



TO THE HONOURABLE MINISTER OF EMPLOYMENT AND LABOUR

Respectfully herewith:

**COMMENTS ON THE PROPOSED EMPLOYMENT EQUITY
REGULATIONS 2024**

APRIL 2024

Prepared by: Solidarity Trade Union's Centre for Fair Labour Practice

CONTENTS

INTRODUCTION	3
SOLIDARITY’S COMMENTS ON THE 2024 REGULATIONS	3
Lawfulness of the Regulations	3
The Regulations are contradictory in nature.....	5
Sectoral Targets amount to a quota system.....	5
Violation of the consultation clause	7
The Sectoral Targets are Contrary to the C111 – Discrimination (Employment and Occupation) Convention, 1955 (No.111) and the settlement agreement reached between Solidarity and the Republic of South Africa.....	10
Voluntary Associations (VA’s) and non-profit organizations	14
CONCLUSION	16

INTRODUCTION

1. In terms of the request for comments contained in Government Notice no. 50058 of 2024 (published in the *Government Gazette* of 1 February 2024), Solidarity hereby submits its written comments on the draft Regulations.
2. The trade union has more than 200 000 members in all occupation fields. Solidarity provides workplace assistance to its members at more than 20 offices countrywide.
3. Solidarity is committed to the Constitution, and actively seeks to safeguard the constitutional rights of its members and, more generally, the public. Solidarity, its members and the public at large have an interest in the appropriate and constitutionally compliant adoption of affirmative action measures, including regulations. Solidarity's representation of members adversely affected by the application of employment equity plans adopted under the EEA is a matter of public record.
4. As a recognised Union at numerous "designated" employers Solidarity engages with employers on a frequent basis regarding the implementation of affirmative action measures and compliance with the EEA.

SOLIDARITY'S COMMENTS ON THE 2024 REGULATIONS

Lawfulness of the Regulations

5. Whilst it is clear that the Government Notice states that the regulations are published in preparation of commencement of section 15A of the Employment Equity Amendment Act No 4 of 2022, *item 4* of the regulations is clearly an attempt to comply with settlement agreement between Solidarity and the government, that was made a Court Order.¹

¹ This agreement came after Solidarity had lodged a complaint with the International Labour Organisation (ILO), against the government's rigid approach to race. A mediation process between Solidarity and the SA government under the supervision of the ILO ensued, which eventually led to the agreement reached. The Settlement Agreement was made an order of court under case number J 6661/23

6. We submit that the current regulations, excluding *part 4* thereof which culminates from the settlement agreement and Court order and not from law, and the process which accompanies it and any consequences that result from it, is unlawful. The Regulations have been published in terms of the Amendment Act, the commencement date of which has not yet been determined. Put differently, the Regulations have been published prematurely and are therefore unlawful.²
7. It is trite in law that a Bill only becomes law after the President of the Republic of South Africa has assented and signed the Bill.
8. Furthermore, only after the President of the Republic of South Africa has assented and signed the Bill does the Act appear in the Government Gazette and comes into effect on a date determined by the President.
9. The act therefore only becomes binding if the President proclaims the effective date.
10. It is submitted that the proclamation notice is still pending and has not been issued by the President, therefore it is trite that the *Employment Equity Amendment Act* has yet to come into effect.
11. In light of the aforementioned, it is submitted that the Minister of Employment and Labour accordingly cannot issue regulations for Section 15A of the *Employment Equity Amendment Act* if the act has yet to come into effect.
12. It submitted that the regulations are unlawful, in the alternative, Solidarity makes the submissions hereunder.

² Section 79 of the *Constitution of the Republic of South Africa*.

The Regulations are contradictory in nature.

13. The Regulations under *Item 3*, regulating the setting of the 5-year Sectoral Numerical Targets, are in stark contradiction with the regulations contained in *Item 4* of the proposed Regulations which in turn regulates the implementation of Affirmative Action measures governed by the settlement agreement that was made a Court Order.
14. The contradictions lie in the fact that the regulations describe 'nuance' as a key aspect and prohibits absolute barriers, but also sets mandatory targets at the same time, which are the opposite of nuanced, flexible measures. The regulations are thus arbitrary or self-defeating, the settlement agreement was bolted on without any attempted to counterbalance the sectoral targets with agreed upon principles it requires to reach a nuanced application of affirmative action measures.
15. In accordance with Van Heerden³, the regulations cannot 'reasonably achieve' their purpose, to wit, equitable representation, because of practical considerations i.e. skills shortages, the faltering economy, and the like. In other words - that the targets are extremely unrealistic and will cause more harm than they will advance historically disadvantaged groups.
16. The contradictions are significant and the regulations under *Item 3* cannot stand when measured against the settlement agreement.

