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EMPLOYMENT EQUITY ACT NO 55, OF 1998

CODE OF GOOD PRACTICE ON THE EMPLOYMENT OF PEOPLE WITH DISABILITIES

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1. FOREWORD

The Employment Equity Act, No. 55,1998 constitutes one of the key legislative and policy interventions within the ethos of South Africa's new constitution to give effect to the provisions relating to removal of policies which result in inequalities in the country. Specific emphasis is placed to ensure equity, the right to equal protection and benefit of the law, *inter alia*, by people with disabilities.

Although many barriers such as widespread ignorance, fear and stereotypes have caused people with disabilities to be unfairly discriminated against in society and in employment, South Africa can take pride in its efforts to formulate policies to protect the rights of people with disabilities.

Unfair discrimination against people with disabilities is perpetuated in many ways, including the following:

- Unfounded assumptions about the abilities and performance of job applicants and employees with disabilities;
- Advertising and interviewing arrangements which either exclude people with disabilities or limit their opportunities to prove themselves;
- Using selection tests which discriminate unfairly;

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- Inaccessible workplaces; and
- Inappropriate training for people with disabilities.

The Code of Good Practice on the Employment of People with Disabilities is thus part of a broader equality agenda for people with disabilities to have their rights recognised in the labour market where they experience high levels of unemployment and often remaining in low status jobs or earn lower than average remuneration.

This is particularly important since disability is a natural part of the human experience and in no way diminishes the rights of individuals to belong and contribute to the labour market. When opportunities and reasonable accommodation is provided, people with disabilities can contribute valuable skills and abilities to every workplace, and contribute to the economy of our society.

2. AIMS

2.1 The Employment Equity Act, No. 55 of 1998 protects people with disabilities against unfair discrimination in the workplace and directs employers to implement affirmative action measures to redress discrimination.

2.2 The Code is a guide for employers and employees on promoting equal opportunities and fair treatment for people with disabilities as required by the Employment Equity Act (the Act).

2.3 The Code is intended to help employers and employees understand their rights and obligations, promote certainty and reduce disputes to ensure that people with disabilities can enjoy and exercise their rights at work.

2.4 The Code is intended to help create awareness of the contributions people with disabilities can make and to encourage employers to fully use the skills of such persons.

3. STATUS OF CODE

3.1 The Code is not an authoritative *summary* of the law, nor does it create additional rights and obligations. Failure to observe the Code does not, by itself, render a person liable in any proceedings. Nevertheless when the courts and tribunals interpret and apply the Employment Equity Act, they must consider it.

3.2 The Code should be read in conjunction with other relevant Codes of Good Practice issued by the Minister of Labour.

3.3 The Code is intentionally general because every person and situation is unique and departures from the guidelines in this code may be justified in appropriate circumstances.

3.4 Employers, employees and their organizations should use the Code to develop, implement and refine disability equity policies and programmes to suit the needs of their own workplaces.

4. LEGAL FRAMEWORK

The Code is issued in terms of section 54(1)(a) of the Employment Equity Act, No. 55,1998 and is based on the Constitutional principle that no one may unfairly discriminate against a person on the grounds of disability.

5. DEFINITION OF PEOPLE WITH DISABILITIES

5.1 Definition of persons with disabilities under the Act

The scope of protection for people with disabilities in employment focuses on the effect of a disability on the person in relation to the working environment, and not on the diagnosis or the impairment.

(i) having a physical or mental impairment;

(ii) which is long term or recurring; and

(iii) which substantially limits their prospects of entry into, or advancement in employment .

5.1.1 Impairment

Section 1 of the Act defines people with disabilities as "people who have a long-term or recurring physical or mental

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impairment, which substantially limits their prospects of entry into, or advancement in, employment"

- (i) An impairment may either be physical or mental or a combination of both.
- (ii) 'Physical' impairment means a partial or total loss of a bodily function or part of the body. It includes sensory impairments such as being deaf, hearing impaired, or visually impaired.
- (iii) '**Mental**' impairment means a clinically recognized condition or illness that affects a person's thought processes, judgment or emotions.

