

EMPLOYMENT EQUITY ACT: ACT NO. 55 OF 1998

EMPLOYMENT EQUITY AMENDMENT ACT, NO. 47 OF 2014

(Copies of the Acts can be downloaded from the Department of Labour Website: www.labour.gov.za.
(Click the Legislation tab and scroll down to the relevant Act.)

Employment Equity Act No 55 of 1998 and Employment Equity Amendment Act no 47 of 2014

The information in this document reflects:

- The objectives of the legislation
- Who must do what
- By when must it be done
- Penalties for failing to comply.

It does not deal with all the provisions such as the Commission for Employment Equity, legal proceedings and the powers of commissioners in arbitration proceedings. The focus is on the needs of business.

What is Meant by “equitable”?

According to businessdictionary.com the meaning of “equitable” is: ***A remedy or solution that is ethically or legally just and reasonable under the circumstances, but may or may not be wholly satisfactory to any or all the involved parties.*** It therefore follows that Employment Equity is ethically and legally just and reasonable under the circumstances that currently prevail in South Africa. Compliance with legislation that aims to redress past inequalities is therefore necessary.

What are the Objectives of the Legislation?

The aim of the legislation is to:

- Remove unfair discrimination in the workplace and to replace it with equal opportunities and fair treatment in employment.
- Introduce measures to remedy disadvantages in employment that are experienced by certain groups, referred to as “designated groups” to ensure that they get fair representation in all occupational categories and levels in the workforce.

Affirmative action measures are key components of the objectives of the legislation.

Who or what are Designated Groups?

A designated group means black people, women, or people with disabilities.

What is the Intention of Affirmative Action Measures?

Affirmative action measures are intended to ensure that suitably qualified employees from designated groups have equal employment opportunity and are equitably (fairly) represented in all occupational categories and levels of the workforce.

What Comprise Affirmative Action Measures?

Affirmative action measures must include:

- Identification and elimination of barriers which have an adverse impact on designated groups
- Actions which promote diversity
- Making reasonable accommodation for people from designated groups

- Retention, development and training of persons from designated groups, including skills development
- Preferential treatment and numerical goals to ensure equitable representation.

NB: Quotas are excluded.

Who Must Comply with the Legislation?

All employers and employees must comply with certain provisions while additional provisions apply to designated employers.

Who are designated employers?

The following employers are “designated”.

- All organs of state *except local government, the National Defence Force, the National Intelligence Agency and the South African Secret Service.*
- Employers who have 50 or more employees, or a total annual turnover as reflected in the table below. (The annual turnover limit was amended by Act 47 of 2013: Employment Equity Amendment Act, 2013. The provisions came into effect on 08 August 2014.)

	Sector / sub-sector: Standard Industrial classification	Total Annual Turnover
1.	Agriculture	R6 million
2.	Catering, Accommodation and other Trade	R15 million
3.	Community, Special and Personal Services	R15 million
4.	Construction	R15 million
5.	Electricity, Gas and Water	R30 million
6.	Finance and Business Services	R30 million
7.	Manufacturing	R30 million
8.	Mining and Quarrying	R22,5 million
9.	Retail and Motor Trade and Repair Services	R45 million
10.	Transport, Storage and Communications	R30 million
11.	Wholesale Trade, Commercial Agents and Allied Services	R75 million

- Any employer who is not covered in the table above and who wishes to become a “designated employer” can do so by notifying the Director-General: Labour of an intention to comply with the requirements applicable to designated employers. The Contact details are:

Mr Lamati

Director-General: Labour

Laboria House

215 Francis Baard Street

Private Bag X117

Pretoria 0001

Telephone: 012 309 4126

Cell: 071 631 6420

Fax: 012 309 4625

Email: Sandisiwe.Kaba@labour.gov.za.

What Must Employees do?

Employees have an obligation to draw the attention of an employer to alleged contraventions, be it by the employer or an employee.

If the employer fails to address the allegation he/she is regarded as guilty of the contravention, unless he/she can prove that it was not reasonably practical to prevent the behaviour.

NB: Temporary employment services (TES) persons are regarded as employees.

What are Employers not Allowed to do?

