10.2.3. Assessments should be used to identify candidates with potential and persons who are suitably qualified. These assessments should then be followed-up by relevant intervention measures like appropriate training and development.

10.3. POLICY AND PRACTICE

10.3.1. An employer who uses medical, psychological and other similar assessments should develop a written policy for the workplace, which identifies the purpose, context, methods and criteria applicable to selecting and conducting assessments.

10.3.2. An employer should ensure that assessments used are valid, reliable and fair[10], so that no group or individual is unfairly disadvantaged as a result of the assessment. Bias in the application of the assessment should be eliminated. The test should match the job in question and should measure the minimum level of the competencies required to perform the job, which must be based on the inherent requirements or essential functions of the relevant job. Tests should avoid arbitrary or irrelevant questions. Only assessments that have been professionally validated as reliable predictors of performance for a particular job, irrespective of race, gender or disability, should be used.

10.3.3. Administrators and users of medical, psychological and other similar assessments should be qualified and registered with the appropriate recognised professional body of South Africa. Assessors should be trained to understand, evaluate and interpret the evidence or outcomes of the assessment objectively against the skills and abilities required for the job and must be able to justify their decisions. The assessment process should also minimise the opportunity for assessors to make subjective or arbitrary judgments that could, deliberately or inadvertently, work to the advantage of one group over another. Assessors should make sure they assess against the competencies for the job.

10.3.4. Special care should be taken to ensure that the language used is sensitive and accessible to those who are being assessed.

10.3.5. All employees or applicants for a particular job should be assessed against the same criteria. The process should make accommodation for diversity and special needs.

10.3.6. An employer should keep assessment records for at least one year[11].

10.3.7. Employers should ensure that reasonable accommodation is made for employees or applicants where required, and that unfair discrimination

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[10]Validity is the extent to which a test measures what it is intended to measure and indicates the degree of accuracy of either predictions or inferences based upon the test score. Reliability is the extent to which a test is dependable, stable and consistent when administered to the same individuals on different occasions. Fairness relates to how the results of the assessments are applied: it is the total of all the variables that play a role or influence the final decision of an employer. This can include the assessment, integration of data, recommendations based on these data or the final decision made by the employer.

[11] Psychological assessment are valid for 1 year

does not occur in the arrangements for the administering of tests or in using assessment centres[12].

10.4. KEY LINKS TO OTHER TOPICS IN THE CODE

10.4.1. **Skills development** – Assessments can be used to identify potential amongst employees or applicants from designated groups. This links to affirmative action in training and development. Enabling an individual access to specific training and development programmes, or any other relevant intervention can eliminate skills and competency gaps identified in an employee.

PART B: DURING EMPLOYMENT

11. TERMS AND CONDITIONS OF EMPLOYMENT

11.1. SCOPE

This section of the Code deals with terms and conditions of employment including working time and rest periods, leave of all kinds[13], rates of pay, overtime rates, allowances, retirement schemes, medical aid and other benefits.

11.2. IMPACT ON EMPLOYMENT EQUITY

11.2.1. An employer may not discriminate unfairly in the terms and conditions of work or access to benefits, facilities or services that are available to employees.

11.2.2. Eligibility for benefits should not be determined on the basis of one or more of the prohibited grounds or other arbitrary grounds.

11.3. POLICY AND PRACTICE

11.3.1. Every employer is required by the Act to audit its terms and conditions of employment to identify whether they contain any unfair direct or indirect discrimination policies and practices. This should be followed by monitoring all changes in the terms and conditions of employment to ensure that all barriers or unfair discrimination policies and practices are removed. An employer should also regularly conduct practice audits to test the perceptions of employees about whether its terms and conditions of employment and practices are non-discriminatory. An employer may address deficiencies identified through appropriate awareness raising

[12]For example, the dates or times for the test coincide with religious festivals or observances, or the employer does not take into account dietary preferences or cultural norms that could cause disadvantage; or where the facilities used are inappropriate (for example the assessment centre is on the first floor of a building with no elevator and the employee or job applicant is in a wheelchair).

[13] Leave includes annual leave, sick leave, maternity leave and family responsibility leave or any other types of leave.

initiatives and other barrier removal mechanisms. These should form a component of the employer's Employment Equity Plan.

11.3.2. Employers should provide training, information and literature to trade union representatives and employees on the applicable terms, conditions and available benefits.

11.3.3. Maternity leave should not result in the loss of benefits for employees upon return to employment.

11.3.4. An employer should provide reasonable accommodation for pregnant women and parents with young children, including health and safety adjustments and antenatal care leave.

11.3.5. Employers should endeavour to provide an accessible, supportive and flexible environment for employees with family responsibilities. This includes considering flexible working hours and granting sufficient family responsibility leave for both parents.

