



PROMOTING THE RIGHT TO WORK OF PERSONS WITH DISABILITIES

Toolkit for the
Private Sector



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**Toolkit for the
Private Sector**



Message from the South African Human Rights Commission **Advocate Bokankatla Joseph Malatji**



It gives me great pleasure to present the South African Human Rights Commission's Disability Toolkit to South African employer groups. It is my hope that this Toolkit will assist in raising the profile of persons with disabilities and at the same time send out a strong message that disability makes business sense.

As many people may know, I was born with a disability. Being blind brings with it many limitations, but I have learned that it is possible to rise above the limitations and not let disability get in the way of life, progress and success. I did it and I encourage all people with disabilities to consider how they can turn their disabilities into abilities – because it is our abilities that matter, not our disabilities. Most importantly, I believe that we ALL have a part to play in raising the awareness of disability as an important human rights issue.

The South African Human Rights Commission is committed to ensuring the protection of the rights of persons with disabilities. We believe that it is a right for persons with disabilities to have employment opportunities, enjoy access to personal and career development and be allowed, without discrimination and with dignity, to participate in, and contribute to South Africa's economic development.

This Toolkit brings together a large body of information, guidelines, legislation and links to best practices and resources. Additionally, the monitoring framework that accompanies this Toolkit serves as an easy to use and self-implementable instrument for employers to evaluate their own progress. The information provided aligns to our local and international obligations that are aimed at promoting and protecting the rights of persons with disabilities and ensuring that the Convention on the Rights of Persons with Disabilities is fully implemented.

We want to encourage inclusive workplaces, with full participation by people with disabilities. We know that real equality can be achieved in employment if we improve education, remove barriers and introduce effective reasonable accommodation.

The South African Human Rights Commission extends its gratitude to all those parties who contributed to the development of this Toolkit and Framework: the consultants from Centre for Human Rights University of Pretoria: Ilze Grobbelaar-du Plessis, Jehoshaphat Njau and Innocentia Mjijima-Konopi who drafted the Toolkit, Trevonica Nadiu, Dr. William Rowland- for drafting the Monitoring Framework, Dr Jerry Gule, the SAE4D, IT GAP (Andy Newel), Standing Tall, SANCB, Total SA, Eskom, Sun International, Barloworld Logistics, FirstRand Bank & Truter & Associates, Blind SA, Epilepsy SA, SADA, NCPPDSA and SAND who participated in the consultation process and provided valuable input.

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Advocate Bokankatla Joseph Malatji
SAHRC Commissioner

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List of **acronyms**

B-BBEE	Broad-Based Black Economic Empowerment
CCMA	Commission for Conciliation, Mediation and Arbitration
CEO	Chief Executive Officer
CSRI	Corporate Social Responsibility Initiatives
CSOs	Civil Society Organisations
CRPD	Convention on the Rights of Persons with Disabilities
GEP	Gauteng Enterprise Propeller
DPOs	Disabled People's Organisations
EEA	Employment Equity Act 55 of 1998
IDC	Industrial Development Corporation
ILO	International Labour Organisation
HR	Human Resources
LRA	Labour Relations Act 66 of 1995
MODE	Medunsa Organisation for Disabled Entrepreneurs
MQA	Mining Qualifications Authority
NHRI	National Human Rights Institution
NGO	Non-Governmental Organisation
PALAMA	Public Administration Leadership and Management Academy
PEPUDA	Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000
SABS	South African Bureau of Standards
SAHRC	South African Human Rights Commission
SARS	South African Revenue Service
SEF	Sheltered Employment Factories
TAG	Technical Assistance Guidelines on the Employment of People with Disabilities
UN	United Nations



Glossary of terms

<i>Accessible:</i>	Easy to approach, enter, operate, participate in, or use safely, independently and with dignity by persons with disabilities (i.e., site, facility, work environment, service or program).
<i>Assistive Technology:</i>	Any item, piece of equipment, or system, whether acquired commercially, modified, or customised, that is commonly used to increase, maintain, or improve functional capabilities of persons with disabilities.
<i>Equality Clause:</i>	Everyone is equal before the law and has the right to equal protection and benefit of the law.
<i>Persons with Disabilities:</i>	Persons with physical or mental impairment that substantially limits one or more of that person's major life activities, have a record of such impairment, or who have been regarded as having such impairment.
<i>Psycho-Social Disabilities:</i>	Disabilities that are associated with mental health conditions.
<i>Ratification:</i>	Formal validation of a treaty or convention.
<i>Reasonable Accommodation:</i>	Reasonable accommodation means necessary and appropriate modification and adjustments in a work place not imposing a disproportionate or undue burden to the employer, where needed in a particular case, to ensure to persons with disabilities the enjoyment or exercise on an equal basis with others of all human rights and fundamental freedoms. In employment, it may include adjustments or modifications of the tools, machines, workstations, and the work environment to an individual's needs. It may also include adjustment in work organisation, work schedules, sequence of work, and in breaking down work tasks to their basic elements.
<i>Unfair labour practice:</i>	As per section 186 (2) (a) of the Labour Relations Act 66 of 1995 (as amended) any unfair act or omission that arises between an employer and an employee relating to the unfair conduct of the employer in the 'promotion, demotion, probation ... or training of an employee or relating to the provision of benefits'.
<i>United Nations:</i>	An intergovernmental organisation established 24 October 1945, to promote international peace and co-operation amongst States.

Mandate of the South African Human Rights Commission to promote and monitor the rights of persons with disabilities

In 2007 South Africa became one of the first countries to ratify the Convention on the Rights of Persons with Disabilities (CRPD). The CRPD lays down the premise for the enjoyment of human rights (including the right to work) by persons with disabilities and demands that State Parties put in place proper structures and services to ensure that the human rights of persons with disabilities are promoted and protected.

International obligations in terms of Article 33(2) of the Convention on the Rights of Persons with Disabilities

The CRPD requires State Parties to establish a framework, involving one or more independent mechanisms, to promote, protect and monitor the implementation of the rights of persons with disabilities.

According to Article 33 (2) of the CRPD, State Parties shall, in accordance with their legal and administrative systems, maintain, strengthen, designate or establish within the state party, *a framework*, including one or more independent mechanisms, as appropriate, to *promote, protect and monitor implementation of the present Convention*.¹

When designating or establishing such a mechanism, State Parties must take into account the principles relating to the status and functioning of national institutions for the protection and promotion of human rights.² Article 33 of the CRPD identifies three mechanisms that are relevant for the implementation and monitoring of the CRPD. States have to:

- » designate one or more focal points within government for matters relating to implementation
- » give due consideration to the establishment or designation of a coordination mechanism within government to facilitate actions across sectors and at different levels and
- » establish or designate a framework that includes one or more independent mechanisms to promote, protect and monitor the CRPD's implementation.

The CRPD requires State Parties, such as South Africa, to establish a framework, involving one or more independent mechanism, to promote, protect and monitor the implementation of the CRPD. Article 33 refers to a “framework”, rather than a “national human rights institution” (NHRI). However, in establishing such a “framework”, as a State Party to the CRPD, South Africa has to take into account the “principles relating to the status and functioning of national institutions for the protection and promotion of human rights”.³

These principles are laid down in the 1993 Paris Principles⁴. The term “national human rights institution” has acquired a specific meaning through the Paris Principles, which refer to a body whose specific functions are to promote and protect human rights. Given this link,, a NHRI such as the South African Human Rights Commission (SAHRC), is most likely to take the form that an “independent framework” should take in order to be in compliance with the national monitoring provisions under the CRPD⁵.

¹ United Nations, *Convention on the Rights of Persons with Disabilities*. Available from: <http://legal.un.org/avl/ha/crpd/crpd.html>.

² Ibid.

³ United Nations Office of the High Commissioner for Human Rights, *Principles relating to the Status of National Institutions (The Paris Principles)*, 1993. United Nations General Assembly Resolution 48/134.

⁴ National human rights institutions (NHRIs) have a special position among independent mechanisms, since the rules governing their composition, mandate and working methods, the Paris Principles, are the criteria to evaluate these mechanisms. It can be argued that if a state party to the CRPD has a NHRI, the best option could be to designate the NHRI. The NHRI can further appoint other bodies, or combine with other bodies in exercising their Article 33 obligations in terms of the CRPD.

⁵ Although many State Parties to the CRPD are in the middle of the process of establishing their “frameworks”, it seems that some EU member State Parties, such as Denmark, Germany and Northern Ireland, described their NHRIs as designated “frameworks”. Some African State Parties to the CRPD, such as Kenya, have also described their NHRIs, such as the Kenya National Commission on Human Rights, as their “framework”.



The Constitution of the Republic of South Africa, 1996 (the Constitution), specifically provides for the establishment of the South African Human Rights Commission (SAHRC) as a NHRI. In order to comply with its founding requirements⁶, the Constitution establishes in Section 181, certain important institutions, which are designed to provide and support the envisaged system of constitutional democracy and open government. These institutions are required to be independent and subject only to the Constitution and the law, and must play an important role in government's constitutional obligations of respecting, promoting, protecting and fulfilling the rights contained in Chapter 2 of the Constitution - the Bill of Rights.

In order to further this aim, the powers of the SAHRC are further elaborated in Section 184 of the Constitution. The SAHRC has powers in terms of both the Constitution and the South African Human Rights Commission Act (SAHRC Act)⁷ to perform its functions and powers envisaged by the Constitution. The SAHRC's mandate with regard to human rights is broad enough to include the human rights of certain categories of people such as persons with disabilities. This means that the SAHRC must, in terms of the Commission's constitutional obligations, amongst others:

- » promote respect for human rights and a culture of human rights
- » promote the protection, development and attainment of human rights
- » monitor and assess the observance of human rights in the Republic.

These constitutional obligations as set out in Section 184 of the Constitution also apply to persons with disabilities in the Republic. This means that the SAHRC must promote respect for human rights and a culture of human rights in relation to persons with disabilities; promote the protection, development and attainment of human rights of persons with disabilities, and monitor and assess the observance of human rights of persons with disabilities in the Republic.

International and national obligations of the SAHRC

As gathered from the above, the role of the SAHRC is two-fold. Firstly, it is envisaged that the SAHRC may be designated as a monitoring mechanism to monitor implementation of the CRPD in terms of Article 33 of the CRPD and secondly the SAHRC has certain constitutional obligations to fulfil in terms of Section 184 of the Constitution. However, these obligations imposed by the CRPD and the Constitution complement each other in more than one way with respect to the promotion, protection and monitoring of the human rights of persons with disabilities.

The SAHRC, therefore, has an international and constitutional obligation to protect, promote and monitor, amongst other things, the rights of persons with disabilities to work in the private sector. This means the SAHRC must:

- » promote (e.g., awareness-raising campaigns and public education) the integration of persons with disabilities in the private sector
- » protect (e.g., by examining individual complaints and participation in litigation) and
- » monitor (e.g., by reviewing legislation and examining the state of domestic implementation of policy and measures to implement the CRPD)

In light of the above and following consultations between the SAHRC, representatives from the South African Business Sector, Disabled People's Organisations (DPO's) and Civil Society Organisations (CSO's), it became clear that businesses have an impact on human rights⁸ and in particular, the human rights of persons with disabilities.

It was acknowledged that South Africa's private sector has limited support in implementing the right to work of persons with disabilities as protected under Article 27 of the CRPD and South African labour laws. Consequently, in a bid to address these issues in line with the constitutional mandate, and to broaden the SAHRC's activities to focal points on business and human rights and develop platforms to convene dialogue among the relevant actors,⁹ the SAHRC commissioned the development of the toolkit, *Promoting the Right to Work of Persons with Disabilities: A Toolkit for the Private Sector*.

⁶ According to the founding provisions in section 1 of the Constitution, South Africa is a sovereign, democratic state founded on values that include human dignity, equality, human rights and freedoms (section 1 (a)), non-racialism and non-sexism (section 1 (b)), the supremacy of the Constitution and the rule of law (section 1 (c)).

⁷ *South African Human Rights Act 40 of 2014 (SAHRC Act)*.

⁸ International Coordinating Committee of National Institutions for the Promotion and Protection of Human Rights (ICC), *the Edinburgh Declaration*, 10 October 2010

⁹ United Nations Human Rights Office of the High Commissioner, *Edinburgh Declaration, Guiding Principles on Business and Human Rights Implementing the United Nations "Protect, Respect and Remedy" Framework*, 2011.

Introduction



Background and context

Persons with disabilities in South Africa experience high levels of unemployment, and often remain in low status jobs and earn lower than average remuneration. Multiple barriers hinder the capacity of persons with disabilities to obtain employment and enjoy full and effective participation in the labour market on an equal basis with others.

These factors have been widely documented and include barriers to education, lack of reasonable accommodation, lack of accessibility to infrastructure and to information, limitations to their legal capacity, as well as attitudinal barriers in society. In addition disability is often equated with inability to work. In the past these factors have had a significant impact on the employment of persons with disabilities in South Africa.

It is estimated that as many as eight in ten persons with a disability are unemployed, making discrimination in terms of denial of employment opportunities one of the most daunting challenges faced by persons living with disabilities in South Africa.¹⁰. Whilst it is true that in present-day South Africa unemployment remains a problem across the board, unemployment disproportionately affects the majority of persons with disabilities.

Disability should not diminish the rights of individuals to belong and contribute to the open labour market.

Purpose of the Toolkit

The Toolkit is part of a broader equality agenda to have the rights of persons with disabilities recognised in the labour market. It is intended to:

- » raise awareness of the right to work of persons with disabilities in the private sector.
- » support and encourage employers in the private sector to recruit, retain, and upskill persons with disabilities by presenting a strong business case for hiring and retaining employees with disabilities and demonstrating that employing persons with disabilities is good business.
- » help employers in the private sector understand their obligations by outlining the employer's legal responsibilities under national and international law, along with national development in policy relevant to advancing the right to employment of persons with disabilities

- a) provide practical guidance to employers based on international best practices on how and where to begin implementing the rights of persons with disabilities, showcase best practice, and recommend resources on how employers in the private sector can practically promote equal opportunities and fair treatment of persons with disabilities.

Who is the Toolkit intended for?

The Toolkit is a resource that may be used by businesses of all sizes in the different sectors. The guidelines provided in the Toolkit are intentionally general so they can easily be adapted by employers to their specific business culture, working environment and human resource procedures. The Toolkit will be particularly relevant to designated employers in terms of the Employment Equity Act 55 of 1998. Human resources personnel, DPO's and all organisations pursuing greater employment opportunities for persons with disabilities will find the Toolkit similarly useful.

How the Toolkit was designed

Consultative interviews were conducted with the disability community, e.g. DPOs, CSO's, disability self-advocates, and other non-governmental organisations (NGO's), when designing the Toolkit, to understand what barriers persons with disabilities face in:

- » accessing employment in the private sector
- » retaining such employment
- » being fully included in the workplace and
- » being promoted and maximising their potential

Consultations were also conducted with members of the private sector to establish their approach to implementing the rights of persons with disabilities and the challenges they faced. The consultative interviews give legitimacy to the Toolkit as it includes the views of persons with disabilities as well as the private sector in its design. A literature review of best practices in other countries was also undertaken.

¹⁰ National Development Plan (2012) and A Eide & M Loeb, 'Data and statistics on disability in developing countries', 2005, *Disability Knowledge and Research Programme*, 8.

Structure of the Toolkit

1

Section 1

The first section of the Toolkit discusses the meaning of disability.

2

Section 2

This is followed by an analysis of the position of persons with disabilities in the private employment sector in South Africa. This section is meant to ground the Toolkit in the present and to serve as an awareness-tool for the private sector on the prevailing inequalities and discrimination against persons with disabilities in the employment sector.

3

Section 3

Section three presents a strong business case for employing persons with disabilities in South Africa.

4

Section 4

Section four of the Toolkit outlines the legal obligations of private sector employers under international and the national legal frameworks pertaining to the right to employment of persons with disabilities in the workplace. This discussion is aimed at fostering an understanding of the right to work of persons with disabilities in general and ensuring that employers have a clear understanding of the nature of their legal obligations. This section commences with a detailed explanation of the right to work of persons with disabilities under Article 27 of the CRPD and sketches the conceptual framework of the right to work. This is followed by the key components of Article 27 and employers' obligations under South African labour laws. This section also reviews South Africa's labour laws.

5

Section 5

The fifth section provides practical guidelines, strategies and information (in various formats such as case studies, fact sheets, and templates) on how employers in the private sector may begin to implement the rights of persons with disabilities in the workplace. This section includes guidelines on employment equity planning in respect of persons with disabilities. The section also links employers to other referenced resource material that have been developed in the field.





