



Government Gazette Staatskoerant

REPUBLIC OF SOUTH AFRICA
REPUBLIEK VAN SUID AFRIKA

Vol. 605

9 November 2015
November

No. 39383

N.B. The Government Printing Works will not be held responsible for the quality of "Hard Copies" or "Electronic Files" submitted for publication purposes

ISSN 1682-5843



9 771682 584003

39383



AIDS HELPLINE: 0800-0123-22 Prevention is the cure

DISCLAIMER:

Government Printing Works reserves the right to apply the 25% discount to all Legal and Liquor notices that comply with the business rules for notice submissions for publication in gazettes.

National, Provincial, Road Carrier Permits and Tender notices will pay the price as published in the Government Gazettes.

For any information, please contact the eGazette Contact Centre on 012-748 6200 or email info.egazette@gpw.gov.za

Contents

<i>No.</i>		<i>Gazette No.</i>	<i>Page No.</i>
GOVERNMENT NOTICES • GOEWERMENTSKENNISGEWINGS			
Labour, Department of/ Arbeid, Departement van			
1085	Employment Equity Act (551998): Code of Good Practice on Employment of Persons with Disabilities	39383	4

GOVERNMENT NOTICES • GOEWERMENTSKENNISGEWINGS

DEPARTMENT OF LABOUR**NO. 1085****09 NOVEMBER 2015****EMPLOYMENT EQUITY ACT 55 OF 1998****CODE OF GOOD PRACTICE ON EMPLOYMENT OF PERSONS WITH
DISABILITIES**

Notice is hereby given in terms of section 54 of the Employment Equity Act 55 of 1998, that the Minister of Labour, having been advised by the Commission for Employment Equity, has replaced the Code of Good Practice on employment of people with disabilities published under Government Notice 1345 in Government Gazette 23702 of 19 August 2002 as corrected by Government Notice 1064 in Government Gazette 23718 of 19 August 2002, as set out in this schedule.

**M N Oliphant****Minister of Labour***21/10/2015*

**EMPLOYMENT EQUITY ACT NO 55 OF 1998
CODE OF GOOD PRACTICE ON THE EMPLOYMENT OF
PERSONS WITH DISABILITIES**

CONTENTS	PAGE
1. FOREWORD	2
2. AIM OF THE CODE	3
3. STATUS OF CODE	3
4. LEGAL FRAMEWORK	4
5. DEFINITION OF PERSONS WITH DISABILITIES	4-6
6. REASONABLE ACCOMMODATION FOR PERSONS WITH DISABILITIES	6-8
7. RECRUITMENT AND SELECTION	8-10
8. MEDICAL AND PSYCHOLOGICAL TESTING AND OTHER SIMILAR ASSESSMENTS	11-12
9. PLACEMENT	12
10. TRAINING AND CAREER ADVANCEMENT	12
11. RETAINING PERSONS WITH DISABILITIES	13
12. TERMINATION OF EMPLOYMENT	13
13. WORKERS' COMPENSATION	13
14. CONFIDENTIALITY AND DISCLOSURE OF DISABILITY	14-15
15. EMPLOYEE BENEFITS	15
16. EMPLOYMENT EQUITY PLANNING IN RESPECT OF PERSONS WITH DISABILITIES	15-17
17. EDUCATION AND AWARENESS	17
18. MONITORING AND EVALUATION	17-8

1. FOREWORD

The **Employment Equity Act 55 of 1998 (the Act)** constitutes one of the key legislative and policy interventions within the ethos of South Africa's constitutional dispensation. It gives effect to the provisions relating to the implementation of the policies and practices that result in the promotion of equality and diversity in the workplace. Focus is placed on eliminating unfair discrimination and promoting the equitable representation of persons with disabilities in the workplace. Discrimination is a socially constructed action and can thus be avoided by ensuring better knowledge, understanding and awareness about disabilities and the challenges encountered by persons with disabilities.

