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South Africa: Employment Equity Bill n° 60

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REPUBLIC OF SOUTH AFRICA

EMPLOYMENT EQUITY BILL

(As introduced in the National Assembly)

(MINISTER OF LABOUR)

[B 60-98]

RIPHABLIKI RAAFRIKA DZONGA

NAWUMBISI WA NDZINGANO WA

MINTIRHO/VUTHORI

*(Tani hi laha wu tivisiweke ha kona eka Huvo yo Endla Milawu ya
Rixaka)*

(HOLOBYE WA MINTIRHO)

[N 60-98] ISBN 0 621 28391 6

BILL

**To provide for employment equity; and to provide for matters
incidental thereto.**

PREAMBLE

Recognising-

that as a result of apartheid and other discriminatory laws and practices, there are disparities in employment, occupation and income within the national labour market; and

that those disparities create such pronounced disadvantages for certain categories of people that they cannot be redressed simply by repealing discriminatory laws,

Therefore, in order to-

promote the constitutional right of equality and the exercise of true democracy;

eliminate unfair discrimination in employment;

ensure the implementation of employment equity to redress the effects of discrimination;

achieve a diverse workforce broadly representative of our people;

promote economic development and efficiency in the workforce; and

give effect to the obligations of the Republic as a member of the International Labour Organisation,

BE IT ENACTED by the Parliament of the Republic of South Africa as follows:-

ARRANGEMENT OF ACT

CHAPTER I

DEFINITIONS, PURPOSE, INTERPRETATION AND APPLICATION

1. Definitions

2. Purpose of this Act

3. Interpretation of this Act

4. Application of this Act

CHAPTER II

PROHIBITION OF UNFAIR DISCRIMINATION

5. Elimination of unfair discrimination

6. Prohibition of unfair discrimination

7. Medical testing

8. Psychometric testing

9. Applicants

10. Disputes concerning this Chapter

11. Burden of proof

CHAPTER III

AFFIRMATIVE ACTION

12. Application of this Chapter

13. Duties of designated employers

14. Voluntary compliance with this Chapter

15. Affirmative action measures

16. Consultation with employees

17. Matters for consultation

18. Disclosure of information

19. Analysis

20. Employment equity plan

21. Report

22. Publication of report

23. Successive employment equity plans

24. Designated employer must assign manager

25. Duty to inform

26. Duty to keep records

CHAPTER IV

COMMISSION FOR EMPLOYMENT EQUITY

- 27. Establishment of Commission for Employment Equity
- 28. Composition of Commission for Employment Equity
- 29. Functions of Commission for Employment Equity
- 30. Staff and expenses
- 31. Public hearings
- 32. Report by Commission for Employment Equity

CHAPTER V

MONITORING, ENFORCEMENT AND LEGAL PROCEEDINGS

Part A

Monitoring

- 33. Monitoring by employees and trade union representatives

Enforcement

- 34. Powers of labour inspectors
- 35. Undertaking to comply
- 36. Compliance order
- 37. Limitations
- 38. Objections against compliance order
- 39. Appeal from compliance order
- 40. Register of designated employers
- 41. Assessment of compliance
- 42. Review by Director-General
- 43. Outcome of Director-General's review
- 44. Failure to comply with Director-General's recommendation

Part B

Legal proceedings

- 45. Conflict of proceedings
- 46. Consolidation of proceedings
- 47. Powers of commissioner in arbitration proceedings
- 48. Jurisdiction of Labour Court
- 49. Powers of Labour Court

Part C

Protection of employee rights

- 50. Protection of employee rights
- 51. Procedure for disputes

CHAPTER VI

GENERAL PROVISIONS

- 52. State contracts
- 53. Codes of good practice
- 54. Regulations
- 55. Delegations
- 56. Designation of organs of state
- 57. Breach of confidentiality
- 58. Liability of employers
- 59. Obstruction, undue influence and fraud
- 60. This Act binds the State
- 61. Application of Act when in conflict with other laws

62. Repeal of laws and transitional arrangements

63. Short title and commencement

SCHEDULE 1

Maximum permissible fines that may be imposed for contravening this Act

SCHEDULE 2

Laws repealed

SCHEDULE 3

Transitional arrangements

CHAPTER I

DEFINITIONS, PURPOSE, INTERPRETATION AND APPLICATION

[Return to table of contents](#)

Definitions

1. In this Act, unless the context otherwise indicates-

"Basic Conditions of Employment Act" means the Basic Conditions of Employment

Act, 1997 (Act No. 75 of 1997);

"black people" is a generic term which means Africans, Coloureds and Indians;

"CCMA" means the Commission for Conciliation, Mediation and Arbitration, established by section 112 of the Labour Relations Act;

"code of good practice" means a document issued by the Minister in terms of section 53;

"collective agreement" means a written agreement concerning terms and conditions of employment or any other matter of mutual interest concluded by one or more registered trade unions, on the one hand and, on the other hand-

(a) one or more employers;

(b) one or more registered employers' organisations; or

(c) one or more employers and one or more registered employers' organisations;

"Commission" means the Commission for Employment Equity, established by section 27;

"Constitution" means the Constitution of the Republic of South Africa, 1996 (Act No. 108 of 1996);

"designated employer" means-

(a) a person who employs 50 or more employees;

(b) a person who employs fewer than 50 employees but has a total annual turnover that is equal to or above the applicable minimum annual turnover of a small business in terms of the Schedule to the National Small Business Act, 1996 (Act No. 102 of 1996);

(c) a municipality, as referred to in Chapter 7 of the Constitution; and

(d) an organ of state as defined in section 239 of the Constitution, but excluding local spheres of government, the National Defence Force, the National Intelligence Agency and the South African Secret Service.

