

<b>Procedure</b>	:	<b>Code of Good Practice – Human Resources</b>
<b>Section</b>	:	<b>Section 4.2</b>
<b>Manual</b>	:	<b>Employment Equity Committee Manual</b>

NOTICE 1358 OF 2005

DEPARTMENT OF LABOUR

EMPLOYMENT EQUITY ACT, 1998 (ACT 55 OF 1998)

**Code of Good Practice on the Integration of Employment Equity into Human Resource Policies and Practices.**

Notice is hereby given that the Code of Good Practice on the Integration of Employment Equity into Human Resource Policies and Practices set out in the schedule is issued by the Minister of Labour on the advice of the Commission for Employment Equity, in terms of section 54 (1) (a) of the Employment Equity Act, 1998 (Act No 55 of 1998).

MMS MDLADLANA, MP

MINISTER OF LABOUR

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**1. FOREWORD**

The Employment Equity Act, 55 of 1998 ("the Act") imposes a duty on employers to eliminate unfair discrimination. It also provides a framework for the attraction, development, the advancement and retention of an employer's human resource talent. Research has shown that employers can increase productivity, motivation and resourcefulness in the workplace when

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they invest in their people and treat them with fairness and equity. This is secured by eliminating the historical barriers that prevent the advancement of the designated groups (Black people including African, Coloured and Indian, Women and People with Disabilities). This ensures that positive or affirmative action measures are in place to expedite their growth and advancement.

In the context of challenges of a compounded diverse global economy and Constraints around infrastructure, skills, poverty, unemployment and service delivery, employers are increasingly aware that having racial, gender and disability diversity is key to business growth and development. Sustaining this growth requires ongoing commitment toward eliminating barriers, including skills development, in its general and specific forms. Some of the main challenges for employers include; attracting, managing, developing and retaining talent in the workforce through effective human resource management. In this context, the implementation of effective employment equity strategies will assist employers to maximize human resource development through the eliminating unfair discrimination and barriers and by promoting affirmative action. This Code provides guidelines to assist employers in implementing these initiatives.

## 2. OBJECTIVE

2.1. The objective of this Code is to provide guidelines on the elimination of unfair discrimination and the implementation of affirmative action measures in the context of key human resource areas, as provided for in the Act. This Code is not intended to be a comprehensive human resources Code, but rather an identification of areas of human resources that are key to employment equity and can be used to advance equity objectives.

2.2. The guidelines in the Code will enable employers to ensure that their human resource policies and practices are based on non- discrimination and reflect employment equity principles at the commencement of employment, during employment and when terminating employment.

## 3. SCOPE AND LEGAL PRINCIPLES

3.1. This Code is issued in terms of section 54 of the Employment Equity Act and must be read in conjunction with the Act and other Codes issued in terms of the Act<sup>1</sup>.

3.2. The Code should also be read in conjunction with the Constitution of South Africa and all relevant legislation, including the following:

3.2.1. the Labour Relations Act, 66 of 1995 as amended;

<sup>1</sup> *Code of Good Practice on the Handling of Sexual Harassment Cases; Code of Good Practice on the Preparation, Implementation and Monitoring of Employment Equity Plans; Code of Good Practice on the Employment of People with Disabilities and Code of Good Practice on Key Aspects of HIV/AIDS and Employment.*

3.2.2. the Basic Conditions of Employment Act, 75 of 1997 as amended;

3.2.3. the Skills Development Act, 97 of 1998;

3.2.4. the Skills Development Levies Act, 9 of 1999; and

3.2.5. the Promotion of Equality and Prevention of Unfair Discrimination Act, 4 of 2000.

3.3. This Code applies to all employers and employees covered by the Act.

3.4. This Code is intended to be a tool to aid employers to implement employment equity by providing principles that should be incorporated into employment equity plans and that guide policies and practices. This Code is also intended to provide guidelines to employers to consider and apply as appropriate to their circumstances.

## 4. STRUCTURE OF THE CODE

4.1. The structure of this Code mirrors the life cycle of an employee in employment. It deals with possible barriers and unfair discrimination that could occur at each phase, including commencing employment, during employment and on termination of employment. It also describes affirmative action measures that could be used at each phase to advance the objectives of the Act.

4.2. Each topic focuses on the following areas:

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4.2.1. **Scope.** This section provides a brief definition of the topic in the context of the employment life cycle.

4.2.2. **Impact of employment equity.** This section deals with non-discrimination principles and affirmative action measures that are relevant to the topic.

4.2.3. **Policy and practice matters.** This section provides information about the policy and practice matters that could arise, and makes suggestions regarding their implementation.

4.2.4. **Link with other areas.** This section identifies cross- references to other key topics as well as other relevant Codes and legislation dealt with in the Codes.

## 5. IMPLEMENTING EMPLOYMENT EQUITY

### 5.1. SCOPE

5.1.1. Implementing employment equity involves two key initiatives:

5.1.1.1. Eliminating unfair discrimination in human resource policies and practices in the workplace; and

5.1.1.2 Designing and implementing affirmative action measures to achieve equitable representation of designated groups in all occupational categories and levels in the workplace.

5.1.2 This section provides a general outline of these areas and the different conceptual and methodological approaches used to deal with them in the workplace.

### 5.2. IMPACT ON EMPLOYMENT EQUITY Eliminating unfair discrimination

5.2.1 Section 6 of the Employment Equity Act prohibits unfair discrimination<sup>2</sup> against employees or job applicants on one or more grounds of personal or physical characteristics like race, gender, sex, pregnancy, marital status, family responsibility, ethnic or social origin, colour, sexual orientation, age, disability, religion, HIV status, conscience, belief, political opinion, culture, language and birth. These "prohibited" or other arbitrary grounds cannot be taken into account in employment decision-making. However, it is fair for them to be taken into account where they are relevant to either affirmative action measures or the inherent requirements of a job.

5.2.2 The Act prohibits both direct and indirect unfair discrimination. Direct unfair discrimination is easy to identify in the workplace because it makes a direct distinction on the basis of one or more of the prohibited grounds. Indirect unfair discrimination (often called adverse impact or systemic discrimination) on the other hand, is more difficult to recognize. Indirect unfair discrimination occurs when a policy and practice appears to be neutral but has a discriminatory effect or outcome for a particular group of employees and cannot be justified.

The employer's motive and intent is generally considered to be irrelevant in determining whether unfair discrimination has occurred. In certain circumstances, the refusal to make reasonable accommodation of an employee's needs and circumstances, where this can be done without undue hardship to the employer, can constitute unfair discrimination.

5.2.3 Equality can involve a formal notion of treating everyone who is in a similar position the same. This can perpetuate unfairness when those who hold similar positions e.g. all senior managers have different needs and circumstances that impact on their ability to perform effectively.

The Constitution requires employers to move beyond formal equality to substantive equality by acknowledging the differences between employees and treating them differently on the basis of those differences. This is necessary to ensure that all employees are treated fairly. Equity therefore invokes the requirement of "fair" treatment in order to achieve substantive equality as an outcome in the workplace. Equal treatment and equal opportunity, like equality, subjects everyone to the same rules without distinction. Equity requires changing the rules so that their application is fair.

<sup>2</sup> Unfair discrimination can take place by means of an action or an omission.

5.2.4 Unfair discrimination is prohibited in the workplace. In order for employers to execute one of their primary responsibilities of eliminating all forms of unfair discrimination in the workplace, it is recommended that all employers should conduct an audit and analysis of all their employment policies and practices, as well as the working environment and facilities. The audit should identify whether any of the policies or practices applicable in the workplace contain any unfair discrimination or barriers to the recruitment, promotion, advancement and retention of members of designated groups. Once

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the actual or potential barriers are identified, an employer should consult about the strategies for eliminating these barriers. These strategies should be incorporated into the development and implementation of the Employment Equity Plan for that workplace. Regular monitoring in the workplace should occur to ensure that the unfair discriminatory policies or practices do not recur or manifest themselves in different ways.

### **Implementing affirmative action measures to achieve employment equity**

5.2.5 Removing barriers<sup>3</sup> is only the first step towards ensuring fairness and equity in the workplace. In the context of historical disparities in South Africa, the Act requires employers, employees and representative trade unions to jointly develop strategies to advance designated groups by adopting appropriate affirmative action measures and incorporating them into formal Employment Equity Plans. Affirmative action measures are essentially remedial measures designed to achieve equity in employment as an outcome<sup>4</sup>.

## **5.3. POLICY AND PRACTICE**

5.3.1 This section provides guidance in relation to the audit, analysis and consultation aspects of the employer's obligations<sup>5</sup>.

5.3.2 Under the Act every designated employer is required to undertake four processes when developing a strategy to implement employment equity.

5.3.2.1. consulting with its employees and representative trade unions;

5.3.2.2. auditing and analyzing all employment policies and practices in the workplace and developing a demographic profile of its workforce;

5.3.2.3. preparing and implementing an employment equity plan; and

5.3.2.4. reporting to the Department of Labour on progress made on the implementation of its employment equity plan.

