

## Affirmative Action: Economic Sectors and Numerical Targets and Quotas



On Friday, 12 May 2023 the Minister of Employment and Labour published the much-anticipated Notice identifying proposed national economic sectors and employment equity numerical targets under the Employment Equity Act (the “**EEA**”). Companies have 30 days to provide comment and are encouraged to make input within this period. The introduction of targets is a significant move because there has to this point been no numerical targets in South Africa underpinning affirmative action.

We explore in this article the vexed question of whether targets amount to quotas just by another name. The EEA defines ‘sector’ widely as ‘an industry or service or part of any industry or service’ and requires the Minister to identify national economic sectors with reference to any Code contained in the Standard Industrial Classification of all Economic Activities published by Statistics South Africa. Eighteen economic sectors, which include Agriculture, Forestry, and Fishing; Mining; Manufacturing; Construction; Financial and Insurance Activities; Transportation and Storage; Information and Communication; Water Supply, Sewerage, Waste Management, and Remediation Activities; Electricity, Gas Steam, and Air Conditioning Supply, amongst others have been identified.

The Minister proposes 5-year sector targets in terms of population groups and gender for the four upper occupational levels (i.e., Top Management, Senior Management, Professionally Qualified, and Skilled) and for employees with disabilities. The proposed numerical targets for the various population groups (i.e., African, Coloured, Indian, and White) and gender must, where applicable, be proportional to the demographics of the Economically Active Populations (“**EAP**”), whether national or provincial. This has

in the past given rise to contention which has received audience before the Constitutional Court.

The Notice determines demographics as follows:

The “*National EAP*” applies to employers “*conducting their business/operations nationally*”.

The “*Provincial EAP*” applies to employers “*conducting their business/operations in a particular province*”.

Employers cannot use the national-and provincial demographics (EAP) at the same time.

Designated employers must choose one demographic (i.e, either national or provincial) and utilise the chosen demographics for the duration of the employment equity plan (the “**EE Plan**”) that is in line with the 5-year sector targets.

Demographics are defined, with reference to the national-or provincial EAP and the meaning of designated groups (i.e., limited to race, sex, and disability). Employers must also implement the 5-year numerical goals and annual targets set out for Semi-Skilled and Unskilled levels in the EE Plans, which are not covered by the sector targets, by utilising the same demographics of the EAP that they have chosen, whether national or provincial. Difficult decisions to be made which cast a shadow for 5 years in the life of an enterprise.

Against this setup, we consider the impact on the difference between numerical goals and quotas. The implementation of amendment to the EEA raises the distinction between numerical targets and quotas sharply and employers need to be alive to these distinctions because the former is lawful whilst the latter is unlawful.

Our law provides that an EE Plan may provide for preferential treatment and numerical goals, but not quotas. The Constitutional Court has already made it clear that an EE Plan must be properly formulated (and not simply a tick box exercise) and it must be applied in a lawful manner by an employer.

The primary distinction between numerical goals/targets and quotas lies in the flexibility of the standard. Quotas amount to prohibited job reservation and this was jettisoned with apartheid. Numerical targets however are intended to serve as flexible employment guidelines. The Constitutional Court has already stated that the Constitution does not take issue with EE Plans that rigidly allocate positions along the lines of race and gender, provided that the EE Plan provides for certain specific deviations or exclusions. So, an EE Plan may be deviated where a candidate has scarce skills or based on the operational requirements of the employer. A designated employer need only provide for limited flexibility; that is a deviation from its general application.

The Constitutional Court also made it plain that an EE Plan can be validly adopted but unlawfully implemented. This often occurs in the real world. If the EE Plan is ‘rigidly’ implemented, the implementation of the EE Plan can render a validly formulated numerical target a prohibited quota. This means that an employer can be challenged on the basis that the target became a quota – which as we know is unlawful.

The minimum standard that must be applied when determining whether the implementation of numerical targets is valid is based on whether it is rational. The EE Plan can only be implemented for its lawful purpose and nothing else. Once it is rigidly applied, it can hardly be said to be a measure that is

being used as one designed to achieve or promote the achievement of equality which is the ultimate objective of affirmative action measures.

An employer accordingly cannot blindly follow numerical targets without due regard for the purpose of the achievement of equality. This is done by inflexibly appointing applicants in 'dogmatic compliance' with the numerical targets of the EE Plan. This would render the targets quotas. We anticipate that this will become very contested terrain in affirmative action law in years to come.

There has already been an indication that the numerical targets will face constitutional challenge. The Notice, on occasion, determines a numerical target of 0%. In the Agriculture, Forestry, and Fishing sector in Limpopo for instance, the numerical target for both coloured-males and females is 0%. A target of 0% can neither 'target' nor be designed to protect or advance anyone in our view. It is meaningless. The Notice is also silent on the meaning of "*conducting their business/operations nationally*" and seems to be plagued in part by irrationality by limiting a designated employer that conducts its business/operations nationally to only the national EAP.

This aside employers now need to be alive to the reality that the targets have been proposed and that what has been mooted by the DEL for a number of years is on the horizon to soon becoming real in the near future.