Sectoral Targets amount to a quota system

17. According to section 15(1) of the EEA, affirmative action measures are designed to ensure that "suitably qualified people from designated groups have equal employment opportunities and are equitably represented in all occupational levels in the workforce of

³ Test to requires that affirmative action measures must:

- 1) target persons or categories of persons disadvantaged by past unfair discrimination
- 2) be designed to protect or advance those classes of persons; and
- 3) it must promote the achievement of (substantive) equality

a designated employer”. Affirmative action measures implemented by a designated employer must include:

- 17.1. measures to identify and eliminate employment barriers, including unfair discrimination, which adversely affect people from designated groups (section 15(2)(a)).
 - 17.2. measures designed to further diversity in the workplace based on equal dignity and respect of all people (section 15(2)(b)).
 - 17.3. making reasonable accommodation for people from designated groups in order to ensure that they enjoy equal opportunities and are equitably represented in the workforce of a designated employer (section 15(2)(c)).
 - 17.4. measures to ensure the equitable representation of suitably qualified people from designated groups in all occupational levels in the workforce (section 15(2)(d)(i)); and
 - 17.5. measures to retain and develop people from designated groups and to implement appropriate training measures, including measures in terms of an Act of Parliament providing for skills development (15(2)(d)(ii)).
18. Section 15(3) provides specifically that these last two measures (contemplated in section 15(2)(d)) “include preferential treatment and numerical goals but exclude quotas”.
19. The sectoral targets are required to be met; they are not simply programme objectives translated into numbers which provide a target to strive for and a vehicle for measuring progress. The sectoral targets have as their purpose to produce immediate end results for the benefitting groups, without addressing the causes of “under-representation”. Failure to adhere to the “targets” results in non-compliance and a penalty, whether in the form of an actual fine or in the form of foreclosure from the opportunity of doing business with the state.
20. The sectoral targets set by the Labour Minister moves even further away from a concern with “need” and relevant socio-economic factors. The sectoral target system does not

allow for appropriate consideration in the employment sphere of varying degrees of disadvantage, and the possible intersectionality of multiple forms of discrimination.

21. From a plain reading of 3.4.6 which states: *‘Where a designated employer has exceeded the set numerical target of a particular racial / gender group at an occupational level, such an employer may not regress in that particular racial/gender group but should set targets towards the EAP.* It is abundantly clear that the regulations ultimately impose sectoral targets which obliges a workforce profile that must reflect the EAP as an end product.
22. The sectoral targets are essentially an unjustifiable quota system out of proportion to what the Constitution allows, that it will cause substantial and undue harm to non-designated groups⁴ and which would not be constitutionally compliant.
23. Rigidity in affirmative action measures in employment frustrates the life chances of non-beneficiaries, ‘causing race or gender-based contests’ that are not in line with an ‘nuanced and inclusive notion of substantive equality’⁵.

Violation of the Consultation clause

24. Legislative requirements relating to preparing an EE plan and targets include the obligation to consult with all relevant parties reflected in section 16 of the Employment Equity Act, regarding preparation of an EE plan which include numerical goals.
25. A designated employer must take reasonable steps to consult and attempt to reach agreement with a representative trade union representing members at the workplace and

⁴ *Harksen v Lane NO* 1997 (11) BCLR 1489; 1998 (1) SA 300 (CC)

⁵ Kohn & Cachalia (note 12 above); AM Louw, ‘Extrapolating “Equality” from the Letter of the Law: Some Thoughts on the Limits of Affirmative Action under the Employment Equity Act 55 of 1998’ (2006) 18(3) South African Mercantile Law Journal 336 (who make this argument in the context of the EEA); J Pretorius ‘The Limitations of Definitional Reasoning Regarding “Quotas” and “Absolute Barriers” in Affirmative Action Jurisprudence as Illustrated by *Solidarity v Department of Correctional Services*’ (2017) 28 Stellenbosch Law Review 269.

its employees or representatives nominated by them, or, if no representative trade union represents members at the workplace, with its employees or representatives nominated by them (section 16(1)) on inter alia (i) the conduct of the analysis referred to in section 19 (see section 17(a)); and (ii) the preparation and implementation of the employment equity plan referred to in section 20 (see section 17(b)).

26. In terms of section 13 of the Act a designated employer is required to consult with parties identified by section 16 of the Act which states the following:

(1) *A designated employer must take reasonable steps to consult and attempt to reach agreement on the matters referred to in section 17-*

(a) with a representative trade union representing members at the workplace and its employees or representatives nominated by them; or

(b) if no representative trade union represents members at the workplace, with its employees or representatives nominated by them.

(2) *The employees or their nominated representatives with whom an employer consults in terms of subsections (1)(a) and (b), taken as a whole, must reflect the interests of –*

(a) employees across all levels of the employer's workforce.

(b) employees from designated groups; and

(c) employees who are not from designated groups.

(3) *This section does not affect the obligation of any designated employer in terms of section 86 of the Labour Relations Act to consult and reach consensus with a workplace forum on any of the matters referred to in section 17 of this Act.*

27. Section 17 of the Act stipulates that an employer should consult on the following issues:

17(1) the conduct of an analysis as referred to in terms of section 19.