5.1.2 Long-term or recurring

- (i) 'Long-term' means the impairment has lasted or is likely to persist for at least twelve months.
- (ii) 'Recurring impairment' is one that is likely to happen again and to be substantially limiting (see below). It includes a constant chronic condition, even if its effects on a person fluctuate.
- (iii) 'Progressive conditions' are those that are likely to develop or change or recur. People living with progressive conditions or illnesses are considered as people with disabilities once the impairment starts to be substantially limiting. Progressive or recurring conditions which have no overt symptoms or which do not substantially limit a person are not disabilities.

5.1.3 Substantially limiting

- (i) An impairment is substantially limiting if, in its nature, duration or effects, it substantially limits the person's ability to perform the essential functions of the job for which they are being considered.
- (ii) Some impairments are so easily controlled, corrected or lessened, that they have no limiting effects. For example, a person who wears spectacles or contact lenses does not have a disability unless even with spectacles or contact lenses the person's vision is substantially impaired.
- (iii) An assessment to determine whether the effects of an impairment are substantially limiting, must consider if medical treatment or other devices would control or correct the impairment so that its adverse effects are prevented or removed.
- (iv) For reasons of public policy certain conditions or impairments may not be considered disabilities. These include but are not limited to -
 - (a) sexual behaviour disorders that are against public policy;
 - (b) self-imposed body adornments such as tattoos and body piercing;
 - (c) compulsive gambling, tendency to steal or light fires;
 - (d) disorders that affect a person's mental or physical state if they **are** caused by current use of illegal drugs or alcohol, unless the affected person is participating in a recognized programme of treatment;
 - (e) normal deviations in height, weight and strength; and conventional physical and mental characteristics and common personality traits.
- (v) An assessment may be done by a suitably qualified person if there is uncertainty as to whether an impairment may be substantially limiting.

6. REASONABLE ACCOMMODATION FOR PEOPLE WITH DISABILITIES (2)

(2) Section 1 of the Act defines reasonable accommodation as "any modification or adjustment to a job or to the working environment that will enable a person from a designated group to have reasonable access to or participate or advance in employment"

6.1 Employers should reasonably accommodate the needs of people with disabilities. The aim of the accommodation is to reduce the impact of the impairment of the person's capacity to fulfil the essential functions of a job.

6.2 Employers should adopt the most cost-effective means that is consistent with effectively removing the barriers to perform the job, and to enjoy equal access to the benefits and opportunities of employment.

6.3 Reasonable accommodation requirement applies to applicants and employees with disabilities who are suitably qualified for the job and may be required -

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- (i) during the recruitment and selection processes;
- (ii) in the working environment;
- (iii) in the way work is usually done, evaluated and rewarded; and
- (iv) in the benefits and privileges of employment.

6.4 The obligation to make reasonable accommodation may arise when an applicant or employee voluntarily discloses a disability related accommodation need or when such a need is reasonably self-evident to the employer.

6.5 Employers must also accommodate employees when work or the work environment changes or impairment varies which affects the employee's ability to perform the essential functions of the job,

6.6 The employer should consult the employee and, where reasonable and practical, technical experts to establish appropriate mechanisms to accommodate the employee.

6.7 The particular accommodation will depend on the individual, the degree and nature of impairment and its effect on the person, as well as on the job and the working environment.

6.8 Reasonable accommodation may be temporary or permanent, depending on the nature and extent of the disability.

6.9 Reasonable accommodation includes but not limited to -

- (i) adapting existing facilities to make them accessible;
- (ii) adapting existing equipment or acquiring new equipment including computer hardware and software;
- (iii) re-organizing work stations;
- (iv) changing training and assessment materials and systems;
- (v) restructuring jobs so that nonessential functions are re-assigned;
- (vi) adjusting working time and leave; and
- (vii) providing specialized supervision, training and support in the workplace.

6.10 An employer may evaluate work performance *against* the same standards as other employees but the nature of the disability may require an employer to adapt the way performance is measured.

6.11 The employer need not accommodate a qualified applicant or an employee with a disability if this would impose an unjustifiable hardship on the business of the employer.

6.12 'Unjustifiable hardship' is action that requires significant or considerable difficulty or expense. This involves considering, amongst other things, the effectiveness of the accommodation and the extent to which it would seriously disrupt the operation of the business.

