

REPUBLIC OF SOUTH AFRICA

EMPLOYMENT EQUITY AMENDMENT BILL

*(As introduced in the National Assembly (proposed section 75); explanatory summary of
Bill published in Government Gazette No. 35799 of 19 October 2012)
(The English text is the official text of the Bill)*

(MINISTER OF LABOUR)

[B 31—2012]

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GENERAL EXPLANATORY NOTE:

[] Words in bold type in square brackets indicate omissions from existing enactments.

_____ Words underlined with a solid line indicate insertions in existing enactments.

BILL

To amend the Employment Equity Act, 1998, so as to substitute or amend certain definitions; to further regulate the prohibition of unfair discrimination against employees; to further regulate the certification of psychometric testing used to assess employees; to provide for the referral of certain disputes for arbitration to the Commission for Conciliation, Mediation and Arbitration; to make further provision regarding the evidentiary burden of proof in allegations of unfair discrimination; to further regulate the preparation and implementation of employment equity plans and the submission of reports by designated employers to the Director-General; to further regulate undertakings by designated employers to comply with requests by labour inspectors; to further regulate the issuing of compliance orders; to provide afresh for the assessment of compliance by designated employers with employment equity and the failure of those employers to comply with requests and recommendations made by the Director-General; to extend the powers of commissioners in arbitration proceedings; to provide for that fines payable in terms of the Act must be paid into the National Revenue Fund; to extend the Minister's power to issue a code of good practice and to delegate certain powers; to further regulate when a person whose services have been procured for a client by a temporary employment service is deemed to be an employee of that client; to increase and provide for the increase by the Minister of certain fines which may be imposed under the Act; and to amend and to provide for the amendment by the Minister of annual turnover thresholds applicable to designated employers; and to provide for matters connected therewith.

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

Amendment of section 1 of Act 55 of 1998, as amended by section 40 of Act 65 of 2002, section 26 of Act 68 of 2002 and section 25 of Act 52 of 2003

1. Section 1 of the Employment Equity Act, 1998 (hereinafter referred to as the principal Act), is hereby amended—

- (a) by the substitution in the definition of “designated employer” for paragraph (d) of the following paragraph:

“(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; and”;

- (b) by the substitution for the definition of “designated groups” of the following definition:
- “**‘designated groups’** means black people, women and people with disabilities who—
- (a) are citizens of the Republic of South Africa by birth or descent; or 5
- (b) became citizens of the Republic of South Africa by naturalisation—
- (i) before 27 April 1994; or
- (ii) 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;” 10
- (c) by the substitution for the definition of “labour inspector” of the following definition:
- “**‘labour inspector’** means a person appointed in terms of section [65] 63 of the Basic Conditions of Employment Act;” and
- (d) by the substitution for the definition of “serve” or “submit” of the following definition: 15
- “**‘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; or 20
- (c) to send or transmit it in any other prescribed manner;”.

Amendment of section 2 of Act 55 of 1998

2. Section 2 of the principal Act is hereby amended by the substitution for paragraph (b) of the following paragraph:
- “(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.”. 25

Amendment of section 6 of Act 55 of 1998

3. Section 6 of the principal Act is hereby amended— 30
- (a) by the substitution for subsection (1) of the following subsection:
- “(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, HIV status, conscience, belief, political opinion, culture, language, **[and]** birth or on any other arbitrary ground.”; and 35
- (b) by the addition of the following subsections:
- “(4) 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), is unfair discrimination. 40
- (5) The Minister, after consultation with the Commission, may prescribe the criteria and prescribe the methodology for assessing work of equal value contemplated in subsection (4).” 45

Amendment of section 8 of Act 55 of 1998

4. Section 8 of the principal Act is hereby amended by the deletion of the word “and” at the end of paragraph (b), the insertion of the word “and” at the end of paragraph (c) and the addition of the following paragraph: 50
- “(d) has been certified by the Health Professions Council of South Africa established by section 2 of the Health Professions Act 1974 (Act No. 56 of 1974), or any other body which may be authorised by law to certify those tests or assessments.”.

