

March 6, 2025

Employer duties imposed by the EEA and sanctions for non-compliance



This is the second part (Part Two) of a four-part series on the recently amended Employment Equity Act (EEA) of 1998 (Act No. 5 of 1998).

This part focuses on the specific employer duties and sanctions for non-compliance with the amended employment equity act and numerical sector targets.

For ease of reference, herewith the link to Part One where we discussed *the Compliance requirements for designated and non-designated employers in the context of the amended EEA*.

Introduction to the amended EEA

With the amendment of the EEA which took effect on 1 January 2025, the requirements for compliance have changed.

Although the majority of the current compliance requirements relate to designated employers – those who employ more than 50 employees, non-designated employers are still required to comply with chapter II, and in some instances with chapter III of the Act. The EEA contains an extensive set of sanctions for designated and non-designated employers who fail to comply with the Act. Although the new numerical sector targets set by the Minister of Employment and Labour (Minister) attracted widespread comment and criticism, non-achievement of these targets does not trigger any fines or similar sanctions.

In order to understand the duties of employers imposed by of the EEA and the sanctions applicable for non-compliance – coupled with the fact that no fines are provided for the non-achievement of the numerical sector targets set by the Minister, requires an apprehension of the working mechanism of the EEA.

Working mechanism of the EEA

Section 2 of the EEA sets as its main purpose the achievement of equity in the workplace. The Act endeavours to pursue this by means of two courses of action: firstly, to remove all forms of discrimination from the workplace as a basic and first objective and secondly, to implement affirmative action to ensure equitable representation at all occupational levels by persons from designated groups (Africans, Indians, Coloureds, women of all races and people with disabilities – all race and gender groups).

The first line of action to remove all forms of discrimination in the workplace is set out in chapter II of the Act and applies to all employers. The second line of action is to implement affirmative action measures enunciated in chapter III and is mainly applicable to designated employers. Chapter III contains two provisions unrelated to affirmative action which also apply to non-designated employers. These are succinctly discussed further below.

In terms of section 15A of the EEA, the Minister has identified 18 national economic sectors and set sectorial numerical goals for four occupational levels: Top Management; Senior Management; Professionally Qualified (Middle Management); and Skilled Technical (Junior Management). The Minister also set a target of 2% of the total workforce for the employment of people with disabilities.

Equal representation through affirmative action

In pursuit of equal representation through affirmative action, the Act requires designated employers to set as affirmative action goals those sector numerical targets (goals) published by the Minister for a period of five years.

- The first set of targets set by the Minister are minimum targets and are lower than the overall Economic Active Population (EAP) targets for each race and gender group. These sector numerical goals must be contained in a designated employer's Employment Equity (EE) Plan broken down in annual goals to gradually progress towards the sector numerical targets set by the Minister, and if that is achieved, then the higher EAP targets.
- The EE Plans for designated employers must be submitted to the Director-General of the Department of Employment and Labour (Department). EE Plans must span a period of one year, to a maximum of five years.
- Designated employers must report annually on progress made in achieving these goals (targets) by submitting EE reports to the Department.
- In developing EE plans, a designated employer is expected to follow an inclusive process of consulting with its employees, disclosing information to allow employees to properly consult and engage, and to conduct an analysis of its employment policies, practices and procedures to identify barriers which could adversely affect the progress of people from designated groups; submit a statement of benefits received at each occupational level of that employer's workforce; and inform its employees of the requirements of the Act and certain developments that may scupper affirmative action.

The strategy of the EEA to achieve equitable representation is to follow a process-driven approach.

Although the EEA requires the setting of numerical targets published by the Minister, the Act acknowledges that there may be reasonable grounds for employers failing to achieve these targets. The EEA recognises that the achievement of targets depends on the circumstances of each employer. The EEA requires employers to comply with the processes prescribed by the Act as peremptory provisions. If these processes are duly followed, the Act assumes that employers should reasonably be able to make progress towards achieving targets. Even if an employer follows the prescribed processes and fully implements the measures prescribed by the Act, it is still possible that targets can be missed. Therefore, the Act does not *per se* propose sanctions for failure to reach targets but instead requires compliance with the processes prescribed by the Act to give the measures introduced by the Act the maximum chance of success in meeting the numerical targets and objectives of the Act.

