

# **CODE OF GOOD PRACTICE ON KEY ASPECTS OF DISABILITY IN THE WORKPLACE *DRAFT FOR PUBLIC COMMENTS***

## **1. AIMS**

1.1. The Employment Equity Act, No. 55 of 1998 protects people with disabilities against unfair discrimination and entitles them to affirmative action measures.

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

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

## **2. STRUCTURE**

The Code cover the following aspects:

- i The definition of disability;
- ii Reasonable accommodation for people with disabilities;
- iii Avoiding unfair discrimination and achieving employment equity during the employment cycle (from recruitment to termination);
- iv Confidentiality and disclosure;
- v Employment benefits; and
- vi Employment equity planning.

## **3. APPLICATION**

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

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

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

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

## **4. LEGAL FRAMEWORK**

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

## **5. DEFINITION OF PEOPLE WITH DISABILITIES**

### ***5.1 Defining persons with disabilities under the Act***

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

Only people who satisfy all the criteria in the definition:

- (i) long-term or recurring;
- (ii) having a physical or mental impairment;
- (iii) which substantially limits,

are considered as persons with disabilities.

#### *5.1.1 Long-term or recurring*

(i) Long-term means the impairment has lasted or is likely to persist for at least twelve months. A short-term or temporary illness or injury is not an impairment which gives rise to a disability.

(ii) A recurring impairment is one that is likely to happen again and to be substantially limiting (see below). It includes a constant underlying condition, even if its effects on a person fluctuate.

(iii) Progressive conditions are those that are likely to develop or change or recur. People living with progressive conditions or illnesses are considered as people with disabilities once the impairment starts to be substantially limiting. Progressive or recurring conditions which have no overt symptoms or which do not substantially limit a person are not disabilities.

#### *5.1.2 Impairment*

(i) An impairment may be physical or mental.

(ii) 'Physical' impairment means a partial or total loss of a bodily function or part of the body. It includes sensory impairments such as being deaf, hearing impaired, or visually impaired and any combination of physical or mental impairments.

(iii) 'Mental' impairment means a clinically recognised condition or illness that affects a person's thought processes, judgment or emotions.

#### *5.1.3 Substantially limiting*

(i) An impairment is substantially limiting if, in the absence of reasonable

accommodation by the employer, a person would be either totally unable to do a job or would be significantly limited in doing the job.

(ii) Some impairments are so easily controlled, corrected or lessened, that they have no limiting effects. For example, a person who wears spectacles or contact lenses does not have a disability unless even with spectacles or contact lenses the person's vision is substantially impaired.

(iii) An assessment whether the effects of impairment are substantially limiting must consider if medical treatment or other devices would control or correct the impairment so that its adverse effects are prevented or removed.

(iv) For reasons of public policy certain conditions or impairments may not be considered disabilities. These include but are not limited to:

- sexual behavior disorders that are against public policy;
- self-imposed body adornments such as tattoos and body piercing;
- compulsive gambling, tendency to steal or light fires;
- 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 recognised programme of treatment;
- normal deviations in height, weight and strength; and
- conventional physical and mental characteristics and common personality traits.

## **6. REASONABLE ACCOMMODATION FOR PEOPLE WITH DISABILITIES**

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

6.2. Employers may adopt the most cost-effective means that are consistent with effectively removing the barrier to a person being able to perform the job, and to enjoy equal access to the benefits and opportunities of employment.

6.3. Reasonable accommodation applies to applicants and employees with disabilities and may be required:

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

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

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

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

6.7. The particular accommodation will depend on the individual, the 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. Examples of reasonable accommodation include:

- (i) adapting existing facilities to make them accessible;
- (ii) adapting existing equipment or acquiring new equipment including computer hardware and software;
- (iii) re-organising work stations;
- (iv) changing training and assessment materials and systems;
- (v) restructuring jobs so that non-essential functions are re-assigned;
- (vi) adjusting working time and leave;
- (vii) providing readers, sign language interpreters, and
- (viii) providing specialised supervision, training and support.

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

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

6.12. Unjustifiable hardship is action that requires significant or considerable difficulty or expense and that would substantially harm the viability of the enterprise. This involves considering 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 should:

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

7.1.2. The inherent requirements of the job are the purposes for which the job

exists. The essential functions and duties of the job are what are necessary to get the job done.