Amendment of section 10 of Act 55 of 1998**5. Section 10 of the principal Act is hereby amended—**

- (a) by the deletion in subsection (6) of the word “or” at the end of paragraph (a) and the insertion in that subsection after paragraph (a) of the following subsection:

“(aA) an employee may refer the dispute to the CCMA for arbitration if—

- (i) the employee alleges unfair discrimination on the grounds of sexual harassment; or
- (ii) in any other case, that employee earns less than the amount stated in the determination made by the Minister in terms of section 6(3) of the Basic Conditions of Employment Act; or”;

- (b) by the substitution in subsection (6) for paragraph (b) of the following paragraph:

“(b) any party to the dispute may refer it to the CCMA for arbitration if all the parties to the dispute [may] consent to arbitration of the dispute.”; and

- (c) by the addition of the following subsection:

“(8) A person affected by an award made by a commissioner of the CCMA pursuant to a dispute contemplated in subsection (6)(aA) may appeal to the Labour Court against that award within 14 days of the date of the award, but the Labour Court, on good cause shown, may extend the period within which that person may appeal.”.

Substitution of section 11 of Act 55 of 1998**6. The following section is hereby substituted for section 11 of the principal Act:****“Burden of proof**

11. (1) If unfair discrimination is alleged on a ground listed in section 6(1), the employer against whom the allegation is made must prove, on a balance of probabilities, that such discrimination—

- (a) did not take place as alleged; or
- (b) is rational and not unfair, or is otherwise justifiable.

(2) If unfair discrimination is alleged on an arbitrary ground, the complainant must prove, on a balance of probabilities, that—

- (a) the conduct complained of is not rational;
- (b) the conduct complained of amounts to discrimination; and
- (c) the discrimination is unfair.”.

Amendment of section 15 of Act 55 of 1998**7. Section 15 of the principal Act is hereby amended—**

- (a) by the substitution for subsection (1) of the following subsection:

“(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.”; and

- (b) by the substitution in subsection (2)(d) for subparagraph (i) of the following subparagraph:

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

Amendment of section 16 of Act 55 of 1998**8. Section 16 of the principal Act is hereby amended by the substitution in subsection (2) for paragraph (a) of the following paragraph:**

“(a) employees from across all occupational [categories and] levels of the employer’s workforce;”.

Amendment of section 19 of Act 55 of 1998

9. Section 19 of the principal Act is hereby amended by the substitution for subsection (2) of the following subsection:

“(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.”.

Amendment of section 20 of Act 55 of 1998

10. Section 20 of the principal Act is hereby amended—

(a) by the substitution in subsection (2) for paragraph (c) of the following paragraph:

“(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;”;

(b) by the addition of the following subsection:

“(7) The Director-General may apply to the Labour Court to impose a fine in accordance with Schedule 1, if a designated employer fails to prepare or implement an employment equity plan in terms of this section.”.

Amendment of section 21 of Act 55 of 1998

11. Section 21 of the principal Act is hereby amended—

(a) by the substitution for subsection (1) of the following subsection:

“(1) A designated employer **[that employs fewer than 150 employees]** must—

(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**

(b) **thereafter,** submit a report to the Director-General once every **[two years]** year, on the first working day of October or on such other date as may be prescribed.”;

(b) by the deletion of subsection (2);

(c) by the substitution for subsections (3) and (4) of the following subsections, respectively:

“(3) Despite **[subsections (1) and (2)]** subsection (1), an employer that becomes a designated employer [that submits its first report in the 12-month period preceding] on or after the first working day of [October, should] April but before the first working day of October, must only submit its [second] first report on the first working day of October in the following year or on such other date contemplated in subsection (1).