Section 1

Rethinking disability



Persons with disabilities have been defined to “include those who have long-term physical, mental, intellectual or sensory impairments which, in interaction with various barriers, may hinder their full and effective participation in society on an equal basis with others.”¹¹

During the course of the past thirty years, views on disability have gradually shifted emphasis from a *medical model* to a *social model* of disability. This transition is of particular importance since the two models represent opposite ends on the spectrum of protection for people with disabilities. A greater international awareness of human rights and human needs has, amongst others, given rise to a shift in emphasis from a medical to a social model of disability.¹² The shift also relates to activities at the international level where the United Nations (UN) has developed a comprehensive human rights system following the Second World War.

For purposes of the Toolkit, it is important to take note of the differences between the two models, since the shift towards the *social model* of disability paved the way and contributed significantly to having disability fully recognised internationally as a human rights issue, and the subsequent adoption of the CRPD by the United Nations (UN).

Out-dated medical model of disability

Unfortunately, the out-dated medical model of disability and its approach are still evident globally in the interpretation(s) of disability and unfair labour practices against persons with disabilities. It is for this reason that the differences between the two models of disabilities are set out below.

The medical model of disability holds that disability results from a physical condition intrinsic to the individual (it is part of the individual’s own body and largely unconnected to the social and geographical environment) and may reduce the individual’s quality of life and cause disadvantages to the individual. The medical model assumes that the solution is to find a cure or at least a way of managing the disability. According to the medical model of disability, the question whether a person qualifies for protection has historically mainly been a health and welfare issue. State intervention has traditionally been channelled through welfare institutions, usually controlled by non-disabled people bestowing charity on persons with disabilities. Charity so dispensed comprised treatment and other benefits which were provided in an attempt to obviate the need of the person with a disability to beg or hide.

The emphasis was placed on the physical or psychological nature of the impairment and the dependence of the person with a disability on the non-disabled. Persons with disabilities were seldom included as part of the management or decision-making processes of organisations acting in the interests of persons with disabilities. The view that disability was a health and welfare issue gave rise to an attitude amongst members of society that persons with disabilities (and their families) were separate from mainstream communal activities, including the labour market. Their dependency on state assistance disempowered these people and undermined their self-confidence and capacity to interact on an equal level with colleagues in the working environment, and elsewhere with other members of society.¹³ The medical model of disability is thus often the basis of an unintended social degradation of persons with disabilities.

¹¹ Article 1 of the *Convention on the Rights of Persons with Disabilities*.

¹² This shift is of extreme significance when one considers the fact that the two models represent two opposite approaches.

¹³ *Integrated National Disability Strategy White Paper Office of the Deputy President*, November 1997. Accessed 4 February 2015. Available from: http://www.gov.za/sites/www.gov.za/files/disability_2.pdf.

Social model of disability

The social model of disability says that disability is caused by the way society is organised, rather than by a person's impairment or difference. It looks at ways of removing barriers that restrict life choices for people with disabilities. Therefore, in terms of the social model, disability is not primarily due to some or other condition inherent in the particular person with disability, but to the manner in which the physical and social environment within which such person must operate has been arranged.¹⁴ This is usually done with a view to the needs and lifestyles of a particular sector of the community namely the non-disabled majority. More often than not, obstacles and impediments in the way of people or workers with disabilities are the inevitable result. This model emphasises an understanding of disability as something that stems from environmental and social obstacles or barriers. It accentuates obstacles or barriers as the cause of the abnormality of disability and concentrates on strategies to remove these obstacles or barriers. Society, therefore, must be rearranged to accommodate everybody – including persons with disabilities – on an equal footing. When barriers are removed, persons with disabilities can be independent and equal in society, with choice and control over their own lives. Persons with disabilities developed the social model of disability because the traditional medical model did not explain their personal experience of disability or help to develop more inclusive ways of living.¹⁵

“The medical model of disability says people are disabled by their impairments or differences...”

The social model of disability says that disability is caused by the way society is organised.”¹⁶

For purposes of this Toolkit, it is important to guard against viewing people with disabilities through the out-dated medical model of disability, but rather to view them against the backdrop of the social model of disability, which is underscored by the CRPD.

What constitutes disability against the backdrop of the social model of disability?

“Disability is an evolving concept... disability results from the interaction between persons with impairments and attitudinal and environmental barriers that hinder their full and effective participation in society on an equal basis with others.”¹⁷

Persons with disabilities range in gender, background, education and the severity of their disability. There are also people with “hidden” disabilities; persons whose disabilities are not visible to the naked eye. This could range from a learning disability, an anxiety disorder, chronic pain, a heart ailment or schizophrenia. Persons with disabilities also include persons who experience a disability later in life after a long work history. The duties imposed on the private sector stem from international obligations (amongst others the CRPD), the Constitution and South African labour laws (such as the Employment Equity Act (EEA), and the Labour Relations Act (LRA)).¹⁸ For purposes of this Toolkit, the obligations with regard to the relevant international and domestic laws can be seen in the diagram below.

¹⁴ Please see the discussion later in the Toolkit with regards to the definition of disability, the *Employment Equity Act 55 of 1998 (EEA)*, and item 5 of the *Code of Good Practice in the Employment of People with Disabilities*.

¹⁵ Scope Website, *the Social Model of Disability*. Available from: <http://www.scope.org.uk/about-us/our-brand/social-model-of-disability>.

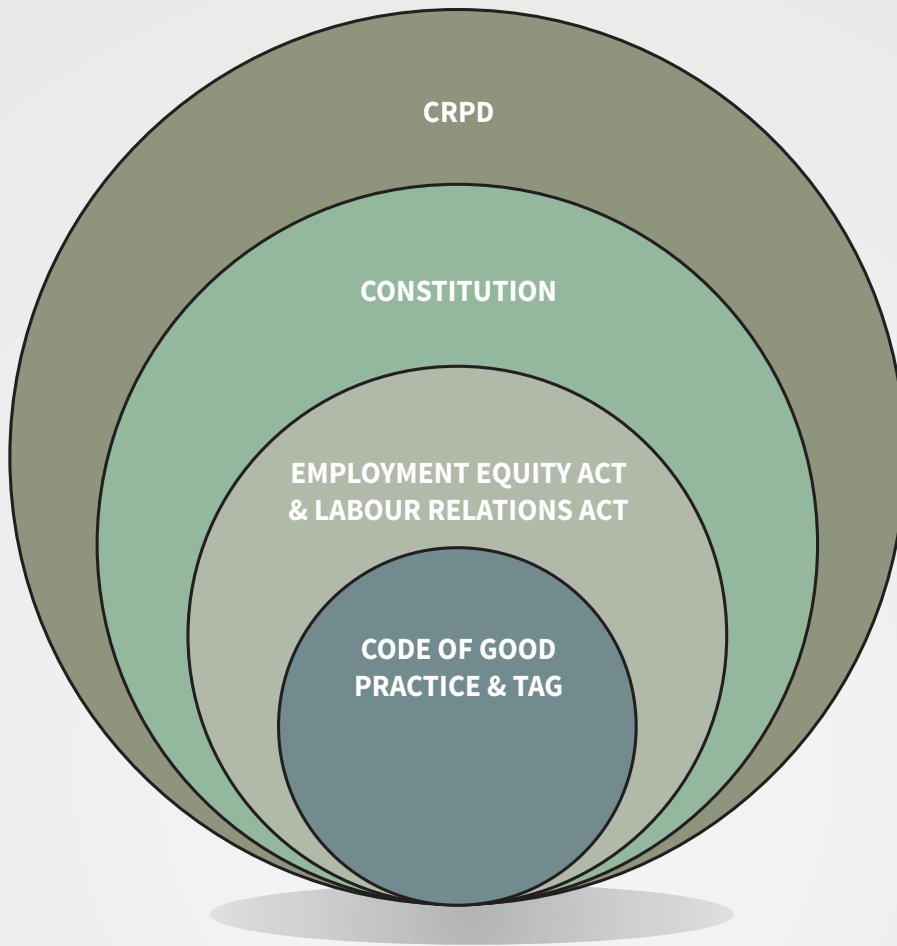
¹⁶ Ibid

¹⁷ Preamble to the *Convention on the Rights of Persons with Disabilities*.

¹⁸ *Labour Relations Act 66 of 1995 (LRA)*.



Diagram 1: Legislation in Context





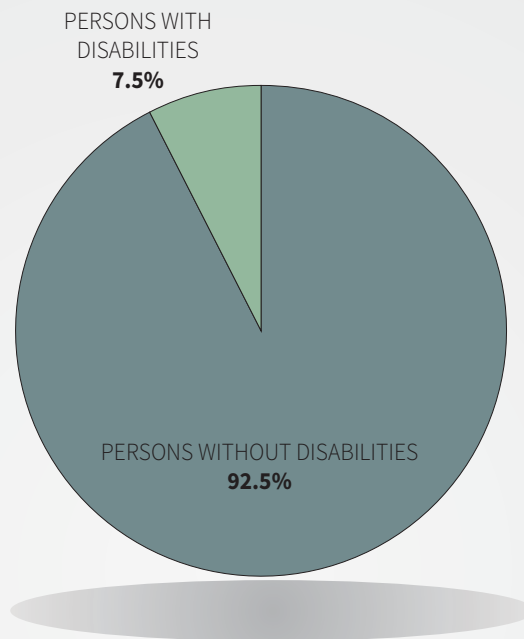
Section 2

Case for change:
employment of persons
with disability in the private
sector in South Africa



Prevalence of disability in South Africa

Statistics regarding persons with disabilities provide the basis for measuring progress in realising the rights of persons with disabilities. The last official data set that significantly disaggregates the situation of persons with disabilities in South Africa is the 2011 Census Report.¹⁹ The Census 2011 Report indicated that persons with disabilities constituted **7,5%** of the total population of South Africa.



Of this number, black Africans had the highest proportion of persons with disabilities (**7,8%**), followed by the white population group (**6,5%**). No variations were observed among the coloured and Indian/Asian population groups. The data showed that disability is more prevalent among females than males (**8,3%** and **6,5%** respectively). Provincial variations show that the Free State and the Northern Cape provinces had the highest proportion of persons with disabilities (**11%**), followed by North West and Eastern Cape (**10%** and **9,6%** respectively). The Western Cape and Gauteng provinces showed the lowest percentage of persons with disabilities (**5%**). The statistics also show that disability is positively correlated with age. That is, the proportion of persons with disabilities increases with age. More than half (**53,2%**) of persons aged 85 and above reported to having a disability.

Disability and employment

There is low labour market absorption of persons with disabilities in South Africa,²⁰ resulting in a very high unemployment rate of persons with disabilities in the country.²¹ Statistics pertaining to the employment of people with disabilities in South Africa show that the private sector in South Africa is absorbing into its workforce fewer than expected people with disabilities. South African employers across the board fall short of national targets for the employment of people with disabilities. There is therefore considerable scope to increase the employment of people with disabilities in the private sector.

¹⁹ This discussion was adapted from the 2011 Census Disability Monograph Executive Summary. Statistics South Africa, *Census 2011: Profile of persons with disabilities in South Africa*. Available from: <http://beta2.statssa.gov.za/publications/Report-03-01-59/Report-03-01-592011.pdf>.

²⁰ This discussion was adapted from the 2011 Census Disability Monograph Executive Summary. Statistics South Africa, *Census 2011: Profile of persons with disabilities in South Africa*. Available from: <http://beta2.statssa.gov.za/publications/Report-03-01-59/Report-03-01-592011.pdf>.

²¹ Department of Women, Children and Persons with Disabilities, *Baseline Country Report*, 2013 and World Health Organisation and World Bank, *World Disability Report*, 2011.

Census 2011 statistics also shows:

- a) **Correlation between degree of impairment and employment:** Statistics show that there is a correlation between the degree of severity of the impairment and the degree of economic participation, with more severe impairments being associated with a decrease in labour market participation. Employment levels were recorded to be highest among persons with less severe impairments and lowest among persons with severe impairments across all provinces. Employment levels are higher for persons with sight disability compared with other disability types.

The severity of the impairment greatly impacts on the economic outcomes pertaining to employment and different population groups are affected differently. The profile of persons with mild and severe disabilities shows how the latter are disadvantaged, particularly the black African and coloured population groups, compared to other population groups. The white population group had the highest proportions of persons employed, while the black African population group had the lowest proportions across all impairments and degrees of difficulty experienced. Among persons with no difficulty in functioning, more than two-thirds of whites are employed. Results further show that coloureds have better employment levels than black Africans. Almost half (47%) of coloureds with no difficulty in functioning were employed, compared to just over a third black Africans across the six activity domains.²²

Table 1: Percentage of persons aged 15–64 employed by degree of disability in six functional domains and population groups²³

TYPE & DEGREE OF DISABILITY		POPULATION GROUP			
		<i>Black African</i>	<i>Coloured</i>	<i>Indian/Asian</i>	<i>White</i>
<i>Sight</i>	None	34,3	47,1	55,6	69,6
	Mild	39,1	47,6	50,5	66,4
	Severe	32,0	36,9	40,4	58,0
<i>Hearing</i>	None	34,9	47,2	55,1	69,4
	Mild	28,6	36,3	40,4	63,4
	Severe	22,1	28,2	33,3	57,9
<i>Communication</i>	None	34,8	47,1	54,9	69,3
	Mild	25,9	33,1	43,5	55,0
	Severe	15,4	17,5	34,3	40,9
<i>Movement</i>	None	35,0	47,5	55,4	69,6
	Mild	26,4	30,2	35,9	56,2
	Severe	16,6	17,3	23,9	41,6
<i>Memory</i>	None	35,0	47,3	55,2	69,5
	Mild	26,5	31,8	37,8	58,1
	Severe	16,4	17,9	24,1	39,6
<i>Self-care</i>	None	34,9	47,3	55,1	69,5
	Mild	20,2	28,3	35,1	49,1
	Severe	11,1	13,3	21	31,3

²² Statistics South Africa, *Census 2011: Profile of persons with disabilities in South Africa*. Available from: <http://beta2.statssa.gov.za/publications/Report-03-01-59/Report-03-01-592011.pdf>, 125.

²³ Statistics South Africa, *Census 2011*.



- b) **Access to employment for women with disabilities:** Females were reported to be more marginalised in employment compared to males. Both measures of disability (disability index and degree of difficulty/impairment measures) show noticeable gender variations. The degree of impairment measure showed that females had the highest percentage of persons experiencing mild and severe difficulties across all types of difficulties except for communication, where both males and females had the same proportion of persons who experienced mild difficulties.

