



2023 EMPLOYMENT EQUITY AMENDMENTS GUIDELINE

(Fourth Edition)



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On 14 April 2023, President Cyril Ramaphosa signed the Employment Equity Amendment Act 4 of 2022 into law (Amendment Act). This act amends the Employment Equity Act 55 of 1998 (EEA). The effective date is 1 January 2025.



[CLICK HERE
to read the
Amendment Act](#)



FAQS

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 and to ensure that all employees receive equal opportunities and 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 who operate in South Africa, except the South African National Defence Force, National Intelligence Agency and South African Secret Service.

While the EEA applies to all employers (excluding those listed above), sections of the EEA (sections 12 – 27) only apply to designated employers. The Amendment Act brings 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



Birth

How are smaller employers affected by the amendments?

Smaller employers are positively affected by a change in the definition of “designated employer”. The definition is amended to exclude employers who employ fewer than 50 employees, irrespective of their annual turnover.

What is the effect of the amendment to the definition of “designated employer”?

As a result of the amendment, smaller employers are not 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 and submission of employment equity reports to the Department of Employment and Labour (DoEL). This will significantly relieve the administrative burden on these employers.

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

smaller employers will be expected to demonstrate that there has been no finding by the Commission for Conciliation, Mediation and Arbitration (CCMA) or a court within the previous 12 months that the employer breached the prohibition on unfair discrimination in the EEA and the CCMA has not issued an award against the employer in the previous 12 months for failing to pay the minimum wage in terms of the National Minimum Wage Act, 2018 (Act 9 of 2018).

Are there any changes in relation to and for people with disabilities?

Yes. The definition of “people with disabilities” has been substituted to align with the definition in the United Nations Convention on the Rights of Persons with Disabilities, 2007. The amended definition includes within its meaning, “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.

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 removes the requirement for HPCSA certification of psychological testing and similar assessments.



What is the purpose of the introduction of sectoral numerical targets?

The new section 15A introduces 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 of these sectors.

How will the sectoral numerical targets be determined?

The amendments empower the Minister to identify and set employment equity numerical targets for each national economic sector. 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 have to be published in order to afford interested parties a period of at least 30 days to comment on the proposals.

Have the sectoral numerical targets been published?

First Published Draft

On Friday, 12 May 2023, the Minister published the first draft five-year sectoral numerical targets for the identified national economic sectors allowing interested parties 30 days to comment (first draft).

The numerical targets focus on top and senior management as well as professionally qualified and skilled levels and people with disabilities. The targets are tabulated according to economic sector based on race (i.e. African, Coloured, Indian and White) and gender (i.e. male and female) with both national and provincial percentages indicated. Separate targets are outlined on each of these racial and gender categories. The category "Black" includes African, Coloured, and Indian persons.

Second Republished Draft

On Thursday, 1 February, the Minister republished revised draft regulations on the sectoral numerical targets with the public having 90 days to comment (republished regulation). The deadline for comments is 2 May 2024.

The five-year sector targets in the republished regulation remove the distinction between provincial and national targets and reflect a single target for each economic sector differentiated on the basis of gender only. The targets reflect the same total national targets in the first draft (with a few exceptions in the finance and insurance sector) and continue to focus on top and senior management as well as professionally qualified and skilled levels and people with disabilities.

The republished regulation has removed the distinction between designated racial groups (African, Coloured, and Indian). The target simply refers to "designated groups" which is defined in the EEA as black people (Africans, Coloured, and Indians), women and people with disabilities who are citizens of South Africa by birth or descent. Alternatively, black people who became citizens of South Africa by naturalisation before 27 April 1994 or after 26 April 1994 and who would have been entitled to acquire citizenship by naturalisation prior to that date but who were precluded by apartheid policies.

The five-year sector targets are minimum targets which an employer is expected to achieve with a view to improving the equitable representation of people from the different designated groups at various occupational levels.