(4) The **[reports]** report referred to in **[subsections (1) and (2)]** subsection (1) must contain the prescribed information and must be signed by the chief executive officer of the designated employer.”;

(d) by the insertion after subsection (4) of the following subsections:

“(4A) An employer that is not able to submit a report to the Director-General by the first working day of October in terms of subsection (1) must notify the Director-General in writing before the last working day of August in the same year giving reasons for its inability to do so.

(4B) The Director-General may apply to the Labour Court to impose a fine in accordance with Schedule 1, if an employer—

(a) fails to submit a report in terms of this section;

- (b) fails to notify and give reasons to the Director-General in terms of subsection (4A); or
- (c) has notified the Director-General in terms of subsection (4A) but the reasons are false or invalid.”; and
- (e) by the deletion of subsection (5).

Amendment of section 27 of the Act 55 of 1998

12. Section 27 of the principal Act is hereby amended—

- (a) by the substitution for the heading of the following heading:
“Income differentials and discrimination”; and
- (b) by the substitution for subsections (1) and (2) of the following subsections, respectively:
 - “(1) Every designated employer, when reporting in terms of section 21(1) **[and (2)]**, must submit a statement, as prescribed, to the Employment Conditions Commission established by section 59 of the Basic Conditions of Employment Act, on the remuneration and benefits received in each occupational **[category and]** level of that employer’s workforce.
 - (2) Where disproportionate income differentials, or unfair discrimination by virtue of a difference in terms and conditions of employment contemplated in section 6(4), are reflected in the statement contemplated in subsection (1), a designated employer must take measures to progressively reduce such differentials subject to such guidance as may be given by the Minister as contemplated in subsection (4).”.

Substitution of section 36 of Act 55 of 1998

13. The following section is hereby substituted for section 36 of the principal Act:

“Undertaking to comply

- 36. (1)** A labour inspector **[must]** may request and obtain a written undertaking from a designated employer to comply with **[paragraphs (a) to (j)]** paragraph (a), (b), (f), (h), (i) or (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.
- (2) If a designated employer does not comply with a written undertaking within the period stated in the written undertaking, the Labour Court may, on application by the Director-General, make the undertaking, or any part of the undertaking, an order of the Labour Court.”.

Amendment of section 37 of Act 55 of 1998

14. Section 37 of the principal Act is hereby amended—

- (a) by the substitution for subsection (1) of the following subsection:
 - “(1) A labour inspector may issue a compliance order to a designated employer if that employer—
 - (a) refused to give a written undertaking in terms of section 36, when requested to do so; or**

- (b) **failed to comply with a written undertaking given in terms of section 36]** has failed to comply with section 16, 17, 19, 22, 24, 25 or 26 of this Act.”;
- (b) by the substitution for subsection (3) of the following subsection: 5
 “(3) A **[labour inspector who issues a compliance order must serve**
a] copy of **[that]** the compliance order must be served on the employer
 named in it.”; and
- (c) by the substitution for subsections (5) and (6) of the following subsections,
 respectively: 10
 “(5) A designated 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 39].
 (6) If a designated employer does not comply with an order within the
 period stated in it, **[or does not object to that order in terms of section**
39,] the Director-General may apply to the Labour Court to make the 15
 compliance order an order of the Labour Court.”.

Repeal of sections 39 and 40 of Act 55 of 1998

15. Sections 39 and 40 of the principal Act are hereby repealed.

Substitution of section 42 of Act 55 of 1998

16. The following section is hereby substituted for section 42 of the principal Act: 20

“Assessment of compliance

- 42. (1)** 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]** may, in addition to the factors stated in section 15, take **[into account all of]** the following into account: 25
- (a) The extent to which suitably qualified people from and amongst the different 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 30
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** 35
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** 40
labour turnover;]
- (b) **[progress made in implementing employment equity by other designated employers operating under comparable circumstances and within the same sector]** reasonable steps taken by a designated employer to train suitably qualified people from the designated 45
groups;
- (c) reasonable **[efforts made]** steps taken 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 50
designated groups; **[and]**
- (dA) reasonable steps taken by an employer to appoint and promote suitably qualified people from the designated groups; and
- (e) any other prescribed factor.