11.3.6. Employers should examine the use of terms and conditions of their fixed term contract employees[14] to ensure that they are not unfairly discriminated against. Fixed-term-contracts can potentially undermine employment equity. This may occur where the employer tends to appoint certain groups of employees (i.e. black people, lower level employees and women) to fixed term contracts as a matter of practice.

11.4. KEY LINKS TO OTHER TOPICS IN THE CODE

11.4.1. **Remuneration** - An employer must provide equal pay for equal work or for work of equal value.

11.4.2. **Retention** - Favourable terms and conditions of employment for employees can serve as an affirmative action measure to promote, attract and retain individuals from designated groups, but should be used with caution as a justified affirmative action measure.

11.4.3. **Working environment** – Flexibility in the terms and conditions of employment (i.e. working hours and schedules, work from home options, job sharing, career breaks, etc.) are examples of a flexible working environment that may promote the retention of employees, particularly members from designated groups.

12. REMUNERATION

[14]A 'fixed term contract employee' is a person who is employed on a contract that includes an agreement detailing the relationship between the employer and employee, which is determined by an objective condition that creates no false expectations of renewal of the contract, and is based on a specific duration or time frame with dates or the completing of a specific task or happening or event.

12.1. SCOPE

Remuneration is any payment in money or in kind, or both in money and in kind, made or owing to any person in return for services rendered[15]. Employers must ensure that remuneration policies and practices are applied consistently without unfair discrimination on the basis of any one or combination of the prohibited grounds.

12.2. IMPACT ON EMPLOYMENT EQUITY

12.2.1. Remuneration differentials most commonly constitute direct unfair discrimination, where an employer pays designated employees less than non-designated employees doing the same or equivalent work simply because they are designated employees. Remuneration discrimination can also be indirect or systemic because it stems from remuneration policies and practices that have an adverse or disparate impact on black people, women and people with disabilities.

12.3. POLICY AND PRACTICE

12.3.1. Employers should audit their existing remuneration policies to ensure that they are based on the principles of pay equity. This requires a comparison of jobs as well as a job evaluation system that is objective, rational and applied consistently to all job functions. It is recommended that all employers consider developing a written remuneration policy, or at the very least written guidelines, to ensure that clear rules exist on how remuneration is determined. This should be communicated in an appropriate format to all employees.

12.3.2. Employers should conduct regular audits of their remuneration practices among employees to identify the lack of awareness about applicable criteria and perceptions of unfair discrimination in remuneration.

12.3.3. Where barriers or discrimination in remuneration are identified, and unless these can be justified, the employer should in consultation with stakeholders develop a strategy for barrier removal.

12.3.4. Job evaluation systems should be objective as these are often the basis on which remuneration differentials emerge.

12.3.5. Remuneration should be based on the value of the post. In this regard, the following factors may be taken into account:

12.3.5.1. Performance and Outputs: the employee's outputs, measured by the performance management process, should carry the most weight in determining individual remuneration levels.

12.3.5.2. Employee potential: This involves estimated ability and competence, as well as the capacity to develop these over time. Estimated ability refers to conceptual and management

[15] The meaning of remuneration in relation to leave pay, notice pay and severance pay is clarified by the Determination issued by the Minister of Labour in terms of Section 35 of the Basic Conditions of Employment Act.

skills which have not yet been demonstrated, whilst competence refers to knowledge and expertise gained, which can be informed by previous outputs or experience.

12.3.6. Employers should monitor income differentials to ensure that these do not contribute to unfair discrimination.

12.4. KEY LINKS TO OTHER TOPICS IN THE CODE

12.4.1. **Performance Management** – Although indirect factors such as motivation and commitment may be considered, it is important to ensure that these are free of unfair discrimination.

12.4.2. **Recruitment and Selection** - In order to attract employees from designated groups, an employer should offer market related salaries and benefits.

13. JOB ASSIGNMENTS

13.1. SCOPE

Job assignments relate to the type of work that is allocated to an employee by their employer. An employer should make decisions on the allocation of job assignments on objective criteria.

13.2. IMPACT ON EMPLOYMENT EQUITY

Unfair direct and indirect discrimination often occur as a result of the way in which work is allocated in a workplace. Where job assignments are based on prohibited grounds or arbitrary characteristics, this may perpetuate unfair discrimination and may result in undermining employment equity. Discrimination in job assignments may occur where there is informal mentoring by a manager who is perceived to favour a particular employee.

13.3. POLICY AND PRACTICE

13.3.1. As part of the policy and practices audit, an employer should identify whether any unfair discrimination occurs in the ability of all employees to access opportunities.

