**Report by the Select Committee on Trade, Industry, Economic Development, Small Business Development, Tourism, Employment and Labour on the public hearings on the Employment Equity Amendment Bill [B 14B-2020] (sec 75) and the Compensation for Occupational Injuries and Diseases Amendment Bill [B 21B-2020] (sec 75) and on responses from the Department of Employment and Labour thereon, dated 22 March 2022**

The *Select Committee on Trade and Industry, Economic Development, Small Business Development, Tourism, Employment and Labour* (the Committee), having heard oral submissions on the above-mentioned Bills on 22 February 2022 and having received the responses from the Department of Employment and Labour thereon on 8 March 2022, reports as follows:

**1. Introduction**

The report provides an overview of submissions made by stakeholders on the two Bills and the responses from the Department of Employment and Labour in respect of the issues raised.

* 1. ***Background***

The purpose of the Employment Equity Amendment Bill [B14B-2020] is to amend the Employment Equity Act of 1998, so as to amend definition; to insert certain definitions; to substitute a definition and to delete a definition; to provide for the Minister to identify sectoral numerical targets in order to ensure the equitable representation of suitably qualified people from designated groups; to provide criteria for the Minister to issue certificates; and to provide for matters connected therewith.

The purpose of the Compensation for Occupational Injuries and Diseases Amendment Bill [B 21B-2020] is to amend the Compensation for Occupational Injuries and Diseases Act, 1993, so as to amend, substitute, insert, delete and repeal certain definitions and sections; to provide for matters pertaining to the Board and its members; to provide for the Commissioner to perform certain functions that were previously performed by the Director-General; to further provide for matters pertaining to rehabilitation, re-integration and return to work for occupationally injured and diseased employees; to regulate the use of health care services; to provide for the Commissioner to review pension claims or awards; to provide for administrative penalties; to regulate compliance and enforcement; and to provide for matters connected therewith.

The Committee placed adverts for public comment in newspapers and ran radio adverts to advertise for public comment. The closing date for written submissions was 22 January 2022. Adverts were placed in the following publications and in all eleven official languages as follows:

1. City Press (English)
2. Die Burger (Afrikaans)
3. Thembisile News (Isindebele)
4. Isolezwe (Isixhosa)
5. Isolezwe (Isizulu)
6. Nthavela (Sepedi)
7. Free State Sun (Sesotho)
8. Business Ink (Setswana)
9. Coal City (Siswati)
10. Ngoho News (Tshivenda)
11. Bushbackridge News (Xitsonga)
	1. ***Attendance by Members of the Committee***

The public hearings were attended by the following Members:

Mr. MI Rayi (Chairperson), ANC, Eastern Cape;

Mr. MK Mmoiemang, ANC, Northern Cape;

Mr. M Dangor, ANC, Gauteng;

Ms. ML Mamaregane, ANC, Limpopo;

Ms. L Moshodi, ANC, Free State;

Ms. HS Boshoff, DA, Mpumalanga;

Mr. JJ Londt, DA, Western Cape; and

Mr. T Brauteseth, DA, KwaZulu-Natal.

* 1. **Submissions**

The Committee received twelve oral submissions from the following stakeholders:

1. Businesses Unity South Africa
2. Banking Association of South Africa
3. Financial Intermediaries Association of South Africa
4. Black Business Council for Built Environment
5. Association for Savings and Investment South Africa / South African Insurance Association
6. Master Builders South Africa
7. Congress of South African Trade Unions
8. Injured Workers Action Group
9. Construction Alliance South Africa
10. COMPSOL
11. South African Civil Engineering Contractors
12. COIDLINK.

**2. SUBMISSIONS ON THE EMPLOYMENT EQUITY AMENDMENT BILL [B 14B-2020]**

**2.1. Business Unity South Africa**

Business Unity South Africa (BUSA), an apex body formed in 2003, is a confederation of business organizations including chambers of commerce and industry, professional associations, corporate associations and unisectoral associations. BUSA represents the views of its members in a number of national structures and bodies, both statutory and non-statutory, and also represents business interests in the National Economic Development and Labour Council (NEDLAC).

In its submission, BUSA acknowledges that the pace of transformation in South Africa has been slow and the importance of ensuring that workplaces are transformed so as to ensure the equitable representation of suitably qualified people from designated groups. While BUSA acknowledges the above and is firmly in support of this process, which will ensure transformation at all levels of a workplace, it highlights that any measures to do so must be rational and constitutional. BUSA represented its constituents when the Bill was tabled at NEDLAC for engagement by social partners (8 November 2017) and maintains that although an agreement was reached at NEDLAC in some aspects of the Bill, there were areas of disagreement recorded by Business. Those areas of disagreement were recorded in the NEDLAC report.

The main contention of BUSA is that the version of the Bill tabled in Parliament is different to the version of the Bill which was engaged on at NEDLAC level and subsequently published in the Government Gazette in September 2018 for public comment. BUSA notes that the most significant amendment proposed is section 15A, which is being contemplated in order to empower the Minister of Employment and Labour to identify national economic sectors for purposes of the administration of the Act, in order to determine “numerical targets for these sectors”, based on factors which the Minister may determine.

***2.1.1. Submission on Section 15A of the Bill***

BUSA maintains that it is essential that all sectors/industries in the country are adequately consulted and that the sector targets should be set with the respective industry bodies who can share meaningful information regarding, amongst others, the composition of the industry, the economic challenges faced in the industry, the state of transformation and the challenges to transformation within the industry. BUSA further believes that the Act needs to make provision for instances where agreement cannot be reached between the Minister and the relevant sector.

BUSA asserts that the impact of the amendments on foreign organisations must also be factored into the consultations. The proposed amendments present considerable uncertainty, particularly as some of these organisations may lag in representation of designated persons for justifiable and objective reasons. The level of complexity from one company to the next is yet another significant factor. As companies may range from small, single owner businesses through to large, multinational entities, the imposition of “one-size-fits-all” targets on a sector without proper and meaningful consultation will no doubt lead to unintended consequences, such as further capital flight and disinvestment. The impact of the potential flight of foreign investment, skills and service delivery should be a material concern to Government. The fact that labour inspectors have the broad powers to determine compliance under section 42 is incomprehensible, given that the result thereof could be the very closure of an organisation and could contribute to a further decline in economic growth and an increase in unemployment levels. The potential for corruption and abuse of power is also a serious threat in this context. The position of Business is that section 42(1) (aA) (dealing with assessment of compliance) should be amended to read “whether or not the employer has taken reasonable steps to achieve the applicable sectoral target”. The amendment to section 42(1)(Aa) as proposed above serves two purposes:

* To align the provision with the rest of the provisions in section 42 (which provide for reasonable steps taken by a designated employer with reference to other compliance criteria); and
* To mitigate against the numerical targets being construed as creating quotas, as this is expressly prohibited by section 15(3) of the Employment Equity Act.

***2.1.2. Submission on section 53 of the Bill***

BUSA maintains that the proposed new subsection 53(6) lists five criteria an employer must satisfy in order for that employer to be issued with a compliance certificate (which certificate will allow it to bid for work with the State). The constitutional law provision against which these amendments are to be measured is section 217 of the Constitution and deals with procurement. The setting of targets by the Minister based on unspecified factors, for a variety of sectors, sub-sectors, regions, etc. does not, in BUSA’s view, satisfy portions of section 217(3). Section 15A, if passed, may be part of national legislation, but it sets no framework within which the policy is to be implemented. It simply empowers the Minister to determine targets without reference to any prescribed framework. As such it will, in BUSA’s view, be unconstitutional for being in conflict with section 217(3) of the Constitution if passed in its present form.

For the compliance certificate (which will allow employers to bid for Government work) to pass constitutional muster and serve a rational purpose, the other considerations in section 217(1) are also important, such as being able to obtain the best possible service at the best possible price – something which should lie at the heart of an efficient, fair, equitable, transparent and cost-effective public procurement exercise. Giving a Minister or one of his or her officials the power to set targets by decree outside of the legislation promulgated specifically to give effect to section 217(3) without setting a similar legislative framework within which this is to be done, will, in those circumstances, conflict with both sections 217(1) and 217(3) of the Constitution, and not be rescued by the proviso in section 217(2), which of itself needs to comply with section 217(3). If the numerical targets which are set constitute an absolute barrier or quota, which the withholding of a certificate and with that the opportunity to bid for Government work will do, that would fall foul of section 15(3) of the Act. The consequences of not meeting the sectoral targets would eliminate organisations from transacting with the State and destroy their revenue lines, resulting in liquidation and job losses. The same consequence would apply to any company exercising its rights to appeal the findings of the Inspector, should they choose to do so, as they will have no certificate during such appeal period either.

BUSA highlights that the effect of the amendments proposed by the Bill on the requirements for employers to consult with Employment Equity Committees is that the Minister may impose sectoral numerical targets. These prescribed numerical targets will effectively override the targets contained in a designated employers’ employment equity plan. However, in terms of section 16, read with section 17, of the current Employment Equity Act, designated employers are legally required to consult with their employees (by way of an employment equity committee) on the content (the targets to be achieved) and implementation of their employment equity plans. BUSA concludes that if the Employment Equity Act is amended, it will mean that an employer will be bound to use the sectoral targets fixed by the Minister in its employment equity plan, and consultation with employees would be rendered meaningless. The employer’s hands will be tied, regardless of the input from its employees. BUSA does not believe that this disempowering consequence should be allowed to stand, given its potentially disruptive effect on workplace harmony and labour relations. BUSA therefore respectfully submits that to accept the current Bill as it stands will not only undermine the workings of NEDLAC by unravelling agreements reached by social partners, but will also have unintended consequences on businesses and their ability to grow and to create or sustain employment.

**2.2. The Banking Association South Africa**

The Banking Association South Africa (BASA) is the national association of domestic and international banks operating in South Africa. It advocates the views of banks on legislation, regulation and social and economic issues that affect the industry. It advances the interests of the banking industry with its regulators, legislators and stakeholders to make banking sustainable, profitable and better able to contribute to the social and economic development and transformation of the country.

In its submission BASA expressed its support for transformation, indicating that it supports the intentions set out by the Bill to accelerate transformation objectives in all sectors of the economy. BASA further outlined that its submission must be viewed in the context of the regulatory environment in which banks operate, specifically the Financial Sector Regulation Act of 2017, which states in section 28 that any organ of State must in performing its functions have regard to the implications of its activities on financial sustainability and provide such assistance to the Reserve Bank and the Financial Oversight Committee to maintain and restore financial stability as the Reserve Bank and the Committee may request. BASA’s submission proceeded to provide information on how certain provisions of the Bill may impact on financial sustainability of its members and to make proposals for changes to the Bill.

***2.2.1. Financial stability***

Some of BASA’s members have been designated as Systemically Important Financial Institutions by the Governor of the South African Reserve Bank in consultation with the Financial Stability Oversight Committee in terms of the Financial Sector Regulation Act, 2017. The Financial Sector Regulation Act already makes provision for fines and the matters the authority must have regard to in determining fines. Fines relating to the targets will most likely negatively affect members’ Environmental Social and Governance (ESG) scores. ESG compliance has become a major issue for international and local investors providing capital for banks. In order to maintain financial stability, in so far as the fines and the factors to be taken into consideration in determining fines, as the current provision of the Bill is in conflict with the Financial Sector Regulation Act provisions which should take precedence.

***2.2.2. Section 15A of the Bill***

In terms of the Bill, Section 15A proposes that 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. 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. BASA highlights that this is concerning as it is not in alignment with previous NEDLAC agreements discussed by business and the social partners. BASA therefore recommends that the Minister revert to the initial agreements negotiated at NEDLAC, namely that consultations will take place with the relevant sector bodies when setting sector targets. The provisions of the Financial Sector Regulation Act, 2017, and financial stability must also be taken into account when setting these targets and penalties.