6.12 An accommodation that imposes an unjustifiable hardship for one employer at a specific time may not be so for another or for the same employer at a different time.

7. RECRUITMENT AND SELECTION

7.1 Recruitment

7.1.1 When employers recruit they should -

- (i) identify the inherent requirements of the vacant position;
- (ii) describe clearly the necessary skills and capabilities required for the job;
- (iii) set reasonable criteria for selection, preferably in writing, for job applicants for such vacant positions.

7.1.2 The 'inherent requirements of the job' are those requirements the employer stipulates as necessary for a person to be

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appointed to the job, and are necessary in order to enable an employee to perform the essential functions of the job.

7.1.3 Application forms should focus on identifying an applicant's ability to perform the inherent requirements of the job.

7.1.4 Advertisements should be accessible to persons with disabilities and, where reasonable and practical, circulated to organizations that represent the interests of people with disabilities.

7.1.5 Advertisements or notices should include sufficient detail about the inherent requirements of the job so that potential applicants with disabilities can make an informed decision.

7.1.6 Employers may not include criteria that are not necessary to perform the essential functions of the job because selection based on non-essential functions may unfairly exclude people with disabilities.

7.1.7 On request, and if reasonable in the circumstances notices and advertisements should be provided in a format appropriate to persons with disabilities, such as large print, Braille, or audiotape.

7.2 Selection

1. Subject to reasonable accommodation, employers should apply the same criteria to test the ability of people with disabilities **as** are applied to other applicants.

2. The purpose of the selection process is to assess whether or not an applicant is **suitably qualified**(3) This may require a two-stage process if an applicant has a disability:

(i) Determining whether an applicant is suitably qualified;

(3) *The Act provides for 'suitably qualified person' in sub sections 20(3), 20(4), and 20(5):*

Sub section 20 (3) For purposes of this Act, a person may be suitably qualified for a job as a result of any one of, or any combination of that person's -

a. formal qualifications;

b. prior learning;

c. relevant experience, or

d. capacity to acquire, within a reasonable time, the ability to do the job.

Subsection 20(4) When determining whether a person is suitably qualified for a job, an employer must - (a) review all the factors listed in subsection (3); and (b) determine whether that person has the ability to do the job in terms of any one of, or any combination of those factors. Subsection 20(5) In making a determination under subsection (4), an employer may not unfairly discriminate against a person solely on the grounds of that person's lack of relevant experience.

ii. Determining whether a 'suitably qualified applicant' needs any accommodation to be able to perform the essential functions of the job.

1. When assessing if an applicant is suitably qualified, an employer may not request information about actual or perceived disability from a previous employer or third party unless with the written consent of the applicant.

2. Employers should monitor their criteria for selection. If these criteria tend to exclude people with disabilities, they should be reviewed to ensure that they do not unfairly discriminate *against* persons with disabilities.

7.3 Interviews

1. Selection interviews should be objective and unbiased. Interviewers should avoid assumptions about people with disabilities.

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2. If an applicant has disclosed a disability or has a self-evident disability, the employer must focus on the applicant's qualifications for the work rather than any *actual* or presumed disability but may enquire and assess if the applicant would, but for the disability, be suitably qualified.
3. Interviewers should ask applicants referred to in 7.3.2 above, to indicate how they would perform essential functions and if accommodation is required.
4. If the employer knows in advance that an applicant has a disability, or if the applicant has a self-evident disability, the employer should if necessary, make reasonable accommodation during the interview.

3. Conditional Job Offers

1. If an applicant with a disability is suitably qualified, an employer may make a job offer conditional on medical or functional testing to determine an applicant's actual or potential ability to perform the essential functions of a specific job.
2. The testing must comply with the statutory requirements and should determine if the applicant is able to perform the essential functions of the job, with or without reasonable accommodation.
3. **An employer may** test applicants with disabilities for a specific job and **not** require all other applicants to undergo testing.
4. **A** conditional job offer may only be made to one person at a time, not to all applicants with disabilities that may have applied for the job.
5. The employer withdraw the job offer if the testing shows that -
 - i. Accommodation requirements would create unjustifiable hardship; or
 - ii. There is an objective justification that relates to the inherent requirements of the job; or
 - iii. There is an objective justification that relates to health **and safety**.

