HUMAN CAPITAL
ADVISORY SERVICES (PTY) LTD

25 May 2023

RE: EMPLOYMENT EQUITY AMENDMENT BILL

On the 14th of April 2023, the President signed off on the EE Amendment Bill. The purpose of this letter is to clearly state the effect that the Bill will have on the Employment Equity process and also to clear the air with regards to any uncertainty.

The Bill has not yet been promulgated, which means that all employers deemed a Designated Employer under the previous Act must still comply until such time that the Amendment Bill has been promulgated. We have been advised that it might happen on the 1st of September 2023, but final confirmation is still needed.

There are changes in the Bill that have a direct influence on you as an employer and it will be outlined below.

- **Definition of Disabled person** – the definition has been extended and now also includes sensory impairment. This means that someone that cannot taste, smell, feel etc. can now also declare they are disabled. Very important to note is that the EEA1 document must be completed at all times, and that declaration of the disability is voluntary. Once an employee has declared they are disabled a doctor letter must be requested in order to ensure the disability is confirmed by a medical practitioner. It is important to note that the EEA1 document must be updated throughout the employee's employment with the company. Any changes must be updated in the EEA1 document (e.g., surname change, disability status change etc.) and all employees must have access to change their details.
- **Voluntary Compliance Sec 14) –** this section has been repealed and deleted in totality. An employer can no longer voluntarily comply with the EE Act.
- **Committee composition –** if a majority union (50% + 1) is present in the company, then there will only be consultations with the union, and no longer with employee representatives. It is therefore important to identify the union shop stewards and to inform them of this change. If no majority union is present then the committee will stay as it is and the consultations will continue as they have over the past few years. In most cases there is a union shop steward already part of the committee consultations but there are rare instances where this is not the case.
- **Definition of a Designated Employer** – any employer with 50 or more employees is deemed to be a designated employer. This means that the employer needs to comply with the EE legislation and comply with the sector targets (Targets are only focused on management levels and both Unskilled and Semi-skilled level will still comply with the EAP stats). The turnover threshold has been deleted and the only way to determine if you need to comply or not is with regards to employees. It is very important to remember that an employee also includes learners, temporary workers, seasonal workers, apprentices, learners, casuals etc. Any employee who receives money for work done at the company premises is deemed to be an employee.
    - So, what about the employers that are no longer deemed to be a Designated Employer under the Amendment Bill? These employers will fill in an EEA14 document which will be sent to Department of Labour Head Office, with supporting documentation to confirm that the employer no longer needs to comply with the Amendment Bill. The document will be signed and discussed during the course of the next meeting once scheduled.
    - How will the Department of Labour know that I have more than 50 employees? The current status is that the Department of Labour is migrating their systems with the CCMA and SARS systems. This will allow the Department of Labour to have access to information regarding your employee's status, meaning the amount of money paid over for employees every month. This places a responsibility on each employer to ensure that they are compliant as the inspectors have already mentioned that they will have no grace with employers that do not comply with the Amendment Bill. It is their view that enough has been done to make employers aware of their duty to comply with various legislations.
- **Sector Targets** – the minister of Employment and Labour now has the power to set sectoral targets. What this means is that we need to now take into account not only the EAP stats but the sectoral targets set by the Department of Employment and Labour. What does this mean in practice? When discussing and drafting the analysis and looking at the over and underrepresentation of groups within the company profile, we usually looked at the most recent EAP stats and

then drafted our EE Plan accordingly. So, if we saw that the White Males are overrepresented (too many) we knew we needed to decrease this group and increase an underrepresented group. We basically set up our own targets within our 3-year period. Now what needs to happen is the sectoral targets are a set percentage. This means that each employer has 5 years to reach this target. We can no longer choose to increase or decrease according to the company operational requirements and what is realistic according to the company structure. It is further important to note that the 5-year sector target is set and must be reached at the end of the 5th year, meaning that each employer can set annual targets themselves, but it must be in line with the end goal in sight (the 5-year sector target).

  - **This does not mean that we need to fire people to make place for other employees in line with the sectoral targets**.
  - This only means that once an employee terminates their employment, through whichever channel, we need to replace the employee with a suitably qualified person from the underrepresented groups and in line with the sectoral targets.
  - The recruitment process must also include the identification of the underrepresented and overrepresented groups, and before an advertisement is sent out or before recruitment starts the recruitment team must know 'who' they are looking for in terms of race and gender specification. The recruitment process must also be a fully documented process and the EE committee now also needs to have access to the information as to who applied (race and gender) and who was successfully appointed.

