealing with employment equity reports and annual submission of reports by a designated employer removes a specific date for annual submissions. The amendment empowers the Minister to make regulations with regard to the requirements of employers in submitting their employment equity reports and the timing of the submission.

DO THE AMENDMENTS OFFER ANY CLARITY RELATING TO A DESIGNATED EMPLOYER'S OBLIGATION TO CONSULT WITH A TRADE UNION?

Yes. An amendment to section 16 of the EEA clarifies the consultation process between a designated employer and its employees. Where there is a representative trade union the designated employer must only consult with that trade union, and not with its employees. The consultations relate to the implementation of an employment equity plan, the analysis conducted by a designated employer to identify employment barriers which adversely affect people from the designated groups, and the content and submission of the employment equity report.

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ARE THERE ANY CHANGES WHICH IMPACT THE POWERS OF LABOUR INSPECTORS?

Yes. Section 36 of the EEA revives the power of a labour inspector to secure an undertaking to comply from a designated employer. This power had been removed in an earlier amendment.

ARE THERE ANY CHANGES IN RELATION TO COMPLIANCE ORDERS AND TO WHAT EXTENT DOES THIS AFFECT COMPLIANCE WITH NUMERICAL TARGETS?

Yes. An amendment to section 37 of the EEA will empower the Minister to make regulations regarding the manner of service of compliance orders, in relation to the affirmative action aspects of the EEA, on designated employers.

While section 37 provides that a labour inspector may serve a compliance order on a designated employer if the employer has failed to comply with sections 16, 17, 19, 22, 24, 25 or 26 of the EEA, it notably excludes section 15 and 15A. This means that a failure to comply with section 15 or 15A (the sections relating to numerical targets) may not be penalised by means of a compliance order.

Section 42 of the EEA will be amended to include an assessment of whether an employer has complied with the sectoral targets set in terms of section 15A. If, after an assessment, it is determined that the employer has failed to comply, section 45 states that the Director-General may apply to the Labour Court for an order directing the employer to comply or, if the employer fails to justify its non-compliance with the request or recommendation, impose a fine in accordance with schedule 1. In the circumstances, non-compliance with sectoral targets will have the same effect as non-compliance with an employment equity plan.

WHEN WILL THE AMENDMENTS COME INTO EFFECT?

The Department of Employment and Labour has announced that the amendments should come into effect on 1 September 2023.

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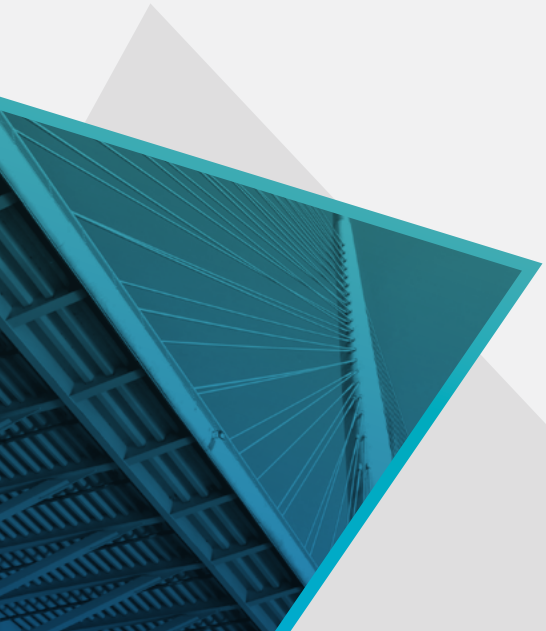

Maternity leave: Who's in and who's out?

Several countries extend commensurate time off and benefits to employees following the birth of a child, regardless of the sex, gender and sexual orientation of the employee. In keeping with this development, and with effect from 1 January 2020, the Labour Laws Amendment Act of 2018 amended the Basic Conditions of Employment Act 75 of 1997 (BCEA) in order to introduce parental leave, adoption leave and commissioning parental leave. But have these amendments gone far enough, or is more required?

Werner and Ika van Wyk (supported by Sonke Gender Justice, which is lobbying for the sharing of care in the home) are arguing that they do not and that sections 25 and 26 of the BCEA should be declared unconstitutional insofar as they unfairly discriminate against fathers of newborn children, by unjustifiably limiting their rights to paternity leave in South Africa. They have raised their challenge by way of a High Court application. Sections 25 and 26 of the BCEA provide for maternity leave and the protection of employees before and after the birth of a child. Werner van Wyk applied to his employer for four months of leave to care for his newborn child after his wife returned to operating her two businesses following the birth of their child. The request was declined.

The Van Wyks' notice filed at the High Court raises the following constitutional issues:

- Whether sections 25 and 26 of the BCEA are unconstitutional insofar as they unfairly discriminate against fathers of newborn children by unjustifiably limiting the father's rights to paternity leave in South Africa.
- Whether sections 25 and 26 ought to be extended to ensure equal rights of all mothers, fathers and same-sex parents of newborn children in South Africa to:
  - include circumstances where a father is the primary caregiver of the newborn child;
  - allow for extended paternal and/or parental leave in workplace leave policies;
  - extend the definition of *"maternity leave"* to include *"parental"* and *"caregiving"* leave; and
  - include the recognition of a new category of *"peri-natal leave"* for the pregnant, delivering, and breastfeeding parent for a period of six weeks.
- Whether the Minister of Employment and Labour is obliged to amend the legislation to encapsulate circumstances where fathers are the primary caregivers to their newborn children and accordingly – to the extent that workplace policies deviate from this standard – they, themselves, will give rise to unconstitutionality.

Maternity leave: Who's in and who's out?

