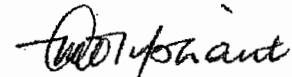

GENERAL NOTICE

NOTICE 1112 OF 2010**DEPARTMENT OF LABOUR****LABOUR RELATIONS AMENDMENT BILL, 2010****BASIC CONDITIONS OF EMPLOYMENT AMENDMENT BILL, 2010****EMPLOYMENT EQUITY AMENDMENT BILL, 2010****EMPLOYMENT SERVICES BILL, 2010**

1. I, **NELISIWE MILDRED OLIPHANT**, Minister of Labour, hereby publish proposed amendments to the Labour Relations Act, 1995, the Basic Conditions of Employment Act, 1997, the Employment Equity Act, 1998 and an Employment Services Bill, 2010, for general information and comment.
2. I will also be tabling these bills at NEDLAC for consideration.
3. Submission of representations:
 - a. All interested parties are invited to submit written comments on the draft bills.
 - b. Such comments should be addressed to: **Mr. Thembinkosi Mkalipi**, Department of Labour, Private Bag X117, Pretoria, 0001, or faxed to 012 309 4156 or e-mailed to Thembinkosi.Mkalipi@labour.gov.za or Maria.Briedenhann@labour.gov.za
 - c. Comments should reach the Department of Labour not later than 17 February 2011.



N M OLIPHANT, MP
MINISTER OF LABOUR

08/12/2010

REPUBLIC OF SOUTH AFRICA

EMPLOYMENT EQUITY AMENDMENT BILL

*(As introduced in the National Assembly (proposed section 75); explanatory
summary of Bill published in Government Gazette No. 33873 of 17 December 2010)
(The English text is the official text of the Bill)*

(MINISTER OF LABOUR)

[B — 2010]

070610nb

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.**

BILL

To amend the Employment Equity Act, 1998, so as to substitute or insert certain definitions; to prohibit a difference in the terms and conditions between employees from the same employer performing substantially the same work or work of equal value; to provide for the certification of psychometric testing used to assess employees; to provide for certain employees to refer unresolved disputes to the CCMA; and to empower the Director General to impose fines; 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

1. Section 1 of the Employment Equity Act, 1998 (hereafter referred to as the principal Act), is hereby amended by—

(a) the substitution in paragraph (d) of the definition of "designated employer" 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 Force, the National Intelligence Agency and the South African Secret Service; and";

- (b) 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 who would have been entitled to acquire citizenship by naturalisation prior to that date but were precluded by Apartheid policies based on race;"

- (c) the insertion after the definition of "HIV" of the following definition:

(" 'independent contractor' means a person who works for or supplies services to a client or customer as part of the person's business, undertaking or professional practice;")

- (d) 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;"

- (e) the substitution for the definition of "serve" of the following definition:

" 'serve' means to send by registered post, telegram, telex, telefax or to deliver by hand and:

(a) in respect of the Labour Courts, any other method of service specified in the Rules of the Labour Courts;

(b) in respect of the Commission, any other method of service specified in the Rules of the Commission;"; and

(f) the insertion after the definition of "trade union representative" of the following definition:

" 'turnover' means the total annual turnover of an employer for the preceding year calculated in accordance with the provisions of the Competition Act, 1998 (Act No. 89 of 1998);".

Amendment of section 6 of Act 55 of 1998

2. Section 6 of the principal Act is hereby amended 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 is a form of unfair discrimination and is prohibited on any one, or more grounds of unfair discrimination listed in subsection (1).

(5) The Minister may, after consultation with the Commission, issue a code of good practice setting out the criteria and the methodology for assessing work of equal value in terms of subsection (4)."

Amendment of section 8 of Act 55 of 1998

3. 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 in terms of the Health Professions Act, 1974 (Act No. 56 of 1974)."

