

**Mr Niresh Singh & Mr Innocent Makwarela**  
**Department of Labour**  
**Private Bag X117**  
**Pretoria**  
**0001**

By e-mail: [Niresh.singh@labour.gov.za](mailto:Niresh.singh@labour.gov.za);  
[Innocent.makwarela@labour.gov.za](mailto:Innocent.makwarela@labour.gov.za)

21 November 2018

Dear Mr Singh and Mr Makwarela

## **SUBMISSION ON THE EMPLOYMENT EQUITY AMENDMENT BILL & REGULATIONS, 2018**

This submission is made by Business Unity South Africa (BUSA) in response to the Minister of Labour's call for comments on the Employment Equity Amendment Bill, 2018<sup>1</sup> ("EEA Amendment Bill") and the Draft Employment Equity Regulations, 2018<sup>2</sup> ("Draft Regulations").

### **1. BACKGROUND TO BUSA**

BUSA is a confederation of business organisations, including chambers of commerce and industry, professional associations, corporate associations, and unisectoral organisations.

BUSA represents a cross-section of business, large and small, on macro-economic and cross-cutting policies and issues which affect business in all three spheres of government. BUSA's function is to ensure business plays a constructive role in economic growth, development and transformation, and to ensure an environment in which business can thrive, expand and be competitive.

As the principal representative of business, BUSA conveys the views of its members in various national structures and bodies, both statutory and non-statutory. BUSA represents the business constituency at Nedlac and participated in the Task Team that was established by Nedlac to consider and engage on the contents of the EEA Amendment Bill and the Draft Regulations.

### **2. CONCERNS**

BUSA must, from the outset, record its two concerns with regards to the EEA4 Form published in the Draft Regulations.

---

<sup>1</sup> Published in the Government Gazette on 21 September 2018, GN 41922.

<sup>2</sup> Published in the Government Gazette on 21 September 2018, GN41923.

## **2.1. EEA4 Form**

The first concern is in reference to the EEA4 Form published in the Government Gazette on 21 September 2018. The EEA4 Form as it appears published in the Government Gazette is not the same EEA4 Form that was tabled at Nedlac (and subsequently signed off by social partners).

BUSA is of the view, taking into account:

- the significant changes made to the EEA4 Form since it was tabled at Nedlac;
- due process; and
- the spirit in which the EEA Amendment Bill and Regulations were deliberated on by social partners at Nedlac;

that the Department of Labour should have, before it published the Draft Regulations, tabled the new EEA4 Form at Nedlac for deliberation.

A further issue that arises is in relation to the agreement reached, concerning the issue of pay differentials, by all social partners (including Government) at the Presidential Jobs Summit held in October 2018<sup>3</sup>. The agreement reached at the Jobs Summit acknowledges that there are significant disparities between the pay of executives and lowest paid workers but importantly, that there is currently no information available as to the extent of the disparity and how it manifests across sectors. In terms of the agreement reached at the Presidential Jobs Summit, research, amongst other things, will be undertaken (with the oversight of a Nedlac Task Team) to inform the modalities of an appropriate mechanism and a methodology as to the ratios to apply when reporting on Executive pay differentials.

In view of the above, BUSA submits that it is premature to amend the EEA4 Form as proposed in the Draft Regulations until such time as the processes and methodology outlined in the Presidential Jobs Summit Framework Agreement has been completed.

## **2.2. Sectoral Targets vs National Targets**

The second area of concern is in reference to section 15A of the EEA Amendment Bill which proposes that the Minister of Labour be empowered to set numerical targets for sectors or parts of sectors.



---

<sup>3</sup> Presidential Jobs Summit Framework Agreement 4 October 2018, page 67

During separate engagements, officials of the Department of Labour indicated that the Department intends setting national numerical targets (to be the same for all sectors) unless sectors justify numerical targets specific to their sector. This is, for the following reasons, of great concern to BUSA:

- When the EEA Amendment Bill was engaged on at Nedlac, the Department of Labour did not, at any point in time, suggest that a National target would be set. BUSA's understanding, during the Nedlac engagements was that the Department of Labour acknowledged that each sector has its own challenges and skills requirements and for this reason, sectoral targets would be established, after consultation, taking into account various factors relevant to a particular sector.
- The statements made by officials of the Department of Labour, differ to what was engaged upon at Nedlac as well as what is provided for in section 15A of the EEA Amendment Bill.

Both the above concerns are considered extremely serious by BUSA as they potentially undermine the good faith when social partners engage on Amendment Bills at Nedlac.

### **3. BUSA'S SUBMISSIONS**

BUSA stands by the agreements reached at Nedlac. For the purposes of this submission, BUSA deals only with those areas of the EEA Amendment Bill and Draft Regulations that it does not support or agree to.

BUSA has also attached to this submission, the template the Department of Labour has requested the public record its comments. In amplification of the submissions contained in the attached populated template, BUSA sets out below, its most significant concerns with the EEA Amendment Bill.

#### **3.1. Section 15A & section 42 (1) (Aa)**

For the purposes of this submission, BUSA deals with section 15A and section 42 (1) (Aa) of the EEA Amendment Bill together.

Section 15A of the EEA Amendment Bill empowers the Minister of Labour to set numerical targets for any sector or part of a sector.

Section 42 (1) of the EEA Amendment Bill lists the criteria against which a designated employer's compliance with the Employment Equity Act 55 of 1998 ("Employment Equity Act") is measured. The EEA

Amendment Bill proposes the insertion of section 42 (1) (Aa) which reads “*whether or not the employer has achieved any sectoral target set in terms of section 15A applicable to that employer*”.