"designated groups" means black people, women and people with disabilities;

"Director-General" means the Director-General of the Department of Labour;

"dismissal" has the meaning assigned to it in section 186 of the Labour Relations Act;

"dispute" includes an alleged dispute;

"employee" means any person other than an independent contractor who-

(a) works for another person or for the State and who receives, or is entitled to receive, any remuneration; and

(b) in any manner assists in carrying on or conducting the business of an employer, and

"employed" and "employment" have corresponding meanings;

"employment law" means any provision of this Act or any of the following Acts:

(a) The Unemployment Insurance Act, 1966 (Act No. 30 of 1966);

(b) the Guidance and Placement Act, 1981 (Act No. 62 of 1981);

- (c)* the Manpower Training Act, 1981 (Act No. 56 of 1981);
- (d)* the Occupational Health and Safety Act, 1993 (Act No. 85 of 1993);
- (e)* the Compensation for Occupational Injuries and Diseases Act, 1993 (Act No. 130 of 1993);
- (f)* the Labour Relations Act, 1995 (Act No. 66 of 1995);
- (g)* the Basic Conditions of Employment Act, 1997 (Act No. 75 of 1997);
- (h)* any other Act, whose administration has been assigned to the Minister.

"employment policy or practice" includes, but is not limited to-

- (a)* recruitment procedures, advertising and selection criteria;
- (b)* appointments and the appointment process;
- (c)* job classification and grading;
- (d)* remuneration, employment benefits and terms and conditions of employment;
- (e)* job assignments;
- (f)* the working environment and facilities;
- (g)* training and development;
- (h)* performance evaluation systems;
- (i)* promotion;
- (j)* transfer;
- (k)* demotion;
- (l)* disciplinary measures other than dismissal; and
- (m)* dismissal.

"family responsibility" means the responsibility of employees in relation to their dependant children, or in relation to other members of their immediate family who need their care or support;

"labour inspector" means a person appointed in terms of section 65 of the Basic Conditions of Employment Act;

"Labour Relations Act" means the Labour Relations Act, 1995 (Act No. 66 of 1995);

"medical testing" includes any test, question, inquiry or other means designed to ascertain, or which has the effect of enabling the employer to ascertain, whether an employee has any medical condition;

"Minister" means the Minister of Labour;

"NEDLAC" means the National Economic, Development and Labour Council established by section 2 of the National Economic, Development and Labour Council Act, 1994 (Act No. 35 of 1994);

"organ of state" means an organ of state as defined in section 239 of the Constitution;

"people with disabilities" means people who have a long-term or recurring physical or mental impairment which substantially limits their prospects of entry into, or advancement in, employment;

"public service" means the public service referred to in section 1(1) of the Public Service Act, 1994 (promulgated by Proclamation No. 103 of 1994), and includes any organisational component contemplated in section 7(4) of that Act and specified in the first column of Schedule 2 to that Act, but excluding-

(a) the National Defence Force;

(b) the National Intelligence Agency; and

(c) the South African Secret Service.

"pregnancy" includes any medical circumstances related to pregnancy;

"prescribed" means prescribed by a regulation made under section 54;

"reasonable accommodation" means any modification or adjustment to a job or to the working environment that will enable a person from a designated group to have access to or participate or advance in employment;

"registered employers' organisation" means an employers' organisation as defined in section 213 of the Labour Relations Act and registered in terms of section 96 of that Act;

"registered trade union" means a trade union as defined in section 213 of the Labour Relations Act and registered in terms of section 96 of that Act;

"remuneration" means any payment in money or in kind, or both in money and in kind, made or owing to any person in return for that person working for any other person, including the State;

"representative trade union" means a registered trade union, or two or more registered trade unions acting jointly, that are sufficiently representative of the employees employed by an employer in a workplace;

"Republic" means the Republic of South Africa as defined in the Constitution;

"serve" or "submit", in relation to any communication, means either-

(a) to send it in writing delivered by hand or registered post; or

(b) to transmit it using any electronic mechanism as a result of which the recipient

is capable of printing the communication;

"suitably qualified person" means a person contemplated in sections 20(3) and (4);

"this Act" includes any regulations made under section 54, but excludes any footnote;

"trade union representative" means a member of a registered trade union who is elected to represent employees in a workplace;

"workplace forum" means a workplace forum established in terms of Chapter V of the Labour Relations Act.

Purpose of this Act

2. The purpose of this 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, in order to ensure their equitable representation in all occupational categories and levels in the workforce.

Interpretation of this Act

3. This Act must be interpreted-

(a) in compliance with the Constitution;

(b) so as to give effect to its purpose;

(c) taking into account any relevant code of good practice issued in terms of this Act or any other employment law; and

(d) in compliance with the international law obligations of the Republic, in particular those contained in the International Labour Organisation Convention (No. 111) concerning Discrimination in Respect of Employment and Occupation.

Application of this Act

4. (1) Chapter II of this Act applies to all employees and employers.

(2) Except where Chapter III provides otherwise, Chapter III of this Act applies only to designated employers and people from designated groups.

(3) This Act does not apply to members of the National Defence Force, the National Intelligence Agency, or the South African Secret Service 1 .

CHAPTER II

PROHIBITION OF UNFAIR DISCRIMINATION

[Return to table of contents](#)

Elimination of unfair discrimination

5. Every employer must take steps to promote equal opportunity in the workplace by

eliminating unfair discrimination in any employment policy or practice.

1. These persons are not defined as "employees" under the Labour Relations Act. However, they could bring unfair discrimination matters before the Constitutional Court, or lodge complaints with the Human Rights Commission.

Prohibition of unfair discrimination

6. (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, sex, pregnancy, marital status, family responsibility,

ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, political opinion, culture, language and birth.

(2) It is not unfair discrimination to-

(a) take affirmative action measures consistent with the purpose of this Act; or

(b) distinguish, exclude or prefer any person on the basis of an inherent requirement of a job.

(3) Harassment of an employee is a form of unfair discrimination and is prohibited on any one, or a combination of grounds of unfair discrimination listed in subsection (1).

(4) An employer must address unfair discrimination in relation to a wage differential-

(a) through collective bargaining;

(b) through other bargaining;

(c) through measures provided for in the Basic Conditions of Employment Act; or

(d) in any similar manner that is appropriate in the circumstances.

Medical testing

7. Medical testing of an employee is prohibited, unless-

(a) legislation permits or requires the testing; or

(b) it is justifiable in the light of medical facts, employment conditions, social policy, the fair distribution of employee benefits or the inherent requirements of a job.

Psychometric testing

8. Psychometric testing of an employee is prohibited unless the test being used-

(a) has been scientifically validated as providing reliable results which are appropriate for the intended purpose;

(b) can be applied fairly to employees irrespective of their culture; and

(c) is not biased against people from designated groups.