CLICK HERE
to access the first published regulation on the draft sectoral numerical targets.



CLICK HERE
to access the republished regulation on the (second) draft sectoral numerical targets.

What factors were taken into account by the Minister and the DoEL in setting the five-year sectoral numerical targets?

The republished regulation states that the following factors were taken into account:

- The extent to which suitably qualified people from amongst the different designated groups are equitably represented within each occupational level in the particular sector workforce in relation to the demographic profile of the national and regional/provincial economically active population (EAP);
- The 2022 EE workforce profiles of each economic sector in terms of race, gender, and disability as reported by the designated employers in their 2022 EE reports submitted to the DoEL;
- The various Sector Codes and the Sector Charters published under the BBBEE Act; and
- The unique sector dynamics (e.g. skills availability, economic and market forces, ownership etc.) raised by Sector Stakeholders in their written submissions during the consultation process.

Do the draft sectoral numerical targets refer to semi-skilled and unskilled employees?

The Minister has not published targets for the semi-skilled and unskilled levels. However, designated employers are required to take into account the EAP demographics in respect of these levels (either national or provincial) in their employment equity plans in terms of section 20(2)(C) of the EEA.

When do the sectoral numerical targets take effect?

The amendments are affective from 1 January 2024. Currently, the sectoral numerical targets have been published in draft form. Interested parties were provided with an opportunity to submit comments.

When the final targets are published, the Minister may provide further information in this regard.

If an employer operates in more than one sector, which sectoral numerical target should it apply?

An employer that operates in more than one sector must use the sectoral numerical targets of the economic sector where the majority of its employees are located.

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) links the sectoral numerical targets to the numerical targets set by a designated employer in its employment equity plan. A designated employer is now required to set numerical targets in line with the applicable sectoral targets set by the Minister. An amendment to section 42 aligns the assessment of compliance with employment equity with the new requirements relating to sectoral numerical targets.

In developing the employment equity plans, employers are required to set annual numerical targets for all population groups in each of the upper occupational levels where there is under representation in relation to the EAP of a specific population group. Where a particular racial or gender group at a specific occupational level exceeds the sector numerical target, the employer may not regress and should set annual targets that aim to reflect the relevant EAP.

The employer is required to take the following factors into account when setting annual numerical targets:

- The employer's workforce profile
- The five-year sectoral numerical targets; and
- The applicable EAP (either national or provincial)

In addition to the above, the republished regulation reiterates factors that must be taken into account by the employer which are mentioned in the EEA and the Code of Good Practice on the preparation, implementation and monitoring of the employment equity plan:

- The inherent requirements of the job;
- The pool of suitably qualified persons;
- The qualification, skills, experience and the capacity to acquire, within a reasonable timeframe, the ability to do the job;
- The rate of turn-over and natural attrition within the workplace; and
- Recruitment and promotional trends within a workplace.

Employers will be measured against the annual targets which are set to ultimately achieve the relevant five-year sectoral numerical targets.



CLICK HERE
to access the published draft
sectoral numerical targets.

What are the economic sectors?

The amendments introduce a definition for "sector" that means "an industry or service or part of any industry or service". Eighteen economic sectors have been identified:



Agriculture, forestry and fishing



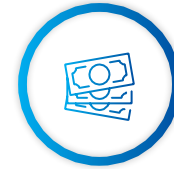
Mining and quarrying



Manufacturing



Construction



Financial and insurance activities



Transportation and storage



Information and communication



Water supply, sewerage, waste management and remediation activities



Electricity, gas steam and air conditioning supply



Human health and social work activities



Arts, entertainment and recreation



Real estate activities



Professional, scientific and technical activities



Wholesale and retail trade; repair of motor vehicles and motorcycles



Accommodation and food service activities




Public administration, defence and compulsory social security



Education



Administrative and support activities



Can an employer apply either or both the national and/or the provincial EAP?