17(2) the preparation and implementation of an Employment Equity Plan referred to in section 20; and

17(3) a report referred to in section 21.

28. The section 19 analysis refers to a quantitative and qualitative analysis. The quantitative analysis process is concerned with obtaining specific numerical information in order to determine the current workforce profile, the under- and/or overrepresentation of certain groups at each occupational level and the formulation of the numerical goals the employer can be expected to achieve within the next one to five years. In terms of the Codes of Good Practice on Employment Equity Plans guidelines are given for setting numerical targets.

29. In accordance with Regulation 9 of the Employment Equity Regulations, 2014, an employer must refer to the relevant Codes of Good Practice issued in terms of section 54 of the EEA when preparing an employment equity plan. The Code of Good Practice was published on 12 May 2017 by way of Government Notice 424 in Government Gazette 40840

30. The consultation clause in the EEA should be interpreted in accordance with *inter alia*, Article 5 of the International Labour Organisation Convention (111) concerning Discrimination in Respect of Employment and Occupation, in respect of special measures, including but not limited to numerical targets, and which states:

“2. Any Member may, after consultation with representative employers' and workers' organisations, where such exist, determine that other special measures designed to meet the particular requirements of persons who, for reasons such as sex, age, disablement, family responsibilities or social or cultural status, are generally recognised to require special protection or assistance, shall not be deemed to be discrimination”

31. The importance of consultation is emphasized in R113 - Consultation (Industrial and National Levels) Recommendation, 1960 (No. 113):

“5. Such consultation and co-operation should aim, in particular—

(a) at joint consideration by employers' and workers' organisations of matters of mutual concern with a view to arriving, to the fullest possible extent, at agreed solutions; and

(b) at ensuring that the competent public authorities seek the views, advice and assistance of employers' and workers' organisations in an appropriate manner, in respect of such matters as--

(i) the preparation and implementation of laws and regulations affecting their interests.

(ii) the establishment and functioning of national bodies, such as those responsible for organisation of employment, vocational training and retraining, labour protection, industrial health and safety, productivity, social security and welfare; and

(iii) the elaboration and implementation of plans of economic and social development.”

32. The Sectoral Targets set by the Minister negates the prescriptive consultation process regulated by section 13,16, 17 and 20 of the EEA, it diminishes the purpose consultation serves in a process where parties are obligated to attempt to reach consensus.
33. The intention of the regulations is to enforce top-down quotas, rather than to implement employment equity targets devised by employers after consultation with their workforce.

The Sectoral Targets are Contrary to the C111 – Discrimination (Employment and Occupation) Convention, 1955 (No.111) and the settlement agreement reached between Solidarity and the Republic of South Africa.

34. The *Employment Equity Act*⁶ sets out in section 3 that it has to be interpreted in compliance with the Constitution⁷ as well as in compliance with the international law obligation of the Republic, in particular those contained in the International Labour Organisation Convention (111) concerning Discrimination in Respect of Employment and Occupation.⁸
35. Section 39, section 232 and section 233 of the *Constitution of the Republic of South Africa* also states similarly that the Republic of South Africa is bound by international law.⁹
36. The International Labour Organisation (hereinafter referred to as the “ILO”) sets out ILO Conventions that are legally binding international treaties with the purpose to set out basic principles and rights at work. There is however, eleven (11) core and/or fundamental ILO Conventions which the ILO see as non-negotiable and should be seen as the baseline of principles and rights at work internationally. These fundamental conventions must be

⁶ *Employment Equity Act* ,55 of 1998.

⁷ Section 3(a) of the *Employment Equity Act*,55 of 1998.

⁸ Section 3(d) of the *Employment Equity Act*,55 of 1998.

⁹ *Constitution of the Republic of South Africa*.

implemented by the member states of the ILO in one way or the other, even if the member states choose not to ratify it.¹⁰

37. It is trite that South Africa has ratified most if not all core ILO Conventions but more specifically has ratified Convention C111 and is furthermore incorporated in the *Employment Equity Act*.

38. Article 1 of the Convention states that the term discrimination includes -

“(a) any distinction, exclusion or preference made on the basis of race, colour, sex, religion, political opinion, national extraction or social origin, which has the effect of nullifying or impairing equality of opportunity or treatment in employment or occupation.”

39. The following are quotes from an ILO Report released during 2003:¹¹

“197. The expression “affirmative action” refers to: a coherent packet of measures, of a temporary character, aimed specifically at correcting the position of members of a target group in one or more aspects of their social life, in order to obtain effective equality” (emphasis added).

“199. A common feature of affirmative action measures is their temporary nature. This presupposes a regular and objective evaluation of affirmative action programmes at ascertaining their effectiveness, redefining regularly their scope and content and determining when to bring them to an end. In some countries, however, they may be discontinued, or their effectiveness reduced as a result of cuts in social spending, economic downturns or economic restructuring.