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

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

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

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

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

2. AIM OF THE CODE

- 2.1 The Act protects persons with disabilities against unfair discrimination in the workplace and directs employers to implement affirmative action measures to redress discrimination.
- 2.2 The Code is a guide for employers and employees on promoting equal opportunities and fair treatment for persons with disabilities as required by the Act.
- 2.3 The Code is intended to help employers and employees understand their rights and obligations in order to promote certainty and reduce disputes to ensure that persons with disabilities can enjoy and exercise their rights at work.
- 2.4 The Code is intended to help create awareness of the contributions persons with disabilities can make and to encourage employers to fully use the skills of such persons.
- 2.5 It is also intended to ensure that all employers identify, respect and promote the rights of any person with a disability, including the right to dignity, particularly pertaining to work and employment.¹

3. STATUS OF THE CODE

- 3.1 The Code is neither an authoritative summary of the law, nor does it create additional rights and obligations. It does however obligate employers with the responsibility to affirm the rights of persons with disabilities in the workplace, and further serves as a guide for any Court or tribunal to consider when interpreting or applying the Act.
- 3.2 The Code should be read in conjunction with the Act, its regulations and any other relevant Code of Good Practice issued by the Minister of Labour.
- 3.3 The Code must be implemented in a manner that is sensitive to the fact that every person is unique and each situation may differ. It, therefore, follows that where reasonable and justifiable, the Code should be adapted to give effect to its intention.
- 3.4 Employers, employees and their organizations must use the Code to develop, implement and refine disability equity policies and programmes to suit the needs of their own workplaces.

¹ UN Convention on the Rights of Persons with Disabilities, Article 27 - Work and employment.

4. LEGAL FRAMEWORK AND GUIDING PRINCIPLES

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

Key guiding principles of the Code²

- a) Human rights and the respect for inherent dignity;
- b) Independence and autonomy of individuals;
- c) Non-discrimination;
- d) Effective participation and inclusion in society;
- e) Respect for difference and diversity;
- f) Equality of opportunity; including equitable representation;
- g) Accessibility;
- h) Gender equality;
- i) Mainstreaming; and
- j) Health and safety.

5. DEFINITIONS AND INTERPRETATION

5.1 Discrimination on the basis of disability

"Discrimination on the basis of disability" means any distinction, exclusion or restriction on the basis of disability which has the purpose or effect of impairing or nullifying the recognition, enjoyment or exercise, on an equal basis with others, of all human rights and fundamental freedoms in the political, economic, social, cultural, civil or any other field. It includes all forms of discrimination, including denial of reasonable accommodation.³

5.2 Definition of persons with disabilities for participation in broader society

The UN Convention on the Rights of Persons with Disabilities of 2007 adopts a broad definition for general international guidance to ensure the full, equal and effective participation of persons with disabilities in society.⁴

5.3 Definition of persons with disabilities involving work and employment

The Act includes a definition for persons with disabilities to ensure their full, equal and effective participation on matters pertaining to work and employment.⁵

² Adapted from Article 3 on general principles from the UN Convention on the Rights of Persons with Disabilities, 2007.

³ Article 2 of the UN Convention on people with Disabilities, 2007.

⁴ "Persons with disabilities" 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.

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

Persons are considered as persons with disabilities if they:

- (a) have a physical or mental impairment;
- (b) which is long term or recurring; and
- (c) which substantially limits their prospects of entry into, or advancement in employment.

5.3.1 Impairment

An impairment may either be physical or mental or a combination of both.

- (a) **'Physical' impairment** means a partial or total loss of a bodily function or part of the body. It includes sensory impairments such as being deaf, hearing impaired, or visually impaired.
- (b) **'Mental' impairment** means a clinically recognized condition or illness that affects a person's thought processes, judgment or emotions.

5.3.2 Long-term or recurring

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

5.3.3 Substantially limiting

- (a) Impairment is substantially limiting, if in its nature, duration or effects it substantially limits the person's ability to perform the essential functions of the job for which they are being considered.
- (b) Some impairments are so easily controlled, corrected or lessened, that they have **no limiting effects**. For example, a person who wears spectacles or

⁵ "people with disabilities" means people who have a long-term or recurring physical or mental impairment which substantially limits their prospects of entry into, or advancement in, employment.

contact lenses does not have a disability unless even with spectacles or contact lenses the person's vision is substantially impaired.

- (c) For reasons of **public policy**, certain conditions or impairments may not be considered disabilities. These include but are not limited to –
- (i) sexual behaviour disorders that are against public policy;
 - (ii) self-imposed body adornments such as tattoos and body piercing;
 - (iii) compulsive gambling, tendency to steal or light fires;
 - (iv) disorders that affect a person's mental or physical state if they are caused by current use of illegal drugs or alcohol, unless the affected person is participating in a recognized programme of treatment;
 - (v) normal deviations in height, weight and strength; and conventional physical and mental characteristics and common personality traits.
- (d) An assessment may be done by a suitably qualified person if there is uncertainty as to whether impairment [may be] is substantially limiting.