Employers must not:

- Discriminate, whether fairly or unfairly, against an employee in any employment policy or practice, irrespective of the reasons. There must be no discrimination on the basis of race, gender, pregnancy, marital status, family responsibility, ethnic or social origin, skin colour, sexual orientation, age, disability, religion, HIV status, conscience, belief, political opinion, culture, language or birth.
- Require employees to undergo medical tests unless legislation allows or requires it. Testing to determine an employee's HIV status is not permitted unless the Labour Court regards it as justifiable. Medical testing may be permitted if it is regarded as necessary in the light of medical facts, employment conditions, social policy, the fair distribution of employee benefits or the inherent requirements of the job. For example, health care workers who come into contact with patients with communicable diseases such as tuberculosis may be required to undergo screening for the disease.
- Psychological testing and similar assessments. This can only be done if the test is scientifically valid and reliable, can be applied fairly to all employees, and is not biased against any employee or group.

Since the objective of the Act is to eliminate injustices of the past, it is not considered unfair to:

- Take measures that promote the objectives of the Act
- Differentiate against, exclude or favour any person on the basis of a fundamental requirement of a job i.e. a person should not be employed to carry out a job if it would place him or her in danger or if it would be difficult for him or to perform the duties. For example, a colour blind person should not be employed as an electrician since electrical connections are based on the identification of colour-coded wires.

What must all Employers (whether designated or not) do or not do?

All employers must:

- Promote equal opportunities in their workplaces
- Eliminate unfair discrimination in all their employment policies and practices

NB: Harassment of an employee is regarded as discrimination and is prohibited on any of the grounds mentioned above.

What, in Addition, must a Designated Employer do?

In addition, a designated employer must:

- Carry out an analysis of employment policies, practices, procedures, and working environment so as to identify employment barriers that adversely affect members of designated groups. The analysis must also include the development of a profile of the workforce within each occupational category and level to determine the under-representation of persons from the designated groups.
- Take reasonable steps to consult with employees representing the diverse interests of the workforce and reach agreement. If the company is unionised, consultation should be with the

relevant trade union. If the company is not unionised, employees can nominate persons to represent them. Consultation can also take place directly with the workers themselves. The party with whom consultation takes place must reflect the interests of employees from all occupational categories and levels of the workforce including employees from both the designated and non-designated groups. The analysis must identify employment barriers that adversely impact on persons from the designated groups

- Disclose all relevant information to the consulting parties that will allow effective consultation to take place.

NB: The employer is not required to disclose information that is:

- ***Legally privileged***
- ***Confidential and, if disclosed, may cause substantial harm to an employee or the employer***
- ***Private personal information relating to an employee, unless that employee consents to the disclosure of that information.***

- On completion of the analysis draw up an “Employment Equity Plan”. The plan must achieve reasonable progress towards employment equity in the employer’s workplace.

What Must the Plan Include?

The plan must include:

- Objectives to be achieved for each year of the plan
- Affirmative action measures to close the gaps identified during the consultation process.
- Numerical goals to achieve equitable representation of suitably qualified persons in each occupational category and all levels in the workforce.
- Strategies and a timetable for achieving the goals identified.
- A timetable for each year of the plan for achieving the other goals (not numerical)
- The duration of the plan
- Procedures to monitor and evaluate implementation of the plan which will identify whether or not reasonable progress is being made in achieving the goals.
- Internal procedures to resolve disputes that may arise regarding implementation and interpretation of the plan
- The persons responsible for monitoring and implementing the plan. This must be one or more senior managers who will supervise and implement it and who must be given the power and resources to do so. The employer must ensure that the managers carry out their duties. The assignment of the responsibilities to a manager does not relieve the employer of any duty imposed by the legislation – i.e. irrespective of steps taken the employer remains the responsible person.

NB: The plan must be not shorter than one year or longer than five years. Before the current Employment Equity Plan reaches the end of its time frame a “subsequent” plan must be drawn up. The legislation is silent on what must be done if employment equity is reached.

What is Required for Implementation?

Implementation measures taken must ensure that suitably qualified people from designated groups have equal employment opportunities and are fairly represented in all occupational categories and levels in the workforce. The measures must include those that:

- Identify and eliminate employment barriers, including unfair discrimination that adversely impacts on people from the designated groups.
- Are designed to further diversify employment in the workplace based on equal dignity and respect of all people
- Reasonably accommodate people from designated groups to ensure that they enjoy equal opportunities and are equitably represented in the workforce.
- Ensure that suitably qualified persons from the designated groups are equitably represented in all occupational categories and at all levels in the workforce.
- Retain and develop persons from designated groups by implementing appropriate training measures which includes skills development
- Take specific measures to reduce any income differentials, including adherence to collective bargaining outcomes, compliance with sectoral determinations and applying norms and benchmarks set by the Employment Conditions Commission.

