SABPP FACT SHEET

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CHANGING THE EMPLOYMENT EQUITY LANDSCAPE

Employment Equity Amendment Act, No 47 of 2013 (Gazette no. 37238)

Introduction

The first changes to the Employment Equity Act since its initial promulgation in 1998, are part of a raft of amendments to South Africa's labour legislation. The changes have seen significant amendments to the Labour Relations, the Basic Conditions of Employment and the Employment Equity Acts. The amendments to the BBBEE Codes which are effective from 1 May 2015 will also have a significant impact on altering the employment relationship as affects Employment Equity and Skills Development.

Since the initial promulgation of the Employment Equity Act employers have been challenged to root out unfair discrimination and transform the demographics of the workplace to be representative of the country's demographics, at all levels of the organisation. The Department of Labour has been critical of what it perceives to be a lack of progress by the corporate sector in transforming the workplace.

Transformation and integration of all South Africans at all levels of the economic and social fabric of society remains a challenge. It is in the interests of all South Africans that a sense of equality is reached enabling normalisation and greater appreciation of the value of diversity across all our people. As we speak this notion is being seriously challenged by many sectors of our society. As many commentators have put it, economic emancipation is an essential for South Africa's political transformation to be complete. This broader notion should challenge all South Africans to reconsider their stance in these matters such that the possibility of finding real and binding solutions are found.

In the period 1998 to date, the Department of Labour has expended significant energy educating employers on the intentions and requirements of the Employment Equity Act. In the phase moving forward the focus

will shift to furthering compliance with key requirements of the Act. To date fines for non-compliance have been limited. It is therefore no surprise that the amendments significantly increase fines for non-compliance.

These amendments address the lack of progress by ramping up approaches to ensure compliance through easing / extending employee rights to make claims against employers and granting the Department of Labour greater powers in this regard.

This Fact Sheet focuses on developing an understanding of the most important amendments and considering the implications of the amendments for employers.

1. Definition of "designated groups" (S 1)

Section 1 of the Act is amended to ensure that the beneficiaries of affirmative action measures identified in Chapter III are limited to "black people, women and people with disabilities who –

a) are citizens of South Africa by descent, or
b) became citizens by naturalisation –
   (i) before 27 April 1994, or
   (ii) after 26 April 1994 and who would have been entitled to acquire citizenship prior to that date but who were precluded by apartheid policies."

This amendment clarifies that foreign nationals or persons who became citizens after April 1994 will not assist an employer to meet numerical employment equity targets. This amendment aligns the definition to the Broad-Based Economic Empowerment Act, 2003.

2. Expanding the grounds for "unfair discrimination" (S 6(1))

There are a number of amendments to Section 6. The first expands the grounds on which "unfair discrimination" may be defined to include "any other arbitrary ground". As such in making a claim of unfair discrimination the complainant is not bound by the 19 grounds initially stipulated in the Act such as gender, race, age, sexual orientation, etc. A complainant is free to identify grounds in addition to them.

Section 11, however, clarifies that the burden of proof in unfair discrimination matters distinguishes against those grounds that are defined and those alleged on any other arbitrary ground. In the former the employer must prove on a balance of probability that the unfair discrimination did not take place or is rational, not unfair or justifiable. If the complainant alleges unfair discrimination as an arbitrary ground the complainant must prove the unfair discrimination.

3. "Equal pay for work of equal value" (S6 (4))

Section 6(4) is possibly the most significant change to the Act. This change is explicit in its intention to require employers to ensure that there is equality in the dispensation of remuneration, benefits and conditions of employment. In the previous Act the employer was required to report on this but the amendments make this requirement significantly more onerous.

The amendment enables employees to claim unfair discrimination in the application of terms and conditions of employment where an employee is performing work of the same or substantially similar value. In other words if an employee claims unfair discrimination due to a proscribed or arbitrary ground due to different

wages or terms / conditions the employer will need to demonstrate that there is no such discrimination or that such discrimination is, in fact, fair (justifiable and reasonable).

The Act, however, clarifies the examples of grounds on which an employer can justify its remuneration practice and / or terms and conditions of employment as follows:

a) Seniority and length of service
b) Qualifications, ability, competence or potential above minimum required levels of performance
c) Performance, quantity or quality, subject to robust performance evaluation
d) Demotion – no reduction at time and fixing until reaching the correct level
e) Temporary employment to gain experience or training
f) Shortage of a skill or market value
g) Any other relevant factor.

The test of the reasonable person arises in this regard. As long as an employer can reasonably justify its position, on a balance of probability it will not be considered unfair discrimination. Obviously this justification must pass the test of being considered fair and objective when viewed by others.

It should be noted that Employers may be required to disclose appropriate / relevant information related to such claims as identified in Section 16 of the Labour Relations Act.

Section 6(5) empowers the Minister of Labour to publish a Code of Good Practice to clarify criteria and methodologies for assessing work of equal value.

Employers are advised to take practical steps to understand and protect themselves against litigation that will be difficult to defend unless effective policies and systems are in place that assure them this space is professionally managed

4. Psychometric assessments (S 8)

Section 8 is amended to clarify that whilst the prescribed clauses for ensuring that psychological assessments are valid, reliable, fairly applied and not biased against a particular group, it now further clarifies that such assessments must be certified by the Health Professions Council of South Africa or any other body which may be authorized by law to certify those assessments.

