

GOVERNMENT NOTICE

DEPARTMENT OF LABOUR

No. 448

1 June 2015

EMPLOYMENT EQUITY ACT, 1998 (ACT 55 OF 1998 AS AMENDED)

CODE OF GOOD PRACTICE ON EQUAL PAY/ REMUNERATION FOR WORK OF EQUAL VALUE

I Mildred Nelisiwe Oliphant, Minister of Labour, hereby in terms of Section 54(1) of the Employment Equity Act, 1998 (Act No 55 of 1998 as amended), and on the advice of the Commission for Employment Equity, issue a Code of Good Practice on Equal Pay/Remuneration for Work of Equal Value.



MINISTER OF LABOUR
MN OLIPHANT, MP

DATE: 16/04/2015

CODE OF GOOD PRACTICE ON EQUAL PAY/REMUNERATION FOR WORK OF EQUAL VALUE

TABLE OF CONTENTS

1. OBJECTIVES	8
2. SCOPE	8
3. LEGAL FRAMEWORK AND PRINCIPLES	9
4. ELIMINATING UNFAIR DISCRIMINATION IN RESPECT OF PAY REMUNERATION	10
5. EVALUATING JOBS	10
6. COMPARING AND EVALUATING MALE- AND FEMALE-DOMINATED JOBS	12
7. FACTORS JUSTIFYING DIFFERENTIATION IN PAY/ REMUNERATION	13
8. PROCESS FOR EVALUATING JOBS FOR THE PURPOSE OF EQUAL PAY/ REMUNERATION FOR WORK OF EQUAL VALUE	14

1. OBJECTIVES

- 1.1. The objective of this Code is to provide practical guidance to employers and employees on how to apply the principle of equal pay/remuneration for work of equal value¹ in their workplaces.
- 1.2. This Code seeks to promote the implementation of pay/remuneration equity in the workplace by employers, including the State, employees and trade unions through human resources policies, practices and job evaluation processes.
- 1.3. The Code further aims to encourage employers to manage their pay/remuneration policies, practices and proper consultation processes within a sound governance framework in order to drive and maximise on the principle of equal pay/remuneration for work of equal value that is fair, free from unfair discrimination and consistently applied.

2. SCOPE

- 2.1. This Code is issued in terms of section 54 of the Employment Equity Act, 1998 (Act No. 55 of 1998) as amended, its regulations and other Codes issued in terms of the Act. In particular, this Code must be read in conjunction with-
 - 2.1.1. the regulations made by the Minister of Labour in terms of section 6(5) of the Employment Equity Amendment Act, 2013 on the criteria and methodology for assessing work of equal value²; and
 - 2.1.2. the Code of Good Practice on the Integration of Employment Equity into Human Resources Policies, Practices and Procedures (HR Code), in particular Part B dealing with Terms and Conditions of Employment.
- 2.2. This Code applies to all employers and employees covered by the Act. To obtain greater clarity as to the definition of an employee, reference should be made to the Code of Good Practice: Who is an Employee issued by the National Economic Development and Labour Council (NEDLAC) in terms of the Labour Relations Act, 1995 (Act No.66 of 1995), as amended.
- 2.3. The Code promotes the elimination of unfair discrimination in respect of pay/remuneration by applying the principle of equal pay/remuneration for work of equal value.
- 2.4. The term “remuneration” as defined in the Basic Conditions of Employment Act³, 1997 (Act No. 75 of 1997), as amended and other labour legislation includes any payment in money or in kind, or both, made or owing to any person in return for working for another person, including the State.

¹ In this Code, “work of equal value” is used to include work that is the same or substantially the same or work of equal value as referred to in section 6(4) of the Act.

² Any reference to regulations in this Code refers to the Employment Equity Regulations, 2014.

³ BCEA Schedule on Calculation of Employee’s Remuneration in terms of Section 35(5), as published under GN 691, 23 May 2003, which provides guidance on calculating remuneration.

- 2.5. Employers must, therefore, examine all aspects of their pay/remuneration policies and practices to ensure compliance with the principle of equal pay/remuneration for work of equal value.
- 2.6. The code provides guidance when interpreting the Employment Equity Act (the Act) and its regulations.

