

Settlement agreement offers some relief to business struggling with EE compliance

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The settlement agreement signed on Wednesday 28 June 2023 between Solidarity and Government in the International Labour Organisation conciliation process, facilitated by the CCMA, will no doubt be welcomed by many businesses in South Africa who have, over the past years, been grappling with the fact that Employment Equity legislation has, to a large extent, put significant emphasis on "race" in recruitment, promotion and restructuring processes.



Image source: Getty Images

In terms of the settlement agreement, the parties have agreed that affirmative action shall be applied in a “nuanced way” and that economically active population statistics will only be one of the many factors that will be taken into account in determining whether a business is compliant with Employment Equity legislation. Whilst it will be interesting to see how labour, businesses and the courts will interpret “nuanced way”, the settlement agreement is clear that no absolute barrier may be placed on any employment practices affecting any person and no termination of employment may be affected as a consequence of compliance with affirmative action targets.

In drafting and implementing employment equity plans and reporting thereon, businesses will be required to take the following criteria into account in order to ensure compliance with affirmative action measures in the workplace:

- inherent requirements of the job;
- the pool of suitably qualified persons;
- the qualifications, skills, experience and capacity to acquire, within a reasonable timeframe, the ability to do the job;
- the rate of turnover and natural attrition within the workplace;
- recruitment and promotional trends within the workplace.

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Insofar as businesses are unable to comply with affirmative action targets set in their employment equity plans or by any other party, they will need to justify such non-compliance on justifiable/ reasonable grounds in order to avoid any penalties for non-compliance. According to the settlement agreement “justifiable/reasonable grounds” may include the following:

- insufficient recruitment opportunities;
- insufficient promotion opportunities;
- insufficient target individuals from the designated groups with the relevant qualifications, skills and experience;
- CCMA awards/court orders;
- transfer of businesses
- merger/acquisitions; and
- impact on business economic circumstances.

Hopefully the signing of this settlement agreement will go a long way in positively assisting businesses in drafting and implementing employment equity plans now that the significant emphasis on “race” in recruitment, promotion and restructuring processes has been addressed.

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