

Please note that most Acts are published in English and another South African official language. Currently we only have capacity to publish the English versions. This means that this document will only contain even numbered pages as the other language is printed on uneven numbered pages.



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THE PRESIDENCY

No. 16

16 January 2014

It is hereby notified that the President has assented to the following Act, which is hereby published for general information:–

Act No. 47 of 2011 : Employment Equity Amendment Act, 2013



AIDS HELPLINE: 0800-123-22 Prevention is the cure

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.

(English text signed by the President)
(Assented to 14 January 2014)

ACT

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 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 10

- 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
- (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;”;
- (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:
- “**‘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
- (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.”.

Amendment of section 6 of Act 55 of 1998

3. Section 6 of the principal Act is hereby amended—
- (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
- (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.
- (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).”.

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:

“(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 paragraph:

“(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, 5
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). 10
- (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.”; 15
- (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. 20
- (4B) The Director-General may apply to the Labour Court to impose a fine in accordance with Schedule 1, if an employer— 25
- (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 30
- (e) by the deletion of subsection (5).

Amendment of section 27 of 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: 35
“**Income differentials and discrimination**”; and
- (b) by the substitution for subsections (1) and (2) of the following subsections, 35
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 40
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).” 45

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 5
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; 10
[(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** 15
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. 20
(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,** 30
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: 35
“(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, 40
respectively:
“(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 45
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
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:

“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:

(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 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 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 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 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 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

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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—
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(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.
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(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—
20
(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.
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(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):

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“(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:

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“(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;”;

(b) by the addition of the following subsection:

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“(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.”.

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.” 5

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 10 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.”.

Amendment of section 56 of Act 55 of 1998

22. Section 56 of the principal Act is hereby amended by the substitution for 15 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).”.

Amendment of section 59 of Act 55 of 1998 20

23. 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 000,00.

(4) The Minister may, **[with the concurrence of the Minister of Justice and]** 25 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

24. Section 61 of the principal Act is hereby amended by the substitution for 30 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 000,00.

(4) The Minister may, **[with the concurrence of the Minister of Justice and]** 35 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 in Act 55 of 1998

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

“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.” 40

Substitution of Schedule 1 to Act 55 of 1998

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 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 <u>2% of the employer’s turn-over</u>
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 <u>4% of the employer’s turn-over</u>
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 <u>6% of the employer’s turn-over</u>
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 <u>8% of the employer’s turn-over</u>
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 <u>10% of the employer’s turn-over</u> ”.

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] R6,00m
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 30 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, 2013, and comes into 35 operation on a date determined by the President by proclamation in the *Gazette*.