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THE EMPLOYMENT EQUITY AMENDMENT BILL

A MIXED BAG



Frik Boonzaaier is a Human Capital Specialist at the BEE Chamber. During his career, he has worked with many national and multinational market leaders. His expertise in the field equips him to chart a course of transformation for organisations by identifying relevant stakeholders whose decisions impact their ability to transform. Frik's aptitude for formulating sustainable strategies aligns his clients' KPIs, training and policies with their transformation goals. However, the area he finds most rewarding is implementation, whereby tracking mechanisms yield tangible results that filter positive change throughout an organisation.



The Employment Equity Amendment Bill (the Bill) was published as Gazette #43535 of 2020. Parliament approved it on 17th May 2022. It is currently in the final stage of promulgation and is on the President's desk for sign-off. The Bill's initial gazette was on 21st September 2018 as Gazette #41922 of 2018. It was in response to the slow pace of transformation in the workplace¹. At the time of going to print, the last update from the Department of Employment and Labour (DoEL) was a press release on 31st August 2022. It stated that the DoEL were preparing for the implementation and enforcement of the Bill from September 2023. Therefore, unless the President has any last-minute concerns about the constitutionality of the amendments contained in the Bill, the passage of the Bill and the amendments to the Employment Equity Act (EEA) will go ahead.

What are the significant amendments to the Bill?

The Bill presents three significant amendments, namely:

- 1 Employers with less than 50 employees, irrespective of turnover, will no longer fall within the ambit of a 'designated employer'. As a result, some current designated employers will become non-designated employers and thus will not have to comply with the duties assigned to a designated employer.
- 2 Promulgating section 53 of the Act provides for issuing certificates confirming a designated employer's compliance with the Act. The compliance certificate will be a prerequisite for any State procurement.
- 3 The Minister of Labour will be empowered to determine sectoral numerical targets to ensure progress towards an equitable representation of people from designated groups at all occupational levels in the workforce.

The focus of this article is to unpack the third point mentioned above, namely the sectoral targets.

Firstly, we need to determine whether the contention that there has been a 'slow pace of transformation' is, in fact, true. Analysis of the average demographic statistics of employers reporting into the DoEL annually, contained in the Commission for Employment Equity Reports (CEE Reports) between 2009 and 2022, attests that the contention does hold water, especially when compared to the National Economically Active Population (EAP).



The DoEL has identified the under-representation of African and Coloured men at the top, senior and middle management, women, as well as persons with disabilities at all occupational levels as the core areas of concern, as illustrated in the tables that follow:

Top Management	CEE Report		National EAP	Variance between	
	2009	2022		CEE Report 2009 & 2022	2022 & National EAP
Men					
African	8,70%	10,70%	43,60%	2,00%	32,90%
Coloured	3,40%	3,50%	5,00%	0,10%	1,50%
Indian	4,60%	7,40%	1,80%	2,80%	-5,60%
White	59,90%	50,20%	4,90%	-9,70%	-45,30%
Women					
African	3,80%	6,40%	25,80%	2,60%	19,40%
Coloured	1,50%	2,40%	4,10%	0,90%	1,70%
Indian	1,30%	3,50%	0,90%	2,20%	-2,60%
White	13,80%	13,00%	3,90%	-0,80%	-9,10%

Senior Management	CEE Report		National EAP	Variance between	
	2009	2022		CEE Report 2009 & 2022	2022 & National EAP
Men					
African	9,80%	15,50%	43,60%	5,70%	28,10%
Coloured	4,20%	4,70%	5,00%	0,50%	0,30%
Indian	5,20%	7,50%	1,80%	2,30%	-5,70%
White	45,60%	33,60%	4,90%	-12,00%	-28,70%
Women					
African	5,20%	10,10%	35,80%	4,90%	25,70%
Coloured	2,60%	3,30%	4,10%	0,70%	0,80%
Indian	2,20%	4,50%	0,90%	2,30%	-3,60%
White	22,30%	17,70%	3,90%	-4,60%	-13,80%