3. Terms and Conditions of Employment

1. **An** employer may not -
 - a. employ people with disabilities or,
- (b) retain employees **who** become disabled, on **less** favourable terms and conditions than employees doing the same **work**, for **reasons** connected with the disability.
1. No person may **harass an** employee on the ground of disability. Such harassment may include **teasing**, ridicule and offensive **remarks**. Any alleged harassment should be handled by the employer in terms of the guidelines contained in the Code of Good Practice on the Handling of Sexual Harassment Cases published in **terms** of the **Labour** Relations Act, 1995.

8. MEDICAL(4) AND PSYCHOLOGICAL TESTING AND OTHER **SIMILAR ASSESSMENTS** (5)

(4) Section 7 of the Act provides that: 7(1) Medical testing of an employee is prohibited, unless - (a) legislation permits or requires the testing; or (b) it is justifiable in the light of medical facts, employment conditions, social policy, the fair distribution of employee benefits or the inherent requirements of a job. Section 7(2) Testing of an employee to determine that employee's HIV status is prohibited unless such testing is determined to be justifiable by the Labour Court in terms of section 50(4) of this Act.

(5) Section 8 of the Act provides: Psychological testing and other similar assessments of an employee are prohibited unless the test or assessment being used - (a) has been scientifically shown to be valid and reliable; (b) can be applied fairly

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toward employees; and (c) is not biased against any employee or group.

1. Medical Testing

1. Tests must comply with sections 7 and 8 of **the Employment Equity Act, No. 55 1998. They must be relevant and** appropriate to the kind of work for which the applicant or employee is being tested.
2. **Employers should establish that tests do not unfairly exclude** and are not biased in how or when they are applied, assessed or interpreted.
3. Tests to establish the health of **an** applicant or employee should be distinguished from tests that assess the ability to perform essential job functions or duties.
4. **Testing** to determine the health status of an employee should therefore **only** be carried out after an employer has established that the person is in fact competent to perform the essential job functions or duties and after a job offer has been made. The same applies to medical testing for admission to membership of an employee benefit scheme.
5. **An** employer who requires a person to undergo any medical, psychological testing and other similar **assessments must bear the costs** of the test.

2. Testing after illness or injury

1. If an employee has been **ill or injured (6) and** it appears that the employee is not able to perform the job, the employer may require **the** employee to agree to a functional determination of disability.

(6) See also sections 10 and 11 of the 'Code of Good Practice: Dismissal' published under section 203 of the Labour Relations Act 66 of 1995 for provisions relating to "Incapacity: Ill health and injury" and dismissal.

2. Such medical or other appropriate tests shall be used to -

- a. determine if the employee can safely perform the job or
- b. to identify reasonable accommodation required for the employee.

1. Health Screening and Safety

1. Employers are required to provide and maintain a safe and **healthy working environment**.
2. **An** employer should not employ a person if the employer can demonstrate that a person with a disability would represent an actual **risk** to him or her or other people, which could not be eliminated or reduced by applicable reasonable accommodation.
3. **An** employer may withdraw a conditional job offer, or need not retain **an** employee with a disability in the same position, if an objective assessment shows that the work would expose the employee or **others** to substantial **health** risk. **This** would **only** apply where there is no reasonable accommodation to mitigate the risk.

2. Pre-benefit Medical Examinations

1. Employees may be required to submit to medical examination or **tests before becoming members** of employee benefit schemes that are offered within the employment relationship.
2. The purpose of these examinations is **to assess a person's suitability** for membership of a benefit scheme and is not relevant to a person's capability to perform the inherent requirements of the job.
3. Therefore an employer may not refuse to recruit, **train**, promote or otherwise prejudice any person **only** because that person **has** been refused membership of a benefit scheme.(7)

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7. See also section 15 on benefits.

9. PLACEMENT

- **Placement involves the orientation and initial training of** a new employee.
- Orientation and initial training should be accessible, responsive to and able to reasonably accommodate the needs of employees who have disabilities.
- Subject to reasonable accommodation, new employees with disabilities **and** other employees who do not have disabilities must **be treated equally**.
- An employer **must** make **an** effort to include disability sensitisation in the orientation / induction and other relevant training programmes of their organisations.