(2) The Minister, after consultation with NEDLAC, may issue a regulation in terms of section 55 which must be taken into account by any person who is required to determine whether a designated employer is implementing employment equity in compliance with this Act.

(3) Without limiting subsection (1)(a), the regulation made in terms of subsection (2) may specify the circumstances under which an employer's compliance should be determined with reference to the demographic profile of either the national economically active population or the regional economically active population.

(4) In any assessment of its compliance with this Act or in any court proceedings, a designated employer may raise any reasonable ground to justify its failure to comply."

Substitution of section 45 of Act 55 of 1998

17. The following section is hereby substituted for section 45 of the principal Act:

"Failure to comply with Director-General's request or recommendation

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

(a) for an order directing the employer to comply with the request or recommendation; or

(b) if the employer fails to justify the failure to comply with the request or recommendation, to impose a fine in accordance with Schedule 1 on the employer.

(2) If an employer notifies the Director-General in writing within the period specified in a request or recommendation that it does not accept the request or recommendation, the Director-General must institute proceedings in terms of subsection (1) within—

(a) 90 days of receiving the employer's notification, in the case of a request; or

(b) 180 days of receiving the employer's notification, in the case of a recommendation.

(3) If the Director-General does not institute proceedings within the relevant period contemplated in subsection (2), the request or recommendation, as the case may be, lapses.

(4) Any challenge to the validity of the Director-General's request or recommendation may only be made in the proceedings contemplated in subsection (1)."

Amendment of section 48 of Act 55 of 1998

18. Section 48 of the principal Act is hereby amended by the addition of the following subsection, the existing section becoming subsection (1):

"(2) An award made by a commissioner of the CCMA hearing a matter in terms of section 10(6)(aA) or (b) may include any order referred to in section 50(2)(a) to (c), read with the changes required by the context, but an award of damages referred to in section 50(2)(b) may not exceed the amount stated in the determination made by the Minister in terms of section 6(3) of the Basic Conditions of Employment Act."

Amendment of section 50 of Act 55 of 1998

19. Section 50 of the principal Act is hereby amended—

(a) by the substitution in subsection (1) for paragraph (h) of the following paragraph:

"(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] an administrative action in terms of this Act on any grounds that are permissible in law;” and

(b) by the addition of the following subsection:

“(5) A fine payable in terms of this Act must be paid into the National Revenue Fund referred to in section 213 of the Constitution.”.

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Amendment of section 53 of Act 55 of 1998

20. Section 53 of the principal Act is hereby amended by the addition of the following subsection:

“(5) The Minister may in the code of good practice set out factors that must be taken into account by any person assessing whether an employer complies with Chapter II or Chapter III.”.

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Amendment of section 55 of Act 55 of 1998

21. Section 55 of the principal Act is hereby amended by the substitution for subsection (2) of the following subsection:

“(2) The Minister **[must]** may 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 than 150 employees.”.

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Amendment of section 56 of Act 55 of 1982

22. Section 56 of the principal Act is hereby amended by the substitution for subsection (1) of the following subsection:

“(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 29(1), (5) and (7), **[53(2),]** 54, 55, 59(4) and 61(4).”.

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Amendment of section 57 of Act 55 of 1998

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23. Section 57 of the principal Act is hereby amended by the substitution for subsection (1) of the following subsection:

“(1) For purposes of Chapter III of this Act, a person whose services have been procured for, or provided to, a client by a temporary employment service is deemed to be the employee of that client, where that person’s employment with the client is of indefinite duration or for a period of **[three]** six months or longer.⁹”.

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Amendment of section 59 of Act 55 of 1998

24. Section 59 of the principal Act is hereby amended by the substitution for subsections (3) and (4) of the following subsections, respectively:

“(3) A person convicted of an offence in terms of this section may be sentenced to a fine not exceeding **[R10 000,00]** R30 0000,00.