Table 2: Percentage and Number of Persons Living with and without Disabilities in South Africa

GENDER	WITH DISABILITIES		WITHOUT DISABILITIES		TOTAL	
	N	%	N	%	N	%
Male	1 188 059	6,5	16 998 903	93,5	18 186 962	100,0
Female	1 682 071	8,5	18 215 843	91,5	19 897 914	100,0
Total	2 870 130	7,5	35 214 746	92,5	38 084 876	100,0

Sex disparities in employment opportunities were shown, with employment rates often higher for males with disabilities than for women with disabilities. The results emanating from an analysis of the data collected in the World Health Survey show employment rates of **52,8%** for men with disabilities and **19,6%** for women with disabilities, compared to **64,9%** of men, and **29,9%** of women without disabilities, respectively.²⁴

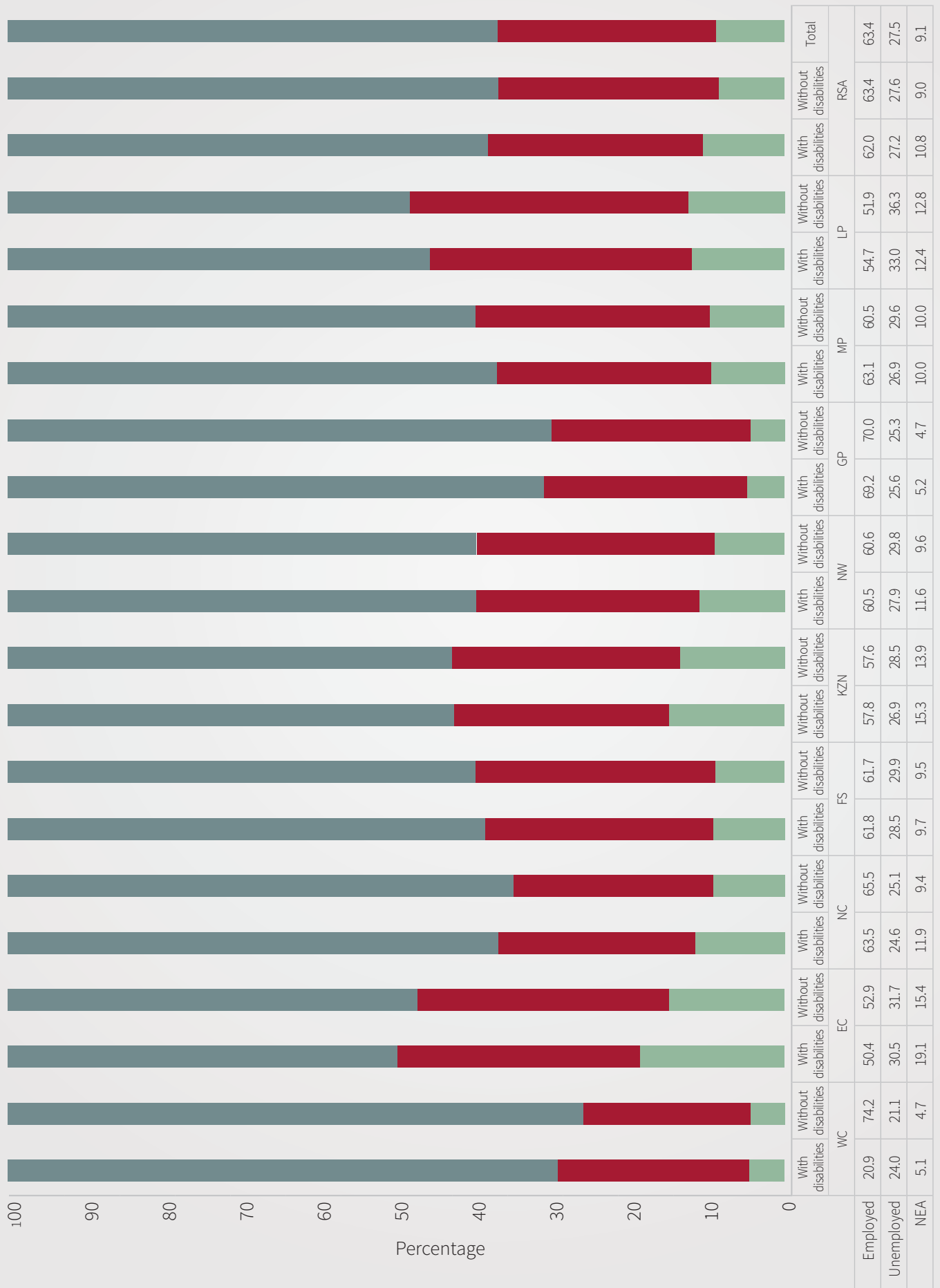
- c) **Racial profile of disability in the workplace:** The profile of people not economically active shows that the black African population group had the highest prevalence, particularly amongst persons with disabilities (**12, 5%** for those with disabilities and **10,7%** for able-bodied persons). Provincial profiles show that the Eastern Cape and KwaZulu-Natal had the highest proportions of economically inactive persons with a disabilities (**19,1%** and **15,3%**).
- d) **Geographical disparities in employment:** Geographical location variations show that farm areas, followed by urban areas, had the highest proportion of persons employed, while rural areas were characterised by very low levels of employment, making persons with disabilities in rural areas the most disadvantaged. Provinces commonly considered 'rural' have the lowest employment levels for persons with disabilities and those without disabilities. These include the Eastern Cape, Limpopo, Northern Cape and KwaZulu-Natal. Urban provinces, such as the Western Cape and Gauteng, have the highest employment levels among persons with and without disability, as depicted in the table on the next page. The labour statistics in the figure below are not surprising, given the imbalances which exist in access to education between persons with and without disabilities in provinces with access to education, compared to provinces with limited access to education. Therefore, the interplay between disability, education and employment cannot be overemphasised.

²⁴ World Health Organisation and World Bank, *World Disability Report*, 2011.

Section 2

Case for change: employment of persons with disability in the private sector in South Africa

Table 3: Employment statistics of persons with disabilities at provincial levels





e) **Disability and income:**

- » Income is linked to employment, which in turn determines the welfare of individuals and their households.²⁵
- » Generally, persons without disabilities earn a higher income than persons with disabilities. This is because in many instances persons with disabilities will be ignored and overlooked for employment opportunities and promotion as they are often regarded as unable to fulfil the responsibilities at hand.
- » Among persons with disabilities, disability severity and type of disability determine one's income. Persons with sight disabilities earn more compared to persons with other – more severe – types of disabilities.
- » Sex variations in earnings show that male persons without disabilities earn a higher income compared to persons with disabilities. Among persons with disabilities, males earn double what females earn, regardless of the degree of disability.
- » Massive earning disparities exist according to geographical location. Persons with disabilities in urban areas generally have higher earnings compared to those in rural areas; a pattern attributed to limited access to employment opportunities in rural areas as well as only having access to low-paying and unskilled jobs.

The South African private sector needs to absorb more persons with disabilities in its workforce to contribute towards the success of this growing sector and, in return, contribute to the prosperity of the country and its people.

Government's progress in advancing employment rights of persons with disabilities – achievements and challenges

South Africa's country report to the United Nations on the implementation of the CRPD in South Africa

South Africa submitted its first state party report to the Committee on the Rights of persons with Disabilities (CRPD Committee) towards the end of 2014.²⁶ The report reflects on the status of the country regarding the implementation of the provisions of the CRPD. Regarding Article 27 of the CRPD, the report recognises that despite the government's efforts through the legislature to provide supportive and enabling legislation on the rights of persons with disabilities,²⁷ the government has yet to translate these norms into economic independence for persons with disabilities. This is due to a lack of access to an enabling environment and accessible public transport, the connection between poverty and disability, as well as a lack of awareness and understanding on how to overcome the underlying barriers.

The report also acknowledges the challenges experienced by persons with psycho-social disabilities. These challenges flow from the stigma and ignorance pertaining to reasonable accommodation and the relevant measures required to elevate the challenges.

²⁵ This discussion was adapted from the Statistics South Africa 2011 Census Disability Monograph Executive Summary. Statistics South Africa, Census 2011: *Profile of persons with disabilities in South Africa*. Available from: <http://beta2.statssa.gov.za/publications/Report-03-01-59/Report-03-01-592011.pdf>.

²⁶ All states parties are obliged to submit regular reports to the Committee on how the rights are being implemented. States must report initially within two years of ratifying the CRPD and thereafter every four years.

²⁷ *Labour Relations Act* 66 of 1995, the *Employment Equity Act* 55 of 1998, and the *Black Based Black Economic Empowerment Act* 53 of 2003.



Several initiatives have been started by the government in an attempt to redress this dire situation in a more affirmative and comprehensive manner. These include:

- a) Job ACCESS Strategic Framework for the Recruitment, Employment, and Retention of Persons with Disabilities in the Public Service Workplace (2009). A baseline study was conducted to examine how the framework has been used by departments to guide their planning on how their programmes will be conducted in the next financial year.
- b) Draft National Disability Rights Policy: The most significant step by the South African government to incorporate the developments in the disability area after the adoption of the CRPD. The development of this policy was a collaborative effort of government and various stakeholders, including the civil society. This document will be useful in promoting and protecting the rights and dignity of persons with disabilities by making a significant contribution to redress their profound social disadvantage and facilitating their participation in mainstream society, including the private sector.
- c) The Handbook on Reasonable Accommodation for People with Disabilities in the Public Service (2007). This will be reviewed to align it with the Policy on Reasonable Accommodation and Assistive Devices, once finalised, to incorporate a funding model for assistive devices.
- d) Capacity development. An accredited training course in Disability Management based on the Job ACCESS Strategic Framework was developed in 2011 by the Public Administration Leadership and Management Academy (PALAMA). The purpose of this training course is to provide officials with skills that would contribute to the inclusion of persons with disabilities in the workplace, and to remove barriers preventing their successful participation in the job market.
- e) In 2011, the Mining Qualifications Authority (MQA) developed and launched a Disability and Reasonable Accommodation Toolkit which assists companies in the mining and minerals sector to ensure that persons with disabilities are included in various programs.
- f) Sheltered work – that is, work undertaken by persons with disabilities in workshops specifically established for that purpose. People working in sheltered workshops retain their social welfare benefits, typically a disability impairment allowance and usually receive a small discretionary additional weekly payment from the work provider.
- g) Sheltered Employment Factories (SEF) – these were established more than 60 years ago with ownership vested in the government to provide employment and empowerment opportunities for persons with disabilities who could not compete in the open labour market. After decades in limbo, in April 2014 they were finally conferred legal status by the new Employment Services Act.²⁸ These factories manufacture furniture, textiles, metal work, leather work, book binding, and screen printing among other products.
- h) The Department of Social Development in 2012 subsidised 293 protective workshops, managed by organisations for persons with disabilities. These workshops provide household income support for 14 212 persons with disabilities. It should be noted that the majority of these facilities are situated in urban centres, despite the majority of persons with disabilities living in rural areas. These areas also have the poorest access to education, the poorest access to public transport, as well as the highest general unemployment rates:

²⁸ Employment Services Act 4 of 2014.



Promoting the Right to work of Persons with Disabilities

Toolkit for the Private Sector

- » 141 urban and 34 peri-urban protective workshops provided income opportunities for 10911 persons with disabilities; and
 - » 118 protective workshops in rural areas provided income opportunities for 3301 persons with disabilities.
- i) The Industrial Development Corporation (IDC) has set aside R50 million to finance enterprises specifically owned by persons with disabilities. Uptake has been slow and this is being addressed in consultation with the Department of Social Development and the Department of Trade and Industry.²⁹
- j) It is recognised that organisations of and for persons with disabilities play a major role in supporting persons with disabilities to become entrepreneurs. From 2004 to 2011, the Medunsa Organisation for Disabled Entrepreneurs (MODE) established 532 persons with disabilities in their own income-generating micro-enterprises, generating between USD 187 and USD 740 per month for these owners and their families. Approximately 900 jobs have been created through this initiative. The success rate is 74%, which is very good for micro-enterprise development.
- k) Gauteng Enterprise Propeller (GEP) in line with its legislative mandate, provides financial and non-financial supports to persons with disabilities. This is geared towards self-sufficiency and inclusivity in the mainstream economy..

²⁹ South African Government Website, *Social Development*. Accessed 29 January. Available at <http://www.gov.za/about-sa/social-development>.



Section 3

The business case for
employing persons with
disabilities



Identifying why employing persons with disabilities is important to the business and how it can assist the organisation in achieving its core business objectives, helps to position it as a priority and a mainstream policy and development issue. Many companies who have benefited from the inclusion of persons with disabilities in their workforce, such as Accenture, Accor, IBM, L'Oréal, Novartis, Sodexo and Standard Bank, all agree that employing persons with disabilities is not only beneficial but a must for competitive businesses.³⁰ There are distinct competitive advantages to employing people with disabilities and creating a more inclusive workplace culture. Below are some reasons why employing persons with disabilities is good business.

Why the inclusion of persons with disability in the workforce is good for your business in South Africa:

1

Gives a competitive edge

In a highly competitive and rapidly-changing business environment, the ability to hire, retain and develop a diverse workforce gives business a competitive edge as it allows businesses to be more creative and more responsive to the diverse needs of a rapidly-changing market.³¹

2

Creates new business opportunities

Persons with disabilities represent a potentially lucrative market in South Africa. The inclusion of persons with disabilities in the workforce improves understanding of how customers with disabilities think, what drives their spending habits, and how to access this market which previously has not been effectively tapped into. Employing persons with disabilities will help business to connect to this client base and build strong customer relations, as well as improve the overall service for customers with disabilities. This is because people in general prefer to deal with businesses whose workforce reflects their customer base.

3

Develops new products and services

Employees with disabilities can help in developing products, product modifications and services that will appeal to the disability market as they have valuable personal insight into the needs of customers with disabilities.³² Many products developed for the disability market also have considerable value in mainstream markets. Some of the most in-demand products available today have evolved from disability-based research, such as:



» *Voice command technology*, first developed for persons with disabilities, is now used in GPS navigational devices, cars, computers, and hands-free phones.



» *Apple's I-Phone shuffle*, built with a hands-free, voice control interface, is a prime example of a device originally designed for persons with vision impairments that now has huge global appeal.

³⁰ International Labour Organisation Report, *Business as unusual: Making workplaces inclusive of people with disabilities*, International Labour Organisation (ILO) Global Business and Disability Network, October 2014.

³¹ Lengnick-Hall, ML Gaunt, PM and Kulkarni, M 'Overlooked and underutilized: People with disabilities are an untapped human resource', 2008, *Human Resource Management*, Vol. 47, p255–273.

³² Adapted from 'Taking action: A HR Guide -Hiring and retaining employees with disabilities' Canadian Manufacturers & Exporters, *Taking action: A HR Guide 'Hiring and retaining employees with disabilities'*. Available from: <http://on.cme-mec.ca/download.php?file=h6z1z1ea.pdf>, p8.



» *Predictive text software* was intended to help persons with disabilities communicate. Today it is used extensively in search engines and email programs to improve communication for all.



» A *popular captioning tool* that is used around the globe to add captions in 50 languages to uploaded videos, was originally intended to help people with hearing impairments watch YouTube videos.



» *Mind control technology* is now the basis for innovative games and toys controlled by brainwaves. This unique technology was developed to help people with severe physical disabilities control electronic devices with brain impulses.

4

Improves opportunities to do business with the government

As a State Party to the CRPD, the South African government will increasingly be looking to do business with companies that they know are acting in accordance with the CRPD. Thus being an enterprise inclusive and accessible to people with disabilities means having a competitive advantage. For instance, the Preferential Procurement Policy Framework of South Africa awards contracts to enterprises based on a preferential points system which features disability inclusion as one of the areas that positively impact the company's overall rating. Not being inclusive may even affect business's ability to get operating licences from the state in future.

5

Meets legal obligations and manages risk

All employers are obliged to comply with national and international labour legislation and regulations. By complying with labour provisions that provide for the rights of persons with disabilities, businesses avoid being in contravention of the law and can avoid receiving a complaint alleging unlawful disability discrimination. Employing persons with disabilities can assist the business to meet its Employment Equity targets, Corporate Social Responsibility Initiatives (CSRI) and Broad-Based Black Economic Empowerment (B-BBEE) targets.

6

Creates good public relations

Including persons with disabilities and accommodating their disability-related needs are important as this helps the business to develop a stronger, more positive corporate identity, earning it a positive reputation as a socially-responsible business.³³ Hiring persons with disabilities can increase a company's brand image with consumers. Research shows that consumers are becoming increasingly sophisticated and more selective in their purchasing decisions and are more favourably disposed to brands that are responsible and ethical. Consequently consumers have been shown to have a positive attitude and favourable impressions towards businesses that hire individuals with disabilities and prefer to give their business to such companies. Investors are also more willing to invest in socially aware and responsible companies who practise diversity and inclusion.

³³ Work without Limits Website, *Employing Persons with disabilities: The business Case*. Available from: www.workwithoutlimits.org.



7

Maximises savings and reduce costs

Contrary to common misconceptions, employing persons with disabilities outweighs the costs of any reasonable accommodation that the employer may need to make along the way. It in effect lowers costs over time by maximising savings and reducing costs.

The reality is that many employees acquire their disability during their working lives. Retaining employees who become disabled and providing reasonable accommodation to continue work can allow employers to retain their valuable skills and experience, while maintaining maximum productivity. Not retaining an employee who becomes disabled means:

- » losing good employees which means losing the return on the human resources (HR) investment in training and management the business would have made
- » incurring recruiting, hiring, training costs plus lower productivity of new staff and
- » productivity losses incurred from unfilled positions.

8

Improves work morale

An inclusive workforce has also been shown to have a positive impact on workplace morale and improve overall job satisfaction. This has a ripple effect because when employees are happier at work, customer satisfaction also improves, solidifying profits and customer loyalty.

9

Creates financial incentives

Employers can benefit from a number of government incentives – financial incentives, training support, and workplace modification support from the government aimed at encouraging the employment of persons with disability. For instance, the employer can claim tax deductions from the South African Revenue Services (SARS) for a learner with disability during learnership.

10

Enhances creativity

Research has shown that diverse work teams are more innovative and creative and less inclined to a unilateral view. This is an asset. Employing persons with disabilities brings a fresh perspective to the decision-making process. The viewpoints expressed by employees with disabilities often reflect their unique and – often unheard – life experiences. This in turn challenges assumptions and stimulates a higher level of critical analysis of business decisions, strategies, and processes, and fuels creativity.

Research has shown that persons with disabilities make good employees, contrary to prejudicial beliefs. People with disabilities bring something fresh to the table.³⁴

³⁴ Canadian Manufacturers & Exporters, *Taking action: A HR Guide 'Hiring and retaining employees with disabilities'*. Available from: <http://on.cme-mec.ca/download.php?file=h6z1z1ea.pdf> 4.