The republished regulation states that an employer that conducts its business operations nationally should apply the national EAP and an employer operating in a particular province should use the provincial EAP. Employers cannot use both national and provincial EAP demographics for the purposes of developing their employment equity plans and setting annual numerical targets.

An employer who elects to use the provincial EAP and operates in more than one province, may choose the EAP for the province in which the majority of its employees are present.

Some concerns have been raised in relation to whether this approach to using the national or provincial EAP aligns with the EEA as well as whether there is a general election for employers who operate in more than one province. There may be further guidance from the Department of Employment and Labour in due course.

Are there reasons that justify an employer's non-compliance with either the annual numerical targets or the five-year sectoral numerical targets?

The republished regulation indicates justifiable grounds for an employer not complying with their annual numerical targets or the five-year sectoral numerical targets. These grounds are reflected in draft regulations published, but not finalised or implemented, in 2018.

The grounds are as follows:

- Insufficient recruitment opportunities;
- Insufficient promotion opportunities;
- Insufficient target individuals from the designated groups with the relevant qualification, skills and experience;
- CCMA awards/Court Order;
- Transfer of business;
- Mergers/acquisitions; and
- Impact on business economic circumstances.

The republished regulation indicates that if there are justifiable reasons for non-compliance, an employer will incur no penalties. However, the republished regulation does not set out the detail of the manner and form in which an employer would be required to demonstrate the presence and impact of the listed justifiable grounds.

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, among other compliance requirements, including:

- the submission of a report in terms of section 21 of the EEA;
- that there is no finding by the CCMA or a court within the previous 12 months that the employer breached the prohibition on unfair discrimination; and
- the CCMA has not issued an award against the employer in the previous 12 months for failing to pay the minimum wage in terms of the National Minimum Wage Act 9 of 2018.

A certificate issued in terms of section 53 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 of the EEA, whichever period is longer.

What is the process of obtaining a compliance certificate?

Section 53 has not yet been operationalised and the amendments go some way in implementing this section. However, the process of procuring a compliance certificate in terms of section 53 is unclear.

Draft regulations published in 2018 set out a process for acquiring this certificate and the factors that may justify non-compliance. These regulations have to date not been finalised and implemented. In relevant part, paragraph 16 of these draft regulations provides that:

"(1) An employer must request a certificate in terms of section 53 by means of the Department website labour.gov.za ...

(4) An employer may include in its application reasonable grounds to justify its failure to comply with any requirement for the issuing of a certificate as contemplated by section 42(4) and, in the case of compliance with a sectoral target, section 53(6)(a) by using EEA15 form.

(a) Justifiable reasonable grounds for not complying with the targets, including:

- (i) insufficient recruitment opportunities;*
- (ii) Insufficient promotion opportunities;*
- (iii) insufficient target individuals from the designated groups with the relevant qualification, skills and experience;*
- (iv) court order;*
- (v) transfer of business;*
- (vi) mergers/acquisitions; and*
- (vii) impact on business economic circumstances.*

This interpretation aligns with the justifiable grounds for non-compliance set out in the republished regulation mentioned above.

Are the sectoral numerical targets equivalent to a quota?

The law distinguishes between a quota and a numerical target or goal. A quota is rigid, or applied rigidly, and amounts to job reservation. On the other hand, a target is a flexible employment guideline. Quotas are prohibited because they constitute an absolute barrier to the future or continued employment or promotion of people who are not from designated groups. Section 15 of the EEA states that a designated employer is not required 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.

The amended section 15A allows the Minister to identify national economic sectors, and then set “numerical targets for any national economic sector identified in terms of subsection (1)”. Importantly, this is a discretionary power and requires consultation with the relevant sectors and the advice of the Employment Equity Commission. Furthermore, the target must be set to help achieve the purpose of ensuring the equitable representation of suitably qualified people from designated groups at all occupational levels in the workforce. The outcome of this exercise should ideally result in the Minister setting numerical targets based on the reality of the sector, the composition of the workforces within the sector, and the shifting needs for certain skills or proficiencies. This means that the target should be neither arbitrary nor rigid.

