

## **COMMENT ON THE EMPLOYMENT SERVICES BILL AND EMPLOYMENT EQUITY AMENDMENT BILL - DECEMBER 2012**

The SA Board for People Practices is a Human Resources (HR) professional body and is also the SAQA Quality Assurance partner for HR learning provision. The HR profession is at the heart of the management of people at work in South Africa and is thus well placed to offer constructive input to the development of policy in in employment services and employment equity. Our comments are based upon the enormous practical experience of our registered professionals in working with the employment laws of this country.

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## **SABPP Principles as a basis for evaluating the amendments**

The SABPP, through its Labour Market Committee, has adopted a set of principles to guide decisions on the SABPP positions and programmes. These principles are set out below to illustrate the basis from which the SABPP is submitting these comments:

- Society and social institutions are complex, organic open systems. The implication of this is that simple solutions to problems or issues are not adequate responses.
- National development should be measured in more than economic terms – social indicators and individual well-being must also be considered.
- Substantially more transformation will be required in the South African economy and society to deliver progress for all South Africans.
- Society contains many competing interest groups. The history of modern South Africa has shown that the inclusive, consultative approach best informs decisions which yield the most sustainable outcomes.
- HR practitioners work at the interface of people, work and society and frequently face the challenge of reconciling competing interests. Professional leadership from the SABPP must deliver practical, down to earth approaches to assist HR practitioners in their work.
- Labour market policy should be influenced by sound research which balances the needs of different stakeholders.

## **COMMENTS**

### *General comments*

The SABPP believes legislation in relation to employment practices is a necessary but not sufficient basis for the efficient working of the labour market and the achievement of equity in employment. The capacity of the State to provide programmes and run the





administration of support services is critical, and has been lacking in many respects in South Africa. Thus, although we note and welcome the intentions of the proposed two pieces of legislation, we note that much hard work will be required to give effect to existing and new legislation. As one example, we note the recent report by the Portfolio Committee on Labour which urged the Department to improve the inspection and enforcement services.

We are encouraged to note the prioritization of 3 main areas of the work of the Department, namely:

- Inspection and Enforcement Services
- Labour Policy and Industrial Relations
- Public Employment Services.

We believe this prioritization gives clarity and will assist in resolving some of the problem areas.

## **Employment Services Bill**

### *1. Partnerships*

We note that 2 (2) ( c) encourages partnerships including in the provision of employment services. In view of the fact that there is a well-established industry of private employment service providers it would seem that there is considerable potential to establish fruitful partnerships rather than stretching the manpower of the Department of Labour unduly.

### *2. Scope of public employment services that the Department must provide*

Section 5. (1) ( e) provides that these services must include advising workers on access to education and training. This section seems to be poorly worded as it would, on current drafting, exclude work seekers from such advice. (There is also no definition of “worker” in the Definitions section).

There could be overlap with the work of the South African Qualifications Authority which has been tasked with advice on access to education and training. Some recognition of the overlap would be beneficial to avoid confusion.





### *3. Employment of Foreign Nationals*

We would like to see a provision that, notwithstanding the provision of the Bill as set out in section 8 (2) (a), a company operating internationally and in South Africa may obtain a general permission from the Minister to transfer into positions in South Africa any of their foreign employees, paying due attention to the availability in South Africa of such skills as each foreign employee might have, for a specified time and a specified purpose without that company having to search within South Africa for a suitable person. We believe that the requirement to operate with Ministerial permission would prevent any abuse of this provision.

It is a very important component of any international company's talent management programme that employees undertake assignments in different countries to develop the global management skills and experience required for senior positions. It is also often very important that certain projects such as new production facilities or research and development projects be staffed with the best people internationally. South African companies operating internationally are able to take advantage of similar concessions granted by other countries, so we believe it should be offered here.

### *4. Reporting on vacancies and filling of positions*

We believe that an improvement in the functioning of the labour market in this regard could be helpful in that present arrangements tend to raise barriers for work seekers without access to the internet, to urban-based private employment agencies, or who are not skilled at job-seeking. However, any intervention in this area must be carefully considered and will require imagination and innovation to create mutual benefit for work-seekers and employers.

We note that the Bill provides an enabling environment where the Minister may, rather than must, make regulations concerning this issue. We also note that section 10(2) allows for differentiation between work categories and employee categories, so that possibly only specific types of vacancies might be included.

We submit therefore that the introduction of such regulations should be carefully considered for practicality of implementation. Consultations with the private sector are crucial here to ensure that a system that works is introduced. The type of scenario where thousands of work-seekers descend on an employer for one or a few vacancies will be highly problematic. The type of scenario, however, where a sophisticated computer-based matching system is used for certain types of scarce skills vacancies, which notifies employers of a few well-suited candidates, could be highly beneficial to



all parties. There are many private providers who operate such systems, which could easily be extended to public employment services.

We recognise that the use of such vacancies notification for temporary or casual work would be very helpful to work-seekers, but from an employer's point of view, it would be very negative to have a large number of work-seekers applying. The administration involved would take a lot of resources and incur additional costs for companies. It is very likely that this would further encourage employers to make use of temporary employment services (labour brokers) in the belief that this will make it easier to comply with the regulations.

### *5. Employment Information*

We welcome intentions to improve the availability and quality of data on employment trends. The Department of Higher Education and Training also has such intentions and we hope that both departments, together with universities and research institutions, will work together to develop one integrated research and information system.

It seems to us that it is over-kill to legislate to the degree of detail included in section 11 of the Bill, bearing in the mind the above potential duplication or overlap.