Employees with disabilities:

- ✓ *have personal traits that are valuable in the marketplace.* Initiative, perseverance, adaptability, goal-oriented, problem-solvers – these are characteristics people with disabilities develop to overcome barriers to their success in their everyday lives. More importantly, these are the characteristics businesses need to help grow their business, get around obstacles, and achieve their goals.
- ✓ *think outside the box.* Every day, persons with disabilities use creative thinking to tackle challenges and get things done. At work, this translates into original ideas, inventive solutions, and the flexibility to consider a variety of options at once.
- ✓ *have fewer absences and stay in their jobs longer.* The tenure of employees with disabilities is generally greater than other employees; this is because people with disabilities have to work very hard to get a job and when they do get one, it is precious to them and they are very unlikely to resign or move to another company.

11

Creating a business case for employing persons with disabilities

The best business cases are those that are customised and able to transform as the organisation changes. In creating an effective business case it is useful to consider the key challenges facing the business and how creating an equal opportunity workplace might help to address them. For instance, an organisation that needs to overcome a skills shortage to achieve its growth objective can become inclusive and accessible making it easier to find new talent. It is also important for the employer to assess the contribution that persons with disabilities are making over time in order to substantiate their business case by setting up some qualitative and/or quantitative indicators.





Section 4

Realising the right to work
of persons with disabilities
in South Africa: the private
sector's legal obligations



International legal framework

Article 27 of the CRPD: Work and employment

The right to work is a fundamental right, recognised in several international legal instruments such as the International Labour Organisations (ILO) Conventions. Article 27 of the CRPD – one of the most detailed and significant articles of the CRPD – restates the right to work from a disability perspective. This article sets the basis for building a society free of stigma and hence free of discrimination: inclusion, participation and community living. Article 27 directs the public sector, in collaboration with the private sector, to undertake a variety of measures to ensure the promotion of the rights of persons with disabilities to work and earn a living: to choose a job; not to be treated unfairly when employed; to receive equal pay for equal work performed, just like everyone else; to benefit from equal opportunities and safe and healthy working conditions just like everyone else; to be able to complain and to join labour and trade unions and not be harassed; to provide them with career counselling, vocational training, and career opportunities; to promote self-employment and business opportunities; to have the possibility to be hired both in the public and in the private sector; to ensure that reasonable changes are made in the workplace environment, that is, fulfil the “reasonable accommodation” principle according to their personal needs; and to promote vocational and professional rehabilitation programmes to support their return to work.

State Parties to the CRPD, including South Africa, undertook and committed themselves to comply with the provisions of Article 27 of the CRPD. The provisions of Article 27 are as follows:



Article 27 of the CRPD: Work and Employment

1. States Parties recognise the right of persons with disabilities to work, on an equal basis with others; this includes the right to the opportunity to gain a living by work freely chosen or accepted in a labour market and work environment that is open, inclusive and accessible to persons with disabilities. States Parties shall safeguard and promote the realisation of the right to work, including for those who acquire a disability during the course of employment, by taking appropriate steps, including through legislation, to, *inter alia*:
 - a) Prohibit discrimination on the basis of disability with regard to all matters concerning all forms of employment, including conditions of recruitment, hiring, and employment, the continuance of employment, career advancement, and safe and healthy working conditions
 - b) Protect the rights of persons with disabilities, on an equal basis with others, to just and favourable conditions of work, including equal opportunities and equal remuneration for work of equal value, safe and healthy working conditions, including protection from harassment, and redress of grievances
 - c) Ensure that persons with disabilities are able to exercise their labour and trade union rights on an equal basis with others
 - d) Enable persons with disabilities to have effective access to general technical and vocational guidance programmes, placement services, and vocational and continuing training
 - e) Promote employment opportunities and career advancement for persons with disabilities in the labour market, as well as assistance in finding, obtaining, maintaining, and returning to employment
 - f) Promote opportunities for self-employment, entrepreneurship, the development of cooperatives, and provide help in starting their own businesses
 - g) Employ persons with disabilities in the public sector

- h) Promote the employment of persons with disabilities in the private sector through appropriate policies and measures, which may include affirmative action programmes, incentives, and other measures
- i) Ensure that reasonable accommodation is provided to persons with disabilities in the workplace
- j) Promote the acquisition by persons with disabilities of work experience in the open labour market
- k) Promote vocational and professional rehabilitation, job retention, and return-to-work programmes for persons with disabilities

Legal obligations under national legislation

Disability discourse in South Africa was not only influenced by international developments, but also influenced by numerous domestic developments within South Africa's political history and socio-economical context. This section of the Toolkit focuses on and analyses the Constitution, as well as the most important labour legislation applicable to the rights of employees with disabilities in South Africa.

The Bill of Rights is the cornerstone of democracy in South Africa and enshrines the rights of all people, including persons with disabilities.³⁵ An important feature of the Bill of Rights is that it binds all government and private institutions³⁶ and protects all people in South Africa, including people with disabilities. The provisions of the Bill of Rights are enforceable by the courts.³⁷ The word "everyone" is used in a number of provisions of the Constitution and includes citizens and non-citizens³⁸ within the boundaries of the Republic of South Africa. The word 'everyone' is sufficiently comprehensive to include persons with disabilities, and for purposes of this Toolkit, workers or persons with disabilities. The Bill of Rights, *inter alia*, protects the right to dignity of employees with disabilities,³⁹ their right to equality,⁴⁰ and their right to bodily and psychological integrity.⁴¹ Every employee with a disability furthermore has a right to privacy⁴² and to freedom of expression,⁴³ association,⁴⁴ movement, and residence,⁴⁵ as well as a right to choose a trade, occupation, or profession freely.⁴⁶ Employees with disabilities further have a right to fair labour practices,⁴⁷ health care,⁴⁸ education,⁴⁹ and access to courts.⁵⁰ However, these rights and others may be limited in terms of section 36 of the Constitution to the extent that such limitation is reasonable and justifiable in an open and democratic society.⁵¹

³⁵ Section 7(1) of the Constitution of the Republic of South Africa, 1996 (hereinafter "the Constitution").

³⁶ Section 8(1) of the Constitution.

³⁷ Section 8(3) of the Constitution.

³⁸ Section 8(2) – (3) of the Constitution determine that the Constitution is binding and applicable to natural persons; I Currie & J De Waal *The Bill of Rights handbook* (2014), pages 34 – 35; and *Mohammed v President of the Republic of South Africa* 2001 3 SA 893 (CC).

³⁹ Section 10 of the Constitution.

⁴⁰ Section 9 of the Constitution.

⁴¹ Section 12(1) of the Constitution.

⁴² Section 14 of the Constitution.

⁴³ Section 16 of the Constitution.

⁴⁴ Section 18 of the Constitution.

⁴⁵ Section 21 of the Constitution.

⁴⁶ Section 22 of the Constitution.

⁴⁷ Section 23 of the Constitution.

⁴⁸ Section 27 of the Constitution.

⁴⁹ Section 29 of the Constitution.

⁵⁰ Section 34 of the Constitution.

⁵¹ Further, section 7(2) of the Constitution provides that the state must respect, protect, promote and fulfil the rights in the Bill of Rights. The state's obligation may be positive or negative in nature. It not only prohibits the state from interfering with the exercise of rights, but in other cases it compels the state to act. The obligation to protect and to promote rights in some instances imposes a positive obligation on the state to introduce, where necessary, appropriate legislative, administrative, financial, judicial, or other suitable measures to allow the realisation of the rights of persons with disabilities (Currie & De Waal: 150).



The interpretation by the courts of the rights contained in the Bill of Rights has resulted in the development of a body of constitutional jurisprudence relevant to workers, employers, and their representative bodies.⁵² The Constitution and specifically the rights contained in the Bill of Rights, could potentially affect labour law in three ways:

- » Firstly, the rights contained in the Bill of Rights could be applied to test the validity of labour legislation aimed at compliance with fundamental rights.
- » Secondly, they could be employed to interpret existing labour legislation which has been promulgated in compliance with the fundamental rights contained in the Bill of Rights.
- » Finally, the rights could be used as a tool to develop the common law in those instances where compliance with any particular human right is not at stake.⁵³

In the paragraph below, section 9 (the right to equality) and section 23(1) (the right to fair labour practices) of the Bill of Rights, and the relevant labour legislation applicable to persons with disabilities, and specifically employees with disabilities, are fully elaborated.

What does the Constitution say about the right to equality in section 9?

In terms of section 9(1) “everyone” – including workers and/or employees with disabilities – is equal before the law and has the right to equal protection and equal benefit of the law. Section 9(2) further provides that equality includes the full and equal enjoyment of *all rights and freedoms*. This means that a worker or employee with a disability has an equal right to work, to be economically active, and to be part of mainstream society. The section further provides that legislative (such as equality⁵⁴ and labour laws⁵⁵) and other measures designed to protect or advance persons or categories of persons disadvantaged by unfair discrimination, may be taken in order to promote and achieve equality.⁵⁶ It is important for the private sector to note that the legislature introduced specific measures in the Employment Equity Act (EEA)⁵⁷ to protect persons with disabilities, in particular, as a designated group for purposes of equal treatment and affirmative action.⁵⁸

Section 9(3) provides that *the State* may not unfairly discriminate directly or indirectly against anyone on one or more of the listed grounds. The grounds specifically mentioned in section 9(3) are “race, gender, sex, pregnancy, marital status, ethnic or social origin, colour, sexual orientation, age, *disability*, religion, conscience, belief, culture, language, and birth”. Of importance to the private sector are the provisions of section 9(4) which determine that *no person* (including the private sector), may unfairly discriminate directly or indirectly against anyone on one or more grounds in terms of subsection 9(3).⁵⁹ This section, therefore, also prohibits any other person, including private individuals and institutions such as employers, from discriminating unfairly against workers with disabilities on one or more of the listed grounds. Section 9(4) requires that “national legislation must be enacted to prevent or prohibit unfair discrimination”. Enacted legislation includes the Promotion of Equality and Prevention of Unfair Discrimination Act (PEPUDA)⁶⁰ and the EEA.⁶¹

Of importance to the private sector is section 9(5), which provides that discrimination on one or more of the grounds listed in subsection 9(3) is unfair unless it is established that the discrimination is fair. In terms of this provision, discrimination based on disability in the workplace is unfair, unless it has been established that such discrimination is fair by reason of, for instance, valid inherent requirements of the work concerned. But what must be understood under the concept “discrimination”?

⁵² Van Niekerk, *et al Law@work*, 2008, p 33 – 53.

⁵³ Van Niekerk *et al* 34 give recognition to Cheadle in this regard. Cheadle delivered an address at the annual Butterworths LexisNexis Current Labour Law seminar, 2007. It is, however, important to note that it is inappropriate for a litigant to rely on any provision of the Constitution if legislation has already been enacted to give effect to the specific principle provided for in the relevant constitutional provision. It is therefore not fitting for a litigant to bypass labour legislation by relying on a constitutional right where specific labour legislation has already been introduced to give effect to the labour provision of the Constitution. *SA National Defence Union v Minister of Defence* [2007] 9 BLLR 785 (CC) confirmed *NAPTOSA v Minister of Education, Western Cape* 2001 2 SA 112 (C) and *Minister of Health v New Clicks SA (Pty) Ltd* 2006 2 SA 311 (CC) in this regard.

⁵⁴ *Promotion of Equality and Prevention of Unfair Discrimination Act* 4 of 2000.

⁵⁵ *Employment Equity Act* 55 of 1998.

⁵⁶ Van Jaarsveld, S., R., & Van Eck B., P., S., *Kompendium van Arbeidsreg* (2006), p137.

⁵⁷ Van Jaarsveld, S., R., & Van Eck B., P., S., *Kompendium van Arbeidsreg* (2006), p57.

⁵⁸ See the discussion of the *Employment Equity Act* 55 of 1998 and affirmative action in the Toolkit.

⁵⁹ Section 9(4) is a horizontally-applicable right to non-discrimination. This means that people, and in this context also persons with disabilities, have a right not to be unfairly discriminated against by other private individuals and institutions.

⁶⁰ *Promotion of Equality and Prevention of Unfair Discrimination Act* 4 of 2000.

⁶¹ See the discussion of the *Employment Equity Act* 55 of 1998 in the Toolkit.

What does “unfair discrimination” mean under the Constitution?

Mere differentiation between persons or groups of persons based on factors such as disability does not necessarily amount to discrimination. Unfair discrimination only takes place if the *manner in which the differentiation is made* amounts to unfair discrimination. It is clear from section 9(3) and (4) that “unfair discrimination” is prohibited and not discrimination *per se*. This means that, should discrimination be established on any of the grounds listed in section 9(3),⁶² such discrimination would be presumed to be *unfair* unless the contrary is proved.⁶³

In what circumstances differentiation would amount to “unfair discrimination” is a complex question.⁶⁴ The prohibition on discrimination does not constitute a prohibition on differentiation (or distinction), but on “unfair discrimination”.

The Constitutional Court addressed the question as to what amounts to “unfair discrimination” in *Prinsloo v Van der Linde*⁶⁵ and referred to the history of South Africa and the view that “discrimination has acquired a particular pejorative meaning relating to the unequal treatment of people based on attributes and characteristics attaching to them”. In this light, “unfair discrimination means treating persons differently in a way which impairs their fundamental dignity as human beings, who are inherently equal in dignity”.⁶⁶

In *Prinsloo* the Court uses *human dignity* as criterion to determine unfair discrimination. The Court endorses the view that “[a]t the heart of the prohibition of unfair discrimination lies a recognition that the purpose of our new constitutional and democratic order is the establishment of a society in which all human beings will be accorded equal dignity and respect regardless of their membership of particular groups”.⁶⁷

According to the Court, equality means nothing “if it does not represent a commitment to recognising each person’s equal worth as a human being, regardless of individual differences”. On this basis the Court decided that differentiation amounted to unfair discrimination if the differentiation infringed upon the human dignity of the person or persons concerned.⁶⁸ The fact that human dignity plays such an important role is of significance to the private sector and to persons or workers with disabilities, since such an interpretation accords with the obligations imposed by the CRPD. Furthermore, the private sector has to take cognisance of unfair discrimination as the Constitutional Court, in *Harksen v Lane*,⁶⁹ has set out the factors that have to be taken into account in determining whether discrimination is unfair.⁷⁰ *Harksen* also formulated the stages in which an enquiry into alleged unequal treatment and unfair discrimination must

⁶² The grounds specifically mentioned in section 9 (3) are ‘race, gender, sex, pregnancy, marital status, ethnic or social origin, colour, sexual orientation, age, *disability*, religion, conscience, belief, culture, language, and birth’. Should discrimination be established on these grounds, such discrimination is presumed to be unfair, unless proven otherwise.

⁶³ Currie & De Waal, 2014. Page 222.

⁶⁴ Also see JL Pretorius, ME Klinck & CG Ngwena, *Employment Equity Law*, 2012, p2-11.

⁶⁵ *Prinsloo v Van der Linde* 1997 6 BCLR 759 (CC); 1997 3 SA 1012 (CC).

⁶⁶ *Prinsloo v Van der Linde* 1997 6 BCLR 759 (CC); 1997 3 SA 1012 (CC), p66.

⁶⁷ *Ibid*, p66.

⁶⁸ *Ibid*, p66.

⁶⁹ 1998 1 SA 300 (CC) para 52.

⁷⁰ The same factors were taken into account in *WH Bosch v The Minister of Safety and Security & Minister of Public Works* Case no. 25/2005 9. In that case, people with disabilities had no access to the first floor of the police station where they had to apply for firearm licences. The factors laid down in *Harksen* will obviously play an important role when equality courts have to determine whether in such cases there was unfair discrimination against people with disabilities.



proceed. These stages are relevant when a court, such as the Equality Court, has to determine whether there was any unfair discrimination against a person,⁷¹ including a worker or person with disability.

In both *Harksen* and *Prinsloo* the determining factor which rendered the discrimination unfair was the *impact it had on the person* against whom the discrimination was inflicted. “Unfair discrimination”, therefore, is discrimination with an unfair impact. It has such an impact where the discrimination imposes burdens on people who have been victims of past patterns of discrimination, or where it impairs to a significant extent, their fundamental dignity.

For purposes of the toolkit it is important to highlight that this involves a subjective assessment to answer the question whether or not potential discrimination against workers or persons with disabilities is fair or not.⁷² This means that the private sector should guard against unfair discrimination, and should implement safeguards against unfair discrimination of workers/persons with disabilities.

What does the Constitution say about the right to fair labour practices in section 23(1)?