6. REASONABLE ACCOMMODATION⁶ FOR PERSONS WITH DISABILITIES

- 6.1 Employers must reasonably accommodate the needs of persons with disabilities.⁷ The **aim of the accommodation** is to reduce the impact of the impairment of the person's capacity to fulfil the essential functions of a job.
- 6.2 Employers must assess and adopt **effective measures**, both in terms of cost and quality that is consistent with removing the barriers to perform the job and to enjoy equal access to the benefits and opportunities of employment.
- 6.3 Reasonable accommodation requirement **applies to** applicants and employees with disabilities who are suitably qualified for the job, which may be required –
- (a) during the recruitment and selection processes;
 - (b) in the working environment;
 - (c) in the way work is usually done, evaluated and rewarded; and

⁶ UN Convention on the Rights of Persons with Disabilities, 2007 defines "Reasonable accommodation as "necessary and appropriate modification and adjustments not imposing a disproportionate or undue burden, 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."

⁷ Section 1 of the Act defines reasonable accommodation as "any modification or adjustment to a job or to the working environment that will enable a person from a designated group to have reasonable access to or participate or advance in employment".

- (d) in the benefits and privileges of employment.
- 6.4 The obligation to make reasonable accommodation may arise when an applicant or employee **voluntarily discloses** a disability related accommodation need or when such a need is **reasonably self-evident** to the employer.
- 6.5 Employers must also accommodate employees when work or the **work environment changes or impairment varies** which affects the employee's ability to perform the essential functions of the job.
- 6.6 The employer **must consult** the employee, and where reasonable and by agreement with the employee, acquire the services of technical experts to establish appropriate mechanisms to accommodate the employee.
- 6.7 The **particular accommodation** will depend on the individual, the degree and nature of impairment and its effect on the person, as well as on the job and the working environment.
- 6.8 Reasonable accommodation may be **temporary or permanent**, depending on the nature and extent of the disability.
- 6.9 Reasonable accommodation includes but is not limited to –
- (a) adapting existing facilities to make them accessible;
 - (b) adapting existing equipment or acquiring new equipment including computer hardware and software;
 - (c) re-organizing workstations;
 - (d) changing training and assessment materials and systems;
 - (e) restructuring jobs so that non-essential functions are re-assigned;
 - (f) adjusting working conditions, including working time and leave; and
 - (g) providing specialized supervision, training and support in the workplace.
- 6.10 An employer may evaluate **work performance** against the same standards as other employees; however, the nature of the disability in certain circumstances may require an employer to adapt the way in which performance is measured.
- 6.11 The employer need not accommodate a qualified applicant or an employee with a disability if this would impose an **unjustifiable hardship** on the business of the employer.

- 6.12 ‘Unjustifiable hardship’ is action that requires **significant or considerable difficulty or expense**. This involves considering, amongst other things, the effectiveness of the accommodation and the extent to which it would seriously disrupt the operation of the business.
- 6.13 An accommodation that imposes an unjustifiable hardship for one employer at a specific time may not be so for another or for the same employer at a different time.

7. RECRUITMENT AND SELECTION

7.1 Recruitment

- 7.1.1 When employers recruit they must –
- (a) identify the **inherent requirements** of the vacant position in terms of the essential functions of the job;
 - (b) **describe clearly** the necessary skills and capabilities required for the job;
 - (c) **set reasonable criteria** for selection, preferably in writing, for job applicants for such vacant positions.
- 7.1.2 The ‘**inherent requirements of the job**’ are those requirements the employer stipulates as necessary for a person to be appointed to the job, and are necessary in order to enable an employee to perform the essential functions of the job.
- 7.1.3 **Application forms** should focus on identifying an applicant’s ability to perform the inherent requirements of the job.
- 7.1.4 **Advertisements** should be accessible to persons with disabilities and, where reasonable and practical, circulated to organizations that represent the interests of persons with disabilities.
- 7.1.5 Advertisements or notices must include **sufficient detail** about the essential functions and the inherent requirements of the job so that potential applicants with disabilities can be able to make an informed decision.
- 7.1.6 Employers may not include criteria that is not necessary to perform the essential functions of the job, as selection based on non-essential functions may unfairly exclude persons with disabilities.
- 7.1.7 On request and if reasonable in the circumstances, notices and advertisements should be provided in a **format appropriate** to persons with disabilities such as large print, Braille, or audiotape.