3. LEGAL FRAMEWORK AND PRINCIPLES

- 3.1. Section 9(3) of the Constitution of the Republic of South Africa states that, “the State may not unfairly discriminate directly or indirectly against anyone on one or more grounds, including race, gender, sex, pregnancy, marital status, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture, language and birth”.
- 3.2. Furthermore, Section 9(4) of the Constitution states that, “no person may unfairly discriminate directly or indirectly against anyone on one or more grounds in terms of subsection (3). National legislation must be enacted to prevent or prohibit unfair discrimination”.
- 3.3. The International Labour Organisation (ILO) Equal Remuneration Convention 1951 (No. 100), which South Africa ratified in 2000, obliges ratifying member States to give effect to the principle of equal pay/remuneration for men and women workers for work of equal value.
- 3.4. The obligation to eliminate unfair discrimination in respect of pay/remuneration arises under Chapter 2 of the Act. Section 5 of the Act requires employers to take positive steps to eliminate unfair discrimination in their workplaces.
- 3.5. Every employer must take steps to promote equal opportunity in the workplace by eliminating unfair discrimination in any employment policy or practice.
- 3.6. Employers must ensure that pay/remuneration policies and practices are applied consistently without unfair discrimination on the basis of any one or combination of the listed or on any other arbitrary grounds.
- 3.7. Section 6(4) of the Act, which came into effect on 1 August 2014, provides that a difference in terms and conditions of employment between employees of the same employer, performing the same or substantially the same work or work of equal value, that is directly or indirectly based on any one or more of the grounds listed in subsection (1) or on any other arbitrary ground, is unfair discrimination.
- 3.8. Section 27 of the Act requires designated employers to report on the pay/remuneration and benefits received by employees in each occupational level of their workforce, and where there are disproportionate income differentials or unfair discrimination by virtue of a difference in terms and conditions of employment, employers must take steps to progressively reduce these differentials. Guidance in this regard is provided for in the Code of Good Practice on the Integration of Employment Equity into Human Resources Policies, Practices and Procedures (HR Code).

- 3.9. Regulations 2 to 7 of the Employment Equity Regulations, 2014, published on 1 August 2014 cover the definition of work of equal value, criteria and the methodology for assessing work of equal value.

4. ELIMINATING UNFAIR DISCRIMINATION IN RESPECT OF PAY/ REMUNERATION

- 4.1. An employer must, in order to eliminate unfair discrimination, take steps to eliminate differences in terms and conditions of employment, including pay/remuneration, of employees who perform the same or substantially the same work or work of equal value that are directly or indirectly based on one or more listed or on any other arbitrary ground.
- 4.2. The principle of equal pay/remuneration for work of equal value addresses a specific aspect of workplace discrimination and the undervaluing of work on the basis of a listed or on any other arbitrary ground in terms of Section 6(1) of the Act.
- 4.3. In South Africa, for historical reasons, the undervaluing of work has the greatest significance when examining work performed by employees who are female, black or those with disabilities. However, differences based on any of the listed or any other arbitrary ground may constitute unfair discrimination.
- 4.4. When examining whether the obligation to apply pay/remuneration equity in the workplace is being complied with, three key issues require scrutiny-
- 4.4.1. Are the jobs that are being compared the same, substantially the same or of equal value in terms of an objective assessment?
- 4.4.2. Is there a difference in the terms and conditions of employment, including pay/remuneration, of the employees in the jobs that are being compared?
- 4.4.3. If there are differences in the terms and conditions of employment, can these be justified on fair and rational grounds?
- 4.5. Differences in terms and conditions of employment, including pay/remuneration, of employees of the same employer may not necessarily constitute unfair discrimination where the complainant and the comparator do not perform the same, similar or work of equal value.
- 4.6. A difference in pay/remuneration will only be unfair discrimination if the differences are directly or indirectly based on race, sex, gender, disability or any other listed or on any other arbitrary ground.

5. EVALUATING JOBS

- 5.1. Article 3 of the ILO Equal Remuneration Convention 1951 (No. 100) requires that “*measures shall be taken to promote objective appraisal of jobs on the basis of the work to be performed*”.