¹⁰ilo.org/global/standards/introduction-to-international-labour-standards/conventions-and-recommendations/lang--en/index.htm

¹¹ Time for equality at work, Global Report under the Follow-up to the ILO Declaration on Fundamental Principles and Right at Work, International Labour Conference, 91st session 2003, pp 63-64.

40. The International Convention on the Elimination of All Forms of Racial Discrimination (hereinafter referred to as "ICERD") also states in article 1 paragraph 1 and 4, read with *General Recommendation 32 of 2009* which provides that:

"Special measures may not, as a consequence, lead to the maintenance of separate rights for different racial groups and that they shall not be continued after the objectives for which they were taken have been achieved."

41. It is trite that the special measures that are referred to in ICERD and in Convention C111 refers to measures such as affirmative action.

42. It is evident that the ILO underlines that affirmative action should be temporary in nature.

43. Solidarity has made representations in terms of article 24 of the ILO indicating that the Republic of South Africa is in non-adherence with its international law obligation more specifically Convention C111.

44. Thereupon, Solidarity and the Republic of South Africa entered into a mediation process in the ILO and facilitated by the Commission for Conciliation, Mediation and Arbitration (hereinafter referred to as the "CCMA").

45. Solidarity and the Republic of South Africa settled the dispute on numerous grounds; however, we wish to highlight the following salient clause in the settlement agreement under case number: H02-23:

a) Affirmative action is a coherent packet of measures, of a temporary nature in line with the Constitution, aimed specifically at correcting the position of members of a target group as defined in the Employment Equity Act in the workplace, in order to obtain effective equality:

46. Subsequently the above-mentioned settlement agreement was made an order of court under case number J 6661/23.

47. The draft regulations on proposed sectoral numerical targets (hereinafter referred to as the “draft regulations”) was published by the Minister of Employment and Labour on 1 February 2024.
48. In Item 3 of the draft regulations the Minister sets out “5-Year” numerical targets.
49. Furthermore, in item 3,2 of the draft regulation it states:
“3.2 The proposed 5-year sectoral numerical targets are minimum targets and are key milestones towards achieving the equitable representation of the different designated groups within each occupation level in that employer’s workforce in relation to the demographics of their applicable EAP.”
50. It is evident by the reading of the clause that the measures put in place are not temporary in nature just by interpreting the words used, milestones and minimum targets. It is apparent that the “goals posts” will be continually shifted.
51. Furthermore, Item 3,4,6 states the following:
“3.4.6. Where a designated employer has exceeded the set numerical target of a particular racial / gender group at an occupational level, such an employer may not regress in that particular racial/gender group but should set targets towards the EAP.”
52. It is also evident by reading the above-mentioned item, that the measures put into place are not temporary, however are deemed to be permanent. Even if the employer has exceeded the set numerical target of a particular racial / gender group that said employer is still bound to continue and then set targets towards the EAP of that racial/gender group.
53. The draft regulations clearly and unambiguously implies that the set numerical targets / measures put into place are not of a temporary nature.

54. It submitted that the draft regulations are in contravention with the Republic of South Africa's obligation to international law as well as the settlement agreement concluded between Solidarity and the Government.

Voluntary Associations (VA's) and non-profit organizations

55. In terms of the draft Regulations and settlement agreement, reasonable grounds for not complying with the targets are premised on, *inter alia*, the business economic circumstances which relates to an employer's core business and operations.
56. The employment sector comprises different spheres of employers, one of these categories of employers include Voluntary Associations and Non-Profit organizations that are established for a public benefit objective or an objective relating to one or more cultural or social activities, or communal or group interests, established under statutory law.
57. The Constitution makes provision for these organizations, and they are created, formed and protected by the following constitutional rights:
- 57.1 Section 18 of the Constitution provides: Everyone has the right to freedom of association.
 - 57.2 Sections 30 and 31 of the Constitution protect language and cultural rights and associational rights of cultural, religious, and linguistic communities.
 - 57.3 Section 30 provides: Everyone has the right to use the language and to participate in the cultural life of their choice, but no one exercising these rights may do so in a manner inconsistent with any provision of the Bill of Rights.
 - 57.4 Section 31 provides: (1) Persons belonging to a cultural, religious or linguistic community may not be denied the right, with other members of the community- (a) to enjoy their culture, practice their religion and use their language; (b) to form, join and maintain cultural, religious and linguistic associations and other organs of civil society. (2) The rights in subsection (1)

may not be exercised in a manner inconsistent with any provision of the bill of rights.

58 Voluntary Associations play an important role in strengthening democracy. It is healthier in a democracy for the boundaries between state and non-state entities to be respected. The freedom of association is a part of a bouquet of rights and freedoms, it can only be safeguarded and protected by balanced consideration of competing rights and interests.