Furthermore, in terms of section 15A (4) notice issued in terms of subsection (3) sets different numerical targets for different occupational levels, sub-sectors or regions within a sector or on the basis of any other relevant factor. In this regard, BASA is of the view that sector targets should be set nationally and not differentiated by region. If regional targets apply, then businesses with a national footprint will have to comply with multiple sets of targets. This will result in a considerable burden in terms of restructuring, managing and monitoring the compliance requirements for businesses that operate nationally.

***2.2.3. Concerns***

BASA expressed that the unintended consequence of hard-coding targets with penalties include the following:

* The issuing of bonds to local or international investors might become difficult in the event a bank has failed to meet the targets within the five-year period, and has a regulatory finding against it. This could impact the raising of capital (and therefore growth) within the country. The same would apply to investments made by asset managers or individuals;
* One of the effects of the targets being hard coded is that it will make it very difficult to reach and comply with the intended goals in a five-year period. The unintended consequences are the biggest risk for the banks. The main concern is how the banks will be perceived by asset managers that have to invest capital in the banks;
* Retrenchments of employees in crucial sectors in order to fit into the targets may unintendedly lead to economic harm and/or systematic risk;
* The impact on the availability of specialised skills within the sector: in the event the targets are hard coded, and where there is a shortage of skills within SA, we may further encourage emigration and exit of skills and capital from the country. This could introduce systemic risk and potentially place parts of the fiscal system at risk;
* Automation within the sector will result in reduced headcount at the lower occupational levels and this needs to be accounted for, failing which members of BASA will be unable to meet the targets.

Given the above-mentioned concerns, BASA recommends the following:

* That the process to set targets should be consultative, transparent and use the best available and up-to-date evidence;
* That the Minister should consult with individual sectors before setting targets to ensure that targets are sector specific;
* That timelines to comply with targets should be extended to a minimum of 10 years instead of five years, to allow for adequate time to transition and avoid unintended consequences.

**2.3. Financial Intermediaries Association of South Africa**

The Financial Intermediaries Association of South Africa (FIA) is a non-profit trade organisation, registered in terms of the Companies Act, and represents the interests of the advisory businesses in the financial services sector. The FIA has 1 700 member businesses and provides financial advice and risk management services to consumers of financial products. The FIA submitted that it is fully committed to transformation, and acknowledges that there is more that can be done in the sector, in particular at senior management level. Whilst the FIA is in support of the proposed amendments to the Bill it urges Parliament to consider the concerns raised in its submission which relate to the following:

* Consultation on targets;
* Need for sub-sector targets;
* Compliance: Impact on regulated entities;
* Fines and penalties;
* Constitutionality.

***2.3.1. Consultation on targets***

It is the FIA’s understanding that the Department of Employment and Labour has consulted with some sectors on the setting of targets in anticipation of the Bill being passed. The FIA submits that to date, it has not been consulted on the setting targets under the Bill. It is of the view that any consultation thus far does not meet the consultation requirement set in section 15A (2) of the Bill, as such consultation may only happen when the Bill is promulgated. The FIA therefore does not agree to any targets set outside of the required consultative process. Based on member knowledge and expertise, the FIA asserts that it can add significant value to the consultation with the Department of Employment and Labour on the setting of sub-sector targets for intermediaries. The following aspects are unique to intermediaries and will require specific consideration:

* The time period to become a fully-fledged advisory business in South Africa;
* Mandatory qualifications and accreditation, including specific regulatory exams;
* Additional skills required to ensure the success of businesses;
* Input regarding the complex regulatory landscape;
* An understanding of the various earning models such as fees and commission;
* The barriers to enter, namely red tape and the high start-up costs for advisory businesses; and
* Levels of literacy in the consumer market.

The FIA asserted that it is committed to the new social consensus on eradicating poverty, inequality and creating jobs.

***2.3.2. Compliance: Impact on regulated entities***

The FIA submits that compliance ought to be considered in terms of section 42 (general compliance) and section 53 (certificate of compliance) of the Bill, read with the Financial Sector Regulation Act. Section 42(1) of the Bill proposes that the Director-General takes certain factors into account in determining whether a designated employer is implementing employment equity in compliance with the Employment Equity Act. Given, however, that compliance will not be obtained in the short term, the FIA proposes that instead of only taking compliance into account, consideration should be given to reasonable steps taken towards compliance. The FIA maintains that section 53 of the Bill has the effect that the Minister may only issue a certification of compliance if the Minister is satisfied, inter alia, that:

1. the employer has complied with a numerical target set out in terms of section 15(A); or
2. 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 in section 42(4).

The FIA maintains that the proposed amendments contained in the Bill has the effect that State contracts may only be issued to employers who have been certified as being in compliance with their obligations under the Employment Equity Act (including targets set out in section 15(A) of the Act. In the financial services industry, however, this has the ability to severely limit the licence of the financial services provider.

The FIA highlights, that in addition to the Act, financial services providers are also required to comply with other legislation which also contains transformation imperatives. In this regard, there is a potential conflict if further sector targets are set by different Regulators and accordingly, the FIA proposes that where targets across different pieces of legislation do not align, the Department of Employment and Labour should engage with the relevant Regulators, specifically on sections 28 and 78 of the Financial Sector Regulation Act. Furthermore, section 28 of the Employment Equity Act provides that an organ of State (such as the Minister) must in performing its functions (such as identifying economic sectors, prescribing criteria for the identification of sectors and setting numerical targets for the purposes of the Bill) ‘have regard’ to the implications of its activities on financial stability. Section 78 further provides that the Minister, in performing his/her regulatory or supervisory function in relation to employment and labour at financial institutions must, to the extent practicable, consult with financial sector Regulators and the Reserve Bank on the performance of that function.

***2.3.3. Fines and penalties***

The FIA submitted that the fines negotiated at NEDLAC were aspirational and not hard coded. Furthermore, it does not believe that the current provisions on fines which are levied for non-compliance with other sections of the Act, should apply to non-compliance with Section 15A of the Bill. The FIA recommends that the Minister consult with relevant sectors on the appropriate fines and penalties at the time of consultation on the sub-sector targets. The FIA is therefore concerned that excessive punitive fines will lead to regulatory failure.

***2.3.4. Constitutionality***

The FIA contends that current targets in hard coded form with the current fines and penalties contained in the Bill amount to “quotas”, as non-compliance can impact the licences of financial service providers. The Constitutional Court in *South African Police Service V Solidarity obo Barnard 2014 (6) SA 123 (CC)* has emphasized that:

* Suitably qualified individuals must be beneficiaries of affirmative action under the Employment Equity Act; and

Measures directed at affirmative action may include preferential treatment and numerical goals but must exclude “quotas”.

**2.4. Black Business Council in the Built Environment**

The Black Business Council in the Built Environment (BBCBE), affiliated to the Black Business Council, is the apex organisation of black construction and professional organisations in the country. One of its key objectives is to engage government and other statutory bodies to influence the drafting and implementation of appropriate legislation in order to create an enabling environment for the black constituency in the building and construction industry. The BBCBE member organisations represent the interest of small, medium and micro enterprises (SMMEs) in the industry and a significant percentage of its membership is women and youth owned. The underlying membership of these organisations is approximately 5 000 companies of members who ply their trade in the built environment industry value chain.

In terms of the Bill the BBCBE fully supports the process to amend the Employment Equity Act, noting that construction sector targets must be aligned with the employment equity targets as set out and agreed upon by industry players in the current Construction Sector Charter codes. Due to concerns regarding government’s capacity to police the full implementation of the Act and its Regulations and in the interest of ensuring that what companies report to the Department of Employment and Labour is a true reflection of the reality of their operations, the BBCBE proposes that the Act should make provision for the private sector to partner with the Department to increase its inspectorate capacity.

**2.5. Association for Savings and Investment and South African Insurance Association**

The Association for Savings and Investment (ASISA) and the South African Insurance Association (SAIA) made a joint submission on the Employment Equity Amendment Bill. ASISA is a non-profit industry body which represents 119 members of the savings, investment and insurance industry. It collectively represents the interests of South Africa’s asset managers, collective investment scheme management companies, linked investment service providers, multi-managers and life insurance companies. SAIA, represents the non-life insurance industry, previously called short-term insurance industry. SAIA’s current 56 members include primary insurers, cell captives, captives and reinsurers and represents approximately 90 per cent of the market in terms of premium income.

***2.5.1. Transformation and targets***

ASISA and SAIA support the objects and purpose of the Bill and acknowledge the need for the equitable representation of suitably qualified persons from designated groups at all occupational levels of the workforce. ASISA and SAIA recognise that this is an essential requirement to gain the trust of future clients and for the sustainability of the economy and the financial sector. To this end, ASISA and SAIA (together with BASA) have already agreed to the targets proposed in the Bill with the Department of Employment and Labour. Such agreement was on the assumption that:

* Sub-sectors would be recognised;
* Targets would not be hard-coded; and
* Fines would be adjusted as a result of (amongst other things) the introduction of targets.

ASISA and SAIA assert that targets were also agreed at the time when the full extent of the Covid-19 pandemic was unknown. In this regard, the financial services sector was particularly hard hit by an increase in bad debt, excess mortality and a withdrawal of funds by investors in order to survive. It has brought about the need for automation and online services which changes employment requirements.

The financial services sector consists of sub-sectors that vary substantially in their make-up, dynamics and requirements. Different sub-sectors within the industry represent different interests and are at different levels of compliance. ASISA and SAIA assert that it is therefore crucial that proper engagement on sub-sectors and sub-sector targets take place to ensure that a *one-size-fits-all* approach is not adopted, which cannot address the diverse nature of the industry.

In respect of sub-sector and regional targets, section 15(A)(3) of the Bill provides for the setting of sub-sector and regional targets. Provinces like KwaZulu-Natal and the Western Cape require that regional demographics be taken into account when targets are set. ASISA and SAIA maintain that an unintended consequence of imposing national targets on regions would be for regional offices to close and move to provinces where national targets are attainable. Job losses could follow as a result. It is crucial for regional demographics to be taken into account when targets are set with role players and with the input of provincial government. National government cannot usurp the role of provincial government.

***2.5.2. Compliance***

It was asserted that compliance has to be considered in respect of:

* General compliance in terms of section 42 of the Bill; and
* A certificate of compliance in terms of section 53 of the Bill.

ASISA and SAIA maintain that the financial sector is highly regulated with multiple licences and multiple capital requirements. As more funds and attention will be moved to address compliance on the hard-coded requirement, other sections of broad-based transformation will suffer. If the majority of companies fail to comply with the targets set out in the Bill, it would be perceived by the public as a governance failure.

Recognition must be given for the achievement of transformation through a combination of other factors to determine an entity’s compliance level. Compliance has always been measured in aggregate rather than compulsory performance on every element. There needs to be clear assessment guidelines in terms of compliance and a robust appeal process to avoid systemic risk to the industry. Any determination of what would constitute compliance will need to take certain industry specific events into consideration.

ASISA and SAIA are of the view that the current wording of the Bill (together with the impact of non-compliance with such targets) suggests that these targets are in fact *quotas* and are too strict for the non-compliance consequences. To avoid targets being akin to quotas, justifiable reasons for non-compliance should be set out in the Bill based on the draft 2018 Regulations. ASISA and SAIA therefore maintain that a *one-size-fits-all* target for an entire sector would be impossible and prejudicial. Specific scarce skills are required in different sub-sectors which would require “suitably qualified persons” consideration requiring individualized numerical targets. If the targets are rigid, the timeframes in which each sector needs to achieve them needs to be extended. ASISA and SAIA therefore maintain that it is not mathematically possible to achieve the target in each race, gender and occupational band at a fixed future measurement point. A sudden resignation of a few individuals shortly before a measurement date may jeopardise compliance. The shortage of suitably skilled employees may imperil black owned small businesses who are highly concerned that their employees will be enticed by companies with deeper pockets.