Section 23(1) of the Constitution guarantees everyone’s right to fair labour practices. From this provision it is clear that every employee, employer, or other organisation or institution involved in labour relations, has the right to fair labour practices in terms of the Constitution.⁷³ It goes without saying that employees with a disability are also entitled to protection in terms of this provision.⁷⁴

The most significant labour laws that provide protection to workers/persons with disabilities are the EEA and the Labour Relations Act 66 of 1995 (LRA), as well as the codes published in terms of these laws. These acts and codes give effect to the equality clause,⁷⁵ the right to fair labour practices,⁷⁶ as well as international and local norms in respect of fair labour treatment of persons with disabilities.⁷⁷

⁷¹ The stages are the following:

- a) It must be established whether the relevant legislation or conduct of the respondent differentiates or distinguishes between persons or categories of persons. If so, it must be established whether there is a rational link between the differentiation and a legitimate government purpose. If no such link can be identified, the differentiation would be irrational and arbitrary and would justify a conclusion that it constitutes an infringement of section 9(1) [1998 1 SA 300 (CC) para 53] that provides for equality and equal protection and benefit of the law. However, even though the differentiation serves a legitimate purpose, it might still possibly constitute an infringement of section 9(2), which provides for protection against unfair discrimination.
- b) If the first part of the enquiry should indicate that the differentiating measure in question was not an arbitrary measure and did in fact serve a legitimate purpose, the court must secondly, determine whether the said differentiating measure amounted to unfair discrimination.

To this end a two stage analyses is necessary:

- a) It must first be established whether the differentiation amounts to discrimination. If the differentiation is based on one or more of the grounds contemplated in section 9(3), for instance disability, a presumption of discrimination arises.
- b) If the differentiation amounts to discrimination, it must be established whether the discrimination amounts to *unfair* discrimination. If the discrimination is found to have been based on one of the grounds listed in section 9(3), such as disability, a presumption of *unfair* discrimination arises. The respondent must then show that the discrimination was fair [the presumption in terms of sec 9(5) of the Constitution. See also *Hoffmann v South African Airways* 2001 1 SA 1 (CC)]. If the discrimination is not based on any of the grounds referred to in section 9(3), the complainant must show that the differentiation was unfair. The test for *unfairness* focuses mainly on the effect of the discrimination on the complainant or others in his/her situation.

Regarding the analyses see also IM Rautenbach ‘Die Konstitusionele Hof se riglyne vir die toepassing van die reg op gelykheid’ (2001) *Tydskrif vir Suid-Afrikaanse Reg (TSAR)* 329, and G Carpenter ‘Equality and non-discrimination in the new South African constitutional order: the early cases – part 1’ (2001) *Tydskrif vir Hedendaagse Romeins-Hollandse Reg (THRHR)* 409; ‘Equality and non-discrimination in the new South African constitutional order: important trilogy of decisions – part 2’ (2001) *THRHR* 619; ‘Equality and non-discrimination in the new South African constitutional order: the sage continues – part 3’ (2002) *THRHR* 37 and ‘Equality and non-discrimination in the new South African constitutional order: update – part 4’ (2002) *THRHR* 177.

⁷² In *Bhe v Magistrate of Khayelitsha* 2005 1 SA 580 (CC), 2005 1 BCLR (CC) the Court found that the rules of customary law regarding birth right infringed upon both the right to equality and the right to dignity. The importance of human dignity was also emphasised in *WH Bosch v The Minister of Safety and Security & Minister of Public Works* Case no. 25/2005 (9) when the Equality Court in Port Elizabeth held that ‘[t]here is no price that can be attached to dignity or a threat to that dignity. There is no justification for the violation or potential violation of the disabled person’s right to equality and maintenance of his dignity that was tendered or averred by the respondent. ...The court therefore found the discrimination to have been unfair.’

⁷³ Van Jaarsveld, S., R., & Van Eck, B., Ps., S., *Kompendium van Arbeidsreg*, 2006, 137.

⁷⁴ *NEHAWU v University of Cape Town* 2003 ILJ 95 (CC) by 110H – 111A: ‘[t]he concept of fair labour practice is incapable of precise definition ... [It should be] given content by legislation and thereafter be left to gather meaning ... from the decisions of specialist courts and tribunals. ... In giving content to this concept the courts and tribunals will have to seek guidance from domestic and international experience. Domestic experience is reflected both in the equity based jurisprudence generated by the unfair labour practice provisions of the 1956 LRA [*Labour Relations Act*] as well as the codification of unfair labour practice in the LRA.’

⁷⁵ Section 9 of the Constitution.

⁷⁶ Section 23(1) of the Constitution.

⁷⁷ Section 23(1) of the Constitution.

Labour Legislation

a) Employment Equity Act 55 of 1998

The EEA constitutes a key legislative and policy intervention that gives effect to the provisions relating to the removal of policies and practices which may result in inequalities. Although the EEA is not a disability-specific piece of legislation, specific emphasis is placed on equity and the right to equal protection and benefit of the law, of *inter alia*, persons with disabilities.

The EEA strives towards the attainment of two goals, namely to:

1

Prohibit unfair discrimination

2

Promote the implementation of affirmative action measures to eradicate inequalities that were institutionalised by previous political policies

Chapter II of the EEA gives effect to the first goal and broadly coincides with the principles of formal equality as enshrined in section 9(1), (3) and (4) of the Constitution.⁷⁸ It provides that everyone, including workers or employees with disabilities, is equal before the law and that unfair discrimination on a list of grounds, including disability, is proscribed. In the past, barriers such as ignorance, fear and stereotyping have resulted in persons with disabilities being unfairly discriminated against in society and employment. It is important for the private sector to note that unfair discrimination is perpetuated in many ways. The most significant of these are:

- » unfounded assumptions about the abilities and performance of persons with disabilities
- » an inaccessible workplace, including the manner in which jobs are advertised which might exclude or limit access to the advertisement;
- » Selection tests that can further discriminate unfairly against persons (or potential workers) with disabilities and
- » arrangements regarding interviews, which might exclude or limit the opportunity of persons with disabilities to prove themselves for employment⁷⁹

Chapter III gives effect to the second goal, namely, the constitutional promise of substantive equality and affirmative action that is contained in section 9(2) of the Constitution.⁸⁰

“Unfair discrimination” under the EEA:

Section 6(1) of the EEA prohibits unfair discrimination in the workplace states that “[n]o person may *unfairly* discriminate,⁸¹ directly or indirectly, against an employee in any employment policy or practice, on one or more grounds, including 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”.

⁷⁸ See the discussion of equality and sections 9(1), (3) and (4) in the Toolkit.

⁷⁹ Foreword to the Code of Good Practice to the EEA. Department of Labour, *Code of Good Practice on Disability in the Workplace*. Available from: <http://www.labour.gov.za/downloads/legislation/Codes%20of%20Good%20Practice/employment-equity/Code%20of%20Good%20Practice%20on%20Disability%20in%20the%20workplace.doc>.

⁸⁰ In this regard also see the discussion regarding the concept of ‘equality’ in the Toolkit. It is important to note that the equality provision of the CRPD aligns itself with substantive equality, and complements the South African approach to equality in the Constitution, and labour laws.

⁸¹ See ‘unfair discrimination’ as from the discussion under the Constitution, is discrimination with an unfair impact. It has the impact where the discrimination imposes burdens on people who have been victims of past patterns of discrimination, or where it impairs to a significant extent the fundamental dignity of the complainant (Currie & De Waal (2014), p225).



This prohibition applies to all workers or employees and job applicants, irrespective of the size of the employer's undertaking.⁸² Section 6(2) provides that it is not unfair discrimination if an employer differentiates on the basis of a valid "inherent requirement" of the job or in the event of the implementation of affirmative action measures in accordance with the EEA.

Affirmative action under the EEA

The promise of substantive equality and affirmative action that is contained in section 9(2) of the Constitution is given effect to in chapter III of the EEA. The second goal of the EEA in chapter III places an obligation on designated employers to implement affirmative action measures in respect of persons from designated groups.⁸³

Designated employers are defined as municipalities, organs of state, employers with 50 or more employees, and employers with less than 50 employees but with a total annual turnover higher than that of a small business in terms of the EEA.⁸⁴ As previously indicated, designated groups that must enjoy the benefit of affirmative action are black people, women and persons with disabilities.⁸⁵

The reason designated employers are duty-bound to favour persons with disabilities when making appointments and considering promotions, is that there are strong indications that unemployment, low salaries, and stereotyping are common occurrences for persons with disabilities.⁸⁶ Designated employers do not have a choice regarding whether they want to implement affirmative action measures or not.⁸⁷ Employers must, in consultation with their employees, devise an affirmative action plan and, depending on the size of the undertaking, must annually or biannually report to the Department of Labour on their progress in pursuance of their affirmative action plans.⁸⁸

The affirmative action plan must contain details regarding "preferential treatment and numerical goals" aimed at attaining equitable representation at the workplace.⁸⁹ In other words, the EEA does not set quotas. Employers must formulate their own goals in the affirmative action plan and strive to attain these goals.

Chapter II of the EEA, which relates to formal equality, expressly provides that the implementation of affirmative action measures that coincide with the goals of the EEA does not constitute unfair discrimination against other candidates.⁹⁰

The EEA does not establish an enforceable right against an employer in favour of disabled employees who are not enjoying the benefits of affirmative action, by way of, for example, appointment or promotion. It does, however, establish a duty on employers to institute affirmative action measures and affords such employers a valid defence against allegations of unfair discrimination against those who may feel that they have been prejudiced by such affirmative action measures.⁹¹

⁸² Section 4(1) provides that Chapter II of the EEA applies to 'all employees and employers' and also covers any 'employment policy or practice' which includes 'recruitment procedures, advertising and selection criteria'.

⁸³ Section 13 of the *Employment Equity Act*.

⁸⁴ Section 1 of the *Employment Equity Act*.

⁸⁵ Section 1 of the *Employment Equity Act*. Black persons are further defined as meaning 'black people, women, and people with disabilities'.

⁸⁶ South African Human Rights Commission, *Towards a Barrier-free Society: A Report on Accessibility and Built Environment*, 2002. Accessed 2 February 2015. Available from: http://www.sahrc.org.za/home/21/files/Reports/towards_barrier_free_society.pdf2002.pdf, p 22. It is mentioned that 'as a result, people with disabilities experience high unemployment levels and, if they are employed, often remain in low status jobs and earn lower than average remuneration. In terms of the Act, all legal entities that employ more than 50 people must submit Employment Equity Plans to the Department of Labour, showing how many people with disabilities are employees and what positions they hold'.

⁸⁷ Sec 13(1) of the EEA provides that the 'designated employer *must*, in order to achieve employment equity, implement affirmative action measures' [our emphasis].

⁸⁸ Section 13(2) of the *Employment Equity Act* describes the duties on designated employers. Sec 21 provides that employers with more than 150 employees must submit reports annually and employees with less than 150 employees must report every second year.

⁸⁹ Section 15(2) of the *Employment Equity Act*.

⁹⁰ Section 6(2) (a) of the *Employment Equity Act*.

⁹¹ In *Harmse v City of Cape Town* 2003 24 ILJ 1130 (LC) and *Dudley v City of Cape Town* 2004 25 ILJ 305 (LC) opposing points of view were adopted regarding the question whether the EEA established an enforceable right in favour of employees from the designated groups. However, in *Dudley v City of Cape Town* 2008 12 BLLR 1155 (LAC) the Labour Appeal Court settled the debate when it held that the EEA did not create such a right, but that it did establish a defence in favour of employers who applied affirmative action.

b) Code of Good Practice in the Employment of People with Disabilities (Code of Good Practice)

The *Code of Good Practice on the Employment of People with Disabilities* (Code of Good Practice) is currently under review by the Department of Labour.⁹² The Code of Good Practice, published in August 2002 in terms of section 54(1) (a) of the EEA, is based on the constitutional principle that no one may unfairly discriminate against a person on the grounds of disability.⁹³ Although the Code of Good Practice is not an authoritative summary of the law and does not create additional rights and obligations, courts and tribunals must take it into account when provisions of the EEA are being interpreted.

What is important for the private sector to take note of is that the Code of Good Practice *provides guidance* to employers or employees and their organisations in respect of the development, implementation, and refinement of disability-equity policies and programmes at the workplace.⁹⁴

The current Code of Good Practice will be referred to in this Toolkit to assist in the interpretation of the EEA. However, as noted above, the current Code is under review by the Department of Labour.

The Code of Good Practice contains further guidelines regarding the interpretation of the definition of disability.⁹⁵ Item 5 of the Code of Good Practice provides that “[t]he 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 of the impairment.*” People are considered persons with disabilities if they satisfy all the criteria in the definition by:

- » having a physical or mental impairment,
- » which is long term or recurring and
- » which substantially limits their prospects of entry into, or advancement in employment

According to item 5 of the Code of Good Practice, a diagnosis should be made of the effect that the impairment may have on the person in *relation to the work environment*.⁹⁶ It is important to note that this introductory part of item 5 supports the CRPD and the social model of disability in determining disability. However, the introductory part, read with the CRPD, is not intended to restrict the interpretation of the definition, but recognises that disability may result from the interaction between a person and his or her working environment as a result of attitudinal or environmental barriers.⁹⁷ The introductory part of the item is followed by a relatively restrictive definition of disability, where all three of the conditions are used as criteria for determining whether a person is a person with a disability or not. It is important for the private sector to note that the Code of Good Practice gives interpretive guidelines for all the three criteria in item 5.

⁹² The Code of Good Practice was published in terms of sec 54 of the EEA in GG 23702 of 19 August 2002. It is to be noted that in 2004 the Department of Labour issued additional guidelines in the ‘Technical Assistance Guidelines on the Employment of People with Disabilities’ that must be read in conjunction with the EEA and the Code of Good Practice. These guidelines are practical in nature and are based on the prohibition on unfair discrimination and affirmative action measures.

⁹³ Legal Framework and Guiding Principles of the Code of Good Practice. Department of Labour, *Code of Good Practice on Disability in the Workplace*. Available from: +

⁹⁴ *Code of Good Practice on the Employment of People with Disabilities*, Status of the Code, 3.4.

⁹⁵ *IMATU v City of Cape Town* 2005 11 BLLR 1084 (LC) the Labour Court, for the first time, had the opportunity to consider the definition in the EEA in the context of the Code of Good Practice. The facts in this case were briefly as follows: Murdoch (the employee) was a type 1 insulin controlled diabetic who applied to the City of Cape Town (the employer) to be transferred to a vacant position of fire-fighter. The employer contended that the employee did not meet the inherent requirements of the job due to the fact that he was prone to a possible debilitating hypoglycaemic attack. This, according to the employer, had the potential of endangering the population, his colleagues and his own life. The employee argued that the employer was merely discriminating against him on grounds of his disability. The Court in the first instance considered whether the situation was covered under one of the listed grounds, namely ‘disability’, of section 6(1). The Court incorrectly held that ‘persons with disabilities’ is not defined in terms of the EEA but nevertheless took the definition and explanation thereof into account as contained in the Code of Good Practice. The Court held that the employee’s diabetes did not limit his long term prospects of employment and that his situation was not covered by the definition of disability. However, the Court found that the EEA did not contain a restricted number of grounds and that the employer’s differentiation was comparable to some of the other grounds covered by section 6(1). The Court held that the employee’s condition could be categorised as potentially discriminating.

⁹⁶ Dupper O., *et al.*, *Essential Discrimination Law*, 2004, p163.

⁹⁷ United Nations Office of the High Commissioner for Human Rights *Monitoring the Convention on the Rights of Persons with Disabilities Guidance for Human Rights Monitors Professional training series No.17* (2010) 15 New York and Geneva, 2010.



c) Technical Assistance Guidelines on the Employment of People with Disabilities

The Technical Assistance Guidelines on the Employment of People with Disabilities (TAG) was intended to *complement* the Code of Good Practice with the *practical implementation* of aspects of the EEA relating to the employment of persons with disabilities in the workplace. The TAG builds on the Code of Good Practice to set practical guidelines and examples for employers, employees, and trade unions to promote equality, diversity, and fair treatment in employment through the elimination of unfair discrimination.⁹⁸ The TAG addresses, amongst other things, reasonable accommodation, recruitment and selection processes, and the placement and retaining of persons with disabilities. However, the current TAG is under review by the Department of Labour.