59 Chapter 44 Freedom of Association Stuart Woolman writes:

Associational freedom protects cultural goods. Cultural practices and affiliations — like instain these practices and affiliations. If, therefore, we wish to safeguard these basic or primordial attachments from undue state interference, then we must be willing to place cultural atimate relationships — often form an integral part of our self-understanding. Cultural associations sussociations securely within the freedom's protective sphere. We might also wish to protect cultural associations for more instrumental reasons. For one thing, cultural associations often act as effective buffers between the individual and state power. For another, the greater the number of and more varied our cultural associations, the more enriched our national culture and our individual lives tend to be. For a third, cultural associations, like other associations, tend to fill the breach left by the decline of familial hierarchies and the concomitant increase in market-driven individualism. They mediate the anomie of modern society, often perform welfare functions the state is unable or unwilling to undertake, and generally function as the glue preventing social disintegration¹²

60 The South African Human Rights commission¹³ released a report wherein guidelines and principles were published that would accommodate associational rights afforded to VA's.

¹² OS 12-03, ch44-p8

¹³ The South African Human Rights Commission (SAHRC) is an institution established in terms of Section 181 of the Republic of South Africa Constitution Act 108 of 1996. The SAHRC and the other institutions created under Chapter 9 of the Constitution are described as “state institutions supporting constitutional democracy”¹. The South African Human Rights Commission is specifically required to: a. promote respect for human rights; b. promote the protection, development and attainment of human rights; c. monitor and assess the observances

The SAHRC stated it is guided by the comments made by Justice Brennan in *Roberts v United States Jaycees*:

*The Court has long recognized that, because the Bill of Rights is designed to secure individual liberty, it must afford the formation and preservation of certain kinds of highly personal relationships a substantial measure of sanctuary from unjustified interference by the State. Moreover, the constitutional shelter afforded such relationships reflects the realization that individual draw much of their emotional enrichment from close ties with others. Protecting these relationships from unwarranted state interference therefore safeguards the ability independently to define one's identity that is central to any concept of liberty.*¹⁴

- 61 If the constitutional rights that the association seeks to protect, promote and enhance relate to religion, culture and language then the reach of the State may be more circumscribed.
- 62 The cultural, religious and linguistic objectives of an organization divorce the employment profile of the said organization from the statistical profile of the economically active population.
- 63 The workforce profile of such organizations cannot be analogous to any Sectoral targets set by the Minister, the VA's and non-profit organizations should reflect their operational requirements when setting their targets.

CONCLUSION

- 64 Solidarity contends that the Regulation is subject to challenge on the basis that it:

of human rights in the Republic. Section 184(2) of the Constitution empowers the SAHRC to investigate and report on the observance of human rights in the country. Further, section 184(2)(c) and (d) affords the SAHRC authority to carry out research and to educate on human rights related matters.

¹⁴ The Exclusionary Policies of Voluntary Associations: Constitutional Considerations, p

- 64.1. It is unlawful as the Employment Equity Amendment Act is not yet in operation.
 - 64.2. The regulations are in contravention of the settlement agreement that was made an order of court.
 - 64.3. The regulations are in contravention its obligations to international law in that the measures are not temporary of nature.
 - 64.4. The sectoral targets amount to quota system.
 - 64.5. The regulations are inconsistent with the Republic's duties under international law.
-
65. VA's and non-profit organizations should reflect their operational requirements when setting their targets.



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Contents

<i>No.</i>		<i>Gazette No.</i>	<i>Page No.</i>
	GOVERNMENT NOTICES • GOEWERMENTSKENNISGEWINGS		
	Employment and Labour, Department of / Verkiesingskommissie		
R. 4295	Employment Equity Act (55/1998) as amended: Draft Regulations on proposed Sectoral Numerical Targets.....	50058	3

GOVERNMENT NOTICES • GOEWERMENTSKENNISGEWINGS

EMPLOYMENT AND LABOUR, DEPARTMENT OF

NO. R. 4295

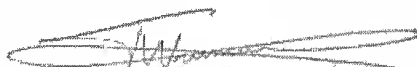
1 February 2024

**EMPLOYMENT EQUITY ACT, 1998 (ACT 55 OF 1998 AS AMENDED)
DRAFT REGULATIONS ON PROPOSED SECTORAL NUMERICAL TARGETS**

I, Thembelani Waltermade Nxesi, Minister of Employment and Labour in terms of Section 55(1) of the Employment Equity Act, 1998 (Act No 55 of 1998 as amended), and on the advice of the Commission for Employment Equity, hereby publish this notice on the proposed sectoral numerical targets for public comment in preparation for the commencement of Section 15A of the Employment Equity Amendment Act No 4 of 2022. This draft regulation on the proposed sector targets is republished in notice in the Government Gazette for further public comment for 90 days from the date of publication.