***2.5.3. Skills shortage***

The financial sector through its various sub-sectors require that many of its positions be filled with highly qualified and experienced technical skills – often a regulatory requirement. Unfortunately, there are not enough of these skills coming through the university system to adequately meet demographics as per the Economically Active Population. In the insurance industry in particular, reporting requirements are complex and the services of chartered accountants and actuaries are required. ASISA and SAIA maintain that there are simply not enough qualified African skills available. Therefore, while individual companies may achieve their demographic targets due to the shortage of African skills, this is often achieved at the expense of another company that has invested in transformation but whose African employees are in high demand to meet targets.

***2.5.4. Fines in Schedule 1 of the Act***

ASISA and SAIA note that fines in Schedule 1 were negotiated at NEDLAC when targets were not hard coded but were aspirational and maintain that the fines are therefore not relevant or realistic in the context of the current proposed sector and subsector targets where targets are unilaterally imposed. The fines are penal and equivalent to Competition Commission fines and disproportionate to failure to meet transformation targets. The nature of the targets can lead to multi-year fines. The quantum of fines will impact capital adequacy reserves and lead to a systemic risk as businesses may fail as a result. This may result in policy holders not having their claims honoured or reduce clients’ cover and investment growth.

High fines will impact consumer and investment confidence which could result in a withdrawal of business. Due to its fiduciary role, ASISA and SAIA members’ turnover consists of its clients’ money and capital adequacy reserves, not only of its own profits which it holds on their behalf. Accordingly, *turnover* as it applies to other businesses not in the financial industry, cannot be equated to *turnover* as it relates to ASISA’s and SAIA’s members. If fines are calculated on turnover (as opposed to profit), it essentially has the effect that a fine on 10 per cent of turnover could often be in excess net profit reducing capital adequacy. Therefore, any fines based on turnover (even if only 1 per cent) will have a significant impact on the stability of a financial services provider, which will in turn lead to systemic risk by depleting the solvency capital.

***2.5.5. Other applicable legislation***

The financial sector performs critical custodian and distributive functions in respect of resources within the economy. It is essential that the skills, knowledge and experience of its labour force is retained and increased. A sound financial sector underpins economic growth, and the development and transformation of all sectors of the economy. Inefficiency in the financial sector results in detrimental consequences for growth, employment, and therefore transformation, in the economy as a whole. The Minister, in performing his functions in terms of section 15A of the Employment Equity Act, as amended, is to act in accordance with all financial sector legislation, specifically sections 28 and 78 of the Financial Sector Regulation Act.

Section 28 provides that an organ of state (such as the Minister) must in performing its functions (such as identifying economic sectors, prescribing criteria for the identification of sectors and setting numerical targets for the purposes of the Employment Equity Act) ‘have regard’ to the implications of his activities on financial stability. Section 78 further provides that the Minister, in performing his/her regulatory or supervisory function in relation to employment and labour at financial institutions, must, to the extent practicable, consult with the financial sector regulators and the Reserve Bank on the performance of that function.

***2.5.6. Constitutionality considerations***

*South African Police Service V Solidarity obo Barnard 2014 (6) SA 123 (CC)*

*[41] Section 15 describes the permissible character of affirmative action measures. They must be designed to ensure that “suitably qualified people from designated groups have equal employment opportunities and are equitably represented in all occupation categories and levels”. I pause to underline the requirement that beneficiaries of affirmative action must be equal to the task at hand. They must be suitably qualified people in order not to sacrifice efficiency and competence at the altar of remedial employment. The Act sets itself against the hurtful insinuation that affirmative action measures are a refuge for the mediocre or incompetent. Plainly, a core object of equity at the workplace is to employ and retain people who not only enhance diversity but who are also competent and effective in delivering goods and services to the public.*

In the context of ASISA and SAIA’s members, the Constitutional Court’s emphasis of the fact that only suitably qualified individuals must be the beneficiaries of Affirmative Action, creates unique challenges, given the shortage of African actuaries, accountants, asset managers, risk underwriters and other qualified individuals. The amendments must take this reality into account.

*South African Police Service v Solidarity obo Barnard 2014 (6) SA 123 (CC)*

*[42] A designated employer is required to implement several measures in pursuit of affirmative action. They must identify and eliminate employment barriers, further diversify the workforce “based on equal dignity and respect of all people” and “retain and develop people” as well as “implement appropriate training measures”. Section 15(3) contains a vital proviso that the measures directed at affirmative action may include preferential treatment and numerical goals but must exclude “quotas”. Curiously, the statute does not furnish a definition of “quotas”. This not being an appropriate case, it would be unwise to give meaning to the term. Let it suffice to observe that section 15(4) sets the tone for the flexibility and inclusiveness required to advance employment equity. It makes it quite clear that a designated employer may not adopt an Employment Equity Policy or practice that would establish an absolute barrier to the future or continued employment or promotion of people who are not from designated groups.*

From this ASISA and SAIA maintain that the impermissibility of imposing quotas is an important factor which should inform the formulation of the Bill. The proposed amendments by ASISA and SAIA to the Bill are captured further in the report under Departmental responses.

**2.6. Master Builders South Africa**

Master Builders South Africa (MBSA) is a federation of registered employer organisations representing contractors and employers in the construction industry and regulated in terms of section 107 of the Labour Relations Act, 1995. It has eight Master Builder Associations and two affiliate organisations and represents more than 4 000 contractors and employers in the industry. The MBSA and its members are in agreement that equitable representation of suitably qualified people from designated groups in the economy is central to achieving sustainable and meaningful socio-economic development. However, the MBSA submitted that the Bill in its current form will have a devastating and negative effect on the building industry and may unintendedly be counter-productive to achieving the transformation objectives it aims to attain.

***2.6.1. Amendment to section 15(A) – Determination of sectoral numerical targets***

The MBSA noted that this section empowers the Minister of Employment and Labour to set sectoral numerical targets after consultation by a notice in the Government Gazette but is silent on the criteria for identifying and setting sectoral numerical targets. The section is also silent on the need for consensus between the Minister and economic sectors in the determination of numerical targets, which demonstrates adequate consultation and is crucial to setting and achievement of any targets set. The MBSA maintains that it is deeply concerned that neither the criteria for setting targets nor the need for consensus have been included in section 15(A) and proposes that section 15A (2) should include a requirement for the Minister to determine a criterion for identifying and setting sectoral numerical targets jointly with economic sectors.

***2.6.2. Amendment to section 53: State Contracts***

The MBSA noted that this section allows for an employer to raise a reasonable ground to justify its failure to comply. However, the Bill is silent on the definition of “acceptable” reasonable grounds to justify a failure to comply, and that this may be subject to abuse. It proposes clear definitions of acceptable *reasonable grounds* to justify failure to comply in the Act. The MBSA further proposes that a compliance period of no less than the minimum required for completion of an occupational qualification dominant for each sector, should be included in the definition of acceptable reasonable grounds for failure to qualify.

The MBSA asserts that tabling the Bill in Parliament without clearly prescribed criterion for identifying and setting sectoral numerical targets is premature. Due consideration should be given to the need for consensus between in the Minister and economic sectors in the determination of targets. Clear definitions of acceptable reasonable grounds to justify failure to comply should be included in the Act.

**2.7. Congress of South African Trade Unions (COSATU)**

COSATU welcomes and supports the Bill and participated in engagements at NEDLAC in respect of this Bill in 2018/19. It believes that it is a critical amendment Bill that will strengthen government to achieve the progressive targets of the Employment Equity Act. However, COSATU’s support for the Bill is dependent on the following provisions, namely:

1. Linkages to National Minimum Wage Commission – This is important to ensure synergy and to hold employers accountable for their compliance with the National Minimum Wage Act.
2. Disabilities – The expansion of the definition of disabilities to include intellectual and sensory is correct and long overdue.
3. Sectoral targets – Empowerment of the Minister to set economic sectoral targets is critical as sectors are not uniform. Some have made progress in achieving targets whilst other remain notorious for their failure to do so. Provisions allowing the Minister to specify targets according to occupational, regional and sub-regional needs is further welcomed. Particular occupational strands often remain laggards, such as low-skilled jobs or managerial positions. It is therefore important for targets to take into account regional and sub-regional demographic diversity. South Africa is a diverse nation and this is often linked to geography. COSATU is of the view that a blanket, uniform approach does not work and ‘one-size-fits-all’ targets can cause social strife. Therefore, provisions requiring the Minister to engage with the Employment Equity Commission when setting targets will help ensure targets are thoroughly considered beforehand.
4. Employer consultation with trade unions – Provisions requiring employers to consult with trade unions are welcomed and will help strengthen collective bargaining and encourage labour market stability.
5. Annual reports – COSATU welcomes the provisions requiring employers to report on matters related to collective bargaining, compliance with the National Minimum Wage Act and its provisions as well as sectoral determinations. This will help support compliance with these progressive and statutory obligations.
6. Labour inspectors – COSATU supports the provisions empowering labour inspectors to enforce compliance by the employers with the Employment Equity Act. These are critical to ensure that inspectors are fully empowered and that recalcitrant employers are held accountable.
7. Compliance certificates – COSATU welcomes the provisions which state that government contracts may only be issued to businesses in compliance of the Act. The need for the Department of Employment and Labour and National Treasury to operationalise this is a long overdue provision.

COSATU therefore supports the Bill, which it believes is progressive and will assist in seeking to address the legacies of discrimination. It is fair, rational and empowers the State to deal with obstinate employers. Equally, it allows for regional diversity, which is a matter requiring sensitivity and links State tender requirements to compliance with labour laws and good labour practices. COSATU therefore urges Parliament to prioritise and pass the Bill as soon as possible.

**2.8. Construction Alliance South Africa**

Construction Alliance South Africa (CASA) is an umbrella body of the construction industry made up of 32 of the sector’s professional organisations, contractor organisations, supplier organisations and other bodies as an association of Associations across the sector value chain. It is not the voice of the entire construction industry which is why organisations such as Master Builders South Africa, South African Civil Engineering Council and Black Business Council for Built Environment will be making separate submissions to the Committee.

CASA engaged with the Bill through its various stages of its public participation, noting that to date six formal engagements have taken place. CASA advised the Department of Employment and Labour at the early stages of public consultation about the lack of alignment between various organisations and that a *one-size-fits-all* approach is ill considered. The basis upon which the Department hoped to proceed with target setting, using broad-based black economic empowerment (BBBEE) sector codes is flawed. The context and application of BBBEE codes are markedly differently from the Department to use management targets contained in sector codes. Therefore, the identified contradictions with existing legislation as well as the systemic constraints the industry faces should be considered.

***2.8.1. Systemic constraints***

The systemic constraints are noted as follows:

* Legislative requirements for registered professionals in senior and top management positions;
* Business sustainability - sector largely knowledge-based. Majority of management team directly involved in operational activities of business and so held liable for compliance;
* Registration requirements and career path to management;
* Statistics on Feeder Channels from Statutory Councils of Professionals;
* Feeder to University studies and professional registration.

***2.8.2. Competency based legislative requirements***

The Occupational Health and Safety Act and Construction Regulations require that “competent persons ref. Qualifications Framework Act 2000” based on required qualifications and training should be responsible for planning, design, administration and management of construction-related processes. Construction Manager, Principal Agent, Principal Engineer roles require that such persons be registered with Statutory Councils, the Engineering Council of South Africa (ECSA), the South African Council for Project and Construction Management Professions (SACPCMP) and the South African Council for the Architectural Profession (SACAP). There exists a public sector risk and liability management requirement in all contracts. Furthermore, insurance companies do not cover practitioners who are not registered professionally. The career progression timelines for middle, senior and top management roles require a minimum of 4-5 years of study, varying minimum entry requirements to study.