Amendment of section 10 of Act 55 of 1998

4. Section 10 of the principal Act is hereby amended by the substitution in subsection (6) for paragraphs (a) and (b) of the following paragraphs:

"(a) any party to the dispute may refer [it] the dispute to the Labour Court for adjudication; or
(b) an employee earning less than the amount prescribed by the Minister in terms of section 6(3) of the Basic Conditions of Employment Act may refer the dispute to the CCMA for arbitration."

Substitution of section 11 of Act 55 of 1998

5. The following section is hereby substituted for section 11 of the principal Act:

11. "Burden of proof

(1) If the employee makes out a *prima facie* case of unfair discrimination, the respondent must prove that—

- (a) the discrimination did not take place as alleged; or
- (b) the conduct is not based on one or more of the prohibited grounds listed in section 6(1).

(2) Discrimination is unfair, unless the respondent proves that the discrimination is fair, if the discrimination did take place—

- (a) on a prohibited ground listed in section 6(1);
- (b) on a ground not listed in section 6(1), and the discrimination—
 - (i) causes or perpetuates systematic disadvantage in the workplace;
 - (ii) undermines human dignity; or
 - (iii) adversely affects the equal enjoyment of a person's right and freedom in a manner that is comparable to discrimination on a ground listed in section 6(1).

(3) For the purposes of this section, a respondent includes an employer of the employee or any other person contemplated in section 6(1)."

Amendment of section 20 of Act 55 of 1998

6. Section 20 of the principal Act is hereby amended by the addition of the following subsection:

"(7) The Director-General may apply to the Labour Court to impose a fine contemplated in Schedule 1 of the Act, if a designated employer fails to prepare and implement an employment equity plan in accordance with the provisions of this Act."

Amendment of section 21 of Act 55 of 1998

7. Section 21 of the principal Act is hereby amended by—

(a) 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.";

(b) the deletion of subsection (2);

(c) the substitution for subsections (3) and (4) of the following subsections:

"(3) Despite [subsections (1) and (2)] subsection (1) , a designated employer that submits its first report in the 12-month period preceding the first working day of October, should only submit its second report on the first working day of October in the following year.

(4) The reports 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."; and

(d) the insertion after subsection (5) of the following subsections:

"(5A) 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)(b) 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.

(5B) The Director-General may apply to the Labour Court to impose a fine contemplated in Schedule 1 of the Act, if an employer who fails to report in terms of subsection (1)(b)—

(a) did not submit valid reasons in terms of subsection (5) for not reporting;

or

(b) the reasons submitted in terms of subsection (5) are found to be false or invalid."

Amendment of section 27 of Act 55 of 1998

8. Section 27 of the principal Act is hereby amended by—

(a) the substitution for the heading of the following heading:

"Income differentials and discrimination"; and

(b) the substitution for subsections (1) and (2) of the following subsections:

"(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 received in each occupational **[category and]** level of that employer's workforce.

(2) Where disproportionate income differentials or unfair discrimination in terms and conditions of employment as contemplated by 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 guidance as may be given by the Minister as contemplated in subsection (4)."

Repeal of section 36 of Act 55 of 1998

9. Section 36 of the principal Act is hereby repealed.

Amendment of section 37 of Act 55 of 1998

10. Section 37 of the principal Act is hereby amended by—

(a) the substitution of subsection (1) of the following subsection:

"(1) A labour inspector may issue a compliance order to a designated employer if that employer has failed or refused to—

[(a) refused to give a written undertaking in terms of section 36, when requested to do so; or

(b) failed to comply with a written undertaking given in terms of section 36]

(a) consult with employees as required by section 16;

(b) conduct an analysis as required by section 19;

(c) publish a summary of its report as required by section 22;

(d) assign responsibility to one or more senior managers as required by section 24;

(e) inform its employees of the provisions of this Act as required by section 25; or

(f) maintain records as required by section 26;

(g) prepare and implement an employment equity plan in accordance with section 20.";

(b) the deletion in subsection (2) of paragraph (c);

(c) the substitution of subsection (4) of the following subsection:

"(4) A designated employer who receives a compliance order served in terms of subsection (3) must—

