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EMPLOYMENT

Additional obligations for designated employers under The Employment Equity Act

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A recent bill submitted to Parliament for consideration would seek to impose potentially stringent new quotas for numerical targets for the employment of persons from designated groups.

The current formulation of the Employment Equity Act already provides for Affirmative Action measures to be introduced by designated employers. These affirmative action measures include measures to ensure the equitable representation of people from designated groups in all occupational levels in the workforce, to retain and develop people from designated groups, and to implement appropriate training measures for people from designated groups. However, it must be borne in mind that these measures apply only to designated employers, which the Bill would only regard as large scale employers which employ more than 50 employees. Currently an employer is also considered to be a designated employer if it has an annual turnover larger than specific thresholds established for different sectors of the South African economy. This turnover threshold and the turnover table would be deleted, making only those employers with more than 50 employees a designated employer.

In addition, the affirmative measures required to be put in place in terms of the EEA also only require the representation of *suitably qualified* persons and accordingly, it is currently acceptable for a lack of skills and qualifications to act as a justification for the lack of equal representation in the workforce.

The EEA Bill proposes to allow the Minister of Employment and Labour to set numerical targets for the representation of suitably qualified persons from designated groups in specific national economic sectors. This appears to contemplate a very detailed treatment of these sectors, in that targets can be set for different occupational levels, sub-sectors or regions. This level of detail is to be welcomed, as at present the EEA provides for only eleven sectors, into which all employers across the entirety of South African economic activity must be fitted. This can sometimes be problematic and fail to take into account the diversity and needs of operations across a sector as large as the very generic "*Wholesale Trade, Commercial Agents and Allied Services*" Sector which is one of the current eleven categories. A more granular treatment would be welcomed.

The EEA bill would then require a designated employer to set numerical goals in its Employment Equity Plan which comply with the sectoral target relevant to that employer. This requirement is simply a refinement of the current obligation of a designated employer, which must still set out numerical goals to redress any identified under-representation of designated groups. However, these goals are currently determined in accordance with the Code of Good Practice on the Preparation, Implementation and Monitoring of the Employment Equity Plan, published under the EEA, with reference to designated groups that are most under-represented in terms of the national and provincial economically active population.

In terms of enforcement, the EEA Bill proposes that a labour inspector would now be able to assess compliance with reference to the inclusion of the sectoral targets for designated groups in the employer's numerical goals in its employment equity plan, and would also be able to issue a compliance order to a designated employer which has a non-compliant Employment Equity Plan. In other words, if the Employment Equity Plan does not contain numerical goals set for the period of the plan (which can be for a period of not less than one and not more than five years), the labour inspector can issue the compliance order. Whether achievement of these numerical goals can otherwise be enforced is still questionable, as these amendments do not seem to propose any consequences for an employer which sets out targets, but fail to achieve them for justifiable reasons. For example, if the employer were to set compliant numerical targets over the five

year period of its plan, but could demonstrate at the end of that period that suitably qualified persons could not be hired into service, it would still be compliant.

This is however not the case of any employer which does or wishes to do business with the State. Further amendments proposed by the EEA Bill would require that, in order for a designated employer to do state business, a certificate must be provided by the Minister of Employment and Labour which confirms its compliance with the Affirmative Action chapters of the EEA. The Minister will not be able to issue such a certificate unless the designated employer can demonstrate that it has met the numerical target set for its sector or has a reasonable ground to justify such failure.

Other conditions to obtain the certificate for state contracts are that the designated employer submitted its employment equity reports, has not had an adverse finding against it for unfair discrimination in the last 3 years, and has not had an adverse award against it in the last 3 years for failure to comply with the National Minimum Wage Act.

The EEA Bill as such does not necessarily establish any new obligations that were not already generally applicable, but would simply strengthen the ability of the Department of Employment and Labour to assess compliance with reference to specific sectoral targets, to enforce compliance and to strengthen the requirements for contracting with the state.

The Portfolio Committee on Employment and Labour has yet to schedule further meetings or to invite comment on the Bill. As such, designated employers should keep an eye out for developments in the process without yet seeking to put in place preliminary steps to comply, especially as the sectors and sectoral targets which may be introduced by the EEA Bill are as yet unknown.



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