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

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

7.1.5. Advertisements or notices should include sufficient detail about the essential functions and duties of the job so that potential applicants with disabilities can make an informed decision if they meet the inherent requirements of the job.

7.1.6. Employers should not include functions that are not essential to performing the inherent requirements of the job because selection based on non-essential functions may exclude people with disabilities unfairly.

7.1.7. On request, and if reasonably practicable, 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. Employers should apply the same criteria to test the ability of people with disabilities as are applied to other applicants, although it may be necessary to accommodate applicants who have disabilities.

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

- (i) Determining whether an applicant is suitably qualified;
- (ii) Determining whether a 'suitably qualified applicant' needs any accommodation to be able to perform the inherent requirements or 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.

7.2.4. Employers should monitor their criteria for selection. If they tend to exclude people with disabilities, they should be reviewed to ensure that inappropriate barriers to persons with disabilities are removed.

## **7.3 Interviews**

7.3.1. Selection interviews should be sensitive, objective and unbiased. Interviewers should avoid assumptions about people with disabilities.

7.3.2. If an applicant has disclosed a disability or has a self-evident disability, the employer must focus on the applicant's qualifications for the work rather than any actual or presumed disability but may enquire and assess if the applicant would, but for the disability, be suitably qualified.

7.3.3. Interviewers should ask all applicants to indicate how they would accomplish the inherent requirements of the job and perform its essential functions and if accommodation is required.

7.3.4. If the employer knows in advance that an applicant has a disability the employer should be prepared to make reasonable accommodation during the interview.

#### ***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 be consistent with measuring if the applicant is able to perform the essential functions of the job, with or without reasonable accommodation.

7.4.3. An employer may test applicants with disabilities for a specific job and not require all other applicants to undergo testing.

7.4.4. If the testing shows that accommodation requirements would create unjustifiable hardship, or that there is an objective justification that relates to the inherent requirements of the job or to health and safety, the employer may withdraw the job offer.

#### ***7.5 Terms and conditions of employment***

7.5.1. An employer may not employ people with disabilities on less favorable terms and conditions for reasons connected with the disability.

### **8. MEDICAL AND PSYCHOMETRIC TESTING**

#### ***8.1. Medical testing***

8.1.1. Tests must be relevant and appropriate to the kind of work and the necessary fitness criteria for the job, the workplace and its hazards, and necessary to the employer's business.

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. Health testing 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, health screening or safety test 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 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 to assess if the employee can safely perform the job or to identify reasonable accommodation for the employee.

### ***8.3. Health screening and safety***

8.3.1. Employers are obliged to provide and maintain a working environment that is safe and without risk to the health of employees.

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 direct risk of substantial harm to his or her own or other people's safety, which could not be eliminated or reduced by applicable reasonable accommodation.

8.3.3. An employer may or need not retain an employee with a withdraw a conditional job offer disability if objective assessment shows that even with reasonable accommodation, the work would expose the employee would expose others to substantial health risk and that there is no reasonable accommodation to mitigate that risk.

### ***8.4 Pre-benefit medical examinations***

8.4.1. Employees may be required to submit to medical examination or tests before becoming members of employee benefit schemes that are offered within the employment relationship.

8.4.2. The purpose of these examinations is to assess a person's suitability for membership of a benefit scheme and is not relevant to a person's capability to perform the inherent requirements of the job.

8.4.3. Therefore an employer may not refuse to recruit, train, promote or otherwise prejudice any person only because that person has been refused membership of a benefit scheme.

## **9. PLACEMENT**

9.1. Placement involves the orientation and initial training a new employee.

9.2. New employees with disabilities must be treated equally, subject to reasonable accommodation, to employees who do not have disabilities.

9.3. Orientation and initial training should be accessible, responsive to and able to accommodate the needs of employees who have disabilities.

## **10. TRAINING AND CAREER ADVANCEMENT**

10.1. Employees with disabilities should be consulted so as to develop specific career advancement programmes responsive to their needs and circumstances.

10.2. Training, work organisation and recreational benefits should be accessible to employees with disabilities. Examples are training tools, materials, venues and processes, as well as canteen facilities, parking, crèche and social and sporting activities.