<sup>3</sup>A barrier exists where a policy and practice, which also includes procedures, guidelines or rules, or an aspect of it that limits the opportunities of employees.

<sup>4</sup> This is covered in more detail in the Code of Good Practice on the Preparation, Implementation and Monitoring of Employment Equity Plans.

<sup>5</sup> The planning and reporting processes are dealt with in the Code of Good Practice on the Preparation, Implementation and Monitoring of Employment Equity Plans.

### **The policy and practice analysis**

5.3.3. Employers should develop realistic employment equity plans that are workplace specific and capable of measurement. This should be informed by conducting a comprehensive audit and analysis of all existing and potentially unfair discriminatory practices and barriers.

5.3.4. The analysis of policies and practices as well as other written documentation can be done through the collection of the information, listing what is applicable and identifying whether any documentation reflects direct or indirect unfair discrimination or barriers to the advancement of designated groups.

5.3.5. Practices are generally the informal or unwritten rules that prevail in the workplace and can be analysed through a combination of employee attitudinal surveys, individual interviews and focus groups to establish perceptions of their impact on achieving employment equity.

5.3.6. The relevant questions to be posed in the analysis would involve looking at whether the policy or practice is:

5.3.6.1. unfairly discriminatory;

5.3.6.2. valid;

5.3.6.3. applied consistently to all employees; and

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5.3.6.4. compliant with legislation.

5.3.7. An employer should formulate appropriate barrier removal measures for each of the forms of unfair discrimination identified in the audit of policies and practices. These mechanisms would also be the subject of consultation and should be incorporated into the Employment Equity Plan of that employer. Appropriate timeframes, strategies and responsibilities should be allocated for each barrier removal measure.

5.3.8. An employer should communicate the outcome of the audit and analysis to employees in as transparent a manner as possible. The method of communication will depend on the culture of the employer; the frequency and common terms of communication; and the role of the Employment Equity Forum or other consultative structure. The leadership of the employer should also receive feedback to be able to provide strategic input with regard to appropriate barrier removal.

#### **Developing a workforce profile and setting numerical targets for equitable representivity**

5.3.9. A workforce profile is a snapshot of employee distribution in the various occupational categories and levels. Under-representation refers to the statistical disparity between the representation of designated groups in the workplace compared to their representation in the labour market. This may indicate the likelihood of barriers in recruitment, promotion, training and development.

5.3.10. Collection of information for the workforce profile is done through an employee survey. It is preferable for employees to identify themselves to enable the employer to allocate them to a designated group. Only in the absence of an employee's self-identification, can an employer rely on existing or historical data to determine the employee's designated group status.

5.3.11. The workforce profile should indicate the extent to which designated groups are under-represented in that workforce in occupational categories and levels. This should be compared to the Economically Active Population at national, provincial or regional, or metropolitan economically active population or other appropriate benchmarks. Employers should set numerical targets for each occupational category and level informed by under-representation in the workforce profile and national demographics. The extent of under-representation revealed by the workforce profile represents the ideal goal reflected as the percentage for each occupational category and level for that workplace.

5.3.12. Employers, employees and trade unions should prioritise the least under-represented groups within the workforce. For example, an employer in the consultation process should focus more on the areas where the most imbalances appeared during the audit and analysis.

5.3.13. Numerical targets will contribute to achieving a critical mass of the excluded group in the workplace. Their increased presence and participation will contribute to the transformation of the workplace culture and to be more affirming of diversity. Employers are required to make reasonable progress towards achieving numerical targets to achieve equitable representation. This means that an employer should track and monitor progress on a regular basis and update its profile continuously to reflect demographic changes.

5.3.14. **Consultation** The success of employment equity depends largely on the efficacy of the consultation process. Employers, employees and trade unions must be willing to play a constructive role in the consultation process. Regular and meaningful consultation will contribute to a joint commitment to workplace transformation. It may also foster workplace democracy and productivity. Consultation will ensure that realistic employment equity plans are prepared which address the training and development of designated groups and the adaptation of the workplace to affirm difference. The involvement of trade unions in the consultation process is not enough. Employers must also consult with employees from across all occupational categories and levels.

5.3.15. It is essential to ensure that whatever form consultation takes, it does not undermine existing collective bargaining processes or existing relationships. 5.3.16. Transformation committees or other structures that already exist, which bring together employees and management, may need to be adopted in order to serve the consultation purposes of the Act. Necessary adaptations may include bringing in representatives from segments of the workforce that do not already participate, including designated or non-designated groups or trade unions. Where workplace forums exist, there should be a vehicle for consultation, and attempts should be made to ensure that these are as representative as possible. Where no structures exist or current structures are impractical for employment equity consultation, the employer should initiate a process to establish a consultative structure and or support an employee initiative of this nature. Criteria for appointment of representatives to the structure, the number of representatives, their roles and responsibilities and mandates will have to be clearly set out. The representatives on the structure should be trained on understanding and implementing the key components of the Employment Equity Act.

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5.3.17. Disputes will inevitably arise in the course of consultation. Employees may feel that they are not being sufficiently included in decision-making, or employers may grow frustrated at delays that are occasioned as a result of the need to consult.

#### **5.4. KEY LINKS TO OTHER TOPICS IN THE CODE**

5.4.1. Performance management - senior management performance should be, amongst others, measured against the extent to which they have achieved their numerical targets.

5.4.2. Recruitment and selection - an employer must take cognisance of numerical targets when offering employment to suitably qualified job applicants.

5.4.3. Promotions - succession planning and decisions on promotion must take account of an employer's numerical targets and ensure that under-represented groups in identified categories are developed and promoted.

**PART A: COMMENCING EMPLOYMENT** An employer can use a number of outreach and proactive mechanisms to attract applicants from under-represented groups.

### **6. JOB ANALYSIS AND JOB DESCRIPTIONS**

#### **6.1. SCOPE**

6.1.1. A job description outlines the role and duties of the job and consists of two components:

6.1.1.1. a description of the outputs of the job (what the job proposes to do. This description should provide an accurate and current picture of what functions make up a job, and should not include unrelated tasks. This should outline the job's location, purpose, responsibilities, authority levels, supervisory levels and interrelationships between the job and others in the same area; and

6.1.1.2. a description of the inputs of the job (i.e. what the person doing the job is required to do). This description should provide details about the knowledge, experience, qualifications, skills and attributes required to perform the job effectively.

6.1.2. Employers should conduct a job analysis when developing a job description. A job analysis is the process used to examine the content of the job, breaking it down into its specific tasks, functions, processes, operations and elements.

#### **6.2. IMPACT ON EMPLOYMENT EQUITY**

Job descriptions may either advance or undermine employment equity depending on how they are written. A job description should clearly state the essential or inherent requirements of the job. These are the minimum requirements that an employee needs in order to be able to function effectively in that job. These requirements should not be overstated so as to present arbitrary or discriminatory barriers to designated groups. However, in the interests of promoting the appointment of employees who may not meet all the essential or inherent job requirements, an employer may decide that an employee who has, for instance, six out of the ten threshold or essential requirements, will be considered to be suitably qualified, subject to obtaining the outstanding requirements within a specified time.

#### **6.3. POLICY AND PRACTICE**

6.3.1. In order to ensure that job descriptions refer only to the essential or inherent job requirements, they should comply with the following criteria:

6.3.1.1. Each task or duty in the job description is essential to be able to perform the job and is not overstated;

6.3.1.2. The job description is free of jargon and is written clearly;

6.3.1.3. The competency specification includes only criteria essential to perform the duties. This should be objective and avoid subjective elements that can be interpreted differently;

6.3.1.4. Experience requirements that are not essential, related or arbitrary to the job should be excluded; and

6.3.1.5. Criteria do not disadvantage employees from designated groups.

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6.3.2. An employer may also use job descriptions to promote affirmative action, for instance, by incorporating potential as a requirement and making reference to development and training to acquire additional skills and competencies.

6.3.3. A job description should be capable of flexible interpretation in the interest of promoting affirmative action. In this regard, an employer may list all the minimum or essential requirements of the job.

#### **6.4. KEY LINKS TO OTHER TOPICS IN THE CODE**

6.4.1. Recruitment and selection - Job descriptions that are flexible may aid the recruitment of employees from designated groups in order to create equitable representation. Rigid job descriptions may operate as a barrier to attracting individuals from designated groups with potential.

6.4.2. Performance management - Specificity of job descriptions contributes to setting clear performance objectives in an employee's career development plan. This may avoid perceptions of unfair or discriminatory treatment in performance.

6.4.3. Skills development - A clear job description enables the identification of skills and competency gaps. These gaps could be closed through appropriate interventions like training and development.

### **7. RECRUITMENT & SELECTION**

#### **7.1. SCOPE**

7.1.1. Recruitment and selection is the process that employers use to attract applicants for a job to determine their suitability. This involves various selection techniques such as short listing, scoring, interviews, assessment and reference checks.