7.2 Selection

- 7.2.1 Subject to reasonable accommodation, employers should apply the same criteria to test the ability of persons with disabilities as are applied to other applicants.
- 7.2.2 The purpose of the selection process is to assess whether or not the applicant is **suitably qualified**.⁸ This may require a two-stage process if the applicant has a disability, which includes:
- (a) Determining whether an applicant is suitably qualified;
 - (b) Determining whether a 'suitably qualified applicant' needs any accommodation to be able to perform the essential functions of the job.
- 7.2.3 When assessing if an applicant is suitably qualified, an employer may not **request information** about actual or perceived disability from a previous employer or third party unless with the written consent of the applicant.
- 7.2.4 Employers must **monitor** their criteria for selection. If these criteria tend to exclude people with disabilities, they must be reviewed to ensure that they do not unfairly discriminate against persons with disabilities.

7.3 Interviews

- 7.3.1 Selection interviews must be **objective and unbiased**. Interviewers must avoid assumptions about persons with disabilities.
- 7.3.2 If the applicant has **disclosed a disability or has a self-evident disability**, the employer must focus on whether the applicant is suitable qualified for the work rather than on any actual or presumed disability.
- 7.3.3 Interviewers should ask applicants referred to in 7.3.2 above, to indicate how they would perform the essential functions or work and if reasonable accommodation is required.
- 7.3.4 If the employer **knows in advance** that the applicant has a disability, or if the applicant has a self-evident disability, the employer should if necessary, make reasonable accommodation during the interview.

⁸ The Act provides for '*suitably qualified person*' in sub sections 20(3), 20(4), and 20(5).

Sub section 20 (3) states that a person may be suitably qualified for a job as a result of any one of, or any combination of that person's – (a) formal qualifications; (b) prior learning; (c) relevant experience, or (d) capacity to acquire, within a reasonable time, the ability to do the job.

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

7.4 Conditional Job Offers

- 7.4.1 If an applicant with a disability is suitably qualified, an employer may make a job offer **conditional on medical or functional testing** to determine an applicant's actual or potential ability to perform the essential functions of a specific job.
- 7.4.2 The testing must comply with the statutory requirements and must determine **if the applicant is able to perform** the essential functions of the job, with or without reasonable accommodation.
- 7.4.3 A conditional job offer may only be made to one person at a time, not to all applicants with disabilities that may have applied for the job.
- 7.4.4 The employer may withdraw the job offer if the testing shows that—
- a) Reasonable accommodation requirements would create **unjustifiable hardship**; or
 - b) There is an objective justification that relates to the inherent requirements of the job; or
 - c) There is an objective justification that relates to health and safety.

7.5 Terms and Conditions of Employment

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

8. MEDICAL AND PSYCHOLOGICAL TESTING AND OTHER SIMILAR ASSESSMENTS

8.1 Medical Testing

- 8.1.1 Tests must comply with sections 7 and 8 of the Act.⁹ They must be **relevant and appropriate** to the kind of work for which the applicant or employee is being tested.
- 8.1.2 Employers should establish that **tests do not unfairly exclude** and are not biased in how or when they are applied, assessed or interpreted.
- 8.1.3 Tests to establish the **health** of an applicant or employee should be distinguished from tests that assess the ability to perform essential job functions or duties.
- 8.1.4 **Testing** to determine the health status of an employee should therefore only be carried out after an employer has established that the person is in fact competent to perform the essential job functions or duties and after a job offer has been made. The same applies to medical testing for admission to membership of an employee benefit scheme.
- 8.1.5 An employer who requires a person to undergo any medical, psychological testing and other similar assessments must **bear the costs** of the test.

8.2 Testing after Illness or Injury

- 8.2.1 If an employee has been **ill or injured**¹⁰ and it appears that the employee is not able to perform the job, the employer may require the employee to agree to a functional determination of disability.
- 8.2.2 Such medical or other appropriate tests shall be used to –
- (a) determine if the employee can safely perform the job; or

⁹ Section 7 of the Act provides that medical testing of an employee is prohibited, unless – (a) legislation permits or requires the testing; or (b) it is justifiable in the light of medical facts, employment conditions, social policy, the fair distribution of employee benefits or the inherent requirements of a job. Section 7(2) Testing of an employee to determine that employee's HIV status is prohibited unless such testing is determined to be justifiable by the Labour Court in terms of section 50(4) of this Act. Psychological testing and other similar assessments of an employee are prohibited unless the test or assessment being used-

(a) had been scientifically shown to be valid and reliable
 (b) can be applied fairly to all employees;
 (c) is not biased against any employee or group; and
 (d) has been certified by the Health Professions Council of South Africa established by section 2 of the Health Professions Act, 1974 (Act No. 56 of 1974), or any other body which may be authorized by law to certify those tests or assessments.