According to the 2020 Published Professional Registration Figures for ECSA and the SACPCMP:

* A total of 19 523 registered as Professional Engineers, 94 per cent male, 6 per cent female and 18 per cent black;
* A total of 6 400 registered for Technologists, 93 per cent male, 8 per cent female and 40 per cent black;
* A total of 10 249 registered as Candidate Professional Engineers, 77 per cent male, 23 per cent female and 58 per cent black;
* A total of 5 849 Candidate Technologists registered, 76 per cent male, 24 per cent female and 86 per cent black.

In respect of Construction Project Managers:

* A total of 910 registered, 98 per cent male, 2 per cent female and 26 per cent black;
* A total of 684 registered as Candidate Construction Project Managers, 83 per cent male, 17 per cent female and 67 per cent black.

***2.8.3. Matric output of learners***

CASA asserts that the current occupants at top management levels would have relied on candidates who matriculated from 2000 – 2005. Numerous structural deficiencies in the basic education system limit the throughput to produce quality potential candidates for the industry. The industry is not necessarily the first choice for high performing learners, and there is a small pool available for medicine, finance, pure sciences and engineering. It was noted that 78 per cent of Grade 4 learners cannot read for meaning, and there is a need for 44 000 capable teachers per year by 2025 to fill the gap left by retirement of the current crop of teachers in the next 10 years.

***2.8.4. Legal contradictions***

CASA asserts that there will be a legislative conflict if the Employment Equity Amendment Bill is implemented, as it will be afforded greater impact than the procurement legislation. Section 63 of Employment Equity Amendment Bill states that it enjoys preference to any other legislation other than the Constitution. Other areas would be in conflict with BBBEE legislation. Section 217 of the Constitution allows for procurement to be utilised by the State for redress of past imbalances.

Target setting on an irrational and unreasonable basis that seeks to absolutely limit public procurement opportunities may be considered unfair and may be unconstitutional.

**2.9. South African Civil Engineering Contractors**

South African Civil Engineering Contractors (SAFCEC) is a registered employer body for contractors engaged in civil engineering construction, it is active in all regions in South Africa and represents over 350 companies, jointly representing more than 50 per cent of employees in the industry.

***2.9.1. SAFCEC Engagement on*** Employment Equity Amendment Bill

SAFCEC outlined its engagement on the Bill dating back from November 2018 to present, noting its correspondence to the Department of Employment and Labour, the Commission of Employment Equity as well as the Portfolio Committee on Employment and Labour. This correspondence includes a substantive submission on data, statistics, research and highlighting the issues of concern, including requests for substantive engagement, particularly to the Department with no response.

***2.9.2. Critical legal considerations***

Race based quotas as opposed to racial targets

SAFCEC notes that section 15 of the Bill describes *affirmative action measures* as including *measures to ensure the equitable representation of suitably qualified people from designated groups in all occupational levels in the workforce*. Section 15(3) provides that such measures *include preferential treatment and numerical goals, but exclude quotas*. Goals [or targets] represent a preconceived target or objective of what is rationally capable of being achieved in the light of the expected impact of external factors. Quotas, on the other hand, function as an end in themselves by providing a ‘target’ that is non-negotiable, fixed and removed from the reality of factors that determine the achievability of a true goal. Accordingly, (in the context of transformation), while ‘goals’ represent objectives, a quota functions as a measure in itself.

***2.9.3 Practical considerations – Compliance***

SAFCEC maintains that compliance certificates potentially barring companies to bid for State work is the incorrect and counterproductive approach.

In respect of enforcement:

* The current Act has significant powers assigned to enforce EE Compliance. (e.g. significant fines levied via CEE).
* Compliance certification is seen as another measure to enforce compliance, particularly in our industry. All industries should be treated the same as far as impact is concerned.

SAFCEC notes that the combined effect of both fines and denying certificates are unreasonable and give rise to the following questions:

* How will international competitors in industry be treated?
* What are the implications for black-owned companies that do not currently submit Employment Equity Plans?

The implementation and actions of an inspectorate to enforce compliance must be defined and guided by the Act. SAFCEC notes significant concerns which relate to the power assigned to inspectors.

***2.9.4. Impact of the Bill on industry***

SAFCEC maintains that strong growth in industry required to enter employment cycle is needed to meaningfully impact employment equity, and therefore job creation through infrastructure investment must take priority. Poorly conceived and implemented employment equity legislation can severely damage this fragile industry denying the country a national asset and skill set which has been defined as critical. Ongoing legal processes absorb resources and is counterproductive. It creates a fertile breeding ground for potential bribery within a powerful inspectorate holding sway over company survival. The ease of doing business decreases, which is in conflict with 2022 State-of-the-Nation Address. As a result, employment costs escalate as employers avoid employment and employ the minimum number of employees. There is a further skills flight of people needed as the mentors and drivers of change.

***2.9.5. Proposals***

SAFCEC maintains that a comprehensive legal review is needed as well as well funded, joint research and policy support programmes to plan, track and evaluate employment equity in the industry. There is a need to develop, agree and implement regulations, including the measurement of progression of potential incumbents as they progress from secondary to tertiary education and onward toward registration and/or the assumption of senior roles.

**3. SUBMISSIONS ON THE COMPENSATION FOR OCCUPATIONAL INJURIES AND DISEASES AMENDMENT BILL [B 21-2020]**

**3.1. Business Unity South Africa**

***3.1.1. Definitions***

The Bill proposes that the definition of *accident* should be amended and read as follows:

*an accident or occurrence arising out of or in the course of an employee’s employment resulting in personal injury, illness or death of an employee.*

BUSA maintains that “disease” is not defined by the Act, but “occupational disease” is defined. BUSA therefore proposes that in order to ensure that there is certainty as to what diseases are referred to in the definition of “accident” that the word “occupational” should be inserted immediately before the word “disease”.

***3.1.2. Functions of the Director-General***

BUSA highlights that one of the proposed amendments is to transfer certain functions currently performed by the Director-General of the Department of Employment and Labour to the Commissioner. During the NEDLAC engagement process, Business requested that Government carefully reviews the Compensation of Occupational Injuries and Diseases Act together with the Bill to ensure that the sections relevant to the functions of the Director-General and the Commissioner are updated accurately to avoid contradictions and anomalies. BUSA notes that it appears that there are still some inaccuracies in this regard, for example section 4 of the Act has not been updated to remove the functions of the Director-General whereas those functions have been moved to the Commissioner.

***3.1.3. Section 69: Amendment to Schedule 3***

BUSA does not support the proposed amendment to section 69 in so far as the Bill proposes that the period for public comment to any changes proposed to Schedule 3 should be reduced from 60 days to 30 days. Furthermore, it was agreed at NEDLAC (as captured in the NEDLAC report) that the 60-day period would be retained. BUSA maintains that despite this agreement, the BILL published in the Government Gazette following NEDLAC consultations proposes a 30-day period for public comment. This should be rectified in line with the NEDLAC agreement.

***3.1.4. Fines and penalties***

During the NEDLAC process, the most significant area of disagreement concerned the proposed amendments to fines and penalties. Business is of the view that the following principles, some of which are enshrined in the Constitution, should apply in so far as the imposition of fines and penalties are concerned:

* Any fine/penalty must be an effective deterrent.
* Any fine/penalty must be proportional to the offence.
* Preferably, any prescribed fine/penalty should be a defined amount (not a percentage of an unknown amount).
* Any fine/penalty should have a “maximum of up to” or a fine of “not more than” in that this will provide the authority imposing any fine/penalty to exercise discretion (taking into account the particular circumstances of each case) on the value of the fine/penalty to be imposed. In other words, a fine/penalty should not be prescribing a fixed rate.
* Penalties should only be imposed by a court of law (if an employer is found guilty of an offence).

***3.1.5. Section 39: Notice of accident to Commissioner***

The Bill proposes that section 39(6) of the Compensation of Occupational Injuries and Diseases Act should be amended to read as follows:

 *An employer, excluding an employer referred to in section 84(1)(a)(i) and (ii) who fails to comply with subsection (1) shall be liable to a penalty of 10% of the declared annual earnings of that particular year.*

According to the above, a penalty at a fixed rate of 10 per cent will be imposed if an employer fails to report an accident to the Commissioner within seven days after having received notice of an accident or having learned in some or other way that an employee has met with an accident.

BUSA does not agree to the penalty being fixed at 10 per cent of an employer’s declared annual earnings. This is disproportionate to the harm caused by a failure to report, regardless of the reason. Therefore, fixing the amount in this manner is a deterrent to employment and is irrational. Any penalty imposed in terms of section 39(6) should only be imposed if an employer is found guilty of an offence (by a competent court of law) and that the penalty imposed should be rephrased as a maximum, namely “up to a maximum of 10 per cent”.

***3.1.6. Section 47(3)(c): Compensation for temporary or partial disablement***

The Bill proposes that section 47(3)(c) of the Compensation of Occupational Injuries and Diseases Act should be amended to read as follows:

 *An employer who fails to comply with paragraph (a) shall be liable to a penalty equal*

 *to double the full amount of three (3) months compensation plus interest.*

According to the above, a penalty of double the full amount of three months’ compensation (plus interest) will be imposed if an employer fails to pay an employee compensation for the first 3 months from the date of the accident.

BUSA does not agree to the proposed amendment. BUSA is of the view that any penalty imposed in terms of section 47(3)(c) should only be imposed if an employer is found guilty of an offence (by a competent court of law). The amendment should read as follows:

*An employer who fails to comply with paragraph (a) shall, if found guilty of an offence, be liable to a penalty of not more than double the compensation payable for a three (3) month period.*

***3.1.7 Section 72(3): Conveyance of injured employee***

The Bill proposes that section 72(3) be amended to read as follows:

 *Any employer who fails to comply with subsection (1) shall be liable to a fine equal to the full cost of conveyance.*

BUSA proposes that section 72(3) should rather read as follows:

*Any employer who fails to comply with subsection (1) may be liable to a maximum fine equal to the full cost of conveyance.*

BUSA represents the Business constituency at NEDLAC and maintains that on 5 July 2017, the Department of Labour tabled the Amendment Bill at NEDLAC for a Task Team to deliberate thereon. The NEDLAC Task Team concluded its deliberations on the Amendment Bill on 19 April 2018 and subsequent thereto, the NEDLAC Report was signed by social partners in May 2018. BUSA notes the following agreements that were reached by the NEDLAC Task Team, emphasising the need to abide thereby:

* The Amendment Bill incorporating public comments should be submitted to the Department of Planning, Monitoring and Evaluation to undertake a SEIAS and assess the cost implications (in particular with reference to the cost of implications for employers).

**3.2. Black Business Council in the Built Environment (BBCBE)**

The BBCBE supports the amendments to the Bill, which are written in good context with respect to improvements on occupational diseases, rehabilitation, inspector’s powers and involvement, and the expansion/extension of time frames to finalize administrative work. The definition of “dependent” has been updated to suit the South African context. However, in broadening the context and with our migratory workforce in mind, it will create challenges for the insurance underwriters and legal aids on one who is most dependent, most relevant, or most bound to the person who was injured/passed away and how to fairly distribute the policy outcomes. BBCBE would like to see the definition to consider the broader legal context.