5. Referral of disputes to the CCMA (S 10)

This amendment allows an employee to refer certain disputes to the CCMA as follows:

i) Allegations of unfair discrimination on the grounds of unfair discrimination
ii) In any other case where an employee earns less than the Basic Conditions of Employment Act Threshold, or
iii) If both parties consent to arbitration of the dispute.

If a matter is referred in terms of this Section the arbitrator may only make an award up to the amount of the Threshold. Either party may appeal to the Labour Court against any such award.

6. Employment Equity Reporting (S 21)

Section 21 now requires all "designated employers" (i.e. all employers employing more than 50 employees and employers with revenue greater than the amounts reflected in the "Threshold applicable to designated employers") to submit an Employment Equity Report to the Director General annually, where previously employers with less than 150 employees were only required to submit these Reports bi-annually.

7. Assessment of compliance (S 42)

The Amendment Act makes fundamental changes to the determination of compliance by a "designated employer" in terms of Chapter III – Affirmative Action. In terms of Section 42 the Director General may, in addition to Section 15, take the following into account in determining compliance with the Act:

"(a) the extent to which the suitably qualifies people from designated groups are equitably represented within each occupational level in relation to the demographic profile of the national and regional economically active population;

(b) reasonable steps by a designated employer to train suitably qualified people from designated groups;

c) reasonable steps taken by a designated employer to implement an employment equity plan;

d) the extent to which the designated employer has made progress in eliminating employment equity barriers that adversely affect people from designated groups;

dA) reasonable steps taken by designated employers to appoint and improve suitably qualified people from designated groups; and

e) any other prescribed factor."

Previously the Act included a number of factors that enabled employers to justify an inability to comply, including but not limited to economic and financial factors relevant to the sector, financial and economic factors of the employer and the pool of suitably qualified people. These clauses have been removed. It would appear that the removal of these clauses may reflect the Department's intention to drive compliance and a need to show progress in achieving demographic transformation. This is after all, the key measure to assess whether the Act is being implemented.

The amendments shift the focus to the degree to which the employer complies with being representative of the national and regional economically active population at all levels of the organisation. Section 45 empowers the Director-General to make a request or recommendation in respect of an employer's failure to comply. Should an employer fail to comply with a request or recommendation the Director-General can apply to the Labour Court for an order to direct an employer to comply.

Employers would be wise to document their approach to the implementation of their Plan such that they can clearly articulate progress, barriers and changes in the demographics in the organisation over time.

8. Fines take on a new dimension

Fines may be issued following a failure by an employer to act on a request, recommendation or undertaking issued by the Director-General may lead to the confirmation of a fine by the Labour Court as identified in the amended Schedule 1. A failure to act on many Sections of Chapter III of the Act can result in a fine. Schedule 1 sets out the maximum fines that may be imposed for contraventions of various Sections of the Act.

The maximum fines commence at R 1, 500 000 or the greater of 2% of turnover for a first transgression. The fines increase in relation to the number of successive transgressions. In the event of four transgressions related to the same provisions within 3 years fines up to R 2 700 000 or 10% of turnover.

9. Threshold applicable to designated employers

The amendment revises the turnover levels by Sector that would require an employer employing less than 50 employees to comply with Chapter III of the Act. Chapter III defines the designated employer who is required to undertake Analysis, develop an Employment Equity Plan and report annually to the Department of Labour.

The turnover levels have been increased ranging from R 6,0m per annum for Agriculture to R 75,0m for Wholesale Trade, Commercial Agents and Allied Services. The average across the sectors identified is R 30,0m per annum.

Employers with a small number of employees would be wise to check the levels as apply to the Sector within which they operate.

10.Managing the amendments effectively

It is unfortunately the case that many organisations, large and small, do not comply with many of the fundamental requirements of the Employment Equity Act. The stakes are now significantly higher, with the greater focus on compliance, easier access to dispute resolution and significantly higher fines for non-compliance. CEO's rely on Human Resource practitioners who, in many respects, give limited focus to transformation and Employment Equity. The following are a few thoughts for consideration:

- Ensure that Employment Equity and BBBEE have a place on strategic agendas.
- Revise Employment Equity policy and Plan. Integrate your Employment Equity and BBBEE strategies.
- Engage with CEO and Line Management to review the seriousness with which numerical targets are managed.

- Retrain managers and staff on the amendments.
- Include Employment Equity targets as Key Performance measures for Line Managers.
- Assess the value of each role, including job descriptions, job evaluation and robust performance management systems.
- Identify a remuneration / benefits structure and employment conditions appropriate to the job evaluation process and identify anomalies.
- Clarify how unacceptable differentials in remuneration will be addressed over time.
- Clarify the reasons for anomalies and record them. Create documentation that ensures the institutional memory is clearly recorded.
- Improve the visibility of the importance of Employment Equity through regular reporting on progress to the Executive, managers and staff.
- Develop an understanding amongst employees regarding the rationale in remuneration / benefit structuring and conditions of employment decisions.

Conclusion

There is no doubt that the Department of Labour is serious about furthering transformation and letting employers know that the playing field has changed. Understanding and acting strategically on these changes, ensuring that they assist the organisation to meet the future strategic direction is the way to go, otherwise these amendments will be seen as onerous, increasing cost and a focus on defending turf. Employers should ensure they have the specialist advice to manage these areas with confidence and internal support to champion change.

THIS FACT SHEET IS WRITTEN BY ANDREW PONS MANAGING PARTNER, PONS PROCESS CONSULTING.
(Email: andrewpons@icon.co.za Tel: 011 706 4107 Website: www.ponsconsulting.co.za)