Applicants

9. For purposes of sections 6, 7 and 8, "employee" includes an applicant for employment.

Disputes concerning this Chapter

10. (1) In this section, the word "dispute" excludes a dispute about an unfair dismissal, which must be referred to the appropriate body for conciliation and arbitration or adjudication in terms of Chapter VIII of the Labour Relations Act.

(2) Any party to a dispute concerning this Chapter, other than an allegation of harassment, may refer the dispute in writing to the CCMA within six months after the act or omission that allegedly constitutes unfair discrimination.

(3) A dispute concerning harassment must be dealt with in terms of the relevant provisions of the Labour Relations Act.

(4) The CCMA may at any time permit a party that shows good cause to refer a dispute after the relevant time limit set out in subsection (2).

(5) The party that refers a dispute must satisfy the CCMA that-

(a) a copy of the referral has been served on every other party to the dispute; and

(b) the referring party has made a reasonable attempt to resolve the dispute.

(6) The CCMA must attempt to resolve the dispute through conciliation.

(7) If the dispute remains unresolved after conciliation-

(a) any party to the dispute may refer it to the Labour Court for adjudication; or

(b) all the parties to the dispute may consent to arbitration of the dispute.

(8) The relevant provisions of Parts C and D of Chapter VII of the Labour Relations Act, with the changes required by context, apply in respect of a dispute in terms of this Chapter.

Burden of proof

11. Whenever unfair discrimination 2 is alleged in terms of this Act, the employer against whom the allegation is made must establish that it is fair.

CHAPTER III

AFFIRMATIVE ACTION

[Return to table of contents](#)

Application of this Chapter

12. Except where otherwise provided, this Chapter applies only to designated employers.

Duties of designated employers

13. (1) Every designated employer must, in order to achieve employment equity, implement affirmative action measures for people from designated groups in terms of this Act.

(2) A designated employer must-

2. Section 6(1) lists the following as prohibited grounds of discrimination:

"race, gender, sex, pregnancy, marital status, family responsibility, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, political opinion, culture, language and birth".

(a) consult with its employees as required by section 16;

(b) conduct an analysis as required by section 19;

(c) prepare an employment equity plan as required by section 20; and

(d) report to the Director-General on progress made in implementing its employment equity plan, as required by section 21.

Voluntary compliance with this Chapter

14. An employer that is not a designated employer may notify the Director-General that it intends to comply with this Chapter as if it were a designated employer.

Affirmative action measures

15. (1) Affirmative action measures are measures designed to ensure that suitably qualified people from designated groups have equal employment opportunities and are equitably represented in all occupational categories and levels in the workforce of a designated employer.

(2) Affirmative action measures implemented by a designated employer must include-

a. measures to identify and eliminate employment barriers, including unfair discrimination, which adversely affect people from designated groups;

(b) measures designed to further diversity in the workplace based on equal dignity and respect of all people;

(c) making reasonable accommodation for people from designated groups in order to ensure that they enjoy equal opportunities and are equitably represented in the workforce of a designated employer;

(d) subject to subsection (3), measures to-

(i) ensure the equitable representation of suitably qualified people from designated groups in all occupational categories and levels in the workforce; and

(ii) retain and develop people from designated groups and to implement appropriate training measures, including measures in terms of an Act of Parliament providing for skills development.

(3) The measures referred to in subsection (2)(d) include preferential treatment and numerical goals, but exclude quotas.

(4) Subject to section 41, nothing in this section requires a designated employer to take any decision concerning an employment policy or practice that would establish an absolute barrier to the prospective or continued employment or advancement of people who are not from designated groups.

Consultation with employees

16. (1) A designated employer must take reasonable steps to consult and attempt to reach agreement on the matters referred to in section 17-

a. with a representative trade union representing members at the workplace and its employees or representatives nominated by them; or

(b) if no representative trade union represents members at the workplace, with its employees or representatives nominated by them.

(2) The employees or their nominated representatives with whom an employer consults in terms of subsection (1)(a) and (b), taken as a whole, must reflect the interests of-

(a) employees from across all occupational categories and levels of the employer's workforce;

- (b) employees from designated groups; and
- b. employees who are not from designated groups.

(3) This section does not affect the obligation of any designated employer in terms of section 86 of the Labour Relations Act to consult and reach consensus with a workplace forum on any of the matters referred to in section 17 of this Act.

Matters for consultation

17. A designated employer must consult the parties referred to in section 16 concerning-

- (a) the conduct of the analysis referred to in section 19;
 - (b) the preparation and implementation of the employment equity plan referred to in section 20; and
- c. a report referred to in section 21.

Disclosure of information

18. (1) When a designated employer engages in consultation in terms of this Chapter, that employer must disclose to the consulting parties all relevant information that will allow those parties to consult effectively.

(2) Unless this Act provides otherwise, the provisions of section 16 3 of the Labour Relations Act, with the changes required by context, apply to disclosure of information.

Analysis

19. (1) A designated employer must collect information and conduct an analysis, as prescribed, of its employment policies, practices, procedures and the working environment, in order to identify employment barriers which adversely affect people from designated groups.

(2) An analysis conducted in terms of subsection (1) must include a profile, as prescribed, of the designated employer's workforce within each occupational category and level in order to determine the degree of underrepresentation of people from designated groups in various occupational categories and levels in that employer's workforce.

Employment equity plan

20. (1) A designated employer must prepare and implement an employment equity plan which will achieve reasonable progress towards employment equity in that employer's workforce.

3. Section 16 of the Labour Relations Act contains detailed provisions about disclosure of information, and disputes concerning disclosure. Regulations concerning the conduct of an analysis may, under section 54, read with section 19, be made. However, the employment policies and practices defined in section 1 are an indication of the potential areas of both direct and indirect discrimination that should be subject to analysis.

(2) An employment equity plan prepared in terms of subsection (1) must state-

(a) the objectives to be achieved for each year of the plan;

(b) the affirmative action measures to be implemented as required by section 15(2);

(c) where underrepresentation of people from designated groups has been identified by the analysis, the numerical goals to achieve the equitable representation of suitably qualified people from designated groups within each occupational category and level in the workforce, the timetable within which this is to be achieved, and the strategies intended to achieve those goals;

(d) the timetable for each year of the plan for the achievement of goals and objectives other than numerical goals;

(e) the duration of the plan, which may not be shorter than one year or longer than five years;

(f) the procedures that will be used to monitor and evaluate the implementation of the plan and whether reasonable progress is being made towards implementing employment equity;

(g) the internal procedures to resolve any dispute about the interpretation or implementation of the plan;

(h) the persons in the workforce, including senior managers, responsible for monitoring and implementing the plan; and

i. any other prescribed matter.