7.1.2. This section identifies some of the strategies that can be used to attract a wide pool of applicants from designated groups.

#### **7.2. IMPACT ON EMPLOYMENT EQUITY**

Recruitment and selection processes should be conducted fairly and without unfair discrimination. One of the barriers in the recruitment process is the inability to attract sufficient numbers from the designated groups. Attracting as many applicants as possible from designated groups may ensure that a larger skills pool is available from which to recruit. Recruitment and selection is often the most important mechanism to achieve numerical targets and to increase the representivity of designated groups in the workplace.

7.2.1. A number of areas in recruitment and selection should be reviewed to eliminate unfair discrimination: These include:

7.2.1.1. Advertising and head hunting;

7.2.1.2. The job application form;

7.2.1.3. The short listing process;

7.2.1.4. Interviews;

7.2.1.5. Job offers;

7.2.1.6. Record keeping; and

7.2.1.7. Reference checking.

#### **7.3. POLICY AND PRACTICE**

7.3.1. The recruitment process should be informed by the employer's employment equity plan, including the recommended affirmative action provisions.

7.3.2. Employers should have written policies and practices that outline their approach to recruitment and selection. This document should:

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7.3.2.1. reflect the values and goals of the employer's employment equity policy or ethos; and

7.3.2.2. include a statement relating to affirmative action and the employer's intention to redress past inequalities.

7.3.3. Where an employer utilises the services of recruitment agencies, it should make the recruitment agency aware of its employment equity policy.

#### **Advertising positions**

7.3.4. When advertising positions employers should refer to their employment equity policy or values and indicate their position on affirmative action.

7.3.5. Job advertisements should place emphasis on suitability for the job, and should accurately reflect the inherent or essential requirements (i.e. the core functions) of the job and competency specifications.

7.3.6. Employers may consider placing all advertisements for positions internally even if a job is being advertised externally. This will make current employees aware of the opportunities that exist within the workplace.

7.3.7. When advertising positions, employers may state that preference will be given to members of designated groups. However, this does not suggest that the process of recruitment excludes members from non-designated groups.

7.3.8. Where possible, employers should place their job advertisements so that it is accessible to groups that are under-represented.

7.3.8.1. Employees who are on maternity leave should be informed of positions advertised in the workplace.

#### **Job Application Forms**

7.3.9. A job application form is a mechanism that is used by an employer as part of selecting a suitable applicant for a position.

7.3.10. The purpose of a job application form is to:

7.3.10.1. standardise the information employers receive from job applicants. This should reduce the probability for unfair discrimination;

7.3.10.2. ensure that the information received from job applicants focuses on the requirements of the job and does not result in indirect unfair discrimination; and

7.3.10.3. obtain biographical information to provide an employer with an easy mechanism for monitoring applications from various designated groups.

#### **Short-listing of Job Applicants**

7.3.11. Short listing is a process in which an employer considers all applications, including curriculum vitae and other relevant documents. An employer should place those job applicants who meet the criteria on a shortlist.

7.3.12. The process of short-listing job applicants should be standardized. Where no standards exist, an approach should be decided on before short- listing commences.

7.3.13. An employer should consider involving more than one person in the process of short-listing applicants to minimize individual bias.

7.3.14. The short-listing panel should be balanced in terms representivity.

7.3.15. Where an employer has outsourced the short- listing process, every effort must be made to ensure that the process is consistent with the recruitment and selection policies of the employer.

7.3.16. An employer should not rely on second hand knowledge or assumptions about the type of work the applicant may be able to do.

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7.3.17. An employer should ensure that it short-lists as many suitably qualified applicants from designated groups as possible.

7.3.18. Suitably qualified<sup>6</sup> applicants must meet the essential job<sup>7</sup> requirements.

7.3.19. When short-listing, an employer could include applicants from designated groups who meet most but not all the minimum requirements. These applicants with potential could be considered for development to meet all the job requirements within a specified timeframe.

<sup>6</sup> A suitably qualified person in the Act is defined as any one or any combination of a person's formal qualification, prior learning; relevant experience or the capacity to acquire within a reasonable time the ability to do the job.

<sup>7</sup> An essential job requirement is the skills, knowledge or experience that are necessary to perform a job.

### Interviews

7.3.20. An interview is a selection tool that provides an employer with the opportunity to meet a job applicant face-to-face.

7.3.21. Employers should use the same panel in the short-listing and interviewing process.

7.3.22. Employers should provide training and guidance to the panel conducting the interviews on:

7.3.22.1. interviewing skills;

7.3.22.2. the measuring system;

7.3.22.3. employment equity and affirmative action; and

7.3.22.4. matters relating to diversity, including skills for recognizing different dimensions of merit.

7.3.23. Employers may develop a standard interview questionnaire. This is a questionnaire prepared before the interview listing a set of questions that will be asked of each applicant interviewed to determine the applicant's suitability for the job. The interview questionnaire should be based on the job description, particularly essential elements of the job and competency specifications. Employers should regularly audit their interview questionnaires to ensure that they do not contain questions that are potentially discriminatory.

7.3.24. An employer should consistently and objectively assess all applicants interviewed using as a basis the job description, competency specification and the measuring system. The same amount of time should be allocated for each candidate and the same or similar questions should be asked.

7.3.25. The measuring system should be standardized. An employer must allocate weightings to ensure that there is a balance between matching job requirements, numerical targets and the needs of the employer.

### Making the job offer

7.3.26. Employers should ensure that a realistic job preview is provided to ensure that both the candidate and employer's expectations are congruent. This is to facilitate the retention of employees from designated groups by effectively managing expectations before the candidate accepts a position, i.e. it must be clear to the candidate on what their expectations are, lines of authority and specific responsibilities;

7.3.27. Where a candidate does not accept a job offer, an employer should conduct an "exit" type interview to establish the reasons for not accepting the offer. This will enable the employer to identify and remove existing barriers.

### Record keeping

7.3.28. An employer should keep copies of all documents relating to each stage of the recruitment process for a reasonable period of time after the position has been filled. These documents will be important in the case where an applicant challenges the recruitment process and selection.

7.3.29. An employer may keep data on its recruitment processes to inform its employment equity strategy and for monitoring changes in attitudes and actions of managers. This information could include:

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7.3.29.1. the demographic details of candidates who apply, those who are short listed, interviewed and those who are made offers;

7.3.29.2. the demographic details of candidates in relation to short listing, interviewing and job offers made in each department to establish which sections within the workplace are advancing the employment equity profile of the employer. The employer can then focus attention on those departments that are not successful in advancing the employment equity objectives; and

7.3.29.3. the persons who were involved in the short listing, interview and job offer process.

#### **Reference checks of job applicants**

7.3.30. The purpose of a reference check is to verify information provided by an applicant during the selection process.

7.3.31. Reference checks should not be conducted in a manner that unfairly discriminates. The same type of reference checks must be conducted on all short-listed applicants.

7.3.32. An employer should only conduct integrity checks, such as verifying the qualifications of an applicant, contacting credit references and investigating whether the applicant has a criminal record, if this is relevant to the requirements of the job.

#### **7.4.KEY LINKS TO OTHER TOPICS IN THE CODE**

7.4.1. Implementing Employment Equity - Recruitment and selection must be aligned to the employer's affirmative action strategy, as reflected in its Employment Equity Plan, which sets out the detail in relation to the numerical targets for each designated group by occupational categories and levels.

7.4.2. Disability - The employer should not unfairly discriminate on the ground of disability. In the context of disability, there are specific recruitment and selection issues that arise. In particular, an employer is required to make reasonable accommodation for the needs of applicants with disabilities. Employers should seek guidance from the [Code of Good Practice on the Employment of People with Disabilities](#) and the [Technical Assistance Guidelines on the Employment of People with Disabilities](#).

7.4.3. Attraction and Retention - The ability of an employer to attract employees from designated groups will depend on a combination of factors, which include recruitment and selection practices, competitive benefits, career opportunities, an affirming environment, reputation and image of the employer.

7.4.4. Assessments - Where an employer makes use of assessments during the selection process, they should refer to the relevant section of this Code.

7.4.5. HIV and AIDS Status - An employer should not unfairly discriminate on the ground of HIV and AIDS. Employers could use the [Code of Good Practice on Key Aspects of HIV/AIDS and Employment](#) for guidance in this area.

#### **INDUCTION**

**8.1. SCOPE** Induction refers to the process where an employer introduces a new employee. This includes familiarizing the new employee with the vision, mission, values, job requirements and the policies and practices, as well as colleagues and the workplace environment.

**8.2. IMPACT ON EMPLOYMENT EQUITY** A carefully planned and implemented induction process will ensure that all new employees, and in particular designated groups, are effectively integrated into the workplace from the commencement of their employment. Proper induction can also function as a retention measure, since an employee who is properly integrated is less likely to be marginalized and more likely to thrive within the workplace.

