
GOVERNMENT NOTICE

DEPARTMENT OF LABOUR

No. 746

29 September 2014

EMPLOYMENT EQUITY ACT, 1998 (ACT 55 OF 1998 AS AMENDED)**DRAFT CODE OF GOOD PRACTICE ON EQUAL PAY FOR WORK OF EQUAL VALUE**

I Mildred Nelisiwe Oliphant, Minister of Labour, in terms of Section 54(1) of the Employment Equity Act, 1998 (Act No 55 of 1998 as amended), and on the advice of the Commission for Employment Equity, hereby issue the draft Code of Good Practice on Equal Pay for Work of Equal Value for public comment. This notice will be effective from the date of publication. Written comments are invited from interested parties and should be submitted within 30 days of publication of the notice in the Government Gazette to the following address:

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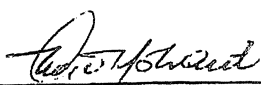
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MINISTER OF LABOUR
MN OLIPHANT, MP

DRAFT CODE OF GOOD PRACTICE ON EQUAL PAY FOR WORK OF EQUAL VALUE FOR PUBLIC COMMENT

1. OBJECTIVE

1.1. The objective of this Code is to provide practical guidance to employers and employees on how to apply the principle of equal remuneration for work of equal value in their workplaces.¹ This Code seeks to promote the implementation of remuneration equity in the workplace by employers, including the State, employees and trade unions through human resources policies, procedures, practices and job evaluation processes.

2. SCOPE

2.1. This Code is issued in terms of section 54 of the Employment Equity Act, 1998 (Act No. 55 of 1998) ('the Act') and must be read in conjunction with the Act, its regulations and other Codes issued in terms of the Act. In particular, this Code must be read in conjunction with –

2.1.1. the regulations made by the Minister of Labour in terms of section 6(5) of the Employment Equity Amendment Act on the criteria and methodology for assessing work of equal value²; and

2.1.2. the Code of Good Practice on the Integration of Employment Equity into Human Resources Policies and Practices (the HR Code), in particular Part B dealing with Terms and Conditions of Employment.

¹ In this Code, "work of equal value" is used to include work that is the same or substantially the same or work of equal value as referred to in section 6(4) of the Act.

² Any reference to regulations in this Code refers to the Employment Equity Regulations, 2014.

- 2.2. This Code applies to all employers and employees covered by the Act. To obtain greater clarity as to the definition of an employee, reference should be made to the Code of Good Practice: Who is an Employee issued by National Economic Development and Labour Council (NEDLAC) in terms of the Labour Relations Act, 1995, as amended.
- 2.3. The Code promotes the elimination of unfair discrimination in respect of remuneration by applying the principle of equal remuneration for work of equal value. The term “remuneration” as defined in the Act and other labour legislation includes any payment in money or in kind, or both, made or owing to any person in return for working for another person, including the State. The statutory concept of remuneration includes deferred remuneration, commission and other forms of variable compensation or pay and employers must, therefore, examine all aspects of their remuneration policies, procedures and practices to ensure compliance with the principle of equal remuneration for work of equal value.
- 2.4. The Code, in itself, does not impose additional legal obligations on an employer, but provides guidance when interpreting the Act and the regulations.

3. LEGAL PRINCIPLES

- 3.1. The obligation to eliminate unfair discrimination in respect of remuneration arises under Chapter 2 of the Act. Section 5 requires employers to take positive steps to eliminate unfair discrimination in their workplaces. Every employer must take steps to promote equal opportunity in the workplace by eliminating unfair discrimination in any employment policy or practice. 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 arbitrary grounds.