### *6. Registration of private employment agencies*

We welcome the intention to register private employment agencies although the efficacy of this provision will depend upon the criteria to be issued by regulation.

We welcome the provision that contracts for services rendered between a private employment agency and a client must specify separately the remuneration for employees and the agency fee. Some existing contracts already do this, and we support this as good practice in the ethical employment of temporary workers.

Section 17 (2) (b) requires a private employment agency to provide information to the Department on request. If this is intended to permit the collection of data for trends analysis as contemplated in section 11, then we feel that the section should state so. It is rather loosely framed at present.

### *The Employment Services Board*

The Employment Services provided by the Department of Labour are very important instruments of the South African labour market and for the labour market to work efficiently it is critical that such Employment Services work very closely with employers in all sectors. To date, some of the Services have worked better than others and this underlines the point that it is policy implementation and service delivery rather than



the policies themselves that will make the difference in improving the functioning of our labour market.

Whilst the Bill proposes private sector representatives on this Board, in conjunction with representatives of other stakeholders, we would like to see Board constituting committees to exercise oversight over each of the services.

### **Employment Equity Amendment Bill**

The SABPP is extremely concerned that the objectives of the Employment Equity Act of 1995 are not being achieved at the rate of progress that was envisaged at the time of the passing of that Act. Some analysts have estimated that it will take until the year 2060 to reach normal representivity at the current rate of progress. We believe that transformation in the workplace in terms of racial, gender and disablement representivity is critical if South Africa wishes to create an economy which delivers a decent life to all its citizens.

The SABPP is currently producing a Position Paper on Employment Equity, which will inform detailed comment on this Amendment Bill. The comments submitted today will therefore merely highlight potential problem areas and we would appreciate the opportunity to make a presentation to the Parliamentary Committee at the appropriate time, by when we will have a full motivation for our comments.

We would like to submit a proposal that only people registered with a recognised HR professional body should be permitted to sign an employer's Employment Equity Plan, and we will be submitting a similar proposal to the Department of Higher Education and Training with regard to the Workplace Skills Plans. We believe that the employment of unqualified people in positions in the Human Resources departments of employers does not contribute towards the achievement of transformation and equity in the workplace. Transformation of an organisation is a complex issue of organisation development and requires facilitation by people with appropriate knowledge, training and experience. Now that the SA Qualifications Authority has put in place the registration of professional designations through the recognition of professional bodies, the mechanisms are in place to support this proposal.





### *Amendment to Section 6 – Difference in terms and conditions of employment*

Regulations for the criteria and methodology for assessing work of equal value will be essential for implementation of this section, but we submit that such criteria and methodology should be based on generally accepted good practice that is already existing, such as the various well-known job evaluation methods. This will avoid any complications of lack of understanding and acceptance. Although there are several such job evaluation methods, as recognised in Employment Equity reporting, form EEA9 (which maps the Paterson, Peromnes, Hay and Castellion methods), we recommend the use of just the Paterson method, as any company using any other method already has the means to map their method to the Paterson method. In passing, we request the Department to remove the mapping on form EEA9 because it is inaccurate and caused confusion, and also to note that the Castellion method of job evaluation has fallen into complete disuse in the last 20 years.

### *Amendment to Section 10 – Arbitration by CCMA*

We note the intention of the amendment to speed up resolution by arbitration of discrimination and sexual harassment cases and to make it less costly for lower level employees. We feel that the reasoning behind the original routing of such cases to the Labour Court for arbitration, being that we need to establish sound jurisprudence in this very tricky area, is still valid and therefore we support the proposal to allow for an appeal to the Labour Court against the award by a CCMA commissioner.

### *Amendment to Section 11 – Burden of proof*

The proposals in this section should help to clarify how companies must show that alleged acts of discrimination are not unfair.

### *Amendment to Section 16 and 20 – Affirmative action to ensure representation in all occupational categories*

The proposed amendment should make it easier for employers to make plans for achieving representivity. The previous requirement to achieve representivity in both occupational categories and levels has made it very difficult when the number of positions serving as the denominator in the ratio is very small.





### *Amendment to Section 20 – Fines for employers who fail to submit a plan or to implement it*

The amendment to allow fines for employers for non-compliance is noted, but this needs to be read in conjunction with the process followed before such fines are levied. It is not clear to us why the sections allowing an employer to appeal against compliance orders are to be removed.

### *Amendment to Section 42 – Assessment of compliance*

In the absence of a memorandum explaining the objectives of the amendments, it is hard to understand why the explicit provisions of Section 42 should be scrapped in favour of a general clause. We can foresee many unproductive discussions between employers and Department of Labour officials as to whether an employer is complying and to what extent, and whether an employer has “reasonable ground to justify its failure to comply.” Considering that non-compliance would, in terms of the proposed amendments to Schedule 1, carry a heavy fine, and that the employer has lost the right to appeal against compliance orders before being taken to the Labour Court, we feel that it would be more effective to provide more rather than less guidance on what is reasonable.

## **CONCLUSION**

The SABPP has been very supportive of Employment Equity legislation which, in our opinion, was well drafted in the 1990s. We would not like to see these proposed amendments undermining the integrity of the original intentions of the Act. Comments submitted here are intended in the spirit of constructive criticism. We look forward to working together with the Department in appropriate areas to realise the vision of a functional labour market and a transformed work place, with all South Africans working productively in decent conditions to grow our economy.

M Meyer, CEO

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