

## iGlobal Law 2024 Annual Alert : South Africa

| Legal Change  | Effective Date  | Action required  |
|---|---|--|
| <p><b>Employment Equity Amendment Act</b></p> <p>On April 6<sup>th</sup>, 2023, prospective changes were introduced to the affirmative action provisions of the Employment Equity Act 1998 ("the Act"). These aim to achieve more rapid transformation in the workplaces of "designated" employers.</p> <p>The amendments relate to, amongst others:</p> <p><u>Definition of designated employer:</u><br/>The definition of a "designated employer" is now amended such that employers who employ fewer than 50 employees, irrespective of their turnover, will no longer count as a "designated" employer and will therefore no longer be required to comply with the employment equity requirements in the Act.</p> <p><u>Setting of sectoral targets by the Minister of Employment and Labour ("the Minister") with which designated employers must comply:</u><br/>The draft sector-specific targets were published for public comment and the timeframe for public comment has now closed. The final targets have not yet been published or implemented.</p> <p><u>Requirements for the issuance of compliance certificates:</u><br/>In order to "incentivize" employers to meet targets, the Bill states that certificates will only be issued by the Minister if certain requirements are met, namely:</p> <ul style="list-style-type: none"> <li>- the employer has complied with any applicable sectoral targets or has raised a reasonable ground for non-compliance;</li> <li>- the employer has submitted its most recent employment equity report; and</li> <li>- within the previous 12 months, the employer has not been found to have breached the prohibition on unfair discrimination, or paid wages below the level of the minimum wage.</li> </ul> <p>The importance of obtaining this certificate is that state contracts may only be offered and issued to employers who have been certified as being compliant with their obligations under the Act.</p> | <p>These changes did not immediately come into force and will take effect on a date fixed by the President by proclamation in the Government Gazette.</p> <p>In relation to the sector-specific targets, whilst still to be confirmed, according to the Department of Employment and Labour, the first year in which the sector-specific targets will apply is 2024 (the year begins on the first working day of October but relates to the preceding 12 months).</p> | <p>Employers should determine whether they fall within the definition of "designated employer".</p> <p>Designated employers should analyse their existing transformation measures and plan for the future imposition of sector targets in the coming reporting year. The consequences of non-compliance have become more serious. Not only can fines of up to 10% of annual turnover be imposed, but there is also the threat of being denied a certificate of compliance.</p> |

|   |   |  |
|---|---|--|
| <p>Furthermore, a failure to comply with these requirements is a sufficient ground for cancellation of any state contract (should no reasonable ground exist to justify such non-compliance).</p>   |   |  |
| <p><b>Basic Conditions of Employment Act and the Unemployment Insurance Act</b></p> <p>The High Court recently declared that provisions of the Basic Conditions of Employment Act 75 of 1997 (“BCEA”) that regulates maternity leave, parental leave, adoption leave and commissioning parental leave, and certain provisions of the Unemployment Insurance Fund Act were constitutionally invalid on the basis that certain provisions unfairly discriminate between parents and the circumstances in which they had their children.</p> <p>The Court’s declaration of invalidity was suspended for 2 years from the date of the judgment to allow Parliament to cure the defects. Pending any amendments to the law the Court ordered that relevant sections must be read to permit all parents (regardless of their gender) to take 4 months’ consecutive parental leave. The Court held that the 4 months of parental leave will apply collectively to both parents and the parents will have a choice as to how they decide to apportion the 4 month parental leave entitlement.</p> | <p>The effective date is unknown at this stage. The High Court decision must be confirmed by the Constitutional Court before the High Court order has any force.</p> <p>Accordingly, the declaration and interim amendments to the law will not come into effect until the High Court’s order is confirmed by the Constitutional Court.</p> | <p>In circumstances where the judgment is not yet in effect, the current law continues to apply. It may be premature for employers to amend leave policy until such time that the Constitutional Court has finally determined the issue.</p> <p>Assuming the Constitutional Court confirms the order, employers will then need to amend their policies to ensure that provision is made for parental leave in line with the interim provisions that have been ordered by the Court, pending the relevant amendments by the legislature. Therefore, employers should keep an eye out for any judgment or confirmation by the Constitutional Court.</p> <p>We would, however, advise that, in the interim out of an abundance of caution, employers carefully consider any application for parental, adoptive parental or commissioning parental leave that is made on a case-by-case basis as employees may potentially claim unfair discrimination in respect of an employer’s decision to pay certain categories of employees and not others.</p> |