10. TRAINING AND CAREER ADVANCEMENT

- Employees with disabilities should **be consulted in** order to ensure input specific to their career advancement.
- Facilities and materials for training, work organisation and recreation **should be accessible** to employees with disabilities.
- **Systems and practices to evaluate work performance** should clearly identify and fairly measure and reward performance of the essential functions of the job. **Work** that falls outside the essential functions of the job should not be evaluated.

11. RETAINING PEOPLE WITH DISABILITIES

- Employees who **become disabled during** employment should, where reasonable be re-integrated into work. Employers should seek to minimize the impact of the disability on employees.
- If **an** employee becomes disabled, the employer should **consult** the employee to assess if the **disability can be reasonably accommodated**.
- If an employee becomes disabled, the employer should maintain **contact with the employee and where reasonable encourage early return-to-work**. This may require vocational rehabilitation, transitional work programmes and where appropriate, temporary or permanent flexible working time.
- If **an** employee is **frequently absent** from work for reasons of illness or **injury**, the employer should consult the employee to assess if the reason for absence is a disability that requires reasonable accommodation.
- If reasonable, employers should explore the possibility of offering alternative work, reduced work or flexible work placement, so that employees are not compelled or encouraged to terminate their employment.

12. TERMINATION OF EMPLOYMENT

- If the employer is unable to retain the employee in employment in terms of paragraph 11 above, then the employer may terminate the employment relationship.
- When employees who have disabilities are dismissed for **operational** requirements, the employer should ensure that any selection criteria used do not either directly or indirectly unfairly discriminate against people with disabilities.
- Employers who provide disability benefits should ensure that employees are appropriately advised before they apply for the benefits available and before resigning from employment because of a medical condition.

13. WORKERS' COMPENSATION

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- Employers should assist employees whose disability arose from a work related illness or accident, to receive the relevant statutory compensation, including compensation from the Compensation Fund and the Unemployment Insurance Fund.

14. CONFIDENTIALITY AND DISCLOSURE OF DISABILITY

1. Confidentiality

1. Subject to sections 7(8) and 18 of the Employment Equity Act(9), employers, including health and medical services personnel, may only gather private information relating to employees if it is necessary to achieve a legitimate purpose, with the written consent of the person.

(8) Section 7 of the Act provides that "(1) Medical testing of an employee is prohibited, unless - (a) legislation permits or requires the testing; or (b) it is justifiable in the light of medical facts, employment conditions, social policy, the fair distribution of employee benefits or the inherent requirements of a job. 7(2) Testing of an employee to determine that employee's HIV status is prohibited unless such testing is determined to be justifiable by the Labour Court in terms of Section 50(4) of this Act."

(9) Section 18 of the Act provides that "(1) When a designated employer engages in consultation in terms of this Chapter that employer must disclose to the consulting parties all relevant information that will allow all those parties to consult effectively, and 18(2) Unless this Act provides otherwise, the provisions of section 16 of the Labour Relations Act, with the changes required by context, apply to disclosure of information."

2. **Employers must protect the confidentiality** of the information that has been disclosed and must take care to keep records of private information relating to the disability of applicants and employees confidential and must be kept separate from general personnel records.
3. When an employer **no longer requires** this information, it must be destroyed.
4. Subject to paragraph 14.2.7, employers may not disclose any information relating to a **person's disability without the written** consent of the employee concerned unless legally required.

2. Disclosure

1. People with disabilities are entitled to keep their disability **status** confidential, But if the employer is **not aware of the disability** or the need to be accommodated, the employer is not obliged to provide it. This does not absolve an employer from their responsibility not to discriminate unfairly, directly or indirectly against job applicants.
2. **A** person with a disability may disclose their disability at any time, even if there is no immediate need for reasonable accommodation.
3. If the disability is **not** self-evident the employer may require the employee to disclose sufficient information to confirm the disability or the accommodation needs.
4. If on reasonable grounds the employer does not believe that the employee is disabled, or that the employee requires accommodation, the employer is entitled to request the employee to be tested to determine the employee's ability or disability, at the expense of the employer.
5. **As** information about disability may **be** technical, employers should ensure that a competent person interprets the information.
6. If an **employer requires further information** this must be relevant to a specific job and its essential functions.
7. **An** employer may not reveal the fact of **an** employee's disability, unless this is required for the health or safety of the person with the disability or other persons.