(a) display a copy of that order prominently at a place accessible to the affected employees at each workplace named in it;

(b) comply with the compliance order within the time period stated in it ; and

(c) inform the inspector in the prescribed form within 30 days of the expiry of the time period of either its compliance with the order or, if it has not complied, the reasons for not doing so.";

(d) the deletion of subsection (5); and

(e) the substitution of subsection (6) of the following subsection:

"(6) If a designated employer does not comply with an order within the period stated in it, **[or does not object to that order in terms of section 39,]** the Director-General may—

- (a) amend the order and serve it to the employer; or
- (b) apply to the Labour Court to make the compliance order or any part of such order an order of the Labour Court."

Repeal of sections 39 and 40 of Act 55 of 1998

11. Sections 39 and 40 of the principal Act are hereby repealed.

Substitution of section 42 of Act 55 of 1998

12. The following section is hereby substituted for section 42 of the principal Act:

42. "Assessment of compliance

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] occupational** 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;]

(b) reasonable steps taken by an 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

- (e) **[any other prescribed factor] reasonable steps taken by an employer to appoint and promote suitably qualified people from the designated groups.**"

Substitution of section 45 of Act 55 of 1998

13. The following section is hereby substituted for section 45 of the principal Act:

45. "Failure to comply with Director-General's recommendation or request

(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—

- (a) for an order directing the employer to comply with the request or recommendation;
- (b) if the employer fails to justify the failure to comply with the request or recommendation, to impose a fine in terms of Schedule 1 on the employer.

(2) Any challenge to the validity of the Director General's request or recommendation may only be made in the proceedings contemplated in sub-section (1)."

Amendment of section 50 of Act 55 of 1998

14. Section 50 of the principal Act is hereby amended by the substitution in subsection (1) for paragraph (h) of the following paragraph:

"(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];"**.

Amendment of section 55 of Act 55 of 1998

15. Section 55 of the principal Act is hereby amended by the substitution of subsection (2) of the following subsection:

"(2) The Minister **[must]** may, by notice in the *Gazette* make **[a regulation]** regulations providing for separate and simplified forms and procedures when making regulations in respect of the obligations created by sections 19, 20, 21, 25 and 26 for employers that employ 150 or fewer employees."

Amendment of section 56 of Act 55 of 1998

16. Section 56 of the principal Act is hereby amended by the substitution of 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)]."

Repeal of section 57 of Act 55 of 1998

17. Section 57 of the principal Act is hereby repealed.

Substitution of Schedule 1 of Act 55 of 1998

18. The following Schedule is hereby substituted for Schedule 1 of the Principal Act:

<i>Previous Contravention</i>	<i>Contravention of any Provision of Sections 16, 19, 20, 21, 22, 23 and 27</i>
No previous contravention	<u>2% of turnover</u>
A previous contravention in respect of the same provision	<u>4% of turnover</u>
A previous contravention within the previous 12 months or two previous contraventions in respect of the same provision within three years	<u>6% of turnover</u>
Three previous contraventions in respect of the same provision within three years	<u>8% of turnover</u>
Four previous contraventions in respect of the same provisions within three years	<u>10% of turnover</u>

Substitution of Schedule 4 of Act 55 of 1998

19. The following Schedule is hereby substituted for Schedule 4 of 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	[R2,00m] <u>R5,00m</u>
Mining and Quarring	R7,50m
Manufacturing	R10,00m
Electricity, Gas and Water	R10,00m
Construction	R5,00m
Retail and Motor Trade and Repair Services	R15,00m
Wholesale Trade, Commercial Agents and Allied Services	R25,00m
Catering, Accommodation and other Trade	R5,00m
Transport, Storage and Communications	R10,00m
Finance and Business Services	R10,00m
Community, Social and Personal Services	R5,00m