In terms of Section 18: Amendment for the Commissioner to have the power to transfer funds to the Public Investment Corporation without the Director-General’s involvement therein. The BBCBE is of the belief that the Director-General of the Department of Employment and Labour should still play a role in the decision and take accountability for investment of the funds. The licence provided to Federated Employers Mutual Assurance (FEM) to conduct business on behalf of the Commission in the construction sector must be advertised for alternative and empowered players in the market to have an opportunity to tender for it.

The BBCBE maintains that provision must be made for other insurance providers, particularly black owned businesses to be allowed to compete for this opportunity. BBCBE asserts that it has become an administrative nightmare and costly for companies (small businesses in particular) to secure letters of good standing. Companies are charged exorbitantly to secure it and in some instances upon renewal they are subjected to unending audit processes. This simply means companies that depend on public sector projects are unable to tender for such opportunities.

**3.3. COSATU**

COSATU welcomes and strongly supports the Bill. It believes it is a critical Bill that will strengthen the protection of workers from injury on duty and increase relief and rehabilitation for those injured. Certain passages of the Bill need to be strengthened and there is a need for government to ensure the Bill’s speedy enactment and implementation.

There is further a need for employers to embrace and implement the provisions in the Bill, and to educate and empower workers. There is also a need to capacitate and modernise the Compensation Fund.

COSATU noted that its areas of support in respect of the Bill were as follows:

1. Compensation – COSATU welcomes the inclusion of all medical costs since most workers, especially industrial and at risk workers, do not have medical aid. Medical aids frequently exclude significant costs from coverage and the provisions in the Bill will assist many workers with unforeseen and often unaffordable costs at a moment of distress or the loss of a bread winner for a family.
2. Dependents – COSATU supports the expanded definition of dependents to include life partners, spouses under different marital regimes and live-in partners. As well as children fully and partially dependent adult children as well as parents, siblings and grandparents. These are necessary to reflect the family and cultural norms of South Africans
3. Domestic Workers – COSATU strongly welcomes the long overdue inclusion of domestic workers under the coverage of the Compensation Fund. This will benefit the almost 1 million domestic workers who have unconstitutionally been excluded to date. The Bill should not have been delayed for so many years, and the result has been that countless domestic workers have been denied Compensation Fund relief.
4. Post-traumatic stress disorder (PTSD) – COSATU welcomes the inclusion of PTSD. This is critical for many workers exposed to violent or other horrific workplace incidents and will benefit security guards, mine workers, correctional service officers and many other workers exposed to violent and other traumatic incidences. Furthermore, it will provide relief to women workers who have been subjected to violence and abuse.
5. Resultant Disease Cover – COSATU welcomes the inclusion of cover for diseases resulting from the workplace. This is critical for many workers exposed to unhealthy workplaces. Examples include exposure to asbestos in the mining and construction sectors, hazardous materials in the chemicals industries, and more recently Covid-19. This will provide security and relief to millions of workers and their families.
6. Compensation Fund Board – COSATU supports the provisions setting out Board membership and NEDLAC’s role in facilitating nominations from organised labour and business. This is an employer and employee scheme and needs to reflect that reality. COSATU further supports Board membership criteria and welcomes the criteria for removal of Board members.
7. No-fault rule – COSATU welcomes the introduction of no-fault rule when determining compensation, which is important to avoid the unfair exclusion of workers. Accidents will often include some degree of fault. The Compensation Fund is meant to assist workers with their medical costs, rehabilitation, reintegration, etc. as well as their families. It should not be used to punish workers and their families during already trying conditions.
8. Ten per cent of earnings – COSATU supports the provision for fines of up to 10% of earnings to offending employers in certain instances. Fines are necessary to ensure that employers take compliance seriously and that those who blatantly break the law are dealt with firmly. Requirements to meet compliance should be fair, rational and not onerous.
9. Prescription – COSATU welcomes the extension to submit claims from 12 months to 3 years. This will assist workers battling to recover and those who are unaware of their rights or lacking the means to submit claims. Government, employers and unions will need to each play their respective roles in ensuring that all employers and employees are aware of the provisions of the Act.
10. Additional time to lodge objections – COSATU welcomes the additional six months’ provision for workers to submit objections when good cause can be shown. Often workers struggle to gather the required documentation. This provision will provide additional space to do so if needed.
11. Labour inspectors – COSATU welcomes provisions providing for the duties and powers of inspectors, in particular to issue compliance orders. This is critical to ensuring the effective implementation of the Act and to protect the rights of workers to work in a safe environment. These are critical to ensuring that inspectors are fully empowered and ensure that recalcitrant employers are held accountable.
12. Road accidents – This provision is welcomed for cover for road accidents occurring during the course of work under the Compensation Fund. COSATU further agrees with the prevention of double dipping during the course of work under the Road Accident Fund.
13. Conditions upon lawyers – COSATU accepts the role of lawyers in what are often complicated submissions, particularly given the backlog. However, lawyers’ excessive fees at the expense of claimants has often robbed claimants of the little monies due to them and further strained the Compensation Fund’s limited resources. The conditions placed upon lawyers in the Bill is therefore accepted as well as the limitations on set court fees, however this needs to be enforced.
14. Responsibilities of employers, contractors and sub-contractors – COSATU supports the inclusion of provisions providing for shared and appropriate responsibilities between employers, contractors and sub-contractors. This is critical to ensure that workers’ rights are not undermined by contracting and sub-contracting and that all employers, contractors and sub-contractors are held accountable for their responsibilities.
15. Incentives for progressive law-abiding employers – COSATU welcomes the provision for incentives for employers who comply with the Act and embrace good labour practices. Employers need to embrace their roles in promoting labour market stability and decent work. Boosted productivity spurs economic growth.

The proposed amendments by COSATU to the Bill are captured further in the report under responses from the Department of Employment and Labour.

**3.4. Injured Workers Action Group**

The Injured Workers Action Group (IWAG) is a coalition of workers, medical service providers, employers and administrators who engage constructively on Compensation of Occupational Diseases and Injuries related issues.

IWAG notes that Cabinet requires a Socio-Economic Impact Study (SEIA) to be conducted for any piece of legislation. The Bill’s SEIA is not fit for purpose. The Bill, written in 2015, is six years out of date and was conducted under a different Minister and President. The Bill was written under the old UMehluko system which has since been replaced and was conducted and written in just two months, it failed to interview and take into account the impact of the Bill on a single medical service provider (MSP). It also failed to interview domestic workers and failed to interview single third party administrators or banks.

Section 43(4) of the Bill seeks to prohibit medical service providers from ceding their claims for payment by the Compensation Fund. This would have resulted in third party administrators who assist the medical fraternity with administration and funding no longer being able to provide this service in the absence of financial and legal security. IWAG maintains that should the provisions in the Bill stand, thousands of MSPs will lose their constitutional rights and be forced to do their own administration and to claim directly and individually against the Compensation Fund. Without the support and benefits of third party administrators and funding, MSPs may choose not to treat injured on duty workers or patients.

IWAG notes that section 43(4) of the Bill was removed by the Portfolio Committee on Employment and Labour after its deliberations and was replaced with the insertion of clauses after the public participation process with no explanation, justification or opportunity to question its reasoning or rationale. The clauses allow the Compensation Fund to effectively cut out any third party or entity from registering and transacting with it. The objectives and rationale for such registration are not made, the criteria are not clear and the manner to be prescribed has not been developed. The Compensation Fund at no time provided an explanation of the reasons or justification for registration to transact with it. This clause arrogates potentially huge and unfettered power in the hands of the Compensation Fund and effectively removes parliamentary oversight. IWAG therefore implores the Committee to exercise its parliamentary oversight and legislative powers and protect the powerless from arbitrary regulation by rejecting the Bill.

**3.5. Compsol**

Compsol is an established service provider of services to medical service providers, including some of the biggest hospital groups and emergency medical services in South Africa. For over twenty years Compsol has been an essential agent in fulfilling the constitutional right of access to healthcare workers under the Compensation for Occupational Injuries and Diseases Act [Act 130 of 1993]. Compsol asserted that the most recent statements of the Compensation Fund reflect that it submits some 35 per cent of the value of all medical accounts administered by the Compensation Fund. This represents 47 per cent of the volume of accounts, and Compsol is accordingly a very significant player in the BILL system.

Compsol further maintains that to ensure that the Compensation Fund complies with its constitutional and statutory obligations, it has been obliged to litigate against the Compensation Fund on various occasions. It has instituted no fewer than 132 actions and applications against the Compensation Fund or Commissioner, the Director-General of the Department of Employment and Labour and the Minister of Employment and Labour. Compsol notes that regrettably it remains continually required to enforce compliance, especially the Compensation Fund. In its view therefore further litigation is unfortunately unavoidable.

During October 2018, Compsol noted with regret a new stratagem, which in its view, is intended by the Compensation Fund to relieve it of prefunding/factoring third parties like Compsol. The Bill was published calling for public comment. In the view of Compsol, this Bill sought to have inserted, an otherwise worthy and well-intended statutory amendment of the Act, a means of destroying Compsol and its competitors.

Compsol maintains that this was done through clause 43(4) of the Bill and the associated attempt to amend the definition of the term *compensation*. These provisions purport to eviscerate it and circumstanced medical service providers by prohibiting the long standing and court mandated cession of medical invoices against the Compensation Fund. The effect of the intended provisions would be that Compsol is prohibited from continuing to act as an invoice factor as it has done.

Compsol further maintains that the Bill was never formally presented to the National Assembly and appears to have been replaced by the 2020 Bill [B 21-2020], which has since become [B 21B-2020]. This Bill, in the same manner as the proposed 2018 Bill, included proposed amendments to the Act, voiding the cession of relinquishment of “medical claims”.

Compsol maintains that following lengthy debate by the Portfolio Committee on Employment and Labour, and withdrawal of the intended amendment by the Compensation Commissioner and the Department of Employment and Labour, this clause was replaced by the following provision adopted by the National Assembly which appears in the version of the Bill before the Select Committee:

*(4)(a) No third party will be allowed to transact with the Compensation Fund unless they are registered with the Compensation Fund in the manner as prescribed.*

*(b) All third party service providers that are already transacting with the Compensation Fund must register with the Compensation Fund within six months after the commencement of the Compensation for Occupational Injuries and Diseases Amendment Act, 2021.*

*(5) For the purpose of this section, a third party means any entity that transacts with the Fund with the aim of assisting either the employee, employer, medical service provider or pensioner with the processing of claims at the Compensation Fund.*

Compsol asserts that an administrative shortcoming must be noted, namely that no public comment was ever called for in respect of the above quoted change to the Bill. The original Bill called for comment, comments were submitted and considered, and an amendment to the Bill was made introducing a completely new and substantial matter, namely the registration of third parties with the Compensation Fund. The Bill that is therefore now before the Select Committee has never been subjected to public scrutiny or comment and the Department has not provided any guidance, commentary or information in regard to the proposed registration, despite having itself suggested the proposed amendments. A material passage of time has elapsed since the proposal and the matter appearing before the Select Committee.

Compsol maintains that the relationship between the Compensation Commissioner, the Department and third parties, is acrimonious at best. It raises concerns as to the true intention of the Compensation Fund Commissioner and the Department behind acceding to the demands made by the public. In Compsol’s view, this is reinforced by the fact that instead of just removing the prohibition on cession of BILL medical invoices from the Bill, it introduces a replacement mechanism to throttle/remove/regulate prefunding third parties as a major stakeholder, who are in the first instance already registered with the Council for Debt Collectors and regulated in accordance with the Debt Collectors Act (Act 114 of 1998, as amended) and associated Code of Conduct.