To clarify the provisions for compliance with and enforcement of the EEA, especially in respect of the prescribed processes as peremptory provisions of the Act, the areas of compliance are broken down in a compliance and enforcement matrix below, indicating: **(1) the provisions of the Act; (2) the nature of non-compliance; (3) the employer to whom it applies; and (4) the sanctions for non-compliance.**

The Matrix of Compliance and Enforcement, with Sanctions

The following matrix delineates those provisions of the EEA which propose a sanction for non-compliance. For ease of reference you can [download 'The Matrix of Compliance and Enforcement' in a PDF document](#) or view the various sections below:

1	2	3	4
PROVISIONS OF THE ACT	NATURE OF NON-COMPLIANCE	EMPLOYER TO WHOM IT APPLIES	SANCTION
Section 5	Failure to take steps / conduct anti-discriminatory assessments of employment and working environment policies and practices.	All Employers	- Written Undertaking - Compliance Order - Recommendation by Director-General of Labour - Making the above an order of Court by the Labour Court - Non-compliance with Court Order: Contempt of Court – Fine and/or Imprisonment.
Section 17	Failure by employer to consult with employees and/or their representatives in conducting analysis, preparation and implementation of an EE plan and report.	Designated Employers	- R1 500 000 for first contravention - R1 800 000 for second contravention - R2 100 000 for two previous or second contravention or contraventions within the preceding 12 months - R2 400 000 for three contraventions within three years - R2 700 000 for four previous contraventions within three years.
Section 19	Failure to conduct an analysis of its employment policies, practices, procedures and working environment to identify employment barriers which adversely affect people from designated groups.	Designated Employers	- R1 500 000 for first contravention - R1 800 000 for second contravention - R2 100 000 for two previous or second contravention or contraventions within the preceding 12 months - R2 400 000 for three contraventions within three years - R2 700 000 for four previous contraventions within three years.

1	2	3	4
PROVISIONS OF THE ACT	NATURE OF NON-COMPLIANCE	EMPLOYER TO WHOM IT APPLIES	SANCTION
Section 20	Failure to prepare, implement and submit an EE Plan.	Designated Employers	- The greater of R1 500 000 or 2% of employer's turnover (annual) for first contravention
			- The greater of R1 800 000 or 4% of the employer's turnover for a second contravention of the same nature
			- The greater of R2 100 000 or 6% of the employer's turnover for two previous similar contraventions within the previous three years or second contravention within preceding 12 months
			- The greater of R2 400 000 or 8% of employer's turnover for three previous contraventions within three years
			- The greater of R2 700 000 or 10% of employer's turnover for four previous contraventions within three years.
Section 21	Failure to submit an EE report annually to the Department.	Designated Employers	- The greater of R1 500 000 or 2% of employer's turnover (annual) for first contravention
			- The greater of R1 800 000 or 4% of the employer's turnover for a second contravention of same nature
			- The greater of R2 100 000 or 6% of the employer's turnover for two previous similar contraventions within the previous three years or second contravention within preceding 12 months
			- The greater of R2 400 000 or 8% of employer's turnover for three previous contraventions within three years
			- The greater of R2 700 000 or 10% of employer's turnover for four previous contraventions within three years.
Section 22	Failure by a public company to include such report in its annual financial report.	Designated Employer who is a public company	- R1 500 000 for first contravention
			- R1 800 000 for second contravention
			- R2 100 000 for two previous contraventions or second contravention within the preceding 12 months
			- R2 400 000 for three contraventions within three years
			- R2 700 000 for four previous contraventions within three years.

