SAMED
advancing patient care through MedTech

SUBMISSION
BY
THE SOUTH AFRICAN MEDICAL TECHNOLOGY INDUSTRY ASSOCIATION
("SAMED")
On
The Employment Equity Amendment Bill (B14-2020)
To the Portfolio Committee on Employment & Labour
Parliament of the RSA

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By email: equitybill@parliament.gov.za

1. Introduction

SAMED is a not-for-gain voluntary trade association that represents the medical device industry in South Africa. Its members comprise large corporates, and smaller entities. It includes multinationals, local companies (distributors and wholesalers) and also companies who participate in manufacturing activities in South Africa.

Medical devices comprise a large range of different products from textiles such as drapes and bandages (textiles), plastics (e.g. syringes), disinfectants, implants (pace-makers) and large capital equipment used in theatres. In vitro diagnostics (IVDs), commonly referred to as laboratory tests (such as the tests now being used during the Covid pandemic), or self-tests (e.g. glucose monitoring) are also examples of medical devices.

In the nature and type of products, it is far more diverse in terms of products, and structures, than other healthcare suppliers of goods and services. It is this variety and diversity that prompts it to make this submission on the Employment Equity Amendment Bill of 2020.

SAMED understands the frustration with the lack of substantial progress in transformation in workplaces, some 22 years after the Employment Equity Act came into effect. SAMED wholeheartedly supports measures aimed at addressing the persistent inequalities in our society in general, and in workplaces specifically.

The SAMED board established a Transformation committee for this purpose. Through this Committee SAMED not only addresses itself as a trade association, but guides and supports members in effecting transformational objectives.

2. Comments on the Employment Equity Amendment Bill, Bill 14 of 2020

2.1. Comment on proposed new section 15A

A new section 15A is to be inserted after section 15 that lists the various affirmative action measures (e.g. barriers, reasonable accommodation and targets for equitable representation).

(a) Setting sectors and sub-sectors

Section 15A(1) states that the Minister of Employment & Labour may identify national economic sectors by having regard to the **Standard Industrial Classification** as published by StatsSA (**"SIC"**). We welcome the addition of "by having regard to", as it means the SIC would not be the only factor in the determination.

The Minister may also prescribe (i.e. in regulations) criteria to be taken into account when establishing sector and sub-sectors. A "sector" is defined in the Bill as "an industry or service or part of any industry or service."

The SIC is now in its 7th version and SAMED has identified inconsistencies that are concerning for the industry body. Furthermore, it appears that SAMED members have classified themselves for the purposes of their EE Reports to the Department of Employment and Labour, not necessarily in accordance with the definitions contained in the SIC.

The broad structure of the SIC is annotated below and SAMED is underlining the potential categories with which its members could fall:

A 01-03 Agriculture, forestry and fishing
B 05-09 Mining and quarrying
C 10-33 Manufacturing
D 35 Electricity, gas, steam and air conditioning supply
E 36-39 Water supply; sewerage, waste management and remediation activities
F 41-43 Construction
G 45-47 Wholesale and retail trade; repair of motor vehicles and motorcycles
H 49-53 Transportation and storage
I 55-56 Accommodation and food service activities
J 58-63 Information and communication
K 64-66 Financial and insurance activities
L 68 Real estate activities
M 69-75 Professional, scientific and technical activities
N 77-82 Administrative and support service activities
O 84 Public administration and defence; compulsory social security
P 85 Education
Q 86-88 Human health and social work activities
R 90-93 Arts, entertainment and recreation
S 94-96 Other service activities
T 97-98 Activities of households as employers; undifferentiated goods- and services-producing activities of households for own use
U 99 Activities of extraterritorial organizations and bodies, not economically active people, unemployed people etc.

Given the diversity within the medical devices sector, sub-targets would have to be set up per division, and as we illustrate below, up to the class level, for the medical devices industry. For example:

Manufacturing (section C), includes:

- manufacturing of textiles (division 13),
- chemical products (division 20),
- pharmaceuticals (division 21),
- rubber and plastics (division 22),
- machinery and equipment not otherwise specified (**division 2**8) and
- "other manufacturing" (division 32).

However, for medical devices, compliance with a Quality Management System (e.g. ISO 13485:2016) may differentiate a medical device textiles manufacturer from non-medical device textile manufacturer. Whether products are manufactured from scratch, or only packed and labelled, would also require different staff types and dependence on suitably qualified persons, or persons with the ability to acquire a certain level of skill. For example, a medical device company must have a so-called "Authorised Representative". This person takes legal responsibility for the company's compliance with the criteria of quality, safety and performance, as set in the Medicines and Related Substances Act of 1965, and the Medical Device Regulations of 2016. This means that the staff complement of a medical device textiles manufacturer will differ from others in the textile space, and may even differ from a bandages manufacturer.