#### **8.3. POLICY AND PRACTICE**

8.3.1. The induction process is an opportunity to convey the employer's expectations and values and to indicate its commitment to equity and diversity. This can occur, not only at the level of introducing the new employee to policies that prohibit unfair discrimination, but also through ensuring that existing employees and leadership demonstrate the necessary supportive behaviour toward all employees.

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8.3.2. The induction process can be useful in demonstrating the leadership's commitment to employment equity by creating an opportunity to send the appropriate message about zero tolerance for harassment and discrimination, as well as support for affirmative action. It can also serve to project senior role models from among the designated groups already employed.

8.3.3. To ensure that the induction process contributes to the effective integration of new employees from designated groups in the workplace, the employer could ensure that managers and human resource staff receive training on the induction process. Managers could also receive training on avoiding stereotypes or assumptions about new employees based on their personal or physical or racial characteristics, ethnicity or other arbitrary criteria.

8.3.4. During the induction process, new employees should receive copies of the applicable policies. Such policies should include a grievance procedure and other dispute resolution mechanisms. Reasonable accommodation should be made for employees with disabilities.

#### **8.4. KEY LINKS TO OTHER TOPICS IN THE CODE**

8.4.1. **Training and development and work assignment** - Where gaps have been identified during the interview, a training and development plan should be prepared with the new employee and should be introduced during the induction process

8.4.2. **Elimination of barriers** - A successful induction will ensure that the employee does not experience barriers in socialising and networking, which would inevitably impact on prospects for advancement. The integration of employees from designated groups should be a conscious effort that extends beyond the induction process.

8.4.3. **Elimination of unfair discrimination** - The employment environment should be free from unfair discrimination and harassment and should also promote a common understanding of what discrimination means and how it will be dealt with.

8.4.4. **Grievance & resolution** - The grievance procedure should be conducive to raising issues that arise in the induction process.

8.4.5. **Performance Management** - All new employees should be provided with information of the work they are required to perform and the standard to which this work must be produced.

#### **9. PROBATION**

**9.1. SCOPE** Probation involves the trial period for a new employee where the Employer assesses the employee's ability and skills to function in the position in order to determine whether to offer the employee a permanent position.

**9.2. IMPACT ON EMPLOYMENT EQUITY** The probation period can either undermine or support an employee from a designated group. An employer should provide the necessary organizational support to ensure that the new employee is successful. An employer should consider the initial work allocation given to a probationary employee to ensure that the new employee can cope with the demands of the new workplace.

#### **9.3. POLICY AND PRACTICE**

9.3.1. An employer should ensure that probationary employees<sup>8</sup> from designated groups are not subjected to unfair discrimination. This can be done by ensuring that managers treat them fairly and consistently. There should be a written probation policy that clearly sets out the roles and responsibilities of the employee and company policies and procedures. These could include the expected performance standards; the frequency and form of performance reviews; the procedures the probationary employee should comply with when raising problems or grievances; the nature of support, mentoring and training and development.

9.3.2. An employer should ensure that managers understand the need for consistent fair treatment of all probationary employees in order to avoid unfair discrimination and perceptions.

9.3.3. Where an employee from a designated group requests reasonable accommodation during the probationary period, the employer should, as much as possible, provide it. Failure to provide reasonable accommodation may be construed as unfair discrimination.

9.3.4. Managers should, where relevant and appropriate, provide regular supervision and guidance to probationary employees, including training and counseling, to improve performance. Managers should keep records of their discussions with probationary employees, as it may provide useful data about an employee's movement in the employment equity

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planning and measurement process. Information used to make decisions about employees should be reviewed, signed and dated by the employee. If the employer has a human resources department, this department should be informed of issues concerning the probationary employee's performance.

9.3.5. By conducting an audit of policies and practices, an employer may identify barriers in the probationary process that impact on designated groups. Strategies to remove these barriers may then be developed and incorporated into the Employment Equity Plan.

9.3.6. An employer may consider keeping a record of the number of employees from designated groups who are not appointed at the end of their probationary period and compare this to probationary employees from non-designated groups. This analysis may indicate the existence of problems in a particular department or with a particular manager. Corrective measures can then be undertaken. To the extent possible, exit interviews may be conducted of probationary employees who are not appointed in order to identify barriers in the process or perceptions of unfair discrimination. Record keeping can facilitate measurement of employment equity progress and may enable an employer to identify problems with retention of designated groups.

<sup>8</sup> See Item 8 of Schedule 8 of the Labour Relations Act- The Code of Good Practice on Dismissal

#### **9.4. KEY LINKS TO OTHER TOPICS IN THE CODE**

9.4.1. Induction - The links mentioned in the induction section are equally applicable to probation.

9.4.2. Performance management - success during probation is often associated with meeting the employer's clearly specified and objective performance standards according to which regular evaluations of the employee 's performance are conducted.

9.4.3. Mentoring and Development - An employer may consider mentoring, coaching and training interventions to support employees from designated groups during the probationary period.

#### **10. MEDICAL, PSYCHOLOGICAL AND OTHER SIMILAR ASSESSMENTS<sup>9</sup>**

**10.1. SCOPE** Appropriate medical, psychological and other similar assessments, if properly used by employers, could contribute positively toward the recruitment and development of suitably qualified applicants and employees. Assessments, whether medical, psychological or other similar assessments, should include rather than exclude individuals with potential and those suitably qualified.

#### **10.2. IMPACT ON EMPLOYMENT EQUITY**

10.2.1. The Act prohibits medical testing, unless legislation permits or requires the testing; or it is justifiable in the light of medical facts, employment conditions, social policy, the fair distribution of employee benefits or the inherent requirements of the job. Psychological and similar assessments are also prohibited by the Act, unless the assessment being used has been scientifically shown to be valid and reliable; can be applied fairly to all employees; and is not biased against any employee or group. Assessments are required to be free from unfair discrimination based on the prohibited grounds. Tests that directly or indirectly unfairly discriminate on these grounds are inappropriate and should be avoided.

10.2.2. An assessment is seen to be directly unfairly discriminatory when it excludes employees from designated groups on the basis of one or more of the prohibited grounds. Indirect unfair discrimination, however, is the more likely outcome. This occurs when, on average, the majority of a particular group assessed scores below the minimum requirement compared to other groups or individuals.

<sup>9</sup> Medical, psychological and other similar assessments are also covered in Section 7 of the Employment Equity Act as well as the Code of Good Practice on Key Aspects of HIV/AIDS and Employment and in the Code of Good Practice the Employment of People with Disabilities.

10.2.3. Assessments should be used to identify candidates with potential and persons who are suitably qualified. These assessments should then be followed-up by relevant intervention measures like appropriate training and development.

#### **10.3. POLICY AND PRACTICE**

10.3.1. An employer who uses medical, psychological and other similar assessments should develop a written policy for the

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workplace, which identifies the purpose, context, methods and criteria applicable to selecting and conducting assessments.

10.3.2. An employer should ensure that assessments used are valid, reliable and fair<sup>10</sup>, so that no group or individual is unfairly disadvantaged as a result of the assessment. Bias in the application of the assessment should be eliminated. The test should match the job in question and should measure the minimum level of the competencies required to perform the job, which must be based on the inherent requirements or essential functions of the relevant job. Tests should avoid arbitrary or irrelevant questions. Only assessments that have been professionally validated as reliable predictors of performance for a particular job, irrespective of race gender or disability, should be used.

10.3.3. Administrators and users of medical, psychological and other similar assessments should be qualified and registered with the appropriate recognised professional body of South Africa. Assessors should be trained to understand, evaluate and interpret the evidence or outcomes of the assessment objectively against the skills and abilities required for the job and must be able to justify their decisions. The assessment process should also minimize the opportunity for assessors to make subjective or arbitrary judgments that could, deliberately or inadvertently, work to the advantage of one group over another. Assessors should make sure they assess against the competencies for the job.

10.3.4. Special care should be taken to ensure that the language used is sensitive and accessible to those who are being assessed.

10.3.5. All employees or applicants for a particular job should be assessed against the same criteria. The process should make accommodation for diversity and special needs.

10.3.6. An employer should keep assessment records for at least one year<sup>11</sup>

10.3.7. Employers should ensure that reasonable accommodation is made for employees or applicants where required, and that unfair discrimination does not occur in the arrangements for the administering of tests or in using assessment centres<sup>12</sup>.

<sup>10</sup> *Validity is the extent to which a test measures what it is intended to measure and indicates the degree of accuracy of either predictions or inferences based upon the test score. Reliability is the extent to which a test is dependable, stable and consistent when administered to the same individuals on different occasions. Fairness relates to how the results of the assessments are applied: it is the total of all the variables that play a role or influence the final decision of an employer. This can include the assessment, integration of data, recommendations based on these data or the final decision made by the employer.*

<sup>11</sup> *Psychological assessment are valid for 1 year*

#### **10.4. KEY LINKS TO OTHER TOPICS IN THE CODE**

10.4.1. Skills development - Assessments can be used to identify potential amongst employees or applicants from designated groups. This links to affirmative action in training and development. Enabling an individual access to specific training and development programmes, or any other relevant intervention can eliminate skills and competency gaps identified in an employee.