(3) For purposes of this Act, a person may be suitably qualified for a job either-

(a) as a result of any one of, or any combination of-

- (i) that person's formal qualifications;
 - (ii) that person's prior learning;
 - (iii) that person's relevant experience; or
- (b) because that person has the capacity to acquire, within a reasonable time, the ability required to do the job.
- (4) When determining whether a person is suitably qualified for a job, an employer must-
- (a) review all the factors listed in subsection 3; and
 - (b) determine whether that person has either-
- (i) the ability to do the job in terms of any one of, or any combination of, those factors; or
 - (ii) the capacity to acquire that ability within a reasonable time.
- (5) An employment equity plan may contain any other measures that are consistent with the purposes of this Act.

Report

21. (1) A designated employer that employs fewer than 150 employees must-

4. Guidelines regarding the factors to be taken into account in determining numerical goals will be included in a Code of Good Practice. However, the factors listed in section 41 (a) (Assessment of compliance) are relevant to setting numerical goals in each organisation.

(a) submit its first report to the Director-General within 12 months after the commencement of this Act or, if later, within 12 months after the date on which that employer became a designated employer; and

- a. thereafter, submit a report to the Director-General once every two years, on the first working day of October.

(2) A designated employer that employs 150 or more employees must-

- a. submit its first report to the Director-General within six months after the commencement of this Act or, if later, within six months after the date on which that employer became a designated employer; and

(b) thereafter, submit a report to the Director-General once every year on the first working day of October.

(3) Despite subsections (1) and (2), a designated employer that submits its first report in the 12-month period preceding the first working day of October, should only submit its second report on the first working day of October in the following year.

(4) The reports referred to in subsections (1) and (2) must contain the prescribed information and must be signed by the chief executive officer of the designated employer.

(5) Every report prepared in terms of this section is a public document.

Publication of report

22. (1) Every designated employer that is a public company must publish a summary of a report required by section 21 in that employer's annual financial report.

(2) When a designated employer within any organ of state has produced a report in terms of section 21, the Minister responsible for that employer must table that report in Parliament.

Successive employment equity plans

23. Before the end of the term of its current employment equity plan, a designated employer must prepare a subsequent employment equity plan.

Designated employer must assign manager

24. (1) Every designated employer must-

(a) assign one or more senior managers to take responsibility for monitoring and implementing an employment equity plan;

b. provide the managers with the authority and means to perform their functions;and

(c) take reasonable steps to ensure that the managers perform their functions.

(2) The assignment of responsibility to a manager in terms of subsection (1) does not relieve the designated employer of any duty imposed by this Act or any other law.

Duty to inform

25. (1) An employer must display at the workplace where it can be read by employees a notice in the prescribed form, informing them about the provisions of this Act 5 .

5. Regulations may, under section 54, be made containing a standard notice, in all official languages, summarising the provisions of this Act, which all employers should display in every workplace.

(2) A designated employer must, in each of its workplaces, place in prominent places that are accessible to all employees-

(a) the most recent report submitted by that employer to the Director-General;

(b) any compliance order, arbitration award or order of the Labour Court concerning the provisions of this Act in relation to that employer; and

(c) any other document concerning this Act as may be prescribed.

(3) An employer who has an employment equity plan, must make a copy of the plan available to its employees for copying and consultation.

Duty to keep records

26. An employer must establish and, for the prescribed period, maintain records in respect of its workforce, its employment equity plan and any other records relevant to its compliance with this Act.

CHAPTER IV

COMMISSION FOR EMPLOYMENT EQUITY

[Return to table of contents](#)

Establishment of Commission for Employment Equity

27. The Commission for Employment Equity is hereby established.

Composition of Commission for Employment Equity

28. (1) The Commission consists of a chairperson and eight other members appointed by the Minister to hold office on a part-time basis.

(2) The members of the Commission must include-

(a) two people nominated by those voting members of NEDLAC who represent organised labour;

(b) two people nominated by those voting members of NEDLAC who represent organised business;

(c) two people nominated by those voting members of NEDLAC who represent the State; and

(d) two people nominated by those voting members of NEDLAC who represent the organisations of community and development interests in the Development Chamber in NEDLAC.

(3) A party that nominates persons in terms of subsection (2) must have due regard to promoting the representivity of people from designated groups.

(4) The Chairperson and each other member of the Commission-

(a) must have experience and expertise relevant to the functions contemplated in section 29;

(b) must act impartially when performing any function of the Commission;

- c. may not engage in any activity that may undermine the integrity of the Commission; and
- d. must not participate in forming or communicating any advice on any matter in respect of which they have a direct financial interest or any other conflict of interest.

(5) The Minister must appoint a member of the Commission to act as chairperson whenever the office of chairperson is vacant.

(6) The members of the Commission must choose from among themselves a person to act in the capacity of chairperson during the temporary absence of the chairperson.

(7) The Minister may determine-

(a) the term of office for the chairperson and for each member of the Commission, but no member's term of office may exceed five years;

(b) the remuneration and allowances to be paid to members of the Commission with the concurrence of the Minister of Finance; and

- a. any other conditions of appointment not provided for in this section.

(8) The chairperson and members of the Commission may resign by giving at least one month's written notice to the Minister.

(9) The Minister may remove the chairperson or a member of the Commission from office for-

(a) serious misconduct;

(b) permanent incapacity;

(c) that person's absence from three consecutive meetings of the Commission without the prior permission of the chairperson, except on good cause shown; or

b. engaging in any activity that may undermine the integrity of the Commission.

Functions of Commission for Employment Equity

29. (1) The Commission advises the Minister on-

(a) codes of good practice issued by the Minister in terms of section 53;

(b) regulations made by the Minister in terms of section 54; and

(c) policy and any other matter concerning this Act.

(2) In addition to the functions in subsection (1) the Commission may-

a. make awards recognising achievements of employers in furthering the purpose of this Act;

b. research and report to the Minister on any matter relating to the application of this Act, including appropriate and well-researched norms and benchmarks for the setting of numerical goals in various sectors; and

c. perform any other prescribed function.