- 5.2. While the Convention only applies to equal pay/remuneration for work of equal value between men and women, the need to conduct an objective appraisal of jobs is a necessary element of applying the principle in all contexts, in particular, to eliminate residual structural inequalities related to legislated and practised racial discrimination that applied in the labour market in South Africa.
- 5.3. In order to ascertain the value of the job for the purpose of applying the principle of equal pay/remuneration for work of equal value, an objective assessment in accordance with relevant and appropriate criteria must be undertaken.
- 5.4. The basic criteria commonly used to evaluate the value of jobs by an employer are-
- 5.4.1. The responsibility demanded of the work, including responsibility for people, finances and material.** This includes tasks that have an impact on who is accountable for delivery of the enterprise's or organisation's goals, for example, its profitability, financial soundness, market coverage and the health and safety of its clients. It is important to consider the various types of responsibility associated with the enterprise's or organisation's goals independently from the hierarchical level of the job or the number of employees it involves supervising.
- 5.4.2. The skills, qualifications, including prior learning and experience required to perform the work, whether formal or informal.** This includes knowledge and skills which are required for a job. What is important is not how these were acquired but rather that their content corresponds to the requirements of the job being evaluated. Qualifications and skills can be acquired in various ways including academic or vocational training certified by a diploma, paid work experience in the labour market, formal and informal training in the workplace and volunteer work.
- 5.4.3. Physical, mental and emotional effort required to perform the work.** This refers to the difficulty related to and the fatigue and tension caused by performing job tasks. It is important not to only consider physical efforts but also take mental and psychological effort into consideration.
- 5.4.4. The assessment of working conditions may include an assessment of the physical environment, psychological conditions, time when and geographic location where the work is performed.** For example, one may consider factors such as noise levels and frequent interruptions for office jobs as conditions of work.
- 5.5. Best practice indicates that the four criteria should form part of every job evaluation. These four criteria are generally regarded as being sufficient for evaluating all the tasks performed in an organisation, regardless of the economic sector in which the enterprise operates.
- 5.6. The weighting attached to each of these factors may vary depending on the sector, employer and the job concerned. These factors do not constitute any particular preference in respect of weighting allocation.

- 5.7. In addition, employers may take into account the conditions under which work is performed in evaluating the value of work. However, many employers take working conditions into account when determining pay/remuneration by, for example, paying an allowance, rather than as part of the job evaluation process.

6. COMPARING AND EVALUATING MALE- AND FEMALE-DOMINATED JOBS

- 6.1. Discrimination in pay/remuneration based on the sex of employees is an international phenomenon found to a greater or lesser degree in all countries. The ILO has suggested that due to-

6.1.1. stereotypes with regard to women's work;

6.1.2. traditional job evaluation methods that were designed on the basis of male dominated jobs; and

6.1.3. weaker bargaining power on behalf of female workers.⁴

- 6.2. The use of job evaluation does, in itself, not ensure that there is an absence of unfair discrimination.

6.2.1. It is acknowledged that traditional job evaluation methods were designed on the basis of male-dominated jobs.

6.2.2. Predominantly female jobs often involve different requirements from those of predominantly male jobs, whether in terms of qualifications, effort, responsibility or working conditions.

6.2.3. Traditionally, female-dominated jobs were evaluated based on methods designed mainly for male-dominated jobs, which partly accounts for wage discrimination.

6.2.4. It is important to be vigilant when selecting the method of job evaluation and to ensure that its content is equally tailored to both female-dominated and male-dominated jobs. For instance, responsibility for money or equipment is often valued more than other forms of responsibility.

6.2.5. Jobs involving caring for others or cleaning may be undervalued because of the erroneous assumption that the skills involved in these jobs are intrinsic to nature of women and not acquired through learning and experience.⁵

- 6.3. Employers may therefore be required to establish the value of male- and female-dominated jobs in order to be able to ascertain whether particular jobs have been undervalued and to align female-dominated jobs with comparable male-dominated jobs in the organisation.

⁴ See, for instance, *Promoting Equity Gender-Neutral Job Evaluation: A Step-by-Step Guide* (ILO, Geneva, 2008) and *Equal Pay: An introductory guide* (ILO, Geneva, 2013).