Middle Management	CEE Report		National EAP	Variance between	
	2009	2022		CEE Report 2009 & 2022	2022 & National EAP
Men					
African	13,40%	22,80%	43,60%	9,40%	20,80%
Coloured	5,30%	5,00%	5,00%	-0,30%	0,00%
Indian	6,20%	4,90%	1,80%	-1,30%	-3,10%
White	38,30%	17,80%	4,90%	-20,50%	-12,90%
Women					
African	7,60%	24,20%	35,80%	16,60%	11,60%
Coloured	3,70%	4,80%	4,10%	1,10%	-0,70%
Indian	3,40%	4,40%	0,90%	1,00%	-3,50%
White	20,00%	13,60%	3,90%	-6,40%	-9,70%

“The amendments to the Employment Equity Act will have far-reaching consequences for designated employers. Now is the time to review your organisation's transformation strategy.”

A crude calculation of the ‘pace of transformation’ from the findings of the CEE Report between 2009 and 2022 generally indicates growth towards EAP alignment. However, comparing the 2022 CEE Report to the National EAP targets makes the reality of the ‘slow pace of transformation’ apparent. For example, take the variance between the overall actual statistics in the CEE Reports per race and gender group over the 13 years - 2009 to 2022 - is it possible to estimate the ‘pace of transformation’ per year? Comparing this ‘pace of transformation’ to the National EAP targets, is it further possible to estimate how long it will take until the demographic representation in the national workforce reflects that of the National EAP targets? The table below illustrates how long it would take for top and senior management to achieve the national EAP targets.

	Men		Women	
	African	Coloured	African	Coloured
Top Management	214 years	156 years	208 years	29 years
Senior Management	64 years	5 years	77 years	15 years

In context, a generation is pitched to be between 20 and 30 years. So, using 20 years as the timeframe for a generation, it would take African men more than ten generations and African women more than seven generations to meet National EAP targets at Top Management. As a collective, women would only realise their National EAP targets at Senior Management by 2053.

What is the status of persons with disabilities?

Since the 17th CEE Report, the representation of persons with disabilities has been featured separately per occupational level. The target applicable for persons with disabilities for both employment equity and B-BBEE purposes is 2% of the total workforce.

Persons with disabilities	CEE Report		Variance	
	2017	2022	CEE Report 2017 vs 2022	Against 2% target
Top Management	1.20%	1.60%	0.40%	-0.40%
Senior Management	1.10%	1.30%	0.20%	-0.70%
Middle Management	0.90%	1.20%	0.30%	-0.80%
Junior Management	0.90%	1.20%	0.30%	-0.80%
Semi-skilled	0.80%	1.30%	0.50%	-0.70%
Unskilled	0.80%	1.40%	0.60%	-0.60%

Although the representation of persons with disabilities improved at all occupational levels between 2017 and 2022, employers have, on average, not met the 2% target at any occupational level. At the current ‘pace of transformation’, for persons with disabilities at top management and the semi-skilled level, it would take five to eight years to meet the targets.

Therefore, considering the findings of the CEE Reports against the National EAP and disability targets, it is safe to say that the DoEL’s contention of a ‘slow pace of transformation’ is correct, at least in terms of EAP and disability percentages. Hence the DoEL’s decision to institute sectoral targets.

What is the status of the sectoral targets?

The DoEL has confirmed that engagements on setting sectoral numerical targets began in June 2019. At the time of going to print, there was no confirmation, however, of whether these engagements were concluded. The next step is to publish the draft sectoral targets for 30-day public comment. Gazetting of the final sectoral targets will only happen once the President has given his assent to the gazetting of the EE Act Amendments. The amendments mean that designated employers must match or exceed the targets which the DoEL will set for five-year cycles at a time.

Which sectors will the DoEL institute sectoral targets for?