Staff and expenses

30. Subject to the laws governing the public service, the Minister must provide the Commission with the staff necessary for the performance of its functions.

Public hearings

31. In performing its functions, the Commission may-

(a) call for written representations from members of the public; and

(b) hold public hearings at which it may permit members of the public to make oral representations.

Report by Commission for Employment Equity

32. The Commission must submit an annual report to the Minister.

CHAPTER V

MONITORING, ENFORCEMENT AND LEGAL PROCEEDINGS

[Return to table of contents](#)

Part A

Monitoring

Monitoring by employees and trade union representatives

33. Any employee or trade union representative may bring an alleged contravention of

this Act to the attention of-

- (a) another employee;
- (b) an employer;
- (c) a trade union;
- (d) a workplace forum;
- (e) a labour inspector;
- (f) the Director-General; or
- (g) the Commission.

Enforcement

Powers of labour inspectors

34. A labour inspector acting in terms of this Act has the authority to enter, question and inspect as provided for in sections 65 and 66 of the Basic Conditions of Employment Act.

Undertaking to comply

35. A labour inspector must request and obtain a written undertaking from an employer to comply with paragraphs (a) to (j) within a specified period, if the inspector has reasonable grounds to believe that the employer has failed to-

- (a) consult with employees as required by section 16;
- (b) conduct an analysis as required by section 19;
- (c) prepare an employment equity plan as required by section 20;
- (d) implement its employment equity plan;
- (e) submit an annual report as required by section 21;
- (f) publish its report as required by section 22;
- (g) prepare a successive employment equity plan as required by section 23;
- (h) assign responsibility to one or more senior managers as required by section 24;
- (i) inform its employees as required by section 25; or
- (j) keep records as required by section 26.

Compliance order

36. (1) A labour inspector may issue a compliance order to an employer if that employer has-

- (a) refused to give a written undertaking in terms of section 35, when requested to do so; or
- (b) failed to comply with a written undertaking given in terms of section 35.

(2) A compliance order issued in terms of subsection (1) must set out-

- (a) the name of the employer, and the workplaces to which the order applies;
- (b) those provisions of Chapter III of this Act which the employer has not complied with and details of the conduct constituting non-compliance;
- (c) any written undertaking given by the employer in terms of section 35 and any failure by the employer to comply with the written undertaking;

(d) any steps that the employer must take and the period within which those steps must be taken;

(e) the maximum fine, if any, that may be imposed on the employer in terms of Schedule 1 for failing to comply with the order; and

a. any other prescribed information.

(3) A labour inspector who issues a compliance order must serve a copy of that order on the employer named in it.

(4) An employer who receives a compliance order served in terms of subsection (3) must display a copy of that order prominently at a place accessible to the affected employees at each workplace named in it.

(5) An employer must comply with the compliance order within the time period stated in it, unless the employer objects to that order in terms of section 38.

(6) If an employer does not comply with an order within the period stated in it, or does not object to that order in terms of section 38, the Director-General may apply to the Labour Court to make the compliance order an order of the Labour Court.

Limitations

37. A labour inspector may not issue a compliance order in respect of a failure to comply with a provision of Chapter III of this Act if-

(a) the employer is being reviewed by the Director-General in terms of section 42; or

(b) the Director-General has referred an employer's failure to comply with a recommendation to the Labour Court in terms of section 44.

Objections against compliance order

38. (1) An employer may object to a compliance order by making written representations to the Director-General within 21 days after receiving that order.

(2) If the employer shows good cause at any time, the Director-General may permit the employer to object after the period of 21 days has expired.

(3) After considering the designated employer's representations and any other relevant information, the Director-General-

(a) may confirm, vary or cancel all or any part of the order to which the employer objected; and

(b) must specify the time period within which that employer must comply with any part of the order that is confirmed or varied.

(4) The Director-General must, after making a decision in terms of subsection (3), and within 60 days after receiving the employer's representations, serve a copy of that decision on that employer.

(5) A designated employer who receives an order of the Director-General must either-

(a) comply with that order within the time period stated in it; or

(b) appeal against that order to the Labour Court in terms of section 39.

(6) If an employer does not comply with an order of the Director-General, or does not appeal against that order, the Director-General may apply to the Labour Court for that order to be made an order of the Labour Court.

Appeal from compliance order

39. (1) An employer may appeal to the Labour Court against a compliance order of the Director-General within 21 days after receiving that order.

(2) The Labour Court may at any time permit the employer to appeal after the 21-day time limit has expired, if that employer shows good cause for failing to appeal within that time limit.

(3) If an employer has appealed against an order of the Director-General, that order is suspended until the final determination of-

(a) the appeal by the Labour Court; or

(b) any appeal against the decision of the Labour Court in that matter.

Register of designated employers

40. (1) The Minister must keep a register of designated employers that have submitted the reports required by section 21.

(2) The register referred to in subsection (1) is a public document.

Assessment of compliance

41. In determining whether a designated employer is implementing employment equity in compliance with this Act, the Director-General or any person or body applying this Act must, in addition to the factors stated in section 15, take into account all of the following:

(a) The extent to which suitably qualified people from designated groups are equitably represented within each occupational category and level in that employer's workforce in relation to the-

(i) demographic profile of the national and regional economically active population;

(ii) pool of suitably qualified people from designated groups from which the employer may reasonably be expected to promote or appoint employees;

(iii) economic and financial factors relevant to the sector in which the employer operates;

(iv) present and anticipated economic and financial circumstances of the employer; and

(v) the number of present and planned vacancies that exist in the various categories and levels, and the employer's labour turnover;

(b) progress made in implementing employment equity by other designated employers operating under comparable circumstances and within the same sector;

(c) reasonable efforts made by a designated employer to implement its employment equity plan;

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

(e) any other prescribed factor.

Review by Director-General

42. (1) The Director-General may conduct a review to determine whether an employer is complying with this Act.