13.3.2. Employers should guard against conduct that perpetuates perceptions of favouritism, which could lead to allegations of unfair discrimination. Access to opportunities should occur on an objective and fair basis to ensure that such perceptions do not arise, and where they do arise, they should be dealt with effectively and expeditiously.

13.3.3. Employers should also monitor behaviour of managers in allocating job assignments, particularly where certain trends can be determined, as these may indicate the existence of indirect unfair discrimination.

13.4. KEY LINKS TO OTHER TOPICS IN THE CODE

13.4.1. **Induction** – An employer should explain, especially during the induction process, the policies or guidelines that apply in relation to how work or opportunities are allocated.

13.4.2. **Job analysis and job descriptions** – A clear job description could ensure that no unrealistic expectations are raised regarding access to opportunities.

13.4.3. **Performance management** – Access to work assignments that enhance career opportunities, or are considered to be desirable, should be allocated objectively by linking them to the career path of employees. These should be clearly communicated to employees to ensure that no misperceptions arise and to prevent allegations of unfair discrimination.

13.4.4. **Retention** – In some instances, allowing certain employees access to work related opportunities that are considered to be "exciting" could be used as a retention measure – i.e. where an employer gives preference to senior managers from designated groups in allocating these opportunities. This should be used with caution as it can have significant organisational implications and can cause resentment where the objectives of such a strategy are not clearly understood or communicated.

13.4.5. **Skills development** – Access to opportunities and work assignments should form part of an employee's development plan and an employer's Workplace Skills Plan.

14. PERFORMANCE MANAGEMENT

14.1. SCOPE

Performance management is a business process that is used to monitor, measure and link what employees do on a continuous basis with the goals, values, culture and business objectives of the employer. It is a process intended to establish a shared understanding about what is to be achieved; how it is to be achieved; and the implications where it is not achieved. This includes clarifying the expectations that the employer has of the employee.

Performance management also involves the training and development of employees.

14.2. IMPACT ON EMPLOYMENT EQUITY

14.2.1. Discrimination in work assignments and performance measurement is more difficult to detect and difficult to prove without an objective, written system that clearly expresses criteria according to which performance will be measured and managed.

14.2.2. The manner in which the performance of an employee is managed may impact on the value that the employee adds to the workplace. It may also impact on how peers perceive the performance and advancement of an employee and on the support received by that employee. Performance management should not be a punitive process, but rather one that facilitates setting clear objectives for development and growth. Providing opportunities for development for employees from designated groups is a critical challenge for many employers.

14.3. POLICY AND PRACTICE

14.3.1. In order to effectively manage performance in a non-discriminatory and fair manner that encourages development, an employer should ensure that managers:

14.3.1.1. receive coaching and diversity training to ensure that they are able to objectively and consistently manage performance and provide honest feedback whilst being sensitive to employee differences;

14.3.1.2. understand and are able to properly implement the performance management system; and

14.3.1.3. are able to provide the necessary coaching, mentoring and support to employees to motivate them towards performance excellence.

14.3.2. Performance management systems could in addition:

14.3.2.1. Measure and incentivise managers for their leadership, mentoring and diversity skills, as well as for achieving employment equity objectives;

14.3.2.2. Incorporate review processes, which may apply measures relating to competencies of managers in diversity management, including feedback from employees and peers;

14.3.2.3. Develop clear learning objectives for all employees, particularly from designated groups. This should link to the acquisition of additional skills and competencies for challenging positions into which employees may be promoted or transferred; and

14.3.2.4. Ensure that the performance management system is linked to the inherent requirements of the job and is free of any unfair discrimination.

14.3.3. Employers should review the results of performance appraisals to assess if there are any significant variations across designated groups. Where

such variations exist, employers should identify the reasons for these discrepancies and take action to remove them.

14.4. KEY LINKS TO OTHER TOPICS IN THE CODE

14.4.1. **Working environment** – a consistent and sustained performance management culture may impact on the integration and retention of employees from designated groups. It may also have implications for issues that go beyond performance and productivity, e.g. elevating employee morale, which in turn leads to productive employees and a more enabling workplace.

14.4.2. **Remuneration** – because performance management is linked to reward, it would be useful for employers to conduct an analysis of the distribution of increases and/or bonuses paid to employees that can be attributed to performance outcomes. This will enable the identification of areas of potential unfair discrimination and ensure that action is taken to eliminate barriers.

14.4.3. **Skills development** – effective and regular performance management may facilitate the identification of training and development needs, which may be addressed through appropriate interventions. These will enable an employee to effectively perform in the existing position or to develop into a more challenging position.

14.4.4. **Retention** – If performance management is linked to employee development and growth, it will impact significantly on an employer's ability to retain its employees.