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

- b) to identify reasonable accommodation required for the employee.

8.3 Health Screening and Safety

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

9. PLACEMENT

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

10. TRAINING AND CAREER ADVANCEMENT

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

11. RETAINING PERSONS WITH DISABILITIES

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

12. TERMINATION OF EMPLOYMENT

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

13. WORKERS' COMPENSATION

- 13.1 Employers should assist employees whose disability arose from a work related illness or accident, to receive the relevant statutory compensation.
- 13.2 Employers must also assist employees with disabilities with any unemployment insurance claims.

14. CONFIDENTIALITY AND DISCLOSURE OF DISABILITY

14.1 Confidentiality

- 14.1.1 Subject to sections 7¹¹ and 18 of the Act¹², employers, including health and medical services personnel, may only gather private information relating to employees if it is necessary to achieve a **legitimate purpose**, with the written consent of the person.
- 14.1.2 Employers must **protect the confidentiality** of the information that has been disclosed and must take care to keep records of private information relating to the disability of applicants and employees confidential and must be kept separate from general personnel records.
- 14.1.3 When an employer **no longer requires** this information, it must be destroyed.
- 14.1.4 Subject to paragraph 14.2.7, employers may not disclose any information relating to a person's disability without the **written consent** of the employee concerned unless legally required.

14.2 Disclosure

- 14.2.1 Persons with disabilities are entitled to keep their disability status confidential. But if the employer is **not aware of the disability** or the need to be accommodated, the employer is not obliged to provide it. This does not absolve an employer from their responsibility not to discriminate unfairly, directly or indirectly against job applicants.
- 14.2.2 A person with a disability may disclose their disability at any time, even if there is no immediate need for reasonable accommodation.
- 14.2.3 If the disability is **not self-evident** the employer may require the employee to disclose sufficient information to confirm the disability or the accommodation needs.
- 14.2.4 If on reasonable grounds the employer does not believe that the employee is disabled, or that the employee requires accommodation, the employer is entitled to request the employee to be tested to determine the employee's ability or disability, at the expense of the employer.

¹¹ Section 7(1) of the Act provides that "medical testing of an employee is prohibited, unless – (a) legislation permits or requires the testing; or (b) it is justifiable in the light of medical facts, employment conditions, social policy, the fair distribution of employee benefits or the inherent requirements of a job. 7(2) Testing of an employee to determine that employee's HIV status is prohibited unless such testing is determined to be justifiable by the Labour Court in terms of Section 50(4) of this Act."

¹² Section 18(1) of the Act provides that "when a designated employer engages in consultation in terms of this Chapter that employer must disclose to the consulting parties all relevant information that will allow all those parties to consult effectively, and 18(2) Unless this Act provides otherwise, the provisions of section 16 of the Labour Relations Act, with the changes required by context, apply to disclosure of information."

- 14.2.5 As information about disability may be **technical**, employers should ensure that a competent person interprets the information.
- 14.2.6 If an employer requires **further information** this must be relevant to a specific job and its essential functions.
- 14.2.7 An employer may not reveal the fact of an employee's disability, unless this is required for the health or safety of the person with the disability or other persons.
- 14.2.8 The employer may, after consulting the person with the disability, **advise relevant staff** that the employee requires accommodation.

15. EMPLOYEE BENEFITS

- 15.1 An employer who provides or arranges for occupational insurance or other benefit plans directly or through a separate benefit scheme or fund, must ensure that they **do not unfairly discriminate**, either directly or indirectly against persons with disabilities.¹³
- 15.2 Employees with disabilities may not be **refused membership** of a benefit scheme only because they have a disability. To increase job security for employees who have disabilities and to reduce the costs of benefit schemes, designated employers should investigate and, if reasonable, offer **benefit schemes that reasonably accommodate** persons with disabilities. These include –
- (a) vocational rehabilitation, training and temporary income replacement benefits for employees who, because of illness or injury, cannot work for an extended period, and
- (b) financial compensation for employees who because of a disability are able to continue to work, but at lower levels of pay than they enjoyed before becoming disabled.

