

2023 EMPLOYMENT EQUITY AMENDMENTS GUIDELINE


(Third Edition)



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On 14 April 2023, President Cyril Ramaphosa signed the Employment Equity Amendment Act 4 of 2022 into law (Amendment Act). This act amends the Employment Equity Act 55 of 1998 (EEA). The effective date of the amendments is yet to be proclaimed by the President.



[CLICK HERE
to read the
Amendment Act](#)



FAQS

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 EEA was passed. The primary purpose of the EEA is to promote the right to equality and to ensure that all employees receive equal opportunities and 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 Service.

While the EEA applies to all employers (excluding those listed above), sections of the EEA (sections 12 – 27) only apply to designated employers. The Amendment Act brings 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



Conscience



Belief



Political opinion



Culture



Language



Birth

How are smaller employers affected by the amendments?

Smaller employers are positively affected by a change in the definition of “*designated employer*”. The definition is 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 are not 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 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. In this regard, smaller employers will be expected

to demonstrate that there has been no finding by the Commission for Conciliation, Mediation and Arbitration (CCMA) or a court within the previous 12 months that the employer breached the prohibition on unfair discrimination in the EEA and the CCMA has not issued an award against the employer in the previous 12 months for failing to pay the minimum wage in terms of the National Minimum Wage Act, 2018 (Act 9 of 2018).

Are there any changes in relation to and for people with disabilities?

Yes. The definition of “*people with disabilities*” has been substituted to align with the definition in the United Nations Convention on the Rights of Persons with Disabilities, 2007. The amended definition includes within its meaning, “*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 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 removes the requirement for HPCSA certification of psychological testing and similar assessments.



What is the purpose of the introduction of sectoral numerical targets?

The new section 15A introduces 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 of these sectors.

How will the sectoral numerical targets be determined?

The amendments empower the Minister to identify and set employment equity numerical targets for each national economic sector. 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 have to be published in order to afford interested parties a period of at least 30 days to comment on the proposals.

Have the sectoral numerical targets been published?

On Friday, 12 May 2023, the Minister published the draft five-year sectoral numerical targets for the identified national economic sectors allowing interested parties 30 days to comment. The numerical targets focus on top and senior management as well as professionally qualified and skilled levels and people with disabilities. The targets are tabulated according to economic sector based

on race (i.e. African, Coloured, Indian and White) and gender (i.e. male and female) with both national and provincial percentages indicated. Separate targets are outlined on each of these racial and gender categories. The category "Black" includes African, Coloured, and Indian persons. There may be further guidance on the percentages from the Department of Employment and Labour in due course.



CLICK HERE
to access the published
draft sectoral numerical
targets.

Can an employer apply either or both national and provincial targets?

The national targets will apply to designated employers operating nationally while the respective provincial targets will apply to employers operating in the relevant province. A designated employer may not apply both the national and provincial targets.

Do the draft sectoral numerical targets refer to semi-skilled and unskilled employees?

The Minister has not published targets for the semi-skilled and unskilled levels. However, designated employers are required to take into account the economically active population demographics in respect of these levels (either nationally or provincially) in their employment equity plans in terms of section 20(2)(C) of the EEA.

When do the sectoral numerical targets take effect?

Currently, the sectoral numerical targets have been published in draft form. Interested parties were provided with an opportunity to submit comments. The Department of Employment and Labour's Deputy Director for Employment Equity announced that until the effective date of the employment equity amendments, which is yet to be proclaimed, the status quo remains intact. This means that employers will need to continue to comply with their current obligations under the Employment Equity Act, including their employment equity plan.

When the final targets are published, the Minister may provide further information in this regard.

What are the economic sectors?

The amendments introduce a definition for "sector" that means "an industry or service or part of any industry or service". Eighteen economic sectors have been identified:



Agriculture, forestry and fishing



Mining and quarrying



Manufacturing



Construction



Financial and insurance activities



Transportation and storage



Information and communication



Water supply, sewerage, waste management and remediation activities



Electricity, gas steam and air conditioning supply



Human health and social work activities



Arts, entertainment and recreation



Real estate activities



Professional, scientific and technical activities



Wholesale and retail trade; repair of motor vehicles and motorcycles



Accommodation and food service activities



Public administration, defence and compulsory social security



Education



Administrative and support activities

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) links the sectoral numerical targets to the numerical targets set by a designated employer in its employment equity plan. A designated employer is now required to set numerical targets in line with the applicable sectoral targets set by the Minister. An amendment to section 42 aligns the assessment of compliance with employment equity with the new requirements relating to sectoral numerical targets.

The Department of Employment and Labour's Deputy Director for Employment Equity announced that once the employment equity amendments take effect, employers will be expected to comply with their own respective employment equity plan targets on an annual basis towards achieving the five-year sectoral targets published by the Minister. In this regard, employers must be guided by the information available on the economically active population.