⁵ *Equal Pay: An introductory guide* (ILO, Geneva, 2013), Part 5.

- 6.4. The fact that there are no comparable male-dominated jobs to female-dominated jobs within the employer's organisation, does not necessarily imply that there is no discrimination on grounds of sex or gender (or other prescribed grounds).
- 6.5. An employee may base a claim on the ground that they would have received higher pay/remuneration if they were not female. To succeed in such a claim, the employee would have to show that a male employee hired to perform the work would have been employed on different terms and conditions of employment.

7. FACTORS JUSTIFYING DIFFERENTIATION IN PAY/ REMUNERATION

- 7.1. Once jobs have been evaluated and/or graded, the various jobs are allocated pay/remuneration packages in accordance with the pay/remuneration philosophy of the employer and the value of the jobs. Employers are required to ensure that unfair discrimination does not occur at any of these stages.
- 7.2. Where employees perform work that is the same or substantially the same or is work of equal value, a difference in terms and conditions of employment, including pay/remuneration, is not unfair discrimination if the differentiation is not based on a listed or on any other arbitrary ground in terms of section 6(1) of the Employment Equity Act, as amended.
- 7.3. Regulation 7 of the Employment Equity regulations lists a number of grounds which are commonly taken into account in determining pay/remuneration. Subject to what is stated below, it is not unfair discrimination if the difference is fair and rational and is based on any one or a combination of the following factors –
 - 7.3.1. the individuals' respective seniority or length of service;
 - 7.3.2. the individuals' respective qualifications, ability, competence or potential above the minimum acceptable levels required for the performance of the job;
 - 7.3.3. the individuals' respective performance, quantity or quality of work, provided that employees are equally subject to the employer's performance evaluation system, and that the performance evaluation system is consistently applied;
 - 7.3.4. where an employee is demoted as a result of organisational restructuring or for any other legitimate reason without a reduction in pay/remuneration and fixing the employee's salary at this level until the pay/remuneration of employees in the same job category reaches this level;
 - 7.3.5. where an individual is employed temporarily in a position for purposes of gaining experience or training and as a result receives different pay/remuneration or enjoys different terms and conditions of employment;
 - 7.3.6. the existence of a shortage of relevant skill in a particular job classification; and

7.3.7. any other relevant factor that is not unfairly discriminatory in terms of Section 6(1) of the Act.

- 7.4. These factors may not be used to determine pay/remuneration in a manner that is biased or indirectly discriminates against an employee or group of employees based on a listed or on any other arbitrary ground in terms of section 6(1) of the Act.

8. PROCESS FOR EVALUATING JOBS FOR THE PURPOSE OF EQUAL PAY/ REMUNERATION FOR WORK OF EQUAL VALUE

- 8.1. The following process may be used to determine equal pay/remuneration for work of equal value-

- 8.1.1. determine the scope of the audit to be conducted to identify inequalities in pay/remuneration on account of gender, race, disability or any other listed or on any other arbitrary ground;
 - 8.1.2. identify jobs that would be subjected to the audit;
 - 8.1.3. ensure that job profiles or job descriptions exist and are current before evaluating jobs;
 - 8.1.4. utilise a job evaluation and/or grading system that is fair and transparent and does not have the effect of discriminating unfairly on any listed or arbitrary ground;
 - 8.1.5. compare jobs that are the same, similar or of equal value in the employer's own organisation or company. This should include comparing female-dominated jobs with male-dominated jobs as well as other jobs that may have been undervalued due to, race, disability or other discriminatory grounds;
 - 8.1.6. select a method of comparing pay/remuneration, both in money and kind, in the relevant jobs: this can be done by using either the average or the median earning of employees in the relevant jobs as the basis for pay/remuneration comparisons or by using another method that will compare pay/remuneration in a fair and rational manner;
 - 8.1.7. identify the reasons for differentiating in pay/remuneration as contemplated by Regulation 7 in the Employment Equity regulations and determine whether they are justifiable;
 - 8.1.8. where differentiation is found not to be justifiable, determine how to address inequalities identified, without reducing the pay/remuneration of employees to bring about equal remuneration; and
 - 8.1.9. monitor and review the process annually.
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