Below are the sectors where the DoEL will prescribe targets:

Administrative and Support Activities	Accommodation and Food Service Activities	Agriculture, Forestry & Fishing
Arts, Entertainment and Recreation	Construction	Electricity, Gas, Steam and Air Conditioning Supply
Education	Financial and Insurance Activities	Human Health and Social Work Activities
Information and Communication	Manufacturing	Mining and Quarrying
Public Administration and Defence; Compulsory Social Security	Professional, Scientific and Technical Activities	Real Estate Activities
Repair of Motor Vehicles and Motorcycles	Transportation and Storage	Water Supply, Sewerage, Waste Management and Remediation Activities
Wholesale and Retail Trade		

What course of action should employers take until the gazetting of the Bill?

Until the President assents to the gazetting of the amendments, the 2013 EE Act stands. Although, upon the gazetting of the Bill, smaller companies will become non-designated employers, all current designated employers, large and small alike, must continue to implement the duties outlined in the Act as it currently stands. In line with the current requirements, a designated employer must have an EE Consultative Committee, develop an EE Plan and report progress annually to the DoEL, among others. These are the duties of a designated employer, which a DoEL inspector will review.

Will current EE Plans become redundant upon the publishing of the gazette?

The timeframe communicated on 31st August 2022 implies that all current EE Plans will become redundant at the end of August 2023. Therefore, new EE Plans, which must include sectoral targets, must be ready for implementation from September 2023 onwards. One of the areas which may be confusing is the assumption that the sectoral targets will trump the EAP targets and that employers, therefore, will no longer need to align with the National EAP targets. On the contrary, designated employers must view sectoral targets as interim targets, which the DoEL will set to accelerate the pace of transformation, so that employers move more quickly towards the National EAP targets. Section 42(1)(a) remains intact and states:

- “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 may ... take the following into account:
 - The extent to which suitably qualified people from and amongst the different designated groups are equitably represented within each occupational level in an employer’s workforce according to the demographic profile of the National and Regional Economically Active Population.
 - “Whether or not the employer has complied with any sectoral target ...” will simply be an addition to the amendment and not a replacement. Pursuing the National EAP targets will put a designated employer in good stead to meet the sectoral targets. Therefore, designated employers with EE plans set to expire before the gazetting of the sectoral targets must base their new EE Plan on the National EAP targets, which a designated employer can then amend upon the gazetting of the sectoral targets.

*“At the current 'pace of transformation',
it will take more than 200 years for
South Africa to meet all National EAP targets
at all occupational levels.”*

*What happens if a designated employer
cannot meet the sectoral targets?*

According to section 16 of the 2018 Draft Regulations issued as Gazette #41923 of 2018, a designated employer will have to justify any misalignment based on one or more of the following:

- > Insufficient recruitment opportunities;
- > Insufficient promotion opportunities;
- > Insufficient target individuals from the designated groups with the relevant qualification, skills and experience;
- > Court order;
- > Transfer of business;
- > Mergers or acquisitions; and
- > Impact on business from economic circumstances.

Although the regulations remain in the draft, designated employers can use the draft regulations as a guideline of what will most likely be applicable in future.

To conclude, the long-awaited EE Act Amendments present a mixed bag and will significantly impact how businesses implement transformation going forward. As the amendments necessitate designated employers to present a certificate of compliance to win State tenders, the cost of non-compliance could be grave.

Consequently, designated employers must thoroughly consider all aspects of the amendments when plotting their new EE course of action.

Until the amendments become effective, it is business as usual. Therefore, all current designated employers must ensure that the implementation of their EE Plans is in line with, and can withstand the scrutiny of, an Employment Equity Director-General review as per the 2013 Amendments.

Any updates on the Bill's finalisation, or additional updates that will contradict the information provided in this article, will feature in the TFM Magazine/BEE Chamber's weekly newsletter. Contact stella@bee.co.za to secure weekly electronic delivery of the newsletter.



Source of reference:

1. <https://www.sanews.gov.za/south-africa/ee-amendment-bill-proposes-sectoral-targets#:~:text=The%20Department%20of%20Labour%20says%20the%20Employment%20Equity,sectoral%20targets%20to%20enable%20employers%20to%20transform%20workplaces.>