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(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.”.

Amendment of section 61 of Act 55 of 1998

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25. Section 61 of the principal Act is hereby amended by the substitution for subsections (3) and (4) of the following subsections, respectively:

“(3) A person who contravenes a provision of this section commits an offence and may be sentenced to a fine not exceeding **[R10 000,00]** R30 0000,00.

9. In terms of section 198A(4)(b) of the Labour Relations Act employees who are procured for or provided to a client by a temporary employment service to perform work, other than work defined as “temporary services”, and who earn less than the threshold determined by the Minister of Labour in terms of section 6(2) of the Basic Conditions of Employment Act, are deemed to be employees of the client for the purposes of this Act.”.

(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.”.

Insertion of section 64A into Act 55 of 1998

26. The following section is hereby inserted in the principal Act after section 64: 5

“Amendment of annual turnover thresholds in Schedule 4

64A. The Minister may, after consultation with the Commission, by notice in the *Gazette*, amend the total annual turnover thresholds in Schedule 4 in order to counter the effect of inflation.”.

Substitution of Schedule 1 to Act 55 of 1998

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27. The following Schedule is hereby substituted for Schedule 1 to the principal Act:

“Schedule 1

MAXIMUM PERMISSIBLE FINES THAT MAY BE IMPOSED FOR CONTRAVENING THIS ACT

This Schedule sets out the maximum fine that may be imposed in terms of this Act for 15
the contravention of certain provisions of this Act.

<i>Previous Contravention</i>	<i>Contravention of any Provision of Sections 16 (read with 17), 19, [20, 21,] 22, 24, 25, 26 and [23] 43(2)</i>	<i>Contravention of any Provision of Sections 20, 21, 23 and 44(b)</i>
No previous contravention	[R500 000] <u>R1 500 000</u>	The greater of <u>R1 500 000</u> or 2% of the employer's turn-over
A previous contravention in respect of the same provision	[R600 000] <u>R1 800 000</u>	The greater of <u>R1 800 000</u> or 4% of the employer's turn-over
A previous contravention within the previous 12 months or two previous contraventions in respect of the same provision within three years	[R700 000] <u>R2 100 000</u>	The greater of <u>R2 100 000</u> or 6% of the employer's turn-over
Three previous contraventions in respect of the same provision within three years	[R800 000] <u>R2 400 000</u>	The greater of <u>R2 400 000</u> or 8% of the employer's turn-over
Four previous contraventions in respect of the same provision within three years	[R900 000] <u>R2 700 000</u>	The greater of <u>R2 700 000</u> or 10% of the employer's turn-over”.

Substitution of Schedule 4 to Act 55 of 1998

28. The following Schedule is hereby substituted for Schedule 4 to the principal Act:

“Schedule 4**TURNOVER THRESHOLD APPLICABLE TO DESIGNATED EMPLOYERS**

Sector or subsectors in accordance with the Standard Industrial Classification	Total annual turnover
Agriculture	[R2,00 m] R6,0m
Mining and Quarrying	[R7,50 m] R22,50m
Manufacturing	[R10,00 m] R30,00m
Electricity, Gas and Water	[R10,00 m] R30,00m
Construction	[R5,00 m] R15,00m
Retail and Motor Trade and Repair Services	[R15,00 m] R45,00m
Wholesale Trade, Commercial Agents and Allied Services	[R25,00 m] R75,00m
Catering, Accommodation and other Trade	[R5,00 m] R15,00m
Transport, Storage and Communications	[R10,00 m] R30,00m
Finance and Business Services	[R10,00 m] R30,00m
Community, Special and Personal Services	[R5,00m] R15,00m”.

Transitional provision

29. An employer who is a designated employer in terms of the principal Act immediately before section 11 of this Act takes effect, must report for the duration of the designated employer’s current employment equity plan as if section 21 of the principal Act has not been amended by this Act.