- **EE Compliance Certificate** – on an annual basis each designated employer must report back to the Department of Labour on the progress made in line with the sectoral targets. After the information has been entered into the reporting system, the system will detect if you are compliant or not. This will all depend on the progress made towards achieving the sectoral targets. There are obviously justifiable reasons to select from once you have not achieved the sectoral targets and the correct reason must then be selected (e.g., no sufficient recruitment opportunities, no sufficient promotional opportunities, no change in current employment on occupational level etc.). It is still unclear whether or not an employer will receive a compliance certificate if a reason for not achieving the target is selected. It is unfortunate that an employer would need this Compliance Certificate to tender for any State contracts, and without the certification your tender documents will be thrown out. It will almost certainly count as many points as a B-BBEE Certificate during the procurement process.
- **EE Plan period** – usually a 3-year EE plan was drafted and implemented. The reasoning behind this is the fact that it is easier to manage change over a 3-year period than a 5-year period. In September 2023, once the EE Amendment Bill has been promulgated (implemented) all designated employers will need to draft and implement a new EE plan and all other plans will become null and void.
- **Non-compliance** – this remains the same, and the fines are still in play. For a first offence the fine can be R1.5 million or 2% of the annual turnover, whichever is the greatest. Unfortunately for an employer that receives a notice of inspection and has no documents to provide to the inspector, a direct fine will be issued and no mercy will be given. There won't be time to get the documents in order and ensure partial compliance. This has been confirmed by various inspectors since the Amendment Bill has become news.

<u>Changes in the consultation process:</u>

It is obvious that the consultation process cannot continue like it did in the past and that changes are needed.

- The first change required is that of the recruitment process, where I am not usually involved in. Each HR/Recruitment officer MUST know what is in their EE Plan. This means that the HR/Recruitment officer must know who is overrepresented and who is underrepresented. To just replace a person because of the immediate need is no longer going to work, and the correct reasoning for the appointment must be available.
- The HR/Recruitment officer is more than welcome to send me an email to request clarification on the over / underrepresented groups. This will be a definite learning curve in the beginning.

The amendments only have an influence on the management levels (Skilled, Mid, Senior, and Top management), so with regards to Unskilled and Semi-skilled there is less focus and we are able to appoint.

- If an employee resigns it is important to make sure that recruitment takes place. Meaning an advertisement with the minimum requirement must be available, the advertisement must also be placed in prominent places where you will be able to reach the correct audience. If no 'black' employee submits their CV, a second round of advertising must be done in order to satisfy the Department of Labour that we did everything in our power to recruit a suitable candidate in line with the sector targets.
- All employee lists will need to be revised and the occupational levels will need to be confirmed. The reason for this is due to the fact that not all organisational structures are the same, and that in one company the receptionist may be Semi-skilled but in another the receptionist forms part of the Skilled occupational level. Once the Job Descriptions, the levels, as well as the race and genders have been confirmed we will have our basis from where the EE Plan will then be drafted.
- Meeting minutes will also change once the legislation has been promulgated. This means that during each meeting, the recruitments, terminations, and promotions will be discussed. I will confirm with the committee if the figures are correct and if replacements were made in line with the EE Plan. It is therefore important to have the information available before the meeting. It can also be sent to me before the meeting has taken place, which will then also make consultation easier. In the meeting minutes these changes will be presented as proof that the committee consulted on the progress of the EE Plan.

What is the way forward for my company, you may ask? The first aspect is not to sit down and think about ways to get 'around' compliance. Window dressing EE Compliance is no longer an option and heavy fines will be implemented, fronting is also out of the question and if you are thinking of splitting your company into multiple sections I would also not recommend that, because as per the B-BBEE Commission that is obvious fronting. As soon as you split your company for the purposes of no longer complying with legislation, and without good reason, the B-BBEE Commission will identify that as fronting and a fine of R10 million and/ or imprisonment could be waiting for you. It is important that everyone sees the importance of Transformation and become committed to the cause. The law is not going anywhere soon and the best advise is to ensure compliance.

As a consultant it is difficult to know what is going on in your business at all times during the course of the year. It is hence very important to send an email to require more information than to appoint the wrong candidate and be penalized for that specific appointment. Each appointment is unique and has its own story to it, so it is crucial that the person is placed in the correct department and corresponding occupational level.

Lastly, I want to state that the Employment Equity Amendment Bill does not state that we need to get rid of, or fire employees currently in higher occupational levels. This will go directly against the reasoning behind the Amendment Bill. Where the targets come into play is when an overrepresented group resigns or get terminated, that specific vacancy must be filled with an underrepresented group.

If there is any uncertainty or questions regarding the Amendment Bill, please do not hesitate to contact me.

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