

## Q&A on the Employment Equity Amendment Bill

This document highlights key amendments to the Employment Equity Act 55 of 1998 (EEA) in terms of the Employment Equity Amendment Bill. Subject to any last minute constitutional concerns, the signing of the bill by the President is imminent.

### 1. 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, 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, 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 (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
- conscience
- belief
- political opinion
- culture
- language and
- birth

### 2. 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.

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### 3. 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.

### 4. 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, given the amendment which will bring about the deletion

of section 14 of the EEA, they will nevertheless be entitled to obtain a certificate of compliance under section 53 of the EEA.

### 5. 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.

### 6. 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 will remove the requirement of certification by the HPCSA of psychological testing and similar assessments.

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### 7. 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.

### 8. 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 proposal.

### 9. 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.

### 10. 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.

### 11. 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.

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### 12. 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.

### 13. 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.

### 14. ARE THERE ANY CHANGES IN RELATION TO COMPLIANCE ORDERS?

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.

### 15. WHEN WILL THE AMENDMENTS COME INTO EFFECT?

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

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