Short title and commencement

30. This Act is called the Employment Equity Amendment Act, 2012, and comes into operation on a date determined by the President by proclamation in the *Gazette*.

MEMORANDUM ON OBJECTS OF EMPLOYMENT EQUITY AMENDMENT BILL, 2012

1. BACKGROUND

The Bill seeks to amend the Employment Equity Act, 1998 (Act No. 55 of 1998) (“the EEA”). The EEA is one of the cornerstones of South Africa’s labour legislation. The proposed amendments are the first amendments since the EEA came into operation in 1998. In preparation for the drafting of the Bill, the Department of Labour (“the Department”) and representatives of organised business and labour undertook a labour law review and have engaged in extensive consultations over a period of almost one year with the National Economic Development and Labour Council (“NEDLAC”).

2. OBJECTS OF BILL

The objects of the Bill can be grouped under the following themes:

- Giving effect to and regulating the fundamental rights conferred by section 9 of the Constitution of the Republic of South Africa, 1996 (“the Constitution”);
- giving effect to obligations incurred by the Republic as a member state of the International Labour Organisation;
- enhancing the effectiveness of primary labour market institutions such as the Commission for Conciliation, Mediation and Arbitration (“the CCMA”) and the Labour Inspectorate;
- rectifying anomalies and clarifying uncertainties that have arisen from the interpretation and application of the EEA in the past decade.

3. DISCUSSION OF BILL

3.1 Amendment of section 1 of EEA

3.1.1 A revision of the definition of “designated groups” is proposed in order to ensure that beneficiaries of affirmative action in terms of Chapter III of the EEA are limited to persons who were citizens of South Africa before the democratic era, or would have been entitled to citizenship but for the policies of apartheid, and their descendants. This proposal will have the result that employment of persons who are foreign nationals or who have become citizens after April 1994, cannot assist employers to meet their affirmative action targets. This change is consistent with changes that are to be made to the Broad-based Black Economic Empowerment Act, 2003 (Act No. 53 of 2003).

3.1.2 In addition, changes are proposed to the definitions of “designated employer”, “labour inspector” and “‘serve’ or ‘submit’ ”.

3.2 Amendment of section 2 of EEA

The purpose of the EEA, in terms of section 2, is to achieve equity in the workplace by amongst other things “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”. In order to avoid confusion that the implementation of the EEA has brought to light, it is proposed that the EEA, in order to simplify the procedures, only refer to “occupational levels in the workforce” and not to “occupational categories and levels in the workforce”. A similar amendment is proposed to sections 15, 16, 19, 20, 27 and 42 of the EEA.

3.3 Amendment of section 6 of EEA

- 3.3.1 The amendment proposed to section 6(1) seeks to clarify that discrimination is not only permitted on a ground listed in that section but also on any other arbitrary ground. This change would create consistency with the terminology used in section 187(1)(f) of the Labour Relations Act, 1995 (Act No. 66 of 1995), that prohibits discriminatory dismissals.
- 3.3.2 A new section 6(4) is proposed in order to deal explicitly with unfair discrimination by an employer in respect of the terms and conditions of employment of employees doing the same or similar work or work of equal value. A differentiation based on a proscribed ground listed in section 6(1) or any other arbitrary ground will amount to unfair discrimination unless the employer can show that differences in wages or other conditions of employment are in fact based on fair criteria such as experience, skill, responsibility etc.
- 3.3.3 While the lack of a provision dealing expressly with wage discrimination on the basis of race and gender has been criticised by the International Labour Organisation, the Labour Court has ruled that unfair wage discrimination is prohibited. The proposed amendment is also consistent with the fact that the failure to apply the principle of equal pay for equal work is classified as an unfair practice in terms of the Promotion of Equality and the Prevention of Unfair Discrimination Act, 2000 (Act No. 4 of 2000) (“the Equality Act”). The new section 6(4), which will provide an explicit basis for equal pay claims of this type, gives effect to the constitutional protection of equality and achieves compliance with core international labour standards binding on South Africa.
- 3.3.4 A new section 6(5) is also proposed in order to empower the Minister of Labour (“the Minister”) to publish a code of good practice dealing with criteria and methodologies for accessing work of equal value contemplated in the proposed section 6(4).