3.2. Section 6(4) of the Act, which came into effect on 1 August 2014, provides that a difference in terms and conditions of employment between employees of the same employer, performing the same or substantially the same work or work of equal value, that is directly or indirectly based on any one or more of the grounds listed in subsection (1) or on any other arbitrary ground, is unfair discrimination. The Labour Court has held that the prohibition against unfair discrimination in section 6(1) of the Employment Equity Act incorporates claims of equal remuneration for work of equal value.³

3.3. The ILO Equal Remuneration Convention 1951 (No. 100), which South Africa ratified in 1995, obliges ratifying member states to give effect to the principle of equal remuneration for men and women workers for work of equal value. The principle of equal remuneration for work of equal value applies equally to equal value claims based on race, or any other ground listed in section 6(1) or any other arbitrary ground. As the Labour Court has pointed out, this is –

“consistent with the substantive conception of equality that the Constitution and the EEA adopt, and in particular, a recognition that since race historically played a role in the value attributed to particular jobs, a systemic approach to the elimination of what might often be structural inequality is necessary.”⁴

³*Mangena and Others v Fila South Africa (Pty) Ltd and Others* [2009] ZALC 81; (2010) 31 ILJ 662 (LC); [2009] 12 BLLR 1224 (LC).

⁴*Mangena and Others v Fila South Africa (Pty) Ltd and Others* at para 5.

- 3.4. Section 27 of the Act requires designated employers to report on the remuneration and benefits received by employees in each occupational level of their workforce. Where there are disproportionate income differentials, or unfair discrimination by virtue of a difference in terms and conditions of employment, employers must take steps to progressively reduce these differentials. Guidance in this regard is provided for in the Code of Good Practice on the Integration of Employment Equity into Human Resources Policies and Practices.

4. ELIMINATING UNFAIR DISCRIMINATION IN RESPECT OF REMUNERATION

- 4.1. An employer must, in order to eliminate unfair discrimination, take steps to eliminate differences in terms and conditions of employment, including remuneration, of employees who perform the same or substantially the same work or work of equal value that are directly or indirectly based on a listed ground or any other arbitrary ground.
- 4.2. The principle of equal remuneration for work of equal value addresses a specific aspect of workplace discrimination: the undervaluing of work on the basis of a ground listed in section 6(1) of the Act or any other arbitrary ground. In South Africa, for historical reasons, this has the greatest significance when examining work performed by employees who are female, black or those with disabilities. However, differences based on any of the other grounds listed in section 6(1) or any other arbitrary ground may constitute unfair discrimination.
- 4.3. When examining whether the obligation to apply remuneration equity in the workplace is being complied with, three key issues require scrutiny –

- 4.3.1. Are the jobs that are being compared the same, substantially the same or of equal value in terms of an objective assessment?
- 4.3.2. Is there a difference in the terms and conditions of employment, including remuneration, of the employees in the jobs that are being compared?
- 4.3.3. If there are differences in the terms and conditions of employment, can these be justified on fair and rational grounds?
- 4.4. Differences in terms and conditions of employment, including remuneration, of employees of the same employer are not unfair discrimination where the complainant and the comparator do not perform the same or similar work or work of equal value. A difference in remuneration will only be unfair discrimination if the differences are directly or indirectly based on race, sex, gender, disability or any other grounds listed in section 6(1) or any other arbitrary ground established in terms of section 11 of the Act.
- 4.5. Regulation 43 of the Companies Regulations (Companies Act), 2011 require all state-owned companies, listed public companies and certain other companies⁵ to establish a Social and Ethics Committee. The functions of a Social and Ethics Committee include amongst others, monitoring the company's standing in terms of all aspects of the Employment Equity Act and the ILO's Protocol on decent work and working conditions.

⁵ Whether a company is required to establish a Social and Ethics Committee is determined by a formula in regulation 26(2) of the Companies Regulations, 2011.

4.6. In addition, the King Code of Governance for South Africa, 2009 (King III)⁶ recommends that all employer entities establish a Remuneration Committee which should annually review all remuneration and benefits received by employees to ascertain whether they are appropriate and competitive. Where an employer has established a Remuneration Committee, its annual review should include ascertaining whether the employer is in compliance with relevant legislative requirements, including the elimination of unfair discrimination in respect of remuneration under the Act. The King Commission further recommends that the Remuneration Committee should assist the board of a company in setting up and administering a remuneration policy. Employers should specify that compliance with the Act is an integral aspect of its remuneration policy.