NB: While the measures should include preferential treatment and numerical goals they should exclude quotas. Nothing requires a designated employer to take any decision on an employment policy or practice that establishes an absolute barrier to the prospective or continued employment or advancement of persons not from designated groups.

Who is Regarded as Suitably Qualified for a job?

In determining whether a person is qualified for a job, the employer must determine whether the person has:

- Formal qualifications for the job
- Prior learning
- Relevant experience
- Capacity to acquire, within a reasonable time, the ability to do the job

It must be determined if the person has the ability to do the job based on one or more of these requirements. The employer may not discriminate on the grounds of lack of relevant experience.

Must Records be Kept?

Designated employers must:

- Establish and maintain records concerning the workforce, the Employment Equity Plan and other records needed for compliance with the legislation. This would include records relating to the implementation of the objectives identified in the Employment Equity Plan, allegations made by employees, action taken to remedy gaps, etc.
- Prepare a statement (as prescribed in the Basic Conditions of Employment Act) on the remuneration and benefits received in each occupational category and level in the workforce.
- Report to the Director-General: Labour on progress made in the implementation of the plan.

Must Reports be Compiled?

The employer must:

- Prepare a report on progress made in the implementation of the plan.
- Use the records in preparing the Reports for submission to the Director-General: Labour.

When Must Reports be Submitted?

Designated employers with fewer than 150 employees must:

- Submit the first report to the Director-General within 12 months after the employer becomes a designated employer.
- Thereafter once every two years on the first working day of October.

Designated employers with 150 or more employees must:

- Submit the first report within six months of becoming a designated employer
- Thereafter once every year on the first working day of October.

The reports must be signed by the CEO of the company.

NB: If the employer is unable to report by this date, the Director-General: Labour must be notified with reasons why it cannot be done.

Reports are public documents, and must be included in the employer's annual financial report. If the company is an organ of state, the responsible Minister must table the report in parliament.

What Duties does the Employer have Towards Employees?

The employer must make the Employment Equity Plan available to every employee for copying and consultation. The employer must also place it in a prominent place in the workplace where it can be read by all employees informing them of:

- The provisions of the Act (this is usually a copy of the Act which can be downloaded from the website of the Department of Labour)
- The most recent report submitted to the Director-General
- Any compliance order, arbitration award or order of the Labour Court that may have been issued in favour of or against the employer

What Powers do Employees and Trade Union Representatives have?

- Employees and trade union representatives have the power to bring contraventions of the legislation to the attention of other employees, the employer, a trade union, a workplace forum, the Director-General: Labour or the Commission for Employment Equity that is established by the Act.
- No one may discriminate against an employee who exercises his / her rights or prevent an employee from exercising them.
- If an employee contravenes any provision of the Act, while performing his or her their duties, the employer is liable unless he or she can prove that everything possible was done to prevent it.

What are the Powers of the Labour Inspectors?

Labour inspectors have the power to:

- Inspect the premises and determine compliance with the employer's Employment Equity Plan
- Obtain a written undertaking from the employer to comply within a specified period if it believed that the plan is not being complied with
- Issue a compliance order if the employer refuses to give a written undertaking.

How can the Employer Respond to an Order to Comply?

The employer can object to a compliance order:

- In writing to the Director-General: Labour within 21 days of receiving the order.
- If the Director-General upholds the order the employer can appeal to the Labour Court within 21 days.

What must be Done when a Dispute Arises?

If an employee or applicant for employment believes he or she has been subjected to discrimination or to unfair medical or psychological testing:

- He or she can approach the Commission for Conciliation, Mediation and Arbitration (CCMA) for conciliation within six months of the alleged discrimination or testing.
- If a dispute is not resolved at conciliation, the parties can agree to refer the dispute to arbitration or it may be referred to the Labour Court for adjudication.
- If an employee claims unfair dismissal due to discrimination it must be dealt with in terms of the Labour Relations Act. The “unfair dismissal” must be referred to the CCMA within 30 days.

NB: When an allegation of unfair discrimination is made, the employer must prove that the action was fair.

What are the Penalties for not Complying?

The following penalties apply for contraventions (maximum fines):

Previous Contraventions	Penalties
No previous contravention	R500 000
A previous conviction for the same contravention/s	R600 000
A previous conviction within the previous 12 months or two previous contraventions of the same provision	R700 000
Three previous convictions of the same contravention	R800 000
Four previous contraventions of the same provision	R 900 000