(2) In order to conduct the review the Director-General may-

(a) request an employer to submit to the Director-General a copy of its current analysis or employment equity plan;

(b) request an employer to submit to the Director-General any book, record, correspondence, document or information that could reasonably be relevant to the review of the employer's compliance with this Act;

(c) request a meeting with an employer to discuss its employment equity plan, the implementation of its plan and any matters related to its compliance with this Act; or

(d) request a meeting with any-

(i) employee or trade union consulted in terms of section 16;

(ii) workplace forum; or

iii. other person who may have information relevant to the review.

Outcome of Director-General's review

43. Subsequent to a review in terms of section 42, the Director-General may-

(a) approve a designated employer's employment equity plan; or

(b) make a recommendation to an employer, in writing, stating-

(i) steps which the employer must take in connection with its employment equity plan or the implementation of that plan, or in relation to its compliance with any other provision of this Act; and

(ii) the period within which those steps must be taken; and

i. any other prescribed information.

Failure to comply with Director-General's recommendation

44. If an employer fails to comply with a request made by the Director-General in terms of section 42(2) or a recommendation made by the Director-General in terms of section 43 (b), the Director-General may refer the employer's non-compliance to the Labour Court.

Part B

Legal proceedings

Conflict of proceedings

45. (1) If a dispute has been referred to the CCMA by a party in terms of Chapter II and the issue to which the dispute relates also forms the subject of a referral to the Labour Court by the Director-General in terms of section 44, the CCMA proceedings must be stayed until the Labour Court makes a decision on the referral by the Director-General.

(2) If a dispute has been referred to the CCMA by a party in terms of Chapter II against an employer being reviewed by the Director-General in terms of section 42, there may not be conciliation or adjudication in respect of the dispute until the review has been completed and the employer has been informed of the outcome.

Consolidation of proceedings

46. Disputes concerning contraventions of this Act by the same employer may be consolidated.

Powers of commissioner in arbitration proceedings

47. A commissioner of the CCMA may, in any arbitration proceedings in terms of this Act, make any appropriate arbitration award that gives effect to a provision of this Act.

Jurisdiction of Labour Court

48. The Labour Court has exclusive jurisdiction to determine any dispute about the interpretation or application of this Act, except where this Act provides otherwise.

Powers of Labour Court

49. (1) Except where this Act provides otherwise, the Labour Court may make any appropriate order including-

(a) on application by the Director-General in terms of section 36(6) or 38(6) making a compliance order an order of the Labour Court;

(b) subject to the provisions of this Act, condoning the late filing of any document with, or the late referral of any dispute to, the Labour Court;

(c) directing the CCMA to conduct an investigation to assist the Court and to submit a report to the Court;

(d) awarding compensation in any circumstances contemplated in this Act;

(e) awarding damages in any circumstances contemplated in this Act;

(f) ordering compliance with any provision of this Act; including a request made by the Director-General in terms of section 42(2) or a recommendation made by the Director-General in terms of section 43(b);

(g) imposing a fine in accordance with Schedule 1 for a contravention of certain provisions of this Act;

(h) reviewing the performance or purported performance of any function provided for in this Act or any act or omission of any person or body in terms of this Act on any grounds that are permissible in law;

(i) in an appeal under section 39, confirming, varying or setting aside all or part of an order made by the Director-General in terms of section 38; and

(j) dealing with any matter necessary or incidental to performing its functions in terms of this Act.

(2) If the Labour Court decides that an employer has unfairly discriminated against any employee, the Court may make any appropriate order that is just and equitable in the circumstances, including-

(a) payment of compensation by the employer to that employee;

(b) payment of punitive damages by the employer to that employee;

(c) an order directing the employer to take steps to prevent the same unfair discrimination or a similar practice occurring in the future in respect of other employees;

(d) an order directing an employer, other than a designated employer, to comply with Chapter III as if it were a designated employer;

(e) an order directing the removal of the employer's name from the register referred to in section 40; or

a. the publication of the Court's order.

(3) The Labour Court, in making any order, may take into account any delay on the part of the party who seeks relief in processing a dispute in terms of this Act.

(4) If the Labour Court declares that the medical testing of an employee as contemplated in section 7 is justifiable, the court may make any order that it considers appropriate in the circumstances, including imposing conditions relating to-

(a) the provision of counselling;

(b) the maintenance of confidentiality;

(c) the period during which the authorisation for any testing applies; and

a. the category or categories of jobs or employees in respect of which the authorisation for testing applies.

Part C

Protection of employee rights

Protection of employee rights

50. (1) No person may discriminate against an employee who exercises any right conferred by this Act.

(2) Without limiting the general protection conferred by subsection (1), no person may threaten to do, or do any of the following:

(a) Prevent an employee from exercising any right conferred by this Act or from participating in any proceedings in terms of this Act; or

(b) prejudice an employee because of past, present or anticipated-

(i) disclosure of information that the employee is lawfully entitled or required to give to another person;

(ii) exercise of any right conferred by this Act; or

i. participation in any proceedings in terms of this Act.

(3) No person may favour, or promise to favour, an employee in exchange for that employee not exercising any right conferred by this Act or not participating in any proceedings in terms of this Act.

(4) Nothing in this section precludes the parties to a dispute arising out of an alleged breach of any right conferred by this Part, from concluding an agreement to settle the dispute.

(5) For the purposes of this section "employee" includes a former employee or an applicant for employment.

Procedure for disputes

51. (1) If there is a dispute about the interpretation or application of this Part, any party to the dispute may refer it in writing to the CCMA.

(2) The CCMA must attempt to resolve a dispute referred to it in terms of this Part through conciliation.

(3) If the dispute remains unresolved after conciliation-

(a) any party to the dispute may refer it to the Labour Court for adjudication; or

(b) all the parties to the dispute may consent to arbitration of the dispute by the CCMA.

(4) In respect of a dispute in terms of this Part, the relevant provisions of Part C and D of Chapter VII of the Labour Relations Act apply, read with the changes required by the context.

CHAPTER VI

GENERAL PROVISIONS

[Return to table of contents](#)

State contracts

52. (1) Every employer that makes an offer to conclude an agreement with any organ of state for the furnishing of supplies or services to that organ of state or for the hiring or letting of anything-

(a) must-

(i) if it is a designated employer, comply with Chapters II and III of this Act; or

(ii) if it is not a designated employer, comply with Chapter II of this Act; and

(b) attach to that offer either-

(i) a certificate in terms of subsection (2) which is conclusive evidence that the employer complies with the relevant Chapters of this Act; or

(ii) a declaration by the employer that it complies with the relevant Chapters of this Act, which, when verified by the Director-General, is conclusive evidence of compliance.