Compsol therefore submits that this intended amendment of the Act must be handled with great circumspection, as it could have an immense prejudicial impact on the beneficiaries of the Act, namely the injured employees of this country and the Medical Service Providers, treating them in good faith, seeing that the majority are trauma injuries and needs medical attention post haste. Compsol further maintains that for these reasons it is of great concern that, as at the date of this submission, the details and requirements of such registration for third party pre-funders/factorers are still unknown. In its view, it would be extremely prejudicial for the public to meaningfully consider and attempt to make comments on this aspect of the Bill as it now stands without knowing how accommodating or stringent those details and requirements would be.

Recommendations made by Compsol to the Bill are captured further in the report under responses from the Department of Employment and Labour.

**3.6. COIDLINK**

COIDLINK is an injury on duty claims administrator, which works with 1 800 medical service providers to administer and provide them with working capital by prefunding injury on duty claims. COIDLINK notes that it is in full support of the latest version of the Bill [B 21B-2020] as adopted by the National Assembly and the consultative process undertaken.

***3.6.1. Background on section 73(4)***

COIDLINK notes that the original Bill, published in the Government Gazette December 2018 for public comment, contained the original version of clause 43 which sought to amend section 73(4) of the [Act 130 of 1993].

*Any provision of any agreement existing at the commencement of this Act or concluded thereafter in terms of a service provider cedes or purports to cede or relinquishes or purports to relinquish any rights to medical claims in terms of this Act, shall be void.*

This proposed amendment, commonly referred to as “cession of relinquishment of medical claims” in the view of COIDLINK sought to discontinue the practice of pre-funding or purchasing medical claims from medical service providers who treat workers injured on duty.

***3.6.2. Actions taken on section 73(4)***

COIDLINK noted that the Portfolio Committee on Employment and Labour facilitated a transparent consultative and thorough process to engage on the Bill. COIDLINK was one of the stakeholders who made submissions representing workers, employers and medical service providers to the Portfolio Committee. The majority of the participants were against the intended section 73(4). The submission by COIDLINK and submissions by many other stakeholders in various clauses were properly considered, including the more contested clause 43(4). The final clause 43(4) agreed to the by the Portfolio Committee and passed by the National Assembly on 9September 2021 was as a result of this consultative process and a compromise of all stakeholders. The proposed amendments to section 43 was expressly declined by the Portfolio Committee, and the following wording was agreed to and accepted in the Bill that was adopted on 31 August 2021:

*Notwithstanding the provision of subsection (2) the medical practitioner may after the claim has been finalised or the period referred to in subsection (1) has lapsed, apply for reopening of the claim and payment of further medical costs. (4)(a) No third party will be allowed to transact with the Compensation Fund unless they are registered with the*

*Compensation Fund in the manner as prescribed. (b) All third parties that are already transacting with the Compensation Fund must register with the Compensation Fund within six months after the commencement of the Compensation of Occupational Injuries and Diseases Amendment Act, 2021.*

***3.6.3. Irrational Reaction (Notice 526/615)***

COIDLINK asserts that the Compensation Fund reacted irrationally to the amended clause 43(4) by publishing Notices 526 and 615. The Government Gazette 526 was published on 10 September 2021, exactly one day after the National Assembly adopted the Bill. Government Gazette 615 was published on 19 October 2021 inviting public comment. COIDLINK maintains that both notices exclude pre-funding third parties from being paid directly by the Compensation Fund, effectively banning them through operational means and rendering the amended clause 43(4) null and void.

In COIDLINK’s view, the Notices clearly undermine the parliamentary legislative process and will cause job losses and business closures. The Notices extend beyond the enabling Compensation for Occupational Injuries and Diseases Act and seek to create a legal instrument to limit customers of the Compensation Fund wishing to transact. The Compensation Fund is clearly using back door tactics to defeat the ends of clause 43(4) as amended by the Portfolio Committee and passed by the National Assembly.

COIDLINK alleged that the Chairperson of the Portfolio Committee on Employment and Labour submitted a letter to the Minister for Employment and Labour on 3 November 2021 seeking clarity on the following:

* What informed the basis for Notice 615?
* How will Notice 615 influence the implementation of the Bill once signed into law?
* Is the intention of the Commissioner to make it impractical to implement clause 43(4)?
* Why does the Compensation Fund want to exclude third parties now after the implementation of the Account Verification System?

To COIDLINK’s knowledge, to date no response was received. It is not opposed to the bank verification process which it regularly undertakes with the Compensation Fund. COIDLINK is however opposed to stopping direct payments from the Compensation Fund to pre-funding third parties, which operationally bans the business of pre-funding and makes it impractical to implement the amended clause 43(4).

COIDLINK submitted a letter to the Commissioner of the Compensation Fund and the Minister of Employment and Labour on 10 December 2021 to raise concerns, particularly as it believes that this is an undeniable attempt to get rid of pre-funders. To date, no progress has been made despite commitments from the Minister of Employment and Labour.

***3.6.4. Recommendations***

COIDLINK maintains that the Minister of Employment and Labour needs to explain Government Gazette Notices 526 and 615 which relate to the Bill, in particular section 43(4). In its view, unless Government Gazette Notice 615 is withdrawn, clause 43 of the Bill will be rendered invalid, effectively rendering the parliamentary process null and void. COIDLINK therefore urges the Select Committee to be vigilant to ensure that administrative powers are not abused by the Commissioner of the Compensation Fund to frustrate the legislative process. In its view, the disregard for the parliamentary process is evident from Notices highlighted and has been issued to frustrate operations of pre-funders as third parties. Furthermore, any administrative Notices must be strictly in line with the Act and must not be used to implement policy changes.

**4. RESPONSES FROM THE DEPARTMENT OF EMPLOYMENT AND LABOUR**

**4.1. Responses from the Department of Employment and Labour in respect of stakeholder submissions on the Employment Equity Amendment Bill [B 14B-2020]**

|  |  |  |
| --- | --- | --- |
| **Stakeholder** | **Submission summary and issues raised** | **Response**  |
| **Section 15A Bill** |
| Business Unity South Africa (BUSA) | * If the numerical targets which are set constitute an absolute barrier or quota, which the withholding of a certificate and with the opportunity to bid for Government work will do, that would fall foul of Section 15(3) of the BILL.
* Giving the Minster or any of his or her officials the power to set targets by decree outside of the legislation promulgated specifically to give effect to Section 217(3) without setting a similar legislative framework within which this is to be done, in those circumstances, conflict with both Sections 217(1) and 217(3) of the Constitution, and not be rescued by the proviso in Section 217(2), which of itself needs to comply with Section 217(3).
 | * **Disagree with the arguments by BUSA that sector targets may constitute a barrier or quota, if a certificate will be withheld for non-compliance.**
* Department are disappointed that BUSA is distancing itself from the NEDLAC Agreement where all social partners, including BUSA agreed that to ensure that sector targets set in terms of section 15A are not quotas, flexibility must be created to allow employers to regulate/ set their own Annual targets towards achievement of the Minister’s regulated sector targets; and in addition, employers should be given an opportunity to raise a justifiable reason/ reasonable ground for failure to comply with the self-regulated annual targets before any punitive measures can be taken against the employer. Such sanctions include, not issuing an EE Compliance Certificate or referring non-compliance to the Labour Court for a penalty.
* Furthermore, the framework within which sector targets will be set is prescribed in the draft EE Regulations, 2018 as agreed by social partners. There is nothing unconstitutional in this matter.
 |
| BUSA | * Sector target should be set with the respective industry in a joint consensus seeking approach; and
* Act needs to make provision for instances where agreement cannot be reached between the Minister and the relevant sector.
 | * Agree that where possible, consensus must be reached with sector stakeholders on the setting of sector targets.
* However, Department disagrees that the Bill must make a provision for another processes in instances where there is no agreement on the sector targets. After 24 years of the BILL with no significant progress due to self-regulation by employers, we believe the Minister must be given powers to still regulate sector targets after consultation with sector stakeholders and on the advice of the Commission for Employment Equity.
 |
| Master Builders South Africa (MBSA) | * Section 15A is silent on the criteria for identifying and setting sectoral numerical targets.
* Section 15A is silent on the need for consensus between the Minister and the economic sectors in determination of numerical targets, which demonstrates adequate consultation and is crucial to setting and achievement of any targets set.
* MBSA proposes that section 15A(2) should include a requirement for the Minister to determine a criteria for identifying and setting sectoral numerical targets jointly with the economic sectors.
 | * Disagree, section 15A is clear that the Minster may identify national economic sectors taking into account any relevant code contained in the Standard Industrial Classification of all Economic Activities published by Statistics South Africa (StatsSA) – this was done and 18 economic sectors were identified and published for public comment in the Draft EE Regulations, 2018. NEDLAC social partners agreed on these sectors and no opposing public comment was received on these sectors.
* Agree that where possible, consensus must be reached with sector stakeholders on the setting of sector targets, but the Minister must still have powers to set targets where there is no consensus upon receipt of advice from the Commission for Employment Equity (CEE).
 |
| Financial Intermediaries Association of Southern Africa (FIA) | * The current targets in hard-coded form with the current fines and penalties contained in the BILL amount to quotas as non-compliance can impact the licences of financial services providers.
* The Constitutional Court in *South African Police Service V Solidarity obo Barnard* 2014 (6) SA 123 (CC) has emphasised that:
* suitably qualified individuals must be the beneficiaries of affirmative action under the Bill; and
* measures directed at affirmative action may include preferential treatment and numerical goals but must exclude “quotas”
 | * Disagree with the arguments by FIA that sector targets set in terms of section 15A of the Bill are hard-coded and amount to quotas, as a result, are unconstitutional in terms of the Constitutional Court judgement in the *South African Police Service V Solidarity obo Barnard* 2014 (6) SA 123 (CC).
* It is important for the Committee to note that it was agreed at NEDLAC with all social partners that to ensure that sector targets set in terms of section 15A are not quotas, flexibility must be created to allow employers to regulate/ set their own Annual targets towards achievement of the Minister’s regulated sector targets – this will be done after consultation with employees as per section 16 read with section 17 of the BILL.
* In addition, NEDLAC social partners agreed that employers should be given an opportunity to raise a justifiable reason/ reasonable ground for failure to comply with the self-regulated annual targets before any punitive measures can be taken against the employer. Such sanctions include, not issuing an EE Compliance Certificate or referring non-compliance to the Labour Court for a penalty.
 |
| The Banking Association of South Africa (BASA) | * Section 15A(3) gives powers to the Minister to set targets in consultation with the National Minimum Wage Commission and not the relevant sector, this is concerning as this is not in alignment with the NEDLAC agreements discussed by business and the social partners. BASA recommends that the Minister reverts back to the NEDLAC agreement.
 | * Disagree, BASA commenting on the incorrect version of the Bill. The Bill was corrected by the Portfolio Committee on Employment and Labour to revert back to NEDLAC agreement to enable the Minister to set sector targets after consulting the relevant sector stakeholders and on the advice of the CEE.
 |
| BASA | * BASA of the view that sector targets should be set nationally and not differentiated by region. If regional targets apply, then businesses with national footprint will have to comply with multiple sets of targets. This will result in a considerable burden in terms of restructuring, managing and monitoring the compliance requirements for businesses that operate nationally.
 | * Agree that national organisations like BASA should not be forced to comply with regional sector targets, but with national sector targets. In this regard, the concern by BASA will be catered for, if the proposed amendment submitted by COSATU on Section 42(a) of the principal Act, to change the word “*and*” to “*or*” is considered and accepted by this Committee.
* The proposed amendment by COSATU to section 42(a) will enable organisations like BASA that operate nationally to choose between national and regional demographics of the Economically Active Population (EAP)
* Therefore, we request the Committee to consider the proposed amendment to Section 42 (a) as proposed by COSATU in their oral submission/ presentation. (See slide 19 hereunder)
 |
| Construction Alliance South Africa (CASA) | Since there is insufficient empirical evidence to enable the setting of targets. CASA commits to collaborate with DEL in conducting research that will inform rational target setting as short term measure. | * Disagree, there is no need for research. Sufficient empirical evidence from the EE data collected from employers in the Construction sector through EE reports submitted annually to DEL – this data indicates that there is insignificant transformation in this sector.
 |
| Financial Intermediaries Association of Southern Africa (FIA); Association for Savings and Investment South Africa (ASISA); andSouth African Insurance Association (SAIA) | * **Section 15A(2)** “*Minister may, after consulting in consultation with the relevant sectors including Regulators where applicable, and with the advice of the 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*).”
* **Section 15A(3)** *“A notice issued in terms of subsection (2) 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. Where a sector provides sufficient reasons for such a distinction, such as a difference in skills requirements, the Minister may set different numerical targets per sub-sector or region.”*
 | Disagree with the proposed amendment to Section 15A(2) to delete the words “after consultation” and the new insertions of the words “in consultation with” and “including Regulators where applicable” because it is important that the Minister should have powers upon receipt of an advice from the Commission for Employment Equity to regulate sector targets in instances where there is no consensus reached with the relevant sector stakeholders. Otherwise, the intended objective of sector targets will be defeated and the mischief of employer’s self-regulated targets, which never worked over 24 years of BILL will be perpetuated – no transformation of workplaces will be realised in our lifetime.Disagree with the proposed amendments to Section 15A(3) to cater for skills requirements because employers had over 24 years of Skills Development Act to develop the skills set required to transform their workplaces. |
| Financial Intermediaries Association of Southern Africa (FIA); Association for Savings and Investment South Africa (ASISA); andSouth African Insurance Association (SAIA) | * Section15A(4 “A draft of any notice that the Minister proposes to issue in terms of subsection (1) or subsection (2) must be published in the Gazette, allowing interested parties at least 30 days to comment and engage with the Minister thereon.” FIA suggests that 30 days be extended to 90 days.
 | Disagree with the proposed “90” days because the 30 days prescribed in the Bill is the minimum time frame required and not a maximum period for the publication of a notice. Disagree that the Minister must again engage with the sector after publication of notice. |
| **Section 16 vs Section 15A Bill**  |
| BUSA  | * The effect of the proposed amendments is that the Minister may impose sectoral numerical targets. These prescribed numerical targets will effectively override the targets contained in a designated employer’s employment equity plan.
* However, in terms of section 16, read with section 17, of the current employment Equity Act, designated employers are legally required to consult with their employees (by way of an employment equity committee) on the content of the targets to be achieved) and implementation of their employment equity plans.
* If the BILL is amended, it will mean that an employer will be bound to use the sectoral targets fixed by the Minister in its employment equity plan, and consultation with employees would be rendered meaningless. The employer’s hands will be tied, regardless of the input from its employees. BUSA does not believe that this disempowering consequences should be allowed to stand, given its potential disruptive effect on workplace harmony and labour relations.
 | * **Disagree** with arguments by BUSA that the sector targets set by the Minister in terms of Section 15A will disempower employers to consult with employees and are in conflict with the requirements of section 16 read with section 17 of the BILL, because BUSA was part of the NEDLAC Agreement, where in all NEDLAC social partners agreed that employers should be given powers to regulate their own Annual targets in the EE Plan towards achievement of their relevant sector targets in consultation with the employees as required by sections 16 and 17 of the BILL.