nb080610

EXPLANATORY MEMORANDUM ON THE EMPLOYMENT EQUITY AMENDMENT BILL, 2010

1. PURPOSE OF BILL

1.1 The Bill seeks to—

- (a) effect amendments to the Employment Equity Act, 1998 (Act No. 55 of 1998) (hereinafter referred to as the “Act”), to ensure compliance with South Africa’s obligations in terms of international labour standards;
- (b) promote the prevention of unfair discrimination in the workplace;
- (c) ensure that the Act gives effect to fundamental Constitutional rights including the right to equality, the right to fair labour practices and protection from unfair discrimination;
- (d) increase fines for non-compliance with the Act;
- (e) align the provisions of this Act with the Promotion of Administrative Justice Act, 2000 (Act No. 3 of 2000), and the Promotion of Equality and Prevention of Unfair Discrimination Act, 2000 (Act No. 4 of 2000); and
- (f) effect certain consequential amendments and textual corrections.

2. DISCUSSION OF BILL

2.1 Clause 1: Definitions

2.1.1 Clause 1 seeks to amend the definition of “designated group” to ensure that the beneficiaries of affirmative action in terms of Chapter III of the Employment Equity Act are limited to persons who were citizens of the Republic of South Africa before the democratic era, or would have been entitled to citizenship but because of

policies of Apartheid those people and their descendants were not allowed citizenship. The proposed definition seeks to provide that the employment of persons from the “designated groups” who are foreign nationals or became citizens subsequent to April 1994 will assist employers to meet their affirmative action targets.

2.1.2 Clause 1 also seeks to amend the definition of “labour inspector” to correct the cross reference to section 65 instead of section 63 of the Act.

2.1.3 Clause 1 seeks to insert new definitions and amend of certain definitions to provide clarity and to align the Act with other legislation.

2.2 Clause 2: Equal pay for work of equal value

2.2.1 Clause 2 seeks to amend section 6 of the Act by the addition of subsection (4) which deals explicitly with unfair discrimination by an employer in respect of the terms and conditions of employment of employees doing the same work, similar work or work of equal value. A differentiation based on a prohibited ground listed in subsection (1) amounts to unfair discrimination unless the employer can show that difference in wages or conditions of employment is in fact based on fair criteria such as experience, skill, responsibility and qualifications.

2.2.2 The lack of a provision dealing expressly with wage discrimination on the basis of race and gender has been criticised by the International Labour Organisation. The failure to apply the principle of equal pay for equal work is classified as an unfair labour practice in the Promotion of Equality and Prevention of

Unfair Discrimination Act, which infringes the right to equality as provided for in section 9 of the Constitution and the right to fair labour practices as provided for in section 23 of the Constitution. The proposed amendment seeks to provide a basis for equal pay claims for same or similar work. Clause 2 also seeks to provide for the Minister of Labour, after consultation with the Commission, to issue a code of good practice setting out the criteria and the methodology for assessing work of equal value.

2.3 Clause 3: Psychometric testing

Clause 3 seeks to amend section 8 of the Act to provide that only psychometric tests that have been certified by the Health Professions Council of South Africa may be used in tests and assessments of an employee. This will ensure that that the testing used is scientifically valid, reliable, and objective and cannot be used to unfairly discriminate and unfairly disadvantage a certain employee or a certain group of employees.

2.4 Clause 4: Disputes concerning discrimination

Clause 4 seeks to amend section 10 of the Act to provide for lower paid employees (those earning less than the earnings threshold prescribed under section 6(3) of the Basic Conditions of Employment Act, 1997 (Act No. 75 of 1997)) to refer a dispute based on discrimination (including equal pay claims) to the CCMA for arbitration.

This will assist lower income employees in having their disputes adjudicated in a cost effective manner which will promote protection for vulnerable, powerless and exploited employees.

2.5 Clause 5: Burden of proof

Clause 5 seeks to substitute section 11 of the Act to align the burden of proof in respect of a claim of unfair discrimination in the workplace with the Promotion of Equality and Prevention of Unfair Discrimination Act.