(2) An employer referred to in subsection (1) may request a certificate from the Minister confirming its compliance with Chapter II, or Chapters II and III, as the case may be.

(3) certificate issued in terms of subsection (2) is valid for 12 months from the date of issue or until the next date on which the employer is obliged to submit a report in terms of section 21, whichever period is the longer.

(4) failure to comply with the relevant provisions of this Act is sufficient ground for rejection of any offer to conclude an agreement referred to in subsection (1) or for cancellation of the agreement 6 .

Codes of good practice

53. (1) The Minister may-

(a) issue any code of good practice 7 ; and

6. Regulations under section 13 of the State Tender Board Act, No. 86 of 1986, may provide that supplies and services shall not be procured for and on behalf of the State, unless an employer has attached to its offer a certificate in terms of section 52(1) (b)(i) or a declaration in terms of section 52(1) (b)(ii) of the

Employment Equity Act.

7. This is an enabling Act. The codes of good practice are intended to provide employers with information that may assist them in implementing this Act, particularly Chapter III. Issues that are likely to be the subject of codes include the following:

- the preparation of employment equity plans;
- advertising, recruitment procedures and selection criteria;
- special measures to be taken in relation to persons with disabilities including benefit schemes;
- special measures to be taken in relation to persons with family responsibilities;
- sexual harassment and racial harassment;
- internal procedures to resolve disputes about the interpretation or application of this Act; and
- sector-specific issues.

(b) change or replace any code of good practice.

(2) Any code of good practice, or any change to, or replacement of, a code of good practice must be published in the *Gazette*.

Regulations

54. (1) The Minister may, by notice in the *Gazette*, make any regulation regarding-

(a) any matter that this Act requires or permits to be prescribed; and

(b) any administrative or procedural matters that may be necessary or expedient to achieve the proper and effective administration of this Act.

(2) The Minister must by notice in the *Gazette* make a regulation providing for separate and simplified forms and procedures in respect of the obligations created by sections 19, 20, 21, 25 and 26 for employers that employ 150 or fewer employees.

Delegations

55. (1) The Minister may delegate any power conferred, or assign any duty imposed, upon the Minister in terms of this Act, except the powers and duties contemplated in sections 28(1), (5) and (7), 52(2), 53, 54, 57(4) and 59(4).

(2) A delegation or assignment must be in writing and may be subject to any conditions or restrictions determined by the Minister.

(3) The Minister may at any time-

(a) withdraw a delegation or assignment made in terms of subsection (1); and

(b) withdraw or amend any decision made by a person exercising a power or performing a duty delegated or assigned in terms of subsection (1).

Designation of organs of state

56. The President must, within six months after the commencement of this Act, and after consultation with the Minister responsible for the Public Service and Administration, publish a notice in the *Gazette* listing every designated employer within any organ of state.

Breach of confidentiality

57. (1) Any person who discloses any confidential information acquired in the performance of a function in terms of this Act, commits an offence.

(2) Subsection (1) does not apply if the information-

(a) is disclosed to enable a person to perform a function in terms of this Act; or

(b) must be disclosed in terms of this Act, any other law or an order of court.

(3) person convicted of an offence in terms of this section may be sentenced to a fine not exceeding R10 000,00.

(4) The Minister may, with the concurrence of the Minister of Justice and by notice in the *Gazette*, amend the maximum amount of the fine referred to in subsection (3) in order to counter the effect of inflation.

Liability of employers

58. (1) If it is proved that an employee, while at work, contravened a provision of this Act, or engaged in any conduct that, if engaged in by that employee's employer, would constitute a contravention of a provision of this Act, both the employee and the employer must be taken to have contravened the provision.

(2) Despite subsection (1), an employer is not liable for the conduct of an employee if that employer is able to prove that it did all that was reasonably practicable to ensure that the employee would not act in contravention of this Act.

Obstruction, undue influence and fraud

59. (1) No person may-

(a) obstruct or attempt to improperly influence any person who is exercising a power or performing a function in terms of this Act; or

(b) knowingly give false information in any document or information provided to the Director-General or a labour inspector in terms of this Act.

(2) No employer may knowingly take any measure to avoid becoming a designated employer.

(3) person who contravenes a provision of this section commits an offence and may be sentenced to a fine not exceeding R10 000,00.

(4) The Minister may, with the concurrence of the Minister of Justice and by notice in the *Gazette*, amend the maximum amount of the fine referred to in subsection (3) in order to counter the effect of inflation.

This Act binds the State

60. This Act binds the State.

Application of Act when in conflict with other laws

61. If any conflict relating to a matter dealt with in this Act arises between this Act and the provisions of any other law other than the Constitution or an Act of Parliament expressly amending this Act, the provisions of this Act prevail.

Repeal of laws and transitional arrangements

62. Each of the laws referred to in the first two columns of Schedule 2 is repealed to the extent specified opposite that law in the third column of that Schedule.

Short title and commencement

63. (1) This Act is called the Employment Equity Act, 1998.

(2) This Act takes effect on a date to be determined by the President by proclamation in the *Gazette*. The President may determine different dates in respect of different provisions of this Act.

(3) If, in terms of subsection (2), different dates are determined for particular provisions of this Act-

(a) Schedule 2 must take effect at the same time as section 6(1) takes effect; and

(b) a reference in a provision of this Act to a time when this Act took effect must be construed as a reference to the time when that provision takes effect.

SCHEDULE 1

Maximum permissible fines that may be imposed for contravening this Act

[Return to table of contents](#)

This Schedule sets out the maximum fine that may be imposed in terms of this Act for

the contravention of certain provisions of this Act.

PREVIOUS CONTRAVENTION CONTRAVENTION OF ANY PROVISION OF
SECTIONS 16, 19, 20, 21, 22 AND 23

No previous contravention R500 000

A previous contravention in respect of the same provision R600 000

A previous contravention within the previous 12 months or two previous contraventions in respect of the same provision within three years R700 000

Three previous contraventions in respect of the same provision within three years R800000

Four previous contraventions in respect of the same provision within three years R900 000

SCHEDULE 2

Laws repealed

[Return to table of contents](#)

Number and year of law Short title Extent of repeal Act No. 66 of 1995 Labour Relations Act, 1995 Item 2(1) (a), 2(2) and 3(4) (a) of Schedule 7

SCHEDULE 3

Transitional arrangements

Definitions

1. In this Schedule, unless the context indicates otherwise-

"pending" means existing immediately before this Act came into operation; and

"repealed provisions of the Labour Relations Act" means the provisions of the Labour Relations Act repealed by Schedule 2.