In fact, it is important to highlight that the implementation plans for the amendments is that the Minister would regulate sector targets for a period not less than three years and not more than five years, to allow the regulatory flexibility for employers in consultation with their employees to regulate their own Annual targets in the EE Plans towards the achievement of the sector targets. |
| **Section 20(2A) and Section 42(1) of the Bill** |
| Financial Intermediaries Association of Southern Africa (FIA); Association for Savings and Investment South Africa (ASISA); andSouth African Insurance Association (SAIA) | **Section 20(2A):***(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.* | **Disagree** with the proposed deletion of the word” sectoral”– employers are required in terms of Section 15A to align their numerical goals in their EE Plans with sector targets set by Minister, in this regard, the word “sectoral” is intended to link the EE numerical goals in the employer’s EE Plan with the sector targets regulated in terms of section 15A. |
| FIA; ASISA; SAIA; and BUSA | Section 42(1) (aA):*(aA) whether or not the employer has complied with a sectoral target or taken reasonable steps to comply with/ achieve the applicable target as set out in terms of section 15A applicable to that employer.* | Disagree with the proposed amendments because section 53(6) of this Bill already caters for the prescription of the justifiable reasons/ reasonable grounds for failure to achieve the set sector targets. Furthermore, the justifiable reasons/ reasonable grounds are already prescribed in Regulation 16 and in the BILL15 form in the Draft EE Regulations, 2018, which was agreed upon by NEDLAC Social Partners, including Organised Business**.** |
| **Section 42(a) of the Bill, 2018 formed part of the NEDLAC Agreement** |
| COSATU | * It is important for targets to take into account regional and sub-regional demographic diversity;
* South Africa is a diverse nation and this is often linked to geography;
* A blanket uniform approach does not work and one size fits all targets can cause social strife; and
* Provisions requiring Minister to engage when setting targets with Employment Equity Commission will help to ensure targets are thoroughly considered beforehand.
 | **Agree** with the proposal by COSATU that it is important for targets to take into account regional demographic diversity because South Africa is a diverse nation and this is often linked to geography. Therefore, we request the Committee to consider the proposed amendment to Section 42(a) of the principal Act as proposed by COSATU as this amendment formed part of the NEDLAC agreement and was mistakenly omitted in the Bill tabled in Parliament. **(vs: page 4, paragraph 3.9 of NEDLAC Report)** If agreed by Committee, section 42(a) will read as follows:*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 may, in addition to the factors stated in section 15, take 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 level in that employer’s workforce in relation to the demographic profile of the national and or regional economically active population;* |
| **Section 53 Bill** |
| Financial Intermediaries Association of Southern Africa (FIA); Association for Savings and Investment South Africa (ASISA); andSouth African Insurance Association (SAIA) | **Section 53(6)(a):***(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 or has taken reasonable steps to comply with those targets;* | **Disagree** with the proposed additions because it will be difficult to measure reasonable steps taken by employers, and even if we were to prescribe/ define the reasonable steps, we run the risk of opening a flood gate of condoning non-compliance with the requirements of the BILL. In fact, the ‘reasonable steps’ were removed from section 42 through the 2013 amendments of the BILL to mitigate the risks of limiting the compliance and enforcement mechanisms of this Act. |
| **Section 53(6)(b):**In relation to section 53(6)(b), the Bill must set out factors that are to be considered in determining whether an entity has a reasonable ground which justifies non-compliance, and that these factors should be included in the Bill itself. ASISA and SAIA suggest that the grounds contained in the draft 2018 regulations should be used for this purpose, with the inclusion of “level of progress made towards achieving the targets” and any other relevant factor”. | **Disagree** because it was agreed by NEDLAC Social partners that justifiable/ reasonable grounds must not be included in the Bill itself, but in the regulations to create regulatory flexibility to cater for future developments. Rationale is that, it is less complex to review and amend the Regulations through NEDLAC process, rather than amending the Act, which has to go through the Parliamentary process. Justifiable grounds in the Draft EE Regulations, 2018 were agreed by NEDLAC and no opposing public comments were received on these. |
| Master Builders South Africa (MBSA) | Section 53(6)(b):The section is silent on the definition of acceptable reasonable grounds to justify a failure to comply – this may be subject to abuse.MBSA proposes that clear definitions of acceptable reasonable grounds to justify a failure to comply should be included in the Act.A compliance period of no less than the minimum required for completion of an occupational qualification dominant for each sector, should be included in the definition of acceptable reasonable grounds for failure to qualify. | * **Disagree** with the proposal that acceptable reasonable grounds should be defined in the Act. It was agreed by NEDLAC Social partners that justifiable/ reasonable grounds must not be included in the Bill itself, but in the regulations to create regulatory flexibility to cater for future developments.
* **Disagree** with this proposal to include a minimum period to complete a qualification as part of reasonable grounds for failure to comply – how do you cater for the skills needs of each sector – this will be cumbersome and open to abuse by employers in each sector.
* Furthermore, justifiable reasons in the Draft Employment Equity Regulations, 2018 already agreed by NEDLAC Social partners and no opposing public comments were received in this regard.
 |
| BUSA | Section 53(6)(b):The criterion that an employer should not have had any unfair discrimination findings from the CCMA or Labour Court in the last 12 months, is irrational and unduly onerous. It allows the Minister the power to usurp the powers of those forums to determine their own dispute resolution processes and to assess appropriate remedies. For example, an employer may be ordered to pay money or restore the position of a wronged employee. To prevent such an employer for bidding for State contracts amounts to double punishment and is unjustified.Similarly, the criterion on a finding about non-payment of minimum wages in the last 12 months is problematic. Appropriate remedies lie in the National Minimum Wage Act and the Labour Relations Act. | * **Disagree** with the arguments by BUSA that the criterion for issuing of EE Compliance Certificate should not include in the criterion, the unfair discrimination cases by CCMA and the non-payment of national minimum wage because the criteria listed under Section 53(6)(b) was agreed by all NEDLAC Social partners without any amendment (vs: NEDLAC Report, page 4, paragraph 3.10.1).
* In fact, the Department is perturbed by BUSA’s arguments seeing that they are now dissociating themselves from the NEDLAC agreement.
 |
| **Fines and Penalties (Not part of Bill)** |
| Financial Intermediaries Association of Southern Africa (FIA) | * The FIA does not believe that the current provisions in respect of fines which are levied for non-compliance with other sections of the Act, should apply to non-compliance with section 15A.
* FIA recommends that the Minister consult with the relevant sectors on the appropriate fines and penalties at the time of consultation on the sub-sector targets.
* FIA is concerned that excessive punitive fines will lead to regulatory failure and a systemic event.
 | * **Disagree** with the proposal from FIA, ASISA and SAIA that the current fines and penalties in Schedule 1 of the Employment Equity Amendment Act (BILLA), 2013 are inappropriate or should be applicable to non-compliance with sector targets set in terms of section 15A.
* In fact, the issue of the current fines and penalties in the BILLA, 2013 was never a matter of concern to any social partner during the NEDLAC negotiations on the EE Amendment Bill.
* Department strongly believe that any kind of non-compliance with any provision of the BILL must be treated in the same manner and the Courts should apply the same sanctions/ penalties in Schedule 1 of the BILLA, 2013.
 |
| Association for Savings and Investment South Africa (ASISA); andSouth African Insurance Association (SAIA) | * ASISA and SAIA recommend that the current fine regime not be applicable to non-compliance with targets set in terms of section 15A, and that this is a matter to be considered for inclusion as a topic for further consultation once the Bill has been promulgated, and prior to publication of notices in terms of section 15A.
 |

**Further Departmental responses to concerns raised in respect of the Bill**

***4.1.1. Section 53 (Bill) vs Procurement***

The Department noted that there are other compliance requirements with other laws outside procurement, which are currently prerequisite for access to State contracts such as:

* SARC Certificate;
* BBBEE Certificate; and
* New Employment Equity (EE) amendment proposal is to add the EE Compliance Certificate to the list to expedite transformation of the economy.

In respect of the rationale as to why section 53 of the Bill was not promulgated in 1998:

* Employers required time to develop and implement systems and processes to comply with the requirements of the Bill, e.g. establish HR Systems to collect workforce data; conduct workplace analysis; develop and implement EE plans with numeral targets and goals; and then submit EE reports to reflect progress made;
* There were no tools and criteria in place to assess compliance, including regulations and systems to issue certificate of compliance under section 53 – now tools and criteria are developed and 99.9 per cent of EE reports are submitted online to enable collection of quality data and analysis of progress made in the labour market after 23 years of the Bill; and
* Proposed sector EE targets is one of the key mechanisms to assess compliance of designated employers.