The private sector should not – when using the definition of “persons with disabilities” in section 1 of the EEA and the Code of Good Practice’s interpretive guideline(s) – impose a “blanket ban” on the prospect of entry into or advancement in employment of persons with disabilities of whatever nature. Private sector employers should scrutinise each job application or employee’s case on merit before a decision is made regarding compliance with the inherent job requirements.

d) Labour Relations Act 66 of 1995

It is important to note that the primary goal of the LRA is to give effect to the constitutional obligations contained in section 23(1) of the Constitution. This goal is made clear in section 1(a), where it is stated that it is the purpose of the LRA to give effect to the fundamental rights contained in the Constitution and the obligations incurred by the state as a member of the International Labour Organisation (ILO).

Section 23(1) states that “everyone” has the right to fair labour practices and it is clear that it also applies to persons with disabilities. However, the constitutional right to fair labour practices should not be confused with the definition of “unfair labour practice” as contained in the LRA. The definition of “unfair labour practices” contained in the LRA only covers *specific* practices perpetrated by employers.⁹⁹

This means that the LRA, broadly speaking, protects employees (including employees with a disability) against unfair dismissal and specific unfair labour practices.¹⁰⁰ The LRA further safeguards all workers’ right to freedom of association,¹⁰¹ promotes collective bargaining,¹⁰² and enshrines every worker’s right to strike.¹⁰³

For purposes of the Toolkit, the focus falls on the protection the LRA affords to persons with disabilities in respect of unfair labour practices perpetrated against them and unfair dismissal on grounds of incapacity due to injury and illness.¹⁰⁴

Persons with disabilities are protected against unfair labour practices under the LRA

In terms of section 186(2) of the LRA, the term “unfair labour practice” means any unfair act or omission that arises between an employer and an employee relating to the unfair conduct of the employer in the “promotion, demotion, probation ... or training of an employee or relating to the provision of benefits”.

The definition also covers the “unfair suspension” or “other unfair disciplinary action short of dismissal” of an employee, including workers/employees with a disability.¹⁰⁵ This means that a worker or employee with a disability also has the option of referring a dispute to the Commission for Conciliation, Mediation and Arbitration (CCMA) based on, for example, non-promotion, demotion or the unfair provision of benefits should it relate to an employee’s or worker’s disability.¹⁰⁶

⁹⁸ Foreword to and purpose of the Technical Assistance Guidelines on the Employment of People with Disabilities (TAG), by the Minister of Labour in August 2002.

⁹⁹ Van Niekerk *et al.* p166 – 167.

¹⁰⁰ Chapter VIII of the *Labour Relations Act*.

¹⁰¹ *Ibid.* Chapter I.

¹⁰² *Ibid.* Chapter II.

¹⁰³ *Ibid.* Chapter IV.

¹⁰⁴ Section 185 of the *Labour Relations Act*

¹⁰⁵ Also included in the definition is any ‘occupational detriment’ in contravention of the Protected Disclosures Act 26 of 2000. The Act is also referred to as the ‘whistle blowers’ act’.

¹⁰⁶ Section 10 of the *Employment Equity Act*.

Persons with disabilities are protected against unfair dismissal under the LRA:

Section 186(1) of the LRA describes a number of occurrences covered by the term “dismissal”. This section includes the termination of a contract of employment by an employer, with or without notice;¹⁰⁷ the non-appointment of employees on fixed term contracts after such an expectation has been created by the employer;¹⁰⁸ the refusal of an employer to allow an employee to resume employment after taking maternity leave;¹⁰⁹ and the termination of the contract by an employee because the employer made continued employment intolerable.¹¹⁰

Before a dismissal can be deemed fair, two main requirements are set by the LRA. A dismissal is deemed to be fair if the employer succeeds to prove that there was a fair reason for dismissal (also referred to as substantive fairness) and that the dismissal was effected in accordance with a fair procedure.¹¹¹

Of importance for the private sector is the fact that certain categories of dismissal are classified as being “automatically unfair dismissal”.¹¹² Amongst others, it is automatically unfair should an employee be dismissed (with or without notice) on grounds of the person's disability.

However, the LRA adds an important *qualification* to this protection in so far as it specifically states that the dismissal of an employee on a ground such as disability *may be fair* if it is based on the *inherent requirements of a particular job*.¹¹³

A number of disabilities can be encountered at the workplace;¹¹⁴ for example, physical disability due to illness and injury; mental incapacity due to stress, illness, trauma, and so on;¹¹⁵ and chronic illness that results in continuous absence from work. Should an employee or worker with a disability be subjected to an automatically unfair dismissal, the employee or worker would be entitled to lodge a claim for reinstatement or a compensation order up to a maximum of 24 months' remuneration, calculated from the day of the dismissal.¹¹⁶

It is important for the private sector to note that both the EEA and the LRA protect employees or workers with disabilities against unfair discrimination when they apply for work, when they qualify for promotion in terms of the provisions of the EEA, and against unfair dismissal in terms of the LRA.¹¹⁷

Code of Good Practice: Dismissal

Schedule 8 of the LRA contains a Code of Good Practice: Dismissal,¹¹⁸ which provides guidelines regarding substantive fairness and the different procedures that apply to dismissal on different grounds. These grounds are misconduct;¹¹⁹ incapacity based on poor work performance;¹²⁰ incapacity on grounds of ill health or injury;¹²¹ and the operational requirements of the employer.¹²²

Any person considering the fairness of a dismissal, whether it be the chair of a disciplinary or incapacity enquiry, or a presiding officer of a tribunal or court, is compelled to take into account the Code of Good Practice: Dismissal before making a decision.¹²³

The Code provides that employers must distinguish between temporary and permanent injury and illness, and must also consider the extent of the employee's inability to render normal services. If the employee's absence is likely to be unreasonably long, the employer must investigate all the possible alternatives short of termination, such as adapting the

¹⁰⁷ Ibid. Section 186(1) (a).

¹⁰⁸ Ibid. Section 186(1) (b).

¹⁰⁹ Ibid. Section 186(1) (c).

¹¹⁰ Section 186(1) (d) of the *Labour Relations Act*.

¹¹¹ Ibid. Section 188.

¹¹² Section 187(1) (f) of the *Labour Relations Act* includes a list of grounds upon which an employee may not be dismissed. The other grounds include, but are not limited to, race, age, gender, sex, political opinion etc.

¹¹³ Section 187(2) (a) of the *Labour Relations Act*; *J Grogan Workplace law* (2005) 147; *Schmahmann v Concept Communication Natal (Pty) Ltd* 1997 ILJ 1333 (LC); and *Archer v United Association of SA* 2005 ILJ 790 (CCMA).

¹¹⁴ Van Jaarsveld S., R., & Van Eck, B., P., S., *Kompendium van Arbeidsreg*, 2006. Page 137.

¹¹⁵ *Spero v Elvey International (Pty) Ltd* 1995 16 ILJ 1210 (IC); and *Automobile Association of SA v Govender* DA23/99 [2000] ZALAC 19 (20 September 2000).

¹¹⁶ Section 194(3) of the *Labour Relations Act*. Van Jaarsveld & Van Eck, *Kompendium van Arbeidsreg*, 2006. Pages 168 – 169. *Van Niekerk v Minister of Labour* 1996 ILJ 525 (K); *Walters v Transitional Local Council of Port Elizabeth* 2000 ILJ 2723; and *POPCRU v SA Police Service* 2003 ILJ 254.

¹¹⁷ Van Jaarsveld S., R., & Van Eck, B., P., S., *Kompendium van Arbeidsreg*, 2006, p168.

¹¹⁸ Amended by Act 42 of 1996 and by Act 12 of 2002.

¹¹⁹ Item 4(1) of the *Dismissal Code*.

¹²⁰ Item 9 of the *Dismissal Code*.

¹²¹ Item 10 of the *Dismissal Code*.

¹²² This is also referred to as retrenchment. Section 189 and 189A provide comprehensive requirements regarding the procedures that must be followed in this regard.

¹²³ Section 188(2) of the *Labour Relations Act*.



employee's duties or securing alternative employment, before contemplating dismissal.¹²⁴ There is a more onerous duty on the employer to accommodate the employee who is injured at work or contracts a work-related illness.¹²⁵

The Code directs that an employer should adopt a staged enquiry before contemplating the dismissal of an employee on grounds of incapacity. During this process the employee (with a disability) must be granted the opportunity to state his or her case and to be represented by a trade union official.¹²⁶ It is more appropriate to refer to this procedure as an incapacity enquiry rather than a disciplinary enquiry as this does not relate to misconduct.

In terms of the Code, employers should follow a four-staged enquiry before dismissing an employee on grounds of disability:

1

Firstly, is the employee/worker with a disability unable to perform his or her work?

2

Secondly, if the answer to the first question is in the affirmative, then to what extent is the employee/worker with a disability unable to do his or her work?

3

Thirdly, the employer must consider whether the employee's/worker's (with disability) working conditions can be adapted

4

Lastly, if this is impossible, is any alternative work which the employee/worker with a disability could be required to do?¹³¹

It is important to note that, if these steps were not followed, the dismissal would not only be unfair, but would also automatically constitute unfair dismissal.

Obligation of the Private Sector to Provide Reasonable Accommodation

Section 1 of the EEA defines reasonable accommodation as "any modification or adjustment to a job or to the working environment that will enable a person from a designated group¹²⁸ to have reasonable access to or participate or advance in employment". The EEA requires designated employers to "reasonably accommodate the needs of persons with disabilities".¹²⁹ This is both a non-discrimination and an affirmative action requirement.

Item 6 of the Code of Good Practice requires employers to make "reasonable accommodation" for persons with disabilities in particular. The aim of accommodation is to reduce the impact of the impairment of the person with a disability to fulfil the essential functions of a job. Reasonable accommodation does not only mean that obstacles and/or barriers should be eliminated at the workplace, but it also requires positive measures to be taken in order to adapt policies, practices, and the working environment in promoting accessibility in the workplace¹³⁰ of persons with disabilities.¹³¹

According to the Code of Good Practice, employers should adopt the most cost-effective means that is consistent with effectively removing the barriers to perform the job. This means that 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. The Code also explains what an "unjustifiable hardship" is. According to the Code, an unjustifiable hardship on the business of the employer is action that requires significant or considerable difficulty or expense.¹³² This involves, *inter alia*, the effectiveness of the accommodation and extent to which it would seriously disrupt the operation of the business.

The Code of Good Practice further explains that safeguards against unfair discrimination should be implemented throughout the full cycle of employment – from recruitment to promotions and termination of employment.¹³³

¹²⁴ Item 10(1) of the *Dismissal Code*.

¹²⁵ Item 10(4) of the *Dismissal Code*. See also *Free State Consolidated Gold Mines (Operations) Bpk v Labuschagne* 1999 ILJ 2823 (LAC).

¹²⁶ Item 10(2) of the *Dismissal Code*.

¹²⁷ *Standard Bank Ltd v CCMA & Others* [2008] 4 BLLR 357.

¹²⁸ Section 1 of the *Employment Equity Act* determines that designated groups that must enjoy the benefit of affirmative action are black people, women, and persons with disabilities.

¹²⁹ Section 6 of the *Employment Equity Act*, 55 of 1998.

¹³⁰ Item 6 of the Code of Good Practice. The Code provides examples of reasonable accommodation. This could entail the adaptation of computer hard- and software, the provision of training and evaluation material, and amendments to work time and leave. See also C Ngwenya 'Equality for people with disabilities in the workplace: an overview of the emergence of disability as a human rights issue' 2004 *Journal for Juridical Science*, p179.

¹³¹ Pretorius J., L., Klinck M., E., & Ngwenya, C., G., *Employment Equity Law*, 2012, 7 – 21.

¹³² Item 6 of the Code of Good Practice.

¹³³ Item 6 of the Code of Good Practice.

Reasonable accommodation measures may include:

- » Making the workplace more accessible according to the person's needs, such as through the removal of physical barriers. Existing facilities may be adapted to make them accessible, e.g. building a ramp to ensure wheelchair access and by making toilets accessible. Lifts should be equipped with special numbering for blind persons. Very often, only minor adjustments are necessary to make a disabled person's workplace accessible and to ensure that he or she is an independent employee.



Access to information and technology is very important. This includes adapting existing or acquiring new equipment, e.g. computer hardware and software. Visually impaired persons may require voice input/output software or magnifying software. Excellent hearing aids are available on the market today that increase a hearing impaired person's ability to communicate.



- » If the job requires action to be taken in response to a signal or sign and the relevant sense is impaired, for example vision, the signal may be converted for another sense and a sound may be used instead. Likewise, in the case of hearing impaired persons, a sound can be replaced with a flashing signal light. These modifications are usually easily incorporated into, or added to, existing machines.



- » Re-organising workstations to ensure that persons with disabilities can work effectively and efficiently, for example by adjusting work schedules if necessary.



- » Changing training and assessment materials and processes, e.g. by providing training materials on request in electronic format, braille or on tape for persons with visual disabilities.

When is an employer obliged to provide reasonable accommodation?

The obligation to reasonably accommodate persons with disabilities may arise when an applicant or employee voluntarily discloses a disability-related accommodation need, or when such a need is self-evident to the employer. The employer should consult the employee and, where reasonable and practical, also consult technical experts for advice on how to adequately address the need and to provide an appropriate solution.

**Guidelines for people with disabilities when reasonable accommodation is required:**

- » As an employee or a job applicant you should be able to explain in your own words the type of accommodation that you require relating to the specific nature, degree, and severity of your disability.
- » Be courageous enough to ask for accommodation if you should require any.
- » It is your protected right to ask for accommodation at any stage of the employment process.
- » Make the final decision about the type of accommodation that you require, but be responsible enough to know that it must be a viable option for both yourself and the employer.



FREQUENTLY ASKED QUESTIONS

When does the duty to reasonably accommodate arise?

The employee asks for an accommodation of some kind, either formally or informally. Sometimes, however, the employer begins to suspect that an accommodation is required.

Is there a process that employers must follow when trying to reasonably accommodate an employee with a disability?

Once the employer has determined that there is an obligation to accommodate the employee, they should work with the employee to identify possible reasonable accommodations. This process will generally include the following steps:

- i) **Acquiring necessary information:** you will need reliable information about how the condition affects work and what treatment, technologies, or other forms of assistance might reduce or eliminate the conflict between the employee's prohibited grounds related need and the workplace requirements. You may also find it useful to get other information from the employee regarding the employee's qualifications, abilities, and self-imposed limitations (e.g. willingness to relocate or commute).
- ii) **Considering possible options:** Your first option for consideration should be accommodating the employee in their existing position. You will have to consider whether the position can be modified by removing duties the employee cannot perform and, in certain circumstances, you may have to consider shifting job responsibilities between employees. For example, a co-worker may be asked to assume some of the duties of an employee with disability while the employee with disability may be asked to perform some of their co-worker's duties provided this is within their capabilities. You may also have to consider changing shift schedules, allowing an employee more frequent breaks from repetitive tasks, temporary re-assignment, including temporary light duties, or a graduated return to work.
- iii) **Including relevant parties:** you should meet with, or at least exchange information with the employee (and union, where appropriate) on a regular basis. It is very important to keep the employee "in the loop" so that the employee both feels included and that the accommodation is important to the employer.
- iv) **Timeliness:** while the time required to conduct the accommodation inquiry will necessarily vary considerably from situation to situation, the employer may be liable for failing to meet its duty to accommodate if there is delay or inaction on the part of management.

Do employers have to provide transport to and from work as an accommodation?

An employer is required to provide the reasonable accommodations that eliminate barriers in the work environment only, not those that eliminate barriers outside of the work environment. Therefore, an employer would not be required to provide transportation as a reasonable accommodation for a commute to work, unless the employer generally provides transportation for its employees.

Do employers have to provide parking as an accommodation?

Parking is considered a benefit of employment. Employers must make reasonable accommodations that enable employees with disabilities to enjoy equal benefits of employment. Therefore, if an employer provides parking for all employees, then it must provide parking for employees with disabilities, unless it would pose an “undue burden” to do so.

What is an “undue burden”?

An employer is required to provide reasonable accommodation unless it is an “undue burden”. Only activities which require “significant or considerable difficulty or expense and that would substantially harm the viability of the enterprise”, including “the extent to which it would seriously disrupt the operation of the business” are considered undue burden. Financial expense or inconvenience is not undue burden, although cost may be one consideration in determining the most suitable reasonable accommodation. In fact, the Code of Good Practice on the Employment of People with Disabilities encourages employers to seek the most cost-effective means to provide reasonable accommodation. Identifying reasonable accommodation that limits financial expense but provides the same impact as far as eliminating a specific barrier to employment may be acceptable. However, failing to provide reasonable accommodation based solely on expense may not fulfil the criteria for undue burden.

Medical and psychometric assessments

Medical and psychological testing should comply with the requirements of the EEA and must be relevant and appropriate to the work for which the person is being tested. Psychometric tests must be valid and reliable, must be able to be applied fairly to all workers, and may not be biased against any worker or group.