All public comment must be in writing and forwarded to:

christina.lehlokoa@labour.gov.za
jullian.mohale@labour.gov.za
innocent.makwarela@labour.gov.za


MR TW NXESI, MP
MINISTER OF EMPLOYMENT AND LABOUR
DATE: 2/1/2024

1. Legislative requirements for the setting of sectoral numerical targets

- 1.1 Section 15A of the Employment Equity Amendment Act, No. 4 of 2022 (EE Amendment Act, 2022) states that the Minister may identify national economic sectors having regard to any relevant code contained in the Standard Industrial Classification of all Economic Activities published by Statistics South Africa.
- 1.2 In terms of Section 15A of the EE Amendment Act, 2022, the Minister may, after consulting the relevant sectors and with the advice of the Commission for Employment Equity (CEE), for the purpose of ensuring the equitable representation of suitably qualified people from designated groups at all occupational levels in the workforce, set numerical targets for any national economic sector identified.
- 1.3 A notice issued in terms of Section 15A (2) of the EE Amendment Act, 2022, empowers the Minister to set different numerical targets for different occupational levels, sub-sectors or regions within a sector or on the basis of any other relevant factor.

2. List of Economic Sectors (EEA17)

- 2.1 Agriculture, Forestry & Fishing
- 2.2 Mining and Quarrying
- 2.3 Manufacturing
- 2.4 Construction
- 2.5 Financial and Insurance Activities
- 2.6 Transportation and Storage
- 2.7 Information and Communication
- 2.8 Water Supply, Sewerage, Waste Management and Remediation Activities
- 2.9 Electricity, Gas Steam and Air Conditioning Supply
- 2.10 Human Health and Social Work Activities
- 2.11 Arts, Entertainment and Recreation
- 2.12 Real Estate Activities
- 2.13 Professional, Scientific and Technical Activities
- 2.14 Wholesale and Retail Trade; Repair of Motor Vehicles and Motorcycles
- 2.15 Accommodation and Food Service Activities
- 2.16 Public Administration and Defence; Compulsory Social Security
- 2.17 Education
- 2.18 Administrative and Support Activities

3. Setting of 5-Year Sectoral Numerical Targets

- 3.1 When setting the proposed 5-year sectoral numerical targets, the following factors were taken into account:
- 3.1.1 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 this case the Sector Workforce was utilised or was considered) in relation to the demographic profile of the national and regional/provincial economically active population (EAP) as required by Section 42(1)(a) of the Employment Equity Act no 55 of 1998 (EEA).
- 3.1.2 The latest 2022 EE workforce profiles of each economic sector in terms of race, gender and disability as reported by the designated employers in their 2022 EE reports submitted to the Department of Employment and Labour.
- 3.1.3 The various Sector Codes and the Sector Charters published under the BBBEE Act.
- 3.1.4 The unique sector dynamics (e.g. Skills availability, economic and market forces, ownership etc.) raised by Sector Stakeholders in their written submissions during the consultation process.
- 3.2 The proposed 5-year sectoral numerical targets are minimum targets and are key milestones towards achieving the equitable representation of the different designated groups within each occupational level in that employer's workforce in relation to the demographics of their applicable EAP.
- 3.3 The proposed 5-year sectoral numerical targets are not intended to add up to 100% like the EAP and the total workforce at each occupational level. For example, the proposed sectoral numerical target excludes the foreign nationals as part of the workforce profile.
- 3.4 When developing the EE Plans in terms of Section 20(2) of the EEA, the designated employers must take the following factors into account:
- 3.4.1 Designated employers are those who employ 50 or more employees. **N.B** Employers with 1-49 employees are designated if they are an organ of state or if they are bound by a collective agreement.
- 3.4.2 Designated employers must take their workforce profile, the relevant 5-year sectoral numerical targets and the applicable EAP into account when setting annual numerical targets in their workplace(s) as required by Section 20(2) of the EEA.
- 3.4.3 Designated employers will be measured against the annual targets set towards meeting the relevant 5-year sectoral numerical targets.
- 3.4.4 Employers should not set targets for those groups whose representation have already exceeded their EAP in a particular occupational level.
- 3.4.5 Designated employers when determining their Annual EE targets towards achieving the minimum 5-year sectoral numerical targets, must set numerical targets for all population

groups in each of the four upper occupational levels where they are under-represented in relation to their respective EAP.

- 3.4.6 Where a designated employer has exceeded the set numerical target of a particular racial / gender group at an occupational level, such an employer may not regress in that particular racial/gender group but should set targets towards the EAP.
- 3.4.7 Designated employers are still required to set numerical goals and Annual EE targets for all population groups at Semi-Skilled and Unskilled occupational levels in their EE Plans in terms of Section 20(2) of the EEA taking into account their respective EAP. While these two levels are not included in the proposed sector numerical targets, it remains incumbent on the employer to set targets for these levels.
- 3.4.8 The National EAP shall apply to designated employers conducting their business / operations nationally, and the respective Provincial EAP shall apply to designated employers conducting their business / operations in a particular province. Designated employers cannot use the national and provincial demographics (EAP) at the same time. Designated employers must choose only one demographic (i.e. either national or provincial, based on their geographical presence within provinces) and utilise the chosen demographics for the entire duration of the EE Plan that is in line with the relevant 5-year sectoral numerical targets.
- 3.4.9 A designated employer who chooses to use the Provincial EAP and operates in more than one Province, may choose the EAP of the Province with the majority of the employees.
- 3.4.10 A designated employer who operates in more than one sector should choose the economic sector with the majority of the employees.