The introduction of sectoral numerical targets and the power of the Government, by way of the Minister, to set these targets has been controversial. Some parties have concerns that the sectorial numerical targets set by the Minister may constitute a rigid quota and therefore potentially render the application of the sectoral numerical targets unconstitutional. The view of the DoEL is that there is a built-in flexibility for employers to set their own targets

on an annual basis with the aim of achieving the five-year sectoral targets published by the Minister.

Do the sectoral numerical targets and compliance in this regard impact an employer’s obligations in terms of B-BBEE legislation?

B-BBEE assessment, compliance and measurement is a separate process to employment equity compliance under the EEA and regulations issued thereunder.

However, for purposes of assessing compliance with the management control element in the B-BBEE Codes, the EEA and the regulations issued thereunder are pertinent as the definitions and designations like employee categorisations and demographics and race groups classifications are all drawn from this legislation.

The targets for compliance under the various B-BBEE Codes are not necessarily the same as those provided under the EEA and the regulations. Nonetheless, compliance with any proposed targets under the EEA will also be relevant for assessing B-BBEE compliance even though targets and weighting may differ. As a general proposition, compliance with numerical targets under the EEA regulations will also be recognisable under the B-BBEE Codes and hence positively impact B-BBEE scoring.

Are there any changes in relation to the submission of employment equity reports and the timing of submissions?

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 and the timing of the submission.

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.

Are there any changes which impact the powers of labour inspectors?

Yes. Section 36 of the Amendment Act 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.

Are there any changes in relation to compliance orders and to what extent does this affect compliance with numerical targets?

Yes. An amendment to section 37 of the EEA empowers 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.

While section 37 provides that a labour inspector may serve a compliance order on a designated employer if the employer has failed to comply with sections 16, 17, 19, 22, 24, 25 or 26 of the EEA, it notably excludes sections 15 and 15A. This means that a failure to comply with sections 15 or 15A (the sections relating to sectoral numerical targets) may not be penalised by means of a compliance order.

Section 42 of the EEA is amended to include an assessment of whether an employer has complied with the sectoral targets set in terms of section 15A. If, after an assessment, it is determined that the employer has failed to comply, section 45 states that the Director-General may apply to the Labour Court for an order directing the employer to comply or, if the employer fails to justify its non-compliance with the request or recommendation, impose a fine in accordance with Schedule 1. In the circumstances, non-compliance with sectoral targets will have the same effect as non-compliance with an employment equity plan.

What is the fine for non-compliance and if the employer fails to justify its non-compliance with applying the sectoral numerical target?

The fines are listed in Schedule 1 of the EEA and are tabulated on a sliding scale depending on previous contraventions by the same employer.

| Previous contravention | Fine |
|--|--|
| No previous contravention | The greater of R1,5 million or 2% of the employer's turnover. |
| A previous contravention in respect of the same provision. | The greater of R1,8 million or 4% of the employer's turnover. |
| A previous contravention within the previous 12 months or two previous contraventions in respect of the same provision within three years. | The greater of R2,1 million or 6% of the employer's turnover. |
| Three previous contraventions in respect of the same provision within three years. | The greater of R2,4 million or 8% of the employer's turnover. |
| Four previous contraventions in respect of the same provision within three years. | The greater of R2,7 million or 10% of the employer's turnover. |

When will the amendments come into effect?

The effective date is 1 January 2025.

BBBEE STATUS: LEVEL ONE CONTRIBUTOR

Our BBBEE verification is one of several components of our transformation strategy and we continue to seek ways of improving it in a meaningful manner.

PLEASE NOTE

This information is published for general information purposes and is not intended to constitute legal advice. Specialist legal advice should always be sought in relation to any particular situation. Cliffe Dekker Hofmeyr will accept no responsibility for any actions taken or not taken on the basis of this publication.

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