Medical testing to determine the health status of a person should only be carried out after the employer has established that the person is competent to perform the essential job functions.

Health and safety

According to the Occupational Health and Safety Act 85 of 1993, the employer must provide and maintain a working environment that is safe for all employees. The needs of employees with disabilities must be catered for by the employer. Evacuation procedures should take into account any specific or additional measures to ensure that an employee with a disability is safely evacuated from a building or work site during emergencies.

Retention

The employer is required to ensure the retention of existing staff with disabilities through rehabilitation, training, or other appropriate measures. Where an existing employee becomes disabled, the employer must ensure that the employee remains in his/her job before considering alternatives, for example re-deployment. Based on operational requirements, the employer must give objective consideration to requests from employees with disabilities for reduced, part-time, or alternative duties.



Employee's compensation



An employee may sustain a partial, temporary, or permanent disability in the course of his/her employment and may require assistance from the employer to access compensation. Such an employee may be entitled to compensation in terms of the Compensation for Occupational Injuries and Diseases Act 130 of 1993.

The main objective of the Compensation Fund is to provide for compensation for disablement caused by occupational injuries or diseases, sustained or contracted by workers during the course of their work, or for death resulting from such injuries or diseases.

Employees must report all workplace accidents to the Compensation Fund in terms of the law. The nearest office of the Department of Labour should be contacted for assistance.

If an employee has a temporary disability (an injury that gets better), an employee should receive 75% of his or her salary for the time that he/she is unfit for duty.

If an employee has a permanent disability (a disability for the rest of the employee's life) an assessment of the disability will be done in accordance with the Compensation for Occupational Injuries and Diseases Act. If the disability is assessed to be 30% or less, a once-off lump sum payment is made for the injury.

If the disability assessed to be more than 30%, the employee will receive a monthly pension for life. The amount of this pension is calculated on the employee's salary at the time of the accident, the percentage of disability and the benefits applicable at the time of the accident.



Section 5

Employment equity
planning in respect of
people with disabilities



As discussed above, section 13 of the EEA states that, “every designated employer must, in order to achieve employment equity, implement affirmative action measures for people from designated groups”. The Code of Good Practice on Preparing, Implementation and Monitoring of Employment Equity Plans sets out a ten-step plan to preparing and implementing an Employment Equity Plan. This section gives the employer practical strategies on using the ten-step process to prepare and implement an employment equity plan with regard to persons with disabilities. It also showcases how employers in other countries are implementing affirmative action for persons with disabilities.

In developing an employment equity plan for persons with disabilities the following must be considered.¹³⁴



Step 1: Assigning responsibility

Responsibility to spearhead disability equality in the workplace

As a first step in the preparation phase of the employment equity plan for persons with disabilities the employer, according to the Code of Practice on Preparing, Implementation and Monitoring of Employment Equity Plans, must assign one or more senior managers to initiate and steer the affirmative action process. Such a person should be a permanent employee, and be provided with the necessary executive authority and means including an appropriate budget and access to required resources, to drive the process and implement statutory duties.¹³⁵ The appointee has to report to the Chief Executive Officer (CEO) of the company.

The employer can either assign someone who has comprehensive knowledge about the rights of employees with disabilities specifically to spearhead the preparation, implementation, and monitoring of equity plans regarding employees with disabilities or ensure that the person/people already assigned to head affirmative action in the company irrespective whether they have a disability or not, acquire further knowledge on disability management in terms of employment equity.¹³⁶

The role of senior managers as change leaders

Without dedication to realising the rights of persons with disabilities in the workplace by senior managers and senior staff, attempts to achieve employment equity for persons with disabilities will fail. Line managers, in particular, play a crucial practical role in promoting a disability-inclusive work environment as they have direct day-to-day contact with the members of the staff.

¹³⁴ Department of Labour, *Technical Assistance Guidelines on the Employment of People with Disabilities*, 2007.

¹³⁵ This appointment is also described in sec 2 of the User Guide to *Employment Equity Act* as the first step in the preparation phase to an employment equity plan. It is also in the 2014 regulations, specifically included as part of the Director General Assessment form contained in Form Employment Equity Act 7.

¹³⁶ Item 16.2.1. of Technical Assistance Guidelines on the Employment of People with Disabilities (TAG).

The involvement of senior leadership is important for a number of reasons

- » It creates a sense of urgency within the organisation around the issue of disability and shows that the company is genuinely concerned about the issue.
- » When organisation leaders spearhead the effort to create a workplace that is inclusive to persons with disabilities by dedicating adequate time and resources, an increasing number of people in the organisation will buy into the idea.
- » Senior leadership sets the standard for others and plays a critical role in promoting the rights of persons with disabilities by ensuring that disability-related policies are implemented and ensuring that the inclusion and accommodation of persons with disabilities in the workplace are seen as key strategic priorities.

Collective responsibility to champion disability inclusion in the workplace

To achieve real progress in creating equal opportunities and the equal representation of persons with disabilities in the workplace, commitment to employment equity by not only top management but board members and employees alike is crucial. Everyone must take part so as to incorporate disability inclusion into the daily culture of the business.

Backing of the Board of Directors

Having board members who are actively involved and committed to creating equal opportunities for persons with disabilities in the workplace helps turn disability policies into practice. The board of directors can play an oversight role by insisting on regular progress reports containing accurate statistics that show how the workforce is changing. The active involvement of board members in disability issues will also show that equal opportunity and diversity lie at the heart of the organisation's plans for the future.

Employees as champions of inclusion

True inclusion of persons with disabilities requires employee buy-in. This is particularly so as persons with disabilities may require additional support from colleagues in their work. There is therefore a need to encourage employees to make efforts to break down barriers that hinder persons with disabilities from actively participating in the workplace and to foster a work environment that supports diversity and creates a culture where everyone feels valued.¹³⁷

¹³⁷ Pretorius, J., L., Klinck, M., E., & Ngwena, C., E., *Employment Equity Law*, 2012.



The L'Oréal Group came up with an initiative that motivates its employees to unite and take concrete steps to achieve its disability agenda.

L'Oréal Group-Disability Initiatives Trophies¹³⁸

The L'Oréal Group is the world's largest cosmetic company with its headquarters in France and subsidiaries around the world, including in South Africa. L'Oréal is dedicated to disability inclusion and has implemented a number of initiatives endorsed by senior management to support the inclusion of disability in its global workforce. The Disability Initiatives Trophies is one such initiative launched in 2008. Held every two years, the initiative is an internal competition in which the Group's various subsidiaries from over 60 countries come together to share their success stories about local disability inclusion and learn from each other. During this initiative the Group takes time to recognise the efforts made by the many subsidiaries and awards such effort. By awarding performing employees in subsidiaries, L'Oréal sends the message that it will reward those within the company who aim to advance its diversity and disability inclusion strategies. The internal competition incentivises the different L'Oréal subsidiaries to take concrete steps that support employees and consumers with disabilities. L'Oréal has therefore been able to advance its disability agenda by engaging its employees in various subsidiaries to unite and take concrete steps to achieve its disability agenda. The event is led directly by the company's CEO and conducted in the presence of senior management. The Commitment from the CEO sends an important signal to the staff that the company is serious about its commitment to including persons with disabilities.



Step 2: Communication and awareness raising

In order for everyone in the organisation to be effectively involved, the employer must ensure that everyone understands the rights of persons with disabilities in the EEA as well as their role and responsibility in terms of the Act. The second step, therefore, entails communication, awareness raising, and training of all employees on the EEA. Employees should be informed of the contents of the Act with reference to persons with disabilities. Employees also need to be informed of the employer's intention to formulate and implement an employment equity plan with regard to persons with disabilities and the process the employer is obliged to follow in terms of Chapter III of the Act. The employees must also be made aware of the need for and importance of participating in the process.¹³⁹ Employers should ensure that all such communications, training and awareness raising is accessible to employees with disabilities through the provision of reasonable accommodation so as to ensure participation of all employees.¹⁴⁰

It is encouraged that at this stage managers undergo diversity management and related skills training, which ideally covers issues such as what constitutes direct and indirect discrimination of employees with disabilities; when does discrimination as a result of inaction and victimisation arise as well as reasonable accommodation.¹⁴¹ The employer must strive to ensure that all employees have the knowledge and support they require to fulfil their obligations under the EEA.

¹³⁸ Pretorius, J., L., Klinck, M., E., & Ngwena, C., E., *Employment Equity Law*, 2012.

¹³⁹ Pretorius, J., L., Klinck, M., E., & Ngwena, C., E., *Employment Equity Law*, 2012, 10 – 14.

¹⁴⁰ Item 16.2 Technical Assistance Guidelines on the Employment of People with Disabilities (TAG).

¹⁴¹ Pretorius, J., L., Klinck, M., E., & Ngwena, C., E., 2012, 10 – 14.

Debunking myths and attitudes about persons with disabilities in the workplace

Many false assumptions, prejudices, myths, and misconceptions concerning people with disabilities in the workplace still persist. This often creates attitudinal barriers which hinder the effectiveness of affirmative action strategies developed to include persons with disabilities in the workplace and perpetuates unfair discrimination against employees with disabilities. Many stereotypes are not a result of malice, but rather lack of awareness and knowledge, often the result of a particular set of social and historical circumstances. Affirmative action will not yield fruits if the institutional prejudices, unconscious bias, and inertia in attitudes against employing people with disabilities are not addressed. Some of the common attitudinal barriers against employees with disabilities face are listed below.



Common attitudinal barriers employees with disabilities face include:¹⁴²

Inferiority: The employee is seen as a 'second-class citizen'

Pity: People feel sorry for the employee and are patronising as a result

Hero Worship: People consider a person with a disability living independently and who is able to work to be 'special'

Diminished Expectation: The employee is dismissed as incapable because of his or her disability. Disability is seen to imply stupidity or slowness. People with disabilities are perceived to be able to do only basic unskilled jobs

The Spread Effect: People assume that the employee's disability affects his or her other senses. This often results in a physical disability being equated with a mental disability

Stereotypes: People make both positive and negative generalisations about disabilities. One such stereotype is that people with disabilities have higher levels of absenteeism from work

Backlash: People believe the employee is being given an unfair advantage because of his or her disability

Denial: People may not believe that hidden/invisible disabilities are legitimate and therefore do not necessitate accommodations

Fear: People are afraid they will offend an employee with a disability by doing or saying the wrong thing and avoid the employee as a result

Drain on Company Resources: People with disabilities are perceived to require higher employment and training costs; higher workers compensation and safety costs and always need expensive and high-tech equipment and are therefore a drain on company resources

Reduced Productivity: It is assumed that people with disability require more support in the workplace which will reduce productivity of others

Employers must promote an awareness and understanding of disability among staff and management and work towards eliminating the attitudinal barriers faced by persons with disabilities in the workplace. Employers and HR professionals should educate themselves and their employees during the awareness raising stage about disability issues and should adopt measures to ensure that the perpetuation of stereotypes and stigma is not being reinforced in the workplace.

¹⁴² See List from the United States Department of Labour for more examples.



Some ideas on how to raise awareness about disability in the workplace from other companies:

- ✓ Create employee resource groups or networks that conduct internal and external awareness raising.
- ✓ Use the international day of persons with disabilities to celebrate employees with disabilities and showcase their abilities.
- ✓ Develop specific guidelines and e-learning modules to assist employees to understand the issues faced by persons with disabilities.
- ✓ Get branches leading in disability inclusion to serve as resources on the employment of persons with disabilities for the entire business network.
- ✓ Design a series of orientation manuals to guide hiring managers in including and accommodating for persons with disabilities.
- ✓ Include disability awareness training in new staff orientation.



Step 3: Consultations

Sec 16(1) (a) and (b) of the EEA requires a designated employer to take reasonable steps to consult¹⁴³ with a representative trade union, employees, and employee representatives throughout the process of developing an employment equity plan. The specific issues requiring consultation are:

- » workplace analysis in terms of sections 19 and 27 of the EEA
- » the preparation and implementation of EE plans in terms of sections 20 and 23
- » the report to the Department of Labour in terms of sections 21 and 22

The employee representatives consulted must reflect both employees with and those without disabilities from across all occupational categories and levels to ensure that the interests of all employees are represented during consultations.

In conducting consultations it is suggested that employers form a consultative forum (or steering committee) or make use of existing organs such as a diversity committee or affirmative action committee.¹⁴⁴ Where the employer chooses to use an existing structure, the employer should take specific steps to promote the representation of employees with different disabilities.¹⁴⁵ In addition, employers should ensure that the representatives with disabilities are provided with such reasonable accommodation they may need in order to participate equitably in the forum.¹⁴⁶

For consultations to be meaningful and effective, it is suggested that the employer takes the initiative of sensitising the employee representative's on the rights of employees with disabilities. It is particularly important that the trade unions be included in these sensitisations. Due to the low visibility of persons with disabilities in the labour force, promoting the employment of persons with disabilities usually is not a top priority among trade unions. The employer can take proactive measures to encourage representative trade unions to protect persons with disabilities who are already in the labour market and also to support measures promoting their entry into the labour market in the private sector by providing relevant training and sensitisation.

¹⁴³ To consult does not mean to agree but attempts should be made to agree or at least include the various viewpoints.

¹⁴⁴ Regulation 8 of the 2014 regulations.

¹⁴⁵ Item 16.2.1 Technical Assistance Guidelines on the Employment of People with Disabilities (TAG)

¹⁴⁶ Item 16.2.1 Technical Assistance Guidelines on the Employment of People with Disabilities (TAG).

Where employees with disabilities are severely underrepresented, as is the case in many companies, the employer is advised to identify local disabled people's organisations in their business area who can participate in consultations in an advisory capacity. Identifying and developing strategic partnerships with local employment agencies will help the organisation achieve its affirmative action goals.



Step 4: Analysis

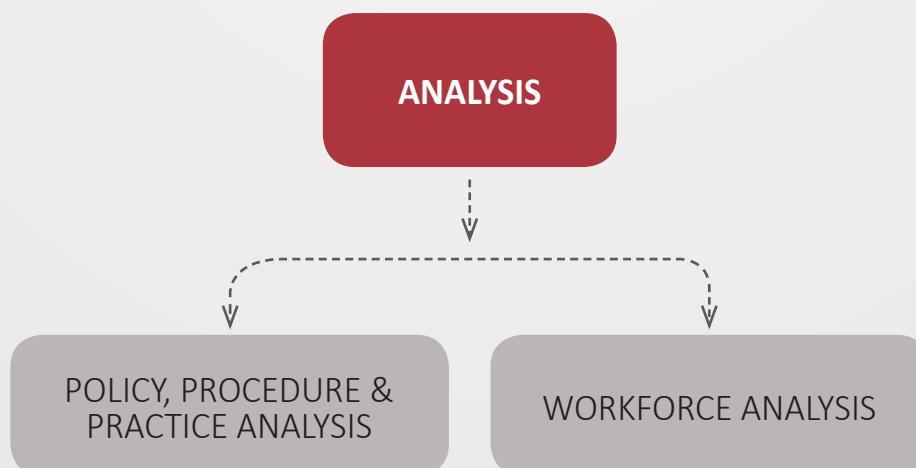
To create an appropriate employment equity plan that will ultimately lead to equitable representation of persons with disabilities in the workforce, the employer must first conduct a two-pronged analysis in accordance with section 19 (1) and (2) of the EEA to identify employment barriers faced by persons with disabilities, as well as the extent of under-representation of persons with disabilities. The employer must:

1

Conduct an analysis of its employment policies, practices and procedures ranging from informal to formal, written documents or followed practices. Promote the implementation of affirmative action measures to eradicate inequalities that were institutionalised by previous political policies.

2

Conduct a workforce analysis and create profiles of its workforce within each occupational category and level.





Structure of analysis

The 2014 Regulations contain a template (Form EEA 2) according to which both the analyses must be undertaken. The template includes:¹⁴⁷

- » A fixed form for the analysis of all employment barriers per policy, procedure and/ or practice and a space to record the proposed affirmative action plans to which narrations should be provided and
- » A picture of the workforce profile per race and gender and a separate picture on disability

Policy, procedure and practice analysis

- » Purpose of the analysis:

The main goal of this analysis is to determine whether the existing framework is responsive to what persons with disabilities need in order to be fully included and accommodated on an equal basis with others in the workplace and, if not, what changes need to be made. This analysis needs to identify barriers, omissions, gaps and inconsistencies in the organisations existing policies, practices and procedures. Identifying these barriers will point to some of the underlying causes of under-representation of persons with disabilities in the organisation as well as assist in deciding on the appropriate affirmative action measures to be instituted. Before the analysis is started the employer should check that everyone understands its purpose.

