THE BANKING ASSOCIATION SOUTH AFRICA

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19 February 2021

Portfolio Committee on Employment and Labour
Committee Secretariat
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Dear Sir,

THE BANKING ASSOCIATION SOUTH AFRICA COMMENTS ON THE DRAFT EMPLOYMENT EQUITY AMENDMENT BILL.

The Banking Association South Africa ("The Banking Association") would like to thank the Portfolio Committee on Employment and Labour for the opportunity to comment on the proposed Draft Employment Equity Amendment Bill.

Our members submitted their individual comments to BASA which we combined and articulated in this document as the industry comments on the Draft Employment Equity Amendment Bill.

We request that our submission be considered, especially on the request that the initial agreement made at NEDLAC on sector targets be reverted back to.

We look forward to engaging with the Portfolio Committee on any aspects which may be unclear and/or need further discussions.

Yours sincerely

Ayanda Baepi
Senior Specialist: Legislation & Regulatory Oversight

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ORGANISATION: BANKING ASSOCIATION SOUTH AFRICA

SUBMISSION DESCRIPTION: DRAFT EMPLOYMENT EQUITY AMENDMENT BILL 2020

NR	REFERENCE IN ACT/BILL/DOCUMENT	COMMENT (Why is it a problem?)	PROPOSED WORDING/CHANGE
1.	Section 1 (a)	1. We are of the view that the deletion of para (b) in the definition of 'designated employer' will have the effect of exempting small businesses from the application of affirmative action regardless of their annual turnover. This creates a potential loophole for employers who employ 50 or more employees to restructure in such a way that would exclude them from the application of affirmative action regardless of their annual turnover.	
2.	Section **15A.** (1) The Minister may, by notice in the *Gazette*, identify national economic sectors for the purposes of this Act, having regard to any relevant code contained in the Standard Industrial Classification of all Economic Activities published by Statistics South Africa. (2) The Minister may prescribe criteria that must be taken into account in identifying sectors	1. Section 15A (3) gives all the powers to the Minister to set targets in consultation with the National Minimum Wage Commission and not the relevant sector. This is highly problematic since it fundamentally alters what was agreed at NEDLAC by business and the social partners. 2. Section 15A (4) is also problematic. As a business with a national footprint compliance with different targets by region will place undue burden in terms of planning and managing the compliance requirements.	1. We propose that the Minister should revert to the initial agreement that was negotiated at NEDLAC i.e., to consult with the relevant sector bodies when setting sector targets. 2. Sector targets should be set nationally and not differentiated by region. 3. One of the fundamental principles which is part of EEA i.e., section 15 (3), is that quotas should be excluded when affirmative measures are designed. Imposed targets are for all intent and purpose quotas. These "quotas" will be imposed on a particular

	and sub-sectors for the purposes of this section. (3) The Minister may, after consulting the National Minimum Wage Commission, for the purpose of ensuring the equitable representation of suitably qualified people from designated groups at all occupational levels in the workforce, by notice in the *Gazette* set numerical targets for any national economic sector identified in terms of subsection (1). (4)A notice issued in terms of subsection (3) may set different numerical targets for different occupational levels, sub-sectors or regions within a sector or on the basis of any other relevant factor. (5) A draft of any notice that the Minister proposes to issue in terms of subsection (1) or subsection (3) must be published in the *Gazette*, allowing interested parties at least 30 days to comment thereon.''.		industry and companies will be expected to achieve the "targets". Companies have different challenges and are moving from different basis irrespective of being in a similar industry/sector. 4. The approach of setting sector targets will not take individual circumstances into consideration and this will not only be unfair to others and potentially amount to creation of unlevelled playing fields, but also goes against the principle of equity. 5. We seek clarity as to whether these imposed targets are aligned with the BBBEE sector codes. The Bill in its current form has no alignment in the definition and/or calculation. At present, companies review their targets regularly depending on the operational challenges. We note that the proposed Bill is silent on the review process, period, and reasons. 6. We request clarity / guidance in this regard. 7. Further the proposed Bill is silent on the repercussions for failure to achieve targets in a particular year or over a particular period. We request clarity or guidance in this regard.

			8. We further propose alignment in this regard to ensure consistency of targets imposed to ensure clarity and avoid ambiguity. 9. Clarity is further sought on which one will take precedent. Will it be quotas or targets.
3.	Section 20 of the principal Act is hereby amended by the insertion after subsection (2) of the following subsection: ‘‘(2A) The numerical goals set by an employer in terms of subsection (2) must comply with any sectoral target in terms of section 15A that applies to that employer.’’.	1. We note this section however compliance would only be possible if the process to set targets is consultative, fair, and transparent.	1. We propose a consultative target setting process with the sector.
4.	Section 21(4A)	1. This section could pose challenges as it only prescribes a process and does not state whether the Department of Labour will have powers to reject the submissions and if so, what remedy would the employer have?	1. We request clarity as to what remedy the employer would have should the Department reject the submission.
5.	Section 42 of the principal Act is hereby amended by the insertion in subsection (1) after paragraph *(a)* of the following paragraph: ‘‘*(a*A*)* whether or not the employer has complied with any sectoral target set in terms of section 15A applicable to that employer;’’.	1. We are of the view that the DG Review process would be unfair if the targets setting process is unfair.	1. We propose a consultative target setting process with the sector.
	Section 53 of the principal Act is hereby amended by the addition of the following subsection:	1. As mentioned above, the DG Review process would be unfair if the targets setting process is unfair.	1. We propose a consultative target setting process with the sector.

6.	''(6) The Minister may only issue a certificate in terms of subsection (2) if the Minister is satisfied that— *(a)* the employer has complied with a numerical target set in terms of section 15A that applies to that employer; *(b)* in respect of any target with which the employer has not complied, the employer has raised a reasonable ground to justify its failure to comply, as contemplated by section 42 (4); *(c)* the employer has submitted a report in terms of section 21; *(d)* there has been no finding by the CCMA or a court within the previous three years that the employer breached the prohibition on unfair discrimination in Chapter 2; and *(e)* the CCMA has not issued an award against the employer in the previous three years for failing to pay the minimum wage in terms of the National Minimum Wage Act, 2018 (Act No. 9 of 2018).''.	2. Employee disputes are almost not avoidable, and the outcomes of legal proceedings are often unpredictable. It would be unfair to place reliance of outcomes of CCMA or Labour Court decisions to determine whether an employer can be issued with a compliance certificate. The CCMA and Court process should not be conflated with the legislative process otherwise we run the risk of employers being afraid to discipline employees for fear of not being able to obtain a compliance certificate as Court proceedings can be unpredictable. The CCMA and Labour Court are there to protect employees and employers and settle disputes between them and therefore the outcome of their processes should not be used against employers.	2. We propose that this requirement be removed from EE compliance.