

Summary of the Employment Equity Act, No 55 of 1998

1. Chapter 1 – Definitions, purpose, interpretation and application

1.1 Purpose of the Act: Section 2

The purpose of the Act is to achieve equity in the workplace, by

- a. promoting equal opportunity and fair treatment in employment through the elimination of unfair discrimination; and
- b. implementing affirmative action measures to redress the disadvantages in employment experienced by designated groups, to ensure their equitable representation in all occupational categories and levels in the workforce.

1.2 Application of the Act: Section 4

- a. Chapter II (sections 5 – 11) applies to all employers and employees.
- b. Chapter III (sections 12 – 27) applies to designated employers.
- c. A designated employer means an employer who employs 50 or more employees, or has a total annual turnover as reflected in Schedule 4 of the Act, municipalities and organs of state. Employers can also volunteer to become designated employers.
- d. A designated group means black people, women, or people with disabilities.
- e. The South African National Defence Force, National Intelligence Agency, and South African Secret Services are excluded from this Act.

2. Chapter 2 - Prohibition of Unfair Discrimination

2.1 No person may unfairly discriminate, directly or indirectly, against an employee in any employment policy or practice, on one or more grounds including 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, and birth.

2.2 It is not unfair discrimination to promote affirmative action consistent with the Act or to prefer or exclude any person on the basis of an inherent job requirement.

2.3 Medical Testing: Section 7

- a. Medical testing of an employee is permissible only when legislation requires testing or when this is justifiable for various reasons.
- b. HIV testing is prohibited unless such testing is determined to be justifiable by the Labour Court.

2.4 Psychological Testing: Section 8

Psychological testing and similar assessments are prohibited, unless the test is scientifically valid and reliable, can be applied fairly to all employees, and is not biased against any employee or group.

2.5 Disputes concerning this Chapter: Section 10

- a. An employee, or applicant for employment, may refer a dispute concerning alleged unfair discrimination (or medical or psychological testing) to the CCMA for conciliation. This must be done within six months of the alleged discrimination (or testing).
- b. If a dispute is not resolved at conciliation, a party may refer it to the Labour Court for adjudication. The parties to a dispute may also agree to refer the dispute to arbitration.
- c. Unfair dismissal disputes in which unfair discrimination is alleged must be dealt with in terms of the Labour Relations Act. The dismissal must be referred to the CCMA within 30 days.

3. Chapter 3 – Affirmative Action

3.1 Duties of a Designated Employer: Section 13

- a. A designated employer must implement affirmative action measures for designated groups to achieve employment equity.
- b. In order to implement affirmative action measures, a designated employer must:
 - consult with employees;
 - conduct an analysis;
 - prepare an employment equity plan; and
 - report to the Director-General on progress made in the implementation of the plan.

3.2 Affirmative Action measures: Section 15

- a. Affirmative action measures are measures intended to ensure that suitably qualified employees from designated groups have equal employment opportunity and are equitably represented in all occupational categories and levels of the workforce.
- b. Such measures must include:

- identification and elimination of barriers with an adverse impact on designated groups;
 - measures which promote diversity;
 - making reasonable accommodation for people from designated groups;
 - retention, development and training of designated groups (including skills development); and
 - preferential treatment and numerical goals to ensure equitable representation. This excludes quotas.
- c. Designated employers are not required to take any decision regarding an employment policy or practice that would establish an absolute barrier to prospective or continued employment or advancement of people not from designated groups.

3.3 Consultation: Sections 16 and 17

A designated employer must take reasonable steps to consult with representatives of employees representing the diverse interests of the workforce on the conducting of an analysis, preparation and implementation of a plan, and on reporting to the Director-General.

3.4 Disclosure of Information: Section 18

To ensure meaningful consultation, the employer must disclose relevant information to the consulting parties, subject to section 16 of the Labour Relations Act, No 66 of 1995.

3.5 Analysis: Section 19

A designated employer must conduct an analysis of employment policies, practices, procedures, and working environment so as to identify employment barriers that adversely affect members of designated groups. The analysis must also include the development of a workforce profile to determine to what extent designated groups are under-represented in the workplace.

3.6 Employment Equity Plan: Section 20

- a. A designated employer must prepare and implement a plan to achieve employment equity, which must:
- have objectives for each year of the plan;
 - include affirmative action measures;
 - have numerical goals for achieving equitable representation;
 - have a timetable for each year;
 - have internal monitoring and evaluation procedures, including internal dispute resolution mechanisms; and

- identify persons, including senior managers, to monitor and implement the plan.

3.7 Report: Section 21

- a. An employer who employs fewer than 150 employees must submit its first report to the Director-General within 12 months after the commencement of the Act, and thereafter every 2 years on the first working day of October.
- b. An employer who employs 150 or more employees, must submit its first report 6 months after the commencement of the Act, and thereafter every year on the first working day of October.

3.8 Designated employer must assign a manager: Section 24

A designated employer must assign one or more senior managers to ensure implementation and monitoring of the employment equity plan and must make available necessary resources for this purpose.

3.9 Income Differentials: Section 27

A statement of remuneration and benefits received in each occupational category and level of the workforce must be submitted by a designated employer to the Employment Conditions Commission (ECC).

Where there are disproportionate income differentials, a designated employer must take measures to reduce it progressively. Such measures may include collective bargaining, compliance with sectoral determinations (section 51 of the Basic Conditions of Employment Act); the application of norms and benchmarks recommended by the ECC, relevant measures contained in skills development legislation, and any other appropriate steps.

4. Chapter 5 – Monitoring, Enforcement and Legal Proceedings

4.1 Monitoring: Section 34

Employee or trade union representatives can monitor contraventions of the Act and report to relevant bodies.

4.2 Powers of the Labour Inspector: Section 35

Labour inspectors are authorised to conduct an inspection as provided for in sections 65 and 66 of the Basic Conditions of Employment Act.

4.3 Undertaking to Comply: Section 36

If the inspector has reasonable grounds to believe that a designated employer has failed to comply with its obligations in terms of the Act, the

inspector will obtain a written undertaking to comply within a specified period.

4.4 Compliance Order: Section 37

If the designated employer refuses to comply with the written undertaking, the inspector will issue an order to comply.

4.5 Review by Director-General: Section 43

The Director-General may conduct a review to determine whether an employer is complying with the Act. On completion of the review, the Director-General may make recommendations for compliance within certain time frames.

4.6 Powers of the Labour Court: Section 50

The Labour Court has the powers to make any appropriate orders, award compensation, or impose fines.

4.7 Protection of Employee Rights: Section 51

The Act protects employees who exercise their rights and obligations under the Act against victimisation, obstruction and undue influence.

5. Chapter 6 – General Provisions

5.1 State contracts: Section 53

Designated employers and employers who voluntarily comply with Chapter III, who seek to do business with any organ of state, will have to apply for a certificate from the Minister confirming their compliance with Chapters II and III of the Act. Non-designated employers' compliance certificates will pertain to Chapter II.

5.2 Liability of Employers: Section 60

Should employees contravene any provision of this Act, while performing their duties, the employer will be liable unless the employer can prove that it did everything in its power to prevent the undesired act.

This summary was compiled by Tim Hayden, Partner at HDI Group and member of the SAICA Legal and Compliance Committee.