Could the sectoral numerical targets impact 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, among other compliance requirements, including:

- the submission of a report in terms of section 21 of the EEA;
- that there is no finding by the CCMA or a court within the previous 12 months that the employer breached the prohibition on unfair discrimination; and
- the CCMA has not issued an award against the employer in the previous 12 months for failing to pay the minimum wage in terms of the National Minimum Wage Act 9 of 2018.

A certificate issued in terms of section 53 is valid for 12 months from the date of issue or until the next date on which the employer is obliged to submit a report in terms of section 21 of the EEA, whichever period is longer.

What is the process of obtaining a compliance certificate?

Section 53 has not yet been operationalised and the amendments go some way in implementing this section. However, the process of procuring a compliance certificate in terms of section 53 is unclear. Draft regulations published in 2018 set out a process for acquiring this certificate and the factors that may justify non-compliance. These regulations have to date not been finalised and implemented. In relevant part, paragraph 16 of these draft regulations provides that:

"(1) An employer must request a certificate in terms of section 53 by means of the Department website labour.gov.za ...

(4) An employer may include in its application reasonable grounds to justify its failure to comply with any requirement for the issuing of a certificate as contemplated by section 42(4) and, in the case of compliance with a sectoral target, section 53(6)(a) by using EEA15 form.

(a) Justifiable reasonable grounds for not complying with the targets, including:

(i) insufficient recruitment opportunities;

(ii) Insufficient promotion opportunities;

(iii) insufficient target individuals from the designated groups with the relevant qualification, skills and experience;

(iv) court order;

(v) transfer of business;

(vi) mergers/acquisitions; and

(vii) impact on business economic circumstances."

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 employment guideline.

Quotas are prohibited because they constitute an absolute barrier to the future or continued employment or promotion of people who are not from designated groups. Section 15 of the EEA states that a designated employer is not required to take any decision concerning an employment policy or practice that would establish an absolute barrier to the prospective or continued employment or advancement of people who are not from designated groups.

The amended section 15A 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 the 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 be neither arbitrary nor rigid.

The introduction of sectoral numerical targets and the power of the Government, by way of the Minister, to set these targets has been controversial. Some parties have concerns that the sectorial numerical targets set by the Minister may constitute a rigid quota and therefore potentially render the application of the sectoral numerical targets unconstitutional. The view of the Department of Employment and Labour is that there is a built-in flexibility for employers to set their own targets on an annual basis with the aim of achieving the five-year sectoral targets published by the Minister.

Are there any changes in relation to the submission of employment equity reports and the timing of submissions?

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

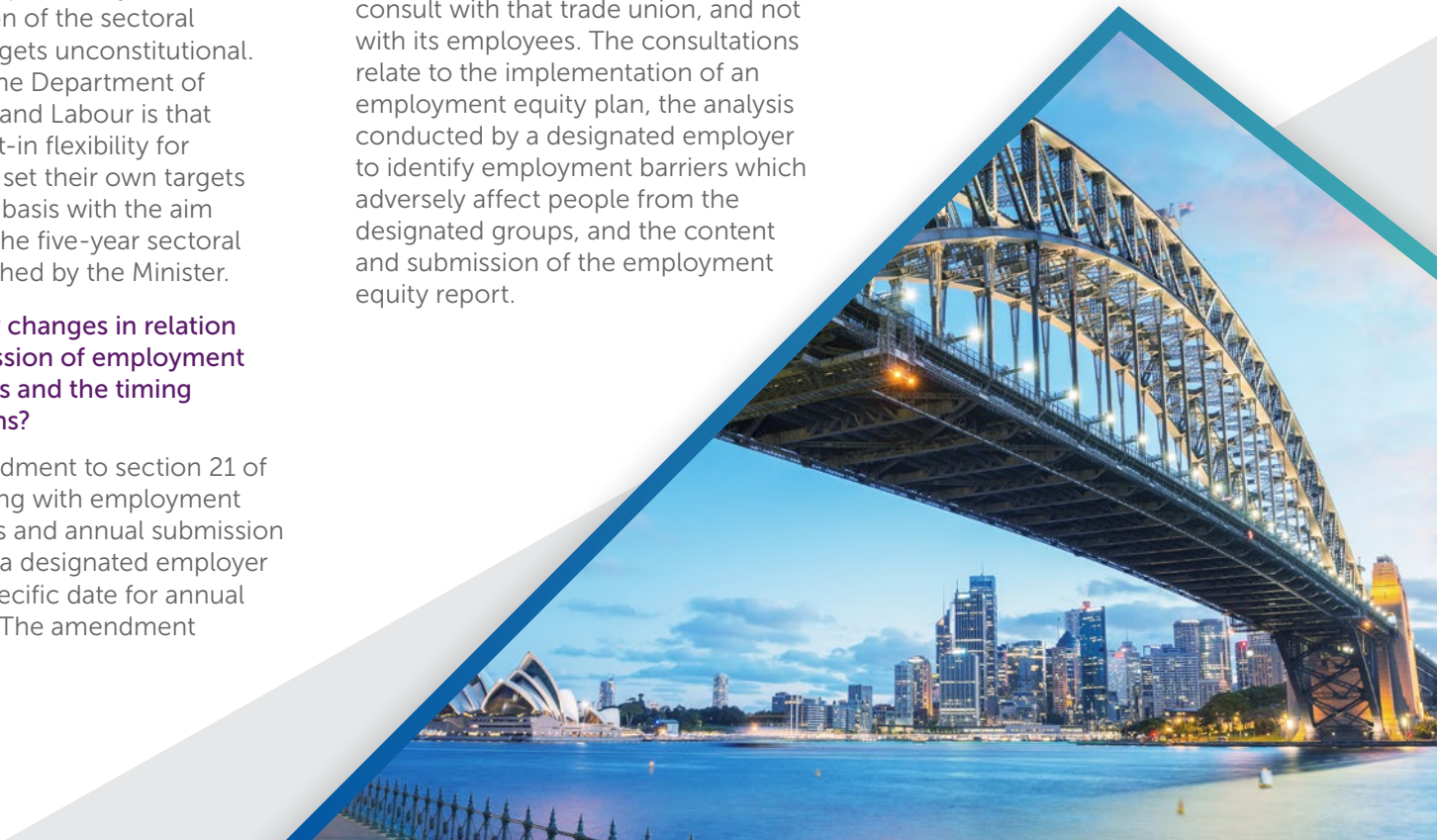
empowers the Minister to make regulations with regard to the requirements of employers in submitting their employment equity reports and the timing of the submission.

