

Labour dept calls for harsher punishment for non-compliance on EE

The Minister of Labour, Mildred Oliphant, said at the launch of the South African Employment Equity (EE) Annual Report for the 2015/2016 that there was a lack of appetite among South African corporates for transformation and that her department would have no option but to consider harsher consequences for the lack of transformation.



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The report, released on 10 May 2017, showed that 68% of management positions are still held by white employees, while African employees occupy only 14.4% of managerial posts in South Africa. The South African Department of Labour said it collated the information using 26,255 employment equity reports received from businesses in South Africa during 2016.

According to Lauren Salt, senior associate in the employment and compensation practice at Baker McKenzie in Johannesburg, the Employment Equity Act already contains hefty penalties for non-compliance with the EEA. The EEA contains the statutory obligation for employers to implement affirmative action measures and provides protection against unfair discrimination.

“These penalties can be anywhere between R1.5 million and up to 10 % of an employer’s annual turnover, depending on the nature and frequency of the non-compliance.”

Salt explains that Section 42 of the Act empowers the Director-General to assess employers' substantive compliance with their Employment Equity obligations, as opposed to their procedural compliance (submitting the EE report on time, appointing an employment equity manager and similar formal requirements).

"In terms of section 43 of the EEA, the DG may issue a recommendation to the employer outlining steps the employer must take in connection with its EE plan (or the implementation thereof), or in relation to its compliance with any other provision of the Act. The DG may also prescribe the period within which those steps must be taken.

"If the employer fails to comply with this recommendation and is unable to justify its actions, the Labour Court may impose a fine on the employer.

"Non-compliance of this nature attracts fines between R1.5 million or 2% of annual turnover and up to R2.7 million or 10% of annual turnover, whichever the greater. The quantum on the fine is dependent on whether employers have had similar contraventions in previous years."

Proposing more penalties

"What the Commission for Employment Equity is proposing is a penalty on top of this fine. Section 53, previously a dormant section of the EEA, requires that every employer that makes an offer to conclude an agreement with the State - for the furnishing of supplies or services to the State - must attach a certificate from the Minister or a declaration (confirmed by the DG) that indicates that the employer complies with its employment equity obligations. Failure to do so will mean it may not be able to do business with the State.

"Measures aimed at achieving greater diversity and representation in the workplace should be applauded. However, it is debatable as to whether the implementation of section 53 would have any significant impact, as it is already common practice for entities, including the State, seeking services from businesses, to request confirmation or proof that they have complied with Employment Equity obligations.

"We need to explore all options to accelerate the pace of workplace transformation. Research confirms that diversity in the workplace supports business growth and profitability. The tougher issue is arguably challenging beliefs about forced transformation and spreading the gospel that transformation benefits society as a whole," concludes Salt.

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