- » Scope of analysis

It is advised that all permanent and non-permanent employees be included in the analysis. Non-permanent staff, such as interns and apprentices, may assist in identifying barriers experienced by job market entrants. The views of persons with disabilities are important as they are best placed to identify aspects that prevent full employment equity as well as possible solutions. Employers should therefore make a special effort to ensure sufficient participation of persons with disabilities.¹⁴⁸

Methods of identifying barriers

The law does not prescribe a method of identifying barriers, gaps, omissions, and the like in the policies, procedures, and practices. Well thought-through strategies, however, must be used to uncover existing employment barriers.

Some ideas of techniques to establish the existence of barriers include:

Focus group discussions



Questionnaires



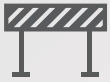
Workshops



The method chosen by the employer should be accessible and be in a language people can understand. Employers should clearly state the confidential nature of the analysis and reassure employees they will not be victimised or fall prey to retaliation for participating in the analysis.

¹⁴⁷ Pretorius, J., L., Klinck, M., E., & Ngwena, C., E., *Employment Equity Law*, 2012, p 10-19.

¹⁴⁸ Ibid. Pages 10-17.



Listed below are some broad questions the employer can use to identify employment barriers that affect persons with disabilities.

- a) What factors in the employment policies, practices and the working environment may affect designated employees adversely, when commencing employment, during employment and upon ending employment, including factors that hamper entry into, advancement in employment and full enjoyment of employment rights as well as subtle forms of discrimination and stereotyping?
- b) Do neutral policies and practices regarding recruitment, selection, selection, pre-employment testing, and job evaluation disproportionately affect persons with disabilities? Do the policies and practice benefit all employees?
- c) Do employment systems such as the manner in which committees and teams are appointed or selected create systemic barriers for employees with disabilities?
- d) Is the policy or practice applied consistently and is it effective in achieving the objective that is set for the policy?
- e) Is there under-representation of persons with disabilities in categories of recruitment, promotion and training and disproportionality in termination (within specific categories) and disciplinary action that can be used as an indication of barriers?



In assessing the policies and practice on *reasonable accommodation* crucial questions in relation to the duty to reasonably accommodate the disability include:

- a) Is there a mechanism for individuals to request accommodation? Do individuals know how the applicable criteria and how to access this mechanism?
- b) Is there a budget in order to address needs of reasonable accommodation? How are monies distributed from this part of the budget?
- c) Are all employees made aware of the need to accommodate disabled employees?
- d) Is there a plan for systematically making buildings, documents and such more accessible?



Standard Bank Disability Policy¹⁴⁹

Standard Bank South African operations (SBSA) are the largest and oldest part of the business and employ just over 27 000 people. While the value of diversity in SBSA has been understood for many years, the promulgation of the Employment Equity Act in 1998 served as a catalyst for developing plans and setting targets for the employment of people from under-represented groups, including people with disabilities. The legislation requires companies to internally audit their current diversity practices and to make necessary improvements. Admittedly for Standard Bank and other companies within the new South African democracy, disability issues have tended to take a backseat to the promotion of racial equality. While the employment of people with disabilities has always been part of the equity agenda in SBSA, it was only in 2013 that the principles and approach underlying this endeavour were codified into a finalised policy on disability.

The formation of its Disability Policy has enabled Standard Bank to drive its diversity and inclusion strategy forward. The ability of managers and employees alike to refer to a standardised set of principles and guidelines regarding disability has fostered both workplace efficiency and fairness. The Standard Bank Disability Policy is intended to 'provide guidance in managing disability in the workplace, and to enable Standard Bank to fulfil its responsibilities in respect of incorporating persons with disabilities into mainstream employment'. The policy is robust; it discusses, in detail, various topics such as: a definition for disability, who is covered under the policy, how to declare a disability, and the process for acquiring reasonable accommodations. The Disability Policy, especially with regard to reasonable accommodation, has informed a much clearer understanding within the organisation of the process to be followed and actions that need to be taken if an employee wishes to apply for reasonable accommodation. Previously, the provision of reasonable accommodation was ad-hoc and depended on the willingness of line managers to fund such accommodations. Persons with disabilities were expected to raise the issue of reasonable accommodation with line managers and engage in negotiations about how to create a more disability-friendly work environment.

Now that there is a standardised policy, as well as a centralised budget, the noise has been taken out of the process and people with disabilities do not feel as if they are a burden or imposition on their workplace. In addition to the Disability Policy, Standard Bank has formalised guidelines on managing employees with disabilities as well as on customers and clients with disabilities. The Guide to Managing Disability in the Workplace serves as a tool to help managers and HR business partners to become more knowledgeable about disability inclusion. The guide is comparable to a training module – providing information on different theories, terminology, and best practices related to disability in the workplace. A section on how disability should be considered in the context of various HR processes helps in the prevention of discrimination in recruiting, on boarding, performance management, and training. Regarding customers and clients, Standard Bank has also produced guidelines for conducting business with people who have disabilities. These guidelines include sections on disability etiquette and interactions with customers, while serving as reinforcement for the organisation's desire to accommodate those with disabilities.

The formation of policies and guidelines regarding disability has provided valuable lessons to Standard Bank about disability inclusion. The creation of a standardised policy targeting disability issues was deemed important by Standard Bank for several reasons. The policy serves as a foundation for legitimation and endorsement from senior structures. In other words, without a formalised policy, senior leadership cannot effectively convey the importance of disability inclusion throughout the enterprise. Managers need to take the management of disability seriously in order for an inclusive culture to become possible. Additionally, Standard Bank realised that the formalisation of disability policies and guidelines

¹⁴⁹ International Labour Office, *Business as unusual: Making workplaces inclusive of people with disabilities*, 2014.

provides employees with a best practice basis to work with. Instead of merely doing ‘something’ to respond to disability issues, managers and employees are provided with the ‘right’ actions to take when managing disability in the workplace.

A final lesson learned by Standard Bank is that dealing with disability in the workplace involves much more than simply buying new equipment. The right amount of time and energy must be put into looking at how the work is structured and having necessary discussions with line managers. An example provided by Standard Bank was its dealing with an employee who had uncontrolled epilepsy and a job that involved climbing ladders frequently. Due to the obvious danger in the employee’s situation, Standard Bank conducted negotiations with the line-manager to help change the nature of the role, which proved to be more complicated than anticipated.

In order to deal with situations like these, Standard Bank recommends that organisations benchmark their current practices for managing disability in order to help understand the issues at hand. In the early stages of managing disability, organisations should codify disability policies and develop centres of expertise to focus on disability issues. While in the beginning it helps to have centralised units focusing on disability, proper management of people with disabilities should, in due course, become part of ‘normal’ HR processes. In its employment equity plan Standard Bank outlines its intention to increase the representation of people with disabilities in its workforce.

Priorities: Making your workplace accessible

For many people with disabilities in South Africa, a common barrier to participating in employment is a lack of accessible buildings or accessible information and communication methods. In order for a workplace to be fully accessible, a work environment must be created that is not only physically but also technologically accessible. Ensuring the workplace is accessible to people with disabilities will maximise productivity by eliminating the barriers which prevent people with disabilities from working to their full potential.

Steps to making workplace physical accessible

It is the employer’s obligation to provide access to buildings, to the worksite, to needed equipment, and to all facilities used by the employees for employees with a disability. The National Building Regulations, the Building Standards Act, and South African Bureau of Standards (SABS) 0400 Code of Practice create accessibility standards for the workplace. Employers must know and comply with these standards to create an accessible workplace for employees.

e) Practical steps

- » Start with assembling a team of individuals to dedicate time assessing, planning and implementing accessibility modifications at your workplace.
- » Seek experts in accessibility to act as consultants for your business.
- » Identify local disabled people’s organisations in your business area that may be able to assist and play an advisory role for your business.
- » Assess the needs of individuals with disabilities in your workplace and include them in the assessment, planning and implementing of accessibility modifications in the workplace.
- » Assess existing conditions in your workplace and determine what changes, if any, need to be made.

Accessibility audit checklist

Below is a self-assessment checklist that your business can use to evaluate the accessibility of the companies’ current business premises and any future office establishments. The checklist will assist in identifying issues that affect the level of access provided by your premises for persons with disabilities. It is not an exhaustive list and employers are advised to refer to the legislation governing accessibility and the built environment and seek expert assistance where appropriate for more guidance.



Accessibility Audit

<i>Travel to site</i>		
Observation: Describe nearest train station, bus stop, distance, location. Are they accessible?		Comment
<i>Car parking</i>		
Are there adequately wide parking spaces, identified with the international sign for wheelchair access, designated for accessible parking?	YES NO	Comment
Is the designated accessible parking space(s) on a level surface and as acceptably close as possible to a main entry door?	YES NO	Comment
Do all employees with disabilities have access to the car park?	YES NO	Comment
<i>Paths of travel to the entrance and exits of building</i>		
Observation: Describe the entrances, entry door, signage (glare/ print/ background)		Comment
Is there a clear and continuous accessible path of travel with no barriers that would make it difficult for a person with disability to navigate (such as steps, steep inclines, escalators, bollards, turnstiles, revolving doors, uneven or loose surfaces, display boards, bins) from the footpath or parking bay to and through the main entrances used by employees?	YES NO	Comment
Is a standard ramp with safety features such as handrails, kerb rails, warning tactile ground surface indicators, level landings provided for adjacent to the main entrance/s?	YES NO	Comment
Apart from the ramp, are there other accommodations provided, e.g. ground surface indicators at the entrance of the building?	YES NO	Comment
<i>Steps and stairs</i>		
In areas where there are stairs, do they have continuous handrails, colour contrasting strips on the leading edge, no open risers, and warning TGSIs at the top and bottom?	YES NO	Comment
In and outside the building, is there an accessible alternative, accessible path of travel, e.g. an elevator?	YES NO	Comment
Where a lift is installed, is it large enough to allow someone using a wheelchair or walking frame to enter and move around?	YES NO	Comment
<i>Signage</i>		
Is there adequate clear signage in accessible formats e.g. braille, TGSIs, tactile signs for persons with visual impairments displayed at the entrance to direct persons with disabilities?	YES NO	Comment
Do the elevator buttons inside and outside the elevator have raised tactile and Braille information and provide audible information telling passengers what floor they are on?		Comment

<i>Conference rooms and work area</i>		
Observation: Describe layout of work area		Comment
Is there a clear accessible path of travel with no steps or other barriers from the main entrance (s) to all work areas and facilities?	YES NO	Comment
Do the design and the layout of the work areas make it easy for persons with disabilities to access all the facilities?	YES NO	Comment
<i>Consider whether:</i>		
The passageways are wide enough for a person using a wheelchair or walking frame to pass by someone else or are there regular passing spaces?	YES NO	Comment
The chairs and tables adjustable or, if fixed, are there spaces for people using wheelchairs?	YES NO	Comment
The doors easily and independently opened by all users (that is, are not heavy with handles that are difficult to manipulate or too high)?	YES NO	Comment
There is good lighting to assist people with a vision impairment to follow the safest pathway and to assist with communication, for example for people who might lip-read?	YES NO	Comment
There is any form of hearing augmentation system in the conference/meeting room?	YES NO	Comment
<i>Accessible toilets</i>		
Are there unlocked accessible toilets for persons with disabilities? Do they have a good circulation space and are they fitted out with grab rails, sinks, mirrors, taps, shelves, coat hooks, and towelling at heights that can be used by people with mobility disabilities?	YES NO	Comment
Is there sufficient signage in accessible format to direct people with disabilities to the toilets?	YES NO	Comment
<i>Fire alarm and emergency exits</i>		
Is the fire escape accessible to persons with disabilities, e.g. is there a flashing light so deaf people are alerted of fire? Is there sufficient space for a wheelchair user?	YES NO	Comment
Does the emergency evacuation procedure in place address the needs of people with disability?	YES NO	Comment
<i>Kitchen and cafeterias</i>		
Is the kitchen accessible? Consider access to the microwave, refrigerator, cutlery, drinking fountains, table, vending machine, etc.	YES NO	Comment
IDENTIFY PRIORITIES		



Tips to minimise costs

To minimise costs a business can make modifications that will encompass a wide range of disabilities and needs, i.e. universal design. Such modifications will effectively eliminate work barriers at minimal cost.

When purchasing accessible services and products there are several affordable vendors and consultants who can help you make the workplace accessible for a reasonable price.

When hiring office space, employers should check whether the building complies with building code requirements for “reasonable accommodation provisions”. Most modern office buildings make provision for toilets for persons with disabilities. Where adaptations are required, these are for the landlord’s account.

Steps to make information technology and electronics accessible in the workplace¹⁵⁰

Inaccessible information technology and electronics inhibit persons with disabilities from performing the essential functions of their jobs and being kept abreast with communications circulating in the company.

Employers should examine the following areas to ensure accessibility to employees with disabilities. Where an IT department exists, they should be tasked with the assessment of:

- » web-based intranet and internet information and applications
- » email and other electronic correspondence
- » software applications and operating systems
- » telecommunications products
- » video and multimedia products
- » desktop and portable computers
- » self-contained, closed products such as calculators, copier machines, and printers
- » online job applications

Practical steps

1

Start by assessing the electronic and information technology accessibility of your business. Consider immediate needs and forecast future needs for all current and prospective employees.

2

Locate a local resource to work with that has expertise in IT accessibility. Work with them during the planning and implementation phases of needed modifications.

¹⁵⁰ Please read and use the Accessible Communication: Workplace Guide. Available from: http://www.eduweb.vic.gov.au/edulibrary/public/hr/equalop/Accessible_Communication_Guide.doc.



Human resource employment checklist for hiring persons with disabilities

Don't's

- » Don't assume that persons with disabilities are unemployable.
- » Don't assume that persons with disabilities lack the necessary education and training for employment.
- » Don't assume that persons with disabilities do not want to work.
- » Don't ask if a person has a disability during an employment interview.
- » Don't assume that certain jobs are more suited to persons with disabilities.
- » Don't assume that persons with disabilities can't do a certain job.
- » Don't assume that your current management will need special training to learn how to work with persons with disabilities.
- » Don't assume that the cost of business insurance will increase as a result of hiring persons with disabilities.
- » Don't assume that the work environment will be unsafe if you employ persons with disabilities or an employee sustains a disability on the job.
- » Don't assume that reasonable accommodations are expensive.
- » Don't make medical judgments.
- » Don't assume that your workplace is accessible.

Do's

- » Do learn where to contact and recruit persons with disabilities.
- » Do learn how to communicate with persons with disabilities.
- » Do ensure that your applications and other company forms do not ask disability-related questions and that they are in formats that are accessible to persons with disabilities.
- » Do consider having written job descriptions that identify the essential functions of the job.
- » Do ensure that requirements for medical examinations do not discriminate and eliminate persons with disabilities.
- » Do provide reasonable accommodations that the qualified applicant will need to compete for the job.
- » Do treat persons with disabilities the same way you would treat any applicant or employee.
- » Do relax and make the applicant with a disability feel comfortable.
- » Do develop procedures for maintaining and protecting confidential medical records.
- » Do train supervisors about how to make reasonable accommodations.



Section 6

Personal narrative



Tshepo's story

Tshepo, 32, became deaf at the age of 6 after contracting meningitis. He attended special school for a few years but dropped out because his family could not afford the transport costs, Tshepo needed to take two taxis to and from school. His father also did not believe that he would benefit from such schooling and the money was better spend on educating his siblings who would ultimately take care of him. As Tshepo did not finish school he can only use rudimentary sign language his family and neighbours can understand. Despite numerous applications, Tshepo has been unable to find work in the private sector and does odd jobs for neighbours and the local church gardening, cleaning to earn a bit of money. He would however like to be employed in a construction company. Tshepo says:

'You see you are looked down on in society because you have a disability. People don't see your potential or see you can contribute, they see you as a burden. People who don't have any disability don't understand and feel what you go through. People also look down on because you don't have anything, you have no money but how can I have money when I cannot find work. Without money your choices are limited...you can't choose where to live, what to eat or wear.

It is hard to get work without matric and being deaf. If you reveal you are deaf when applying for a job and you have no matric no one will call you for an interview. I even approached several people for work but see you as another problem. In my advocacy class they taught us that the law says employers must not discriminate against employees with disabilities but employers do not want to employ you because they think you cannot get the work done.

There are so many problems in trying to get a job. I am struggling to see who is advertising jobs adverts, the job adverts are in newspapers and I am told on the internet but I cannot read because I never finished school so I have to depend on my family to assist me. It is also hard to for me to approach prospective employers and ask for employment as they do not understand sign language and I often get lost when using taxis as I cannot ask for directions.'

Tshepo's story is not unique. It is the story of many persons with disabilities in the country.

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