5. EVALUATING JOBS

5.1. Article 3 of the ILO Equal Remuneration Convention 1951 (No. 100) requires that “measures shall be taken to promote *objective appraisal* of jobs on the basis of the work to be performed”. While the Convention only applies to equal remuneration for work of equal value between men and women, the need to conduct an objective appraisal of jobs is a necessary element of applying the principle in all contexts, in particular to eliminate residual structural inequalities related to legislated and practised racial discrimination that applied in the labour market and workplace in South Africa.

⁶ The Code is available at <http://www.iodsa.co.za>.

5.2. In order to ascertain the value of the job for the purpose of applying the principle of equal remuneration for work of equal value, an objective assessment in accordance with relevant and appropriate criteria must be undertaken.

5.3. The basic criteria commonly used to evaluate the value of jobs by an employer are –

5.3.1. The responsibility demanded of the work, including responsibility for people, finances and material. This includes tasks that have an impact on who is accountable for delivery of the enterprise's/organisation's goals, for example, its profitability, financial soundness, market coverage and the health and safety of its clients. It is important to consider the various types of responsibility associated with the enterprise's/organisation's goals independently from the hierarchical level of the job or the number of employees it involves supervising.

5.3.2. The skills, qualifications, including prior learning and experience required to perform the work, whether formal or informal. This includes knowledge and skills which are required for a job. What is important is not how these were acquired but rather that their content corresponds to the requirements of the job being evaluated. Qualifications and skills can be acquired in various ways including academic or vocational training certified by a diploma, paid work experience in the labour market, formal and informal training in the workplace and volunteer work.

5.3.3. Physical, mental and emotional effort required to perform the work. This refers to the difficulty related to and the fatigue and tension caused by

performing job tasks. It is important not to only consider physical efforts but also take mental and psychological effort into consideration.

- 5.4. Best practice indicates that these three criteria should form part of every job evaluation. These three criteria are generally regarded as being sufficient for evaluating all the tasks performed in an organization, regardless of the economic sector in which the enterprise operates. However, the weighting attached to each of these factors may vary depending on the sector, employer and the job concerned.
- 5.5. In addition, employers may take into account the conditions under which work is performed in evaluating the value of work. However, many employers take working conditions into account when determining remuneration by, for example, paying an allowance, rather than as part of the job evaluation process.
- 5.6. The assessment of working conditions may include an assessment of the physical environment, psychological conditions under which the work is performed, as well as geographic location. For example, one may consider factors such as noise levels and frequent interruptions for office jobs as conditions of work. However, working conditions may not be relevant to assessing the value of all jobs and many employers do not use this factor in job evaluation as it is not a measure of the complexity of a job.

5.7. The factors listed below may be relevant in determining the value of a job –

Responsibility (output)	Skill (input)	Effort (process)	Conditions of work (if taken into account)
Impact	Knowledge / skill	Physical demands	Geographic location
Decision-making	Analytical ability	Pressure and mental exertion	Size
Accountability	Communication	Planning of work	Time of work
Internal and external contacts	Planning of work	Problem solving	Safety conditions
Directing the work of others	Influence	Complexity of services and products	Environmental factors
Size or turnover	Job complexity		
	Recognition of prior learning		
	Qualification		

5.8. Not all the factors discussed above may be relevant to evaluating all jobs. In assessing a claim concerning equal remuneration for work of equal value, the factors relevant to the positions concerned should be determined and compared.

5.9. In addition to the factors discussed above, any other factor indicating the value of the work may be taken into account in evaluating work, if the employer shows that the

factor is relevant to assessing the value of the work and can be objectively determined.

5.10. An employer may justify the value assigned to an employee's work by reference to the classification of a relevant job in terms of a sectoral determination made in terms of the Basic Conditions of Employment Act, 1997 binding on the employer. In other words, if jobs are accorded the same value and minimum remuneration in a sectoral determination, an employer covered by the determination is justified in basing its remuneration on that classification. If an employee or trade union claims that minimum wages set by a sectoral determination violates the principle of equal remuneration for work of equal value, they may make representations to the Employment Conditions Commission or bring a legal challenge to the relevant sectoral determination. In the case of a collective agreement concluded in a bargaining council, any challenge on this basis would have to be directed at the employer and trade union parties that concluded the collective agreement.