Under **Section C, Manufacturing**:

Division 32 "other manufacturing" one finds:

Group 325: "Manufacture of medical and dental instruments and supplies" under which there is –

Class 3250 and **sub-class 32500** "Manufacture of medical and dental instruments and supplies"

Some medical device companies fall under section G, **wholesale**, however the definition of a 'wholesaler' in this section may be contrary to the definition of a "wholesaler" under the Medicines and Related Substances Act, 1965. The point here is that medical device companies could fall in vastly different categories and therefore face vastly different targets.

Medical gasses, for example, falls under **Class 2011** "Manufacture of basic chemicals".

IVDs fall under **"2100 Manufacture of pharmaceuticals, medicinal chemical and botanical products"** ***and*** **includes manufacture of medical impregnated wadding, gauze, bandages, dressings etc**.

Under **Section G, Wholesale**:

Division 46 Wholesale trade, except of motor vehicles and motorcycles

Group 4649 Wholesale of other household goods

Class 46493 Wholesale trade in pharmaceuticals, toiletries and medical equipment

It is evident how "wholesale" of medical equipment would be different to wholesale of toiletries.

Many medical device companies may also fall in the retail space.

SAMED therefore submits that levels more refined than the class level in the SIC be considered, so as to ensure that similar employers face similar regulatory and other requirements as this will influence the pools of available candidates and whether skills can be acquired or not at a new workplace.

(b) Setting targets

The second part of section 15A (subsection 3) deals with the setting of targets. It empowers the Minister to "set numerical targets for any national economic sector identified". The Minister may "set different numerical targets for different occupational levels, sub-sectors or regions within a sector or on the basis of any other relevant facto" (subsection 4). SAMED is of the view that the legislation should reflect that the sector target should be set with therespective industry in a joint consensus seeking approach. The basis of the Labour Relations Acthas been set up on a joint consensus seeking approach and if these targets are to be effective, that kind of approach should be embarked on. It is essential that all sectors/industries in the country are adequately consulted and that the sector targets should be set with the respective industry bodies who can share meaningful information regarding, amongst others, the composition of the industry, the economic challenges faced in the industry, the state of transformation and the challenges to transformation within the industry.

The level of complexity from one company to the other is significant (range from small single owned business, to large, multinational entities), and as such, the imposition of "a one size fits all" targets on a sector without proper and meaningful consultation is unlikely to achieve positive results.

SAMED welcomes the opportunity that will be provided in the Bill to comment on such targets, prior to its finalisation (section 15A(5)). However, SAMED submits that employers, and representative bodies such as SAMED may require more time than the allocated 30 days to engage on the targets and the methodology underpinning it.

It is therefore not only the targets that should be published, but also the methodology, SIC categories or other factors considered, and the weight attached to each, to enable meaningful comments. It is essential that the Minister consult all relevant sectors when determining numerical targets and that sufficient time be provided thereon for meaningful consultation to be had as well as what the consultation process will entail. It is recommended that section 15A be amended to state that the Minister **will consult** the relevant sectors when determining what the numerical targets should be. SAMED further believes that the Act needs to make provision for instances where agreement cannot be reached between the Minister and the relevant sector. Arbitration might be an activity to consider in this regard.

The Employment Equity Act works on targets to be achieved in a particular year. The practical implementation of the targets and how compliance will be measured is not clear in the proposed amendments. For example:

- Will a single target be set for a single year, and targets would then have to be set annually?
- Will multiple targets be set for subsequent years, e.g. for 2023, 2024, etc?
- By when will those targets be set to create enough time for an employer to achieve those?
- What will happen if an employer has no or little staff turnover in a particular year?

Linked to this, will the compliance certificate be issued:

- On some level of achievement, or only complete achievement?
- Will the achievement on targets in some, but not all of the six job levels, lead to non-compliance?
- Will the achievement in some, but not all of the eight designated groups, lead to non-compliance?
- If set for multiple years, how will compliance be measured in years 1 and 2, as the employer is working towards achieving a target?

SAMED proposes that the practicalities of the timing, and time-horizons of setting targets be addressed in the law, so that there is certainty as to what would be required of employers. SAMED further proposes that the level of compliance be set out in the Act.

2.2. Comment on proposed new section 20(2A): The employer's own targets

The employer still sets its own targets, but does so that it "complies" with "any sectoral target that applies to that employer". These prescribed numerical targets will effectively override the targets contained in a designated employers' employment equityplan.

It is unclear what is meant by "comply with". Does it mean that the target must be the same as, or could it exceed, or set its own target over the duration of its own EE Plan, so that it complies with the ministerial target over the period of the plan? Or could it be set at lower levels if there are justification for such lower levels?