1	2	3	4
PROVISIONS OF THE ACT	NATURE OF NON-COMPLIANCE	EMPLOYER TO WHOM IT APPLIES	SANCTION
Section 23	Failure to prepare a subsequent EE plan before the end of current EE plan.	Designated Employers	- The greater of R1 500 000 or 2% of employer's turnover (annual) for first contravention
			- The greater of R1 800 000 or 4% of the employer's turnover for a second contravention of same nature
			- The greater of R2 100 000 or 6% of the employer's turnover for two previous similar contraventions within the previous three years or second contravention within preceding 12 months
			- The greater of R2 400 000 or 8% of employer's turnover for three previous contraventions within three years
			- The greater of R2 700 000 or 10% of employer's turnover for four previous contraventions within three years.
Section 24	Failure to assign a senior manager to monitor implementation of EE Plan	Designated Employer	- R1 500 000 for first contravention
			- R1 800 000 for second contravention
			- R2 100 000 for two previous contraventions or second contravention within the preceding 12 months
			- R2 400 000 for three contraventions within three years
			- R2 700 000 for four previous contraventions within three years.
Section 25(1)	Failure by employer to display provisions of EEA in workplace.	All Employers	- R1 500 000 for first contravention
			- R1 800 000 for second contravention
			- R2 100 000 for two previous contraventions or second contravention within the preceding 12 months
			- R2 400 000 for three contraventions within three years
			- R2 700 000 for four previous contraventions within three years.

1	2	3	4
PROVISIONS OF THE ACT	NATURE OF NON-COMPLIANCE	EMPLOYER TO WHOM IT APPLIES	SANCTION
Section 25(2)	Failure to place its most recent EE report, any compliance order and other prescribed document in a prominent place in each of its workplaces.	Designated Employer	· R1 500 000 for first contravention · R1 800 000 for second contravention · R2 100 000 for two previous contraventions or second contravention within the preceding 12 months · R2 400 000 for three contraventions within three years · R2 700 000 for four previous contraventions within three years.
Section 26	Failure to maintain records of compliance with the EEA for a period of five years.	All Employers	· R1 500 000 for first contravention · R1 800 000 for second contravention · R2 100 000 for two previous contraventions or second contravention within the preceding 12 months · R2 400 000 for three contraventions within three years · R2 700 000 for four previous contraventions within three years.
Section 43(2)	Failure to comply with request from Director-General.	All Employers	· R1 500 000 for first contravention · R1 800 000 for second contravention · R2 100 000 for two previous contraventions or second contravention within the preceding 12 months · R2 400 000 for three contraventions within three years · R2 700 000 for four previous contraventions within three years.
Section 44(b)	Failure to comply with recommendations within the time stipulated by the Director-General in respect of compliance with the EEA.	All Employers	· The greater of R1 500 000 or 2% of employer's turnover (annual) for first contravention · The greater of R1 800 000 or 4% of the employer's turnover for a second contravention of same nature · The greater of R2 100 000 or 6% of the employer's turnover for two previous similar contraventions within the previous three years or second contravention within preceding 12 months · The greater of R2 400 000 or 8% of employer's turnover for three previous contraventions within three years · The greater of R2 700 000 or 10% of employer's turnover for four previous contraventions within three years.

Conclusion

In order to pursue the objectives of the Act, the Act requires employers to comply with several processes. To this end, the EEA provides for several enforcing mechanisms and sanctions for non-compliance.

Although numerical targets set by the Minister for the employment of people from designated groups are an important objective of the Act, no fines are set by the Act for failure to reach these numerical targets. The Act instead focuses on the proper implementation of the processes prescribed in the Act in an endeavour to meet objectives and targets. However, section 53 makes provision for the issuing of certificates by the Minister for employers who envisage conducting business with the state. Employers will still be eligible for certificates if they fully comply with the Act even if they can, on reasonable grounds, justify their failure to meet numerical sector targets. The Act requires the *setting* of targets, not necessarily the *achievement* of targets.

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About the Author: *Gideon Gerber* is a director of SERR Synergy and completed his Doctor of Laws (LLD) at the University of Pretoria, with research focusing on B-BBEE in the context of the Constitution and international law. He has published various articles in academic journals on topics such as B-BBEE fronting offences, among others. Gideon is also a regular speaker at B-BBEE seminars and has written articles for Business Day and Landbouweekblad on a broad spectrum of B-BBEE matters.

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