### **PART B: DURING EMPLOYMENT**

#### **11. TERMS AND CONDITIONS OF EMPLOYMENT**

**11.1. SCOPE** This section of the Code deals with terms and conditions of employment including working time and rest periods, leave of all kinds<sup>13</sup>, rates of pay, overtime rates allowances, retirement schemes, medical aid and other benefits.

#### **11.2. IMPACT ON EMPLOYMENT EQUITY**

11.2.1. An employer may not discriminate unfairly in the terms and conditions of work or access to benefits, facilities or services that are available to employees.

11.2.2. Eligibility for benefits should not be determined on the basis of one or more of the prohibited grounds or other arbitrary grounds.

#### **11.3. POLICY AND PRACTICE**

11.3.1. Every employer is required by the Act to audit its terms and conditions of employment to identify whether they

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contain any unfair direct or indirect discrimination policies and practices. This should be followed by monitoring all changes in the terms and conditions of employment to ensure that all barriers or unfair discrimination policies and practices are removed. An employer should also regularly conduct practice audits to test the perceptions of employees about whether its terms and conditions of employment and practices are non-discriminatory. An employer may address deficiencies identified through appropriate awareness raising initiatives and other barrier removal mechanisms. These should form a component of the employer's Employment Equity Plan.

*<sup>12</sup> For example, the dates or times for the test coincide with religious festivals or observances, or the employer does not take into account dietary preferences or cultural norms that could cause disadvantage; or where the facilities used are inappropriate (for example the assessment centre is on the first floor of a building with no elevator and the employee or job applicant is in a wheelchair).*

*<sup>13</sup> Leave includes annual leave, sick leave, maternity leave and family responsibility leave or any other types of leave.*

11.3.2. Employers should provide training, information and literature to trade union representatives and employees on the applicable terms, conditions and available benefits.

11.3.3. Maternity leave should not result in the loss of benefits for employees upon return to employment.

11.3.4. An employer should provide reasonable accommodation for pregnant women and parents with young children, including health and safety adjustments and antenatal care leave.

11.3.5. Employers should endeavour to provide an accessible, supportive and flexible environment for employees with family responsibilities. This includes considering flexible working hours and granting sufficient family responsibility leave for both parents.

11.3.6. Employers should examine the use of terms and conditions of their fixed term contract employees<sup>14</sup> to ensure that they are not unfairly discriminated against. Fixed-term-contracts can potentially undermine employment equity. This may occur where the employer tends to appoint certain groups of employees (i.e. black people, lower level employees and women) to fixed term contracts as a matter of practice.

#### 11.4. KEY LINKS TO OTHER TOPICS IN THE CODE

11.4.1. **Remuneration** - An employer must provide equal pay for equal work or for work of equal value.

11.4.2. **Retention** - Favourable terms and conditions of employment for employees can serve as an affirmative action measure to promote, attract and retain individuals from designated groups, but should be used with caution as a justified affirmative action measure.

11.4.3. **Working environment** - Flexibility in the terms and conditions of employment (i.e. working hours and schedules, work from home options, job sharing, career breaks, etc.) are examples of a flexible working environment that may promote the retention of employees, particularly members from designated groups.

#### 12. REMUNERATION

*<sup>14</sup> A fixed term contract employee' is a person who is employed on a contract that includes an agreement detailing the relationship between the employer and employee, which is determined by an objective condition that creates no false expectations of renewal of the contract, and is based on a specific duration or time frame with dates or the completing of a specific task or happening or event.*

**12.1. SCOPE** Remuneration is any payment in money or in kind, or both in money and in kind, made or owing to any person in return for services rendered<sup>15</sup>. Employers must ensure that remuneration policies and practices are applied consistently without unfair discrimination on the basis of any one or combination of the prohibited grounds.

#### 12.2. IMPACT ON EMPLOYMENT EQUITY

12.2.1. Remuneration differentials most commonly constitute direct unfair discrimination, where an employer pays designated employees less than non-designated employees doing the same or equivalent work simply because they are designated employees. Remuneration discrimination can also be indirect or systemic because it stems from remuneration policies and practices that have an adverse or disparate impact on black people, women and people with disabilities.

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### 12.3. POLICY AND PRACTICE

12.3.1. Employers should audit their existing remuneration policies to ensure that they are based on the principles of pay equity. This requires a comparison of jobs as well as a job evaluation system that is objective rational and applied consistently to all job functions. It is recommended that all employers consider developing a written remuneration policy, or at the very least written guidelines, to ensure that clear rules exist on how remuneration is determined. This should be communicated in an appropriate format to all employees.

12.3.2. Employers should conduct regular audits of their remuneration practices among employees to identify the lack of awareness about applicable criteria and perceptions of unfair discrimination in remuneration.

12.3.3. Where barriers or discrimination in remuneration are identified, and unless these can be justified, the employer should in consultation with stakeholders develop a strategy for barrier removal.

12.3.4. Job evaluation systems should be objective as these are often the basis on which remuneration differentials emerge.

12.3.5. Remuneration should be based on the value of the post. In this regard, the following factors may be taken into account:

12.3.5.1. Performance and Outputs: the employee's outputs, measured by the performance management process, should carry the most weight in determining individual remuneration levels.

12.3.5.2. Employee potential: This involves estimated ability and competence, as well as the capacity to develop these over time. Estimated ability refers to conceptual and management skills which have not yet been demonstrated, whilst competence refers to knowledge and expertise gained, which can be informed by previous outputs or experience.

<sup>15</sup> The meaning of remuneration in relation to leave pay, notice pay and severance pay is clarified by the Determination issued by the Minister of Labour in terms of Section 35 of the Basic Conditions of Employment Act. 12.3.6. Employers should monitor income differentials to ensure that these do not contribute to unfair discrimination.

### 12.4. KEY LINKS TO OTHER TOPICS IN THE CODE

12.4.1. **Performance Management** - Although indirect factors such as motivation and commitment may be considered, it is important to ensure that these are free of unfair discrimination.

12.4.2. **Recruitment and Selection** - In order to attract employees from designated groups, an employer should offer market related salaries and benefits.

### 13. JOB ASSIGNMENTS

13.1. **SCOPE** Job assignments relate to the type of work that is allocated to an employee by their employer. An employer should make decisions on the allocation of job assignments on objective criteria.

13.2. **IMPACT ON EMPLOYMENT EQUITY** Unfair direct and indirect discrimination often occur as a result of the way in which work is allocated in a workplace. Where job assignments are based on prohibited grounds or arbitrary characteristics, this may perpetuate unfair discrimination and may result in undermining employment equity. Discrimination in job assignments may occur where there is informal mentoring by a manager who is perceived to favour a particular employee.

### 13.3. POLICY AND PRACTICE

13.3.1. As part of the policy and practices audit, an employer should identify whether any unfair discrimination occurs in the ability of all employees to access opportunities.

13.3.2. Employers should guard against conduct that perpetuates perceptions of favouritism, which could lead to allegations of unfair discrimination. Access to opportunities should occur on an objective and fair basis to ensure that such perceptions do not arise, and where they do arise, they should be dealt with effectively and expeditiously.

13.3.3. Employers should also monitor behaviour of managers in allocating job assignments, particularly where certain trends can be determined, as these may indicate the existence of indirect unfair discrimination.

### 13.4. KEY LINKS TO OTHER TOPICS IN THE CODE

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13.4.1. **Induction** - An employer should explain, especially during the induction process, the policies or guidelines that apply in relation to how work or opportunities are allocated.

13.4.2. **Job analysis and job descriptions** - A clear job description could ensure that no unrealistic expectations are raised regarding access to opportunities.

13.4.3. **Performance management** - Access to work assignments that enhance career opportunities, or are considered to be desirable, should be allocated objectively by linking them to the career path of employees. These should be clearly communicated to employees to ensure that no misperceptions arise and to prevent allegations of unfair discrimination.

13.4.4. **Retention** - In some instances, allowing certain employees access to work related opportunities that are considered to be "exciting" could be used as a retention measure - i.e. where an employer gives preference to senior managers from designated groups in allocating these opportunities. This should be used with caution as it can have significant organizational implications and can cause resentment where the objectives of such a strategy are not clearly understood or communicated.

13.4.5. **Skills development** - Access to opportunities and work assignments should form part of an employee's development plan and an employer's Workplace Skills Plan.

## 14. PERFORMANCE MANAGEMENT

14.1. **SCOPE** Performance management is a business process that is used to monitor, measure and link what employees do on a continuous basis with the goals, values, culture and business objectives of the employer. It is a process intended to establish a shared understanding about what is to be achieved; how it is to be achieved; and the implications where it is not achieved. This includes clarifying the expectations that the employer has of the employee. Performance management also involves the training and development of employees.