15. SKILLS DEVELOPMENT

15.1. SCOPE

15.1.1. The Skills Development Act and the Skills Development Levies Act provide reinforcing and supporting tools for developing employees in line with employer business objectives. This contributes to a critical pool of candidates from designated groups from which employers could recruit, thus facilitating accomplishment of Employment Equity Act objectives.

15.1.2. This section describes the areas that impact on an employer's ability to develop employees from designated groups, which includes:

15.1.2.1. effectively identifying training needs and matching these with the needs of the employer;

15.1.2.2. providing effective mentoring and coaching;

15.1.2.3. providing structured on-the-job training;

15.1.2.4. considering accelerated development for employees with potential;

15.1.2.5. providing meaningful job roles;

15.1.2.6. implementing individual development plans;

15.1.2.7. providing access to opportunities to act in a higher position;

15.1.2.8. providing shadowing[16] opportunities;

15.1.2.9. creating challenging work assignments; and

15.1.2.10. developing and promoting positive role models for designated groups.

15.1.3. The section also deals with the retraining of managers and supervisors to enable them to effectively manage a diverse workforce.

15.2. IMPACT ON EMPLOYMENT EQUITY

Skills development of employees is a key driver for the achievement of employment equity objectives. The Act positions skills development of designated groups as an affirmative action measure. Development and training are key strategies to enable designated groups to advance and to reach equitable representation in all occupational categories and levels.

15.3. POLICY AND PRACTICE

15.3.1. Every employer should develop written policies and practices to reflect its commitment to training and development. These policies and practices should refer to the objective of encouraging the training of employees while prioritising designated groups. The policy may incorporate preference in access to training and development opportunities for designated groups, until their representation in all occupational categories and levels has reached critical mass. This policy may then form the basis for the Workplace Skills Plan.

15.3.2. Employers should assist employees to identify and address their skills gaps by formulating appropriate objectives in their personal development plans, agreeing to timeframes and accessing the resources required to meet these objectives.

15.3.3. Employers and employees should also strive to create an organisational culture that encourages and rewards learning for everyone in the workplace. An employer may achieve these objectives through:

15.3.3.1. appropriately structured career breaks;

15.3.3.2. bursary schemes;

15.3.3.3. on the job learning;

[16] A person following and observing another in order to gain experience or insight into a job.

15.3.3.4. mentoring and coaching.

15.3.3.5. employee counselling for growth and advancement; and

15.3.3.6. access to literacy and numeracy programmes.

15.3.4. The competency requirements for senior managers, team leaders, line managers, supervisors and professional staff should include specifications related to the development of employees.

15.3.5. Employers should consider conducting leadership and management development programmes to ensure that leaders and managers have the necessary knowledge and skills to effectively manage, develop and empower employees. Every effort should be made to create a work climate that is conducive to the successful integration and retention of employees from designated groups.

15.3.6. Employers should communicate their training and development priorities to all senior and line managers responsible for performance management. An employer should use these requirements to guide the identification of potential individuals in a proactive manner and identify individuals who can be scheduled for training and development.

15.3.7. All formal training offered to employees, whether through in-house training or from an external training provider, should ideally be linked to unit standards or qualifications that are registered on the National Qualifications Framework. This ensures that employees are able to receive nationally recognised credits and certificates for their learning achievements. This may redress past imbalances in formal education opportunities for people from designated groups.

15.3.8. Where employers consider implementing the Recognition of Prior Learning (RPL) principles to redress historical education and training disadvantages to promote employment equity and validate employee skills and knowledge, this should be based on an employer specific RPL policy.[17]

15.3.9. Where applicable, employers should consider implementing Learnerships[18] to offer occupationally driven, outcomes based learning while creating employment opportunities for previously disadvantaged individuals.

15.3.10. In procuring formal training courses from internal or external providers, employers should take into account the equity profile of the provider.

15.3.11. In procuring formal training courses from external providers, employers should ideally offer preference to suitable Black Economically Empowered companies in support of the development and sustainability of Black Economic Empowerment initiatives.

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[17] RPL as defined by South African Qualifications Authority (SAQA), is a process whereby people's prior learning can be formally recognized in terms of registered qualifications and unit standards, regardless of where and how the learning was attained. RPL acknowledges that people never stop learning, whether it takes place formally at an educational institution, or whether it happens informally.

[18] Learnerships are created in terms of the Skills Development Act, No. 97 of 1998 (Chapter 4, Sections 16 to 19).

15.3.12. Employers, particularly those whose workforces include employees who are not functionally literate, should consider offering Adult Basic Education and Training (ABET) opportunities.

15.3.13. An employer's employment equity policy or policies should be a standard component of all training and development courses to ensure that employees understand its philosophy in relation to the workplace.