However, in terms of section 16, read with section 17, of the current Employment Equity Act, designated employers are legally required to consult with their employees (by way of an employment equity committee) on the content (the targets to be achieved) and implementation of their employment equity plans.

If the Employment Equity Act is amended, it will mean that an employer will be bound to usethe sectoral targets fixed by the Minister in its employment equity plan, consultation with employees would be rendered meaningless. The employer's hands will be tied, regardless ofthe input from its employees.

2.3. Compliance with targets: section 42(1)(aA) and section 53

This section would form the basis of the Compliance Certificate, on which SAMED has raised questions above.

No specific reference is made to the process and duration of such certificate, however whereas this section pertains to the DG of Employment and Labour, however, the proposed amendments to section 53(6) states that the *Minister* issue a certificate. It is also not clear how this section, under the DG, would relate to the Compliance Certificate that would be issued by the Minister under section 53. This is the Certificate referenced in the Draft Procurement Bill.

A new subsection proposes that the *DG* "to determine whether a designated employer is implementing employment equity in compliance with the Act … take the following into account:"

"(aA) whether or not the employer has complied with any sectoral target set in terms of section 15A applicable to that employer"

The use of the word "any" creates the impression that the DG will have a discretion in terms of which target or targets s/he deems worthy of consideration.

For the Ministerial Compliance Certificate, an employer must (section 53(6)):

- Have complied with **a** numerical target set in terms of section 15A that applies to that employer;
- If it has not complied, raise a reasonable ground to justify its failure to comply, as contemplated by section 42(4);
- Has submitted its Employment Equity Report in terms of section 21;
- Not have had a finding by the CCMA or a court within the previous three years that the employer breached the prohibition on unfair discrimination in Chapter 2; and
- Not have had the CCMA issue an award against the employer in the previous three years for failing to pay the minimum wage in terms of the National Minimum Wage Act, 2018 (Act No. 9 of 2018).

It seems that it would be possible to justify non-compliance, which supposes a process of some draft certificate or draft process, whereafter the employer could provide justifications.

The timelines and process of applying are not stipulated. The burden this will place on the Minister, or his/her designatee, will be tremendous, and where certificates are requested prior to large state tenders, one can envisage possible backlogs.

The provision (proposed amendment to section 53, clause 12) in relation to discrimination cases are also significant, and given the fact that there may be different pronouncements at various levels of discrimination cases, and findings may be under appeal, could have severe consequences to employers and the business's activities. At the very least, subsection (d) must add "which is not under review or appeal". It would also mean that employers who have settled such cases, would not be penalised, whilst those who did not settle, would.

Section 53 of the Employment Equity Act, which has been in the legislation for some time but has not "*yet been operationalized*" will be put into effect. This will mean that State contracts may only be issued to employers that have been certified as being in compliance with their obligations under the Employment Equity Act (one of them being the requirement to achieve the numerical targets prescribed by the Minister).

The amendments being proposed, if passed in their present form, will mean that bidders canbe excluded from bidding for government projects unless the prescribed targets have been met by them. The effect hereof is that achieving the targets as set by the Minister (and obtaining the requisite certificate) will become a threshold / mandatory / minimum requirementfor participating in the bid at all, whereas currently BBBEE status is part of the overall evaluation, as to either 10% or 20% of the total score, the balance being for price (functionality / the ability to do the work in question often being the threshold requirement).

SAMED proposes that the process of Compliance Certificates, the issuing authority and the timelines be set out in the Act. Further amendments on subsection (d) is proposed above.

2.4 Other aspects of the Amendment Bill

Section 1: The definition of "people with disabilities" is proposed to be amended to include, apart from physical and mental impairment, also "intellectual or sensory" impairment, making it clear that those "in interaction with various barriers, may" substantially limit their prospects of entry into, or advancement in, employment. The disability therefore is no longer required to be the only barrier, nor must it be proven that it had hampered access, the fact that it "may", would be adequate.

Section 8: The various elements that are required to be adhered to before psychological assessment is done, are now connected by "and", meaning that all four criteria (e.g. fair application and HPCSA approval) must be in place before these assessments can be lawfully done on employees.

Section 36 now would also allow an inspector to instruct an employer to prepare an employment equity plan, and the employer must issue a written undertaking to that effect.

On designated employers, the thresholds per sector is repealed, and only employers with more than 50 employees have to comply with the affirmative action provisions of the EEA.

The above amendments are supported by SAMED.

3. Verbal presentation to the Portfolio Committee

SAMED requests that it be given an opportunity to provide the Portfolio Committee onEmployment and Labour a verbal presentation on its submissions contained herein as to elaborate on the submissions and engage with the Committee Members on these matters.

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