10.3. Systems and practices to evaluate work performance should clearly identify and fairly measure and reward performance of the inherent requirements or essential functions of the job. Work that falls outside the inherent requirements or essential functions of the job should not be evaluated.

## **11. RETAINING PEOPLE WITH DISABILITIES**

11.1. Employees who become disabled during employment should, where practicable, be re-integrated into work .

11.2. If an employee is, or becomes a person with a disability, the employer should keep in touch with the employee and where practicable, encourage early return-to-work. This may be require vocational rehabilitation, transitional work programmes and where appropriate, temporary or permanent flexible working time.

11.3. If an employee is frequently absent from work for reasons of illness or injury, the employer may consult the employee to assess if the cause of the illness or injury is a disability that requires accommodation.

11.4. If practicable, employers should offer alternative work, reduced work or flexible work placement, so that employees are not compelled or encouraged to apply for benefits if they could, with reasonable accommodation, continue in employment.

## **13. TERMINATION OF EMPLOYMENT**

13.1. If an employee becomes disabled, the employer should consult the employee to assess if the disability can be reasonably accommodated.



13.2. If not, the employer should consult the employee to explore the possibility of alternative employment appropriate to the employee's capacity.

13.3. If the employee is unable to be accommodated or there is not appropriate alternative employment, the employer may terminate the employment relationship.

13.4. When employees who have disabilities are dismissed for operational requirements, the employer should ensure that any selection criteria do not directly or indirectly unfairly discriminate against people with disabilities.

13.5. Employers who provide disability benefits should ensure that employees are fairly advised before they apply for the benefits available and before resigning from employment because of a medical condition.

## **14. CONFIDENTIALITY AND DISCLOSURE OF DISABILITY**

### ***14.1 Confidentiality***

14.1.1. Employers, including health and medical services personnel, may only gather private information relating to employees if it is necessary to achieve a legitimate purpose.

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 separate from general personnel records.

14.1.3. When an employer no longer requires the information it must be returned to the employee or be destroyed or rendered anonymous.

14.1.4. Employers may not disclose any information relating to a person's disability without the written consent of the person concerned.

### ***14.2 Employee disclosure***

14.2.1 People with disabilities are entitled to keep their disability status confidential. But if the employer is not aware of the disability or the need to be accommodated, the employer is not obliged to provide it.

14.2.2. 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.

14.2.3. If the employer disputes 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.

14.2.4. As information about disability may be technical, employers should ensure that a competent person interprets the information.

14.2.5. If an employer requires further information this must be relevant to a specific job and its essential functions.

14.2.6. If accommodating the employee requires the co-operation of other employees, it may be necessary to reveal the fact of a person's disability if it is not otherwise obvious, to some of the person's colleagues, particularly a supervisor or manager.

14.2.7. The employer may, after consulting the person with the disability, advise relevant staff that the employee requires accommodation, without disclosing the nature of the disability, unless this is required for the health or safety of the person with the disability or other persons.

**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 people with disabilities.

15.2. Employees with disabilities may not be refused membership of a benefit scheme only because they have a disability.

15.3. To increase job security for employees who have disabilities and to reduce the costs of benefit schemes, designated employers should investigate and, if practicable, offer benefit schemes that reasonably accommodate persons with disabilities. These include:

(i) vocational rehabilitation, training and temporary income replacement benefits for employees who, because of illness or injury, cannot work for an extended period, and

(ii) financial compensation for employees who because of a disability are able to continue to work but at lower levels of pay than they enjoyed before becoming disabled.

## **16. EMPLOYMENT EQUITY PLANNING IN RESPECT OF PEOPLE WITH DISABILITIES**

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

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

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

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

16.5. When designated employers are compiling their workplace profile in terms of Section 19 of the Act, employees with disabilities may choose to either:

- (i) identify their disability themselves; or
- (ii) disclose their disability to their employer as long as their identity is kept confidential.

16.6. 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.

16.7. When designated employers are setting targets, they should aim to recruit and promote people with disabilities at all occupational levels, as people with disabilities are often employed in low status work and tend to be promoted less often than employees without disabilities.

16.8. If employees with disabilities are concentrated in particular occupational categories, the employer should consider if its criteria for selection or performance standards could be adapted to facilitate employees with disabilities being employed in different categories.

16.7. 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 at work.

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