5.11. There is no legal requirement for employers to use a job evaluation system. However, businesses that use formal systems of job evaluation to grade the jobs within their establishment must ensure that the job evaluation system it uses does not have the effect of discriminating unfairly on grounds of race, sex, gender, disability or any other grounds listed in section 6(1) of the Act or any other arbitrary ground. In the absence of an established grading system, employers may elect to use the six occupational levels that are reflected in the EEA9 form in the Employment Equity regulations as a basis for grading their jobs. The table below sets out the six occupational levels:

OCCUPATIONAL LEVELS	DESCRIPTION
Top Management/ Executives	Controls the functional integration of the business. Determines the overall strategy and objectives of the business. Directs the company into the future. The nature of the work and focus is long-term. Sign-off on policy or strategy.
Senior Management	Knowledge of entire business area or unit/company or group. Provide inputs for formulation of the overall Organisational strategy. Translates the overall strategy into business plans for business or functional unit, thereby operationalizing organizational strategy. Implements and manages business plan, goals and objectives and ensures the achievement of overall key Organisational/Business Unit/Functional outputs. Manages the development of innovation and change.
Professionally Qualified & experienced specialists/mid-management	Professional knowledge of sub-discipline or discipline. Provide input in the formulation of Organisational/Functional Unit business plans. Formulate and implement departmental/team plans that will support the Business Unit business plans. Optimisation of resources (finances, people, material, information and technology) to achieve given objectives in most productive and cost effective way.
Skilled Technical & Academically Qualified/ Junior Management/ Supervisors/ Foremen/ Superintendents	Applies broad knowledge of products, techniques and processes. Evaluates procedures and applies previous experience. A good solution can usually be found. Determines own priorities. What has to be done is stipulated; but may require initiative in terms of how it should be done.
Semi-Skilled & discretionary decision-making	Accountable for direct product, process or service quality. Incremental improvement of existing processes and procedures according to clear guidelines. Choosing of correct action on the basis of set standards, training procedures and past experience.
Unskilled & defined decision-making	Steps to accomplish work or processes are clearly defined and understood. Tasks are sometimes repetitive and uncomplicated and the work cycle is short.

6. COMPARING AND EVALUATING MALE- AND FEMALE-DOMINATED JOBS

6.1. Discrimination in remuneration based on the sex of employees is an international phenomenon found to a greater or lesser degree in all countries. The ILO has suggested that this is due to –

6.1.1. stereotypes with regard to women's work;

6.1.2. traditional job evaluation methods that were designed on the basis of male dominated jobs; and

6.1.3. weaker bargaining power on behalf of female workers.⁷

6.2. The use of job evaluation does, in itself, not ensure that there is an absence of unfair discrimination. It is acknowledged that traditional job evaluation methods were designed on the basis of male-dominated jobs. Predominantly female jobs often involve different requirements from those of predominantly male jobs, whether in terms of qualifications, effort, responsibility or working conditions. Until recently, female-dominated jobs were evaluated based on methods designed mainly for male-dominated jobs, which partly accounts for wage discrimination. It is important to be vigilant when selecting the method of job evaluation and to ensure that its content is equally tailored to both female-dominated and male-dominated jobs. For instance, responsibility for money or equipment is often valued more than responsibility. Jobs involving caring for others or cleaning may be undervalued because of their

⁷ See, for instance, *Promoting Equity Gender-Neutral Job Evaluation: A Step-by-Step Guide* (ILO, Geneva, 2008) and *Equal Pay: An introductory guide* (ILO, Geneva, 2013).

erroneous assumption that the skills involved in these jobs are intrinsic to nature of women and not acquired through learning and experience.⁸

- 6.3. Employers may therefore be required to establish the value of male- and female-dominated jobs in order to be able to ascertain whether particular jobs have been undervalued and to align female-dominated jobs with comparable male-dominated jobs in the organisation.
- 6.4. The fact that there are no comparable male-dominated jobs to female-dominated jobs or within the employer's organisation does not necessarily imply that there is no discrimination on grounds of sex or gender (or other prescribed grounds). An employee may base a claim on the ground that they would have received higher remuneration if they were not female. To succeed in such a claim, the employee would have to show that a male employee hired to perform the work would have been employed on different terms and conditions of employment.