While BUSA acknowledges that the pace and depth of transformation in South Africa has been insufficient, BUSA does not, save for section 15A (1) and for the reasons that follow, support section 15A (2), (3), (4) and (5) of the EEA Amendment Bill:

As the Department of Labour knows, the Business position, during the Nedlac engagements was that Business was prepared to agree to the whole of section 15A of the EEA Amendment Bill provided that section 42 (1) (aA) (dealing with assessment of compliance) was amended to incorporate the words “*reasonable steps were taken by a designated employer*” to achieve the applicable sectoral target. The proposed amendment to section 42 (1) (Aa) by the Business constituency during the Nedlac engagements (which was supported by Labour) was not accepted by Government. This was consequently recorded as a “*material area of disagreement*” in the Nedlac Report.

While BUSA acknowledges that Regulation 16 (4) of the Draft EE Regulations makes provision for a designated employer who applies for a certificate of compliance (for the purposes of being permitted to do work for the State) and who has not achieved the applicable targets, to record justifiable reasonable grounds for not doing so, BUSA is of the view that Regulation 16 (4) on its own is insufficient and that the Employment Equity Act itself should, in so far as assessment of compliance is concerned, expressly state that an employer must have taken reasonable steps to achieve the target, not that it must have achieved the target.

The amendment to section 42 (1) (Aa) as proposed by BUSA serves two purposes:

- to align the provision with the rest of the provisions in section 42 (which provide for reasonable steps taken by a designated employer in reference to other compliance criteria); and
- to mitigate against the numerical targets being construed as creating quotas as this is expressly prohibited by section 15 (3) of the Employment Equity Act.

### **3.2. Consultation with sectors**

Section 15A (2) of the EEA Amendment Bill requires the Minister of Labour to consult with the relevant sectors before setting numerical targets. BUSA is of the view that the method and format of consultation with sectors should be prescribed in the Regulations. It must be clearly stated with whom the engagements will be conducted. For example, it can be indicated that the consultations will be conducted with the various employers comprising a critical mass in each sector either individually or through any employer’s organisation that represents the employers in the sector.

This will ensure that the form and manner in which the consultations are held are transparently conducted within a clear framework of what the minimum consultation process will entail. The consultations are critical for the success of transformation. There should be joint consensus seeking engagements as the more agreements reached in each sector, the higher degree of buy-in and adherence to the targets set.

### **3.3. EEA4 Form**

As mentioned early on in this submission, the EEA4 Form that was tabled during the Nedlac process and subsequently signed off by social partners is not the same EEA4 Form that was published in the Government Gazette on 21 September 2018. BUSA does not, at the time of submitting these comments, know what methodology has informed the new EEA4 Form and the information that designated employers will be required to furnish to the National Minimum Wage Commission. BUSA is of the view that review of the EEA4 Form must take place within the context of the agreement reached at the Presidential Jobs Summit in relation to the issue of pay disparities, and that the Nedlac Task Team should be re-established for this purpose.

### **3.4. Complexity**

Some employers are already, by virtue of the sector in which they operate, bound by Charters, which Charters, to an extent, prescribe targets. In addition, some designated employers operate in more than one sector. It is important that if the EEA Amendment Bill is passed into law and numerical targets are set for sectors that these do not create uncertainty and/or complexity for businesses. There must be alignment between the Employment Equity Act and other legislation (such as B-BBEE and Sector Codes) so as to ensure that there are no unintended consequences and so as to ensure that there are no issues with having to interpret several different pieces of legislation in so far as compliance is concerned.

## **4. CONCLUSION**

In conclusion:

- BUSA acknowledges that the pace and depth of transformation in South Africa has been insufficient and that employment equity mechanisms can, if properly designed, contribute to achieving a more equitable workplace.

- BUSA reiterates, as reflected in the Nedlac Report, that it does not agree to section 15A (2)-(5) on the basis that Government was not prepared to amend section 42 (1) (Aa) of the EEA Amendment Bill to incorporate the words “*reasonable steps taken by a designated employer*”. BUSA would support this amendment if the wording were to be incorporated as motivated by both Business and Labour in Nedlac.
- It is important that if the EEA Amendment Bill is passed and the Minister of Labour is empowered to establish numerical targets that those targets are realistic, taking into account, the specific challenges faced by individual sectors. If numerical targets are set, those targets must take into account that the opportunities for diversity come largely with attrition rather than job growth especially at top and senior levels of a business. The result of a greater degree of joint consensus in the setting of targets, the more likely the action will be a faster pace of transformation.
- BUSA reiterates that it does not support the approach of National Numerical Targets – sector targets should be informed by a sector’s particular circumstances and requirements.
- The Department of Labour needs to give careful consideration to the thin dividing line between targets and quotas and the risk of challenge to the latter.
- Business’ ability to transform rapidly will be greatly enhanced with Government playing a significant role in creating the enabling conditions for growth. This requires Government to carefully consider the complexities associated with overlaying further targets in addition to what is already prescribed in existing Charters and the B-BBEE Codes.

BUSA proposes further engagement with the Department of Labour on the EEA Amendment Bill and Draft Regulations in Nedlac, particularly in light of the concerns outlined in paragraph 2 of this submission.

Yours sincerely



**TANYA COHEN**  
**CHIEF EXECUTIVE**