### 14.2. IMPACT ON EMPLOYMENT EQUITY

14.2.1. Discrimination in work assignments and performance measurement is more difficult to detect and difficult to prove without an objective, written system that clearly expresses criteria according to which performance will be measured and managed.

14.2.2. The manner in which the performance of an employee is managed may impact on the value that the employee adds to the workplace. It may also impact on how peers perceive the performance and advancement of an employee and on the support received by that employee. Performance management should not be a punitive process, but rather one that facilitates setting clear objectives for development and growth. Providing opportunities for development for employees from designated groups is a critical challenge for many employers.

### 14.3. POLICY AND PRACTICE

14.3.1. In order to effectively manage performance in a non-discriminatory and fair manner that encourages development, an employer should ensure that managers:

14.3.1.1. receive coaching and diversity training to ensure that they are able to objectively and consistently manage performance and provide honest feedback whilst being sensitive to employee differences;

14.3.1.2. understand and are able to properly implement the performance management system; and

14.3.1.3. are able to provide the necessary coaching, mentoring and support to employees to motivate them towards performance excellence. 14.3.2. Performance management systems could in addition:

14.3.2.1. Measure and incentivise managers for their leadership, mentoring and diversity skills, as well as for achieving employment equity objectives;

14.3.2.2. Incorporate review processes, which may apply measures relating to competencies of managers in diversity management, including feedback from employees and peers;

14.3.2.3. Develop clear learning objectives for all employees, particularly from designated groups. This should link to the acquisition of additional skills and competencies for challenging positions into which employees may be promoted or transferred; and

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14.3.2.4. Ensure that the performance management system is linked to the inherent requirements of the job and is free of any unfair discrimination.

14.3.3. Employers should review the results of performance appraisals to assess if there are any significant variations across designated groups. Where such variations exist, employers should identify the reasons for these discrepancies and take action to remove them.

#### 14.4. KEY LINKS TO OTHER TOPICS IN THE CODE

14.4.1. **Working environment** - a consistent and sustained performance management culture may impact on the integration and retention of employees from designated groups. It may also have implications for issues that go beyond performance and productivity, e.g. elevating employee morale, which in turn leads to productive employees and a more enabling workplace.

14.4.2. **Remuneration** - because performance management is linked to reward, it would be useful for employers to conduct an analysis of the distribution of increases and/or bonuses paid to employees that can be attributed to performance outcomes. This will enable the identification of areas of potential unfair discrimination and ensure that action is taken to eliminate barriers.

14.4.3. **Skills development** - effective and regular performance management may facilitate the identification of training and development needs, which may be addressed through appropriate interventions. These will enable an employee to effectively perform in the existing position or to develop into a more challenging position.

14.4.4. **Retention** - If performance management is linked to employee development and growth, it will impact significantly on an employer's ability to retain its employees.

#### 15. SKILLS DEVELOPMENT

##### 15.1. SCOPE

15.1.1. The Skills Development Act and the Skills Development Levies Act provide reinforcing and supporting tools for developing employees in line with employer business objectives. This contributes to a critical pool of candidates from designated groups from which employers could recruit, thus facilitating accomplishment of Employment Equity Act objectives.

15.1.2. This section describes the areas that impact on an employer's ability to develop employees from designated groups, which includes:

15.1.2.1. effectively identifying training needs and matching these with the needs of the employer;

15.1.2.2. providing effective mentoring and coaching;

15.1.2.3. providing structured on-the-job training;

15.1.2.4. considering accelerated development for employees with potential;

15.1.2.5. providing meaningful job roles;

15.1.2.6. implementing individual development plans;

15.1.2.7. providing access to opportunities to act in a higher position;

15.1.2.8. providing shadowing<sup>16</sup> opportunities;

15.1.2.9. creating challenging work assignments; and

15.1.2.10. developing and promoting positive role models for designated groups.

15.1.3. The section also deals with the retraining of managers and supervisors to enable them to effectively manage a diverse workforce.

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**15.2. IMPACT ON EMPLOYMENT EQUITY** Skills development of employees is a key driver for the achievement of employment equity objectives. The Act positions skills development of designated groups as an affirmative action measure. Development and training are key strategies to enable designated groups to advance and to reach equitable representation in all occupational categories and levels.

### 15.3. POLICY AND PRACTICE

15.3.1. Every employer should develop written policies and practices to reflect its commitment to training and development. These policies and practices should refer to the objective of encouraging the training of employees while prioritising designated groups. The policy may incorporate preference in access to training and development opportunities for designated groups; until their representation in all occupational categories and levels has reached critical mass. This policy may then form the basis for the Workplace Skills Plan.

15.3.2. Employers should assist employees to identify and address their skills gaps by formulating appropriate objectives in their personal development plans, agreeing to timeframes and accessing the resources required to meet these objectives.

15.3.3. Employers and employees should also strive to create an organizational culture that encourages and rewards learning for everyone in the workplace. An employer may achieve these objectives through:

15.3.3.1. appropriately structured career breaks;

15.3.3.2. bursary schemes;

15.3.3.3. on the job learning;

*<sup>16</sup> A person following and observing another in order to gain experience or insight into a job.*

15.3.3.4. mentoring and coaching.

15.3.3.5. employee counseling for growth and advancement; and

15.3.3.6. access to literacy and numeracy programmes.

15.3.4. The competency requirements for senior managers, team leaders, line managers, supervisors and professional staff should include specifications related to the development of employees.

15.3.5. Employers should consider conducting leadership and management development programmes to ensure that leaders and managers have the necessary knowledge and skills to effectively manage, develop and empower employees. Every effort should be made to create a work climate that is conducive to the successful integration and retention of employees from designated groups.

15.3.6. Employers should communicate their training and development priorities to all senior and line managers responsible for performance management. An employer should use these requirements to guide the identification of potential individuals in a proactive manner and identify individuals who can be scheduled for training and development.

15.3.7. All formal training offered to employees, whether through in-house training or from an external training provider, should ideally be linked to unit standards or qualifications that are registered on the National Qualifications Framework. This ensures that employees are able to receive nationally recognised credits and certificates for their learning achievements. This may redress past imbalances in formal education opportunities for people from designated groups.

15.3.8. Where employers consider implementing the Recognition of Prior Learning (RPL) principles to redress historical education and training disadvantages to promote employment equity and validate employee skills and knowledge, this should be based on an employer specific RPL policy.<sup>17</sup>

15.3.9. Where applicable, employers should consider implementing Learnerships<sup>18</sup> to offer occupationally driven, outcomes based learning while creating employment opportunities for previously disadvantaged individuals.

15.3.10. In procuring formal training courses from internal or external providers, employers should take into account the equity profile of the provider.

15.3.11. In procuring formal training courses from external providers, employers should ideally offer preference to suitable

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Black Economically Empowered companies in support of the development and sustainability of Black Economic Empowerment initiatives.

<sup>17</sup> RPL as defined by South African Qualifications Authority (SAQA); is a process whereby people's prior learning can be formally recognized in terms of registered qualifications and unit standards; regardless of where and how the learning was attained. RPL acknowledges that people never stop learning, whether it takes place formally at an educational institution, or whether it happens informally.

<sup>18</sup> Learnerships are created in terms of the Skills Development Act, No. 97 of 1998 (Chapter 4, Sections 16 to 19).

15.3.12. Employers, particularly those whose workforces include employees who are not functionally literate, should consider offering Adult Basic Education and Training (ABET) opportunities.

15.3.13. An employer's employment equity policy or policies should be a standard component of all training and development courses to ensure that employees understand its philosophy in relation to the workplace.

15.3.14. An employer should offer diversity training to all employees.

15.3.15. Staff responsible for selecting employees for training, either as part of their induction or to develop particular skills, should themselves be trained to:

15.3.15.1. recognise potential, particularly from designated group employees;

15.3.15.2. select trainees according to objective criteria or in terms of the Workplace Skills Plan or training and development policy;

15.3.15.3. align training and development access for designated groups to numerical targets and other objectives set in the Employment Equity Plan; and

15.3.15.4. identify and address any barriers or unfair discrimination practices in the allocation of training opportunities.

15.3.16. An employer should monitor training opportunities in order to identify and address any disparities between groups and to ensure that training is done to achieve the employment equity objectives set out in its Employment Equity Plan.

15.3.17. An employer should conduct post training impact evaluations to track the progress of employees to ensure that training employment equity objectives are met.

#### 15.4. KEY LINKS TO OTHER TOPICS IN THE CODE

15.4.1. **Implementing employment equity** - Employees from designated groups who are provided with effective training and development interventions are likely to perform better. This may contribute towards improved workplace performance and may increase the profile of employees from designated groups.

15.4.2. **Performance management** - The performance management system should include the measurement of line managers and supervisors in relation to the contribution they make to the skills development of employees.

