

Further public consultation on the cards for Employment Equity Act amendments

By [Tracy van der Colff](#)

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The Employment Equity Amendment Act (EEAA) introduced significant changes to the Employment Equity Act (EEA), including the removal of the annual turnover threshold for designated employers and the empowerment of the Minister of Employment and Labour to set numerical employment equity targets for each national economic sector.



Image source: Christina Morillo from [Pexels](#)

Recap

The Employment Equity Act 55 of 1998 (EEA) applies to all employers and employees in South Africa. The purpose of the EEA is twofold: to promote equal opportunity and fair treatment in employment through the elimination of unfair discrimination; and to provide for the implementation of affirmative action measures.

Affirmative action measures are designed to ensure that suitably qualified people from designated groups (defined by the EEA as black people, women and people with disabilities) have equal employment opportunities and are equitably represented in all occupational levels of a designated employer's workforce.

Whilst the provisions dealing with the elimination of unfair discrimination apply to all employers, the provisions relating to affirmative action only apply to designated employers.

Currently, the definition of “designated employer” includes employers who:

- employ 50 or more employees; or
- employ fewer than 50 employees but have a total annual turnover equal to or above the threshold amount listed in schedule 4 of the EEA (the annual turnover threshold ranges from R2m – R25m, dependent on the industry).

Amongst other obligations (such as consulting with employees and conducting a workplace analysis), a designated

employer must prepare and implement an employment equity plan that will achieve reasonable progress towards employment equity in that employer's workforce. An employment equity plan is a document that outlines the steps an employer will take to achieve employment equity in the workplace. It must include specific goals and objectives, as well as measures to address any disparities in the employer's workforce. Designated employers are required to report to the Department of Labour annually on their progress in terms of their employment equity plan.

Failure to comply with the EEA, including the obligations of a designated employer, may attract fines ranging from the greater of R1.5m or 2% of the employer's turnover, to the greater of R2.7m or 10% of the employer's turnover, depending on whether there have been previous contraventions.



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Employment Equity Amendment Act

On 14 April 2023, President Cyril Ramaphosa signed into law the Employment Equity Amendment Act 4 of 2022 (EEAA). Although the amendments were expected to become operational in September 2023, the President has yet to proclaim the effective date of the EEAA.

Some of the key amendments brought about by the EEAA are:

- Amended definition of Designated Employer. The annual turnover threshold will fall away when the amendments become operational, meaning that the new definition excludes employers who employ less than 50 employees, irrespective of annual turnover.
- The Minister of Employment and Labour (Minister) is empowered to identify and set numerical employment equity targets for each national economic sector, after consultation with the affected sectors. Designated employers are currently permitted to set their own targets in their employment equity plans. However, once the amendments become operational, designated employers must align the numerical targets in their employment equity plans with the applicable sectoral targets set by the Minister. Designated employers are required to comply with the targets and assess and report against them.

Employers who wish to contract with the State require a compliance certificate (obtained from the Department of Labour), confirming compliance with, inter alia, the EEA.

Whilst the amended definition of Designated Employer is likely welcome news for smaller employers, the pricklier amendment relates to the ability of the Minister to set targets, which Designated Employers must use when preparing their employment equity plans.

Draft employment equity regulations 2023

The draft employment equity regulations outlining sector and sub-sector targets were published for comment on 12 May 2023, and tabulate the proposed 5-year sector targets for the various economic sectors in terms of population groups and gender, for the four upper occupational levels (top management, senior management, professionally qualified, skilled employees), and for employees with disabilities. The numerical goals set by the designated employer in its employment equity plan must comply with any applicable sectoral target set by the Minister.

On Wednesday 15 November 2023, the Minister reportedly briefed the Portfolio Committee on Employment and Labour and advised that the revised draft employment equity regulations under the EEAA would be released for a second round of public comments. Interested parties are again expected to have at least 30 days to comment on the draft regulations.



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Looking ahead

There is undeniably a need to see meaningful, impactful and sustained transformation at all levels of society. Affirmative action obligations aside, there is a lot that employers can and should be doing to eliminate unfair discrimination and ensure sustained representation and advancement of underrepresented groups at every level of an employer's workforce – simply put, it's good for business and it's the right thing to do.

However, viewed in isolation and in the absence of a meaningful D&I transformation strategy, affirmative action measures may present as additional bureaucratic red tape through which larger employers need to navigate, failing which they may be slapped with hefty penalties.

The advent of the EEAA caused a fair amount of panic; however, it's not all brimstone and fire for employers with 50+ employees. Employers are anxious that failure to meet the targets set by the Minister may result in hefty penalties and the inability to contract with the State.

In an assessment of compliance with the EEA, a designated employer may raise any reasonable ground to justify its failure to comply. The hefty fines for non-compliance are also not new; these predate the 2023 amendments and should not be cause for alarm. In practice, the Department of Labour will typically conduct an assessment and issue a compliance order as a first step.

Employers who are either over the 50-employee headcount mark or who are teetering close to it should await the release of the draft regulations for a second round of public comments and participate meaningfully in the process.

Employers may also consider alternative creative solutions to keep their headcount below 50, where justified by the underlying operational requirements. Examples include restructuring business operations where viable or utilising alternative staffing solutions (temporary employment services, outsourced service providers, etc.).

Until the effective date of the EEAA is proclaimed, the status quo remains intact, and designated employers (as per the "old" definition) must comply with their current obligations under the EEA.

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