

DUTIES OF A DESIGNATED EMPLOYER

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According to the Employment Equity Act No. 55 of 1998, as Amended (EEA), if an organisation fits the definition of a 'Designated Employer', it is obligated to perform the duties outlined in sections 16 through to 26 of the Act. Failure to do this puts a Designated Employer at risk of having a fine imposed according to Schedule 1 of the EEA. Fines can range between R1,5m and 10% of an organisation's turnover, depending on the type and number of contraventions. The EEA defines a Designated Employer as an organisation with 50 or more employees. Otherwise, it is a business with less than 50 employees but a turnover that exceeds the industry threshold as indicated in Schedule 4 of the Act, as follows:

Overview	Threshold Total Annual Turnover
Agriculture	R6m
Mining and Quarrying	R22.5m
Manufacturing	R30m
Electricity, Gas and Water	R30m
Construction	R15m
Retail and Motor Trade and Repair Services	R45m
Wholesale Trade, Commercial Agents and Allied Services	R75m
Catering, Accommodation and other Trade	R15m
Transport, Storage and Communications	R30m
Finance and Business Services	R30m
Community, Special and Personal Services	R15m

The gazetting of the Draft Amendments to the EEA is imminent. Following the gazette, the only criterion for being a Designated Employer will be 50 or more employees as the turnover thresholds will be removed. Until the gazette, those that are currently designated due to turnover must still comply.

Before the 2013 EEA amendments (Act 47 of 2013), if a Labour Inspector found that a Designated Employer was non-compliant in performing its duties, the Department of Employment and Labour (DoEL) was obligated to follow a process which necessitated:

- ① Obtaining a Written Undertaking (EEA5);
- ② Issuing a Compliance Order (EEA6); and
- ③ Applying to the Labour Court to impose a fine.



In essence, Designated Employers had two opportunities to rectify any non-compliances before the DoEL imposed a fine. One of the most significant amendments to the EEA that came into effect on 1st August 2014 is that the DoEL no longer had to follow steps 1 and 2 as outlined on page 41. Thus, since then, the DoEL has had the immediate power to apply to the Labour Court to impose a fine. In most instances, the DoEL will still follow the process. However, there is a significant risk that a Designated Employer may not have the opportunity to rectify any non-compliance issues. Therefore, advice to Designated Employers is that they remain compliant at all times. During an inspection, the DoEL will assess whether a Designated Employer complies with the following duties in line with the EEA requirements::

[Sections 16, 17 and 18](#) outline the duty to consult with employees. For this purpose, a Forum must be established with a membership that includes representatives of recognised trade unions and nominated staff representatives from all EE levels, incorporating all race and gender groups as well as persons with disabilities. Amongst others, the role of the Forum is to assist in the analysis of a Designated Employer's current situation – as per section 19 that follows. The Forum provides a platform for consultation on the Designated Employer's EE Plan – as per section 20 that follows and the EE Report - as per section 21 that follows. The Designated Employer must disclose all relevant information to enable the Forum to perform its duties.

- > During an inspection, a Designated Employer must provide proof of the consultation. The evidence must incorporate the nomination process, including how members were nominated and the minutes of meetings, which should occur at least quarterly.

[Section 19](#) obligates a Designated Employer to:

- > Through analysis, identify any barriers in policies, procedures or practices which may adversely impact Designated Groups, namely African, Coloured and Indian People, as well as women and persons with disabilities, both of which include White People;
- > Identify Affirmative Action measures to overcome any barriers identified;
- > Ascertain the degree of alignment of its employee profile across each EE level with the most recently published Economically Active Population (EAP) statistics. A Designated Employer must record the results of the analysis on the EEA12 template. The complete EEA12 does not accompany the submission to the DoEL, but must be available if requested during an inspection.

[Section 20](#) stipulates that a Designated Employer must develop an EE Plan to address any barriers and under-representation of specific groups identified during the analysis required in section 19. An EE Plan guides transformation and must, at a minimum, follow the format of the EEA13 template, as follows:

- > The duration of the EE Plan must be between one and five years and include the barrier analysis and Affirmative Action measures. It must indicate the time frames and the positions of the employees responsible for implementing the Affirmative Action measures.
- > A Designated Employer must set numerical goals and targets to include the aspirational racial, gender and disability profile per EE level for each year of the plan. It must indicate strategies to achieve these goals and targets, such as recruitment and retention strategies.
- > An EE Plan must include the process to monitor achievements against the objectives as outlined in the plan. Furthermore, a transparent process is required to resolve disputes arising from the interpretation and implementation of the EE Plan. It must further highlight the senior manager appointed in terms of Section 24 that follows.

As with the EEA12, the EEA13 does not accompany the submission to the DoEL. However, it must be available during an inspection upon request.

