

EMPLOYMENT

Worried about the new EE Amendments? Progressive implementation of numerical targets is possible!

25 April 2023 5 min read

On 12 April 2023 the President signed the Employment Equity (EE) Amendment Bill, 2020 into law. The Act is not operative as the President is yet to set a date on when the amendments will take effect.

There is much contention with some amendments. Over regulation, unwarranted intervention, and interference with a private body's ability to develop responsive and agile recruitment strategies: are just some of the arising concerns. The reality at present is; we have a law and we must engage with that law in light of its purpose and the goals it aims to realise. The Department of Employment and Labour clarified, in a number of its engagements, that the amendments are necessary to accelerate societal and economic transformative objectives of the Employment Equity Act 55 of 1998. A close assessment of the public consultations, the Act and the draft Employment Equity Regulations, 2018 reveals that the intention is to strike a balance between flexibility and the enforcement of compliance.

The Act introduces two significant changes. First, it empowers the Minister to identify national economic sectors. The Minister identified 18 national economic sectors with their respective sub-sectors. The list of national economic sectors and sub-sectors is contained in draft EE Regulations. Since June 2019, the Department has consulted various economic sectors on the amendments.

Next, the Minister is authorised to set numerical targets for the identified national economic sectors. The numerical targets will only apply to designated employers. All employers who employ less than 50 employees are excluded. This is not a new exemption. The amendments merely remove the annual turnover thresholds classifying SMMEs that breach the threshold as designated employers. Within the sectors, differential numerical targets may apply to certain sub-sectors or regions or occupational levels. A proposed criteria for determining the numerical targets is contained in draft EE Regulations. Notwithstanding that the Minister may set the initial proposed targets on consultation with the National Minimum Wage Commission, the Department has adopted a slightly nuanced strategy by consulting with affected economic sectors on the proposed sector specific targets with the intention to reach consensus on the targets.

Other concerns raise the possible abuse of the discretion to set numerical targets. There is nothing in the amendments that suggests that the Minister has unfettered discretion. Instead, there are built-in checks and balances to ensure that the numerical targets are sensitive to the realities on the ground for identified economic sectors, sub-sectors or regions. The Minister must consult with the NMW Commission (consisting of independent experts, organised business, labour and community) in the first phase of developing the numerical targets. In the second phase, the proposed targets are published for public comment. If interested and/or affected parties are of the opinion that the Minister has either failed to consider or has not adequately considered their comments, the final notice on the targets may be subject to review.

Second, the Bill seeks to encourage or incentivise compliance with set the numerical targets by regulating the conditions that will apply for the issuance of annual compliance certificates to employer's who seek to do business with the state. Before a compliance certificate is issued, the Minister must be satisfied that the employer has complied with the prescribed conditions, including the numerical targets unless the employer presents reasonable grounds for non-compliance.

Although justifications for non-compliance are not outlined in the Act, justifiable grounds proposed in draft EE Regulations include: insufficient recruitment or promotion opportunities; the pool of designated target individuals who possess the desired qualifications, skills and expertise is insufficient; or non-compliance is occasioned by court orders, transfer of business, mergers/acquisitions and/or economic/financial feasibility. These reasonable grounds are wide enough to afford employers room to progressively implement compliance strategies that will realise the targets over a period of time. Progressive compliance strategies will effectively speak to the operational and

economic needs of the company while producing the desired outcomes of the sector targets. Employers may detail their progressive implementation strategies in their employment equity plans.

Given that the conditions for the issuance of a compliance certificate are conjunctive, there is a risk that employers who falter on any one of the conditions may be prevented from contracting with the state. It remains to be seen how the Minister will approach circumstances where employers comply with most of the conditions but there are arbitration awards and/or court orders against the employer in relation to a breach of any prohibition on unfair discrimination and/or failure to pay minimum wages. Especially where the arbitration awards and/or court orders are subject to review and/or appeal.

On 31 August 2022, the Department announced that it will soon publish a list of sector targets for public comment. Since employers are expected to align their employment equity plans with the set targets, it is prudent to participate in this process if you are affected or anticipate that you may be affected.

Employment Practice Area



Sandile July

Head of Employment

[View Profile](#)



Nonkosazana Nkosi

Director

[View Profile](#)



Sandile Tom

Director

[View Profile](#)