15.3.14. An employer should offer diversity training to all employees.

15.3.15. Staff responsible for selecting employees for training, either as part of their induction or to develop particular skills, should themselves be trained to:

15.3.15.1. recognise potential, particularly from designated group employees;

15.3.15.2. select trainees according to objective criteria or in terms of the Workplace Skills Plan or training and development policy;

15.3.15.3. align training and development access for designated groups to numerical targets and other objectives set in the Employment Equity Plan; and

15.3.15.4. identify and address any barriers or unfair discrimination practices in the allocation of training opportunities.

15.3.16. An employer should monitor training opportunities in order to identify and address any disparities between groups and to ensure that training is done to achieve the employment equity objectives set out in its Employment Equity Plan.

15.3.17. An employer should conduct post training impact evaluations to track the progress of employees to ensure that training employment equity objectives are met.

15.4. KEY LINKS TO OTHER TOPICS IN THE CODE

15.4.1. **Implementing employment equity** - Employees from designated groups who are provided with effective training and development interventions are likely to perform better. This may contribute towards improved workplace performance and may increase the profile of employees from designated groups.

15.4.2. **Performance management** - The performance management system should include the measurement of line managers and supervisors in relation to the contribution they make to the skills development of employees.

15.4.3. **Promotion** - Effective training and development of employees from designated groups may enhance their skills and knowledge and ultimately their chances for career advancement.

16. PROMOTION AND TRANSFER

16.1. SCOPE

Promotions and transfers are processes that facilitate employee mobility for various purposes, including career development, succession planning and operational requirements. This should facilitate representation of members of designated groups in all occupational categories and levels, thus meeting employment equity objectives.

16.2. IMPACT ON EMPLOYMENT EQUITY

Promotions and transfers have the potential to impact on numerical goals and accelerate equitable representation of all groups in occupational categories and levels within a workplace. These initiatives are key drivers for employment equity in that they can involve fast tracking the advancement towards achieving numerical targets.

16.3. POLICY AND PRACTICE

16.3.1. Employers are prohibited from unfair discrimination in promotion and transfer decisions. One of the mechanisms for eliminating unfair discrimination is to ensure that written policies and practices specify the criteria, which apply to promotions and transfers. Managers implementing the policies and practices should be monitored to ensure that they are not applying these inconsistently.

16.3.2. An employer may implement a policy of preference toward members of designated groups in transfers and promotions as a legitimate affirmative action measure.

16.3.3. Lateral transfers to equivalent positions may be effectively used to achieve employment equity targets. Reasonable provision must be made where an employee requests a transfer.

16.4. KEY LINKS TO OTHER TOPICS IN THE CODE

16.4.1. **Retention** - Promotions and transfers may contribute to retention, specifically in instances where employees from designated groups do not feel sufficiently challenged or rewarded in an existing position.

16.4.2. **Skills Development** – Linking promotions and transfers to development and growth opportunities for designated groups will ensure that they do not occur in isolation from numerical targets and employment equity objectives.

16.4.3. **Remuneration** – Linking promotions and transfers to remuneration may encourage employees to transfer to a less popular operational or geographic area.

17. CONFIDENTIALITY AND DISCLOSURE OF INFORMATION

17.1. SCOPE

17.1.1. This section deals with information employees are entitled to obtain from their employers and information employers may disclose about their employees.

17.1.2. The relevant provisions of Section 16 of the Labour Relations Act, 1995, apply to the disclosure of information in terms of this part of the Code, in addition to any other laws, including the Regulation of Interception of Communications and Communication-Related Information Act, 2002 and the Promotion of Access to Information Act, 2000.

17.2. IMPACT ON EMPLOYMENT EQUITY

17.2.1. When engaging in employment equity consultation, the Act requires that designated employers disclose to consulting parties all relevant information.

17.2.2. The object of disclosure is to make the process of consultation as participative and as meaningful as possible to ensure good faith engagement and to develop trust between employers and employees.

17.2.3. Timeous disclosure of information will facilitate consensus regarding appropriate employment equity initiatives to reduce challenges.

17.2.4. An employer must disclose information that is relevant and that is reasonably required by the consulting parties to engage effectively on employment equity.

17.2.5. Information is generally considered to be relevant if it is likely to influence the formulation, presentation or pursuance of a position or demand proposed by a consulting party in their deliberations on employment equity.

17.3. POLICY AND PRACTICE

Type of information

17.3.1. The employer can comply with many of these requirements by referring the consulting parties to the documents that contain the necessary information if they are reasonably accessible to such consulting parties.