3.4 Amendment of section 8 of EEA

Only psychometric tests that have been certified by the Health Professions Council of South Africa, or another body which is authorised to certify such tests, may be used in tests on employees.

3.5 Amendment of section 10 of EEA

- 3.5.1 At present, all unfair discrimination claims fall within the exclusive jurisdiction of the Labour Court. It is proposed that section 10(6) should be amended to allow parties to the dispute the option of referring the dispute for arbitration in the CCMA under the following circumstances:
- (a) An employee may refer the dispute to the CCMA for arbitration if the employee’s cause of action arises from an allegation of unfair discrimination on the grounds of sexual harassment;
 - (b) lower-paid employees (those earning less than the earnings threshold prescribed under section 6(3) of the Basic Conditions of Employment Act, 1997 (Act No. 75 of 1997)), will be entitled to refer any discrimination claim to the CCMA for arbitration;
 - (c) any party to the dispute may refer the dispute to the CCMA for arbitration if all the parties to the dispute consent thereto.
- 3.5.2 It is proposed in a new section 10(8) that a person affected by an arbitrator’s award in cases referred to in paragraph 3.5.1 may appeal to the Labour Court.

3.6 Amendment of section 11 of EEA

It is proposed that the provisions regulating the onus of proof in discrimination claims in section 11 should be consistent with the approach in respect of this issue in section 13 of the Equality Act.

3.7 Amendment of section 20 of EEA

A new section 20(7) is proposed in order to empower the Director-General to apply to the Labour Court to impose a fine on an employer who fails to prepare or implement an employment equity plan.

3.8 Amendment of section 21 of EEA

3.8.1 It is proposed that all designated employers should be required to submit annual reports on the implementation of their Affirmative Action Plans. At present, employers with between 50 and 150 employees are only required to report every second year. Since reporting can be done via the internet, this will not impose undue obligations on this category of employers.

3.8.2 Two new subsections to section 20 (subsections (4A) and (4B)) are proposed in order to empower the Director-General to apply to the Labour Court to impose a fine on an employer who without good reason fails to file the required annual report.

3.9 Amendment of sections 36, 37, 39, 40, 42 and 45 of EEA

3.9.1 The Bill seeks to simplify the enforcement provisions of the EEA by eliminating unnecessary mandatory steps as well as mandatory criteria that must be taken into account in assessing compliance with the EEA. The proposed amendments will promote effective enforcement and prevent the tactical use of reviews as a mechanism for delaying the enforcement process. It will not prevent employers aggrieved by decisions from challenging these decisions at an appropriate juncture.

3.9.2 The specific changes that are proposed are as follows:

- (a) The power to request employers to make written undertakings to comply with the EEA is made discretionary (section 36(1)). This is consistent with changes to be made to the Basic Conditions of Employment Act, 1997.
- (b) If an employer does not comply with a written undertaking that the employer has made, the Director-General may apply to have the undertaking made into an order of the Labour Court (section 36(2)).
- (c) The power of a labour inspector to issue a compliance order is clarified by specifying the provisions to which this power applies (section 37(1)).
- (d) The provisions dealing with the service of compliance orders are revised so that persons other than inspectors may effect service (section 37(3)).
- (e) The provisions for objections and appeals against compliance orders (sections 39 and 40) are repealed.
- (f) The factors that may be taken into account in determining whether an employer is implementing employment equity in compliance with the EEA are revised. The Minister is empowered to make regulations dealing with the assessment of such compliance, including specifying the circumstances under which an employer's compliance should be assessed by reference to the demographic profile or either the national or regional economically active population. It is also explicitly provided for that an employer may raise any reasonable ground to justify failure to

comply with the implementation of employment equity (section 42).