15.4.3. **Promotion** - Effective training and development of employees from designated groups may enhance their skills and knowledge and ultimately their chances for career advancement.

#### 16. PROMOTION AND TRANSFER

**16.1. SCOPE** Promotions and transfers are processes that facilitate employee mobility for various purposes, including career development, succession planning and operational requirements. This should facilitate representation of members of designated groups in all occupational categories and levels, thus meeting employment equity objectives.

**16.2. IMPACT ON EMPLOYMENT EQUITY** Promotions and transfers have the potential to impact on numerical goals and accelerate equitable representation of all groups in occupational categories and levels within a workplace. These initiatives are key drivers for employment equity in that they can involve fast tracking the advancement towards achieving numerical targets.

#### 16.3. POLICY AND PRACTICE

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16.3.1. Employers are prohibited from unfair discrimination in promotion and transfer decisions. One of the mechanisms for eliminating unfair discrimination is to ensure that written policies and practices specify the criteria, which apply to promotions and transfers. Managers implementing the policies and practices should be monitored to ensure that they are not applying these inconsistently.

16.3.2. An employer may implement a policy of preference toward members of designated groups in transfers and promotions as a legitimate affirmative action measure.

16.3.3. Lateral transfers to equivalent positions may be effectively used to achieve employment equity targets. Reasonable provision must be made where an employee requests a transfer.

#### **16.4. KEY LINKS TO OTHER TOPICS IN THE CODE**

16.4.1. **Retention** - Promotions and transfers may contribute to retention, specifically in instances where employees from designated groups do not feel sufficiently challenged or rewarded in an existing position.

16.4.2. **Skills Development** - Linking promotions and transfers to development and growth opportunities for designated groups will ensure that they do not occur in isolation from numerical targets and employment equity objectives.

16.4.3. **Remuneration** - Linking promotions and transfers to remuneration may encourage employees to transfer to a less popular operational or geographic area.

#### **17. CONFIDENTIALITY AND DISCLOSURE OF INFORMATION**

##### **17.1. SCOPE**

17.1.1. This section deals with information employees are entitled to obtain from their employers and information employers may disclose about their employees.

17.1.2. The relevant provisions of Section 16 of the Labour Relations Act, 1995, apply to the disclosure of information in terms of this part of the Code, in addition to any other laws, including the Regulation of Interception of Communications and Communication- Related Information Act, 2002 and the Promotion of Access to Information Act, 2000.

##### **17.2. IMPACT ON EMPLOYMENT EQUITY**

17.2.1. When engaging in employment equity consultation, the Act requires that designated employers disclose to consulting parties all relevant information.

17.2.2. The object of disclosure is to make the process of consultation as participative and as meaningful as possible to ensure good faith engagement and to develop trust between employers and employees.

17.2.3. Timely disclosure of information will facilitate consensus regarding appropriate employment equity initiatives to reduce challenges.

17.2.4. An employer must disclose information that is relevant and that is reasonably required by the consulting parties to engage effectively on employment equity.

17.2.5. Information is generally considered to be relevant if it is likely to influence the formulation, presentation or pursuance of a position or demand proposed by a consulting party in their deliberations on employment equity.

##### **17.3. POLICY AND PRACTICE**

###### **Type of information**

17.3.1. The employer can comply with many of these requirements by referring the consulting parties to the documents that contain the necessary information if they are reasonably accessible to such consulting parties.

17.3.2. Information should be supplied in a manner and format that are accessible to all employees in the workplace.

###### **Confidentiality and Disclosure**

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17.3.3. Private, personal information is regarded as confidential information. It will include information that may be typically found in an employee's personnel file. This may include information concerning the employee's financial circumstances, marital circumstances, criminal record or health status (e.g. HIV and AIDS, alcoholism, etc.). The employer may not disclose this kind of information unless the employee consents in writing.

#### **Collection and communication of employee data: Balancing the need for information against the right to privacy**

17.3.4. Information is collected on employees from the time when they are job applicants. The collection and disclosure of information may in some circumstances violate the right to privacy. It is therefore important for employers to balance the need for requiring certain information against the need to maintain high standards of personal privacy and the confidences of third parties.

17.3.5. An employer should not collect personal information from employees, unless - 17.3.5.1. The information is collected for a lawful purpose that is directly related and necessary to implement employment equity in the workplace, e.g. for making recruitment, development and promotion decisions; and

17.3.5.2. The information is reasonably necessary for that purpose.

17.3.6. An employer may not collect personal data regarding an employee's sex life, political, religious or other beliefs, or criminal convictions, except in exceptional circumstances where such information may be directly relevant to an employment decision.

#### **Security of disclosed information**

17.3.7. Information collected on employees, such as race, gender, sexual orientation, religion, performance, training records, psychological assessments or health, or any other information imparted by employees to their employer, should be kept secure and only those entitled to see it in the course of their duties should have access.

17.3.8. For governance purposes, employers should ideally have a written security policy for the gathering and disclosure of information. Employers should keep a written record of the names of those, whether internal or external to the employer, to whom employee information has been revealed and for what purpose.

#### **Employee rights**

17.3.9. Employees should be afforded opportunities of checking the accuracy of their information and rectifying and updating it, particularly where it relates to employment equity.

17.3.10. Employees can insist on the rectification or deletion of incorrect or misleading information. Where information is corrected, those Alterations should be communicated to subsequent users of the information.

#### **17.4. KEY LINKS TO OTHER TOPICS IN THE CODE**

17.4.1. **Employment equity implementation** - The disclosure of information by an employer must occur within the context of an employer's employment equity policies. Disclosure of information is a necessary pre- requisite to meaningful consultation by parties, as required under the Act.

17.4.2. **Recruitment and Selection** - Information about employees, which is collected by an employer during the recruitment process or during employment, must be collected for a lawful purpose and must be directly related to the function or job requirement.

17.4.3. **Assessments** - An employee's manager, with the assistance of an expert in testing, should only consider psychological assessments of an employee if the assessments are current.

**18. RETENTION SCOPE** The retention of all employees, specifically employees from designated groups, is a key challenge for employers given the opportunities for mobility that exist in the global economy. This section identifies some challenges and their implications for implementing employment equity to retain employees from designated groups.

**IMPACT ON EMPLOYMENT EQUITY** Retention of employees from designated groups is critical for achieving and sustaining numerical targets and goals as envisaged in the Act. Employers who seek to retain their talented and skilled employees, particularly those from designated groups, should develop and implement retention strategies.

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## 18.1. POLICY AND PRACTICE

18.1.1. Employers may consider identifying trends that exist in their workplaces regarding the reasons for termination. This will enable employers to develop appropriate strategies to retain employees, particularly employees from designated groups. These strategies should be directed at removing barriers that cause termination of employment.

18.1.2. Employers may consider negotiating retrenchment criteria that deviate from the "last in first out" principle, where the implementation of this principle will detrimentally affect the representivity of designated groups in that workplace.

18.1.3. Employers could also implement various incentives to promote retention.

## 18.2. KEY LINKS TO OTHER TOPICS IN THE CODE

18.2.1. **Induction** - An effective induction process should be implemented to integrate employees, particularly those from designated groups, into the workplace.

18.2.2. **Terms and conditions of employment** - Equitable and favourable terms and conditions of employment as well as an environment that affirms diversity contribute to long-term employee retention.

18.2.3. **Skills development** - Providing equitable training and development opportunities contribute towards employee retention, especially if this is linked to career development.

18.2.4. **Remuneration** - fair remuneration contributes to the retention of employees.

18.2.5. **Performance Management and Reward** - Recognising and rewarding good performance may contribute to retention.

18.2.6. **Termination** - An exit interview may provide information on the reasons for employee turnover.

## 19. HARASSMENT

**19.1. SCOPE** This section deals with the elimination of harassment in the workplace. It provides a framework for facilitating and promoting the development and implementation of policies and practices that result in workplaces free of harassment where employers, employees and associated parties<sup>19</sup> put a premium on one another's integrity and dignity. This in turn builds a workforce that respects one another's privacy and the right to equity and equality in the workplace.

### 19.2. IMPACT ON EMPLOYMENT EQUITY

19.2.1. Section 6 of the Act and other related legislation recognize that harassment in the workplace, whether direct or indirect, is a form of unfair discrimination and is prohibited on one or a combination of the following grounds: Race, gender, sex, pregnancy, marital status, family responsibility, ethnic or social origin, colour, sexual orientation, age, disability, religion, HIV status, conscience, belief, political opinion, culture, language and birth.

<sup>19</sup> *Associated parties may include suppliers and contractors.*

19.2.2. Harassment is unwanted or unsolicited attention based on one or more of the prohibited grounds. It involves conduct that is unwanted by the person to whom it is directed and who experiences the negative consequences of that conduct. The conduct can be physical, verbal or non-verbal. It affects the dignity of the affected person or creates a hostile working environment. It often contains an element of coercion or abuse of power by the harasser.