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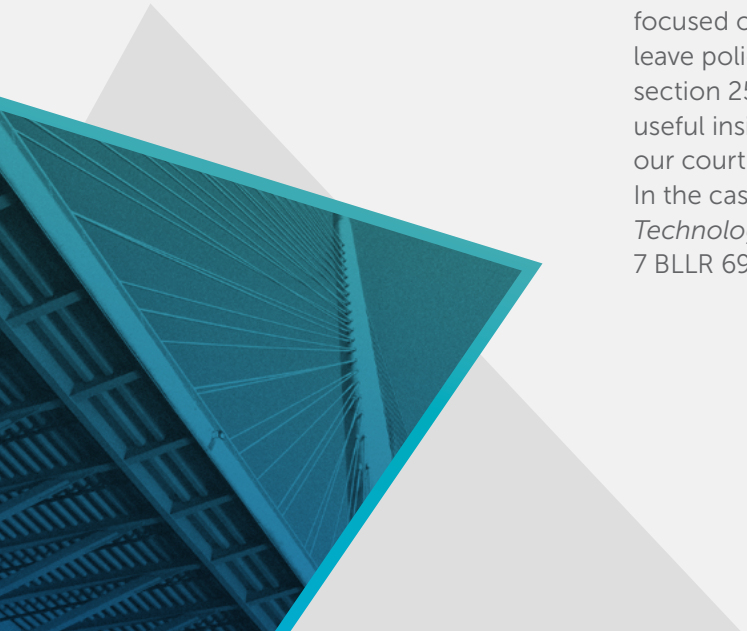

EXTENDING THE SCOPE OF MATERNITY LEAVE

In terms of section 25 of the BCEA an employee is entitled to four months of unpaid maternity leave following the birth of her child. The Van Wyks' application seeks to extend the scope of maternity leave to include parental leave and caregiving leave. While maternity leave is not expressly defined in the BCEA, the provisions of section 25 relate to pregnancy and birth, and a pregnant employee's right to maternity leave.

The scope of maternity leave has been challenged before. While the previous challenge was priorto the recent amendments to the BCEA and focused on the employer's maternity leave policy and not specifically section 25, the judgment offers some useful insight into the approach which our courts have adopted in the past. In the case of *Mia v State Information Technology Agency* (Pty) Ltd [2015] 7 BLLR 694 (LC) the applicant, who was party to a same-sex civil union and who together with his spouse had entered into a surrogacy agreement, applied for four months of paid maternity leave in terms of his employer's maternity leave policy. His employer declined the request, stating that only female employees were entitled to maternity leave under the BCEA (at the time the BCEA was silent on the issue of leave for surrogate parents) and its policy. The applicant challenged the refusal arguing that the refusal on the basis that he was not the biological mother of the child constituted unfair discrimination on the grounds of gender, sex, family responsibility and sexual orientation. The Labour Court adopted a purposive interpretation of maternity leave and found that:

> *".. the right to maternity leave as created in the Basic Conditions of Employment Act in the current circumstances is an entitlement not linked solely to the welfare and health of the child's mother but must of necessity be interpreted to and take into account the best interests of the child. Not to do so would ignore the Bill of Rights in the Constitution of the Republic of South Africa and the Children's Act [including the right of every child to family or parental care]."*

The Labour Court considered that at the time the legislation governing civil unions and surrogacy agreements was relatively recent and that our laws' recognition of same-sex marriages and its regulation of the rights of parents who have entered into a surrogacy agreement suggests that any policy adopted by an employer likewise should recognise or be interpreted or amended to adequately protect the rights that flow from

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the Civil Union Act 17 of 2006 and the Children's Act 38 of 2005. While the BCEA was not under scrutiny in the case before it, the Labour Court concluded that in order to properly deal with matters such as this it is necessary to amend the BCEA.

Having considered these issues and the developments in our law, the Labour Court declared that the manner in which the employer's maternity leave policy had been applied was unfairly discriminatory, directed the employer not to discriminate against surrogate parents when applying the policy in future, and to pay the applicant the equivalent of two months' salary (in addition to the two months paid leave the employer had granted him).

While this case was decided prior to the 2018 amendments, the court's reasoning in adopting a purposive interpretation of maternity leave and its consideration of the best interests of the child, may likewise be considered by the High Court and play a role in deciding the Van Wyks' application.

We will monitor the Van Wyk case and provide an update on the impact thereof (if any) on parental and maternity leave in the future.

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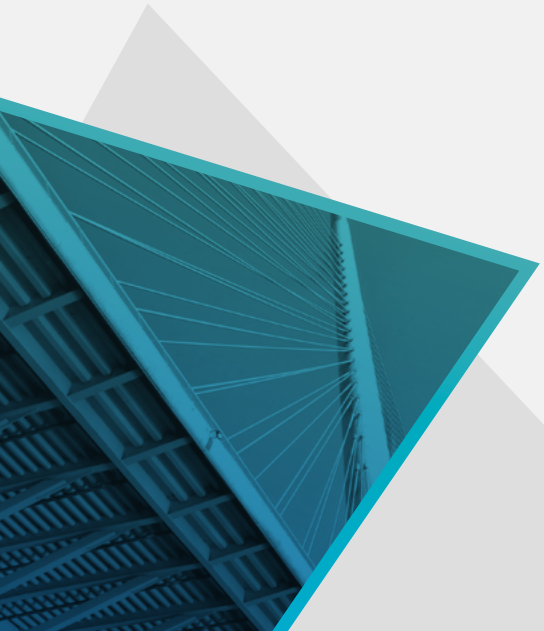

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Our BBBEE verification is one of several components of our transformation strategy and we continue to seek ways of improving it in a meaningful manner.

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