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.

Are there any changes which impact the powers of labour inspectors?

Yes. Section 36 of the Amendment Act 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 empowers 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 sections 15 and 15A. This means that a failure to comply with sections 15 or 15A (the sections relating to sectoral numerical targets) may not be penalised by means of a compliance order.

Section 42 of the EEA is 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.

What is the fine for non-compliance and if the employer fails to justify its non-compliance with applying the sectoral numerical target?

The fines are listed in Schedule 1 of the EEA and are tabulated on a sliding scale depending on previous contraventions by the same employer.

Previous contravention

Fine

No previous contravention.

The greater of R1,5 million or 2% of the employer's turnover.

A previous contravention in respect of the same provision.

The greater of R1,8 million or 4% of the employer's turnover.

A previous contravention within the previous 12 months or two previous contraventions in respect of the same provision within three years.

The greater of R2,1 million or 6% of the employer's turnover.

Three previous contraventions in respect of the same provision within three years.

The greater of R2,4 million or 8% of the employer's turnover.

Four previous contraventions in respect of the same provision within three years.

The greater of R2,7 million or 10% of the employer's turnover

When will the amendments come into effect?

The effective date is yet to be proclaimed by the President.

MARKET RECOGNITION

Our Employment Law team is externally praised for its depth of resources, capabilities and experience.

Chambers Global 2014–2023 ranked our Employment Law practice in Band 2 for employment. *The Legal 500 EMEA 2020–2023* recommended the South African practice in Tier 1, and our Kenyan practice in Tier 3 for employment.

The way we support and interact with our clients attracts significant external recognition.

Aadil Patel is the Practice Head of the Employment Law team, and the Joint Sector Head of the Government & State-Owned Entities sector.

Chambers Global 2015–2023 ranked him in Band 2 for employment. *The Legal 500 EMEA 2021–2023* recommended Aadil as a leading individual for employment and recommended him from 2012–2020.

The Legal 500 EMEA 2021–2023 recommended **Anli Bezuidenhout** for employment.

The Legal 500 EMEA 2020–2023 recommended **Jose Jorge** for employment.

Chambers Global 2018–2023 ranked **Fiona Leppan** in Band 2 for employment. *The Legal 500 EMEA 2022–2023* recommend her for mining. *The Legal 500 EMEA 2019–2023* recommended her as a leading individual for employment, and recommended her from 2012–2018.

Chambers Global 2020–2023 ranked **Gillian Lumb** in Band 3 for employment. *The Legal 500 EMEA 2020–2023* recommended her for employment.

Chambers Global 2021–2023 ranked **Imraan Mahomed** in Band 2 for employment and in Band 3 from 2014–2020. *The Legal 500 EMEA 2020–2023* recommended him for employment.

The Legal 500 EMEA 2023 recommended **Phetheni Nkuna** for employment.

The Legal 500 EMEA 2022 recommended **Desmond Odhiambo** for dispute resolution.

Hugo Pienaar is the Head of the Infrastructure, Logistics, and Transport sector, and a director in our Employment Law practice. *Chambers Global 2014–2023* ranked Hugo in Band 2 for employment. *The Legal 500 EMEA 2014–2023* recommended him for employment.

The Legal 500 EMEA 2023 recommended **Thabang Rapuleng** for employment.

The Legal 500 EMEA 2022–2023 recommended **Njeri Wagacha** for employment. *The Legal 500 EMEA 2023* recommends Njeri for corporate, commercial/M&A.



BBBEE STATUS: LEVEL ONE 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.

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