**19.3. POLICY AND PRACTICE** 19.3.1. Every employer is under obligation in terms of the Act to take steps to prevent workplace harassment. This includes ensuring that a clear rule prohibiting harassment and other forms of unfair discrimination that exists in the workplace, and that all employees understand it. This should be incorporated in a formal written policy like a code of conduct with an appropriate dispute resolution procedure that is communicated throughout the workplace and displayed in prominent places.

19.3.2. The policy should make it clear that harassment is a form of unfair discrimination, and will be regarded by the employer as a serious form of misconduct, which will be subjected to disciplinary action and may result in dismissal.

19.3.3. On an incremental scale of "minor", "serious" and "very serious", harassment is a very serious offence. The disciplinary code of an employer should provide for very serious offences like harassment by placing a waiver on all warning

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procedures, and moving directly to a disciplinary enquiry that could be followed by a hearing.

#### 19.4. KEY LINKS TO OTHER TOPICS IN THE CODE

19.4.1. **Recruitment & Selection** - Applicants for a job are normally most vulnerable to harassment in exchange for special favours. Therefore special attention should be placed on behaviour that is likely to be interpreted as harassment.

19.4.2. **Promotion & Transfer** - Mechanisms should be put in place to prevent 'welcome' or 'unwelcome' harassment that could be seen as influencing promotion and transfer decisions.

19.4.3. **Discipline, Grievance & Dispute Resolution** – Appropriate policies and procedures, which promote appropriate behaviour and serves as a guard against harassment, should be developed and implemented by employers.

**20. DISCIPLINE, GRIEVANCE AND DISPUTE RESOLUTION**<sup>20</sup> This section of the Code is based on the principle that employers and employees should treat each other with mutual respect. To this end, the Code seeks to balance the right of employees to fair employment practices against the right of employers to expect satisfactory conduct and performance by employees.

<sup>20</sup> *Schedule 8 of the Labour Relations Act, which includes the Code of Good Practice on Dismissal deals with some of the key aspects of dismissals for reasons related to conduct and capacity. The Code of Good Practice on Dismissal also deals with termination based on operational requirements.*

#### 20.1. SCOPE

20.1.1. This section deals with issues employers may consider when managing grievances filed by employees or disciplining employees for transgressing workplace policies and practices.

#### 20.2. IMPACT ON EMPLOYMENT EQUITY

20.2.1. The manner in which discipline and grievance are managed can generate conflict in a workplace and may undermine employment equity achievements and policies. Employers should ensure that their disciplinary and grievance policies are consistently and impartially applied.

20.2.2. This section of the Code is not intended to serve as a substitute for grievance or disciplinary procedures concluded at a workplace. An employer should evaluate whether their existing grievance, discipline and dispute resolution procedures are conducive to dealing with unfair discrimination and harassment.

#### 20.3. POLICY AND PRACTICE The Grievance Process

20.3.1. Unfair discrimination or allegations of a breach of the Act should be dealt with as quickly and as thoroughly as possible. Conflict is best managed if addressed expeditiously and according to fair and impartial principles.

20.3.2. Employers should endeavour to protect complainants and ensure that complaints and grievances lodged are dealt with sensitively and discretely.

20.3.3. Employers should take disciplinary action against any employee who retaliates against a fellow employee for using the grievance procedure to address a concern or grievance concerning an alleged act of harassment, unfair discrimination or a breach of the Act.

20.3.4. Employers should consider workplace policies that make any act of unfair discrimination or breach of the Act a form of very serious misconduct.

20.3.5. Employers should ensure that employees are aware of or can reasonably be expected to be aware of workplace policies and practices, particularly in relation to unfair discrimination.

20.3.6. Employers are responsible for ensuring the consistent application and enforcement of policies to avoid allegations of arbitrary or unfair application of discipline on the basis of one or more of the prohibited grounds. Policies on discipline must apply equally to all employees.

20.3.7. Disciplinary action should seek to correct an employee's behaviour. Disciplinary measures may include counseling, warnings or creative solutions. The primary aim of discipline should be to encourage a culture of respect for difference and

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dignity.

20.3.8. Employers should value and encourage greater awareness of diversity.

20.3.9. Employers should keep a record of all grievances, disputes and disciplinary actions taken and conduct regular audits to determine the extent to which:

20.3.9.1. employees have utilised the procedures. This information should be disaggregated by race, gender and disability;

20.3.9.2. the grievances filed by employees where breaches of the Act are alleged; and

20.3.9.3. the outcome of processes.

20.3.10. Employers may use the outcome of this review to assess whether its policies are being utilised and whether they are being used to address grievances and disputes that arise in the workplace in relation to unfair discriminatory practices or any other breaches of the Act.

## 20.4. KEY LINKS TO OTHER TOPICS IN THE CODE

20.4.1. **Working environment** - Conflict is inherent in workplaces. Employers need to manage the manifestations of conflict in a manner that discourages unfair discrimination.

20.4.2. **Harassment** - Employees must be made aware that harassment is serious misconduct, and it will be dealt with effectively and efficiently.

## PART C: ENDING EMPLOYMENT

### 21. TERMINATING EMPLOYMENT

21.1. **SCOPE** An employer may terminate the employment of an employee by agreement or for reasons based on misconduct, incapacity or for operational requirements. This section outlines some of the key employment equity considerations in ensuring that employment is terminated in a fair and consistent manner.

#### 21.2. IMPACT ON EMPLOYMENT EQUITY

21.2.1. Terminations should be fairly and lawfully effected and must serve the purposes of the employer without discriminating against any employee.

21.2.2. In the context of termination for operational requirements, an employer, when consulting with the affected party, should consider the appropriateness of adopting the standard selection criteria of Last In First Out (LIFO) as this may undermine the retention of designated groups. In the context of employment equity, traditional criteria may undermine the progress made to achieve numerical targets and would need to be revisited to ensure that they support the achievement of employment equity objectives.

#### 21.3. POLICY AND PRACTICE

21.3.1. In order to achieve numerical targets, employers may initiate voluntary exit strategies to make space for designated groups. This strategy should be preceded by consultation in order for it to be accepted as a legitimate affirmative action measure. It should be transparent and effectively communicated to those existing incumbents who may be affected. Employers should be guided by the long-term viability and sustainability of institutional knowledge in making the decisions to use voluntary exits of non- designated groups, as a strategy to achieve numerical targets. An employer should implement this strategy in tandem with skills development, career development and succession planning to ensure that skills that are core to the employer are replaced.

21.3.2. When terminating the employment of an employee for reasons of incapacity based on disability or chronic illness, employers should refer to the Code of Good Practice on Key Aspects of HIV/AIDS and Employment and the Code of Good Practice on the Employment of People with Disabilities.

#### 21.4. KEY LINKS TO OTHER TOPICS IN THE CODE

21.4.1. **Skills development** - An employer should provide skills training to its managers to ensure that they do not act in a

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discriminatory manner.

21.4.2. **Disputes and grievance resolution** - Termination of employment must be conducted according to fair labour practices and in line with the employer's procedures, including its discipline, grievance and dispute resolution procedures.

## 22. EXIT INTERVIEWS

### 22.1. SCOPE

22.1.1. Exit interviews are conducted by the employer with the employee at the time of voluntary termination, retirement or retrenchment.

22.1.2. The purpose of an exit interview is to obtain information about the employee's experience during employment. These exit interviews could provide valuable information about barriers and other factors that could have contributed to the termination.

**22.2. IMPACT ON EMPLOYMENT EQUITY** An employer should analyse the information it obtains from exit interviews and identify trends, which should inform barrier removal initiatives.

### 22.3. POLICY AND PRACTICE

22.3.1. To make exit interviews an effective process, employers should consider:

22.3.1.1. Conducting a standard exit interview providing a set of guidelines for consistent application;

22.3.1.2. Conducting an exit interview that allows the departing employee to comment on any discriminatory practices in the workplace;

22.3.1.3. Senior employees, who are skilled at obtaining information, should conduct exit interviews. Alternatively, an employer may consider using an independent person or persons from designated groups to ensure that the departing employee is able to speak as openly and honestly as possible about their experiences; and

22.3.1.4. Information disclosed in exit interviews is confidential and can only be used to identify themes or problems in the workplace.

22.3.2. Employers may consider developing periodic reports reflecting trends that may have emerged during exit interviews, including the identification of barriers experienced by employees from designated groups.

22.3.3. Senior management should take action to eliminate barriers that are identified during exit interviews.

22.3.4. Employers may consider comparing their staff turnover rates against similar jobs within the same sector. If turnover is higher than these benchmarks then an employer should consider initiating interventions to address the problems.

### 22.4. KEY LINKS TO OTHER TOPICS IN THE CODE

22.4.1. **Retention** - There are numerous factors that impact on the retention of employees from designated groups. These factors include work climate, competitive remuneration, effective performance management, learning pathways, organisational culture, incentive schemes, challenging work assignments, work-life balance and workplace environment.

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