Disputes arising before commencement of this Act

2. Any dispute contemplated in item (2)(1) (a) of Schedule 7 of the Labour Relations

Act that arose before the commencement of this Act, must be dealt with as if the repealed

provisions of the Labour Relations Act had not been repealed.

Courts

1. (1) In any pending dispute contemplated in item (2)(1) (a) of Schedule 7 of the Labour Relations Act in respect of which the Labour Court or the Labour Appeal Court had jurisdiction and in respect of which proceedings had not been instituted before the commencement of this Act, proceedings must be instituted in the Labour Court or Labour Appeal Court (as the case may be) and dealt with as if the repealed provisions of the Labour Relations Act had not been repealed.

(2) Any dispute contemplated in item (2)(1) (a) of Schedule 7 of the Labour Relations Act in respect of which proceedings were pending in the Labour Court or Labour Appeal Court must be proceeded with as if the repealed provisions of the Labour Relations Act had not been repealed.

(3) Any pending appeal before the Labour Appeal Court must be dealt with by the Labour Appeal Court as if the repealed provisions of the Labour Relations Act had not been repealed.

(4) When acting in terms of subitems (1) to (3), the Labour Court or Labour Appeal Court may perform or exercise any function or power that it had in terms of the repealed provisions of the Labour Relations Act.

MEMORANDUM ON THE OBJECTS OF THE EMPLOYMENT EQUITY BILL, 1998

The principal object of the Employment Equity Bill, 1998, is to achieve equity in employment through promoting equal opportunities and implementing affirmative action to redress disadvantages experienced by people from designated groups.

The most important proposals contained in the Bill are that-

- all employers take steps to end unfair discrimination in their employment policies and practices;
- unfair discrimination on the grounds of race, gender, sex, pregnancy, marital status, family responsibility, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, political opinion, culture, language and birth against employees or job applicants be prohibited;
- medical testing of employees be prohibited unless justified;
- psychometric testing be prohibited unless justified;
- designated employers prepare and implement employment equity plans subsequent to conducting a workforce analysis and consulting with unions and employees;
- employment equity plans contain specific affirmative action measures to achieve the equitable representation of people from designated groups in all occupational categories and levels in the workforce of designated employers;
- all designated employers report to the Department of Labour on their implementation of employment equity;
- a Commission for Employment Equity be established;
- enforcement of employment equity obligations on designated employers takes place by the Labour Inspectorate and the Director-General of the Department of Labour;

- any employer that intends to contract with the State complies with its employment equity obligations; and
- an employee be protected from victimisation for exercising rights conferred by the Bill.

THE DRAFTING PROCESS

This Bill emerged out of an extensive consultation process. This process began with the establishment of the Affirmative Action Policy Development Forum by the Minister of Labour in 1995. This Forum represented the major stakeholders in the area of affirmative action and employment equity, viz. the unions, business, community organisations, disabled people's organisations, women's organisations and non-governmental organisations. When it completed its work, a team of experts was appointed to draft the green paper. The team members included Lady Amos (formerly Ms Valerie Amos), former CEO of the Equal Opportunities Commission (UK), Prof. Paul Benjamin (Cheadle, Thompson & Haysom) (CTH), Ms Urmila Bhoola (CTH), Prof. Halton Cheadle (CTH), Mr Siphso Madhlopha (Madhlopha Attorneys), Ms Thuli Madonsela (Chief Director, Department of Justice), Dr Neva Makgetla (Deputy Director-General, Department of Public Service and Administration, Mr Mpho Makwana (former Director: Equal Opportunities, Department of Labour), Ms Lucia Rayner (Deputy Director: Equal Opportunities, Department of Labour), Jackie Scholtz (State Law Advisers) and Dr Caroline White (University of Natal, Durban, formerly Centre for Policy Studies). This team's efforts led to the publication of the Green Paper on Employment and Occupational Equity on 1 July 1996.

The Minister then appointed a team of legal experts to draft the Employment Equity Bill. This team began its work in February 1997. Its members were Ms Amanda Armstrong (CTH), Ms Urmila Bhoola (CTH), Mr Siphso Madhlopha (Madhlopha Attorneys) and Mr Mzi Yawa (formerly, Department of Labour). Professor Julio Faundez of Warwick University (UK) was seconded to the drafting team by the International Labour Organisation (ILO). The drafters made extensive use of his expertise. Mr Phil Knight advised the drafters on the use of plain language. To assist the Legal Drafting Team in its work, a policy reference group was formed to advise the legal drafters on equity policy matters. The group under the leadership of the Director: Equal Opportunities, Mr Loyiso Mbabane, consisted of Mr Les Kettledas, Mr Jeremy Baskin, Dr Guy Mhone, Ms Lucia Rayner, Ms Tanya Golden, Ms Nokhanya Moerane, Mr Jesse Maluleke, Mr Terence Chauke and Ms Thuli Madonsela. The team completed its work at the end of August 1997.

During September to November 1997 the USAID sponsored inputs from several international experts including Mr Deval Patrick, Mr Kenneth Gage, Ms Ellen Vargas, Mr Joseph Kennedy and Ms Shirley Wilcher. Professor Harish Jain of Canada also provided extensive input through financial assistance of USAID.

The first version of the Bill was released on 1 December 1997. A summit was later held to establish areas of agreement and disagreement and to endeavour to reach agreement as far as the objectives and formulation of the Bill were concerned. The Bill was then tabled at NEDLAC for negotiations. Negotiations took place in March and April 1998 and, as a result, a number of changes were made to the Bill. The subsequent draft was approved by Cabinet in May 1998.

PARLIAMENTARY PROCEDURE

The State Law Advisers and the Department of Labour are of the view that this Bill must be dealt with in accordance with the procedure established by section 75 of the Constitution since it contains no provision to which the procedure set out in section 74 or 76 of the Constitution applies.