2.6 Clause 6: Employment equity plan

Clause 6 seeks to amend section 20 of the Act to empower the Director-General to apply to the Labour Court to impose a fine when an employer fails to prepare or implement an employment equity plan in accordance with the provisions of this Act.

2.7 Clause 7: Report

2.7.1 Clause 7 seeks to amend section 21 of the Act to provide for all designated employers to submit annual reports on the implementation of their Affirmative Action Plans. Presently, employers with between 50 and 150 employees are required to report every second year. Reporting can be done online and will not impose undue obligations on designated employers.

2.7.2 The proposed amendment seeks to empower the Director-General of Labour to apply to the Labour Court to impose a fine on an employer, who without a valid reason, fails to file its annual report. This seeks to ensure that designated employees adhere to the provisions of the Act.

2.8 Clause 8: Income differentials and discrimination

Clause 8 amends section 27 of the Act and seeks to provide that a designated employer must take measures to reduce disproportionate income differentials or unfair discrimination in terms of the conditions of employment. This is aimed at preventing and eliminating unfair discrimination in the workplace.

2.9 Clause 9: Undertaking to comply

Clause 9 repeals section 36 of the Act because the process of obtaining a written undertaking from a designated employer to comply with section 36 delays the employer to comply with the provisions of the Act.

2.10 Clauses 10-13: Enforcement provisions

Clauses 10-13 seeks to amend sections 37, 39, 40, 42 and 45 of the Act to eliminate certain mandatory steps and criteria that must be taken into account in determining whether a designated employer is implementing employment equity in compliance with the Act. These proposed amendments seek to promote effective enforcement and prevent the use of reviews as a mechanism to delay the enforcement process. The proposed amendments do not prevent employers who are aggrieved by decisions from challenging these decisions at an appropriate juncture. The Director-General may apply to the Labour Court to impose a fine on an employer that does not comply with a request made during a review of the employer's compliance with the Act or a recommendation made as a result of such a review.

2.11 Clause 14: Powers of Labour Court

Clause 14 seeks to amend section 50(1)(h) of the Act to empower the Labour Court to review administration actions in terms of the Employment Equity Act. This amendment aligns this Act with the Promotion of Administrative Justice Act.

2.12 Clause 15: Regulations

Clause 15 seeks to effect a grammatical correction to section 55 of the Act by empowering the Minister to make “regulations” instead of “a regulation”.

2.13 Clause 16: Delegations

Clause 16 seeks to abolish the limitation imposed on the power of the Minister to delegate in terms of this Act. This clause seeks to empower the Minister to delegate the power to issue certificates of compliance with the Act.

2.14 Clause 17: Temporary employment service

Clause 17 repeals section 57 of the Act to align the Act with the Labour Relations Act, 1995 (Act No. 66 of 1995).

2.15 Clauses 18: Schedule 1: Maximum permissible fines that may be imposed for contravening this act

Clause 18 seeks to repeal the Schedule 1 of the Act, which aims to increase the penalties for contravention of the provisions of this Act by imposing penalties that are linked to the annual turnover of the employer.

2.16 Clause 19: Turnover threshold applicable to business employers

Clause 19 seeks to amend Schedule 4 to the Act by increasing the total annual turnover that an employer in agriculture must exceed to be classified as a designated employer from R 2 million to R 5 million.

3. PERSONS CONSULTED

None

4. FINANCIAL IMPLICATIONS FOR STATE

None

5. PARLIAMENTARY PROCEDURE

5.1 The Department of Labour and the State Law Advisers are of the opinion that this Bill must be dealt with in accordance with the procedure established by section 75 of the Constitution of the Republic of South Africa, 1996, since it contains no provision to which the procedure set out in section 74, 76 and 77 of the Constitution applies.

5.2 The State Law Advisers are of the opinion that it is not necessary to refer this Bill to the National House of Traditional Leaders in terms of section 1(1)(a) of the Traditional Leadership and Government Framework Act, 2003 (Act. No. 41 of 2003), since it does not contain provisions pertaining to customary law or customs of traditional communities.