Section 21 requires a Designated Employer to report its EE progress to the DoEL annually. The core aim of this is to assess the implementation of a Designated Employer's EE Plan. The deadline is 1st October if submitting the report manually; otherwise, online submissions must reach the DoEL by 15th January of the following year.

For reporting purposes, a Designated Employer must complete and submit an EEA2 and an EEA4 form. The information necessary for the EEA2 form is as follows:

- > A snapshot of the workforce profile on the last day of the Designated Employer's chosen EE reporting period, categorised by EE level, race, gender and disability status.
- > Workforce movement for the reporting period, including recruitments, promotions and terminations, again per EE level, race and gender.
- > A breakdown of the Beneficiaries of Skills Development interventions. These must only include Beneficiaries who had training interventions with the core aim of achieving numerical goals, again categorised by EE level, race and gender.
- > A summary of identified barriers, including an estimate of the dates when Affirmative Action measures are earmarked for implementation.
- > The EE Plan must include the persons responsible for implementing such Affirmative Action measures.
- > An Income Differential Statement - EEA4. The aim is to identify unfair discrimination in employment terms and conditions between different groups performing work of equal value and must accompany the EEA2 submission.

Sections 22 through to 26 stipulate that a Designated Employer must:

- > Publish a summary of its EE Report - in the EEA10 format - in its Annual Financial Report as section 22 indicates.
- > Develop a successive EE Plan before the current plan expires, as per section 23.
- > Officially assign and provide a formal mandate to at least one Senior EE Manager overseeing the implementation of the EE Plan as per section 24.
- > Inform employees about the provisions in the EEA, as well as the content of the EE Plan and EE Report. Such communication must include any legislative actions against the Designated Employer concerning the provisions of the EEA as per section 25.
- > Keep accurate records of all EE related documents and data as per section 26.

The following table outlines the various fines applicable for different contraventions of the above sections.

Contravention	Contraventions of sections 16, 17, 19, 22, 24, 25, 26 and 43(2)	Contraventions of sections 20, 21, 23 and 44(b)
No previous contravention	R1.5m	The greater of R1.5m or 2% of the employer's turnover
A previous contravention in respect of the same provision	R1.8m	The greater of R1.8m or 2% of the employer's turnover
A previous contravention within the last 12 months or two previous contraventions in respect of the same provision within three years	R2.1m	The greater of R2.1m or 6% of the employer's turnover
Three previous contraventions in respect of the same provision within three years	R2.4m	The greater of R2.4m or 8% of the employer's turnover
Four contraventions in respect of the same provision within three years	R2.7m	The greater of R2.7m or 10% of the employer's turnover



It is important to note that fines imposed are per contravention. For example, ABC Traders, a Designated Employer with an annual turnover below its industry threshold, was found to be non-compliant with both the duties to develop an EE Plan and the constitution of an EE Forum. They continued across multiple inspections not to address these contraventions. The fines that the DoEL will impose on ABC Traders are outlined in the table below.

Contravention	EE Forum Contravention	EE Plan Contravention	Total
First contravention	R1.5m	R1.5m	R3m
Second contravention	R1.8m	R1.8m	R3.6m
Third contravention	R2.1m	R2.1m	R4.2m
Fourth contravention	R2.4m	R2.4m	R4.8m
Fifth contravention	R2.7m	R2.7m	R5.6m
Total	R10.5m	R10.5m	R21m

If ABC Traders' turnover was more than the industry threshold, the applicable fines would be heftier.

In summary, a Designated Employer must consider all requirements and time frames so that it does not falter and expose itself to the risk of hefty fines. The following 12 steps guide Designated Employers in remaining compliant.

- 1 Appoint an EE Manager;
- 2 Establish an EE Forum;
- 3 Perform an analysis;
- 4 Develop an EE Plan;
- 5 Consult on the EE Plan with the EE Forum;
- 6 Finalise the EE Plan;
- 7 Prepare the EE Report;
- 8 Consult on the EE Report with the Forum;
- 9 Report the progress in implementing the EE Plan to the DoEL;
- 10 Publish a summary of the EE Report in the Annual Financial Statements. However, this only applies to publicly listed Designated Employers;
- 11 Communicate Employment Equity-related information to employees throughout the process; and
- 12 Keep accurate records relating to every aspect of the implementation processes.

Following these steps will provide peace of mind that a DoEL inspection will go smoothly, with limited findings and recommendations; therefore, a Designated Employer will lessen the risk of penalties.

A parting note: this article indicates the minimum requirements to protect a Designated Employer by ensuring compliance with the EEA. However, the focus should always be to move beyond mere compliance to transformation, which requires implementing measures over and above those outlined here. Moving above and beyond will nurture a changing environment with capacitated relevant stakeholders.