- (g) The Director-General may apply to the Labour Court for an order directing an employer to comply with a request made during a review of the employer's compliance with the EEA or a recommendation made as a result of such a review, or to impose a fine for not complying with a request or recommendation. It is proposed that any challenge to the validity of a request or recommendation by the Director-General may only be made during those proceedings. If the employer notifies the Director-General that it does not accept a request or recommendation, the request or recommendation lapses unless the Director-General institutes proceedings within the stipulated period (section 45).

3.10 Amendment of section 48 of EEA

A new section 48(2) is proposed, setting out the awards that a commissioner of the CCMA may make in hearing an unfair discrimination claim.

3.11 Amendment of section 50 of EEA

The Bill seeks to align the power of the Labour Court to review an administrative action in terms of the EEA with the Promotion of Administrative Justice Act, 2000 (Act No. 3 of 2000). It is also proposed in a new section 50(5) that any fine payable in terms of the EEA must be paid into the National Revenue Fund.

3.12 Amendment of section 53 of EEA

The Bill seeks to empower the Minister to issue a code of good practice which must be taken into account in order to assess whether employers are complying with the EEA for the purposes of awarding state contracts.

3.13 Amendment of section 55 of EEA

It is proposed in section 55(2) that the Minister's power to make regulations providing for separate and simplified forms and procedures for employers that employ fewer than 150 employees should be discretionary.

3.14 Amendment of section 56(1) of EEA

It is proposed that the Minister may also delegate the power to issue certificates confirming compliance by an employer with Chapter II, or Chapters II and III, of the EEA. Currently the Minister may not delegate that power.

3.15 Amendment of section 57 of EEA

The Bill seeks to amend section 57(1), which deals with the application of affirmative action provisions to employees placed to work by temporary employment services, to make it consistent with the new approach to temporary employment services contained in amendments proposed to the Labour Relations Act, 1995. Employees who are placed with a client by a temporary employment service for longer than six months will be deemed to be employees of the client for the purposes of affirmative action.

3.16 Amendment of sections 59 and 61 of EEA

The Bill seeks to increase the maximum fines that can be imposed for criminal offences contemplated in sections 59 and 61 from R 10 000 to R 30 000. In addition, it is proposed that the Minister should be empowered to adjust those fines in order to counter inflation without the concurrence of the Minister of Justice and Constitutional Development.

3.17 Insertion of section 64A in EEA

It is proposed that the Minister should be empowered to adjust the annual turnover threshold set out in Schedule 4 in order to counter the effect of inflation.

3.18 Amendment of Schedule 1 to EEA

The Bill seeks to adjust the maximum fines that may be imposed for contraventions of the EEA contained in Schedule 1 in order to reflect the change in the value of money. In addition, it is proposed that an employer's turnover may be taken into account in determining the maximum fine that may be imposed for substantive failures to comply with the EEA.

3.19 Amendment of Schedule 4 to EEA

The Bill proposes in Schedule 4 an increase of 200 per cent to the total annual turnover threshold that an employer must exceed in order to be classified as a designated employer.

4. CONSULTATION

The Employment Equity Commission, NEDLAC and the Economic Cluster were consulted.

5. FINANCIAL IMPLICATIONS

The amendments that deal with changes to dispute resolution and the functioning of the CCMA are estimated to lead to increased operating costs for the CCMA and an increase in its baseline budget.

6. PARLIAMENTARY PROCEDURE

- 6.1 The State Law Advisers and the Department of Labour are of the opinion that this Bill 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.
- 6.2 The State Law Advisers are of the opinion that it is not necessary to refer this Bill to the National House of Traditional Leaders in terms of section 18(1)(a) of the Traditional Leadership and Governance Framework Act, 2003 (Act. No. 41 of 2003), since it does not contain provisions pertaining to customary law or customs of traditional communities.