7. FACTORS JUSTIFYING DIFFERENTIATION IN REMUNERATION

- 7.1. Once jobs have been graded, the various jobs are allocated remuneration packages in accordance with the remuneration philosophy of the employer and the value of the jobs. Employers are required to ensure that unfair discrimination does not occur at any of these stages.
- 7.2. Where employees perform work that is the same or substantially the same or is work of equal value, a difference in terms and conditions of employment, including remuneration, is not unfair discrimination if the differentiation is not based on race,

⁸ *Equal Pay: An introductory guide* (ILO, Geneva, 2013), Part 5.

sex, gender or on any other ground listed in section 6(1) of the Employment Equity Act or any other arbitrary ground.

7.3. Regulation 7 of the Employment Equity regulations lists a number of grounds which are commonly taken into account in determining remuneration. Subject to what is stated below, it is not unfair discrimination if the difference is fair and rational and is based on any one or a combination of the following grounds –

7.3.1. the individuals' respective seniority or length of service;

7.3.2. the individuals' respective qualifications, ability, competence or potential above the minimum acceptable levels required for the performance of the job;

7.3.3. the individuals' respective performance, quantity or quality of work, provided that employees are equally subject to the employer's performance evaluation system, that the performance evaluation system is consistently applied;

7.3.4. where an employee is demoted as a result of organisational restructuring or for any other legitimate reason without a reduction in remuneration and fixing the employee's salary at this level until the remuneration of employees in the same job category reaches this level;

7.3.5. where an individual is employed temporarily in a position for purposes of gaining experience or training and as a result receives different remuneration or enjoys different terms and conditions of employment;

7.3.6. the existence of a shortage of relevant skill in a particular job classification;
and

7.3.7. any other relevant factor that is not unfairly discriminatory.

7.4. These factors may not be used to determine remuneration in a manner that is biased or indirectly discriminates, against an employee or group of employees based on any ground listed in section 6(1) or any arbitrary ground. For instance, the use of length of service or seniority as a factor in determining remuneration may unfairly discriminate against women who tend to interrupt their careers to raise children. Likewise, the use of length of service or seniority may discriminate against black employees in circumstances where they had been prevented by legislation or past practice from being employed in a particular job or acquiring the skills or qualifications required to perform particular jobs.

7.5. In addition, the weighting accorded to a particular factor in determining remuneration is proportionate. In other words, a factor may not be given a disproportionate weighting so that it skews remuneration patterns in favour of employees with particular characteristics (such as length of service).

8. PROCESS FOR EVALUATING JOBS FOR THE PURPOSE OF EQUAL REMUNERATION FOR WORK OF EQUAL VALUE

8.1. The following process may be used to determine equal remuneration for work of equal value –

8.1.1. Determine the scope of the audit to be conducted to identify inequalities in remuneration on account of gender, race, disability or other unfair discrimination or arbitrary ground.

8.1.2. Identify jobs that would be the subject to the audit.

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- 8.1.3. Ensure that job profiles or descriptions are updated and current before evaluating jobs.
- 8.1.4. Utilise a job evaluation system that is fair and transparent and does not have the effect of discriminating unfairly on any listed or arbitrary ground.
- 8.1.5. Compare jobs that are the same, similar or of equal value in the employers' own organisation or company. This should include comparing female-dominated jobs with male-dominated jobs as well as other jobs that may have been undervalued due to, race, disability or other discriminatory grounds.
- 8.1.6. Select a method of comparing remuneration, both in money and kind, in the relevant jobs: this can be done by using either the average or the median earning of employees in the relevant jobs as the basis for remuneration comparisons or by using another method that will compare remuneration in a fair and rational manner.
- 8.1.7. Identify the reasons for differentiating in remuneration as contemplated by Regulation 7 in the Employment Equity regulations and determine whether they are justifiable.
- 8.1.8. Where differentiation is found not to be justifiable, determine how to address inequalities identified, without reducing the remuneration of employees to bring about equal remuneration.
- 8.1.9. Monitor and review the process annually.
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