***4.1.2. Process of issuing of Compliance Certificate***

The Department indicated that issuing of an EE certificate of compliance will be done by declaration (Bill form) and automation through the EE system online facility. The aannual assessment of annual EE targets will be conducted immediately through the automated online submission of EE reports. Automation will make it easy to **S**ave, **P**rint and **E**mail the certificate when required – access to the certificate online will be 24/7. The EE system will be linked to the Commission for Conciliation, Mediation and Arbitration (CCMA) Case Management System and the National Minimum Wage (NMW) Exemption System to ensure back-end verification with the CCMA Arbitration Awards for discrimination cases; and to check if employers have been exempted from paying the NMW, the turn-around time will be expedited to issue certificates. No manual certificateswill be issued by labour inspectors/any official. Certificates will be issued automatically by the EE system after the submission of EE reports (designated employers); and small employers/non-designated employers – a certificate will be issued after submission of a request for a certificate (BILL15 form) online.

***4.1.3. Law enforcement vs corruption / bribery***

The Department notes that SAFCEC raised a concern about labour inspectors receiving bribes in exchange for certificates of compliance and concedes that we live in an environment wherein corruption/bribery is rife. However, law enforcement cannot be stopped based only on the fear of corruption/bribery. The two parties involved in corruption, i.e. the corruptor and the receiver of a bribe must be dealt with to ensure that we curb/eliminate the scourge of corruption. The Department must continue to enforce the law.Both labour laws and criminal laws must be enforced to maintain compliance, peace and stability in the labour market and society as a whole. The Black Business Council in the Built Environment (BBCBE) proposes to forge a partnership with the department to increase enforcement capacity. There is no need to amend the BILL and we are not averse to partnerships. Proposals to partner with the BBCBE or any other organisation are welcome as long as we can improve compliance with the Bill and transform the labour market.

***4.1.4. Areas of agreement to amend in the Bill***

The Department agrees with the following amendment to section 42(a) of the Amendment Bill, 2018 (part of NEDLAC agreement) as proposed by COSATU and in this regard, request the Committee to consider the inclusion of this amendment in the current Bill.

Upon the Committee’s consideration and approval, **section 42(a)** would read as follows:

 42(a) 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 may, in addition to the factors stated in section 15, take 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 level in that employer’s workforce in relation to the demographic profile of the national and or regional economically active population;*

***4.1.5. Update on consultation process with relevant sector stakeholders***

The Department reported that in June 2019, the Department and the Commission for Employment Equity started with the consultation process with each economic sector separately with the purpose of reaching consensus on the setting of EE sector-specific targets for the designated groups, particularly at the top four occupational levels (Top Management; Senior Management; Professionally Qualified; and Skilled Technical level); and for persons with disabilities.Notwithstanding that the promulgation of the EE Amendment Bill is still underway in the parliamentary processes, the Department and the Commission for Employment Equity have made significant strides in relation to the consultation process with relevant sector stakeholders. Thus far, consensus has been reached on the sector targets with the financial and insurance sectors. The Department is busy conducting follow-up engagements with other sectors regarding the Department’s proposed targets tabled in the initial round of consultation.

***4.1.6. Constitutionality of section 15A Quotas Vs Employment Equity target***

The Department sought to make a distinction between quotas versus employment equity (EE) targets, noting that quotas are mandatory outcomes whereas EE targets are aspirational goals. Quotas are rigid and must be achieved at all costs whereas EE targets are flexible but attempts must be to achieve goals where reasonably practicable. Furthermore, for quotas, penalties are instituted for missed outcomes and no consideration is made of justifiable reasons whereas there is flexibility in EE targets built into the Draft EE Regulations 2018, with justifiable reasons reflected in the Bill form. The Department maintains that flexibility is built in two ways, namely:

* Employers have powers to set their own annual EE targets in the EE plan through consultation with employees and trade unions in terms of section 16 of the Bill towards achieving the regulated EE target (over a three to five-year period).
* Regulation 16(4) states that justifiable grounds not complying with the targets include:
	+ Insufficient recruitment opportunities
	+ Insufficient promotion opportunities
	+ Insufficient target individuals from designated groups with the relevant qualification, skill and experience
	+ Court Order
	+ Transfer of business
	+ Mergers/Acquisitions and
	+ Economic impact on business circumstances.

The Department therefore maintains that in light of the issues raised above with respect to flexibility, it is clear the sectoral EE targets are not quotas.

**4.2. Responses from the Department of Employment and Labour in respect of the Compensation for Occupational Injuries and Diseases Amendment Bill [B 21B-2020]**

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| --- | --- | --- |
| **Stakeholder** | **Submission summary and issues raised** | **Response**  |
| **Definition of Accident** |
| BUSA | Amendment to definition of AccidentBUSA proposed that the definition of “Accident” should read as follows: “accident” means an incident or occurrence arising out of or in the course of employee’s employment and resulting in personal injury, illness, occupational disease or the death of the employee’’ | **On the definition of accident*** The following definition of accident was agreed upon by the social partners at NEDLAC of which BUSA is a constituency:
* **“accident” means an [accident]** incident or occurrence arising out of and in the course of employee’s employment and resulting in personal injury, illness, occupational disease or the death of the employee**’’**
* COID is an occupational injury instrument to assist workers who sustain injury in the course of them doing their job.
* Removal of the word “and” and replacement with “or” as proposed by BUSA delinks the type of work from the injury itself. The state offers other forms of social protection for any injury other than that caused by the occupation of the work.
* The department proposes that the wording in the definition be left as published in the Bill
* On the insertion of the occupational before the word disease, this was agreed upon and done at the level of NEDLAC. See the definition above.
 |
| **Transfer of powers of the Director-General** |
| BUSA  | **Amendment of section 4*** BUSA further submitted that there are inaccuracies with regard to the transfer of Director-General administrative powers to the Commissioner. The word Director-General still appears in instances where it must be replaced by the Commissioner.
 | On the transfer of the Director-General’s administrative powers to the Commissioner* This was also agreed upon at NEDLAC and in order to avoid human error the Office of the Chief State Law Adviser advised on the need for the omnibus provisions in clause 62 of the Bill (not section 62).
* The clause’s heading is “Substitution of certain expressions in Act 130 of 1993”

Relevant for this purpose is clause 62(d) which reads as follows:* (d) By the substitution for the expression “Director-General” wherever it occurs of the word “Commissioner” except in section 1 and section 18, section 30, section 50, section 55 and section 69”
 |
| **Notice periods and Schedule 3 and penalties** |
| BUSA | Amendment of section 69 * BUSA further proposed that the notice period for the amendment of Schedule 3 should be 60 days rather than 30 days.
* BUSA proposed that the penalties should be expressed in monitory terms rather than percentages and that the Bill must still provide for offence to be imposed by court.
 | **On 30 days’ notice period before amending schedule 3 of the Act*** Clause 39 amends section 69 and provides for Government Notice to be published at least 60 days before amending Schedule 3. So this is line with BUSA submission on the matter.

**On fines and penalties (10%)*** It was agreed at NEDLAC that we must decriminalize non-compliance to BILL by the substitution of the offences and fines provisions with the administrative penalties.
* It was also agreed that it is undesirable to put actual amounts of penalties but that percentages must be used. (This may be the area of disagreement nonetheless the Bill was concluded as explained above. Clause 42 is in line with what was engaged on at NEDLAC and provides for penalties and not fines.
 |
| **Rehabilitation and return to work** |
| COSATU | **Insertion of Section 70A (1)(c) and 2(b)*** COSATU proposed that the insertion of Section 70A if enacted into law it will restrict the injured employees to their previous employment and will not empower them to perform work either as independent contractor or to be self-employed.
* COSATU further submitted that Section 70A (1) must provide for mandatory provision of Rehabilitation facilities, service and benefits.
 | **On section 70A*** The Department believes that the ambit of the proposed Section 70A is wide enough to assist the injured employee to perform not only the work he/she was doing at the time of the accident or contraction of disease but also to be rehabilitated to engage in other economic activities such as independent contractor or self-employment. The regulations and policies on rehabilitation will provide for the implementation of section 70A.
* The discretionary use of “may” is linked to the incentive to employers who participate in rehabilitation programmes on the reductions of premiums/assessments that employers must pay annually. This is likely to get a buy-in from employers than the mandatory provision.
 |
| **Issuing of licences in terms of Section 30**  |
| COSATU | * COSATU raised a concern that the issuing of licences to the licensees might fall in the hands of insurance companies who may deprive the employees of benefits on the basis of technicalities. Section 30(7)
* COSATU raised a further concern that how the operation of licences will be supervised to ensure that workers’ claims are not inappropriately rejected.
* COSATU proposed that licences should be issued to organisations subject to control of Boards consisting of an equal number of representatives of employers and registered union and that the awarding of licences is done through transparent and fair procedures.
 | On the issuing of license to licensees* The license in their current form already contains built-in mechanism for monitoring of the licensees in that in addition to the conditions prescribed by the Minister, the Director-General is empowered to determine the conditions for provisional settlement of the claims. In other words, the Director-General will have to confirm the decisions taken by the licensee before they are regarded as final. This is in terms of Section 62 read with Section 45.
* Section 30 already provides that the Minister may determine the conditions for the license and the financial securities thereof. Board representation can form part of these conditions along with many other governance conditions
* With regards to the awarding of licences, the Department agrees that the licence must be awarded through tender processes.
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| **Investment of funds with the Public Investment Corporation** |
| Black Business Council for Built Environment (BBCBE) | **Amendment of section 18*** BBCBE raised a concern that the Commissioner should not have the power to transfer Funds to the PIC without the Director-General involvement.
* BBCBE further proposed that licences to FEM to conduct business of behalf of the Fund in the construction sector must be advertised in order to empower players in the market by tendering and to afford black-owned businesses to compete for the issuing of licences.
 | **On the investment of the funds with PIC by the Commissioner.*** The Director-General is the Accounting Authority of the Compensation Fund even under the Bill. The implication of this is that the Commissioner must still inform or even seek approval from the Director-General for major financial decisions.
* The Commissioner will do all the research and due diligence regarding the portfolio under which the funds must be invested but the Accounting Authority has the final say in the matter. The DG is accountable to the Minister who in turn is accountable to the Parliament regarding the funds of Compensation Fund.
* The Department agrees that the license must be awarded through tender processes.
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| **Amendment to Section 73 – Amendment to Clause 43** |
| COIDLINK, COMPSOL and IWAG | * The submissions of COIDLINK, COMPSOL and IWAG are considered together because they are similar in nature. The main contestation is the insertion of Section 73(4) and (5) in the Bill.
* COMPSOL’s proposal that Section 73(4) should provide for registration of any party claiming medical costs with the council for debt collectors and that it should be regulated in terms of Debt Collectors Act.
 | **Clause 43 which provides for the addition of subsection (4) and (5) to section 73**. * In terms of the subsection as amended by the Portfolio Committee on Employment and Labour, the Minister is empowered to regulate the registered third parties (registered with the Fund) who transact with the Fund.
* The regulations will be published for public comment and also subjected to certification by the Office of the Chief State Law Adviser for constitutionality, reasonableness and legality. Any legislation must be supported by regulatory framework.
* The Department of Employment and Labour does not agree that the Bill be rejected merely on the intimation and fear that the Minister may introduce draconian regulations in terms of 73(4). To do so is to enter the angelic world of pronouncing on things still unknown.
* Compensation Fund administers Bill and the Minister will not have power to issue regulations in respect of parties that are regulated under Debt Collector Act.
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