17.3.2. Information should be supplied in a manner and format that are accessible to all employees in the workplace.

Confidentiality and Disclosure

17.3.3. Private, personal information is regarded as confidential information. It will include information that may be typically found in an employee's personnel file. This may include information concerning the employee's financial circumstances, marital circumstances, criminal record or health status (e.g. HIV and AIDS, alcoholism, etc.). The employer may not disclose this kind of information unless the employee consents in writing.

Collection and communication of employee data: Balancing the need for information against the right to privacy

17.3.4. Information is collected on employees from the time when they are job applicants. The collection and disclosure of information may in some circumstances violate the right to privacy. It is therefore important for employers to balance the need for requiring certain information against the need to maintain high standards of personal privacy and the confidences of third parties.

17.3.5. An employer should not collect personal information from employees, unless –

17.3.5.1. The information is collected for a lawful purpose that is directly related and necessary to implement employment equity in the workplace, e.g. for making recruitment, development and promotion decisions; and

17.3.5.2. The information is reasonably necessary for that purpose.

17.3.6. An employer may not collect personal data regarding an employee's sex life, political, religious or other beliefs, or criminal convictions, except in exceptional circumstances where such information may be directly relevant to an employment decision.

Security of disclosed information

17.3.7. Information collected on employees, such as race, gender, sexual orientation, religion, performance, training records, psychological assessments or health, or any other information imparted by employees to their employer, should be kept secure and only those entitled to see it in the course of their duties should have access.

17.3.8. For governance purposes, employers should ideally have a written security policy for the gathering and disclosure of information. Employers should keep a written record of the names of those, whether internal or external to the employer, to whom employee information has been revealed and for what purpose.

Employee rights

17.3.9. Employees should be afforded opportunities of checking the accuracy of their information and rectifying and updating it, particularly where it relates to employment equity.

17.3.10. Employees can insist on the rectification or deletion of incorrect or misleading information. Where information is corrected, those alterations should be communicated to subsequent users of the information.

17.4. KEY LINKS TO OTHER TOPICS IN THE CODE

17.4.1. **Employment equity implementation** - The disclosure of information by an employer must occur within the context of an employer's employment equity policies. Disclosure of information is a necessary pre-requisite to meaningful consultation by parties, as required under the Act.

17.4.2. **Recruitment and Selection** - Information about employees, which is collected by an employer during the recruitment process or during employment, must be collected for a lawful purpose and must be directly related to the function or job requirement.

17.4.3. **Assessments** - An employee's manager, with the assistance of an expert in testing, should only consider psychological assessments of an employee if the assessments are current.

18. RETENTION

SCOPE

The retention of all employees, specifically employees from designated groups, is a key challenge for employers given the opportunities for mobility that exist in the global economy. This section identifies some challenges and their implications for implementing employment equity to retain employees from designated groups.

IMPACT ON EMPLOYMENT EQUITY

Retention of employees from designated groups is critical for achieving and sustaining numerical targets and goals as envisaged in the Act. Employers who seek to retain their talented and skilled employees, particularly those from designated groups, should develop and implement retention strategies.

18.1. POLICY AND PRACTICE

18.1.1. Employers may consider identifying trends that exist in their workplaces regarding the reasons for termination. This will enable employers to develop appropriate strategies to retain employees, particularly employees from designated groups. These strategies should be directed at removing barriers that cause termination of employment.

18.1.2. Employers may consider negotiating retrenchment criteria that deviate from the "last in first out" principle, where the implementation of this principle will detrimentally affect the representivity of designated groups in that workplace.

18.1.3. Employers could also implement various incentives to promote retention.

18.2. KEY LINKS TO OTHER TOPICS IN THE CODE

18.2.1. **Induction** – An effective induction process should be implemented to integrate employees, particularly those from designated groups, into the workplace.

18.2.2. **Terms and conditions of employment** – Equitable and favourable terms and conditions of employment as well as an environment that affirms diversity contribute to long-term employee retention.

18.2.3. **Skills development** – Providing equitable training and development opportunities contribute towards employee retention, especially if this is linked to career development.

18.2.4. **Remuneration** - fair remuneration contributes to the retention of employees.

18.2.5. **Performance Management and Reward** – Recognising and rewarding good performance may contribute to retention.

18.2.6. **Termination** – An exit interview may provide information on the reasons for employee turnover.

19. HARASSMENT

19.1. SCOPE

This section deals with the elimination of harassment in the workplace. It provides a framework for facilitating and promoting the development and implementation of policies and practices that result in workplaces free of harassment where employers, employees and associated parties[19] put a premium on one another's integrity and dignity. This in turn builds a workforce that respects one another's privacy and the right to equity and equality in the workplace.

19.2. IMPACT ON EMPLOYMENT EQUITY

19.2.1. Section 6 of the Act and other related legislation recognize that harassment in the workplace, whether direct or indirect, is a form of unfair discrimination and is prohibited on one or a combination of the following grounds:

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.

