



KRIEK WASSENAAR & VENTER ING
PROKUREURS - ATTORNEYS

Our Ref: PJ Wassenaar/es/QB0984

Your ref:

15 May 2023

**THE MINISTER OF EMPLOYMENT AND LABOUR
LABORIA HOUSE
215 FRANCIS BAARD STREET
PRETORIA**

URGENT

By e-mail: albertina.barlow@labour.gov.za
Khangala.Mudumela@LABOUR.gov.za
nontobeko.yako@labour.gov.za
mzukisi.ndara@labour.gov.za

**THE DIRECTOR-GENERAL
DEPARTMENT OF EMPLOYMENT AND LABOUR
LABORIA HOUSE
215 FRANCIS BAARD STREET
PRETORIA**

By e-mail: Sandisiwe.Kaba@labour.gov.za
Malixole.Ntleki@labour.gov.za
webmaster@labour.gov.za

**THE DIRECTOR: EMPLOYMENT EQUITY
LABORIA HOUSE
215 FRANCIS BAARD STREET
PRETORIA**

By e-mail: innocent.makwarela@labour.gov.za
Christina.lehlokoa@labour.gov.za
Jullian.mohale@labour.gov.za

Minister/Sir/Madam

EMPLOYMENT EQUITY ACT: DRAFT EMPLOYMENT EQUITY REGULATIONS 2023 FOR PUBLIC COMMENT

1. We act on the instructions of Sakeliga NPC ("our client").

www.kwv-inc.com

(t) (+27) 12 756 7566 • (f) (+27) 86 596 8799 (a) 3rd Floor, HB Forum Building, 13 Stamvrug Road, Val de Grace, Pretoria 0184
(p) Postnet Suite # 11, Privaatsak / Private Bag X025, Lynwood Ridge, 0040 • BTW Reg: 4020260685

Direkteure/ Directors: Johan Kriek (B Proc, LLM), Péter Johannes Wassenaar (LLB)

Bygestaan deur/assisted by Tertia Johanna Wassenaar (LLB), Kayla Dames (Bcom LLB), Rohann Eloff (Bcom LLB), Melissa Jansen van Vuuren (LLB);

Konsultante / Consultants: Catherina Elizabeth Pienaar (BA, BCur, LLB, LLM, PhD) , Sylvia Adriana Venter (LLB)

• Reg: 2012/030418/21

Docdate 20230302



2. Our client has noted the *Draft Employment Equity Regulations 2023 for Public Comment* (“draft regulations”), which was published in the Government Gazette of 12 May 2023. In the notice, the public is informed that the draft regulations will be open for public comment for 30 days from date of notice.
3. The following documents were attached to the gazetted notice:
 - 3.1 An index titled *List of Economic Sectors (EEA17)*, containing a total of 18 so-called economic sectors;
 - 3.2 A notice titled *Very Important Information*, which explains that the table follows on the notice contains the proposed 5-year sector targets for various economic sectors in respect of four so-called upper occupational levels. The notice also explains that the so-called *Economically Active Populations (EAP)* will apply to designated employers on both a provincial as well as a notional level, depending on the nature of their operation. What measure will be applied to determine whether a business is conducting operations on a national level is unclear;
 - 3.3 The draft EAP table of designated sector targets.
4. The *Very Important Information* and draft EAP table of designated sector targets attached to the regulations are unintelligible to the extent that it is impossible to determine how targets have been determined and what the impact of the regulations could be, should they be promulgated. For instance, the indicated requirement that targets for the various population groups must, “*where applicable...be proportional to the demographics of the Economically Active Populations, whether national or provincial*” is incoherent and susceptible to various interpretations.
5. Most notably, the notice published in the Government Gazette does not make any reference to what recommendations the Minister received from the Commission for Employment Equity (“Commission”) in respect of the sector determinations made. No explanation is given as to how the relevant sector targets were set by the Commission and/or the Minister. No information is provided as to how and why the four upper occupational levels (i.e. Top Management, Senior Management, Professionally Qualified and Skilled levels) were identified, and why the specific sector target weights were attached to each category in the eighteen so-called economic sectors. No explanation is given in the draft notice as to why a different sector target has been set for each sector and what information the Commission and/or the Minister relied upon when making their determination for each respective sector and each specific target.