4. Implementation of Affirmative Action measures

- 4.1 Affirmative action is a coherent packet of measures, of a temporary nature in line with the Constitution, aimed specifically at correcting the position of members of a target group as defined in the Employment Equity Act in the workplace, in order to obtain effective equality.
- 4.2 Affirmative action shall be applied in a nuanced way (as outlined in 4.3 and 4.4 below) and the economically active population statistics will only be one of many factors that will be taken into account in the compliance analysis of affirmative action in any workplace as required by sections 15 and 42 of the EEA.
- 4.3 No absolute barrier may be placed upon any employment practices affecting any persons from any group as per section 15(4) of the EEA.
- 4.4 For the purpose of preparing and implementing an employment equity plan, reporting and compliance analysis of affirmative action in any workplace, the following criteria must be taken into account–
- a) Inherent requirements of the job (section 6(2)(b) of the EEA);
 - b) The pool of suitably qualified persons (section 20(3) of the EEA);
 - c) The qualification, skills, experience and the capacity to acquire, within a reasonable timeframe, the ability to do the job (section 20(3) of the EEA);
 - d) The rate of turn-over and natural attrition within a workplace (Code of Good Practice on the preparation, implementation and monitoring of the EE Plan and HR Code); and

- e) Recruitment and promotional trends within a workplace (Code of Good Practice on the preparation, implementation and monitoring of the EE Plan and HR Code).
- 4.5 In the compliance analysis of affirmative action in any workplace justifiable/reasonable grounds for not complying with the targets as set by the employer and/or any other targets set by any other party, may include (as already stipulated in Regulation 16(4) and in the EEA15 Form, Draft EE Regulation 2018):
- a) Insufficient recruitment opportunities;
 - b) Insufficient promotion opportunities;
 - c) Insufficient target individuals from the designated groups with the relevant qualification, skills and experience;
 - d) CCMA awards/Court Order;
 - e) Transfer of business;
 - f) Mergers/ Acquisitions; and
 - g) Impact on Business Economic circumstances.
- 4.6 The employer will incur no penalties or any form of disadvantage if in the compliance analysis of affirmative action in any workplace there are justifiable/reasonable grounds for not complying with the targets.
- 4.7 No employment termination of any kind may be effected as a consequence of affirmative action.

5. 5-Year Sectoral Numerical Targets for All Sectors

The table below contains the proposed 5-year sectoral numerical targets for the various population groups and gender (i.e., Top Management, Senior Management, Professionally Qualified and Skilled levels) and for employees with disabilities (* Please note Sec 3. when developing the EE Plan).

5-YEAR SECTORAL NUMERICAL TARGETS						
DESCRIPTION	GENDER	1. AGRICULTURE, FORESTRY & FISHING	2. MINING AND QUARRYING	3. MANUFACTURING	4. CONSTRUCTION	DESIGNATED GROUPS
		DESIGNATED GROUPS	DESIGNATED GROUPS	DESIGNATED GROUPS	DESIGNATED GROUPS	
Top management	Male	20,0%	29,9%	25,0%	33,0%	
	Female	15,0%	20,1%	15,0%	17,0%	
	Total	35,0%	50,0%	40,0%	50,0%	
Senior Management	Male	25,0%	35,0%	33,0%	40,0%	
	Female	15,0%	21,0%	17,0%	20,0%	
	Total	40,0%	56,0%	50,0%	60,0%	
Professionally Qualified & Middle Management	Male	35,0%	41,0%	37,0%	50,0%	
	Female	25,0%	24,0%	25,0%	25,0%	
	Total	60,0%	65,0%	62,0%	75,0%	
Skilled Technical	Male	50,4%	49,1%	50,0%	50,4%	
	Female	27,6%	25,9%	34,0%	37,6%	
	Total	78,0%	75,0%	84,0%	88,0%	
Disability only	All	2% OF TOTAL WORKFORCE	2% OF TOTAL WORKFORCE	2% OF TOTAL WORKFORCE	2% OF TOTAL WORKFORCE	2% OF TOTAL WORKFORCE