16. EMPLOYMENT EQUITY PLANNING IN RESPECT OF PERSONS WITH DISABILITIES

- 16.1 The Code of Good Practice for the Preparation, Implementation and Monitoring of Employment Equity Plans provides guidelines to employers and employees.¹⁴ This Code spells out **additional measures** to ensure that persons with disabilities who are suitably qualified for a

¹³ Benefits in this Code refer to benefits such as fringe benefits, medical benefits, group disability assurance benefits, retirement schemes and life assurance schemes.

¹⁴ See also Code of Good Practice on the Preparation, Implementation and Monitoring of Employment Equity Plans.

job can enjoy equal opportunities and are equitably represented in the workforce.

- 16.2 Further guidance is also provided in the Code of Good Practice for Preparation, Implementation and Monitoring of Employment Equity Plans on how to conduct an analysis and develop an employment equity plan in templates annexed to the Employment Equity Regulations.
- 16.3 When designated employers are **consulting** in terms of section 16 of the Employment Equity Act, 1998 they should use the opportunity to heighten the awareness of their employees of the value and importance of recruiting and retaining the employees who have disabilities.
- 16.4 When an employer facilitates the establishment of a **consultative forum** in terms of section 16(1) (a) and (b) of the Act¹⁵, the employer should take specific steps to promote the representation of employees with different disabilities in the forum.
- 16.5 If people with disabilities are under-represented in all occupational levels and categories in the workplace, the employer could **seek guidance** from organisations that represent persons with disabilities or relevant experts, for example in vocational rehabilitation and occupational therapy.
- 16.6 When designated employers are **compiling their workplace profile** in terms of Section 19 of the Act, employees with disabilities, including persons with non-visible disabilities, may choose to either:
 - a) not disclose their disability status; or
 - b) disclose their disability openly to their employer; or
 - c) disclose their disability in a confidential way which assures confidentiality of their identity and their impairment and any disability related accommodation that may be requested and/or required.
- 16.7 The workplace profile should include any employees who are **not in active employment**; for example, employees who are receiving total or partial income replacement benefits while recovering from illness or disability.
- 16.8 When designated employers are **setting targets**, they must aim to recruit and promote and retain persons with disabilities at all occupational levels, as persons with disabilities are often employed in low status work and tend to be promoted less often than employees without disabilities.

¹⁵ Section 16 (1) states that "A designated employer must take reasonable steps to consult and attempt to reach agreement on the matters referred to in section 17 – (a) with a representative trade union representing members at the workplace and its employees or representatives nominated by them; or (b) if no representative trade union represents members at the workplace, with its employees or representatives nominated by them.

- 16.9 If employees with disabilities are **concentrated in particular occupational levels**, the employer should consider if its criteria for selection or performance standards could be adapted to facilitate employees with disabilities being employed in different levels.
- 16.10 Employers should regularly evaluate the **relationship between employees and the working environment**, and where necessary provide appropriate programmes to prevent injury, illness and disability and promote health and safety at work.
- 16.11 Employers should also adopt and implement the ‘Universal Design’¹⁶ concept to promote accessibility to their goods and services.

17. EDUCATION AND AWARENESS

- 17.1 The Department of Labour should ensure that copies of this code are available and accessible, particularly to persons with disabilities and organisations offering support to such persons and their families.
- 17.2 Employers and employer organizations should include the Code in their orientation, education and training programmes of employees.
- 17.3 Trade unions should include the Code in their education and training programmes of shop stewards and employees.
- 17.4 The Department of Labour should ensure that copies of this code are available and accessible, particularly to persons with disabilities and organisations offering support to such persons and their families.
- 17.5 Employers and employer organizations should include the Code in their orientation, education and training programmes of employees.
- 17.6 Trade unions should include the Code in their education and training programmes of shop stewards and employees.

18. MONITORING AND EVALUATION

- 18.1 The responsibility for overseeing the implementation of the Code must be assigned to one or more senior manager(s) and must:
- a) be included in the performance contract of the senior manager(s).
 - b) be treated seriously and weighted accordingly in the performance contract of the senior manager(s) concerned.

¹⁶ UN Convention on the Rights of Persons with Disabilities, 2007 defines “Universal Design” as the design of products, environments, programmes and services to be usable by all people, to the greatest extent possible, without the need for adaptation or specialised design. ‘Universal Design’ shall not exclude assistive devices for particular groups of persons with disabilities where this is needed.”

- 18.2 Predefined indicators must be established in order to ensure that what is being measured for monitoring and evaluation is established from the initial stages of the process.
- 18.3 Outcomes of the monitoring and evaluation process must enhance existing and inform future policies and practices.