[19] Associated parties may include suppliers and contractors.

19.2.2 Harassment is unwanted or unsolicited attention based on one or more of the prohibited grounds. It involves conduct that is unwanted by the person to whom it is directed and who experiences the negative consequences of that conduct. The conduct can be physical, verbal or non-verbal. It affects the dignity of the affected person or creates a hostile working environment. It often contains an element of coercion or abuse of power by the harasser.

19.3. POLICY AND PRACTICE

19.3.1. Every employer is under obligation in terms of the Act to take steps to prevent workplace harassment. This includes ensuring that a clear rule prohibiting harassment and other forms of unfair discrimination that exits in the workplace, and that all employees understand it. This should be incorporated in a formal written policy like a code of conduct with an appropriate dispute resolution procedure that is communicated throughout the workplace and displayed in prominent places.

19.3.2. The policy should make it clear that harassment is a form of unfair discrimination, and will be regarded by the employer as a serious form of misconduct, which will be subjected to disciplinary action and may result in dismissal.

19.3.3. On an incremental scale of "minor", "serious" and "very serious", harassment is a very serious offence. The disciplinary code of an employer should provide for very serious offences like harassment by placing a waiver on all warning procedures, and moving directly to a disciplinary enquiry that could be followed by a hearing.

19.4. KEY LINKS TO OTHER TOPICS IN THE CODE

19.4.1. **Recruitment & Selection** – Applicants for a job are normally most vulnerable to harassment in exchange for special favours. Therefore special attention should be placed on behaviour that is likely to be interpreted as harassment.

19.4.2. **Promotion &Transfer** – Mechanisms should be put in place to prevent 'welcome' or 'unwelcome' harassment that could be seen as influencing promotion and transfer decisions.

19.4.3. **Discipline, Grievance & Dispute Resolution** – Appropriate policies and procedures, which promote appropriate behaviour and serves as a guard against harassment, should be developed and implemented by employers.

20. DISCIPLINE, GRIEVANCE AND DISPUTE RESOLUTION[20]

This section of the Code is based on the principle that employers and employees should treat each other with mutual respect. To this end, the Code seeks to balance the right of

[20] Schedule 8 of the Labour Relations Act, which includes the Code of Good Practice on Dismissal deals with some of the key aspects of dismissals for reasons related to conduct and capacity. The Code of Good Practice on Dismissal also deals with termination based on operational requirements.

employees to fair employment practices against the right of employers to expect satisfactory conduct and performance by employees.

20.1. SCOPE

20.1.1. This section deals with issues employers may consider when managing grievances filed by employees or disciplining employees for transgressing workplace policies and practices.

20.2. IMPACT ON EMPLOYMENT EQUITY

20.2.1. The manner in which discipline and grievance are managed can generate conflict in a workplace and may undermine employment equity achievements and policies. Employers should ensure that their disciplinary and grievance policies are consistently and impartially applied.

20.2.2. This section of the Code is not intended to serve as a substitute for grievance or disciplinary procedures concluded at a workplace. An employer should evaluate whether their existing grievance, discipline and dispute resolution procedures are conducive to dealing with unfair discrimination and harassment.

20.3. POLICY AND PRACTICE

The Grievance Process

20.3.1. Unfair discrimination or allegations of a breach of the Act should be dealt with as quickly and as thoroughly as possible. Conflict is best managed if addressed expeditiously and according to fair and impartial principles.

20.3.2. Employers should endeavour to protect complainants and ensure that complaints and grievances lodged are dealt with sensitively and discretely.

20.3.3. Employers should take disciplinary action against any employee who retaliates against a fellow employee for using the grievance procedure to address a concern or grievance concerning an alleged act of harassment, unfair discrimination or a breach of the Act.

20.3.4. Employers should consider workplace policies that make any act of unfair discrimination or breach of the Act a form of very serious misconduct.

20.3.5. Employers should ensure that employees are aware of or can reasonably be expected to be aware of workplace policies and practices, particularly in relation to unfair discrimination.

20.3.6. Employers are responsible for ensuring the consistent application and enforcement of policies to avoid allegations of arbitrary or unfair application of discipline on the basis of one or more of the prohibited grounds. Policies on discipline must apply equally to all employees.

20.3.7. Disciplinary action should seek to correct an employee's behaviour. Disciplinary measures may include counselling, warnings or creative solutions. The primary aim of discipline should be to encourage a culture of respect for difference and dignity.

20.3.8. Employers should value and encourage greater awareness of diversity.

20.3.9. Employers should keep a record of all grievances, disputes and disciplinary actions taken and conduct regular audits to determine the extent to which:

20.3.9.1. employees have utilised the procedures. This information should be disaggregated by race, gender and disability;

20.3.9.2. the grievances filed by employees where breaches of the Act are alleged; and

20.3.9.3. the outcome of processes.