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8. The employer may, after consulting the person with the disability, **advise relevant staff** that the employee requires accommodation.

15. EMPLOYEE BENEFITS (10)

3. An employer who provides or arranges for occupational insurance or other benefit plans directly or through a separate benefit scheme or fund, must ensure that they do not unfairly discriminate, either directly or indirectly against people with disabilities.
4. **Employees with disabilities may not be refused membership** of a benefit scheme only because they have a disability.

(10) Benefits in this Code refer to benefits such as fringe benefits, medical benefits, **group** disability assurance benefits, retirement schemes and life assurance schemes.

1. To increase job security for employees who have disabilities and to reduce the **costs** of benefit schemes, designated employers **should investigate and, if reasonable, offer benefit schemes** that reasonably accommodate persons with disabilities. These include -
 - i. vocational rehabilitation, training and temporary income replacement benefits for employees who, because of illness or **injury**, cannot work for an extended period, and
 - ii. financial compensation for employees who because of a disability are able to continue to work but at lower levels of pay than they enjoyed before becoming disabled.

16. EMPLOYMENT EQUITY PLANNING IN RESPECT OF PEOPLE WITH DISABILITIES (11)

16.1 The Code of Good Practice for the Preparation, Implementation and Monitoring of Employment Equity Plans provides guidelines to employers and employees. **This Code spells out additional measures to** ensure that people with disabilities who are suitably qualified for a job can enjoy equal opportunities and **are** equitably represented in the workforce.

16.2 When designated employers **are consulting** in terms of section 16 of the Employment Equity Act, 1998 they should use the opportunity to heighten the awareness of their employees of the value and importance of recruiting and retaining the employees who have disabilities.

16.3 When an employer facilitates the establishment of a **consultative forum** in terms of section 16(1) (a) and (b) of the Act (12), the employer should take specific steps to promote the representation of employees with different disabilities in the forum.

16.4 If people with disabilities are under-represented in all occupational levels and categories in the workplace, the employer could **seek guidance** from organisations that represent people with disabilities or relevant experts, for example in vocational rehabilitation and occupational therapy.

(11) See also Code of Good Practice on the Preparation, Implementation and Monitoring of Employment **Equity Plans**

(12) Section 16 (1) states that "A designated employer must take reasonable steps to consult and attempt to reach agreement on the matters referred to in section 17 - (a) with a representative trade union representing members at the workplace and its employees or representatives nominated by them; or (b) if no representative trade union represents members at the workplace, with its employees or representatives nominated by them.

5. When designated employers are **compiling their workplace profile in** terms of Section 19 of the Act, employees with disabilities, including people with non-visible disabilities, may choose to either:
 - i. not disclose their disability status; or
 - i. disclose their disability openly to their employer; or
 - ii. disclose their disability in a confidential way which assures confidentiality of their identity and their impairment and any disability related accommodation that may be requested and \ or required.

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5. **The workplace profile should include any employees who are not in** active employment; for example employees who are receiving total or partial income replacement benefits while recovering from illness or disability.
6. When designated employers are setting targets, they should aim to recruit and promote and retain people with disabilities at all occupational categories and levels, **as** people with disabilities are often employed in low **status** work and tend to be promoted less often than employees without disabilities.
7. **If employees with disabilities are concentrated in particular** occupational categories and levels, the employer should consider if its criteria for selection or performance standards could **be** adapted to facilitate employees with disabilities being employed in different categories and levels.
8. **Employers should regularly evaluate the relationship between employees and the working** environment, and where necessary provide appropriate programmes to prevent **injury**, illness and disability and promote health and safety at work.

17. EDUCATION AND AWARENESS

1. The Department of Labour should ensure that copies of this code are available and accessible, particularly to persons with disabilities.
2. Employers and employer organizations should include the Code in their orientation, education and training programmes of employees.
3. Trade unions should include the Code in their education and training programmes of shop stewards and employees.

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