6. Our client, for instance, does not understand why on the national level determination the sector target for Upper Management amongst Coloured persons in economic sector 17 (Education) is 5.9%, whereas the sector target for the same group in economic sector 1 (Agriculture, Forestry & Fisheries) is 3.5%, and 8.1% in economic sector 8 (Water Supply, Sewerage, Waste Management). Similar unexplained discrepancies at a national level exist amongst both the African and Indian population groups. However, it seems as if the sector target for the White population group has been fixed at 8% throughout all economic sectors. In similar fashion, no explanation or basis is given for this determination.
7. No explanation is given as to why the total sector target for what is deemed to be Black population differs amongst the sectors. More confusing is the lack of explanation as to how the sector population group percentages are to be applied. If we for instance take the targets set for Upper Management for economic sector 2 (Mining and Quarrying) as an example:
 - 7.1 The national target is 43.5% (African), 5.1% (Coloured), 1.5% (Indian), 8% (White) and then 50% (Black).
 - 7.2 It is unclear whether the sector determinations consider the 'Black' column as a separate or cumulative target. The total of the African, Coloured and Indian columns is 50.1%, indicating a separate target. However under other economic sectors, like sector 5 (Financial and Insurance Activities), the 'Black' column is equal to the total of the African Coloured and Indian columns. However, under sector 4 (Construction), the total of the 'Black' column again differs from the total of the other three columns.
 - 7.3 Where it is clear from the *Workforce Profile 2022 Total* row that the sum of the 'White' and 'Black' columns will equate to a 100% total, the same seemingly does not apply to the national target total row. Under sector 2, the total amongst all four columns is 108.1%, whilst the sum of the 'White' and 'Black' columns is 58%. What the significance of all of this is, is unclear.
8. The publication in fact lacks any substantive information in terms of which the public can properly consider and comment upon the draft sector determinations. It is not possible for the public to meaningfully engage with the draft regulation due to it being generally unintelligible and its lack of sufficient information as to how the specific percentages and targets were determined.
9. In order for the public to meaningfully comment on the list, the public including our client would need least the following guidance and information:

- 9.1 The methodology used to determine the specific percentages and sector targets;
 - 9.2 The data that was used to support the methodology;
 - 9.3 The assumptions that were made in the methodology, the assumptions which were relied upon in differentiating between the different sectors and the positions in the sector.
10. Without sufficient information and in absence of clarification, the public is unable to make informed comments on the list. As a result, the danger exists that some if not most comments received by the Minister from the public will be based on an emotional rather than reasoned reaction to the designations. This goes against the principles of participatory democracy and constitutes a form of public participation tokenism. This process is clearly aimed at avoiding actual reasoned public consultation, thereby undermining the legitimacy of the entire process. In fact, our client holds the view that the unintelligible targets and lack of sufficient information and clarification in relation to them prevent or at least frustrates public engagement with the draft regulations. For this reason, as it stands, the regulation-making process will be susceptible to legal review.
11. Currently, the lack of sufficient information as to the process and methodology employed by the Minister and the Commission in setting the sector targets, is in our client's view procedurally and substantially irrational.
12. Our client requests that the notice be withdrawn as a matter of urgency. Our client will not be able to meaningfully participate in the current process until such time that it has sufficient information and clarification to properly comment on the draft regulations.
13. Our client reserves the right to seek a review of the regulation-making process if the Minister continues along this path.

Yours faithfully,



KRIEK WASSENAAR & VENTER ING
PÉTER WASSENAAR – DIREKTEUR / DIRECTOR
(f) 086 596 8516
(e) peter@kriekprok.co.za

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