20.3.10. Employers may use the outcome of this review to assess whether its policies are being utilised and whether they are being used to address grievances and disputes that arise in the workplace in relation to unfair discriminatory practices or any other breaches of the Act.

20.4. KEY LINKS TO OTHER TOPICS IN THE CODE

20.4.1. **Working environment** - *Conflict is inherent in workplaces.* Employers need to manage the manifestations of conflict in a manner that discourages unfair discrimination.

20.4.2. **Harassment -** Employees must be made aware that harassment is serious misconduct, and it will be dealt with effectively and efficiently.

PART C: ENDING EMPLOYMENT

21. TERMINATING EMPLOYMENT

21.1. SCOPE

An employer may terminate the employment of an employee by agreement or for reasons based on misconduct, incapacity or for operational requirements. This section outlines some of the key employment equity considerations in ensuring that employment is terminated in a fair and consistent manner.

21.2. IMPACT ON EMPLOYMENT EQUITY

21.2.1. Terminations should be fairly and lawfully effected and must serve the purposes of the employer without discriminating against any employee.

21.2.2. In the context of termination for operational requirements, an employer, when consulting with the affected party, should consider the appropriateness of adopting the standard selection criteria of Last In First Out (LIFO) as this may undermine the retention of designated groups. In the context of employment equity, traditional criteria may undermine the progress made to achieve numerical targets and would need to be revisited to ensure that they support the achievement of employment equity objectives.

21.3. POLICY AND PRACTICE

21.3.1. In order to achieve numerical targets, employers may initiate voluntary exit strategies to make space for designated groups. This strategy should be preceded by consultation in order for it to be accepted as a legitimate affirmative action measure. It should be transparent and effectively communicated to those existing incumbents who may be affected. Employers should be guided by the long-term viability and sustainability of institutional knowledge in making the decisions to use voluntary exits of non-designated groups, as a strategy to achieve numerical targets. An employer should implement this strategy in tandem with skills development, career development and succession planning to ensure that skills that are core to the employer are replaced.

21.3.2. When terminating the employment of an employee for reasons of incapacity based on disability or chronic illness, employers should refer to the Code of Good Practice on Key Aspects of HIV/AIDS and Employment and the Code of Good Practice on the Employment of People with Disabilities.

21.4. KEY LINKS TO OTHER TOPICS IN THE CODE

21.4.1. **Skills development** – An employer should provide skills training to its managers to ensure that they do not act in a discriminatory manner.

21.4.2. **Disputes and grievance resolution** – Termination of employment must be conducted according to fair labour practices and in line with the employer's procedures, including its discipline, grievance and dispute resolution procedures.

22. EXIT INTERVIEWS

22.1. SCOPE

22.1.1. Exit interviews are conducted by the employer with the employee at the time of voluntary termination, retirement or retrenchment.

22.1.2. The purpose of an exit interview is to obtain information about the employee's experience during employment. These exit interviews could provide valuable information about barriers and other factors that could have contributed to the termination.

22.2. IMPACT ON EMPLOYMENT EQUITY

An employer should analyse the information it obtains from exit interviews and identify trends, which should inform barrier removal initiatives.

22.3. POLICY AND PRACTICE

22.3.1. To make exit interviews an effective process, employers should consider:

22.3.1.1. Conducting a standard exit interview providing a set of guidelines for consistent application;

22.3.1.2. Conducting an exit interview that allows the departing employee to comment on any discriminatory practices in the workplace;

22.3.1.3. Senior employees, who are skilled at obtaining information, should conduct exit interviews. Alternatively, an employer may consider using an independent person or persons from designated groups to ensure that the departing employee is able to speak as openly and honestly as possible about their experiences; and

22.3.1.4. Information disclosed in exit interviews is confidential and can only be used to identify themes or problems in the workplace.

22.3.2. Employers may consider developing periodic reports reflecting trends that may have emerged during exit interviews, including the identification of barriers experienced by employees from designated groups.

22.3.3. Senior management should take action to eliminate barriers that are identified during exit interviews.

22.3.4. Employers may consider comparing their staff turnover rates against similar jobs within the same sector. If turnover is higher than these benchmarks then an employer should consider initiating interventions to address the problems.

22.4. KEY LINKS TO OTHER TOPICS IN THE CODE

22.4.1. **Retention -** There are numerous factors that impact on the retention of employees from designated groups. These factors include work climate, competitive remuneration, effective performance management, learning pathways, organisational culture, incentive schemes, challenging work assignments, work-life balance and workplace environment.