

nb080610

EXPLANATORY MEMORANDUM ON THE EMPLOYMENT EQUITY AMENDMENT BILL, 2010

1. PURPOSE OF BILL

1.1 The Bill seeks to—

- (a) effect amendments to the Employment Equity Act, 1998 (Act No. 55 of 1998) (hereinafter referred to as the “Act”), to ensure compliance with South Africa’s obligations in terms of international labour standards;**
- (b) promote the prevention of unfair discrimination in the workplace;**
- (c) ensure that the Act gives effect to fundamental Constitutional rights including the right to equality, the right to fair labour practices and protection from unfair discrimination;**
- (d) increase fines for non-compliance with the Act;**
- (e) align the provisions of this Act with the Promotion of Administrative Justice Act, 2000 (Act No. 3 of 2000), and the Promotion of Equality and Prevention of Unfair Discrimination Act, 2000 (Act No. 4 of 2000); and**
- (f) effect certain consequential amendments and textual corrections.**

2. DISCUSSION OF BILL

2.1 Clause 1: Definitions

2.1.1 Clause 1 seeks to amend the definition of “designated group” to ensure that the beneficiaries of affirmative action in terms of Chapter III of the Employment Equity Act are limited to persons who were citizens of the Republic of South Africa before the democratic era, or would have been entitled to citizenship but because of

policies of Apartheid those people and their descendants were not allowed citizenship. The proposed definition seeks to provide that the employment of persons from the "designated groups" who are foreign nationals or became citizens subsequent to April 1994 will assist employers to meet their affirmative action targets.

2.1.2 Clause 1 also seeks to amend the definition of "labour inspector" to correct the cross reference to section 65 instead of section 63 of the Act.

2.1.3 Clause 1 seeks to insert new definitions and amend of certain definitions to provide clarity and to align the Act with other legislation.

2.2 Clause 2: Equal pay for work of equal value

2.2.1 Clause 2 seeks to amend section 6 of the Act by the addition of subsection (4) which deals explicitly with unfair discrimination by an employer in respect of the terms and conditions of employment of employees doing the same work, similar work or work of equal value. A differentiation based on a prohibited ground listed in subsection (1) amounts to unfair discrimination unless the employer can show that difference in wages or conditions of employment is in fact based on fair criteria such as experience, skill, responsibility and qualifications.

2.2.2 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 failure to apply the principle of equal pay for equal work is classified as an unfair labour practice in the Promotion of Equality and Prevention of

Unfair Discrimination Act, which infringes the right to equality as provided for in section 9 of the Constitution and the right to fair labour practices as provided for in section 23 of the Constitution. The proposed amendment seeks to provide a basis for equal pay claims for same or similar work. Clause 2 also seeks to provide for the Minister of Labour, after consultation with the Commission, to issue a code of good practice setting out the criteria and the methodology for assessing work of equal value.

2.3 Clause 3: Psychometric testing

Clause 3 seeks to amend section 8 of the Act to provide that only psychometric tests that have been certified by the Health Professions Council of South Africa may be used in tests and assessments of an employee. This will ensure that that the testing used is scientifically valid, reliable, and objective and cannot be used to unfairly discriminate and unfairly disadvantage a certain employee or a certain group of employees.

2.4 Clause 4: Disputes concerning discrimination

Clause 4 seeks to amend section 10 of the Act to provide for 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)) to refer a dispute based on discrimination (including equal pay claims) to the CCMA for arbitration. This will assist lower income employees in having their disputes adjudicated in a cost effective manner which will promote protection for vulnerable, powerless and exploited employees.

2.5 Clause 5: Burden of proof

Clause 5 seeks to substitute section 11 of the Act to align the burden of proof in respect of a claim of unfair discrimination in the workplace with the Promotion of Equality and Prevention of Unfair Discrimination Act.

2.6 Clause 6: Employment equity plan

Clause 6 seeks to amend section 20 of the Act to empower the Director-General to apply to the Labour Court to impose a fine when an employer fails to prepare or implement an employment equity plan in accordance with the provisions of this Act.

2.7 Clause 7: Report

2.7.1 Clause 7 seeks to amend section 21 of the Act to provide for all designated employers to submit annual reports on the implementation of their Affirmative Action Plans. Presently, employers with between 50 and 150 employees are required to report every second year. Reporting can be done online and will not impose undue obligations on designated employers.

2.7.2 The proposed amendment seeks to empower the Director-General of Labour to apply to the Labour Court to impose a fine on an employer, who without a valid reason, fails to file its annual report. This seeks to ensure that designated employees adhere to the provisions of the Act.

2.8 Clause 8: Income differentials and discrimination

Clause 8 amends section 27 of the Act and seeks to provide that a designated employer must take measures to reduce disproportionate income differentials or unfair discrimination in terms of the conditions of employment. This is aimed at preventing and eliminating unfair discrimination in the workplace.

2.9 Clause 9: Undertaking to comply

Clause 9 repeals section 36 of the Act because the process of obtaining a written undertaking from a designated employer to comply with section 36 delays the employer to comply with the provisions of the Act.

2.10 Clauses 10-13: Enforcement provisions

Clauses 10-13 seeks to amend sections 37, 39, 40, 42 and 45 of the Act to eliminate certain mandatory steps and criteria that must be taken into account in determining whether a designated employer is implementing employment equity in compliance with the Act. These proposed amendments seek to promote effective enforcement and prevent the use of reviews as a mechanism to delay the enforcement process. The proposed amendments do not prevent employers who are aggrieved by decisions from challenging these decisions at an appropriate juncture. The Director-General may apply to the Labour Court to impose a fine on an employer that does not comply with a request made during a review of the employer's compliance with the Act or a recommendation made as a result of such a review.

2.11 Clause 14: Powers of Labour Court

Clause 14 seeks to amend section 50(1)(h) of the Act to empower the Labour Court to review administration actions in terms of the Employment Equity Act. This amendment aligns this Act with the Promotion of Administrative Justice Act.

2.12 Clause 15: Regulations

Clause 15 seeks to effect a grammatical correction to section 55 of the Act by empowering the Minister to make "regulations" instead of "a regulation".

2.13 Clause 16: Delegations

Clause 16 seeks to abolish the limitation imposed on the power of the Minister to delegate in terms of this Act. This clause seeks to empower the Minister to delegate the power to issue certificates of compliance with the Act.

2.14 Clause 17: Temporary employment service

Clause 17 repeals section 57 of the Act to align the Act with the Labour Relations Act, 1995 (Act No. 66 of 1995).

2.15 Clauses 18: Schedule 1: Maximum permissible fines that may be imposed for contravening this act

Clause 18 seeks to repeal the Schedule 1 of the Act, which aims to increase the penalties for contravention of the provisions of this Act by imposing penalties that are linked to the annual turnover of the employer.

2.16 Clause 19: Turnover threshold applicable to business employers

Clause 19 seeks to amend Schedule 4 to the Act by increasing the total annual turnover that an employer in agriculture must exceed to be classified as a designated employer from R 2 million to R 5 million.

3. PERSONS CONSULTED

None

4. FINANCIAL IMPLICATIONS FOR STATE

None

5. PARLIAMENTARY PROCEDURE

5.1 The Department of Labour and the State Law Advisers are of the opinion that this Bill must be dealt with in accordance with the procedure established by section 75 of the Constitution of the Republic of South Africa, 1996, since it contains no provision to which the procedure set out in section 74, 76 and 77 of the Constitution applies.

5.2 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 1(1)(a) of the Traditional Leadership and Government Framework Act, 2003 (Act. No. 41 of 2003), since it does not contain provisions pertaining to customary law or customs of traditional communities.