5-YEAR SECTORAL NUMERICAL TARGETS					
DESCRIPTION	GENDER	5. FINANCIAL AND INSURANCE ACTIVITIES	6. TRANSPORTATION AND STORAGE	7. INFORMATION AND COMMUNICATION	8. WATER SUPPLY, SEWERAGE, WASTE MANAGEMENT AND REMEDIATION ACTIVITIES
		DESIGNATED GROUPS	DESIGNATED GROUPS	DESIGNATED GROUPS	DESIGNATED GROUPS
Top management	Male	26,0%	30,0%	28,0%	45,0%
	Female	20,0%	20,0%	22,0%	35,0%
	Total	46,0%	50,0%	50,0%	80,0%
Senior Management	Male	24,0%	38,0%	35,0%	50,0%
	Female	24,0%	22,0%	25,0%	38,0%
	Total	48,0%	60,0%	60,0%	88,0%
Professionally Qualified & Middle Management	Male	30,0%	48,0%	40,0%	50,4%
	Female	34,0%	27,0%	30,0%	40,8%
	Total	64,0%	75,0%	70,0%	91,2%
Skilled Technical	Male	47,4%	50,4%	48,0%	50,4%
	Female	40,8%	37,6%	37,0%	40,8%
	Total	88,2%	88,0%	85,0%	91,2%
Disability only	All	2% OF TOTAL WORKFORCE	2% OF TOTAL WORKFORCE	2% OF TOTAL WORKFORCE	2% OF TOTAL WORKFORCE

5-YEAR SECTORAL NUMERICAL TARGETS					
DESCRIPTION	GENDER	9. ELECTRICITY, GAS STEAM AND AIR CONDITIONING SUPPLY	10. HUMAN HEALTH AND SOCIAL WORK ACTIVITIES	11. ARTS, ENTERTAINMENT AND RECREATION	12. REAL ESTATE ACTIVITIES
		DESIGNATED GROUPS	DESIGNATED GROUPS	DESIGNATED GROUPS	DESIGNATED GROUPS
Top management	Male	28,0%	25,0%	25,0%	25,0%
	Female	22,0%	25,0%	25,0%	20,0%
	Total	50,0%	50,0%	50,0%	45,0%
Senior Management	Male	39,0%	30,0%	45,0%	27,0%
	Female	26,0%	30,0%	30,0%	23,0%
	Total	65,0%	60,0%	75,0%	50,0%
Professionally Qualified & Middle Management	Male	47,0%	50,4%	50,4%	30,0%
	Female	33,0%	40,8%	40,8%	35,0%
	Total	80,0%	91,2%	91,2%	65,0%
Skilled Technical	Male	50,4%	50,4%	50,4%	33,0%
	Female	37,6%	40,8%	40,8%	37,0%
	Total	88,0%	91,2%	91,2%	70,0%
Disability only	All	2% OF TOTAL WORKFORCE	2% OF TOTAL WORKFORCE	2% OF TOTAL WORKFORCE	2% OF TOTAL WORKFORCE

5-YEAR SECTORAL NUMERICAL TARGETS					
DESCRIPTION	GENDER	13. PROFESSIONAL, SCIENTIFIC AND TECHNICAL ACTIVITIES	14. WHOLESALE AND RETAIL TRADE; REPAIR OF MOTOR VEHICLES AND MOTORCYCLES	15. ACCOMMODATION AND FOOD SERVICE ACTIVITIES	16. PUBLIC ADMINISTRATION AND DEFENCE; COMPULSORY SOCIAL SECURITY
		DESIGNATED GROUPS	DESIGNATED GROUPS	DESIGNATED GROUPS	DESIGNATED GROUPS
Top management	Male	25,0%	25,0%	22,5%	50,4%
	Female	20,0%	15,0%	22,5%	40,8%
	Total	45,0%	40,0%	45,0%	91,2%
Senior Management	Male	27,0%	33,0%	28,0%	50,4%
	Female	23,0%	23,0%	30,0%	40,8%
	Total	50,0%	56,0%	58,0%	91,2%
Professionally Qualified & Middle Management	Male	33,0%	37,0%	33,5%	50,4%
	Female	32,0%	38,0%	37,5%	40,8%
	Total	65,0%	75,0%	71,0%	91,2%
Skilled Technical	Male	44,4%	47,2%	47,0%	50,4%
	Female	44,0%	40,8%	41,0%	40,8%
	Total	88,0%	88,0%	88,0%	91,2%
Disability only	All	2% OF TOTAL WORKFORCE	2% OF TOTAL WORKFORCE	2% OF TOTAL WORKFORCE	2% OF TOTAL WORKFORCE

5-YEAR SECTORAL NUMERICAL TARGETS			
	17. EDUCATION		18. ADMINISTRATIVE AND SUPPORT ACTIVITIES
DESCRIPTION	GENDER	DESIGNATED GROUPS	DESIGNATED GROUPS
Top management	Male	33,0%	30,0%
	Female	25,0%	20,0%
	Total	58,0%	50,0%
Senior Management	Male	31,5%	38,0%
	Female	29,5%	27,0%
	Total	61,0%	65,0%
Professionally Qualified & Middle Management	Male	35,0%	44,2%
	Female	35,5%	40,8%
	Total	70,5%	85,0%
Skilled Technical	Male	42,0%	50,4%
	Female	42,5%	40,8%
	Total	84,5%	91,2%
Disability only	All	2% OF TOTAL WORKFORCE	2% OF TOTAL WORKFORCE

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